Introduction to the Feminist Judgments: Rewritten
Trusts and Estates Opinions Project

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How would judicial opinions change if the judges were to use feminist methods and perspectives when deciding cases? That is the question that various groups of scholars, working around the globe and mostly independently of each other, have taken up in a series of books of “shadow opinions” – literally, rewritten judicial decisions – using precedents, authorities, theories, and approaches that were in existence at the time of the original decision to reach radically different outcomes and often using saliently different reasoning. This global sociolegal movement toward critical opinion writing originated when a group of lawyers and law professors who called themselves the Women’s Court of Canada published a series of six rewritten decisions in 2008 in the Canadian Journal of Women and the Law. Inspired by that project, scholars have produced similar projects in the United Kingdom,1 Australia,2 the United States,3 Ireland,4 and New Zealand/Aotearoa.5 There is an

1 See Feminist Judgments: From Theory to Practice (Rosemary Hunter et al. eds., 2010).
4 See Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity (Máiread Enright et al. eds., 2017).
5 See Feminist Judgments of Aotearoa New Zealand: Te Rino – A Two-Stranded Rope (Elisabeth McDonald et al. eds., 2017).
introduction to international law feminist judgments project and a Scottish project. Other feminist judgments projects are underway in India, Africa, and Mexico.

Most of the early projects involved rewriting judicial opinions that were mostly, if not entirely, grounded in questions of constitutional interpretation. Starting with *Feminist Judgments: Rewritten Tax Opinions*, however, scholars and lawyers approached the question posed at the start of this chapter by examining areas of law in which constitutional arguments do not necessarily play a primary role. This development in the series thus takes the sociolegal movement of critical opinion writing in an uncharted direction, exploring various subject matters from a critical feminist perspective.

**THE APPEAL OF CRITICAL OPINION WRITING**

Critical opinion writing, as a form of scholarship, has tremendous appeal to us – and given the number of completed, ongoing, and nascent projects around the world, it obviously appeals to others in different countries and across a variety of areas of law, too. But why?

Critical opinion writing appeals because it represents a multidimensional challenge to preconceived notions about legal subjects and objects, as well as about how law is created and interpreted, and how it develops. Critical opinion writing challenges the law and the legal system to open its vistas. It encourages those who write and rewrite judicial opinions (and those who read and rely on those opinions) to respect varied perspectives. It showcases those viewpoints by including writers from different cultures and socioeconomic backgrounds, and of different genders, races, and sexual orientations.

Critical opinion writing challenges rewriters – in this volume, professors or practitioners who are more accustomed to analyzing, applying, and critiquing judicial opinions than to writing them from the ground up – by forcing them to

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6 See *Feminist Judgments in International Law* (Loveday Hodson & Troy Lavers eds., 2019).
7 See *Scottish Feminist Judgments: (Re)Creating Law from the Outside* In (Sharon Cowan, Chloë Kennedy, & Vanessa E. Munro eds., 2016).
place themselves in the shoes of the judges or other original authors. Informed by the path that history has taken since the original opinion was written but using only those sources available at the time the original opinion was drafted, the rewriter must wrestle with and resolve the issues and conundrums that judges routinely face. This task demands achieving a just result in the case at hand while taking a broader view of how the case fits into the general framework and structures of the law, so as not to prematurely stymie future legal development or foreclose it altogether.

Having played the role of the judge, opinion writers benefit from a new lens through which to view and interpret judicial opinions when they return to their lives as critics and consumers of judicial opinions. This experience should grant rewriters a new appreciation for the difficulty of crafting good judicial opinions and increase their empathy for the work done by judges. At the same time, critical opinion writing challenges judges themselves by highlighting the contingent nature of the opinions they write and their role in the process of making law. Imagining an alternative path for the law – whether by directly displacing the majority opinion in a case or by laying the groundwork for a different path in the future by means of an imagined concurring or dissenting opinion – challenges the tone of neutrality, objectivity, and inevitability that judges generally seek to convey when writing their opinions. Critical opinion writing also undermines the notion that it is not so much the person as it is the office pronouncing a judgment. The rewritten opinions thus pointedly show that, however nostalgic the analogy, a judge deciding cases is much more than a baseball umpire simply calling balls and strikes, as some have contended. By producing work in the form of a judicial opinion (rather than the more typical law review article or essay critiquing an opinion), the rewriter challenges the judicial monopoly not only on articulating what the law ought to be, but also on correctly interpreting the law or steering the law toward the cause of justice and the flourishing of society. The commentaries that accompany the rewritten opinions underscore this challenge by explaining just how the rewritten opinions differ from the originals and by imagining a different path for sociolegal history. Taken together, the opinions and commentaries in this volume also illustrate the importance of diversity on the bench, so that judges do not approach their work with a uniform worldview influenced by the same set of preconceptions and advantages, and can thus helpfully challenge and call into question each other’s perspectives.

For those who read these rewritten opinions (and we hope that some sitting judges and current lawmakers will be among them), critical opinion writing may help to expose the ways in which judges—and, in turn, the development of the law—are subtly influenced by preconceptions, endemic privilege and power hierarchies, and prevailing social norms and “conventional” wisdom. Compared with the originals, the rewritten opinions demonstrate how appreciating alternative perspectives can benefit the law and society as a whole; they reveal how subjective experiences and unchallenged assumptions can influence the interpretation and application of the law and its development. Naturally, the commentaries included with each rewritten opinion in this volume facilitate these revelations, but, in the end, there is no substitute for comparing the original and rewritten opinions side by side for yourself. Whether you are a student of inheritance law, a practitioner, a judge, or merely an interested citizen, actively engaging in this process of questioning judicial decision-making can help to develop your sensitivity to the multiple (and sometimes insidious) influences on any decision-maker. For those of you who are judges, this process may help to raise your awareness of these influences so that they do not inappropriately shape your own opinion writing.

THE GOALS OF THE PROJECT

This volume, *Feminist Judgments: Rewritten Trusts and Estates Opinions*, is unique in that it covers an area of the law that, perhaps more than any other, influences people’s security and opportunities in life. This area of law is about the intergenerational and interspousal transfer of wealth. Women in the United States have less wealth than men—much less. Women have thirty-two cents for every dollar of wealth that men have." Because wealth is primarily transmitted through inheritance, inheritance law—the law of trusts and estates—matters to women. We define the law of wealth transmission as it applies to women and affects women’s access to wealth broadly: It includes access to entitlements such as social security and pension benefits, donative freedom (in other words, the right to devise property as desired), the right to make end-of-life decisions, the right of a surviving spouse to a fair share of a predeceased spouse’s estate, the right of a spouse to be released from a contract that waives her rights to family wealth, the right to form families in nontraditional ways, and much more.

This area of law is especially poignant because it applies to the most personal and yet commonplace experiences of life: marriage, divorce, child-rearing, sickness, and (of course) death. Paradoxically, these are areas in life in which women are commonly not situated in the same way as men. Do women still feel more pressure than men to marry and have children before a certain age? Does this disadvantage women in discussing and negotiating family wealth issues? How does their greater likelihood of being caregivers for children and elders inhibit their own ability to build wealth? Does the statistical likelihood that a woman will outlive a male spouse make spousal inheritance a more fraught issue for women than for men?

A central question of feminist jurisprudence—and hence of this volume—is, How should the law deal with the reality of women’s different situations in these life events? Should it offer women special protections based on this reality, or should it simply express the law’s aspirations by treating women as equals?

The goals of this book are to raise these questions in the context of wealth transmission and to make readers connect trusts and estates law with women’s social status and relative lack of wealth. Just as the volume that gave rise to this series, Feminist Judgments: Rewritten Opinions of the United States Supreme Court, showed how feminist analysis can transform the decisions of a nation’s highest court and a volume that might be seen as a companion to this one, Feminist Judgments: Rewritten Tax Opinions, showed how feminist analysis can transform statutory analysis, so too does this volume show how feminist analysis can transform the rules we apply to the making and receiving of gratuitous transfers and ask whether a feminist transformation of this area of law would change women’s wealth.

Although feminism’s starting point with respect to trusts and estates is women’s material inequality and how the law should address it, it broadens out, as it must, into wider questions about the wealth disparities of other groups. This is because, first, the question common to all interactions of subordinated groups with the law is whether the law should acknowledge and account for the unevenness of the playing field we stand on or whether it should blindly apply the same standards to everyone and “let the chips fall where they may.” Once we ask this question with respect to women, it becomes inevitable that we ask the question about others as well. The second reason why feminism must confront other types of discrimination is the phenomenon of intersectionality—that is, the way in which multiple vectors of oppression interact when a person is a member of more than one historically unequal group (e.g., an African American woman). There are examples in this book of how these multiple vectors intersect to magnify the
wealth effects of each kind of discrimination. In this volume, Browne Lewis’s rewrite of O’Neal v. Wilkes12 makes exactly this point in showing how the refusal to recognize equitable adoption negatively affects both women as women and African American women as members of their communities. To emphasize and welcome this intersectional approach, we asked two different authors – one from the United States and one from Israel – to write commentaries on the O’Neal opinion.

This book has a broader aim than showing people why it is important to look at these issues through a feminist lens; it is also designed to appeal to several different audiences with the hope of raising awareness about the field of estates and trusts. Because this area focuses on death and dying, laypersons may not ordinarily be inclined to read such a book. The opinions and commentaries in this book are therefore written accessibly for anyone who is interested in these issues and opinions – in cases as stories that impact everyone and to which the vast majority of people will be able to relate.

METHODOLOGY

Our process for choosing which trusts and estates cases to rewrite from a feminist perspective was deliberate and thoughtful. We began by putting together a list of cases culled from our own teaching, knowledge, and scholarship. Other than one reproductive technology case and one gender-restricted charitable trust case, the cases did not necessarily address gender on their face, but many of them raised obvious questions of gender as the law was applied. For example, one case involved a woman who was defined as having an “insane delusion” because she left her property to an organization that advocated for woman suffrage. Another involved a testator whose will was invalidated because she devised her property to a younger man with whom she was having a romantic relationship. Other cases are even less obviously about gender, although they have very real and disparate effects on women, both economically and politically. Those cases involve topics such as: how federal law preempts many areas otherwise relevant to trusts and estates law; a surviving spouse’s right to an elective share of the decedent’s estate and the value of her interest; the ability to satisfy child support from trust property; and whether an “equitably adopted” child is entitled to inherit from an intestate decedent.

To benefit from the input of colleagues with different areas of expertise, we assembled a diverse and distinguished group of leading trusts and estates scholars as our advisory panel to help us to evaluate the cases on our list as

12 439 S.E.2d 490 (Ga. 1994) (see Chapter 5).
especially deserving (or not) of feminist rewriting and to suggest other cases. This panel consists of Alexander Boni-Saenz, Alfred L. Brophy, Naomi R. Cahn, Camille M. Davidson, Thomas P. Gallanis, William P. LaPiana, Ray D. Madoff, Sergio Pareja, Casey Ross, Robert H. Sitkoff, Phyllis C. Taite, and Michael T. Yu. The names of all of the panel members and their institutional affiliations are listed at the front of this book. We received much valuable feedback from the panel and expanded the list of cases. We then issued a public call for authors, allowing those interested in rewriting an opinion or delivering a commentary to indicate their preferences for any of the cases on the list. Prospective authors were further invited to suggest cases that we had not included.

With the goal of choosing the most qualified and diverse range of authors and taking into account the input of our advisory panel, we narrowed the list down to eleven cases. We are proud that our contributors bring to the book a range of expertise and experience. The authors include nationally recognized inheritance law experts, well-known feminist scholars, specialists in other areas of the law (e.g., health law), junior scholars, a practicing attorney, and colleagues whose primary teaching work occurs in the clinical setting. We sought diversity of expertise, gender, ideology, race, sexual orientation, and status in the academy, consistent with an active commitment to a volume that would represent many viewpoints and voices.

WHAT IS A FEMINIST JUDGMENT, ANYWAY?

In our call for participation, we explicitly stated that we, as volume editors, conceive of feminism as a broad movement concerned with justice and equality, as explained above, and that we welcomed proposals to rewrite cases to bring into focus the ways in which traits such as gender, race, ethnicity, socioeconomic class, disability, sexual orientation, national origin, and immigration status may, in isolation or in intersection, influence the outcome of cases. In keeping with the stance taken in the compilation and editing of Feminist Judgments: Rewritten Opinions of the United States Supreme Court, we did not instruct authors on what we believed to be a “feminist” interpretation of the cases or confine them to any certain method or process for completing their work. It is the view of the editors of this volume, shared by the editors of other volumes in the Feminist Judgments series, that while feminism has been historically motivated by concern for equality for women, the most effective and inclusive feminism takes into account the way in which many intersecting identities can make the quest for justice more complex and elusive, given the structure of both the law itself and the meaning of equal protection as interpreted by twenty-first-century courts. We did and do
welcome a diversity of viewpoints about feminism’s goals and practices and how they manifest in judicial opinions. Consequently, this volume includes commentators and opinion writers who disagree about what does and does not make the original and the rewritten opinion feminist.

GUIDELINES FOR OPINIONS AND COMMENTARY

The purpose of Feminist Judgments: Rewritten Trusts and Estates Opinions is to show (not describe) how certain inheritance law cases could have been decided differently if the judges had brought to bear a more gender-sensitive viewpoint. Authors were free to draw on their own understandings and interpretations of feminist theories and methods, but they were limited to rewriting their opinions based on the law and facts in existence at the time of the original decision. This is a key feature of all the books in the Feminist Judgments series. Whether the question involves statutory law (tax, the Employee Retirement Income Security Act of 1974 or ERISA, elective share) or common law (mental state, trust restrictions, adoption), the rewritten opinions show how a judicial decision often depends on the judges’ experiences, perspectives, and reasoning processes. Opinion authors were free to rewrite the majority opinion, to add a dissenting or concurring opinion, or even to imagine that the original opinion had been appealed and write an opinion affirming or reversing that appeal. Some authors enjoyed the exercise of reenvisioning the original opinion as though they had been part of the deciding court. Other authors found it easier to react to a majority opinion with which they disagreed and therefore chose to write a dissent. Of the eleven rewritten cases in the book, only one is a US Supreme Court decision. We also include decisions from the highest courts in Florida, Georgia, Maryland, Mississippi, Nebraska, New Hampshire, New Jersey, and New York, and from lower courts in Pennsylvania and Tennessee. What the collection demonstrates is that incorporating feminist theories and methods into inheritance cases, regardless of the court, is consistent with judicial duties and accepted methods of interpretation.

From a practical perspective, opinion authors were limited to 10,000 words, regardless of whether they were writing reimagined majority opinions, dissenting opinions, or concurring opinions, as appropriate to the court. Commentators had the difficult task of explaining, in 4,000 words or fewer, what the original court decided, how the feminist judgment differs from the original judgment, and what practical impact the feminist judgment might have had on the law in this area. Each opinion and commentary went through at least three rounds of editing with us, and opinion writers and commentators also shared their thoughts with each other throughout the process. In fact,
many pairs of opinion writers and commentators worked quite closely and cooperatively through the rounds of editing, with the commentary writers incorporating points at the request of the opinion writers and opinion writers acting on suggestions from the commentary writers. The members of our advisory panel also graciously read and gave comments on draft opinions, ensuring that the authors received feedback from multiple sources. The ultimate decision to accept or reject feedback, however, remained with the authors. Had we been the authors or commentators, we might have taken a different approach or reached a different conclusion in several cases in the book. And in some cases, as mentioned above, opinion writers and commentators saw issues differently. In any event, we did not press authors to reach the conclusions we would have reached nor did we force opinion writers and commentators to reach agreement. Instead, we celebrate these multiple viewpoints as consistent with the richness and complexity of feminist thought.

ORGANIZING THE CASES

The eleven cases in the book span 1947 to 2008. They implicate a wide range of issues, including the adverse impact of paternalism, the basic meaning of equality, marriage, divorce, retirement, blended families, adoption, reproductive technology, charitable gifts, trusts, and end-of-life decision-making. We considered a variety of different organizational frameworks for the cases, attempting to group them by common themes or subject matter. Ultimately, however, because many of the cases involve multiple issues, it was difficult to settle on any one coherent organizing framework. For that reason, we decided to present the cases in chronological order. By presenting cases from oldest to most recent, we hope to have eliminated our personal bias, and readers should be able to develop their own sense of how the opinions relate to each other and how various courts’ styles, language, and reasoning have evolved.

All citations in the opinions follow the “blue pages” rules in The Bluebook system of citation that are normally used by judges and practitioners. Citations in the commentaries follow The Bluebook system of citation for law review footnotes.

FEMINIST THEORIES AND METHODS

A Formal Equality vs. Substantive Equality

Out of the important sex discrimination cases brought before the Supreme Court in the 1970s emerged what might be called a “formal equality” approach
to sex discrimination. In the 1971 trusts and estates case Reed v. Reed, the Supreme Court ruled for the first time that a law violated women’s rights to equal protection under the Fourteenth Amendment. That case involved an Idaho statute that accorded an automatic preference for a male administrator of a decedent’s estate, given two individuals equally related to the decedent. Then attorney (now Justice) Ruth Bader Ginsburg wrote the brief on behalf of the Reed plaintiff, successfully arguing that the Idaho law was unconstitutional. Unfortunately, she did not persuade the Court to apply to gender discrimination cases the strict scrutiny that applied in racial discrimination cases. Two years later, in Frontiero v. Richardson, Ginsburg was amicus curiae for the plaintiff in a case that challenged the Air Force’s automatic allocation of spousal benefits to married male service members, but required married female service members to show that their husbands were dependent on them before receiving a spousal benefit. Eight of the justices agreed that the Air Force’s policy was unconstitutional, but they could not agree on the appropriate level of scrutiny under which to evaluate the law. Thereafter it became likely that gender discrimination claims always would be subject to “intermediate scrutiny,” not strict scrutiny.

For many feminists, removing formal obstacles to women’s participation in all aspects of political, social, and economic life was the primary goal of early litigation. Yet others became dissatisfied with this formal equality approach and instead sought reform that would achieve substantive equality between women and men. The underlying rationale is that in cases in which women and men are not equally situated (e.g., pregnancy), treating the sexes the same operates in fact as a form of discrimination against women, by denying them the care they need. This problem is illustrated by the case of Geduldig v. Aiello, in which the Supreme Court found that the exclusion of pregnancy from the California state disability plan did not violate the Equal Protection

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13 404 U.S. 71 (1971) (rejecting legal preference between two equally related individuals for the male administrator of a decedent’s estate).
16 See, e.g., Catharine A. MacKinnon, Substantive Equality: A Perspective, 96 Minn. L. Rev. 1, 6 (2011) (“But what about all those situations in which the sex inequality is real, so the sexes are situated unequally? The more pervasive the reality of sex inequality is, the fewer outliers will be permitted in reality, so the more that reality will look like a sex-based difference, mapping itself onto (the social idea of) sex as such, which it will be increasingly rational for law to ignore as it ascends the tiers of scrutiny.”).