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Learning from Feminist Judgments: Lessons in Language and Advocacy

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I. Introduction

Law students come to law school with varying conceptions about judicial decision-making. As students move through law school, these conceptions may change multiple times and sometimes dramatically. Some students think that judges decide cases based on pure logic, while others believe that it is all politics or that judges simply follow their hunches.[1] Still others may think that judges are motivated by loyalty to the executive who appointed them or are influenced by whether they ate breakfast that day.[2] As

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1. *See* Linda L. Berger, *A Revised View of the Judicial Hunch*, 10 LEGAL COMM. & RHETORIC: JALWD 1 (2013) (comparing studies of how unreflective intuition may bias decision-making with studies of how experts use intuition to call up potential solutions for effective problem-solving).

2. There is some truth to these beliefs. *See* Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699, 723-38 (1995) (discussing the ways that loyalty and gratitude might conflict with the duty of impartiality). The impetus for this article was a student who dismissed a judge's opinion as the product of loyalty to the president who appointed him. *See* E-mail from Laura E. Little to Kathryn Stanchi (October 1, 2019) (on file with author); *see also* Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. U.S. 6889

legal educators, we know that judicial decision-making is a complex and multifaceted process that can reflect the influence of all these things and more. One of our primary goals should be to help students learn more about how judges actually go about making their decisions while dispelling the myth that judicial decision-making is a purely neutral and logical enterprise that proceeds by locating universally accepted black-letter rules and applying them to generally agreed-upon facts. This goal is made more difficult because legal commentators, judges, and politicians continue, at least publicly, to employ the myth to describe the process: the ideal judge simply finds and applies the law rather than engaging in fact selection, rule interpretation, and the development (or stagnation) of the law.[3]

Most legal educators agree that our pedagogical goals are much more complex than equipping our students for a life in the law that involves the discovery and objective application of straightforward rules. Scholars have described what we teach in a variety of ways: we teach "how to think like a lawyer," "critical reasoning," mental and intellectual discipline, and legal interpretation and composition.[4] Many of us engage in dialogue (Socratic or otherwise) with our students in the classroom, encouraging them to see all sides of a case and think carefully about the progression of the reasoning. This may be an excellent tool to meet our goals. But it is largely an oral process, and student comprehension and retention may be low, particularly if the final examination focuses largely on issue spotting and application of doctrinal rules.

This essay offers a perspective-shifting approach to meeting some of our pedagogical goals in law school: the study of re-imagined judicial decisions. Our thesis is that exposing students to "alternative judgments"—opinions

(2011) (study of Israeli judges suggests that the decisions of even expert judges were affected by external factors, such as whether they had a lunch break).

3. *See, e.g.*, Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 6 (2009), https://www.govinfo.gov/content/pkg/CHRG-111shrg56940/pdf/CHRG-111shrg56940.pdf [https://perma.cc/LX4F-Q5BN] (opening statement of Sen. Jeff Sessions) ("[O]ur legal system is based on a firm belief in an ordered universe and objective truth. The trial is the process by which the impartial and wise judge guides us to truth."); Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005), https://www.govinfo.gov/content/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf [https://perma.cc/B2NQ-8PT6] (statement of John G. Roberts) (comparing the judge's role to that of a baseball umpire, merely applying the rules to call "balls and strikes").

4. *See generally* Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 545–61 (1991) (collecting justifications for the case method of law school pedagogy); William A. Keener, *Methods of Legal Education*, 1 YALE L.J. 143, 146 (1892); Paul F. Teich, *Research on American Law Teaching: Is There a Case Against the Case System?*, 36 J. LEGAL EDUC. 167, 169–70 (1986).

that have been rewritten by authors who look at the law and the facts differently—will help students develop a more realistic and nuanced view of judicial decision-making: one that is aspirational and based in the real world, and one that allows them to envision their futures as successful advocates. The "alternative judgments" of the feminist judgments projects[5] can enrich the law-school experience in multiple ways. First, seeing a written decision that differs from the original can help students think "outside the box" constructed by the original opinion by showing them a concrete example of another perspective written in judicial language. An alternative judgment tangibly illustrates for students that the original decision was not inevitable and that other perspectives are not only possible but legitimate. This method of introducing a new perspective is different and, we argue, more powerful than assigning a scholarly article that requires students to "transfer" scholarly language to judicial language. Second, the rewritten judgments show law's potential to change and its ability to serve different accounts of justice. So many of our students come to law school wanting to "change the world" and become disheartened; alternative judgments can be an antidote to defeatism and cynicism.

Third, alternative judgments counter the narrative that law is objective while other arguments are political or biased. Simply by comparison with the original opinions, the alternative judgments demonstrate that judges, like

5. The term "feminist judgments projects" refers to recent, ongoing, and future scholarly projects devoted to rewriting judicial opinions from a feminist perspective. A group of Canadian lawyers and law professors came together to produce the first Feminist Judgment Project. Diana Majury, *Introducing the Women's Court of Canada*, 18 CAN. J. WOMEN & L. 1, 4 (2006) (introducing judgments published in 2008, although dated 2006 because of a backlog at the journal). This model was adapted and replicated in FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter, Clare McGlynn & Erika Rackley eds., 2010); AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW (Heather Douglas, Francesca Bartlett, Trish Luker & Rosemary Hunter eds., 2014); FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter U.S. FEMINIST JUDGMENTS]; NORTHERN/IRISH FEMINIST JUDGMENTS: JUDGES' TROUBLES AND THE GENDERED POLITICS OF IDENTITY (Máiréad Enright, Julie McCandless & Aoife O'Donoghue eds., 2017); FEMINIST JUDGMENTS OF AOTEAROA NEW ZEALAND: TE RINO: A TWO-STRANDED ROPE (Elisabeth McDonald, Rhonda Powell, Māmari Stephens & Rosemary Hunter eds., 2017) [hereinafter AOTEAROA NEW ZEALAND FEMINIST JUDGMENTS]; SCOTTISH FEMINIST JUDGMENTS: (RE)CREATING LAW FROM THE OUTSIDE IN (Sharon Cowan, Chloë Kennedy & Vanessa E. Munro eds., 2019); FEMINIST JUDGMENTS IN INTERNATIONAL LAW (Loveday Hodson & Troy Lavers eds., 2019); *see also* Jhuma Sen et al., *Call for Papers*, THE FEMINIST JUDGMENTS PROJECT: INDIA, https://fjpindia.wixsite.com/fjpi/call-for-papers [https://perma.cc/9UVF-Y7EX] (last visited Aug. 20, 2019); *The African Feminist Judgments Project*, CARDIFF L. & GLOBAL JUST., https://www.lawandglobaljustice.com/the-african-feminist-judgments-project [https://perma.cc/W6PR-GGTR] (last visited Aug. 20, 2019); *Sentencias con Perspective de Género MÉXICO (Feminist Judging Mexico)*, GÉNERO Y JUSTICIA (Mar. 15, 2008), https://feminismosgeneroyjusticia.blogspot.com [https://perma.cc/SZF4-AJT2] (last visited Aug. 20, 2019).

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. Fourth, feminist judgments provide tools for students to understand how persuasion and explanation are able to work effectively—in many different guises—even within the significant conventions and constraints of legal practice. Finally, but by no means least important, alternative feminist judgments are one of the only ways that "outsider" students—those whose perspectives have been historically erased or marginalized in law—can see themselves and their lived experiences reflected in the law.

II. The Feminist Judgments Projects

As the feminist judgments projects demonstrate, the most important constraint of judicial practice in common law jurisdictions is the expectation that judges will put their decisions in writing to explain and to justify the outcome.[6] The late Judge Patricia Wald gave two primary reasons why judges write opinions instead of just announcing the results: one, to justify their power and reinforce their "oft-challenged" authority to decide; and two, to allow the public, the press, lawyers, and other judges to hold deciding judges accountable for consistency and fairness.[7]

These two reasons for written decision-making form the impetus for the various feminist judgments projects: rewriting decisions is a way to challenge the power and authority of particular decisions and to hold judges accountable. Indeed, "the feminist judgment-writing projects have been animated by a perceived gap between law and justice . . . . Wherever such a gap is perceived, an alternative has already begun to be imagined."[8] The

6. Penny Pether first documented the practice of systematic "unpublication" of federal appellate court opinions, suggesting that it developed as a reaction against appeals from marginalized litigants. She argued that the result—"private judging"—developed as a structural means for excluding marginalized people from the protection of the U.S. common law. Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1440–42 (2004); *see also* Penelope Pether, *Strange Fruit: What Happened to the United States Doctrine of Precedent?*, 60 VILL. L. REV. 443, 446 (2015) (reviewing trend beginning in 1960 toward courts simply declaring "that some of their opinions would be *published*, which eventually came to mean *precedential*, and others would not"); Penelope Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why The Federal Circuits' Nonprecedential Status Rules are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955, 965 (2009) (noting that issuance of "unpublished" opinions is especially common in "collateral criminal appeals, prison conditions appeals, social security appeals, veterans' benefits appeals, asylum appeals, and civil rights appeals of varying kinds" (footnotes omitted)).

7. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995).

8. Rosemary Hunter, *Feminist Judgments as Teaching Resources*, 2 OÑATI SOCIO-LEGAL SERIES, no. 5, 2012, at 47, 58.

history of the various feminist judgments projects, and in particular the proliferation of these projects across the globe, demonstrates the power of providing an alternative written account of judicial decisions.

Beginning in Canada, spreading to the United Kingdom, the United States, and around the globe, feminist judgments projects emerged from an informal, international collaboration of feminist scholars and lawyers who decided to rewrite significant judicial opinions affecting traditionally marginalized individuals and groups. One of their primary goals was to demonstrate how the use of feminist theories, methods, and perspectives might have changed the reasoning, the result, or both.[9] Beginning with the Women's Court of Canada (WCC), the first organizing group of law professors and activists began their project in 2004 and published the first six rewritten decisions based on Section 15 of Canada's Charter of Rights and Freedoms in 2008.[10] That collection was followed in 2010 by the English collaboration, which included twenty-three rewritten opinions originally issued by the House of Lords, the Court of Appeal, or the Privy Council. The next published feminist judgments project came from Australia, encompassing twenty-four opinions from courts ranging from trial courts to the High Court. The U.S. Feminist Judgments Project, rewriting twenty-five opinions of the Supreme Court of the United States, was published in 2016. The Northern/Irish Feminist Judgments Project and New Zealand/Aotearoa Feminist Judgments Project followed a year later. The Scottish and international projects came to press in late 2019,[11] and projects are under way in India, Africa, and Mexico.[12]

The signature achievement of the feminist judgments projects has been to combat the myth of a purely logical judicial decision-making process and to demonstrate that judicial decision-making is rarely detached from personal background and experience. By re-imagining the reasoning of judicial opinions through the added insight of feminist theories and methods, while bound by the precedent and facts of the time, the feminist judgment authors are able to write and decide like actual judges, while still accounting for intersecting inequalities resulting from gender, race, class, disability, sexual orientation, gender identity, ethnicity, immigration status and national identity. The power of the alternative judgments in the classroom comes from comparison: they look and sound like real judicial decisions but consider issues of social justice that are often not a part of the traditional discourse of law.

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9. *See* sources cited *supra* note 5.

10. Although the publication date is 2006, the judgments were published in 2008 because of a backlog at the journal. Majury, *supra* note 5, at 4.

11. *See* sources cited *supra* note 5.

12. *See* sources cited *supra* note 5.

III. How Students Benefit When Teachers Use Feminist Judgments in the Classroom

At law schools in the U.S. and internationally, as well as in undergraduate courses, professors are bringing feminist judgments into upper-level seminars and courses on jurisprudence, brief and opinion writing, and specific subject matters such as tax and employment discrimination. By simply introducing alternative feminist judgments, teachers prompt comparative analysis and show students the concrete reality that the original opinion was not the only plausible option and the original reasoning was not the only possible logic. In this essay, we discuss only a few of the tangible benefits of teaching with alternative judgments; we encourage professors to experiment with using these judgments in the classroom to uncover even more benefits. We have organized the benefits into three broad categories: (1) language learning; (2) critical thinking and argumentation; and (3) inspiration.

One key benefit of reading the alternative judgments in comparison with the original judgments is linguistic. The comparison allows students to see clear examples of the use of language and how different voices and words affect writers and readers. Teaching with feminist judgments links together methods for learning effective language use with methods for learning how language use can effect change. Students see how other writers transformed theory into practice and how experienced brief writers have crafted arguments and analysis to advance social justice. The reasoning in the judgments gives students models for social justice arguments and analysis in legal writing.

Teaching alternative judgments also stimulates critical thinking and argumentation. The alternative judgments expose students to facts, voices, and history that have often been hidden or ignored. By exposing students to new sources of legal argument, the judgments can help students see how precedent can pose obstacles to social justice while simultaneously showing them a way around those obstacles. Because they reveal the contingency of what appears to be settled law, the alternative judgments broaden the array of persuasive tools by expanding student understanding of available legal theories and showing how to use feminist and critical theory methods in brief and opinion writing.

The judgments also serve an important inspirational function. They can give students who rarely see their voices or their lived experiences in judicial opinions the opportunity to see themselves in law. This teaches students who may feel marginalized or erased by law the valuable lesson that they are welcome in law (and law school) and that their voices are just as valid and judicial as the "traditional" judicial voice. The judgments can also serve to awaken—or reawaken—student zeal for law as a vehicle for social change.

They also introduce students to the many divergent versions of feminist theory and feminist history and show that feminism is not monolithic or static.[13] By writing their own alternative judgments, students learn that they have a role to play in crafting arguments to advance their own alternative versions of the future. Finally, because feminist judgments projects are global, alternative judgments provide a springboard for discussion about comparative and international perspectives on law and social justice.

A. Teaching Language's Power

Language and law are so interdependent that students must understand the constraints of one in order to understand how to work with the other. Thus, "[t]he capacity of law to achieve justice, procedurally and substantively, is linked to the capacity of the language of law to challenge assumptions and existing rules, norms, and practices, as well as to offer new ways of thinking about social dilemmas."[14] In this section, we explore just three examples of how alternative judgments can stimulate student thinking about what a judicial opinion is and is not; the importance of facts in judicial decision making and how theory can be transformed into practice.

1. Illustrating How Feminist Writing Can Be Judicial

By reading alternative feminist judgments, students begin to appreciate the range of effective language uses that are possible even within the relatively narrow rhetorical context of judging. Judges write within a context of constraints that require them to comply with controlling precedent, gain the assent of their colleagues, and adhere to conventions of style, voice, and citation use. Nonetheless, as Judge Wald emphasized:

> [J]udges still use *rhetoric* to maneuver. The way they present the facts, the way they describe rules and standards of review, the way they "handle" precedent, their decisions to write separately or stay with the pack, all provide wide avenues in which to drive the law forward. A judge's individual skill at working these levers of power, and doing so in a way that does not overly antagonize colleagues, continues to have

13. "Feminism" comprises a multiplicity of theories, methods, and approaches. 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, 167–68 (2018). Nonetheless, feminist judgments have some things in common. These include an awareness of the ways in which apparently neutral or objective legal rules and practices have varying, and nonneutral, effects on individuals. Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, *Introduction to the U.S. Feminist Judgments Project*, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 3–5.

14. Presentation Proposal from Andrea McArdle et al. to the Association of American Law Schools 2 (Jan. 6, 2018) (on file with authors).

> a powerful influence on decision making. That is why, in the end, judges—as well as their words—matter so much.[15]

How to write within and yet through those constraints is one of the most important lessons students learn by reading feminist judgments. This is a lesson not only of opinion writing but of legal writing across the board. With some of the rewritten judgments, professors can show students a feminist judgment that hews closely to the original, changing only key aspects of the reasoning to create stronger precedent. This experience forces students to rethink what a "feminist" judicial opinion is. As Rosemary Hunter noted when writing about the British project:

> Some students who expected that judgments written from a feminist perspective would be biased or incoherent were forced to rethink their preconceptions. . . . Students comparing the two judgments found that it was the *feminist* judgment that appeared neutral, dispassionate, "legal" and "objective," while the original judgment was more emotional, partial and overdetermined.[16]

That kind of re-evaluation of expectations can work a significant shift in student understanding of the law and its processes. For example, Deborah L. Rhode's rewritten feminist judgment[17] in *Johnson v. Transportation Agency*[18] makes very subtle changes to the original opinion, which is thought to be the first example of the United States Supreme Court applying the concept of substantive equality to a gender justice claim. The *Johnson* Court recognized that when men and women are in different situations, inequitable outcomes might result from applying identical rules.[19] What Rhode does is move some material from footnotes to the main text and expand on the Court's reasoning—the same reasoning was in the original, but more obliquely written.[20] Rhode re-wrote the opinion to maintain the slim 5-4 majority that supported the original opinion while also clarifying and solidifying the precedential value of the opinion.[21] In particular, Rhode expands from the original opinion to explain what "merit" and "equality" mean in the context of a biased hiring process.[22] Rhode's rewritten judgment

15. Wald, *supra* note 7, at 1419.

16. Hunter, *supra* note 8, at 53.

17. Deborah L. Rhode, *Rewritten Opinion in* Johnson v. Transportation Agency, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 327–40.

18. 480 U.S. 616 (1987).

19. *Id.* at 637–38, 641–42.

20. *See* Deborah Gordon, *Commentary on* Johnson v. Transportation Agency, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 325.

21. *Id.* at 327.

22. *Id.* at 324.

shows students an opinion with clearly articulated feminist ideas that might have commanded a majority in the Supreme Court.[23]

2. Demonstrating the Difference Facts Can Make in Judicial Opinions

Early in law school, students are taught to read to find "the meaning" of a text by focusing primarily on language and rules:

> When students attempt to tell the stories of conflict embodied in the cases assigned for their courses, they typically start by focusing on the content of the story. First-year law professors insistently refocus the telling of these stories on the sources of authority that give them power within a legal framework. What was the court authorized to decide? If it writes about hypothetical situations other than the one before it, students learn, this part of the story is to be separated from the "holding"—the authoritative part of the case. The holding is valid only if uttered by the correct authority, following the correct procedure, delivered in the correct form. This is a new and very different sense of where to look when we decide what counts as a "fact," how to construct valid accounts of events, and where to demand accuracy.[24]

Although students learn to focus precisely and in depth on "form, authority, and legal-linguistic contexts," their comments on "content,

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23. *Id.* at 326.

24. Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 494–95 (2007) (footnotes omitted). While Mertz emphasized that "there is without question a certain genius to a linguistic-legal framework that treats all individuals the same," she pointed out that even though the move toward abstraction can counter aspects of social context that lead to bias, "this process conceals the ways legal results are often quite reflective of existing power dynamics, while simultaneously pulling lawyers away from grounded moral judgment and fully contextualized considerations of human conflict." ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" 220 (2007). Thus, "the legal system itself, while purporting to serve all citizens equally, can hide behind the screen provided by its legal-linguistic filter, concealing even from itself, the way that inequalities are integral to its structure." *Id.* at 220. Similarly, in *Educating Lawyers*, the Carnegie Foundation investigators concluded that:

> By questioning and argumentative exchange with faculty, students are led to analyze situations by looking for points of dispute or conflict and considering as "facts" only those details that contribute to someone's staking a legal claim on the basis of precedent. The case-dialogue method drills students, over and over, in first abstracting from natural contexts, then operating upon the "facts" so abstracted according to specified rules and procedures, and drawing conclusions based upon that reasoning. Students discover that to "think like a lawyer" means redefining messy situations of actual or potential conflict as opportunities for advancing a client's cause through legal argument before a judge or through negotiation. By contrast, the task of connecting these conclusions with the rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions, remains outside the case-dialogue method.

WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 28 (2007).

morality, and social context" are treated as unimportant.[25] Reading alternative judgments can provide the missing piece to allow students to explore the content, morality, and social context of legal opinions. Several of the feminist judgments in the U.S. Feminist Judgments volume explored the appellate record to unearth additional facts that were omitted from the original opinions. Teaching the feminist judgments with expanded factual narratives can show students the critical importance of facts to legal reasoning: how decisions about what facts to include can fundamentally change the nature of the opinion and affect the legitimacy of the holding and outcome and how bias sometimes arises more subtly through omission of facts.

An important example is Angela Onwuachi-Willig's rewrite[26] of *Meritor Savings Bank v. Vinson.*[27] In that case, the original opinion makes no mention of the race of the parties.[28] In her rewritten opinion, Onwuachi-Willig emphasizes the importance of stating that both the victim of the hostile work environment and her harasser were African Americans working in a white-dominated business; she explains that ignoring race in the legal context is a flawed example of the widespread legal fiction that law can be applied in a "color blind" manner in a society that is anything but color blind.[29] Although the original opinion does not mention race, racial stereotypes could explain much of the reasoning of the opinion, including the oft-criticized reasoning that the victim's manner of dress is relevant to whether the harassment was "welcome."[30] Racial dynamics could also help explain why the victim was hesitant to report.[31] In addition to revealing the race of the parties, Onwuachi-Willig also gives the reader other details about the victim's socio-economic situation, her past troubles, and her relationship with the perpetrator.[32] These additional facts make the rewritten *Meritor* a rich exploration of racial politics and the law, well worth assigning as an example of how Black experience has been erased from law.

Another example of a rewritten opinion using expanded facts is Ann McGinley's feminist judgment[33] in *Oncale v. Sundowner Offshore*

25. Mertz*, supra* note 24, at 496.

26. Angela Onwuachi-Willig, *Rewritten Opinion in* Meritor Savings Bank v. Vinson, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 303–21.

27. 477 U.S. 57 (1986).

28. *See id.*

29. Onwuachi-Willig, *supra* note 26, at 309.

30. *Id.* at 317.

31. *Id.* at 311.

32. *Id.* at 304, 312.

33. Ann McGinley, *Rewritten Opinion in* Oncale v. Sundowner Offshore Services., Inc., *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 414–25.

Servs., Inc.,[34] which includes graphic details of sexual harassment. The original *Oncale* did not elaborate on the nature of the harassment, stating that as matter of "dignity" the Court would describe those acts only generally as "sex-related, humiliating actions."[35] As McGinley writes, "A decision not to relate the facts alleged protects those who may have engaged in the behavior and diminishes the perceived severity of the acts."[36] By contrast, McGinley's narrative includes details that make clear the extent and severity of the harassment, including that several employees and supervisors restrained Oncale while one employee "placed his penis on the back of Oncale's head" and one supervisor "forced a bar of soap between Oncale's buttocks" while another employee restrained him in a shower.[37] McGinley's inclusion of these facts provides an important counter-narrative to the misapprehension that sexual harassment law is "political correctness" gone rampant and stifles innocent sexual joking and banter (a narrative that the original opinion explicitly mentions). It is also critical to McGinley's reasoning that the harassment against Oncale was a product of violent gender-policing in a hyper-masculine work environment, which, in McGinley's view, is prohibited by Title VII.[38]

3. Showing Students How to Shift From Theory to Practice

Law students hear about theory in the classroom and read about theory in treatises and law review articles, but law school is still structured so that legal theory is somewhat divorced from practice. This may lead students to think that *practice* is about the "black letter" law and *theory* is for law professors.[39] Feminist judgments directly challenge this separation and encourage students to view theory as a vehicle for enriching the practice of law and one that is essential to crafting effective arguments that advance social justice. Many alternative judgments incorporate multiple feminist theories, as well as critical race theory, poverty law theory, and others. In doing so, alternative judgments give students exposure to ideas about gender and racial justice they would not otherwise encounter, provide templates and resources for social justice arguments, and help students think critically and creatively.

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34. 523 U.S. 75 (1998).

35. *Id.* at 76–77.

36. McGinley, *supra* note 33, at 415.

37. *Id.* at 416. The commentary to this opinion points out that accounting for Oncale's story in this kind of detail is grounded in feminist legal theory, especially narrative and dignity strands. *See* Margaret E. Johnson, *Commentary on* Oncale v. Sundowner Offshore Services., Inc., *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 408–14.

38. *Id.* at 413.

39. Kathryn Stanchi, *Step Away From the Casebook: A Call for Balance and Integration in Law School Pedagogy*, 42 HARV. J. CIV. RTS.-CIV. LIB. L. REV. 611, 613 (2008).

For example, two feminist judgments provide clear practical examples of the tension between formal and substantive equality theory. Valorie Vojdik's rewrite[40] of Ruth Bader Ginsburg's majority opinion in *United States v. Virginia*[41] takes on the problems of a purely formal approach to anti-discrimination law. Choosing to concur in the judgment that the all-male admission policy of the Virginia Military Institute ("VMI") was unconstitutional, Vojdik (unlike Ginsburg) has no need to convince five male colleagues to agree with her.[42] Vojdik was free to provide additional reasoning to support Ginsburg's majority opinion. Rooted in anti-stereotyping and anti-subordination theories, Vojdik's opinion urges that merely ruling that women must be admitted to VMI without requiring VMI to substantially change its approach to education would result in a hollow victory for women seeking to attend VMI.[43] In comparison with the original opinion, Vojdik's rewritten opinion shows students the two theories translated into practice, and the difference theory can make to practical outcomes.

Similarly, Pamela Laufer-Ukeles, in her rewritten opinion[44] in *Muller v. Oregon*,[45] also confronts an issue that divided, and continues to divide, feminists. Practical feminists see the legislation in *Muller*, which mandated limited working hours for women, as the necessary first step to providing protection for all workers;[46] difference feminists tend to see legislation like the statute at issue in *Muller* as recognition that women's ability to become pregnant and bear children require some protection in the workplace.[47] Laufer-Ukeles grounds her opinion more in the third-wave feminist approach that staunchly rejects any "protectionist" legislation based on stereotypes of women. In her rewritten dissent, Laufer-Ukeles acknowledges that the employer is the party most advantaged by her approach of striking down the legislation, but concludes that leaving the law intact hurts all women by

40. Valorie Vojdik, *Rewritten Opinion in* United States v. Virginia, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 389–407.

41. 518 U.S. 515 (1996).

42. *See* Vojdik, *supra* note 40, at 389.

43. Christine M. Venter, *Commentary on* United States v. Virginia, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 397.

44. Pamela Laufer-Ukeles, *Rewritten Opinion in* Muller v. Oregon, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 83–97.

45. 208 U.S. 412 (1908)

46. Andrea Donoff, *Commentary on* Muller v. Oregon, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 80–81.

47. *See, e.g.,* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1285 (1987) (female "difference" whether it is biological or cultural should be costless); Lundy R. Langston, *Women in the New Millennium: The Promises of the Past Are Now the Problems for the Millennium*, 6 CARDOZO WOMEN'S L.J. 1, 5–6 (1999) (noting that because men and women are different, entitlements should not be based on gender).

reinforcing stereotypes of women as weaker than men and thereby impeding the movement toward equality.[48] Laufer-Ukeles's opinion makes for a striking tool to teach the divergence between theoretical approaches, and particularly in contrast to the original, provides a stark example of how different theoretical approaches would look in practice.

The rewritten opinion in *Oncale* also illustrates how theory influences statutory construction.[49] The original opinion, written by Justice Scalia, purports to be an exercise in simply reading the words of the text.[50] McGinley, by contrast, uses masculinities theory and sex stereotyping theory (and case law) to hold that Title VII's prohibition against sex stereotyping prohibits harassment based on a perceived failure to meet gender expectations.[51] This allows McGinley to reason that Oncale's treatment by his work colleagues was "because of sex" whether they "thought him to be insufficiently masculine or because they perceived him to be homosexual."[52] McGinley's opinion teaches students the complexity involved in interpreting words in statutes and how perspective and theory can change the way a statute is construed.

B. Stimulating Critical Thinking and Creative Argumentation

Comparative analysis—simply comparing the original opinions with the feminist judgments—encourages students to engage in critical analysis and evaluation. What new evidence was introduced into the feminist judgment? What different questions were raised? What new issues were addressed? What different kinds of reasoning did the two opinions use?

Allowing students to see how a very different precedent could have been created with the same legal and linguistic constraints shows them definitively that decision making is not a process of merely finding the right "rule" and applying it. Rather, the legal decision-making is a creative, elaborate, complex process, more art than science.[53] Showing students alternative judgments undermines the concept of purely neutral judicial decision-making and encourages students to think outside the box, gives them additional tools to develop their own arguments, and stimulates critical thinking about the law. In the following sections, we address only a few—developing critical

48. Pamela Laufer-Ukeles, *supra* note 44, at 96–97.

49. Ann C. McGinley, *Rewritten Opinion in* Oncale v Sundowner Offshore Services, Inc., *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 414–25.

50. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

51. McGinley, *supra* note 49, at 420–24.

52. *Id.* at 424.

53. *See* Timothy W. Floyd, *Literature for Lawyers and Judges*, 29 TEX. TECH L. REV. 967, 967 (1998) (reviewing BARRY R. SCHALLER, A VISION OF AMERICAN LAW: JUDGING LAW, LITERATURE, AND THE STORIES WE TELL (1997)).

analytical skills, learning from history, and providing models for different types of reasoning and arguments.

1. Developing Critical Analysis

All the feminist judgments are examples of critical analysis and evaluation,[54] but those that explore reasoning or legal foundations that depart sharply from the original are excellent tools for showing students the multiple avenues for legal decision-making. For example, in her rewritten opinion[55] of *Harris v. McRae*,[56] Leslie Griffin reinvigorates the Establishment Clause as a basis for challenging abortion restrictions. In her reasoning, she confronts the traditional reluctance of judges to acknowledge legislators' religious motivations for abortion laws, even when evidence of that motivation is clear and convincing—as it was in the case of the Hyde Amendment, which denied public funding for medically necessary abortions.[57]

Griffin's opinion concludes that the Hyde Amendment violates both the Establishment Clause and equal protection because Congress had enacted "a personal moral principle unrelated to the Medicaid Act into law."[58] In her opinion, she carefully traces the legislative history through many iterations, including Representative Henry Hyde's comments on the floor of the House that he "certainly would like to prevent, if [he] could legally, anybody having an abortion."[59] In addition to laying bare the underlying reasons for the passage of the Hyde Amendment, Griffin's rewrite illuminates the original opinion's cursory treatment of the argument that the Amendment violates the Establishment Clause.[60] Griffin's rewritten opinion is an excellent illustration

54. For a detailed analysis, see Rebecca Flanagan, *The Kids Aren't Alright: Rethinking the Law Student Skills Deficit*, 15 BYU EDUC. & L.J. 135, 144 (2015):

> Critical thinking has many definitions and can be broken into two forms: critical thinking with a cognitive component, and a disposition to think critically. A generally accepted definition of the cognitive component of critical thinking includes "systematic evaluation of what you have heard and read . . . an ability to ask and answer critical [interrelated] questions at appropriate times" and the formulation of follow-up questions. The disposition to think critically includes an "inclination to ask challenging questions and follow the reasons and evidence wherever they lead, tolerance for new ideas, willingness to use reason and evidence to solve problems, and willingness to see complexity in problems." At their core, both types of critical thinking involve questioning knowledge.

55. Leslie C. Griffin, *Rewritten Opinion in* Harris v. McRae, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 247–56.

56. 448 U.S. 297 (1980).

57. Griffin, *supra* note 55, at 250–53.

58. *Id.* at 247.

59. *Id.* at 248–50.

60. Mary Ziegler, *Commentary on* Harris v. McRae, *in* U.S. FEMINIST JUDGMENTS, *supra* note 4, at 244–45.

and model for students wanting to develop a broader range of arguments in cases involving law and morality. It certainly would stimulate discussion of how the Establishment Clause is used (and not used) when religious motivation is obvious. Indeed, one of the authors pointed out this feminist judgment to a student writing a law review note about fetal burial laws; that, in turn, led to the student's digging deeply into the legislative record to uncover religious motivations for the law.

The judgments can also be used to spark class discussion about what particular legal standards mean, about the indeterminacy of language, and how different perspectives can mean very different interpretations of words like "intermediate scrutiny." For example, David Cohen's rewritten opinion[61] in *Rostker v. Goldberg*[62] engaged in a rigorous version of intermediate scrutiny. In *Rostker,* the Supreme Court upheld Congress's determination that only men must register for military service.[63] In his rewritten feminist judgment, David Cohen acknowledges the test: "that the law must have an important government purpose and be substantially related to that purpose," noting that only the second part of the test is at issue.[64] But, in a detailed discussion, he outlines the ways in which restricting the draft to men could be considered substantially related to the goal of military excellence only because of "gross stereotypes and generalizations about men and women."[65] Not only did he demonstrate that the law was based on stereotypes of women,[66] but he also examines the ways in which the law stereotypes men as well, particularly as "violent, aggressive, strong, and powerful."[67] Because the law was based on these overbroad generalizations, Cohen finds that it violated equal protection and is thus unconstitutional.[68] Step by step, the opinion provides students with a method for rebutting easy conclusions, including the dissent's argument that Congress acted intentionally.[69]

2. Confronting History and Hearing Missing Voices

Feminist judgments are one of the only places where marginalized voices and histories, including some that mirror students' own experiences,

61. David S. Cohen, *Rewritten Opinion in* Rostker v. Goldberg, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 277–96. The opinion also provides a roadmap for demolishing "identity-based classifications in the military context," citing to intentional deceptions of the Court related to its reasoning in *Korematsu v. United States*, 323 U.S. 214 (1944). *Id.* at 283–84.

62. 453 U.S. 57 (1981).

63. *Id.* at 83.

64. Cohen, *supra* note 61, at 285.

65. *Id*.

66. *Id.* at 285–87.

67. *Id.* at 287–88.

68. *Id.* at 296.

69. *Id.* at 291–93.

are incorporated into judicial opinions. This makes the feminist judgments one of the only teaching tools that allows students to see, in a practical law-making context, the histories and experiences left out of the legal canon. Seeing that history[70] not only gives students a broader appreciation for how law works and what experiences it values but also, as we discuss later, is a way for students within those marginalized groups to feel seen and heard in the law.

For example, the rewritten feminist judgment[71] in *Nguyen v. INS*[72] is a deep historical lesson in the ways that racial bias and patriarchy have shaped U.S. nationality and citizenship law. The statute at issue in *Nguyen* limited the ability of fathers to transmit citizenship to non-marital children born abroad.[73] The feminist judgment and commentary make clear that like the bans many states had on inter-racial marriage, the policy in *Nguyen* similarly reinforced white supremacy and racial exclusion by denying citizenship to bi- or multi-racial children.[74] Author Ilene Durst points out that many of non-marital children born to U.S. fathers were the result of U.S. military occupation in other countries, and that the military strongly discouraged male service members from marrying the foreign mothers of their children.[75] Providing a chilling historical echo of current immigration policy, Durst concludes that "restrictions on citizens conferring citizenship upon spouses or children were fed by fear of 'mass reproduction' of non-whites" in the United States.[76] Reading the feminist *Nguyen* would give students a lens through which to see the repetition of history in current U.S. immigration policy.[77]

Similarly, Teri McMurtry-Chubb, the author of the rewritten feminist judgment[78] in *Loving v. Virginia*,[79] foregrounds the history of slavery and

70. Brent Staples, the New York Times columnist who won the Pulitzer Prize in 2019, frequently posts on social media: "History is the only education; everything else is just training." Valerie Russ, *Brent Staples talks about his path from Chester to a Pulitzer Prize*, PHILADELPHIA INQUIRER (April 22, 2019), https://www.inquirer.com/news/brent-staples-pulitzer-editorial-writing-2019-chester-race-social-justice-philadelphia-20190422.html [https://perma.cc/S3FT-JNSY].

71. Ilene Durst, *Rewritten Opinion in* Nguyen v. INS, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 473–84.

72. 533 U.S. 53 (2001).

73. *Id.* at 59.

74. Sandra Park, *Commentary on* Nguyen v. INS, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 468–71.

75. Durst, *supra* note 71, at 477–80.

76. *Id.* at 479.

77. *Id.* at 477–80.

78. Teri McMurtry-Chubb, *Rewritten Opinion in* Loving v. Virginia, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 119–36.

79. 388 U.S. 1 (1967).

slave marriages in that opinion to make clear that the original opinion's treatment of the case as primarily about the "right to marry" bypassed the core issue.[80] In McMurtry-Chubb's view, the miscegenation law in *Loving* is just one example of a complex web of legal structures that were created to construct and reinforce white supremacy.[81] McMurtry-Chubb's recounting of the violent history of slavery that led to laws like the one at issue in *Loving* shows the law's deep interdependence with history and the importance of history to interpreting law. It also shows the importance of naming and confronting the shameful and brutal history of the law's treatment of African-American peoples to creating a strong precedent that will lead to legal reform. Comparing McMurtry-Chubb's starkly historical account with the original opinion, which mentions white supremacy in passing but relies on abstractions,[82] leaves students with a lesson in history that much of the law omits.

The rewritten feminist judgment[83] in *Planned Parenthood of Se. Pa. v. Casey*[84] centers on including the voices of poor women, rural women, and Native American women who were erased and ignored in the original decision. In the original *Casey*, the Supreme Court upheld several parts of the Pennsylvania Abortion Control Act, including requiring women to wait 24 hours after receiving specific information to obtain an abortion.[85] In her rewritten majority opinion, Lisa Pruitt points out the disconnect created by the case: laws like the one at issue in *Casey* impact primarily poor women, but most judges have little understanding of the lived conditions of poor women.[86] For these poor women, and especially for rural women and Native American women, enormous challenges are raised by laws requiring them to travel long distances to find abortion providers.[87]

In the original opinion, the question of undue burden was asked abstractly, about a mythical woman with substantial resources and no

80. McMurtry-Chubb, *supra* note 78, at 124.

81. *Id.* at 134–35.

82. Inga N. Laurent, *Commentary on* Loving v. Virginia, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 114–119.

83. Lisa Pruitt, *Rewritten Opinion in* Planned Parenthood v. Casey, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 365–83.

84. 505 U.S. 833 (1922).

85. *Id.* at 885–87.

86. Pruitt, *supra* note 83, at 377–78; *see, e.g.*, ALL. FOR JUST., *Broadening the Bench: Professional Diversity and Judicial Nominations* (Mar. 18, 2016), https://www.afj.org/reports/professional-diversity-report [https://perma.cc/2DWU-EBA4] (noting that vast majority of Federal judiciary comes from those who practiced as corporate lawyers and prosecutors); Tracey E. George & Albert H. Yoon, *The Gavel Gap: Who Sits in Judgment On State Courts*, AM. CONST. SOC'Y, http://gavelgap.org/pdf/gavel-gap-report.pdf [https://perma.cc/B5JP-9YQ6] (last visited Mar. 24, 2019) (noting the lack of diversity in state judiciaries).

87. Pruitt, *supra* note 83, at 378–79.

constraints or obligations. As a result, for that woman, very few burdens would be so substantial as to prevent from accessing abortion. In the re-imagined opinion, Pruitt puts "missing" women—poor, rural, Native—at the center of her reasoning and vividly illustrates how the Pennsylvania law creates a substantial and impermissible burden for these very real women.[88] As Pruitt writes: "The meaning of any legal standard can only be understood by considering the actual situations in which it applies. . . . [The Pennsylvania law] has a much greater impact on the poor and on those living far from an abortion provider."[89] Particularly when contrasted with the original, the rewritten *Casey* shows how particular voices are erased by the law and how judicial decision making is hampered when social and historical context is absent.

3. Giving Students Models for Novel Arguments

Social justice advocates often blend stories of individuals affected by injustice with the context provided by historical and social science background information. Studying feminist judgments helps students learn this "feminist practical reasoning"[90] and "narrative feminist method"[91] in a practice context so that they can use these methods to craft their own arguments. Having models available in legal language makes it easier for students to make the leap when they engage in advocacy writing of their own.

Feminist practical reasoning and narrative method appear in several of the feminist judgments. Maria Isabel Medina's rewritten opinion[92] in *Town of Castle Rock v. Gonzales*,[93] for example, began with the long history of protective orders—unrecognized and unenforced—that led the Colorado legislature to enact legislation expressly designed to protect individuals and families from domestic violence.[94] Notwithstanding this legislation, the original opinion found that Ms. Gonzales and her children had no constitutional due process right to police protection, even though she had a restraining order against her husband and the father of her three young daughters.[95] Despite repeated calls to the police on the day her husband kidnapped the girls, no efforts apparently were made to find him, and the girls

88. *Id.* at 377–80.

89. *Id.* at 376.

90. *See* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 15.

91. *Id.*

92. Maria Isabel Medina, *Rewritten Opinion in* Town of Castle Rock v. Gonzales, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 509–26.

93. 545 U.S. 748 (2005).

94. Medina, *supra* note 92, at 509–13.

95. *Town of Castle Rock*, 545 U.S. at 751, 768.

were killed by their father.[96] In Medina's rewritten judgment, the tragic facts of the *Gonzales* case and the broader social context of the legislation provided the foundation for the holding that the benefit created by the state was a property interest creating a due process right.[97]

Ann Bartow's rewritten judgment[98] in *Gebser v. Lago Independent School District*[99] is a lesson in narrative methodology and its use to provide a solid justification for a legal holding. In *Gebser*, a teenage girl brought a Title IX action against a school district because a trusted teacher and mentor had had sexual intercourse with the girl for several years.[100] The original opinion held that the student could not sue her school district under Title IX and referred to the statutory rape as a "relationship" between a girl and a teacher.[101] In the feminist rewrite, Bartow focuses almost immediately on "what should have been the majority's central understanding of this case: When a teacher sexually assaults a minor student, they are not having a relationship. The sex is non-consensual as a matter of law. The student is being raped."[102]

The heart of the feminist opinion is narrative storytelling as "an important tool for reframing the stories of people . . . who have not received justice from the Court."[103] Bartow criticizes the language and narrative tone of the Circuit Court and the Supreme Court, which said that the 13-year-old had a "relationship" with her teacher that "grew," and used similar phrases that revealed "embedded and problematic perceptions" of young girls and their ability to consent to sexual intercourse with a teacher.[104] By uncovering parts of the student's story that were neglected by the Fifth Circuit and the original Supreme Court opinion, the feminist opinion is designed to show the bias and injustice of the legal standard before it makes the argument for a new standard.

C. Inspiring and Broadening Perspectives

Assigning the feminist judgments provides much needed lessons missing from the core canon of legal pedagogy. For decades, law students and law professors have criticized both the substance and process of law

96. *Id.* at 753–54.

97. Medina, *supra* note 92, at 525–26.

98. Ann Bartow, *Rewritten Opinion in* Gebser v. Lago Vista Independent School District, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 430–46.

99. 524 U.S. 274 (1998).

100. *Id.* at 277–79.

101. *Id.* at 277–78.

102. Bartow, *supra* note 98, at 431 (citation omitted).

103. *Id.* at 434.

104. *Id.* at 434–35.

teaching as marginalizing to students from non-traditional backgrounds.[105] This pedagogical failure certainly has ramifications for what our students learn and whether we are creating future lawyers and judges who are capable of handling an increasingly diverse clientele. But it can also contribute to student disengagement, attrition, and cynicism about the law while reinforcing the long-standing, unforgivable lack of diversity in law practice and law-making. Exposing students to diversity in legal thinking and thinking by diverse legal writers is an essential part of law school pedagogy. Feminist judgments can help fill that pedagogical gap.

1. Developing Student Identity as Lawyers, Advocates, and Legal Writers

Perhaps the most important achievement of teaching with feminist judgments is to equip students to envision themselves as advocates and legal writers with the potential to advance causes they embrace. Law students from traditionally underrepresented communities rarely see familiar individuals playing positive or active roles within the legal system. Teachers using feminist judgments in the classroom can help students recognize their part in bringing about alternative versions of the future or remedying injustice. One of the authors of an alternative feminist judgment in the U.S. Feminist Judgments volume wrote that as she was drafting her rewritten opinion in *Loving v. Virginia*,[106] one of her students stopped by. Asked to wait, he began to read the opinion over her 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!" 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.[107]

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105. *See, e.g.*, Margaret E. Montoya*, Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. MICH. J.L. REFORM 263, 299–300 (2000) ("[P]edagogical techniques that are utilized in the law school classroom, which is designed architectonically and epistemologically to be hierarchical, have been repeatedly shown to alienate and silence students, especially students of color and women from different backgrounds."); Suzanne Homer & Lois Schwartz, *Admitted But Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY J. GENDER L. & JUST. 1, 3, 44 (2013); Jonathan Feingold & Doug Souza, *Measuring the Racial Unevenness of Law School*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 71, 97 (2013).

106. *See* McMurtry-Chubb, *supra* note 78, at 119.

107. Bridget J. Crawford, Kathryn M. Stanchi & Linda L. Berger, *Teaching with Feminist Judgments: A Global Conversation*, 28 LAW & INEQ. (forthcoming 2020) (on file with authors).

One of the editors of the Supreme Court volume had a similar experience when teaching a student to write an alternative judgment. The assignment was to rewrite *Rogers v. American Airlines*,[108] a case finding that an employer policy against cornrow hairstyles did not violate Title VII.[109] That student, an African American woman, was concerned about sounding like an "angry Black woman" in her rewritten opinion, but after reading some of the judgments by African American women law professors, came to realize that her voice was valid, legitimate, and worthy of being heard.

By reinforcing the voices of the marginalized as legitimate and "judicial," the concept of alternative or re-imagined judgments helps students develop their personal and professional identities. These judgments help students from groups traditionally underrepresented in law navigate the difficult and sometimes hostile law school space. Students not only benefit in terms of professional identity development but also feel more at home when they participate in reading and writing opinions that take seriously the problems of individuals and families who differ from traditional expectations. Feminist judgments provide an avenue for students to see "fully contextualized considerations of human conflict," and for some nontraditional students to see themselves and their everyday experiences reflected in judicial opinions.

Examples of feminist judgments that can be used to advance this goal run throughout the book and the series. As just a few examples: Ruthann Robson's rewritten opinion[110] in *Lawrence v. Texas*,[111] in which she has the Supreme Court apologize for the decision in *Bowers v. Hardwick*, can be an exceptionally moving and validating opinion for LGBTQ students; Ilene Durst's rewritten opinion in *Nguyen v. INS* could be especially important in the current anti-immigration climate for law students who are immigrants or first-generation U.S. residents;[112] Angela Onwuachi-Willig's rewritten *Meritor v. Vinson* is important for its depiction of African-American lived experiences, especially for African-American women;[113] Lisa Pruitt's rewritten opinion in *Planned Parenthood v. Casey* for its focus on poor and Native women;[114] Lucinda M. Finley's rewritten opinion[115] in *Geduldig v.*

108. 527 F. Supp. 229 (S.D.N.Y. 1981).

109. *Id.* at 231.

110. Ruthann Robson, *Rewritten Opinion in* Lawrence v. Texas, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 488, 500–01.

111. 539 U.S. 558 (2003).

112. *See* Durst, *supra* note 71, at 473–84.

113. *See* Onwuachi-Willig, *supra* note 26, at 303–21.

114. *See* Pruitt, *supra* note 83, at 365–83.

115. Lucinda M. Finley, *Rewritten Opinion in* Geduldig v. Aiello, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 187–208.

Aiello[116] for its eloquent and empathetic recitation of how pregnancy burdened the women in that case; Ann Bartow's expanded narrative in *Gebser v. Lago Vista*, in which she makes clear that a 50-year-old male teacher who had sexual intercourse with his 15-year-old student was engaged in rape, not a romantic relationship.[117] These stories can validate students who have had similar experiences, can provide a needed counter-narrative to the stereotypes that underlay the original opinions, and can demonstrate new perspectives and experiences for more traditional students, which can relieve minority students from the responsibility to shoulder the counter-arguments and narratives solely on their own.[118]

Reading and writing judicial opinions whose authors have purposefully re-envisioned the status quo—and who often have done so without resorting to conventional formulas and frameworks—helps students feel more at home as writers. The feminist judgments projects exemplify many approaches to legal reasoning and writing. Knowing that there was not only one right answer, and not only one right way to argue, empowers students who wish to argue for change. By engaging with a full spectrum of intentional rewritings, students learn to experiment themselves, not only because crafting alternatives allows them to advocate for causes they believe in, but also because it allows them to participate in a richly creative and constructive process.

2. Introducing Students to Novel Arguments

When students read a Supreme Court opinion that has brushed aside a particular argument, they "learn" that the argument is unimportant and should not be raised again. But many of the feminist judgments illustrate that some of these discarded arguments have great value. Just a few examples include: Leslie C. Griffin's Establishment Clause analysis in *Harris v. McRae*, demonstrating the threadbare nature of the original opinion's rationale for permitting states to deny medically necessary abortions to Medicaid recipients;[119] Kim M. Mutcherson's equal protection analysis in her rewritten *Roe v. Wade*, altering the original opinion's famous reliance on privacy and

116. 417 U.S. 484 (1974).

117. Bartow, *supra* note 98, at 430–46.

118. Students in minority groups in law school can be "in the position of representing their ascribed category to the group, whether they choose to do so or not." *See* Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965 (1977); Lumumba Seegars, *Being the Token*, HARV. CRIMSON, (Feb. 23, 2007), https://www.thecrimson.com/article/2007/2/23/being-the-token-being-the-token/ [https://perma.cc/4MPD-AG42] ("Being the token black person is not fun. I am expected to be an authority on the lives of all black people. People think I represent all black people and black culture; however, at the same time, I'm supposed to rise above black culture.").

119. Griffin, *supra* note 55, at 247–56.

the trimester framework for evaluating abortion restrictions;[120] and Dara E. Purvis's adoption of strict scrutiny for sex discrimination cases in *Frontiero v. Richardson*, recognizing the harm of gender stereotypes for both men and women while reversing the denial of a married female servicemember's right to receive the same spousal support benefits as a married male servicemember.[121] An excellent teaching example for Constitutional Law students is Phyllis Goldfarb's rewritten opinion[122] in *Bradwell v. Illinois*,[123] the decision that denied Myra Bradwell the right to practice law. Goldfarb reviews the history of the Fourteenth Amendment and demonstrates how the early Reconstruction cases—*Bradwell* and the *Slaughterhouse* cases—stifled the radical change intended by that newly ratified amendment.[124]

In *Bradwell,* the U.S. Supreme Court upheld the state of Illinois' denial of a law license to Myra Bradwell.[125] This decision upended two historical movements: it undermined the then-current wave of feminism focusing on formal equality as well as the potentially expansive interpretation of the Reconstruction Amendments adopted after the Civil War.[126] The rewritten judgment shows students how a fearful Court suppressed the momentous power of the words and history of the Fourteenth Amendment. It gives students an important historical lesson and shows them how we live with the specter of these nineteenth-century decisions *to this day.* It stimulates students to ask how the United States could have an amendment like the Fourteenth, but still have Jim Crow laws and open sex discrimination. By reviving the Privileges or Immunities Clause and giving it the reading it deserved, Goldfarb's opinion provides a new source of argument and a model for making the argument.[127]

3. Encouraging Comparative Analysis and Plural Perspectives

Just as looking at concurrences and dissents helps students become aware of differing perspectives and ways of constructing knowledge, contrasting the original opinions with the feminist opinions opens up examination of several questions: Which of the judgments would better serve

120. Kim M. Mutcherson, *Rewritten Opinion in* Roe v. Wade, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 151–67.

121. Dara E. Purvis, *Rewritten Opinion in* Frontiero v. Richardson, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 173–84.

122. Phyllis Goldfarb, *Rewritten Opinion in* Bradwell v. Illinois, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 58–77.

123. 83 U.S. 130 (1873).

124. Goldfarb, *supra* note 122, at 58–77.

125. *Bradwell*, U.S. 130 at 139.

126. Kimberly Holst, *Commentary on* Bradwell v. Illinois, *in* U.S. FEMINIST JUDGMENTS, *supra* note 5, at 55.

127. Goldfarb, *supra* note 122, at 60.

the cause of advancing justice? What makes a particular judgment appear to be "feminist" in comparison with the original?

Beyond this kind of comparison, the feminist judgments projects offer other opportunities for comparative analysis, including analysis across disciplines and jurisdictions, as well as over time. For example, Rosemary Hunter is optimistic that by examining the opinions in one jurisdiction over time, she will find judgments by sitting judges that "acknowledge and incorporate excluded knowledges—and particularly feminist knowledge about women's lives."[128] Her goal is to find "ways in which they consistently articulate an understanding of the world that is different from the conventional understandings espoused (explicitly or implicitly) by their judicial colleagues."[129] When these judges introduce new modes of reasoning, their colleagues may sometimes go along with them, and as a result, "the law opens up a little."[130]

As already noted, the rewritten judgments contain numerous examples of the diversity among feminist theories. Particularly interesting examples can be found in the rewritten opinions of feminists on the bench. In the U.S. Feminist Judgments volume, for example, one of the rewritten opinions[131] is that of Justice Ruth Bader Ginsburg in *United States v. Virginia*.[132] Comparing Valorie Vojdik's rewrite with Justice Ginsburg's original highlights the debate between formal and substantive equality theory. Similarly, the decisions of one self-identified feminist judge of the UK Supreme Court, Lady Hale, were rewritten in the British project.[133]

Examples illustrating the wide variety of decision-making methods can be found in the New Zealand and Australian projects. The New Zealand project recognizes traditions that come from Māori (Indigenous New Zealanders) and Pakeha (New Zealanders of European descent). As a result,

128. Rosemary Hunter, *Comment: Diversity and Legal Reasoning*, 7 FEMINISTS@LAW 1 (2017). Professor Hunter's optimism may be warranted. For the first time, the Canadian Supreme Court cited one of the Canadian feminist judgments in an opinion. *See R. v. Goldfinch*, 2019 S.C.C. 38 (citing Jennifer Koshan, *Marriage and Advance Consent to Sex: A Feminist Judgment in* R v JA, 6 OÑATI SOCIO-LEGAL SERIES 1377 (2016)).

129. Hunter, *supra* note 128, at 2.

130. *Id.* at 1.

131. *See* Vojdik, *supra* note 40, at 389.

132. 518 U.S. 515 (1996) (invalidating the Virginia Military Institute's exclusion of women).

133. Rosemary Hunter, *Feminist Judgments as Teaching Resources*, 2 OÑATI SOCIO-LEGAL SERIES 47–62 (2012).

the book itself is intersectional,[134] focusing primarily on "making space" for Māori culture and law within the judgments.[135]

In the Australian project, several Indigenous authors rejected the conventional form and content of a judgment, with one contributor explaining her inability to write a judicial opinion and writing an essay instead. The essay explains that using the required methodology would not allow "open places for Nunga (Australians of Aboriginal descent) women because the rewriting needs to be done from 'another space,' outside the jurisdiction of the Australian common law and the sovereignty of the Australian state."[136] The (Canada) Indigenous Bar Association as well as a group of Australian scholars have begun projects that will take up the challenge of bringing native voices to the law through the sociolegal method of judgment rewriting.[137]

IV. Conclusion

Having undermined the concept of judges as neutral arbiters, how can we reassure law students that they will nonetheless have an opportunity to

134. What legal scholars now call "intersectionality" began as a description of the lived experience of women of color, who must navigate aspects of their multiple identities that converge at a "crossroads." *See* THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR, at xxii (Cherie Moraga & Gloria Anzaldua, eds., 4th ed. 2015). Professor Kimberlé Crenshaw brought intersectionality to the study of law and feminist legal theory in her groundbreaking work. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti-Racist Politics*, 1989 U. CHI. LEGAL F. 139 (1989). The central point of intersectionality is that multiple identities come together to produce unique forms of discrimination and disadvantage. Some scholars now use the term intersectionality more broadly to denote the effort to understand and incorporate multiple identities into legal analysis. *See, e.g.*, Aisha Nicole Davis, *Intersectionality and International Law: Recognizing Complex Identities on the Global Stage*, 28 HARV. HUM. RTS. J. 205 (2015).

135. AORTERAOA NEW ZEALAND FEMINIST JUDGMENTS, *supra* note 5, at 42 (quoting Linda Smith as explaining that instead of "struggles in the margin," many Māori have chosen to focus on "[m]aking space" within "education, health research and social justice," identifying that approach as "attached to a political idea such as *rangatirartanga*, often translated as sovereignty or self-determination") (citing Linda T. Smith, *Choosing the Margins: The Role of Research in Indigenous Struggle for Social Justice*, *in* QUALITATIVE INQUIRY AND THE CONSERVATIVE CHALLENGE (Norman K. Denzin & Michael D. Giardina eds., 2006).

136. Irene Watson, *First Nations Stories, Grandmother's Law: Too Many Stories to Tell*, in AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW, *supra* note 5, at 53; *see also* Thalia Anthony, *Commentary on* In the matter of Djappari, *in* AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW, *supra* note 5, at 437, 441.

137. *See, e.g.*, Bridget J. Crawford, *Bringing Indigenous Voices Into Judicial Decision-Making*, FEMINIST LAW PROFESSORS BLOG (Aug. 19, 2019), http://www.feministlawprofessors.com/2019/08/bringing-indigeneous-voices-into-judicial-decision-making [https://perma.cc/8AEE-8MQ3] (describing new Australia project); Bridget J. Crawford, *Reimagining Canada's Aboriginal Rights Jurisprudence*, FEMINIST LAW PROFESSORS BLOG (Aug. 15, 2019), http://www.feministlawprofessors.com/2019/08/reimagining-canadas-aboriginal-rights-jurisprudence [https://perma.cc/5Q5P-G5QL] (describing new Canada project).

advance justice before impartial and independent decision makers? After helping law students understand that judges, like the rest of us, are linked to their experiences and their communities, what can we offer them to overcome those connections when necessary to achieve fair outcomes? In the Appendix to this article, we provide short descriptions of actual use of feminist judgments in the classroom. Each of the teachers listed would be more than happy to share information about their course or experiences. We encourage all law instructors to use feminist judgments as a vehicle for lessons about the power of perspective and persuasion. The judgments are also a call for reflection and evaluation when the requirements of any course syllabus might push us toward quantity of coverage, without pausing to reflect on its quality.

As for what we can offer students to reassure them about judges, Patricia Cain argued that what we want from judges is "a special ability to listen with connection before engaging in the separation that accompanies judgment."[138] The ability to listen with connection is created through storytelling:

> When you listen as a judge, you must transcend your sense of self, so that you can really listen. Listen to the story that is being told. Do not prejudge it. Do not say this is not part of my experience. But listen in such a way as to make it part of your experience. Find some small part of your own self that is like the Other's story. Identify with the Other. Do not contrast. Only when you have really listened, and only then, should you judge.[139]

In Cain's view, at least a momentary separation is necessary for judging, but it follows when judges allow this connection to be made: "A judge should transcend self to listen, and then a judge should decide with empathy and understanding—as a new self, if you will, for having experienced the story of the other."[140]

Acknowledging that judges bring their backgrounds and experiences with them to their decision making, the feminist judgments projects endeavor to make space for alternative voices without compromising judicial impartiality and independence.[141] Within that space, feminist approaches can change the way that facts are perceived and understood, not only in the current case, but for future cases. Where the law allows discretion, judges applying feminist methods or persuaded by feminist perspectives may exercise it in different ways. As legal doctrine develops incrementally,

138. Patricia Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1954 (1988).

139. *Id.* at 1955.

140. *Id.*

141. *See* Rosemary Hunter, *Can Feminist Judges Make a Difference*, 15 INT'L J. OF THE LEGAL PROFESSION 15–17 (2006).

feminist perspectives may eventually ease the perceived inevitability of the current state of the law.[142]

Appendix

Selected Law School Courses Assigning U.S. Feminist Judgments[143]

1. Gender and the law seminars

Professor: Susan Appleton, Washington University School of Law
Course Title: Feminist Theories, Feminist Judgments
Assigned Reading: *U.S. Feminist Judgments*[144] and *Introduction to Feminist Legal Theory*[145]
Methods and Assigned Writing: This seminar is designed to acquaint students with feminist legal theory, to illuminate how to discover and apply such theory in the rewritten opinions, and to enhance the students' own writing experiences while drafting opinions and commentary. The teaching methods include weekly reading assignments and class discussion of one to three rewritten opinions along with relevant pages from *Introduction to Feminist Legal Theory*; a guest appearance by the author of one of the rewritten opinions in *U.S. Feminist Judgments* to discuss the experience; and the writing requirements, which include a first draft and final version of both a "feminist judgment" on a case that the student selects with professor approval and a comment on a classmate's feminist judgment. The professor encourages students to be ambitious and to not necessarily limit themselves to rewriting opinions in which gender might be an explicit issue. Some projects have featured cases on topics such as campaign finance law, eminent domain, and public employee unions.

142. *See* Erica Rackley, *Difference in the House of Lords*, 15 SOCIAL AND LEGAL STUDIES 163–85, 181 (2006).

143. These and other professors discuss their courses in *Teaching with Feminist Judgments: A Global Conversation*. Crawford, Stanchi, & Berger, *supra* note 107. The course descriptions in the Appendix summarize discussions and emails with the professors.

144. *See generally* U.S. FEMINIST JUDGMENTS, *supra* note 5.

145. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY (3d ed. 2012).

Professor: Pam Wilkins, University of Detroit Mercy School of Law
Course Title: Feminist Legal Theory (intersession course)
Assigned Reading: *U.S. Feminist Judgments*[146] and *Introduction to Feminist Legal Theory*[147]
Methods and Assigned Writing: The students in the intersession course have read *Griswold v. Connecticut*, *Roe v. Wade*, *Planned Parenthood of Se. Pa. v. Casey*, and *Lawrence v. Texas*. The teaching methods include: responses to writing prompts through daily journal entries; the use of multimedia short videos about feminist theory and history; analysis of feminist judgments cases and the related statutes; and comparative/international analysis (student body is more than 30 percent Canadian). Most students have just finished their first year and Constitutional Law is a required second-year course, so many students read the feminist judgments for these cases *before* they read the actual U.S. Supreme Court opinions. Several students have told the professor that they later reread the feminist judgment opinions on their own when they cover the cases in their second-year Constitutional Law course.
Suggestions: The professor suggests that future courses should include field trips or have a series of presentations by Skype to bring in international or comparative work.

2. Judicial opinion writing courses

Professor: Kathryn M. Stanchi, University of Nevada, Las Vegas, William S. Boyd School of Law
Course Title: Judicial Opinions: Critical Drafting and Analysis (taught at Temple)
Assigned Reading: *U.S. Feminist Judgments*[148]
Methods and Assigned Writing: The students are asked to analyze and compare the feminist judgments to the original opinions after reading the key theories that informed the rewritten judgment. Students also rewrite an opinion, choosing from among four cases. Students also write a cover note to their student commentator about what theories they incorporated, and they write a commentary about a classmate's opinion.
Suggestions: The professor has 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, she assigned Leslie Griffin's

146. *See generally* U.S. FEMINIST JUDGMENTS, *supra* note 5.
147. *See generally* CHAMALLAS, *supra* note 145.
148. *See generally* U.S. FEMINIST JUDGMENTS, *supra* note 5.

feminist rewrite of *Harris v. McRae*[149] to a student who was writing a law review note on the fetal burial laws some states have passed.

Professor: Andrea McArdle, City University of New York School of Law
Course Title: Writing from a Judicial Perspective (advanced 4-credit lawyering seminar)
Assigned Reading: *U.S. Feminist Judgments*[150]
Methods and Assigned Writing: In this seminar, students focus on a pending U.S. Supreme Court case that deals with an issue of public law and are asked to produce an opinion deciding it. The course description begins by asking them 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? Students are also asked how the "practice" of judicial writing can foreground social justice perspectives. The professor uses the rewritten opinion model to encourage reflection on what makes an opinion justice-serving. She assigns five or six *U.S. Feminist Judgments* opinions that are linked doctrinally or thematically to the U.S. Supreme Court case on which the students are focusing that semester. Students are asked to analyze the feminist judgments in terms of structure, reasoning, and rhetoric, and to reflect on how the feminist authors' alternative legal framings and analyses call into question the ostensibly neutral and objective perspective to which law lays claim.

3. Clinical (simulation or live client) courses

Professor: Teri McMurtry-Chubb, Mercer University School of Law
Course Title: Social Justice Lawyering Seminar
Assigned Reading: *U.S. Feminist Judgments*[151]
Methods and Assigned Writing: This seminar is a simulated-impact litigation clinic using feminist judgments to help student learn how to integrate interdisciplinary work into brief writing on social justice issues. Students review and analyze motion and appellate briefs from watershed civil rights cases. They consider how the lawyers and judges used judicial narrative and interpretation as tools to support or oppose existing power structures. One of the cases studied is *Loving v. Virginia*, where students are asked to study each party's brief, the original opinion, and the rewritten opinion, but in addition, they are provided with archival documents illuminating the historical and social context. The discussion critically

149. Griffin, *supra* note 57.
150. *See generally* U.S. FEMINIST JUDGMENTS, *supra* note 5.
151. *Id.*

analyzes how the litigators and judges chose to frame the arguments and what alternatives are possible in judicial decision making.

Suggestions: The professor's longer-term goal is to integrate multicultural rhetoric and the feminist judgments projects into the required legal writing curriculum.

4. Introduction to law/jurisprudence courses

Professor: Ross Astoria, University of Wisconsin-Parkside (undergraduate)

Course Title: Law, Politics, and Society

Assigned Reading: *U.S. Feminist Judgments*,[152] *Feminist Legal Theory: A Primer*,[153] and *Invitation to Law and Society*[154]

Methods and Assigned Writing: The course centers on normative jurisprudence, with feminism providing the normative perspectives. The course introduces the canon of legal sociology. Each social theory posits a different role for law in constituting a particular social form, and the course uses the feminist judgments as "data points" to illustrate and critique these theoretical perspectives. While reading the feminist judgments, students are prompted with the following general questions: What is the doctrinal foundation of the judgment? 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? The course then tests one or more sociological perspectives through the feminist judgment. The questions and conversations allow students to identify and evaluate how different legal holdings shape and reflect the organization of society.

5. Subject-matter courses

Professor: Bridget Crawford, Pace Law School

Course Title or Subject Matter: Federal Income Taxation; Estate and Gift Taxation; or Tax Policy

Assigned Reading: Comparison of Original and Rewritten Opinions

Methods and Assigned Writing: In the ordinary progression of a "traditional" tax course, students compare an actual tax decision with one of the rewritten opinions in *Feminist Judgments: Rewritten Tax Opinions*.[155] The selected case is preferably one that is reprinted in the casebook (i.e., the

152. *Id.*

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

154. KITTY CALAVITA, INVITATION TO LAW AND SOCIETY: AN INTRODUCTION TO THE STUDY OF REAL LAW (2d ed. 2016).

155. FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS (Bridget J. Crawford & Anthony C. Infanti eds., 2017).

students would have read it anyway), but it is presented to them in a handout, with the original case formatted to resemble the text of the Cambridge University Press book. The feminist judgments follow. Students read both cases in advance of class and come prepared to discuss several questions, distributed in advance. The same questions could be used as the basis of a reflection paper or a smaller group discussion followed by classroom presentations. The questions are:

> (1) How did the two opinions vary in terms of the language the judge or judges used to describe the taxpayer in the case?
>
> (2) Did you find the language of each opinion equally accessible?
>
> (3) Did whatever personal view of the taxpayer (as sympathetic, unsympathetic, credible, not credible, etc.) you had after reading the first version of the opinion change after reading the second version of the opinion?
>
> (4) Are there facts or context that came to the forefront in one version of the decision but not the other?
>
> (5) How do the cases' outcomes differ, and which decision do you think is correct as a matter of law? Be as specific as possible in citing provisions of the Internal Revenue Code or Treasury Regulations in your answers.
>
> (6) Which opinion has more persuasive reasoning? What makes that reasoning more persuasive in your view?
>
> (7) Are there factors *other* than law that you think might have led the judge to rule in a particular way? What are those factors and what in the language of the opinion itself makes you think so?
>
> (8) Can you identify any overarching theories or ideological commitments underlying the decisions?
>
> (9) Are there important facts or details that you think are missing from either opinion? Another way of thinking about this question is to ask yourself if you would have introduced more/different evidence if you had been the taxpayer's lawyer.
>
> (10) Which do you think is the "real" court decision and which is the "re-imagined" decision?
>
> (11) (Once the feminist judgment has been identified . . .) What makes the judgment "feminist," as you understand the term? If the judgment does not seem "feminist," is there a term that seems more accurate?
>
> (12) Substantively speaking, what impact has the "real" opinion had on the subsequent development of the law? What would the law look like if the feminist judgment had been the actual opinion? Which approach better accords with your personal sense of fairness? Which approach better accords with tax policy values like efficiency, neutrality and horizontal equity?