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## The Critical Tax Project, Feminist Theory, and Rewriting Judicial Opinions

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# **SYMPOSIUM ON *FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS***

THE CRITICAL TAX PROJECT, FEMINIST THEORY, AND  
REWRITING JUDICIAL OPINIONS

*Anthony C. Infanti and Bridget J. Crawford\**

In most social settings, disclosing that one is a tax professor usually stops conversation—and not in a good way. People tend to smile politely; they might inquire about a recent change to the tax law, complain that “tax day” is approaching, or ask for some free tax advice. Then the conversation topic tends to switch relatively quickly. This is true whether having a drink with fellow members of a community organization or attending a conference reception with other law professors. Most people think tax is boring (“Just tell me what I owe, and I’ll pay”), difficult to understand (“I don’t know how other people end up paying nothing in taxes”), or both. And even on those special occasions when one has the opportunity to socialize with other tax academics or economists, mention work in “critical tax theory” or “feminist analysis” and eyes tend to glaze over and the conversation may shift quickly to “safer” territory. Conversely, revelation to a group of feminist legal scholars that one studies tax likely will be met with a polite murmur, “Oh, how interesting,” or a kind head nod, before someone mentions a recent Supreme Court decision about gender discrimination.

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But the everyday relevance of taxation to all members of society combined with the persistence of pervasive discrimination along many different lines of disadvantage in U.S. society renders interrogation of tax law from a critical perspective vitally important. In fact, the importance of taxation and critical feminist perspectives on taxation are at the core of *Feminist Judgments: Rewritten Tax Opinions*, which is the first volume in the series of books inspired by *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*.<sup>1</sup> The book of rewritten Supreme Court opinions, published in 2016, featured twenty-five “shadow judgments” and related commentary written by a diverse group of contributors that included law professors from every part of the academy as well as practitioners. The book’s editors sought to show how U.S. Supreme Court decisions might change if the justices used feminist perspectives, ideas, and methods when deciding cases.<sup>2</sup> Using the same facts and law in existence at the time of the original decision, the feminist judgment rewriter was free to choose to write a dissent, concurrence, or an entirely new opinion. Each commentator was tasked with explaining the background and decision in the original case, how the shadow judgment differed from the actual opinion, and what difference the feminist opinion might have made if it had been the actual decision in the case.<sup>3</sup>

Because of our own interest in studying tax law’s practical impact on historically disempowered groups and individuals,<sup>4</sup> we believed that tax decisions were ripe for feminist rewriting as well. Linda Berger and Kathy Stanchi were enthusiastic about including a tax-oriented volume in the series of subject-matter specific books that had been approved by Cambridge University Press. We immediately began assembling a “wish list” of cases for a volume of *Feminist Judgments: Rewritten Tax Opinions*.

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<sup>1</sup> FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi et al. eds., 2016) [hereinafter FEMINIST JUDGMENTS: SCOTUS]; FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS (Bridget J. Crawford & Anthony C. Infanti eds., 2017).

<sup>2</sup> FEMINIST JUDGMENTS: SCOTUS, *supra* note 1, at 3.

<sup>3</sup> *Id.* at 8.

<sup>4</sup> See, e.g., Anthony C. Infanti & Bridget J. Crawford, *Introduction* to CRITICAL TAX THEORY: AN INTRODUCTION xxi, xxii (Anthony C. Infanti & Bridget J. Crawford eds., 2009).

Despite the popularity of the Supreme Court project,<sup>5</sup> and the existence of several similar rewriting projects around the world,<sup>6</sup> some of our tax colleagues expressed skepticism that the fundamental assumption underlying the Feminist Judgments project—that perspective matters—was applicable to an area like tax that is largely statutory. Indeed, there has been some scholarship devoted to gender and statutory interpretation,<sup>7</sup> but it is an understudied area of the law. Yet, there is no shortage of work on how different methods and philosophies of statutory interpretation may impact a judge’s understanding of a particular law. In light of that robust area of scholarship, we thought there was great value in an anecdotal investigation into whether an explicitly feminist perspective—however a particular author defined that term—might impact the outcome or reasoning in tax cases.

The thirteen shadow judgments and the related commentaries in *Feminist Judgments: Rewritten Tax Opinions* bear out our instinct about the transformative impact of feminist judging, even in a statutory-based area of law. A judge that adopts a feminist perspective may reach different results than a judge who does not, or reach the same results using different reasoning, even when presented with the same facts, statutes, and case law.

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<sup>5</sup> See, e.g., Leslie A. Gordon, *New Project Rewrites SCOTUS Opinions from a Feminist Perspective*, ABA J. (Feb. 1, 2015, 3:30 AM), [http://www.abajournal.com/magazine/article/new\\_project\\_rewrites\\_scotus\\_opinions\\_from\\_a\\_feminist\\_perspective](http://www.abajournal.com/magazine/article/new_project_rewrites_scotus_opinions_from_a_feminist_perspective); Samantha Michaels, *See How Your Life Would Change if We Cloned Ruth Bader Ginsburg*, MOTHER JONES (Oct. 10, 2015), <https://www.motherjones.com/media/2015/10/feminist-judgements-supreme-court-ginsburg-roe-v-wade>.

<sup>6</sup> See, e.g., AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW (Heather Douglas et al. eds., 2014); FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter et al. eds., 2010); FEMINIST JUDGMENTS OF AOTEAROA NEW ZEALAND TE RINO: A TWO-STRANDED ROPE (Elisabeth McDonald et al. eds., 2017); NORTHERN/IRISH FEMINIST JUDGMENTS: JUDGES’ TROUBLES AND THE GENDERED POLITICS OF IDENTITY (Máiréad Enright et al. eds., 2017); Diana Majury, *Introducing the Women’s Court of Canada*, 18 CAN. J. WOMEN & L. 1 (2006); *Feminist International Judgments Project: Women’s Voices in International Law*, U. LEICESTER, <http://www2.le.ac.uk/institution/researchimages/feminist-international-judgments-project-women2019s-voices-in-international-law> (last visited May 8, 2019); see also SCOTTISH FEMINIST JUDGMENTS PROJECT, <http://www.sfjp.law.ed.ac.uk/>; THE FEMINIST JUDGMENT PROJECT INDIA, <https://fjpindia.wixsite.com/fjpi/call-for-papers>; *The African Feminist Judgment Project*, CARDIFF L. & GLOBAL JUST., <https://www.lawandglobaljustice.com/the-african-feminist-judgments-project> (last visited May 8, 2019); E-mail from Alma Luz Kadue Beltran y Puga Murai to Kathryn Stanchi (July 7, 2017) (on file with Kathryn Stanchi) (regarding Mexican Feminist Judgments).

<sup>7</sup> See, e.g., Gwen Thayer Handelman, *Sisters in Law: Gender and the Interpretation of Tax Statutes*, 3 UCLA WOMEN’S L.J. 39 (1993); Marjorie E. Kornhauser, *A Legislator Named Sue: Re-Imagining the Income Tax*, 5 J. GENDER, RACE & JUST. 289 (2002).

We were absolutely delighted when we heard from so many colleagues that the book inspired them to think or teach differently. The essays that follow represent the reactions of eleven different individuals—including recent law school graduates, practicing attorneys, long-time teachers of U.S. tax law, and colleagues who study tax, but primarily systems other than that of the United States.

The series begins with a reflection by Canadian tax scholar Kim Brooks on the feminist statutory interpretation project generally, and the particular contours it takes in the tax context.<sup>8</sup> As the editors of the *Feminist Judgments* volume of Supreme Court decisions had earlier done with respect to the contributions to that book, Brooks remarks upon the tax opinion rewriters' emphasis on the lived experience of the parties in the cases and the use of narrative to convey personal stories to the court.<sup>9</sup> Like their Supreme Court rewriting counterparts, the contributors to *Feminist Judgments: Rewritten Tax Opinions* tend to take a wider view of what constitutes "legal authority" than judges typically do.<sup>10</sup> Brooks also draws attention to the feminist statutory embrace of substantive equality over formal equality in two of the opinions in the book.<sup>11</sup>

Three of the contributions—from Diane Klein, Ann Mumford, and Ajay Mehrotra—respond directly to individual rewritten opinions included in the book. Klein's essay highlights that what Alice Abreu affectionately refers to as "money law" is not just about economics.<sup>12</sup> Because class, gender, and race are related, tax laws that benefit married couples tend to disproportionately benefit white couples (and, we would add, different-sex couples as well).<sup>13</sup> Klein points out that Patricia Cain's partial dissent in the

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<sup>8</sup> See Kim Brooks, *Feminist Statutory Interpretation*, 16 PITT. TAX REV. 125 (2019).

<sup>9</sup> *Id.* at 127, 129–30.

<sup>10</sup> *Id.* at 130.

<sup>11</sup> *Id.* at 131.

<sup>12</sup> Alice G. Abreu, *Tax Counts: Bringing Money-Law to LatCrit*, 78 DENV. U. L. REV. 575, 575 n.1 (2001) ("By 'money-law,' I mean the areas traditionally viewed as comprising the business curriculum: tax, corporations, securities, commercial law (UCC), securities, banking, antitrust and the like.").

<sup>13</sup> Diane Klein, *United States v. Davis and Prof. Cain's Rewritten Opinion: An Intersectional Argument for Capping Section 1041*, 16 PITT. TAX REV. 135 (2019). On the differential taxation of same-sex couples, see, for example, Lily Kahng, *The Not-So-Merry Wives of Windsor: The Taxation of Women in Same-Sex Marriages*, 101 CORNELL L. REV. 325 (2016).

rewritten *United States v. Davis* focuses on the disparate treatment of spouses in community property states in comparison with spouses in common law states.<sup>14</sup> This inspires Klein to propose changes to § 1041 that would limit the amount of tax-free transfers of appreciated property incident to divorce. A capped benefit, like the limitation on the exclusion of gain on the sale of a principal residence under § 121, would presumably increase the amount of income taxes that wealthy divorced spouses would need to pay. As a statistical matter, most divorcing people do not have appreciated assets and so the *Davis* decision, both the original and as rewritten by Cain, would have a limited impact that would primarily affect more privileged couples, according to Klein.<sup>15</sup>

In responding to David Cruz's rewritten majority opinion in *O'Donnabhain v. Commissioner*, Ann Mumford notes Cruz's technical expertise and his extraordinary attention to the taxpayer as "a party to the social contract at the heart of which sits tax."<sup>16</sup> Mumford's essay, in its appreciation of Cruz's careful language choice, invites the reader to consider the role that each of the Internal Revenue Service, the taxpayer, and the judge plays in tax litigation. She also holds out Cruz's rewritten opinion as demonstrating the ability of a judge to act in a traditionally neutral role while still showing great respect for the taxpayer as a human being. This emphasis on the individual is a common method adopted by many of the contributors to *Feminist Judgments: Rewritten Tax Opinions*. Cruz's subtle language seems to inspire Mumford with hope that judicial opinions might in fact be able to express full regard for a taxpayer's humanity, and not simply for their consumption of, or contribution to, market rights.

Ajay Mehrotra, himself a legal historian, expresses great admiration for the careful historical (and literary) analysis engaged in by Mary Louise Fellows in her rewrite of the Supreme Court's decision in *Welch v. Helvering*, involving the deduction of certain purportedly business expenses.<sup>17</sup> Fellows

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<sup>14</sup> Klein, *supra* note 13, at 136–37.

<sup>15</sup> *Id.* at 143–44.

<sup>16</sup> Ann Mumford, "Rhiannon O'Donnabhain Is a Taxpayer": *Tax and the Social Contract in O'Donnabhain v. Commissioner*, 16 PITT. TAX REV. 145 (2019).

<sup>17</sup> Ajay K. Mehrotra, "Life in All Its Fullness": *Cardozo, Fellows, and the Critical Context of Welch v. Helvering*, 16 PITT. TAX REV. 151 (2019).

provides important context and detail that are missing from the original opinion. She refers to Mary Shelley’s book *Frankenstein* to show that economic relations are not always neatly divided between the private and public spheres, as Justice Cardozo conceived of them in the original opinion. Mehrotra urges Fellows—and presumably future *Feminist Judgments* writers—to be bold in their actions and to consider the ability that courts have to lead the way in effectuating social and legal change. He is critical of Fellows’s decision to remand the case for further consideration, deeming that a failure to take “a radical feminist stand on the case.”<sup>18</sup> But it may be that Fellows was attempting to write an opinion that the real Supreme Court justices at the time would have joined, using her dicta, sources, and analysis to do the most work.

In contrast to Klein, Mumford, and Mehrotra, who all write in response to particular judgments in the book, Hilary Escajeda takes inspiration from the project as a whole. Just as many of the contributions to *Feminist Judgments: Rewritten Tax Opinions* explore the false dichotomy between the “public” and “private” spheres, Escajeda proposes a change to the tax system that would accord symbolic and actual value to the unpaid care and service work that taxpayers do for families and communities.<sup>19</sup> She proposes a refundable tax credit with inflation-adjusted caps and income phaseouts. As a practicing attorney, Escajeda recognizes that even a seemingly “minor” refundable credit can make a big difference in the lives of many taxpayers and their families.

This series of review essays is greatly enriched by the comparative perspective of Åsa Gunnarsson (from Sweden) and Ann O’Connell and Kerrie Sadiq (from Australia, writing jointly). Gunnarsson, one of the most prominent international voices on gender and tax matters, seems to find hope in her own pessimism.<sup>20</sup> On the one hand, she is discouraged by the rampant gender bias that the rewritten cases lay bare in *Feminist Judgments: Rewritten Tax Opinions*. She sees rewriting cases as too modest, too

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<sup>18</sup> *Id.* at 158.

<sup>19</sup> Hilary G. Escajeda, *Called to Serve: Elevating Human-Performed Caregiver and Volunteer Work in an Era of AI-Robotic Technologies*, 16 PITT. TAX REV. 161 (2019).

<sup>20</sup> Åsa Gunnarsson, *Strategies to Materialize Gender Equality in Tax Law and Doctrine: Rewritten Tax Opinions*, 16 PITT. TAX REV. 173 (2019).

incremental almost, to effectuate any kind of meaningful change in gender relations, particularly in North America (as compared to the experience in Scandinavia).<sup>21</sup> On the other hand, Gunnarsson ultimately embraces legal reform as part of a larger social justice project. She uses recent developments in Swedish politics as a reminder that “there is no obvious end-point” to the feminist work of reform and, rather than dismiss endeavors such as the judicial rewriting projects that are taking place around the globe, states that feminists should “intensify our work to develop the body of feminist legal scholarship.”<sup>22</sup>

O’Connell and Sadiq take as their inspiration Kathy Lahey’s chapter in *Feminist Judgments: Rewritten Tax Opinions* discussing the *Symes* case from Canada. O’Connell and Sadiq canvas decisions from the United States, United Kingdom, and Australia on the deductibility of childcare expenses incurred to engage in paid employment outside the home.<sup>23</sup> In all of these cases, the taxpayer lost and legislatures later stepped in to provide some relief—but always in ways that mark childcare costs as not being a legitimate business expense. Inspired by the real-life feminist judgment in *Symes*, O’Connell and Sadiq suggest that the time has come to reconsider this treatment and to allow a deduction for the cost of childcare.

Alice Abreu and Montano Cabezas and Brandon King (the latter two writing together) round out the contributions by embracing their own situated perspectives. Abreu is an experienced tax teacher and scholar, yet she reveals that Fellows’s feminist rewrite of *Welch v. Helvering* caused her to rethink the way she had been teaching the case for more than thirty years.<sup>24</sup> Abreu’s epistemic humility comes through clearly in her writing. Because she thinks so deeply about tax pedagogy, it is easy to see why Abreu has received numerous teaching awards. Abreu suggests that tax teachers should be aware of the value in referring to the taxpayers by their full names when teaching cases such as *Gregory v. Helvering*, *Eisner v. Macomber*, and *Crane v.*

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<sup>21</sup> *Id.* at 175.

<sup>22</sup> *Id.* at 177.

<sup>23</sup> Ann O’Connell & Kerrie Sadiq, *Tax: Women, Work and Family*, 16 PITT. TAX REV. 179 (2019).

<sup>24</sup> Alice G. Abreu, *Feminist Tax Judgments: Operationalizing Diversity*, 16 PITT. TAX REV. 189 (2019).



*Commissioner*.<sup>25</sup> Each of these cases involved a sophisticated female taxpayer. Abreu believes that when students understand that the litigants are female, the cases “can serve as a vehicle for delivering a message of empowerment for women, while also countering gender stereotypes.”<sup>26</sup> She also invites teachers to do the same when discussing tax decisions by female judges and cases litigated by female attorneys.<sup>27</sup> After all, one of Ruth Bader Ginsburg’s first sex discrimination cases was a tax case. Tax law becomes a vehicle for discussing social justice in Abreu’s vibrant classroom.

Cabezas and King highlight how the feminist judgments—and indeed critical tax scholarship generally—allow a shift in focus from the technical operations of particular legal rules to the larger role that tax law plays in shaping society.<sup>28</sup> They describe the disconnect that tax students can feel between their inclinations to work on questions like “equitable distribution and fairness across demographics” and real-life tax practice that is too often driven in ways that cater to, and preserve, wealth and privilege.<sup>29</sup> Cabezas and King write with the same humility that Abreu does, acknowledging their own experiences of advantage, disadvantage, privilege, and pressure. They write with humanity—their own, their fellow students’, their tax colleagues’, and their tax teachers’—at the center of analysis. Cabezas and King emphasize that all good critical tax scholarship invites consideration of structural barriers to inequality and of how systems perpetuate bias. Critical tax work, they explain, “is not about attacking large corporations and wealthy individuals because of their worth, but instead about calling attention to how they amassed their wealth and encouraging those in power to recognize this truth.”<sup>30</sup> Cabezas and King encourage empathy for the real individuals (and their struggles) behind cases in law school textbooks.

The responsive essays in this volume reflect some of the responses that readers may have to the application of feminist legal methods and theories to tax decisions. Although we, too, can feel impatient with incremental change,

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<sup>25</sup> *Id.* at 194.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 195.

<sup>28</sup> Montano Cabezas & Brandon King, *Feminist Judgments: Rewritten Tax Opinions—The Student Perspective*, 16 PITT. TAX REV. 201 (2019).

<sup>29</sup> *Id.* at 203.

<sup>30</sup> *Id.* at 206–07.

these responses to the book also inspire hope that the rewriting project represents more than just wishful thinking. Rather, the book shows that actual cases involving real people could have been decided differently, if only the decision-makers had looked at the matters through altered lenses. The book's opinions and commentaries collectively push back against the argument that statutes—with some allegedly fixed meaning—have an impermeability that common law cases do not. Those who interpret and apply statutes bring to that endeavor their cumulative life experiences and individual perspectives. Indeed, it is not possible to have a judge who lacks a unique perspective; each of us has one. To the extent that the judge has a viewpoint informed by feminism, we believe that the tax law has greater capacity to serve human needs.