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Teaching With Feminist Judgments

Kathryn Stanchi,¹ Bridget Crawford² and Linda Berger³

Introduction: The Feminist Judgment Projects

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 using feminist methods and reasoning. One of the primary goals of these projects is to demonstrate that the law has a vast, but often unrealized, potential for social justice.

The feminist judgment methodology requires the authors of rewritten opinions to act as judges in following the rules of precedent and custom—and to be bound by the same facts and law as in the original opinion—while demonstrating that cases can still be decided in ways that address social justice concerns. The academics, activists, and lawyers who collaborate on these volumes provide rewritten opinions accompanied by commentaries that help law students and other readers understand the social and historical context of the original judgment as well as the ways in which feminist theories and approaches influenced the feminist judgment's reasoning or outcome or both.

¹ E.L. Cord Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law. Many thanks to the editors of this project for the opportunity to write about this important issue. Also thank you to Sue Liemer, Teri McMurtry-Chubb, Melynda Barnhart, Ellie Margolis, Dan Barnett, Laura Graham, George Mader, Charles Calleros and Lori Johnson, who generously shared their wisdom and experience with legal writing problems using Title VII.

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While the most obvious use of feminist judgments in the classroom is in feminist or critical theory seminars, feminist judgments can also be a rich source of alternative analysis and arguments in first year legal writing as well as first year or upper level doctrinal courses. In this chapter, we give several examples of how exposing students to the alternative judgments of the feminist judgments project in a variety of courses can help students develop a more realistic and nuanced view of law that is simultaneously aspirational and based in the real world. These alternative judgments are excellent tools to incorporate diverse perspectives in the law classroom because they counter the narrative that law is objective while other perspectives are political or biased. The first book in the Feminist Judgments series focused on the Supreme Court of the United States.⁴ Other books typically have a specific subject-matter focus, including taxation;⁵ reproductive justice;⁶ family law;⁷ trusts and estates;⁸ employment discrimination;⁹ torts.¹⁰ Future volumes are expected in other areas as well.

Using Feminist Judgments in First Year Legal Writing

Generating creative arguments and problem solutions

Because legal writing is often thought of as a wholly practical “skills” course, it may be difficult for some to see how feminist judgments might be useful in teaching it. But the sheer breadth of skills taught in legal writing courses provides an array of opportunities to use feminist judgments to incorporate diverse viewpoints. Moreover, it is the pigeon-holing of legal writing that makes it such an important context for teaching that understanding diversity and different perspectives is, in fact, a critical lawyering skill.

⁴ FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016)

⁵ FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS (Bridget J. Crawford & Anthony C. Infanti eds., 2017).

⁶ FEMINIST JUDGMENTS: REPRODUCTIVE JUSTICE REWRITTEN (Kimberly Mutcherson ed., 2020).

⁷ FEMINIST JUDGMENTS: FAMILY LAW OPINIONS REWRITTEN (Rachel Rebouché ed., 2020).

⁸ FEMINIST JUDGMENTS: REWRITTEN TRUSTS & ESTATES OPINIONS (Deborah S. Gordon, Browne C. Lewis & Carla Spivack eds. 2020).

⁹ FEMINIST JUDGMENTS: REWRITTEN EMPLOYMENT DISCRIMINATION OPINIONS (Ann C. McGinley & Nicole Buonocore Porter eds., 2020).

¹⁰ Feminist Judgments: Rewritten Tort Opinions (Martha Chamallas & Lucinda M. Finley eds., 2020).

In the first semester, when students learn the basics of legal research and legal analysis, including analogical reasoning and problem solving, feminist judgments can give students a fresh perspective on the law's application to a client's problem and help students think of creative ways to further the client's goals. In the second semester, when students are introduced to persuasive writing, feminist judgments can stimulate students to generate "outside the box" legal arguments. In both semesters, reading alternative judgments can help students think creatively when researching, show students how to do deep factual research, and help with cultural competence.

As an example, consider a typical first year legal writing problem involving sex discrimination or sexual harassment. This area of law is a fertile source of legal writing assignments, as it teaches statutory analysis in a fact sensitive context. A quick survey of the participants on the Legal Writing Institute Listserv along with a perusal of the Legal Writing Institute Idea Bank showed numerous Title VII based problems used in first year writing. These assignments covered a diverse array of topics, from pregnancy discrimination, gender stereotyping (including some involving transgender discrimination), hostile work environment sexual harassment, discrimination in appearance or dress, and the defense of bona fide occupational qualification. These assignments also serve as excellent vehicles to raise diversity issues.

The rewritten judgments can be assigned at varying points in the semester. They could be assigned during the research phase, when students are likely to encounter the original opinion. They can be assigned for the same class during which the original opinion will be discussed, or during a class when the analysis or arguments for the assignment are being discussed. For class discussion, the professor can put students in groups and assign them to discover and point out the differences in factual context and reasoning in the original and the alternative and brainstorm about how the new factual context in the alternative judgments might help them see the facts of their own problem, or their client, in a new way. The professor could also charge students with creating arguments out of the different reasoning in the alternative

judgments. The rewritten judgments have a wide utility in showing students how to shift perspective in developing reasoning and arguments in their assignments.

Teaching Intersectionality and Cultural Competency

The rewritten judgments can be excellent tools to introduce the concept of intersectionality as a source of creative analysis and argumentation. They can also serve as a way of teaching students that learning about people with different life experiences is a critical lawyering skill. For example, in the sex discrimination assignments reviewed for this chapter, few identified the race of the plaintiff, unless the assignment involved a race or ethnicity claim, and almost none identified the race of the defendant. This fact alone provides an excellent springboard for class discussion, as the absence of any identification raises a number of questions. Are students supposed to assume that the parties are white unless otherwise identified? Are the assignments subtly teaching students that the law is, or should be, “race neutral” or “color blind” in sex discrimination claims? What difference might race make in the analysis of a sex discrimination claim? How might race be introduced, in the assignment or in the resulting documents, in a way that acknowledges its significance without being discriminatory? All of these questions can lead to an important discussion of intersectionality and how cases that allege only sex (and not race or ethnicity) discrimination might raise issues of gender-race dynamics.

In this situation, a legal writing professor could assign Angela Onwuachi-Willig’s rewritten opinion in *Meritor Savings Bank v. Vinson*, a case involving workplace sexual harassment.¹¹ Onwuachi-Willig’s feminist rewrite could be assigned at multiple points in the semester: if the assignment will lead students to research and read the original *Meritor*,¹² Onwuachi-Willig’s

¹¹ Angela Onwuachi-Willig, *Rewritten Opinion in Meritor Savings Bank v. Vinson*, in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016), 303-321.

¹² 477 U.S. 57 (1986).

rewrite could be assigned around the time that *Meritor* is likely to be discussed in class. But even if *Meritor* is not directly applicable to the assignment, Onwuachi-Willig's rewrite could be assigned prior to classes in which the professor expects to challenge students to discuss and explore the legal arguments or reasoning related to the assignment.

The rewritten opinion provides a rich education in racial gender politics and shows students intersectional analysis articulated in judicial language. If the legal writing assignment did not identify the race of the parties, Onwuachi-Willig's opinion can serve as a tool to push students to ask questions related to race and intersectionality and can encourage them to become more aware of the different experiences and challenges confronting people of color. If the assignment does specify race or ethnicity, the professor can use Onwuachi-Willig's opinion to explore how race or ethnicity might impact the analysis or use it to encourage students to broaden their research to include secondary sources that explain intersectional issues in sex discrimination or harassment cases.

Teaching Students to Reach Beyond Traditional Reasoning

The rewritten judgments can also help students see deeper issues of diversity and inclusion and catch embedded or unconscious bias that they might have missed in the original opinions. In one of the assignments I reviewed, for example, a woman employee sues her employer for hostile work environment sexual harassment. In one version of the assignment, a male co-worker shows the employee pornography on his computer and she objects to this, causing her other co-workers, including female co-workers, to ostracize her and call her a "prude." In another version of the same assignment, a junior female law firm associate is accosted by her supervisor's husband at a work party, and another lawyer sees what looks like an embrace between the two. The female associate is then ostracized by the female supervisor, and both male and female coworkers, as a "cheater" and a "homewrecker." These assignments raise

difficult issues of gender stereotyping, particularly because in both cases female employees either contribute to the harassment or are not bothered by it.¹³

In analyzing these assignments, students might research and read, among other cases, *Price Waterhouse v. Hopkins*, the leading case on sex stereotyping, *Meritor Savings Bank v. Vinson*, or *Oncale v. Sundowner Offshore Services*, the case holding that same-sex sexual harassment is actionable under Title VII.¹⁴ These cases contain valuable information the students need to conceptualize the legal issues. But the reasoning in the original opinions does not address the more complicated gender dynamics raised by the facts and contain reasoning that seems to reflect gender or race bias.

Assigning one of the rewritten versions of these cases would allow students to read analysis that helps them see a deeper picture of the complicated dynamics of stereotyping. Again, the teacher could assign the rewritten case around the time that the students are likely to encounter the original case in their research, or may assign the rewritten case to coincide with the day the original case would be discussed in class. Because the analysis of the rewritten judgments is written in a judicial style, they give the students a model for “translating” critical theory into law practice prose.

For example, a professor could assign Martha Chamallas’s rewritten *Price Waterhouse v. Hopkins*, which uses the trial testimony of Dr. Susan Fiske to elaborate on what stereotyping is and how it can infect a workplace.¹⁵ Seeing a concrete example of how a decision maker might use social science in decision-making can help students be more expansive and creative in their

¹³ The pornography Title VII assignment was originally created by Professor Ellie Margolis at Temple University Beasley School of Law. Several assignments (including the ‘homewrecker’ assignment) were created using Professor Margolis’s original assignment as a foundation. Both of these assignments are based, in part, on *Spain v. Gallegos*, 26 F.3d 439 (3d Cir. 1994) (holding that female employee ostracized because of rumors of an affair with her boss stated prima facie case of hostile work environment).

¹⁴ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

¹⁵ Martha Chamallas, *Rewritten Opinion in Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016), 345-360.

research and argument crafting. In a persuasive writing class, the professor could ask students to outline how Chamallas’s rewritten opinion helped them understand more deeply what stereotyping and implicit bias are. They can then challenge students to think about how this new knowledge might enrich their understanding of their own client’s case. The professor can challenge students to come up with ways that social science research might help them better understand the issues in their assignment and how social science research might influence or enhance their own research or reasoning process. Chamallas’s use of Dr. Fiske’s testimony can help students resolve the tougher factual issues, such as the seeming indifference of the other female employees to the pornography and the participation of women in the “homewrecker” harassment.

Teaching Students to Recognize Hidden Bias in the Law

In addition to helping students understand complex issues of human behavior and how social science research can enhance their arguments, the alternative judgments can also help students see hidden bias in the law. Because the alternative judgments often confront the thornier points of discrimination explicitly, they can often help students manage those issues more easily than the originals, which tend to avoid explicit acknowledgement of racism or gender bias.

For example, Ann McGinley’s rewritten majority in *Oncale v. Sundowner Offshore Serv., Inc.*¹⁶ gives concrete help to students wrestling with how women can sexually harass other women, and how to articulate or explain possible underlying motives. Although the original *Oncale* decision clearly stands for the proposition that same sex harassment can create a hostile work environment, it misses the opportunity to address why same sex harassment might occur. And, the original indicates that Title VII might tolerate “ordinary socializing in the workplace” such as “male on male horseplay” and “intersexual flirting.” Students confronting a hostile work

¹⁶ Ann McGinley, *Rewritten Opinion in Oncale v. Sundowner Offshore Svcs., in FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016), 414-425.

environment problem that involves a complex workplace dynamic may be puzzled by what these terms mean – what is the difference between “horseplay” and abuse? What is the difference between ordinary social dynamics and ostracizing someone based on sex? Does Title VII really force you to socialize with someone you just do not like?

McGinley’s opinion can help with those questions. She gives a number of helpful additional examples, exploring the varying and complicated motivations for harassing behavior. For example, she notes that “some women engage in discriminatory behavior against other women in order to assure their own position among men” and that people may go along with discriminatory behavior to enhance their self-worth.¹⁷ McGinley’s opinion gives students thought-provoking examples that can help them reconcile and articulate why some women might participate in the harassment of another woman or tolerate pornography or other inappropriate workplace behavior.

Teaching First Year Doctrinal Courses with Feminist Judgments

Strengthening doctrinal understanding while studying persuasion and decision making

Large-enrollment courses with heavy doctrinal coverage provide natural—if surprising—opportunities to work with feminist judgments. By integrating feminist judgments into doctrinal courses, instructors can deepen students’ engagement with doctrinal material while also inviting more explicit consideration of how judicial reasoning works and how it may be affected by an advocate’s argument choices. For example, when read in comparison with the original opinions, the feminist judgments may prompt students to think more carefully about how their construction of legal arguments and incorporation of critical perspectives could affect the judge’s approach to a problem. Reading the original opinion to compare and contrast it with the feminist judgment helps students gain a deeper understanding of not only the

¹⁷ *Id.* at 420.

particular substantive law under consideration, but also how an advocate's choices influences a case's presentation, and how a judge's world view informs judicial reasoning or outcomes. Feminist judgments have the added benefit of revealing the false divides between and among skills-oriented courses (including legal writing and reasoning), theory-oriented courses (like jurisprudence), and doctrinal classes.

Feminist judgments volumes are being published in a range of doctrinal subject matter areas taught in law schools. First year torts is an excellent course for introducing the lessons of feminist judgments.

Comparing the original and the feminist judgment in a torts classic

Years after they graduate from law school, lawyers remember *Tarasoff v. Regents of University of California*¹⁸ as the case that imposed an affirmative duty to warn on psychotherapists. *Tarasoff* is in the canon: excerpts can be found in every leading torts casebook, and the California Supreme Court opinion is said to have helped courts “reconceptualiz[e] the nature and source of duty and of tort liability.”¹⁹

But the excerpts that made their way into the casebooks—like the majority opinion itself—omit facts, context, and theory that support a broader societal duty to protect individuals from the violent acts of others. The original opinion recounted the murder of a female college student at the University of California at Berkeley by a male student. It mentioned that the male student had sought mental health counseling and that his University therapist informed campus police about threats made during the counseling. After interviewing him and determining that he was “rational,” campus police released the male student. The California Supreme Court held that psychotherapists had a duty to warn identifiable third parties of threatened harm from their patients, but exempted campus police from the same duty.

¹⁸ *Tarasoff v. Regents of Univ. of California*, 551 P.2d 334 (Cal. 1976).

¹⁹ Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 98 (1994).

When torts professors assign their first-year law students to read the re-envisioned Tarasoff opinion from *Feminist Judgments: Rewritten Torts Opinions*²⁰ alongside the original majority California Supreme Court opinion, students encounter a recurring theme against a complex cultural backdrop: society's reluctance to impose responsibility on its members to protect individuals from harm caused by third parties. In the feminist judgment, a concurrence and partial dissent, Justices Sharmila Lodhia and Stephanie Wildman agree that the therapist had a duty to warn, but they would also impose a duty on campus police.²¹

One way of introducing the legal and policy issues underlying *Tarasoff* is to have students first read the full majority opinion (a necessary first step because the casebook excerpts do not address the court's reasoning on the responsibility of the campus police) and then the feminist judgment. The professor could also ask students to draft and bring to class an argument on the issue of the duty owed by the campus police—arguing either on behalf of Tatiana Tarasoff's parents or the campus police. The professor could structure the class discussion around the arguments the students have drafted, using guided questions such as:

1. The feminist authors believe that their more detailed factual background “provides significant insight into the cross-cultural and gender realities that bear on understanding why a duty by defendants to warn Tarasoff of her physical peril existed in this case.” Do the additional facts provided about Prosenjit Poddar (the male student), Tatiana Tarasoff (the female student), and the actions taken by the psychotherapist and the campus police significantly change your understanding of the motivations and actions of the parties? How did this affect the arguments you made on behalf of one or more of the parties?

2. For example, the feminist judgment states that “[m]ore careful scrutiny of the behavior of individuals involved in this case by the therapist and/or police might have revealed the volatility of this particular intimate relationship. . . . Dr. Moore asserted in his letter to the

²⁰ FEMINIST JUDGMENTS: REWRITTEN TORT OPINIONS (Martha Chamallas & Lucinda Finley eds., 2020).

²¹ Sharmila Lodhia & Stephanie Wildman, *Rewritten Opinion in Tarasoff v. Regents of Univ. of California*, in FEMINIST JUDGMENTS: REWRITTEN TORTS OPINIONS, __.

campus police that one of the causes of Poddar's severe emotional distress was his perception that Tarasoff had violated 'his honor.'" Should this fact (as just one example) have been included in the original judgment? How did the absence of such facts affect the reasoning and the outcome, if at all?

3. The feminist judgment points to race- and gender-linked patterns of violence. If you included such patterns in your argument, how did you provide evidence of them? How would you? Should judges take these patterns into account in determining the question of the duty of the University and its agents to warn an individual who has been threatened by a patient of the University? How are the patterns relevant? Are they prejudicial?

4. The feminist judgment begins by referring to the "Good Samaritan conundrum" in tort law and points out that traditionally there has been no duty to rescue except when a special relationship exists. But it goes on to find justification for a duty to warn in democratic principles and in "the cultural and gender context in which the question of duty to protect arises on the basis of these facts." Are these two new rationales equally persuasive? Did you present either or both of them in your argument? Would you present either or both of them to a court?

5. The California Supreme Court majority held that the campus police owed no duty to Tarasoff because unlike the defendant therapists, they had no "special relationship to either Tatiana or to Poddar sufficient to impose upon such defendants a duty to warn respecting Poddar's violent intentions." The feminist judgment's third rationale for imposing a duty is the majority's failure to delineate any actual distinction between the two sets of university employees. Is the feminist judgment more or less persuasive when it relies on this disagreement with the majority opinion?

6. The feminist judgment explicitly adopts feminist argumentation methods. For example, the authors more extensively use (1) narrative facts to illuminate what happened and to explain the motivations and actions of the parties; the authors provide more information about the (2) broader cultural and social context within which the murder took place; and the authors cite (3) a law review article rather than a case or statute for one of their main legal

theories. Are any similar argumentation methods used in the majority opinion? Comparing the two opinions, which seems the most persuasive? Why?

7. If you were writing an alternative judgment rather than an argument on behalf of one of the parties, what would be the basis of your reasoning on the issue of the duty of the campus police? Your outcome?

This assignment deepens law students understanding of Tarasoff while introducing alternative sources and methods of argument that they are unlikely to encounter in their first year torts course. As a result, it helps students become more sophisticated readers of judicial opinions and more knowledgeable and resourceful authors of legal arguments.

Teaching Upper Level Doctrinal Courses With Feminist Judgments

Uncovering the lack of neutrality in seemingly neutral law

“Money law”²² courses like Federal Income Taxation might at first seem unlikely candidates for introducing feminist judgments. But, in fact, these courses are especially hospitable to working with feminist judgments because students who are intimidated by the subject are glad to encounter more accessible material. Students who think they already know something about the subject are challenged in their assumption that the tax law is neutral and unbiased. Students who fall somewhere in the middle of that spectrum bring to the material an openness to any pedagogical methods that illuminate a complex topic.

Doing a “Blind” Comparison of the Original Opinion and Feminist Rewrite

A particularly provocative way of integrating feminist judgments into a large Federal Income Tax class—or indeed any large doctrinal course—is to ask students to read a feminist judgment and a published case without revealing which is which. In the part of the Federal Income Tax

²² The phrase is Alice Abreu’s. See Alice G. Abreu, *Tax Counts: Bringing Money-Law to LatCrit*, 78 DENV. U.L. REV. 575, 575 n.1 (2001) (“By ‘money-law,’ I mean the areas traditionally viewed as comprising the business curriculum: tax, corporations, securities, commercial law (UCC), securities, banking, antitrust and the like”).

course devoted to medical expense deductions, for example, students typically read the relevant section of the Internal Revenue Code that permits a deduction for “expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care....”²³ Students also read the related Treasury Regulations, one or more cases that explore the meaning of “medical care,” and rulings by the Internal Revenue Service about what can and cannot be deducted as medical expenses.²⁴ Cult deprogramming? Not deductible.²⁵ That pilgrimage to a religious shrine? Not deductible.²⁶ But clarinet lessons, when recommended by an orthodontist as a treatment for crooked teeth? Deductible.²⁷

A professor can integrate into this typical set of reading assignments one of the opinions from *Feminist Judgments: Rewritten Tax Opinions*,²⁸ along with the original case. For this exercise, the instructor should take care that the differences in format do not give away, by typeface or otherwise, that one is a real court opinion and one is an alternative judgment. As one example, when teaching deductions, the instructor could assign the United States Tax Court’s decision in *O’Donnabhain v. Commissioner*,²⁹ which held that many (but not all) of the taxpayer’s expenses for what the court called “sex reassignment surgery” did constitute medical care for tax purposes along with the feminist judgment in that case, written by Professor David B. Cruz. Professor Cruz’s reimagined majority opinion allows a deduction for all of the taxpayer’s expenses and evinces a degree of humanity and understanding that is lacking in the original opinion.³⁰

²³ 26 U.S.C. § 213(a) (allowing for medical expense deduction).

²⁴ See, e.g., JOEL E. NEWMAN, DOROTHY A. BROWN & BRIDGET J. CRAWFORD, *FEDERAL INCOME TAXATION: CASES, PROBLEMS & MATERIALS* (7th ed. 2019).

²⁵ I.R.S. Priv. Ltr. Rul. 80-21-004 (Feb. 26, 1980).

²⁶ *Ring v. Commissioner*, 23 T.C. 950 (1955) (denying deduction for taxpayer’s pilgrimage to Our Lady of Lourdes Shrine in France).

²⁷ Rev. Rul. 62-210, 1962-2 C.B. 89.

²⁸ *FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS* (Bridget J. Crawford & Anthony C. Infanti eds., 2017).

²⁹ *O’Donnabhain v. Commissioner*, 134 T.C. 34, *action on dec.*, 2011-47 (Nov. 21, 2011).

³⁰ David B. Cruz, *Rewritten Opinion in O’Donnabhain v. Commissioner*, in *FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS* (Bridget J. Crawford & Anthony C. Infanti eds., 2017) 274-96.

Without any introductory framing, the professor can guide students through a series of questions. The initial focus should be on how the two opinions vary in terms of the language the judges use to describe the taxpayer and what facts the judges highlight in their opinion. Students quickly identify that one opinion (which later is revealed as the actual, original opinion) focuses on the fact that the taxpayer was born as a male, served in the military as a man, married a woman, was the biological father of three children, and received extensive psychological counseling and a medical diagnosis of “severe” gender identity disorder.³¹ The other opinion (which is later revealed as the feminist judgment) begins with the simple sentence, “Rhiannan O’Donnabhain is a taxpayer,” and then takes brief note of her life experience as a man and her medical diagnosis before turning to the core of the opinion: a discussion of the taxpayer’s medical expenditures.³²

Students then explore whether the facts and contextual background that come to the forefront in one opinion but not the other, and how that emphasis (or deemphasis) impacts their views of the taxpayer. The instructor might ask whether the students sensed any shift in their own personal view of the taxpayer—as sympathetic or unsympathetic, for example—after reading one opinion versus both opinions. Depending which opinion the student reads first, the subjective impression of the taxpayer might vary considerably.

Students easily identify the differences in the holding of each opinion. One (later revealed as the original opinion) disallows a deduction for the taxpayer’s breast augmentation surgery “because the petitioner already had normal breasts before surgery.”³³ The other (later revealed as the feminist judgment) permits a deduction for all of the taxpayer’s transition care, including the breast augmentation, reasoning that “[d]ue regard for the well-being of transgender persons counsels more tolerance for conclusions regarding the necessity of their attempts to bring their bodies into alignment with the gender identity disorder....”³⁴ Although both the

³¹ 134 T.C. at 35, 39.

³² Cruz, *supra* note 30, at 274-75.

³³ 134 T.C. at 72.

³⁴ Cruz, *supra* note 30, at 296.

original opinion and the feminist judgment are “pro taxpayer” in that they allow deductions, what is the significance of permitting a deduction for breast augmentation of “normal breasts”? Who decides what breasts are “normal”? Some instructors might be understandably reluctant to discuss such a seemingly non-tax subject as human anatomy (and corresponding socially constructed views of the “normal” woman or man), but it serves the larger pedagogical point that taxation is, indeed, implicated in all aspects of life, and that lawyers must be able to talk about difficult, uncomfortable, or “private” topics with professionalism and in a manner that recognizes humanity and dignity of all people.

Students then can turn to the language of the Internal Revenue Code and Treasury Regulations to ground their views of which of the opinions is correct as a matter of law. To do so, they must grapple with the meaning of “medical care,” and how the tax law result in this case (i.e., deductibility) depends on the labeling of the trans taxpayer as having a “disease.” That is because medical care, for purposes of Internal Revenue Code § 213, is defined as amounts paid “for the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure or function of the body.”³⁵ In one of the opinions (later revealed as the feminist judgment) the judge (Professor David B. Cruz writing as Judge Cruz) embraces the disease model “advisedly and not without hesitation, not wanting to reinforce a notion that the taxpayer was defective in any way or that she needed to be ‘cured.’ ”³⁶ At the same time, the feminist judgment recognizes that the taxpayer’s “disease” diagnosis is crucial to the finding that her expenditures are deductible. This is an opportunity in the classroom discussion to talk about judicial decision making and tone—the two opinions have radically different ways of talking about the taxpayer and her medical treatment. If the class discussion appears to be replicating some of the biases embedded in the original opinion, the instructor can ask students to take a short one-minute writing break, to take quick notes for themselves about the words they find themselves using when talking about or reflecting on the taxpayer, and comparing—as a matter of self-reflection only—how their vocabulary and tone is closer to one opinion or

³⁵ 26 U.S.C. § 213(d)(a) (defining “medical care”)

³⁶ Cruz, *supra* note 30, at 282.

the other. The instructor might choose at that point to move the discussion in another direction.

At any point during the discussion, or at the end, the professor can reveal which opinion is the original and which is the shadow judgment. Students generally understand the larger feminist judgments project once they learn of its goals to show by doing that the law could be different if a feminist perspective applies. In a course in federal income taxation, students typically are not expecting to hear the word “feminist.” Therefore, in describing the larger feminist judgments project, the instructor has an opportunity to explain how feminist legal theory, just like other critical perspectives, can serve as a lens for evaluating both substantive law and its interpretation. For students who resist the term “feminist” as applied to the rewritten opinion in *O’Donnabhain* (or any opinion), they might be asked to identify a term that seems more accurate to them. Students might suggest “humanist,” or “rights-based,” among other labels. The “feminist” identifier may not sit easily for some students; others will be open to it. For those of us for whom feminism and justice are synonymous, securing student acceptance of the label is not an especially important pedagogical goal. If the students recognize the differences in the opinion, the goal has been met: they can see in the side-by-side opinions what a difference perspective makes.

If students can conclude their reflections with consideration of what impact the feminist judgments might have had on the subsequent development of the law, they are themselves doing the same work that the contributors to the feminist judgments projects are doing. By asking how the feminist judgment squares with or challenges traditional measurements of tax law—efficiency, neutrality and horizontal equity—students acquire a new perspective on a subject they either thought they knew, or did not, but now appreciate more deeply. This ability to reflect critically is a skill that transports across the curriculum and throughout a lawyer’s career. Honing that skill through “money law” courses is an unexpected but memorable learning experience.

Conclusion

These are just a few of the possible ways that feminist judgments can be incorporated into law teaching. Because the rewritten opinions use the same law and precedent in effect at the time of the original decision, any differences in reasoning or result invite consideration. The fact that the opinion rewriter reached a different (or the same) holding with language that departs from (or comports with) the original opinion forces students to confront the malleability of law. How one interprets and applies the law is the product of historical context, (typically unmentioned) intellectual commitments, and what the judge determines “counts” as important in decision making—which might relate to how much of the parties’ individual stories factor into the judicial opinion and what sources are treated as the basis for that opinion. By heightening students’ awareness of the importance of perspective, feminist judgments are invaluable and flexible teaching tools.