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BOOK REVIEW

Judicial Opinions Reimagined: Engendering a Language of Justice

*Feminist Judgments:
Rewritten Opinions of the
United States Supreme Court*

Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, eds.

Andrea McArdle, reviewer

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Feminist Judgments: Rewritten Opinions of the United States Supreme Court

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What separates the language of law from the language of justice? Where do we see the language of justice in the form and framing of law, and in law's substance? Can judicial opinions—as a genre, as a form of public discourse—contribute to law's capacity to avoid legal formalism and instead achieve justice? If existing judicial opinions could be reimagined and revised to incorporate theoretical perspectives and methods associated with feminism, what impact would such a reworking have on the trajectory of legal doctrine and the prospects for reaching just outcomes?

Feminist Judgments: Rewritten Opinions of the United States Supreme Court offers revelatory responses to these questions.¹ Reconstructing U.S. Supreme Court opinions from a range of feminist perspectives, this coedited volume drew inspiration from the groundbreaking *Feminist Judgments* projects launched in Canada² and the United Kingdom,³ and adds to a growing body of work flourishing in Ireland⁴ and Australia.⁵ A hallmark of the U.S. project is its pluralist understanding of feminism and

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

² *Women's Court of Canada Rewrites Supreme Court Decisions*, UNIV. OF TORONTO (Mar. 6, 2008), <https://www.law.utoronto.ca/news/press-releases/women%e2%80%99s-court-canada-rewrites-supreme-court-decisions>.

3 *Feminist Judgments Project*, UNIV. OF KENT, <https://www.kent.ac.uk/law/fjp/> (last visited Apr. 6, 2018).

4 *Northern/Irish Feminist Judgments Project*, <http://www.feministjudging.ie/> (last visited Apr. 6, 2018).

5 *Australian Feminist Judgments Project: Jurisprudence as Praxis (2012–2014)*, UNIV. OF QUEENSLAND, <http://researchers.uq.edu.au/research-project/14034> (last visited Apr. 6, 2018).

the theoretical frameworks, analytic methods, and rhetorics feminism embraces.⁶ As the editors recognize, feminism is a justice-seeking political movement but also a philosophical undertaking, a way of seeing and processing human experience.⁷ Applied to law and to drafting the distinctive genre of the judicial opinion, the book's inclusive orientation highlights the multiple ways in which feminism has advanced women's equality, and how it could further serve that purpose and broader social-justice struggles.⁸

The twenty-five rewritten U.S. Supreme Court opinions included in the volume analyze issues of gender inequality implicating the Fourteenth Amendment, the Commerce and Establishment Clauses, Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and U.S. immigration law. Although the feminist opinion writers were asked to work within the parameters of the record, the amicus briefs filed in relation to the case, and the law and factual sources existing at the time of the original opinion, the authors were otherwise free to pursue alternative approaches to reasoning and writing the opinions. The aim of this partial stricture was to demonstrate that, even under the constraints of the era in which the original opinions were written, other legal framings and analyses were feasible, and well suited to the legal issue and context.⁹ The rewritten versions bear out the insight behind the editors' guidelines. Notwithstanding the aura and "rhetoric of inevitability"¹⁰ that judicial opinions as a genre invoke, the feminist opinions show that other analytic and rhetorical choices were indeed apposite, jurisprudentially persuasive, and justice-serving.¹¹

Each opinion is preceded by a contextual essay that summarizes the original opinion, situates it in U.S. jurisprudence, and theorizes the impact the rewritten opinion would have had on the landscape of U.S. law. These illuminating essays carry forward the editors' elaboration of the project's aims and methods, as well as Berta Esperanza Hernandez-Truyol's magisterial chapter reviewing the roots of feminism and its principal branches,

6 FEMINIST JUDGMENTS, *supra* note 1, at 3–4.

7 *Id.* at 3.

8 *Id.* at 5–6.

9 *Id.* at 9–12. However, the authors were not asked to show that their rewritten rationales and rhetoric would have commanded the support of the Justices who served on the Court when the original opinions were rendered—an endeavor that is conjectural at best. *Id.* at 9. Removing that condition of judicial writing allowed the authors greater scope to pursue the full measure of their reasoning and voice, especially if they wrote a majority opinion.

10 Robert A. Ferguson, *The Rhetorics of the Judicial Opinion: The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 213–16 (1990).

11 FEMINIST JUDGMENTS, *supra* note 1, at 4.

Section One of the Fourteenth Amendment to support Myra Bradwell's admission to the Illinois bar.²⁴

Whether through fresh readings of doctrine, revised narratives of the facts, explicit use of feminist arguments, or reconceived rhetorical possibilities, the rewritten opinions offer a window into how an intentionally feminist approach can be justice-enhancing. Although discussing how each of the rewritten opinions is justice-serving would be tempting, it would hardly be feasible in a book review. Nonetheless, a number of the outstanding contributions to this volume warrant mention here.

In fact, a number of rewritten opinions pointedly call for the Court to seek and do justice. Ruthann Robson's rewritten opinion in *Lawrence v. Texas*²⁵ centers the concepts of sexual equality²⁶ and sexual autonomy (in preference to the original opinion's use of a privacy- and dignity-based analysis).²⁷ Recounting the "devastating" human impact of *Bowers v. Hardwick*,²⁸ which upheld a statute criminalizing same-sex activity, an outcome *Lawrence* overruled, Robson's opinion avows that the Court must take "responsibility for justice."²⁹ The Robson majority does so by explicitly apologizing for the harm caused by criminalizing same-sex relations. The opinion deepens the apology by recounting the impact of the ruling in *Bowers v. Hardwick*—on Hardwick himself, and on others whom the legal system effectively punished, including in employment and custody cases, for their openly gay sexuality.³⁰

Ann Bartow's dissenting opinion in *Gebser v. Lago Vista Independent School District*³¹ is similarly justice-focused. This Title IX damages action brought by a high-school student and her parent against a school district had alleged that one of the student's male teacher-mentors had sexually exploited her. Justice O'Connor's majority opinion held that an implied private right of action for money damages under Title IX requires a showing that the school district had been deliberately indifferent to the teacher's conduct after having received actual notice of the claim.³² Rejecting this difficult-to-meet liability standard as a "travesty of justice,"³³ Bartow highlights the minor student's vulnerability. Drawing on a signature feminist method, Bartow pointedly uses narrative to expand on the majority's recital of facts. The opinion also reframes the majority's references to the teacher's sexual "relationship" with the student as, in fact,

24 *Id.* at 66-72.

25 539 U.S. 558 (2003).

26 FEMINIST JUDGMENTS, *supra* note 1, at 496-500.

27 *Id.* at 490-94.

28 478 U.S. 186 (1986).

29 FEMINIST JUDGMENTS, *supra* note 1, at 503.

30 *Id.* at 501-03.

31 524 U.S. 274 (1998).

32 *Id.* at 292-93.

33 FEMINIST JUDGMENTS, *supra* note 1, at 443.

34 *Id.* at 431, 437-40.

constituting “rape” and “sexual abuse” preceded by the teacher’s deliberate “grooming” of the student.³⁴

Opinions that originally reached salutary results also benefited from a feminist reworking. When accountant Ann Hopkins was denied a promotion because she did not conform to her male colleagues’ expectations of female behavior, Justice Brennan’s plurality opinion in *Price Waterhouse v. Hopkins*³⁵ reaffirmed the Court’s recognition in *City of Los Angeles, Department of Water and Power v. Manhart*³⁶ that Title VII’s ban on discrimination “because of sex” covered the “entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”³⁷ Martha Chamallas’s rewritten concurrence makes the social-science evidence that was available to the Court at the time more central to her opinion’s reasoning; she uses it effectively to unpack sex stereotypes and illuminate the workplace culture and the biased assessment standards that blocked Hopkins’s advancement.³⁸

Similarly, Val Vojdik’s concurrence to Ruth Bader Ginsburg’s majority opinion in *United States v. Virginia*,³⁹ striking down Virginia’s males-only admission policy to the Virginia Military Institute (VMI), adds to the majority rationale. In particular, the rewritten opinion emphasizes how VMI’s admission policy subordinated women⁴⁰ and adopts strict scrutiny to assess the policy.⁴¹ Rejecting outright a separate educational program for women,⁴² Vojdik requires Virginia to take affirmative steps to eradicate a culture of “misogyny” at VMI predicated on debasing women.⁴³

For their intellectual breadth, incisive analysis, and creativity, the rewritten opinions stand on their own as legal literature. The volume is also a highly useful resource. It would be especially valuable in a course on feminist legal history and theory as it charts the development of gender equality law and invites readers to consider the distance between what the law is and what it could become. And for teachers of legal rhetoric, *Feminist Judgments* provides a crucial implement in the writer’s toolkit. As I’ve found in my own use of the collection in a seminar on judicial-opinion writing, the opinions offer compelling evidence of intentionality in writing. They showcase the choices available to opinion authors in framing, structure, and rhetoric.⁴⁴

35 490 U.S. 228 (1989).

36 435 U.S. 702 (1978).

37 *Id.* at 350–51 (quoting L.A. Dep’t of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

38 FEMINIST JUDGMENTS, *supra* note 1, at 351–53, 357–60.

39 518 U.S. 515 (1996).

40 FEMINIST JUDGMENTS, *supra* note 1, at 394–96, 398–400.

41 *Id.* at 401.

42 *Id.* at 401–03.

43 *Id.* at 402, 403–07.

44 I use “rhetoric” here in the broader sense in which Patricia Wald has applied the term, i.e., committing fully developed judicial reasoning to written form. See generally Patricia Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995).

For students who want to become acquainted with the conventions of the judicial opinion as a legal writing genre, studying the feminist opinions in relation to the original versions offers exemplars of a broader analytic and writing process. Aided by the contextual essays,⁴⁵ students can see contrasts in scope, vision, and tone between the official and rewritten opinions. From the contrast, they can recognize ways in which feminist theory and method contribute to the justice-serving capacity of the refashioned judgments. Students can learn from examining the feminist writers' deliberate choice of sources—precedent, facts, social-science evidence—and the authors' considered use of that material. Students can benefit, too, from robust examples of concurring and dissenting opinions, evidence of clarity of voice and engagement with audience, and, relatedly, demonstrations of empathy and humanity. By offering feminist judgments to students as exemplars, and then encouraging them to reflect on the process of using these opinions as touchstones, we can help students add to their repertoire as writers, and deepen their discernment as readers.

Whether read for our own or our students' edification, *Feminist Judgments* is replete with examples of writing that is bracing, thought-provoking, and humane. The opinions reject categories and frameworks of law that limit and oppress, and embrace a discourse marked by candor, clarity, and empathy, in which gender is never a deficit, but an attribute connected to human flourishing. I can think of no better reason to seek out and spend time with this compelling book, and to learn and draw inspiration from it.

⁴⁵ For instructors who wish to assign a limited number of opinions in a course, Cambridge University Press has made *Feminist Judgments* available as an e-book for “institutional acquisition,” which then enables students to access individual opinions without purchasing the entire book.