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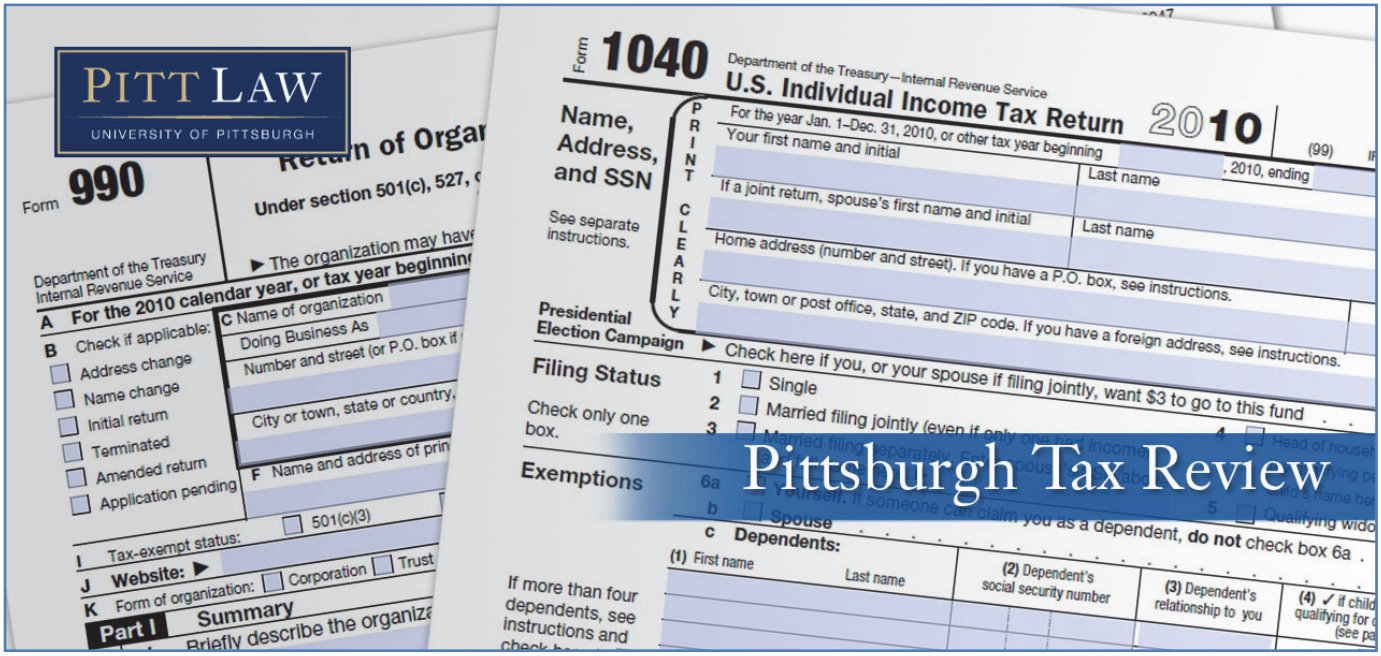

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Leading Canadian scholar Ruth Sullivan describes the act of statutory interpretation as a mix of art and archeology.[1] *Feminist Judgments: Rewritten Tax Opinions* affirms her assessment.[2] If the act of statutory interpretation requires us to deploy our interdisciplinary talents, at least somewhat unmoored from the constraints of formal expressions of legal doctrine, why haven't feminists been more inclined to write about statutory interpretation? Put another way, some scholars acknowledge that judges "are subtly influenced by preconceptions, endemic privilegings and power hierarchies, and prevailing social norms and 'conventional' wisdom."[3] Those influences become the background for how judges read legislation.[4] Yet, there is surprisingly little literature about how feminists (or feminist decision-makers) do or could approach statutory interpretation projects.[5]

Feminist Judgments offers concrete illustrations of how feminists, charged with authoring feminist judgments, go about the work of statutory interpretation in tax law.[6] The editors of the collection did not constrain the

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[1] RUTH SULLIVAN, STATUTORY INTERPRETATION 29 (3d ed. 2016).

[2] Bridget J. Crawford & Anthony C. Infanti, *Introduction to the Feminist Judgments: Rewritten Tax Opinions Project*, *in* FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS 6–8 (Bridget J. Crawford & Anthony C. Infanti eds., 2017).

[3] *Id.* at 6.

[4] *Id.*

[5] This is in contrast to a developed literature on feminist judging and feminist legal theory and method. *See, e.g.*, Rosemary Hunter, *Can Feminist Judges Make a Difference?*, 15 INT'L J. LEGAL PROF. 7, 7, 30 (2008); Mary Jane Mossman, *Feminism and Legal Method: The Difference It Makes*, 3 AUSTL. J.L. & SOC'Y 30 (1986).

[6] FEMINIST JUDGMENTS, *supra* note 2.

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meaning of feminism,[7] nor did they articulate what they believed was a "feminist" interpretation.[8] To that end, the collection offers fertile ground for scholars who might wish to theorize about feminist statutory interpretation. What principles of interpretation might be distilled?

This essay offers some preliminary reflections on what feminist statutory interpretation in tax entails, using the eleven decisions (and the attendant commentaries) presented in the collection as source material.[9] Ten principles are proposed as a way of generating discussion about an undertheorized area of feminist scholarship (statutory interpretation).

First, and perhaps most fundamentally, feminist statutory interpretation acknowledges that "who is doing the interpreting matters."[10] This principle aligns with the widely accepted feminist insight that "neutral rules and procedures tend to drive underground the ideologies of the decisionmaker. . . . Disadvantaged by hidden bias, feminists see the value of modes of legal reasoning that expose and open up debate concerning the underlying political and moral considerations."[11] The authors of each chapter in *Feminist Judgments* craft their decisions in ways that diverge from the original judgments. In some cases, they author new majorities; in some, dissents; and in others, they concur. But key to the rewriting exercise, as feminists, their process of applying statutory provisions to facts leads to different reasoning and in some cases different outcomes. Even though they are relying on the same precedents available to the original courts, who the authors are has had an effect on the interpretation of the law. Patricia Cain's decision about how transfers on the completion of a relationship should be treated for tax purposes throws into stark relief the different type of approach that can be brought to bear on a tax issue as a result of the person authoring

[7] The "call for participation . . . stated that [the editors] . . . conceive[d] of feminism as a broad movement concerned with justice and equality and that [they] welcomed proposals to rewrite cases in a way that brings into focus issues such as gender, race, ethnicity, socioeconomic class, disability, sexual orientation, national origin, and immigration status." Crawford & Infanti, *supra* note 2, at 9.

[8] *Id.*

[9] *Id.* at 11.

[10] *Id.* at 7.

[11] Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 862–63 (1990).

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the decision.[12] Key in her decision is a close examination into the nature of women's lived experiences.[13] Patricia Cain has made a signature contribution in the tax law scholarship on gender equality.[14] Her lived experience must have helped her in shaping her approach to the decision and, compared to the original decision, that orientation shows.[15]

Second, decision-makers cannot escape who they are, but they can bring an open mind to the exercise of understanding how multiple interpretive communities would approach the interpretive problem before them. Being conscious that we are not "perspectiveless" facilitates our efforts to make sense of and incorporate other world views into our decision-making.[16] The decision authored by David Brennen exemplifies this approach.[17] Brennen authors a concurring opinion in a decision about whether a private university that engages in discrimination against racial minorities should be precluded from accessing tax-exempt status.[18] The original judgment denied tax-exempt status on the grounds of that racial discrimination;[19] however, Brennen (a man) looks at how gender and race intersect to hold that when you look at the range of affected interpretive communities—here, women of color—it becomes clear that the discrimination is not limited to race.[20] By keeping an open mind and listening to people with alternative experiences to his own (specifically in this instance, women of color), Brennen is able to

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[12] Patricia A. Cain, United States v. Davis, *in* FEMINIST JUDGMENTS, *supra* note 2, at 129.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *See, e.g.*, Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 95, 110 (1990).

[17] David A. Brennen, Bob Jones University v. United States, *in* FEMINIST JUDGMENTS, *supra* note 2, at 150.

[18] *Id.* at 150.

[19] Elaine Waterhouse Wilson, *Commentary on* Bob Jones University v. United States, *in* FEMINIST JUDGMENTS, *supra* note 2, at 140.

[20] Brennen, *supra* note 17, at 156; Wilson, *supra* note 19, at 144.

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author a decision that speaks in a more thorough way to the communities affected by the judgment.[21]

Third, feminists who engage in statutory interpretation accept the linguistic insight that no words have inherent meaning.[22] This seems a simple point; yet, it remains hotly contested among the scholars of statutory interpretation. In the context of critical race theory, Andre Smith puts it this way:

> . . . a thorough consideration of plain meaning must include the meanings attributed to a word by different 'interpretive communities,' to the extent such meanings differ from the dominant one. Judges trying to gather the plain meaning of 'Direct Tax' in the U.S. Constitution must research and incorporate the view of women, blacks, [N]ative [A]mericans, or any group whose interpretation differs from the dominant construct . . . .[23]

Smith subverts our sense of "plain meaning" by demonstrating how an understanding of language—and the presence of multiple interpretive communities—means that words can only be understood in the light of their use in a given context. The judgment by Mary Louise Fellows offers a brilliant illustration of this linguistic observation.[24] In her decision she revisits the meanings of "ordinary and necessary," which are the standard criteria for the deduction of business expenses.[25] By looking at the use of that phrase and at the consequences of alternative interpretations, she resolves the issue before the court in a vastly different way than the original court.[26]

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[21] Brennen, *supra* note 17.

[22] *See, e.g.*, Grace E. Hart, Comment, *Methodological Stare Decisis and Intersystemic Statutory Interpretation in the Choice-of-Law Context*, 124 YALE L.J. 1825, 1827 (2015) (citing Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2141–42 (2002) ("Because statutes are merely 'strings of words,' statutory meaning is not inherent in the text but instead is derived from the interaction of the text and the interpretive process.").

[23] ANDRE L. SMITH, TAX LAW AND RACIAL ECONOMIC JUSTICE: BLACK TAX 1 (2015); *see* Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297 (1992) (discussing the related insights about how we can deploy multiple consciousness to understand law).

[24] Mary Louise Fellows, Welch v. Helvering, *in* FEMINIST JUDGMENTS, *supra* note 2, at 103.

[25] *Id.* at 109–17.

[26] Nicole Appleberry, *Commentary on* Welch v. Helvering, *in* FEMINIST JUDGMENTS, *supra* note 2, at 102–03.

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Fourth, feminist statutory interpretation requires an appreciation of the factual circumstances of the parties before the court. It requires judges to demonstrate regard for the parties before them. Hierarchies inherent in judicial processes—for example, referring to one party only by their role (as appellant) without recognizing their humanity—are eschewed. The judge appreciates that the parties who appear before the court are real people and attempts to understand their circumstances before applying the law to their "facts." As Katherine Bartlett has reflected, a key feminist method is "seeking insights and enhanced perspectives through collaborative . . . engagements with others based upon personal experience and narrative."[27]

Every one of the judgments in this collection reflects this concern for the real people who find themselves before the court. To offer three illustrations, first, in her decision on whether a married taxpayer can seek relief from joint liability (following joint filing), Danshera Cords explores in detail the life of Kathryn Cheshire.[28] She interprets the "knowledge" requirement in the law in a contextual way that centers Kathryn Cheshire's role in the filing of her joint return and her experience with her husband (in terms of the quality and nature of their relationship).[29] Similarly, in his rewritten judgment on whether the real or personal property of the Sisseton and Wahpeton Nation was taxable by the state, Grant Christensen removes the racist, classist, and paternalist descriptions of the Nation and its members.[30] He affirms the humanity of the people affected by the decision, who were excluded as parties in the original decision, in determining that the Nation and its members have an interest in the case.[31] In his review of whether a transgender woman can deduct costs related to gender confirmation surgery,[32] David Cruz centers the experience of Rhiannon O'Donnabhain and demonstrates compassion and understanding in his approach to interpreting the legislation in a way that sees how the

[27] Bartlett, *supra* note 11, at 831.

[28] Danshera Cords, Cheshire v. Commissioner, *in* FEMINIST JUDGMENTS, *supra* note 2, at 225.

[29] *Id.*

[30] Grant Christensen, United States v. Rickert, *in* FEMINIST JUDGMENTS, *supra* note 2, at 64.

[31] *Id.*

[32] David B. Cruz, O'Donnabhain v. Commissioner, *in* FEMINIST JUDGMENTS, *supra* note 2, at 274.

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requirement that the surgery be "for the purpose of affecting any structure or function of the body" is more appropriate than the previous court's focus on disease and disorder.[33] This same sensitivity to framing an issue and its effect for people who appear before the courts is exemplified by Jennifer Bird-Pollan, who looks at the tax deductibility of the costs of assisted reproductive technology.[34]

Fifth, feminist statutory interpretation broadens the scope of applicable authority. Unlike many tax judgments, which rely on a very limited subset of authorities (primarily previous judicial precedent and the provisions at issue), feminist tax judgments embrace an expansive and often multidisciplinary approach to authority. As Patricia Williams summarizes, "[t]he advantage of [an interdisciplinary] approach is that it highlights factors that would otherwise go unremarked."[35] For example, most judgments rely substantially on the work of academics (including academics in disciplines outside of law) and some rely on the insights that can be garnered from literature. In no decision does an author get preoccupied with a precise hierarchy of interpretive sources.

Sixth, feminist approaches to statutory interpretation avoid the trap of believing that there is only one answer in applying a provision to a given set of facts. None of the authors of the rewritten judgments seek out "the" answer; instead, each author appears to accept that their interpretations are the best attempt for now. This approach is also reflected in the orientation of the book as a whole and in the statement by the editors that, "[i]f we had been the authors or commentators, we might have taken a different tack or reached a different conclusion."[36] This approach avoids the hubris that characterizes at least some judicial decisions and judicial attitudes.

Seventh, feminist judges in tax cases are not ignorant of the tax avoidance efforts undertaken by taxpayers. They steer away from formalism and legalism in search of a better understanding of the taxpayer's motives

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[33] *Id.* at 277.

[34] Jennifer E. Bird-Pollan, Magdalin v. Commissioner, *in* FEMINIST JUDGMENTS, *supra* note 2, at 253.

[35] PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 7 (1992).

[36] Crawford & Infanti, *supra* note 2, at 11.

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and of the economic, social, and political consequences of approaches to statutory interpretation that enable tax avoidance. Drawing again on Mary Louise Fellows's decision,

> [She] remand[s] the case for the lower court to examine [the company's] tax treatment of its debt. The lower court should deny the taxpayer a deduction for his payments to the creditors of [the company] to the extent that the corporation, as a result of its debt, previously had reduced or otherwise avoided tax liability.[37]

Mary Louise Fellows mandates a check on the potential for tax avoidance in the design of her decision.

Eighth, feminist statutory interpretation does not lose sight of systemic power differences among groups and it seeks proactively to remedy that discrimination through legal interpretation. Perhaps these authors are well positioned to deploy this principle. As Francisco Valdes urges,

> [A]s legal scholars, we possess a unique structural capacity for theorizing social reality and law's relationship to it: as critical legal scholars devoted to social justice, we have the responsibility to exercise that capacity to articulate frameworks of effective antisubordination resistance.[38]

To illustrate, in Mary Heen's judgment, gender-specific mortality tables are rejected in favor of the (equality promoting) gender-neutral tables.[39] Where a provision appears facially neutral but has discriminatory effect for marginalized groups, feminist judges attend to the consequences of interpretations that create or exacerbate the discrimination. Wendy Gerzog's decision, which looks at the qualified terminable interest property elections and their effect on surviving spouses, exposes the stereotypes about women that underpin the original decision in overturning its holding.[40]

Ninth, feminist statutory interpretation avoids drawing a hard line between the public and private. Feminists have long taken issue with the

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[37] Fellows, *supra* note 24, at 109.

[38] Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1415 (1998).

[39] Mary L. Heen, Manufacturers Hanover Trust Co. v. United States, *in* FEMINIST JUDGMENTS, *supra* note 2, at 172.

[40] Wendy C. Gerzog, Estate of Clark v. Commissioner, *in* FEMINIST JUDGMENTS, *supra* note 2, at 195.

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distinction between public and private and some of the more pernicious effects for women as a result of the way that distinction takes shape in law. As Susan Boyd urges, "[i]n trying to reframe strategies related to law, it is necessary to avoid dichotomizing the public and private spheres. . . . [T]he two are interconnected in a complex manner."[41] Take, for example, the decision authored by Ann Murphy, which focuses on whether a married couple could split income.[42] In it, she scrutinizes the arrangements between E.F. Earl and G.C. Earl and characterizes those arrangements in a way more typical of the "private" sphere.[43]

Tenth, feminist statutory interpretation in the tax context situates income tax law as a key mechanism for advancing higher-order values, for example democracy or equality. No decision does this more beautifully than Ruthann Robson's rewritten opinion.[44] She begins by introducing us to Edith Windsor and Thea Spyer, the central figures in the decision, in ways that remind one of the way you would introduce someone for whom you have developed love or at least great affection.[45] She then eviscerates the foundations of section 3 of the Defense of Marriage Act, which prevented Windsor from benefiting from the estate tax marital deduction on Spyer's death.[46] In justifying her judgment, Robson recognizes the higher-order functioning of tax law; namely that "tax laws, like all other laws, should have as their mandate progress toward equality."[47]

The aim of this essay was to offer some preliminary thinking about feminist statutory interpretation, built from the excellent judgments offered in Bridget Crawford and Anthony Infanti's collection. Most of these principles would seem to apply in contexts outside of tax law interpretation.

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[41] Susan B. Boyd, *Can Law Challenge the Public/Private Divide? Women, Work, and Family*, 15 WINDSOR Y.B. ACCESS TO JUST. 161, 184–85 (1996).

[42] Ann M. Murphy, Lucas v. Earl, *in* FEMINIST JUDGMENTS, *supra* note 2, at 89.

[43] *Id.*

[44] Ruthann Robson, United States v. Windsor, *in* FEMINIST JUDGMENTS, *supra* note 2, at 306.

[45] Allison Anna Tait, *Commentary on* United States v. Windsor, *in* FEMINIST JUDGMENTS, *supra* note 2, at 300.

[46] *Id.* at 301.

[47] Robson, *supra* note 44, at 316.

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I hope many of the authors of the rewritten judgments will become judicial appointees and we'll be able to convert theorizing into descriptive practice.

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