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*FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS—THE
STUDENT PERSPECTIVE*

Montano Cabezas & Brandon King



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*FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS—THE
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Montano Cabezas & Brandon King***

Brandon King and Montano Cabezas: We hope, as recent law school graduates, to bring the male law student and judicial clerk perspectives to this collection of essays. Both of us encountered the tax edition of the *Feminist Judgments* series shortly after law school, while we were clerks at the U.S. Tax Court and the Tax Court of Canada, respectively. We are now beginning our careers as practicing tax lawyers.

Montano: Law students are usually expected to be bright, objective, and eager to take on critical perspectives. My experience, however, was that one's confidence and willingness to take on critical perspectives is largely dependent on one's self-perceived level of expertise. This, I found, was especially true with respect to taxation.

In my case, I had never spent time thinking about business, financial, and economic concepts. While I did not find the analysis related to such concepts difficult in the abstract, my conclusions were often different than the din of hype-talk and jargon that surrounded these topics. In the media, the fervor and zeal with which commentators opined on markets and transactions left me baffled. In my business and tax classes, the pugilistic manner that those with business and accounting backgrounds would occasionally divert class discussions from thoughtful analysis to talking points about the markets always being right or the self-evident merits of minimal regulation was off-putting. (As a kind of quiet retaliation, I would refer to these people as the "Finance Bros.") While my classes fostered critical approaches to business and tax issues, my confidence in the

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usefulness of these more thoughtful approaches would often vanish in the so-called real world outside of academia.

In this “real world,” which for me became a vivid reality about the time I started to look for summer positions at law firms, I would be jolted from my preferred policy-based approach to something that felt cold and distant, which I was told was “real” tax. During this interview process, while wearing an uncomfortable suit, I would gingerly step through the streets of the various financial districts of large metropolitan centers before being whisked into shiny boardrooms with endless supplies of warm cookies and Perrier. At some point, I realized that the powerful men and women (but mostly men) that I spoke to really were not at all interested in the critical approaches that, to me, seemed obviously relevant. Feeling a small part of me die inside, I reverted to the talking points I heard repeated by the Finance Bros, and was welcomed into the big-law club.

As a recent graduate who was trying to figure out how to align my intellectual interests, my aspirations for making our society better, and the more banal realities of having to make ends meet, *Feminist Judgments: Rewritten Tax Opinions*¹ was a welcome reminder of the best aspects of critical perspectives on tax law, and the relevance that those perspectives have in relation to the issues that I care about.

Brandon: My perspective is similar in that the world of tax law was almost entirely new to me when I started law school. In my first tax class, I was exposed for the first time to a range of buzzwords that are often used in the business world. Recognition, realization, clearly reflect, earnings and profits, and more all became part of my daily tax lingo. At the time, I thought these terms and concepts represented the entirety of the tax world that I would soon enter. But just as the eager law student is often unprepared for the realities of legal practice, so too was I for the disconnect between concepts and application. I remember having a discussion with a law firm partner about the intersection of tax law and social psychology, two topics I explored deeply in my final year of law school. His eyes glazed over, as if I had spoken a foreign language. When I shifted back to speaking about balance sheets, earnings reports, and deferred tax assets, his eyes returned to normal. I found

¹ FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS (Anthony C. Infanti & Bridget J. Crawford eds., 2017).

this disheartening, and I was concerned that his reaction would be typical of those I would encounter in the tax field.

For me, *Feminist Judgments: Rewritten Tax Opinions* was a breath of fresh air and critical thinking that reminded me why tax matters at the end of the day. Setting aside the scientific and technical parlance and methods that are usually associated with tax, the book reminded me of the broader world that tax operates in: a world that should be, but often is not, focused on equitable distribution and fairness across demographics. Like Montano, I too found the book to be a welcome reminder about the often-neglected critical perspectives of tax law, and a welcome relief from the often stuffy field that focuses on narrow technical points without due concern for the bigger picture of tax law.

Montano: As someone who read *Feminist Judgments: Rewritten Tax Opinions* to reaffirm his critical scholarship biases, the introductory essay² was a welcome reminder of the best traditions of critical scholarship. One highlight was the rich and eloquent description of the critical approach as a “multidimensional and iterative challenge to preconceived notions about law’s subjects and objects as well as about how law is created and interpreted and how it develops.”³ Another highlight was Kathleen Lahey’s essay,⁴ which provided a historical context that was previously unknown to me. And I was delighted by the throwing-of-shade on the idea of tax law and the allocation of tax obligations as being “scientific” and “neutral,”⁵ as opposed to “a fundamentally distributive task, and not fundamentally about anything economic or scientific.”⁶

But this collection is much more than a bouquet of first principles. I was particularly appreciative of the broad conception of what constitutes a

² Bridget J. Crawford & Anthony C. Infanti, *Introduction* to FEMINIST JUDGMENTS, *supra* note 1, at 3.

³ *Id.* at 4.

⁴ Kathleen A. Lahey, *Feminist Judging for Substantive Gender Equality in Tax Law: Changing International and Comparative Constitutional Contexts*, in FEMINIST JUDGMENTS, *supra* note 1, at 22.

⁵ Crawford & Infanti, *supra* note 2, at 7.

⁶ Allison Christians, *Taxing According to Value Creation*, 90 TAX NOTES INT’L 1379, 1379 (2018).

feminist perspective.⁷ Such inclusivity allowed the collection to encompass a diverse range of viewpoints that had as a common characteristic a fundamental thoughtfulness, the positive effect of which is difficult to overstate. Such thoughtful, critical scholarship is perhaps most effective when it allows readers to recognize their own latent biases. My own humbling experience came from Mary Louise Fellows's reimagining of *Welch v. Helvering*,⁸ which made me realize how many presumptions concerning commercial matters are still wildly gendered, and how little I had questioned those presumptions.

In tort law, Western legal traditions have consciously moved away from standards like the reasonable man, the man on the Clapham omnibus, and the *bon père de famille*. But such deliberate removal of gendered concepts is more difficult when the biases are not explicitly named, like in the gendered norms concerning many business deductions. As a straight, cisgender, white(ish) male, I am often blind to the biases and privilege that I hold. For me, Professor Fellows's greatest success, as well as the success of the collection as a whole, is making an unjust application of the law a tangible reality to those who may not experience such unjustness directly. And for those who are already woke and alive to these issues, the various rhetorical devices used in this collection, such as logic, humanization, or context, show potential ways of making unjust applications of the law real to those who may not recognize them.

Brandon: I read *Feminist Judgments: Rewritten Tax Opinions* to see how my own privileges and biases are reflected in the original opinions. Of particular interest to me is how unconscious bias pervades decision-making. Opinions, such as *Cheshire*,⁹ force me to confront these biases. As someone who encountered numerous innocent spouse cases as a clerk, reading this case again triggered an automatic response in my brain that spouses should know what goes on under their roof. But after reading Professor Cords'

⁷ Crawford & Infanti, *supra* note 2, at 9.

⁸ Mary Louise Fellows, *Welch v. Helvering*, in FEMINIST JUDGMENTS, *supra* note 1, at 103.

⁹ Michelle L. Drumbl, *Commentary on Cheshire v. Commissioner*, in FEMINIST JUDGMENTS, *supra* note 1, at 215.

rewrite,¹⁰ I realized that my thinking was not only biased, because I have the privilege of living in a household where my partner and I are transparent about our finances, but also sexist in that I diminished Ms. Cheshire’s credibility by assuming she was acting at the beck and call of her husband. This is just one example of how the collection forces me, as a privileged cisgender white male, to understand the downstream effect of biased decision-making.

I deviate slightly now to note that the greatest hits in the collection for me are the *O’Donnabhain*¹¹ and *Magdalin*¹² cases. Both involve issues that are inherently political and implicate sex—transgender surgery¹³ and in vitro fertilization (IVF) procedures, respectively.¹⁴ For these reasons, their rewrites exemplify perhaps the clearest examples of why critical thinking is necessary to understand how societal norms of gender are deeply entrenched. In *O’Donnabhain*, the taxpayer, a transgender woman, eked out a victory, but only after the court wrestled with the issue of how she should be referred to in the opinion and whether transgender surgery constitutes mere “cosmetic treatment.”¹⁵ In *Magdalin*, the court rejected a claim by a gay man for medical expense deductions for IVF procedures, on the basis that his own body was not affected by the procedure, with the implication that only a straight couple would be able to claim the deduction.¹⁶ Both illustrate the implicit (or explicit) stereotype that gender and gender roles are fixed and cannot and should not be deviated from.

¹⁰ Danshera Cords, *Cheshire v. Commissioner of Internal Revenue*, in FEMINIST JUDGMENTS, *supra* note 1, at 225.

¹¹ Nancy J. Knauer, *Commentary on O’Donnabhain v. Commissioner*, in FEMINIST JUDGMENTS, *supra* note 1, at 266; David B. Cruz, *O’Donnabhain v. Commissioner of Internal Revenue*, in FEMINIST JUDGMENTS, *supra* note 1, at 274.

¹² Katherine Pratt, *Commentary on Magdalin v. Commissioner*, in FEMINIST JUDGMENTS, *supra* note 1, at 243; Jennifer E. Bird-Pollan, *Magdalin v. Commissioner of Internal Revenue*, in FEMINIST JUDGMENTS, *supra* note 1, at 253.

¹³ Knauer, *supra* note 11, at 268–69.

¹⁴ Pratt, *supra* note 12, at 246.

¹⁵ Knauer, *supra* note 11, at 268–71.

¹⁶ Pratt, *supra* note 12, at 246–48.

Montano: Brandon’s mention of the *O’Donnabhain* case reminds me of some unsavoury passages from the dissenting judgment in that case, which appear in Nancy Knauer’s introductory essay.¹⁷ The critical treatment of the positions taken by some of the Tax Court judges reminds me of an argument that I have often heard used against critical scholarship; namely, that one should not impose the morality and social norms held by younger generations on the reasoning of older generations. Rationales that are put forward for this argument often rely on notions of diversity, freedom of expression, and the notion that it is a simple truth that people who grow up in different times may have different values and priorities. While I think the reasoning behind these rationales is flawed, such arguments, if only because they are so widely used (especially in nonacademic contexts), deserve a thoughtful response.

My best response is that critical scholarship is not critical of the individual, but is rather critical of the effects of decisions on particular segments of society. In other words, a decision that may have been made in a different time with different values can be respected for what it is, but to the extent that those decisions continue to have deleterious effects on a segment of society, they should be re-evaluated and commented on. All of the reimagined decisions and their accompanying essays are successful in this regard. By showing how the lives of a wide range of persons can be greatly improved with thoughtfulness, context, and a touch of humanity, this collection is a vibrant addition to the critical literature in an area of law that most people do not associate with feminism or gender equality.

Brandon: I think there has long been a criticism that critical thinking is best left to academics and intellectuals who are of modern times. Such a view is ill-placed, however, because the focus of critical thinking is neither shaming nor chastising those who do not subscribe to its ideals. It is instead (properly) focused on the recognition of systemic bias and prejudice and remedies. In the same vein, critical thinking about tax is not about attacking large corporations and wealthy individuals because of their worth, but instead

¹⁷ Knauer, *supra* note 11, at 270. “The majority placed great weight on a notation in *O’Donnabhain*’s medical record that her breasts . . . ‘had a very nice shape.’” *Id.* at 269 (quoting *O’Donnabhain v. Comm’r*, 134 T.C. 34, 72 (2010)). “Judge Holmes’s concurrence was notable for the way he bristled at the ‘crash course on transsexualism that this case has forced on us.’” *Id.* at 269–70 (quoting *O’Donnabhain*, 134 T.C. at 86 (Holmes, J., concurring)). “[Dissenting Judge] Gustafson maintained that transition care is medically unethical because such treatment ‘has given up on the mental disease, has capitulated to the mental disease, has arguably even changed sides and joined forced with the mental disease.’” *Id.* at 270 (quoting *O’Donnabhain*, 134 T.C. at 122 (Gustafson, J., dissenting)).

about calling attention to how they amassed their wealth and encouraging those in power to recognize this truth.

Montano: I entirely agree with everything that Brandon says. It is almost as if the notion of critical approaches, the vocabulary used to discuss social issues, and the value that these approaches represent to society as a whole have not successfully been dispersed to a nonacademic audience. This is worrisome. Those who participate in critical discussions about taxation have a myriad of assumptions that inform their conversations. While it would be burdensome to reiterate those assumptions at every opportunity, critical scholars must realize that not doing so is effectively a form of exclusion. This is perhaps especially true in judicial opinions, which have multiple and varied audiences.

If critical scholarship wants to change norms, then it must also be aware of the importance of including an educational aspect within its commentary. Through its opening essay, the context provided by the historical and introductory pieces, and an inclusive approach to feminism, this collection provides a structural and stylistic exemplar of how that can be possible.

Brandon: I applaud the authors for taking on the enormous, but important, task of approaching the cases and tax law generally from a nonmainstream approach. Such an alternative approach is critical for bridging the gap between the authors and decisionmakers on one side and those not trained in the technical details of tax law on the other. I would, however, push the envelope a step further and say that more needs to be done in approaching tax law not only from a critical perspective but also from an empathetic one. As the book properly notes, mainstream tax analysis often “focuses on people as little more than the sum of their financial transactions.”¹⁸ This dehumanizes and homogenizes taxpayers to the level of notations on a page, thereby completely rejecting their backgrounds and stories. In doing so, the empathy factor is lost entirely. Because tax law affects the lives of individuals in sometimes deeply personal ways, it is important for the authors to make an effort to truly understand the struggles taxpayers face when attempting to comply with the tax law.

¹⁸ Crawford & Infanti, *supra* note 2, at 7.

I was thinking of this notion when I read the rewrite of *United States v. Davis*,¹⁹ which I think does an excellent job of noting that divorce is messy, quite so in the tax law area, and that its effects often fall harder on women.²⁰ What this opinion highlights is that writing is a tool of empowerment and charges the writer with “recogniz[ing] the real-life experiences of women” instead of just putting words on a page.²¹ I consider this to be a powerful empathy tool.

Another example that hits close to home for me is dependency exemptions for children, an area of the U.S. Internal Revenue Code that is fraught with technical challenges and arcane language that most taxpayers cannot digest. Most judges simply tick through the requirements of the statute, making brief mentions here and there of the taxpayer’s living arrangements and the level of support for the children. These opinions are usually very short and leave the reader wondering what really happened in the household. My guess is that most judges, and the authors of this book, have not had to worry much about “who gets to claim the kid on the taxes this year.” As a child of divorced parents, this came up every year of my adolescence, and my mother, unfortunately, bore the emotional and financial brunt of this more often than not. An empathetic approach to this issue might give my mother, and other women similarly situated, empowerment by recognizing their day-to-day struggles.

In the end, I would push the authors to go a step further and answer the fundamental question of “why does this matter” at both the individual and societal levels. What I mean by this is: How are the day-to-day challenges that people face reflected in the opinions and literature we produce? I believe that by engaging in empathetic thinking and analysis, we truly get to the heart of how tax law impacts peoples’ lives on a day-to-day basis.

¹⁹ Patricia A. Cain, *United States v. Davis*, in *FEMINIST JUDGMENTS*, *supra* note 1, at 129.

²⁰ *Id.* at 132.

²¹ Linda M. Beale, *Commentary on United States v. Davis*, in *FEMINIST JUDGMENTS*, *supra* note 1, at 121, 129.