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Journal

UCLA Women's Law Journal, 3(0)

Author

Hendelman, Gwen Thayer

Publication Date

1993

DOI

10.5070/L331017575

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ESSAY

SISTERS IN LAW: GENDER AND THE INTERPRETATION OF TAX STATUTES

Gwen Thayer Handelman*

Notwithstanding the insights of conventionalism and the appeal of the concept of an “interpretive community,”¹ there is both obvious and not-so-obvious diversity in the legal profession, even behind the apparent homogeneity of the upper-middle-class mainstream legal elite. The differences play themselves out not only in our substantive conclusions as lawyers but also in the way we reason, not only in our policy judgments but also in our methodology. My particular concern in this Essay is how these differences manifest themselves in the central task of tax lawyering: statutory construction.

For the past few years, I have been worrying about people’s belligerent attitudes toward paying taxes and the consequent ethic among some taxpayers and their legal advisers that seems to condone misrepresentation and virtual thievery in reporting income tax liability.² My focus has been on defining standards of intellectual

* Associate Professor, Washington and Lee University School of Law, Lexington, Virginia; B.A. 1968, J.D. 1981, University of Michigan. Many thanks go to an extraordinary research assistant, Melissa Lande, and colleagues David Caudill, Mary Lou Fellows, Mark Grunewald, David Millon, Doug Rendleman, Joan Shaughnessy, and Allan Vestal; and to the Frances Lewis Law Center, which provided financial support.

1. See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980). Stanley Fish is among the most notable proponents of the view that “interpretive communities” are defined by instinctively shared assumptions and procedures that constrain the understanding of the meaning of rules.

2. A character in an English mystery novel nicely sums up my view: “[A] man who enjoys the privileges of living in a country, and yet is not willing to make his just contribution to that country’s exchequer, is no more an upright or honourable man than

integrity for private practitioners on whom taxpayers rely to resolve statutory ambiguity in assessing their obligations under the tax laws. My purpose has been to delineate the distinction between a responsible interpretation of an ambiguous statute, on the one hand, and exploitation of statutory ambiguity in order to represent a client's preferences (generally, not to pay taxes) as law, on the other.³ Whatever one's view of the propriety or inevitability of the expression of "naked preference" in judicial decisionmaking,⁴ surely it must be agreed that private practitioners who have substantial practical power but no political authority and no accountability are bound to define the civic obligations of their clients in accordance with the judgments of those who are authorized to speak for the public.

Or so I thought. In *Zen and the Art of Statutory Construction*,⁵ pursuant to the view that only politically authorized decisionmakers legitimately can define the scope of legal rights and duties, I proposed that lawyers approach statutory interpretation as an attempt to adopt the perspective of the historic drafter(s). I was startled by the fervor with which several colleagues disputed that it was even possible, let alone appropriate, for interpreters to set aside their preconceptions and assume another's standpoint. On at least one occasion, the point was made with such feeling that I had the impression that I had suggested an act of self-mutilation. I began to detect that women, who uniformly failed to object to the propriety or feasibility of the methodology, were more comfortable with my proposal than men. Quite technical in portions and interspersed with mathematical equations, *Zen* does not look much like "women's work." Nevertheless, I had to consider that somehow I

one who spends a week at a first-class hotel and leaves without paying his bill." SARAH CAUDWELL, *THE SIRENS SANG OF MURDER* 218 (1989).

Of course, I would hold women equally culpable. However, statistics indicate that women in fact are less likely to evade tax liability. J. Andrew Hoerner, *Why Comply? Michigan Conference Focuses on Why Taxpayers Do Not*, 49 *TAX NOTES* 1294, 1297 (1990) (citing study of Ann Witte of Wellesley College).

3. Gwen T. Handelman, *Constraining Aggressive Return Advice*, 9 *VA. TAX REV.* 77 (1989) [hereinafter Handelman, *Return Advice*]; Gwen T. Handelman, *Counseling Ordered Liberty: Reply to a Commentary*, 9 *VA. TAX REV.* 781 (1990); Gwen T. Handelman, *Caring Reasonably*, 20 *CAP. U. L. REV.* 345 (1991).

4. "When a naked preference is at work, one group or person is treated differently from another solely because of a raw exercise of political power." Stephen M. Feldman, *Exposing Sunstein's Naked Preferences*, 1989 *DUKE L.J.* 1335, 1338 (quoting Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *COLUM. L. REV.* 1689, 1693 (1984)).

5. Gwen T. Handelman, *Zen and the Art of Statutory Construction: A Tax Lawyer's Account of Enlightenment*, 40 *DEPAUL L. REV.* 611 (1991).

brought my womanhood into my professional undertakings, that my work is that of "a lawyer and a woman,"⁶ although I have never before formally addressed "women's issues" or referred to feminist scholars.

I have now taken some time away from my more traditional legal research to acquaint myself with a sampling of the literature on gender differences and "difference" feminist jurisprudence.⁷ As explained more fully below, Carol Gilligan's *In a Different Voice*⁸ posits that divergent moral orientations may be traceable to gender. She suggests that two different "modes of describing the relationship between other and self" grow out of the process of establishing gender identity: females become oriented toward creating and sustaining connections with others; males, toward separation.⁹ These different social orientations shape the direction of moral development, respectively, toward an ethic of care and responsibility or toward an ethic of autonomy characterized by rights and rules. The other influential work is Deborah Tannen's best-selling book on the theme of differences between men and women in their use of language.¹⁰ She employs a "status-connection framework" that is built, not on Gilligan's work, but on sociolinguistic concepts of power and solidarity as motivations for conversation.¹¹ She finds that it is characteristic of women to use language to "create a community" and for men to use language to "manage contest."¹²

Despite the apparent incongruity between academic studies on how individuals come to define a "self" and situate themselves in a social context and the technical minutiae that comprises much of tax analysis, these works offered practical insight into my work as a tax lawyer. In this paper, I begin to crystallize my thoughts on why men and women might approach the reading of tax statutes differently. I can see that my prescription in *Zen* of diligent attention to

6. Karen Gross, *Foreword: She's My Lawyer and She's a Woman*, 35 N.Y.L. SCH. L. REV. 293, 294 (1990).

7. I concentrate on two works so widely read that they inevitably are brought into any public discourse on the influence of gender on modes of reasoning and use of language.

8. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

9. *Id.* at 1.

10. DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990) [hereinafter TANNEN II]; see also DEBORAH TANNEN, *THAT'S NOT WHAT I MEANT!: HOW CONVERSATIONAL STYLE MAKES OR BREAKS YOUR RELATIONS WITH OTHERS* (1986) [hereinafter TANNEN I].

11. TANNEN II, *supra* note 10, at 300; see TANNEN I, *supra* note 10, at 101-17.

12. TANNEN II, *supra* note 10, at 210.

and identification with the historic drafter may reflect my social-psychological orientation as a woman and may actually tend to offend male values.¹³ Of course, my work also reflects other determinants of identity,¹⁴ for example a place of relative privilege in American society, notwithstanding my gender, that may influence me to reside greater trust in that society and recognize, because of the greater benefits I have enjoyed, greater social obligation than others less privileged. Nevertheless, the influence of gender appears to be powerful, and I am hopeful that the recognition of gender differences in approaches to tax practice can inform the effort to define ethically responsible tax advice.

What follows is neither social science nor legal reasoning, although perhaps the application of a mind that "thinks like a lawyer" to social science data and hypotheses. I describe the social orientations that the literature on gender differences has associated with men and women, respectively, and examine my own work in light of these insights. For these purposes, I assume that Carol Gilligan and Deborah Tannen have reasonably accurately described two distinct orientations, whether or not they are associated with gender, that are expressed in social interaction. While I do not assert that the correlation with gender is innate or absolute, I accept for present purposes the empirical evidence that the different orientations are associated with gender generally and refer to them as such. Recognizing the potential for misunderstanding about this somewhat emotionally-charged subject, it might be well to begin by

13. I recognize that there would be a difference of opinion as to whether what I have undertaken is either feminist or jurisprudence. Compare Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 833-34 (1990) (defining "feminist" as challenging women's subordination) and Jeanne L. Schroeder, *Abduction from Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 TEX. L. REV. 109, 114-15 (1991) (forwarding as a feminist goal "redefining the concept of person and law in light of women and women's insights") and Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 802-22 (1989) (criticizing Carol Gilligan's gender "stereotypes") with Kathryn Abrams, *Feminist Lawyering and Legal Method*, 16 LAW & SOC. INQUIRY 373 (1991) (including as feminist method "standpoint" that argues that those with shared experiences that are not shared by the dominant group allow the outsiders to see different elements of reality) and Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989-90) (defining as "feminist" work derived from female experiences) and Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 3-4 (1988) (asserting that "truly feminist jurisprudence" is built on "feminine insights into women's true nature . . .").

14. "Everyone is shaped by innumerable influences such as ethnicity, religion, class, race, age, profession, the geographical regions they and their relatives have lived in, and many other group identities—all mingled with individual personality and predilection." TANNEN II, *supra* note 10, at 16.

grounding my premise that gender may influence the practice of tax law.

I. THE UNCERTAIN ORIGINS OF DIFFERENCE

Controversy has raged over whether differences in social orientation are innate as well as over whether gender is the sole or most significant determinant of the way individuals define themselves in relation to others. I do not propose that one's "essential" nature is determined by the reproductive fraction of human biology. Recognizing gender as a powerful cultural determinant is as far as I am willing to go. It is hardly debatable that one's culture influences one's way of seeing and understanding the world and modes of relating to others. For example, we are accustomed to the concepts of a "legal culture" and "thinking like a lawyer," and the popular press reflects virtually universal appreciation that professional identity may be tied to a particular orientation.¹⁵ In a society that accords such great importance to gender identity, it is not outlandish to suppose that distinctive male and female cultures have emerged.

Those who recognize distinct male and female orientations do not necessarily agree on the source of the differences. Carol Gilligan makes "[n]o claims" about whether differences in orientation are natural or conditioned, explaining that "[c]learly, these differences arise in a social context where factors of social status and power combine with reproductive biology to shape the experience of males and females and the relations between the sexes."¹⁶ Still, she appears to think that gender differences are deeply psychologically rooted, apparently accepting the Freudian premise that establishment of gender identity is the central developmental task of childhood. By this account, if the primary caretaker is female, as is most often the case, the male need for self-definition necessarily takes the form of differentiating himself from the female. However, in estab-

15. See, e.g., Keith R. Ablow, *A Preoccupation with Image: Why Psychiatrists Don't Talk about What They Do*, WASH. POST, June 2, 1992, at 9 (stating that psychiatrists have a special way of seeing and thinking about the world); Harry Stein, *The Media's Middle Name is Not Objectivity*, TV GUIDE, June 13-19, 1992, at 33 ("[E]very community is possessed of a distinct culture, a set of shared assumptions that have taken on the status of givens. And anyone who doubts that journalism is an exception is living in a world far removed from this one."). [My editor questioned whether I wanted to use TV GUIDE as a source, but it rather tickled me to use such an unpretentious reference and so gently urge my view that lawyers and academics desperately need to stay in touch with and learn from popular culture.]

16. GILLIGAN, *supra* note 8, at 2.

lishing "their primary definition of self," girls identify with the female.¹⁷

One wonders if it might be more or less true that the child's "primary" definition of self will be based on reproductive equipment that is currently of little physiological significance, depending upon the magnitude of the consequences of gender assignment in the environment to which the child is being acculturated.¹⁸ Any male child subjected to the pervasive message that to be female like mother is bad for any reason (*e.g.*, because it is sexually "inappropriate" or will needlessly condemn the child to perpetual subordination, which the male child may escape) is likely to want to establish distance from her. If the mother is the predominant figure in the child's universe, then separation may define the dominant theme of the child's social-psychological orientation.

Carol Gilligan attributes different orientations to the process of gender differentiation, but they may result also or instead from establishing cultural identity. The Freudian framework within which she operates has its origins in nineteenth century, middle-class Europe. Different cultural influences may shape child development differently. Or it may be that the differences in social orientation are less psychologically embedded than Gilligan supposes. She herself recognizes that, "the different [moral] voice . . . is characterized not by gender but theme. Its association with women is an empirical observation" and that "this association is not absolute."¹⁹ Cultures associated with various racial, ethnic and religious groups are social constructions that might be powerful determinants of values that defy the gender associations. For example, Japanese culture reflects "female" values of connection and commonality, discouraging differentiation from others, as illustrated by a saying that warns of the perils of self-promotion: "one step ahead into the darkness."²⁰

In addition, the social orientation and attendant moral ethic and uses of language that grow out of women's experience of subordination may be shared with other groups that have occupied the position of "other" in our society. First, oppression may foster an

17. *Id.* at 8.

18. *Cf.* Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 86 (asserting that there is no selfhood that pre-exists society).

19. GILLIGAN, *supra* note 8, at 2.

20. *See, e.g.*, TAKAKO KISHIMA, *POLITICAL LIFE IN JAPAN: DEMOCRACY IN A REVERSIBLE WORLD* (1991); *cf.* TANNEN II, *supra* note 10, at 217 (noting that to appear "better than others" violates the egalitarian ethic of women's culture: "people are supposed to stress their connections and similarity").

orientation toward connection due to a perceived need for solidarity within the subgroup, and social isolation imposed by the larger society may facilitate commitment to the subgroup.²¹ Further, skills such as attentiveness and responsiveness to others both help maintain an essential connection with others and also prove useful to the “outsider” in coping with or even surviving in the dominant culture. The standpoint of oppressed groups enables them to see more aspects of the social relations that oppress them.²² The “outsider’s” perspective is one of awareness: watching, listening, synthesizing, and reacting to those who control access to gratification and survival. This is a perspective that all members of outsider cultures may share to some extent, depending upon the urgency of the survival issues confronted by the individual or group. Anne Wilson Schaeff traces women’s culture²³ to efforts—some productive and creative, others counter-productive and self-destructive—to cope with an assigned inferior status in the dominant culture²⁴ that Adrienne Rich has called “the Kingdom of our Fathers.”²⁵ Those coping mechanisms might well be exhibited by others assigned low status on bases other than gender.

While I might speculate endlessly, I am neither competent nor motivated to resolve the issue of the origins of the different orientations that have been identified with gender. There appears to be widespread agreement, however, that, whatever their causes, these academic models reflect appreciably distinct approaches to social relationships found in the “real world.” That the differences in social orientation between men and women identified here are neither absolute nor “natural” is indicated both by experiential evidence that men and women fail to conform uniformly to the social or

21. See Steven F. Friedell, *The “Different Voice” in Jewish Law: Some Parallels to a Feminist Jurisprudence*, 67 IND. L.J. 915, 948 (1992); GILLIGAN, *supra* note 8, at 168–69 (citing studies of Carol Stack and Lillian Rubin of urban African-American and white working-class families).

22. See, e.g., ANNE W. SCHAEFF, *WOMEN’S REALITY: AN EMERGING FEMALE SYSTEM IN A WHITE MALE SOCIETY* 13–15 (1981); Nancy J. Hirschmann, *Freedom, Recognition, and Obligation: A Feminist Approach to Political Theory*, 83 AM. POL. SCI. REV. 1227, 1230 (1989); cf. TANNEN II, *supra* note 10, at 47 (observing that a “boy in a low-status position finds himself being pushed around” and so keeps “track of who’s giving orders and who’s taking them”).

23. Anne Wilson Schaeff uses the term “women’s reality.” See SCHAEFF, *supra* note 22.

24. See generally *id.* See also GILLIGAN, *supra* note 8, at 168 (citing JEAN B. MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN* (1976)); CATHARINE A. MACK-INNON, *FEMINISM UNMODIFIED* 38–39 (1987).

25. ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 56 (1976).

value orientations associated with their gender and by the commonalities between "women's culture" and cultures that are male-dominated. Thus, accepting as true that such differences exist, as I do for purposes of this endeavor, does not constitute a basis for reinforcing gender stereotypes. I echo Deborah Tannen's sentiments in this regard:

I always feel uneasy when I talk about male/female differences. There are many for whom the suggestion that there are such differences constitutes ideological heresy, and there are others who maintain that even if such differences exist, it is best not to talk about them, because anything that bolsters the idea that women are different from men will be used to denigrate women. (The same can be said of research on racial, ethnic, and class differences.) I see this danger, and I also see the danger of generalizing, especially when not enough research has been done to test intuition and observation. There are always exceptions to general patterns, and describing the patterns seems to slight the individuals who are exceptions. (To such individuals I offer sincere apologies.) But I decided to go ahead and confront these issues because I have found that talking about male/female differences in this way evokes a very strong "aha" response: Many people exclaim that this description fits their experience²⁶

My sense is that my experiences as a female have influenced my perspective. In this Essay, I concentrate on identifying feminine undercurrents in my work and ignore its manifold expressions, in content and structure, of "thinking like a (male) lawyer."²⁷

26. TANNEN I, *supra* 10, at 204-05 (notes to chapter eight); see also TANNEN II, *supra* note 10, at 14-18. A cringe-inducing example of the sort of stereotyping to be avoided was identified for me by my colleague Doug Rendleman in an old article on (of all things) punctuation in legal writing. The author characterized the dash as the most "feminine" form of punctuation, reflecting capriciousness and undisciplined thinking. Lavery, *Punctuation in the Law*, 9 A.B.A. J. 225, 228 (1923).

27. Law school indoctrinates students in values associated with male culture. See, e.g., RAND JACK & DANA C. JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 32-37 (1989); Leslie Espinoza, *Constructing a Professional Ethic: Law School Lessons and Lesions*, 4 BERKELEY WOMEN'S L.J. 215 (1989); Joan M. Shaughnessy, *Gilligan's Travels*, 7 LAW & INEQ. J. 1, 14-20 (1988). I believe that most of us are well indoctrinated before we arrive or we would not have been admitted in the first place.

For my purposes, it hardly matters how individuals come to develop their orientation since my object is simply to promote better lawyering through self-awareness, far short of the intense introspection associated with psychotherapy. Nevertheless, I think it appropriate to refer to the divergent orientations as "male" and "female," because the insights into my own work discussed here arose in that context. Because I cannot and do not wish to decide the significance of gender in the formation of the two orientations on which Carol Gilligan and Deborah Tannen base their work (or to assume that there are not others), it would be appropriate for me to use quotation marks around male (or men) and female (or women) throughout. However, I will not adopt that tiresome tech-

II. THE NATURE OF GENDER DIFFERENCES

The publication a few years ago of Carol Gilligan's *In a Different Voice* familiarized a broad readership with the hypothesis that there are two fundamentally divergent social-psychological orientations, allocated roughly along gender lines. Her thesis is that divergent social orientations result in distinctive approaches to moral reasoning: defining moral problems either in terms of rights and rules or as issues of care and responsibility.²⁸ Deborah Tannen has explored the hypothesis that, depending upon orientation, communication is seen as a means to achieve either power or solidarity. There follows a summary description of the constellation of characteristics associated with men and women that I have derived from these authors and employed to assess the influence of gender on my approach to the interpretation of tax statutes.

The orientation associated with maleness is individualistic and hierarchical, emphasizing separateness. Carol Gilligan relates that "[f]or boys and men, separation and individuation are critically tied to gender identity since separation from the mother is essential for the development of masculinity."²⁹ Males thus focus on achieving autonomy, differentiating themselves from others, and negotiating status, exemplified in a "need for distinctive achievement."³⁰ Gilligan's studies show that men tend to perceive intimacy as dangerous.³¹ The desire for personal distance leads to abstraction of human relationships and away from empathy. Men seek to achieve gratification through dominance, and strive "to gain control over the sources and objects of pleasure in order to shore up the possibilities for happiness against the risk of disappointment and loss."³²

"[P]roceeding from a premise of separation but recognizing that 'you have to live with other people,'"³³ the individual focused on separateness abstracts moral problems from interpersonal situa-

nique, and I ask readers who think that this omission risks gender stereotyping to supply that punctuation mentally at the appropriate junctures.

Patricia Cain warns not to confuse "'standpoint critique' with existential reality," but I am not sure that the confusion can be entirely avoided. See Cain, *supra* note 13, at 213; see also Hirschmann, *supra* note 22, at 1229 (defining a standpoint "[a]s the perspective from which one views the world, social relations, and hence reality" and noting that "[t]o the degree that a particular group of people (e.g., women) share socially and politically significant characteristics, they will share a standpoint").

28. GILLIGAN, *supra* note 8, at 73.

29. *Id.* at 8.

30. *Id.* at 162.

31. *Id.* at 40.

32. *Id.* at 46 (referring to Freud's definition of autonomy).

33. *Id.* at 37 (quoting study subject "Jake").

tions³⁴ and seeks rules that, "by limiting interference make life in community safe, protecting autonomy through reciprocity, extending the same consideration to others and self."³⁵ Morality is equated with observing the autonomous bounds of others and a Golden Rule of not doing unto others what you would not want to have done to you.³⁶ It is a morality of one-on-one (*mano a mano?*) respect determined from the perspective of the moral actor rather than the other immediately concerned, let alone that of those not immediately represented for whom the action or inaction may have consequences.

The orientation associated with femaleness emphasizes commonalities and sustaining connections, defining the self in relation to others. Establishing their gender identity with reference to commonalities shared with their mothers, girls have "a basis for 'empathy' built into their primary definition of self."³⁷ Gilligan reports that "[g]irls emerge with a stronger basis for experiencing another's needs or feelings as one's own (or of thinking that one is so experiencing another's needs and feelings)."³⁸ Those focused on living life in relationships attempt to achieve gratification by trying to please others rather than by trying to dominate others. Gilligan's studies show that women tend to fear isolation.³⁹ They are reluctant to differentiate themselves in any way that will risk dislike, because likability is essential to maintaining connection with others. Women perceive that aggression is tied to "the fracture of human connection," and thus pursue "activities of care" that "make the social world safe, by avoiding isolation and preventing aggression rather than seeking rules to limit its extent."⁴⁰

For those focused on connection, responsibility to others becomes the central moral dictate, and visions of right and wrong are particularized and contextualized, rather than abstract. The "capacity 'to understand what someone else is experiencing' is the prerequisite for a moral response."⁴¹ Moral problems arise "from conflicting responsibilities rather than from competing rights" and

34. *Id.* at 32.

35. *Id.* at 37-38.

36. *Id.* at 19-20.

37. *Id.* at 8.

38. *Id.* (quoting Nancy Chodorow, *Family Structure and Feminine Personality*, in *WOMEN, CULTURE AND SOCIETY* (Michelle Z. Rosaldo & Louise Lamphere eds., 1974)).

39. *Id.* at 42.

40. *Id.* at 43.

41. *Id.* at 57 (quoting study subject "Claire").

require for their resolution “a mode of thinking that is contextual and narrative rather than formal and abstract.”⁴² Women assume an obligation of vigilance “to consider all that’s involved, to be as aware as you can be of what’s going on, as conscious as you can of where you’re walking.”⁴³

Inattention to one’s own interest can be associated with a female orientation. Carol Gilligan explains that, historically, the ethic of care has led to self-denial and subordination:

As the events of women’s lives and of history intersect with their feelings and thought, a concern with individual survival comes to be branded as ‘selfish’ and to be counterpoised to the ‘responsibility’ of a life lived in relationships. And in turn, responsibility becomes, in its conventional interpretation, confused with a responsiveness to others that impedes a recognition of self.⁴⁴

However, the ethic of care does not lead inexorably to self-abnegation: “Once obligation extends to include the self as well as others, the disparity between selfishness and responsibility dissolves.”⁴⁵ Gilligan portrays moral maturity for women as achieved in moving from equating goodness with self-denial to recognizing oneself as included in the network of relationships that moral action is directed to sustain. This should not be confused with “selfishness,” a concept that dichotomizes self and others, because self is defined not with reference to the degree of separation achieved but in terms of location in a “web of connection.”

Deborah Tannen has authored several sociolinguistic analyses of conversational style, and in *You Just Don’t Understand* she explores the different ways that men and women use language. Tannen’s work focuses on the metamessage: “[w]hat is communicated about relationships, attitudes toward each other, the occasion, and what we are saying.”⁴⁶ Different conversational styles reflect the different means of achieving social gratification. “Conversational style isn’t something extra, added on like frosting on a cake,” she explains, “It’s the very stuff of which the communication cake is made.”⁴⁷

According to Tannen, men employ conversation to negotiate status. For those “who see relationships as fundamentally hierarchical,” there are only two choices: one is in a position of either

42. *Id.* at 19.

43. *Id.* at 99 (quoting study subject “Sharon”).

44. *Id.* at 127.

45. *Id.* at 94.

46. TANNEN I, *supra* note 10, at 29.

47. *Id.* at 46.

superiority or inferiority in relation to others, one-up or one-down. "[T]o be independent [the hierarchically oriented] must be dominant rather than subordinate,"⁴⁸ and power comes from opposition to others. "In this world, conversations are negotiations in which people try to achieve and maintain the upper hand if they can, and protect themselves from others' attempts to put them down and push them around."⁴⁹

For women, "the community is the source of power,"⁵⁰ and [t]he symmetry of connection is what creates community."⁵¹ Women seek connection through conversation⁵² and tend to look for agreement, while men struggle to identify a unique point of view.⁵³ Tannen recognizes that both sexes use conversation to achieve power and solidarity, but asserts that they "place different relative weights on status versus connection,"⁵⁴ and demonstrate distinctive manners of achieving dominance or connection in conversation.⁵⁵ "[B]oys and men often use opposition to establish connections, [and] girls and women can use apparent cooperation and affiliation to be competitive and critical."⁵⁶

"[B]oys and girls grow up in what are essentially different cultures,"⁵⁷ and children learn to use language differently in their play in their "sex-separate peer groups."⁵⁸ Competition and flouting authority is *de rigueur* in boys' play.⁵⁹ Boys vie for leadership based on arbitrary power, and "compliance indicate[s] submission to the authority of the leader" rather than an "act of cooperation insofar as it reinforces the smooth working of the group."⁶⁰ "[F]raming proposals with 'Let's' and 'We,' " girls imply that the "group [is] a community, and the results of compliance would increase the power of the community, not the individual power of the person making

48. TANNEN II, *supra* note 10, at 292.

49. *Id.* at 24-25.

50. *Id.* at 178 (discussing Barbara Johnstone, *Community and Contest: How Women and Men Construct Their Worlds in Conversational Narrative* (1989) (unpublished manuscript, on file with author)).

51. *Id.* at 29.

52. *Id.* at 300.

53. *Id.* at 167.

54. *Id.* at 71.

55. *Id.* at 162-65, 171-74.

56. *Id.* at 171.

57. *Id.* at 18.

58. Deborah Tannen, *Teachers' Classroom Strategies Should Recognize That Men and Women Use Language Differently*, *CHRON. HIGHER EDUC.*, June 19, 1991, at B1.

59. TANNEN II, *supra* note 10, at 250-51.

60. *Id.* at 157.

the suggestion."⁶¹ "Not accustomed to having others try to bend their will simply to solidify a dominant position, girls do not learn to resist others demands on principle."⁶² Girls give and respond positively when the reasons cited for exercises of leadership are "for the general good."⁶³

III. SOCIAL PSYCHOLOGICAL ORIENTATION AND TAX LAW

That writings on gender differences in moral reasoning and conversational styles could instruct the methodology of tax lawyers seems a preposterous proposition initially but is almost obvious upon reflection. Moral judgments underlie any system of taxation,⁶⁴ and an individual's response to the tax system has moral implications as well.⁶⁵ Different ethical traditions answer differently questions of whether a moral obligation to pay (or refuse to pay) taxes exists and, if so, the basis of such an obligation, the content of any attendant conditions, and who is to judge whether the conditions have been satisfied.

Carol Gilligan suggests that gender influences one's receptivity to particular ethical perspectives and raises for tax lawyers the issue of how, if professional judgments reflect one's values at all, they may be colored by gender. Deborah Tannen's work suggests that gender differences affect individual styles of communication, ways of hearing and responding to others. Viewed as a mode of communication, statutes must be interpreted, and methods of resolving statutory ambiguity may vary with conversational style. Then, differences in social orientation could produce not only divergent philosophical and political values, but different approaches to statutory interpretation, and potentially different understandings.

Indeed, men and women may apply their lawyering skills to entirely separate realities. Carol Gilligan finds that men and wo-

61. *Id.* at 156.

62. *Id.* at 154.

63. *Id.* at 157.

64. See generally HAROLD M. GROVES, *TAX PHILOSOPHERS: TWO HUNDRED YEARS OF THOUGHT IN GREAT BRITAIN AND THE UNITED STATES* (Donald J. Curran ed., 1974).

65. See, e.g., MEIR TAMARI, "WITH ALL YOUR POSSESSIONS": JEWISH ETHICS AND ECONOMIC LIFE 209-17 (1987); Eugene Bardach, *Moral Suasion and Taxpayer Compliance*, 11 *LAW & POL'Y* 49 (1989); Charles E. Curran, *Just Taxation in the Roman Catholic Tradition*, 13 *J. RELIGIOUS ETHICS* 113 (1985); Azim A. Nanji, *Ethics and Taxation: The Perspective of the Islamic Tradition*, 13 *J. RELIGIOUS ETHICS* 161 (1985); Donald W. Shriver Jr. & E. Richard Knox, *Taxation in the History of Protestant Ethics*, 13 *J. RELIGIOUS ETHICS* 134 (1985).

men "perceive and construe social reality differently,"⁶⁶ and Deborah Tannen makes the same observation in noting that men and women may interpret the same conversation differently.⁶⁷ Yet these different realities may go unacknowledged. Gilligan's research suggests that "men and women may speak different languages that they assume are the same, using similar words to encode disparate experiences of self and social relationships."⁶⁸

Women have brought "more choices and more voices" to the legal profession and "additional options for behavior" to address legal problems."⁶⁹ Being "comfortable being yourself" is essential to the effectiveness of a lawyer, and "to the extent that there are differences between men and women, women will be the most effective lawyers they can be when they [follow] the instincts they bring to it."⁷⁰ Recognizing the pressures "to be something that we aren't," a panelist at an American Judicature Society conference relayed that her "goal is to become myself within this profession."⁷¹ As I finished *Zen and the Art of Statutory Construction*, I had that sense of becoming myself in my profession.

IV. ZEN IN SUM

Zen and the Art of Statutory Construction was an effort to redeem intentionalist statutory interpretation as theoretically appropriate for private attorneys and to demonstrate the feasibility of credible reconstructions of legislative intent. The article distinguishes the interpretive role of the private counselor from that of the judge and defends and illustrates intentionalist analysis cast as an historical inquiry. *Zen* prescribes this form of intentionalist approach to statutory construction for lawyers, such as tax advisers, whose judgments determine the incidence of government benefits and burdens when statutory language is ambiguous and clarification is not sought through administrative ruling or judicial decision. This prescription for private practitioners comports with the positivist notion of legal authority that only a judgment authorized by the instruments of organized society counts as "law."

66. GILLIGAN, *supra* note 8, at 171.

67. TANNEN II, *supra* note 10, at 13.

68. GILLIGAN, *supra* note 8, at 173.

69. *Different Voices, Different Choices? The Impact of More Women Lawyers and Judges on the Justice System*, 74 JUDICATURE 138, 143 (transcript of panel discussion sponsored by the American Judicature Society) (quoting Jean R. Haynes).

70. *Id.*

71. *Id.*

Zen is premised on my earlier work⁷² which recounts the long-standing debate about the ethics of tax advisory practice and argues that standards of responsible interpretation should be observed in advising tax return positions to be routinely reported as compliant with law. Although rarely phrased in these terms,⁷³ I believe that the meaning of "law," and therefore of the "bounds of the law" and "compliance" with law, is the hidden core of the enduring concern about appropriate standards of return advice⁷⁴ and the similar issues that are now being raised about the culpability of legal advisers in savings and loan failures and corporate environmental crimes. The articulated differences between private practitioners and the government center on how to interpret "doubtful" or "questionable" statutory requirements. I have argued that private practitioners, who are not politically authorized decisionmakers, should constrain interpretation of a tax statute to the meaning assigned by decisionmakers who have political authority: legislative, judicial or administrative. Otherwise, routine reporting of tax liability, without explanation that the position is simply one lawyer's unauthorized view, is misrepresenting as "law" the adviser's own (actually, the client's) preferences.

For some time the federal tax system tolerated reporting, under various guises, simple personal preferences or opinions as to the requirements of the tax laws.⁷⁵ One costume in which personal

72. See *supra* note 3.

73. But see Judson I. Temple, *The Tax Return and the Standard of Accuracy* (pt. 1), 15 REV. TAX'N INDIVIDUALS 315 (1991); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

74. Both the American Bar Association (ABA) and the American Institute of Certified Public Accountants (AICPA) have adopted ethical standards for tax advisers that permit a practitioner to advise a client to report without disclosure, that is, as an accurate statement of the requirements of the internal revenue laws, a position supported only by a "good faith argument" for "modification" or even "reversal of existing law." ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 352 (1985), reprinted in 39 TAX LAW. 631 (1986) (emphasis added) [hereinafter Formal Op. 85-352]; AICPA Statement on Responsibilities in Tax Practice (1988 Rev.) No. 1, ¶¶ .02a, .07 (August 1988) (emphasis added) [hereinafter SRTP No. 1]. Thus, each of the standards incorporates permission to deviate from existing legislative, judicial, or administrative authority and substituting the adviser's judgment for "existing law." The Treasury Department, on the other hand, insists that positions reported as in compliance with "law" conform to "authority" as defined under the accuracy-related penalty regulations. Treas. Reg. § 1.6662-4(d)(3)(iii). "Authority" includes legislative, judicial, and agency decisions but not articles, treatises, or other opinions generated by individuals acting in a non-governmental capacity.

75. See Treas. Reg. § 1.6694-1(a) (1978) (superseded) (providing that a tax return preparer's "good faith" disagreement with an IRS regulation or ruling would not be considered negligent or intentional disregard of rules or regulations). The new preparer penalty provisions enacted in 1989 generally require clear and obvious disclosure of

preference can dress is a prediction of the likelihood of success in litigation. Finding ambiguity in the Code, practitioners have felt free to pull out of their legal analytical bag of tricks "reasonable" or "realistically likely to succeed" arguments to support the interpretation most favorable to their clients. The American Bar Association adopted these formulations as ethical standards of return advice.⁷⁶ The claim to legitimacy of the definition of tax advising as predicting the outcome of litigation rests on the Holmesian/realist definition of law as what the courts will say it is—which may be based on an extension, modification, or even reversal of existing law—rather than a "more formalistic evaluation of what the law really is."⁷⁷ This definition seems entirely consistent with the notion that law is the product of politically-authorized decisionmakers. However, the legitimacy of the ABA standard is undermined because it allows a lawyer to advise reporting, without explanation, a position that a court *might*, but probably would *not*, endorse. The danger of such a course on the part of the private practitioner is that legal reasoning may become fortunetelling, an exercise of imagination influenced by wishful thinking, creative rather than compliant.

Intentionalist methodology is premised on the view that only a politically authorized judgment is law. Indeed, as ordinary citizens we normally recognize what does and does not count as law by who produced the words, not by which words were produced, at least if those authorized as lawmakers roughly observe prescribed procedure. Even when a court declares a statute unconstitutional, which might be cited as an instance of when what the words say trumps who issued them, laws are only recognized as unconstitutional by *who* so declares. The generators of legislation enjoy presumptive political authority. Therefore, "the content supplied to the words of a statute by legislative will—'legislative intent'—"⁷⁸ presumptively is "law."

positions contrary to rulings and regulations. See H.R. REP. NO. 658, 94th Cong., 1st Sess. 278 (1975).

76. Formal Op. 85-352, *supra* note 74 (adopting arguably higher "realistic possibility" standard to supersede "reasonable basis" standard of Formal Opinion 314). The standard adopted is as follows: "A lawyer may advise reporting a position on a tax return so long as the lawyer believes in good faith that the position is warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law and there is some realistic possibility of success if the matter is litigated."

77. Lawrence Zelenak, *Reforming Penalty Reform: Congress Should Eliminate the Profusion of Accuracy Standards*, 52 TAX NOTES 471, 473 n.20 (1991).

78. Handelman, *supra* note 5, at 618.

The legislative intent identified by the interpreter necessarily will be the product of the interpreter's perceptions, and so a subjective intellectual construct. However, "legislative intent" is not an artifice but the actual experience of real people. Like other issues of historical fact, legislative intent can be reliably identified, given sufficient probative evidence, if the interpreter undertakes a good faith review of the evidence. A careful inquiry into historical fact, motivated by a genuine desire to grasp the communication represented by legislation, offers the best chance for ascertaining how those who crafted it would have wanted the statute to apply in circumstances not expressly provided for or perhaps not even specifically contemplated.

Thus, I propose that statutory interpretation be approached by lawyers (as opposed to judges) as an effort to understand what the actual people involved in the legislative process were trying to communicate through legislation. This is an exercise in empathic understanding, stepping into the shoes of the drafter and assessing what the words mean from that viewpoint. Although legislative intent cannot always be resurrected, it can be reliably identified where probative evidence is available if, as far as possible, the reader sets aside preconceptions as to what the words mean or should mean, and understands the words in the sense that the drafter used them, adopting for these purposes the drafter's perspective. The task challenges the tax advisor to learn all the available facts and draw the most plausible inferences from them.

Zen describes my resolution of the ambiguity in a tax provision using this approach. In federal tax law, statutes tend either to be fairly recently enacted or the subject of extensive judicial and administrative gloss which lightens the weight of a "dead hand." Judicial and administrative decisions are politically authorized judgments which practitioners may properly represent as "law." However, *Zen* posits a statutory construction problem unaddressed by judicial or administrative authority to highlight the task of ascertaining the *legislatively* authorized meaning: that is, legislative intent. The analysis demonstrates that the original meaning of ambiguous statutory terms can be reliably reconstructed so precisely as to reveal the application of the words even in circumstances not specifically foreseen.

In *Zen*, I tried to locate the thinking of the historic drafter in committee reports and the circumstances of enactment. Without reiterating a lengthy and somewhat technical discussion, I felt a high degree of assurance that I precisely identified the intended

meaning because there was substantial inferential evidence of the intended purpose of the provision and a mathematically exact solution. The problem addressed by the statute was disparate treatment of two different forms of economically identical transactions, and my reading of the words matched the mathematical solution to the inequity. Of course, my reconstruction was a subjective intellectual construct and could be said in that sense to be no less an expression of personal opinion than those I would label improper. In the circumstances, however, given the mathematical exactitude, it was highly implausible that the drafter had *not* intended the meaning I identified. The alternative was that fortuity accounted for the match between the mathematical solution and the verbal solution. It seemed much more plausible to me that the drafter was knowledgeable in both tax issues and statutory drafting, and thus that the finely fitted statutory remedy was not dumb luck.

V. FEMININE ZEN

Both the definition of civic obligation and the interpretive methodology set forth in *Zen* quite obviously reflect an orientation toward connection and an ethic of care and responsibility. Further, *Zen* not only reflects a complex of values derived from a social orientation associated with women, but also is problematic under a morality premised on autonomy. Interpretive methodology does not exist in isolation from substantive values, but I attempt to discuss them separately below because each offers distinctive manifestations of gender differences.

A. *Civic Obligation*

Zen's conception of social responsibility reflects commitment to and easiness with the existence of strong public (common) institutions. These sentiments are characteristic of those oriented toward connection.⁷⁹ *Zen* illustrates a particular conception of the nature and source of social obligation and also comfort with and trust in collective decisionmaking mechanisms, perhaps even to the point of affirmative discomfort with individualistic modes of decision, that arises from the strong sense of social obligation of an orientation toward connection. *Zen's* premise is that for a national community to endure, the unifying energy of the federal income tax

79. See, e.g., TANNEN II, *supra* note 10, at 178 (observing that women tend to feel that the community is the source of their power, and so community strength is reassuring).

must be preserved, and this is only possible if even under a self-assessment system a communal means of settling on the content of the tax laws is observed.

The social orientation reflected in *Zen* is that individuals are stronger when the collectivity is powerful enough to discharge effectively such responsibilities as we have undertaken together. *Zen* is directed to strengthening the central role of the tax system in marshalling commitment to collective efforts. Both the taxing process itself and its product, revenue, are instruments of national unity (or community). *Zen's* focus on compliant—that is, fair and forthright—reporting of tax liability reflects a desire to strengthen collective, as opposed to atomistic, approaches to problem-resolution because an effective means of raising revenue is essential to the survival of collective endeavors. It seems to me not coincidental that “no new taxes” are favored by those who emphasize “personal responsibility” and advocate dispersing to local governments and the private sector the task of addressing conditions that from another perspective seem beyond the control of any given locality or individual and thus best addressed in a unified, rather than fragmented, manner.⁸⁰

Revenue is essential to the practical success of efforts to address common problems; the process of revenue collection can also identify and create commonalities. First, despite the variegated deviations that are continuously debated,⁸¹ the federal income tax remains premised on the widely-endorsed view that collective endeavors should be supported by community members according to their ability to pay, and that similarly situated people (with respect to their ability to pay) should be treated similarly. Further, the shared experience of self-assessment connects a diverse citizenry at least as much as public rituals such as July Fourth fireworks. Additionally, disaffection with the federal income tax both reflects and promotes isolation and alienation from a national community, but debate about taxes is national sport, drawing in arm-chair quarterbacks from the far corners of the country. *Zen* seeks to protect that national community.

80. See Friedell, *supra* note 21, at 933–37 (noting the inconsistency of reliance on market forces to regulate even issues of commercial life with the “different voice” of Jewish and feminist ethics).

81. See, e.g., Daniel Halperin, *Valuing Personal Consumption: Cost Versus Value and the Impact of Insurance*, 1 FLA. TAX REV. 1 (1992); Louis Kaplow, *The Income Tax as Insurance: The Casualty Loss and Medical Expense Deductions and the Exclusion of Medical Insurance Premiums*, 79 CAL. L. REV. 1485 (1991); Stanley A. Koppelman, *Personal Deductions Under an Ideal Income Tax*, 43 TAX L. REV. 679 (1988).

Zen's conception of social obligation comports with a morality of care in contrast to notions of social obligation derived from a rights-and-rules focused ethic of autonomy. Continuing obligation arising from the fact of life in society characterizes the former; limited, sporadic obligation arising from the marked boundaries of individual autonomy defines the latter. The intellectual and ethical challenge of a morality of care is not "how to exercise one's rights without interfering with the rights of others," but how "to lead a moral life" recognizing obligations to the self, family and "people in general."⁸² A central issue is "how to carve out a space for the self without violating care."⁸³ The moral dilemma "becomes one of limiting responsibilities without abandoning moral concern."⁸⁴ Ability-to-pay as a basis for defining one's debt to society, a contextualized and relativistic judgment implicitly taking account of how much one has benefited from social organization—one's share of the social product⁸⁵—while assessing what one has to give, may be peculiarly compatible with this moral orientation.

Under an ethic of care, a moral obligation to assume responsibility and care for others is understood as the natural consequence of engaging in social interaction. Obligation arises "from the experience of connection and [is] conceived as a problem of inclusion rather than one of balancing claims" to autonomy.⁸⁶ Because "the reality of connection" is experienced "as given rather than as freely contracted," women "arrive at an understanding of life that reflects the limits of *autonomy and control*," rather than limited obligation.⁸⁷ Because human life *is* social life—from our births relying on social structure for survival—that obligation is inescapable. Non-fulfillment of obligation demands an explanation, while freedom from obligation "must be *achieved*."⁸⁸

Carol Gilligan's studies indicate that under an ethic of care, the line between law and morality is less distinct, or at least less salient, than under an ethic of autonomy.⁸⁹ What *does* it matter whether

82. GILLIGAN, *supra* note 8, at 21.

83. Hirschmann, *supra* note 22, at 1242.

84. GILLIGAN, *supra* note 8, at 21.

85. See, e.g., Alvin Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 YALE L.J. 1081 (1980).

86. GILLIGAN, *supra* note 8, at 160.

87. *Id.* at 172 (emphasis added).

88. Hirschmann, *supra* note 22, at 1241-42. Hirschmann argues that women's obligations are imposed by societal expectations, rather than elected by women; therefore, escaping these obligations requires both effort and justification. *Id.* Hirschmann labels this conception a "feminist model." *Id.* at 1242.

89. GILLIGAN, *supra* note 8, at 27-32.

obligation is termed "legal" or "moral" if it arises from the fact of living with others? People are nonconsensually obligated in many ways; "obligation is given [and] it does not really make sense to ask how it can arise."⁹⁰ The ethic of care "reflects a cumulative knowledge of human relationships, evolves around a central insight, that self and others are interdependent."⁹¹ The attentiveness to others thus demanded leads to awareness of the needs of others, giving rise to the obligation to act. Morality involves making decisions as to individual courses of action consistent with one's obligation to care for others, and so a multiplicity of preferences must be taken into account. Compliance with law accomplishes this. Law, as the product of the institutions of a community, may be seen as the vehicle by which consideration of those beyond the immediate parties is imported into individual decisionmaking. In this sense, law facilitates nurturing; it is a vehicle for caring for others.⁹²

Under this conception of law, lack of clarity in the terms does not negate the obligation to attend to the welfare of others. This obligation is not akin to the satisfaction of a debt for a sum certain, but asks for continuing cooperation premised on interdependence. That a statutory provision defining an obligation to the community is unclear does not result in relief from the obligation to contribute to the public good under an ethic that recognizes that obligation as arising from the fact of life in society. Rather, since the obligation but not the scope is clear, calculating one's fair share of tax becomes a moral dilemma. *Zen* approaches resolution of the moral dilemma raised by statutory ambiguity in determining one's debt to the collective fund with reference to a communal judgment that will clarify the public interest.

Consistent with an orientation of connection, *Zen* seeks agreement on a "common" understanding.⁹³ Adjudicative or administrative processes supply common definitions of ambiguous statutory terms. However, under the terms of the self-assessment system, taxpayers and their advisers decide on their own the application of the revenue laws to their circumstances. That private process needs to incorporate the obligations to the community as expressed by those recognized as empowered to speak for the community. Acting as

90. Hirschmann, *supra* note 22, at 1241.

91. GILLIGAN, *supra* note 8, at 74.

92. *But see* Shaughnessy, *supra* note 27, at 20 (asserting that "law is not nurturing" but is "regulated force").

93. TANNEN II, *supra* note 10, at 167 (observing that women use language to achieve agreement).

and for an individual (rather than on behalf of the community) cannot constitute compliance with "law" in a world where a web of connections generates obligations which are incorporated into law by those who are politically authorized to speak for the community. Thus, *Zen* concludes that such politically authorized judgments must support the assessments of taxpayers, whether determined privately or with recourse to a public decisionmaking apparatus.

To a rule-oriented person, if a statute is unclear on a point, there *is* no rule governing the case, and every person is entitled to act in his or her own self-interest, at least within a range bounded by clear pronouncements of others' rights. In this view, the taxpayer and adviser should be free to make any decision that does not affirmatively interfere with the rights of others (and individualists may have difficulty with the concept that the community, or the government as its surrogate, has rights).⁹⁴ Any decision in that range would be considered within the bounds of the law. If there is no rule, there is no legal obligation. Those who adhere to an ethic of autonomy can conceive of such a decision as *within* the law because law-as-rules sets negative bounds: thou-shalt-nots. Law in the sense of affirmative legal obligation is the exception in a world where action is presumptively "lawful" in the sense of not in violation of any rule. Frederick Schauer has identified how "from a feminist perspective," the avoidance of rules "can be seen as the embodiment of an excessively self-confident avoidance of constraint, deference, and respect for the decision-making capacities of others."⁹⁵ Of course, this is so only if the rejection of rules represents the rejection of obligation. Such is not the case in "women's reality."

94. See David R. Dow, *Individuals, Governments and Rights: A Reply to Cathleen Herasimchuk*, 30 S. TEX. L.J. 369 (1989) (responding to the contention that states are entitled to due process rights).

95. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 162 n.25 (1991).

Ironically, he makes these observations in the context of questioning the "association of ruleness with maleness." The association of rules with a male orientation, however, is in their status as exceptional constraints in a world where the opportunity for the sort of arrogance he describes is the norm, and there is no responsibility or obligation to others or the community—law, if you will—in the absence of rules. Schauer sees danger in the feminist methods of "particularity and a contextual sensitivity that is the antithesis of maleness," envisioning that a "particularist looking at every relevant aspect of immediate experience is unconstrained, immodest, non-deferential, and perhaps even arrogant." *Id.* In this assessment, Schauer severs the intuitive method associated with femaleness from its communalist moral orientation and imagines the application of women's method by an unconnected autonomy-seeking decisionmaker, in short, by a man!

While *Zen* asserts that taxpayers and their advisers have a responsibility to adopt a communal meaning of statutory terms, the rule-oriented may honor the “every-man-for-himself” approach as the exercise of “natural liberty,” respecting “spheres of action not subject to law.”⁹⁶ But liberty is not equated by everyone with freedom from governmental interference:

Liberty is perhaps meaningfully defined as immunity from government if one is either possessed of power over others or is so self-sufficient that others cannot acquire power over her/him. Women’s experience of relative powerlessness vis-a-vis the environment in which we live suggests that this popular notion of liberty is either insufficient or seriously flawed.⁹⁷

While male culture reflects a profound distrust and fear of the instrumentalities of government, *Zen* reflects no presumptive preference for private power. Women have been as victimized by private power as by public.⁹⁸

Focusing on the tax system as a means to strengthen the community, I am fearful of the disintegrating effects of an “every-man-for-himself” approach to statutory ambiguity. I am more comfortable acknowledging and deferring to the authority of those to whom the community has delegated responsibility. Agreement on which members of the community will assume responsibility for addressing various issues is a way to preserve a Rule of Law, *i.e.*, obligatory modes of behavior, even in the absence of a consensus on underlying norms.⁹⁹

96. Hirschmann, *supra* note 22, at 1233 (referring to John Locke’s definition of liberty as “to follow my own Will in all things where the Rule prescribes not”). See, e.g., Earl C. Ranenal, *Tyranny of the Weak*, WASH. POST, Jan. 3, 1993, at C7 (expressing the author’s conception of the essence of the Constitution as “protection of individuals against agents of government” and decrying the tendency in our political system to use “‘law’ to stifle boldness and individualism,” claiming “this ‘law’ is the handmaiden of petty and meticulous civic (read collective) virtue; but it is the enemy of creativity and enterprise in our society”).

97. Gayle Binion, *Toward a Feminist Regrounding of Constitutional Law*, 72 SOC. SCI. Q. 207, 214 (1991).

98. See, e.g., MACKINNON, *supra* note 24, at 101–02 (observing that “[t]his right to privacy is a right of men ‘to be let alone’ to oppress women one at a time”); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 631 (1990) (observing that the state’s refusal to intervene in private matters does not necessarily expand individual autonomy).

99. See Toni M. Massaro, *Empathy, Legal Storytelling and the Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099, 2110 (1989) (suggesting that the rule of law may be advanced by the “proper” ordering of voices, deciding with whom we should empathize—“why, when, and according to what procedures”); cf. Friedell, *supra* note 21, at 949 (noting that in the communitarian Jewish culture of the diaspora, “because of their religious authority, individual rabbis were often able to lead the people and impose a structure of communal values”).

I cannot regard as law at all the judgments of individuals as individuals; law must represent a judgment made on behalf of the community. Even if the lawyer's judgment is "reasonable," even if the likelihood of success in litigation is not fantastic, if the lawyer makes the decision on behalf of an individual, the decision is not law. Nevertheless, a lawyer might, although representing private parties, assume the decisional standpoint of a politically authorized decisionmaker and, for purposes of apprising clients of the requirements of the tax laws, make the decision on behalf of the community. For many sorts of legal requirements, this may be—and probably is—not only a theoretically sound but also a practical means to arrive at an operating definition of "law" to avoid costly recourse to public lawmaking fora. However, aside from the objection that it would be "impossible" for lawyers to set aside their preconceptions and adopt the perspective of another,¹⁰⁰ there are other practical impediments in this approach to interpretation of tax statutes.

Normally, a lawyer's judgments with respect to the legality of conduct will be tested through social interaction and thus will be practically accountable as the client acts in the world according to the lawyer's advice. If the goal is to avoid litigation, whatever tendency the lawyer may have to shade an interpretation of law to favor a client's narrow self-interest likely will be disciplined by the potential for contradiction by those the client's conduct affects: employees will stand ready to dispute the employer's reading of an employment contract; suppliers will be prepared to protest the purchaser's application of the Uniform Commercial Code; area residents will rise in alarm over emissions a manufacturer claims are consistent with environmental laws. Tax advisers need not look over their shoulders with the unease of the advisers of such clients as these, however. Tax advice disappears, usually forever, into a confidential paper domain, its practical consequence to the public fund hidden from public view and inquiry.

Further, even if a conscientious lawyer has no need for the checks of public scrutiny, the very nature of statutory ambiguity virtually assures that different decisionmakers acting in accordance with separate or even the same image of the public interest may arrive at different answers. For the federal tax system, this means an intolerable degree of entrenched lack of uniformity in a system premised on treating the similarly-situated similarly. The only

100. See *infra* text accompanying notes 110–114.

practical alternative is adherence to the decisions of the politically authorized and accountable. Conflicting judicial and administrative interpretations, and thus lack of uniformity, may still result, but rather than becoming entrenched, the lack of uniformity among politically authorized decisionmakers generates tension and pressure for a definitive Supreme Court or congressional resolution.

I concede considerable unease with the degree of deference to political authority that I prescribe. Even though the federal government often has been cast as protector, it has also been the oppressor. Those to whom I propose deference have consistently failed women and other outsiders in important ways.¹⁰¹ Is the different voice that has found expression in my work the voice of submission? Femininity in our society has been associated with conventionality and preservation of the status quo: "some women might be expected pathetically to cling to the conventions of society as a substitute for the selves and connectedness they can never achieve" in a society that assigns women a status of perpetual inferiority.¹⁰² It is important to be alert to aspects of the ethic of care that reflect immature moral development, cramped by the conditions of subordination. However, we should also be mindful of the biases of the dominant culture and understand that the reality of domination is not the only reality.¹⁰³ The ethic of care can be self-actualizing: "When the distinction between helping and pleasing frees the activity of taking care from the wish for approval by others, the ethic of responsibility can become a self-chosen anchor of personal integrity and strength."¹⁰⁴ There is a distinction between submitting to arbitrary authority and responding in the interests of the general good. To responsible adults, compliance need not be equated with "submission," as in young boys' games, but may be seen as increasing the power of a community from which we can draw our strength.¹⁰⁵

101. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 141-52 (criticizing the failings of federal law); Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 LAW & INEQ. J. 137 (1991) (documenting how inheritance laws, including federal estate and gift tax provisions, operate to disadvantage women).

102. Schroeder, *supra* note 13, at 134 n.57; see MACKINNON, *supra* note 24.

103. Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 12 (1987) (noting that to deny differences among people "undermines the value they may have to those who cherish them as part of their own identity").

104. GILLIGAN, *supra* note 8, at 171.

105. TANNEN II, *supra* note 10, at 157; see *supra* text accompanying notes 54-56.

It is well to be sensitive to the possibility that *Zen* may reflect self-destructive by-products of the experience of surviving as an outsider, such as fear of displeasing the powers that be. However, *Zen* allows for resistance to political authority. Any position may be reported that could be argued in court, *i.e.*, any position that is not itself arbitrary and unreasonable.¹⁰⁶ *Zen* simply advocates that challenges to politically authorized judgments be identified as such. Moreover, I should note that while my approach to tax lawyering may seem to some as overly deferential to authority, at least one commentator has criticized the standard of civic obligation in my work as insufficiently deferential to the *weight* of authority¹⁰⁷ because I acknowledge *any* politically authorized judgment as "law." Furthermore, the resolution to the problem posed in *Zen* turned out to be the most taxpayer-favorable among the interpretations the words would support. In sum, in practice I do not equate self-abnegation with civic virtue.

B. *Methodology*

To ascertain the legislatively authorized meaning of statutes, *Zen* advocates methodology that I would describe as practical reasoning if the term had not already been appropriated.¹⁰⁸ It might also be called "women's intuition." The prescribed method reflects modes of relating to a problem that have been described as characteristically female: contextual, particular, personal. The technique relies on the characteristically feminine skills of attentiveness and empathy, based on the simple proposition that attentiveness plus empathy will yield understanding.

Zen describes statutes as a form of communication, noting that the word "communication" is derived from the same stem as community, referring to commonness,¹⁰⁹ and analogizes interpreting

106. I have no answer to the objections to my views of those who cannot agree to any cooperation with the federal tax system and who consistently engage in subversion and resistance even when economic self-interest is not coincidentally advanced. However, most lawyers, my audience, are not committed to subversion and resistance *except* perhaps with respect to the tax laws. Lawyers work through the system, and the issue addressed in *Zen* is whether that work will serve only private interests or the larger community.

107. Judson Temple objected to the proposition in *Constraining Aggressive Return Advice* that any relevant authority constitutes adequate support to advance a position as "law." Temple, *supra* note 73, at 319; Handelman, *Return Advice*, *supra* note 3; see Zelenak, *supra* note 77, at 472 n.11.

108. See, e.g., William N. Eskridge Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

109. Handelman, *supra* note 5, at 623 n.56.

statutes to conversing with the drafters conceptualized as individuals who actually existed and acted purposively. Personifying and situating the drafters in their historical context and employing empathy to connect with them contrasts sharply with abstraction of the drafting process and "legislative intent" in the standard literature on statutory interpretation.¹¹⁰

Zen recounts that the literature on statutory interpretation abstracts the drafting process and "legislative intent."¹¹¹ Antonin Scalia exemplifies a view of statutes as disembodied texts, words unmoored from their human source, and is openly hostile to intentionalism.¹¹² For Cass Sunstein, interpretation is not communication at all in the sense of transferring ideas from one person to another. He speaks of statutes as architectural structures, frameworks within which the interpreter moves to promote good policy.¹¹³ Stanley Fish says that we already have the same ideas, and it is neither necessary nor possible to transfer them.¹¹⁴ Even such as Richard Posner, who has recognized ambiguous statutes as analogous to a garbled battle command,¹¹⁵ posits that the commander's message must be inferred from the perspective of the person to whom the command was directed, from the *situation*, not from the perspective of the *commander* situated in the historical context.¹¹⁶

I would have expected that legislative supremacists would cast the interpretive inquiry as an effort to complete the communication

110. There is here, however, something of an "apples" and "oranges" problem because the standard literature on legislative intent addresses judicial, and occasionally, administrative interpretation of statutes or even the Constitution, while my work on tax practitioners' interpretation has no implications whatsoever for judges or administrators and cannot be assumed to be transferable to any other areas of law, let alone constitutional interpretation.

111. Handelman, *supra* note 5, at 625-28.

112. Justice Scalia objects so vehemently to intentionalist analysis employed by other members of the Court that he regularly writes separately even though he agrees with the result. He has stated his position as follows: "I decline to participate in this process." *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring); *see also*, *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2487-88, 2490-91 (1991) (Scalia, J., concurring); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29-30 (1989) (Scalia, J., concurring in part and dissenting in part); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 564, 527-30 (1989) (Scalia, J., concurring); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

113. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990).

114. FISH, *supra* note 1.

115. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189-90 (1986).

116. *Id.*

of the historic drafter. Instead, they generally analyze "legislative intent" as an intellectual construct that has little to do with actual events or real people. Exceptions are Patricia Wald and Abner Mikva, D.C. Circuit judges with legislative experience (he, as a member of Congress). Judge Wald observes that

the typical representative votes on a complex statutory scheme without reading either the full bill or the legislative history, such as committee reports; and that in voting 'yes' he or she intends to give approval to and put imprimatur on both the language of the statute and the process that produced it.¹¹⁷

Both Judge Wald and Judge Mikva recognize that the process involves delegation of authority to committees and exercise of considerable responsibility by staff.¹¹⁸ Judge Wald points out the inconsistency of those who claim to honor legislative supremacy but ignore legislative realities of which they disapprove, warning that "to second-guess Congress' chosen form of organization and delegation of authority, and to doubt its ability to oversee its own constitutional functions effectively. . . . runs the risk of violating the spirit if not the letter of the separation of powers principle."¹¹⁹ Nevertheless, most who inquire into "legislative intent" fail to take account of the actual people and processes involved in the legislative process (and, in fact, some have been known to get quite testy at suggestions that the actual individuals involved are relevant).¹²⁰

I had thought that reminding lawyers that real people, with real intentions, not constructs of "legislative intent," were behind statutes, would clarify the potential for communication between drafter and audience. I had repeatedly been startled by the vehemence with which writers of various leanings dispute the relevance

117. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 307 (1990) (emphasis omitted).

118. See, e.g., Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 385 (noting that generally the only meaningful discussion of legislation occurs in committee). Judge Wald has noted:

The committee is the "work place" of the Congress. Members of the committee, to whom the bills are referred and to whom the task of sifting the dross from the gold is delegated, act as the "agents" of the rest of the members; they are supposed to put the legislation in shape, take care of the details of draftsmanship, and be familiar enough with the technicalities and policies to explain it to the rest of the body.

Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 201 n.48 (1983).

119. Wald, *supra* note 117, at 307.

120. See, e.g., Handelman, *supra* note 5, at 650 n.174 (quoting Daniel Farber, indignant that I would surrender a "sensible" interpretation in deference to an "unidentified scrivener").

and/or reliability of reconstructions of intended meaning (the historic message) inferred from the context in which legislation was enacted. Analogizing statutory interpretation to an endeavor with which we are all familiar and practiced seemed an effective way to address the objection that legislative intent is a myth. And writing *Zen*, I had the *experience* of connecting with a drafter in ascertaining the meaning of ambiguous statutory terms and demonstrated that it could be done. Nevertheless, several readers commented that my approach could not work because it was “impossible” to set aside one’s preconceptions in the attempt to understand intended meaning. Few seemed to have the patience to study the technical example that constitutes my proof.

These discussions left me with much the same sense I had experienced in conversation with a male Chinese student in Shanghai about the treatment of women students who, after “the events of June 4”¹²¹ were moved from attractive stone buildings inside the walls that enclosed a lush, wooded campus to cement block buildings on a barren street outside the walls. Apparently, the coeducated living arrangements had been patterned on western practices, and, as such, were deemed somehow to have contributed to the “pro-democracy” movement. I asked if the women students did not object to the unfairness of singling them out to be moved to the less desirable housing, suggesting that women were treated unequally in violation of Maoist principles. The young man seemed puzzled. Despite attempts to rephrase my question in accessible English terminology, I succeeded only in eliciting the repeated answer “impossible.” I cannot know what he thought I had said, but “impossible” in the normal sense of the word was an inappropriate response. Perhaps he meant to suggest the unavailability to women of avenues of complaint rather than to deny the existence of conditions of inequity in Communist society. But it occurred to me that “impossible” may translate somewhat peculiarly as “it cannot be acknowledged.”

My colleagues’ insistence that what I proposed and what I had experienced were “impossible” suggested to me that they suffered from some peculiar disability. As with the Chinese student, I initially tried to explain using different terms, and, failing, I have ended at a similar conclusion, that in male culture the possibility of

121. The reference is to the bloody confrontation between student demonstrators and the military at Tieneman Square in Beijing, China in June of 1989. Nicolas D. Kristof, *Crackdown in Beijing: Troops Attack and Crush Beijing Protest: Thousands Fight Back*, N.Y. TIMES, June 4, 1989, at A1.

arriving at an understanding of tax statutes through empathic understanding of the drafter's intent cannot be acknowledged.

I did not appreciate that reinjecting the real, historic, human players into the process of statutory interpretation would not cause all the pieces of a model of statutory construction to fit into place because my view of how conversation is conducted and my assessment of what it accomplishes may be peculiarly feminine. Men and women may "mean entirely different things when they speak of communication."¹²² My account of statutory interpretation as conversation may resonate with women's experience¹²³ but is the stuff of fantasy (or nightmare) to men. The nature of the male orientation and its position of dominance in American society makes it more difficult for men to recognize a reality other than their own.¹²⁴ Deviations from "men's reality" might then be seen as inaccurate, not true, "impossible."¹²⁵

Understanding conversation as a means to achieve connection and establish commonality with others reflects a female perspective; men characteristically do not regard the purpose of conversation this way. Instead, conversation is a method of negotiating status in a hierarchy. For a man, the purpose of communication indeed may be "to confuse, win, and stay one-up,"¹²⁶ rather than an occasion to share another's ideas, make them "common." Moreover, men are not likely to see statutory interpretation as analogous to conversation because they can be expected to resist acknowledging a person to whom they should attend, let alone defer, at the other end.

The prerequisite attentiveness to the thinking of the author of legislation inherent in my conception of civic responsibility reflects a female orientation. For me, personifying the drafter is comfortable, facilitating a sense of connection. From the male perspective, it

122. SCHAEF, *supra* note 22, at 134.

123. See, e.g., Minow, *supra* note 103, at 57-70 (discussing the possibility of adopting, or at least glimpsing, the perspective of others and avoiding false impartiality by stepping outside our own skins and choosing whose partial view to advance or accept).

124. SCHAEF, *supra* note 22.

125. [J]ust as the master is in many ways in an inferior position to the slave because he is blind to the importance of material life to self-consciousness, so the boy develops a stance that, while keeping him master, also keeps him from a true realization of self. For the one-sided recognition he achieves through patriarchy is far from the full recognition required for 'relational autonomy.'

Hirschmann, *supra* note 22, at 1237.

See also RICH, *supra* note 25, at 65 (remarking that the powerful "have a good deal at stake in suppressing or denying awareness of the personal reality of others; power seems to engender a kind of willed ignorance").

126. *Id.*

is acknowledging the intolerable: that we are governed by people, not laws. This seemed to me a simple, obvious "reality" since, notwithstanding the example of the tablets on Sinai, laws do not spring fully formed into existence. For men, maintaining that disembodied texts, rather than *people*, have authority, may preserve the capacity for obedience to law without triggering their resistance to personal submission. Male "reality" allows for compliance with rules without the need to acknowledge assumption of a one-down position vis-à-vis another in a hierarchy.

The technique of "women's intuition," close attention and empathy, may represent to the person focused on status an acknowledgement of inferiority. As easily as the technique of "women's intuition" comes to me, it bears the mark of subservience. It has been called "the kind of intuition men label 'woman's' and scoff at" and described as "what slaves had and bosses never bothered to acquire. It grew from the need to please without calling attention to yourself. The slave learned to catch hidden signals, subtle signs of approval and disapproval, learned to anticipate events, to sooth tempers, to make nice."¹²⁷

In sum, *Zen's* approach to statutory interpretation requires interpreters to engage in conduct that may be extremely emotionally difficult for men:

1. Admit that they are not in possession of important information and attend to another who is. This requires the interpreter to assume what men would perceive as a one-down status. "[M]any men resist asking for directions and other kinds of information" because they focus on the metamessage of inferiority sent in the fact that someone else has information that the asker does not.¹²⁸ Men achieve status by possessing information: "the one who has more information is framed as higher up on the ladder, by virtue of being more knowledgeable and competent."¹²⁹

2. Empathize, *i.e.*, break down barriers between themselves and others and confront their essential commonality. This may threaten male identity by opening up the possibility that they are like their mothers from whom, in Freudian terms, they have so desperately striven to achieve separation as prerequisite to establishment of their masculinity (or, in feminist terms, to assure that they are not relegated to a status of permanent inferiority in the society).

127. LINDA BARNES, *COYOTE* 142-43 (1990); see Schroeder, *supra* note 13, at 204 n.296 (discussing "slave-consciousness" as superior to the consciousness of the masters).

128. TANNEN II, *supra* note 10, at 62.

129. *Id.*

In addition, attempting to adopt another's perspective may require "almost superhuman effort and enormous commitment" because as members of a dominant class men may have little experience in attempting to understand another's reality and "must constantly do battle" with the feeling that they "already know[] and understand[] everything."¹³⁰

3. Acknowledge that their autonomy to assert their independent judgment is subject to the condition that they empower the government by providing information (through disclosure). Status in the male system is gained by telling *others* what to do and lost by obedience.¹³¹ The requisite attitude in such an environment is vigilance against attempts to bend their will.¹³² Cooperation is risky, and may not be recognizable as distinguishable from submission.

There is always potential for misunderstanding in cross-cultural exchanges, but at least if we understand that we misunderstand each other, we can move toward understanding and dialogue. In *Zen*, I insisted that practitioners confront the difficult proposition that others get to make the laws and they don't. Since boyhood, men have learned that giving orders and getting others to follow is the way to become and remain a leader. The only alternative is subordination. "A command, by definition, distinguishes the speaker from the addressee and frames him as having more power."¹³³ It appears to me that men are being deliberately uncooperative in their approach to statutory interpretation, still playing "King of the Hill." They also seem blind to the potential for empathic understanding. However, Deborah Tannen's work suggests that men may achieve connection with others in a style that, as a woman, I might not recognize. She describes tenth grade boys "acting in concert, creating ensemble . . . , seeming to ignore each other but mirroring each other's movements in coordinated rhythm."¹³⁴ She notes that, "judged by the standards of women" the boys appear to be "avoiding connection" when actually they are trying to "avoid combativeness" and achieve "friendly connection."¹³⁵ Directly addressing each other would be confrontational, necessitating a contest to determine their respective positions in a hierarchy: who

130. SCHAEF, *supra* note 22, at 15.

131. TANNEN II, *supra* note 10, at 154.

132. *Id.* at 152.

133. *Id.* at 156.

134. *Id.* at 269.

135. *Id.*

is to be "one-up" and who "one-down." The male way of occupying the same place at the same time, to relate as equals, is indirection.

This may be reflected in the American Bar Association's formulation of the approach to understanding the tax laws as predicting how a court would decide¹³⁶ or Treasury's prescription in the regulations under former Code section 6661, to pursue "the same analysis that a court would be expected to follow."¹³⁷ These may be efforts to articulate a way to achieve a common understanding of the requirements of the internal revenue laws with reference to an authorized decisionmaker without demanding of the interpreter the personal deference, attentiveness and empathy that my formulation entails. The lawyer is asked to parallel judicial decisionmaking, act in concert with, not as follower of, the politically authorized decisionmaker. Therefore, male resistance to direction and attempts to control them may not be triggered. Although the ABA's prescription suffers from a lack of legitimacy,¹³⁸ more recent formulations of a "legal realist-type prediction of what courts would actually do"¹³⁹ may equally successfully avoid a threatening metamessage but also import accountability by limiting the materials on which undisclosed return positions may be based to legislative, judicial and administrative "authority" as defined under Treasury Regulations.¹⁴⁰ Among these promising formulations are the Treasury's final regulations under the Code section 6694 preparer penalties,¹⁴¹ and proposed improvements offered by legal academics.¹⁴² All proposed amendments to the rules governing practice before the Internal Revenue Service,¹⁴³ allow the adviser to act in the capacity of judge, to engage in analysis as a court would. A lawyer's readiness to resist threats to autonomy may be neutralized if the adviser is assigned this Solomonic role, even circumscribed as it is by the requirement to stick to "authority" (if there is no "in your face" reminder that the promulgators of authority exercise real power while

136. Formal Op. 85-352, *supra* note 74.

137. Treas. Reg. § 1.6661-3(b)(3) (1985) (superseded by Treas. Reg. § 1.6662-4(d)(3) (as amended in 1992), which deletes this phrase but leaves the interpretive approach intact).

138. See *supra* text accompanying note 77.

139. Zelenak, *supra* note 77 at 473 n.20.

140. Treas. Reg. § 1.6662-4(d)(3)(iii) (1992).

141. See Treas. Reg. § 1.6694 (1992).

142. See Temple, *supra* note 73; Zelenak, *supra* note 77.

143. 57 Fed. Reg. 46,359 (to be codified at 31 C.F.R. pt. 10) (proposed Oct. 8, 1992). See Gwen T. Handelman, *Law and Order Comes to "Dodge City": Treasury's New Return Preparer and IRS Practice Standards*, 50 Wash. & Lee L. Rev. 631 (1993).

the lawyer is simply play-acting). Still, even these formulations seem to require the "impossible," that the interpreter identify with the perspective of another.

But men are not entirely incapable of attentiveness to others and empathic understanding if not demanded in a context that requires that they assume a one-down position. This is intriguingly demonstrated from Tom Clancy's novel, *The Hunt for Red October*.¹⁴⁴ As I pursued my research and formed tentative opinions that the values of male culture tend to interfere with effective communication, I became fascinated with the contradiction ostensibly posed by the extraordinary communicative achievement through empathic understanding among men portrayed in the motion picture version of *The Hunt for Red October*. I was eager to understand a stridently male visualization of successful communication.

The novel begins with Americans tracking a new model of Soviet submarine. At some point, both the Soviet and American military figure out that the submarine captain is planning to defect. To assist this effort, the Americans must find a way to warn the submarine away from the Soviet pursuers. Because of the risk of interception, the Americans cannot contact the submarine captain by radio, but they succeed in getting their message through, accomplished by very careful attention and empathy, behaviors that Gilligan and Tannen assert men characteristically resist. Attentiveness to another places the listener in a one-down position, and empathic connection threatens male identity, which is premised on separateness. What emerged from the book much more forcefully than the film was Deborah Tannen's observation that, to men, information is power. To have information is to be powerful, and that to need

144. TOM CLANCY, *THE HUNT FOR RED OCTOBER* (1985). It was not pleasure reading. I do not enjoy books that describe as a doting father a man who spans his first-grade daughter whom he has taught to play computer games, for trying her hand at word processing when she quite unintentionally erased some of his work. *Id.* at 23, 46-47. Apparently the author does not consider his hero's image tarnished because he releases his frustrations through domestic violence. This same admirable character addresses "elite executive," but female, secretaries (who wish that their bosses would not make their own coffee!) by their given names while they address him by his title. *Id.* at 46-47. The book is, in fact, a catalog of values and behaviors I find painful to see exalted as virtuous. For me, it was a strictly professional foray deep into male culture, slashing my way through the dense thicket to ask the natives, "How do you communicate with each other?"

For an extraordinarily entertaining and disturbing account of the language of this culture, see Carol Cohn, *Sex and Death in the Rational World of Defense Intellectuals*, 12 *SIGNS* 687 (1987).

information is to be weak, one-down. Providing information (e.g., giving advice, relaying a news story) can be an exercise of power, but it becomes complicated because sharing information also shares power and may diminish one's relative standing. The idea that information is power also gives rise to the dichotomy of needing to pay close attention (one-down) to achieve dominance.

In a spy novel, of course, everyone is listening very closely to beat each other at the game and/or advance in status. Attentiveness, then, which might ordinarily be viewed as a weakness becomes a strength; eavesdropping technology is glorified, and the technician who listens best is a hero. Resolving uncertainty and clarifying the ambiguity is, in these circumstances, the means to victory. In a contest, paying close attention is a way to win the game because the information can be used against the other contestants to one's own ends.

To beat the Russians, obtaining information is not enough in these special circumstances. To win, they have to understand the Soviet captain, with whom the Americans are motivated to ally themselves to defeat the Russians. Actually, the empathic connection is not personally achieved by the macho hero, who is cast as a loner,¹⁴⁵ but by one Commander Barclay, who approaches the task just the way I would recommend:

1. Recognize the partner in the communicative endeavor as a real, purposive person, not an abstraction: "Gentlemen, we are not trying to communicate with a submarine, we are trying to communicate with a man. . . . What do we know about Marko Ramius?"

2. Walk in the shoes of that person and reason from experience: "Marko's bet his life that he could sneak into an American port undetected by anyone. We have to shake that confidence to warn him off. . . . He's a former *attack* submarine commander. He'll still be thinking about how to attack his enemies, and how does a sub commander do that?"¹⁴⁶

145. Indeed, Jack Ryan draws conclusions from "patterns of activity" and "data" rather than people or personal experience, describes himself as dealing "principally with technical intelligence," responds to inquiries as to the likely intentions of the officers of the Soviet sub in terms of what would be the "rational thing for them to do," and refers to others as "psychological" questions. CLANCY, *supra* note 144, at 104-05.

Near the end, Ryan *watches* "men from two different places and two very different cultures trying to find common ground. Both sides were reaching out, seeking similarities of character and experience, building a foundation for understanding." *Id.* at 411.

146. In Clancy's world, commanders generally seem inclined to employ empathy as game strategy. At the beginning of the book, when the Americans first begin tracking the submarine, a Commander Wilson says, "If it was me, I'd go down near the bottom and circle slowly right about here. . . . So let's creep up on him. We'll reduce speed to

The book is almost entirely the story of men and machines devoted to listening for the Soviet submarine and understanding the captain's intentions. Yet, it is not titled "Reaching Out to Red October." It is true that the Soviets were pursuing the sub to destroy it, but the book is not about the *hunt* for Red October, but about establishing a connection with it. But the author has to make perfectly clear that the objective is legitimately masculine, *i.e.*, achieving dominance.

In this novel that exemplifies male values, attentiveness and empathy are valued as tools in competition, demonstrating that careful attention to and identification with others are not inherently inconsistent with the male orientation. However, it may be "impossible" for those of the male persuasion (perhaps peculiarly appropriate terminology) to employ close attention and empathy to circumscribe their own autonomy.

Under a self-assessment system, vigilance to threats to autonomy may be particularly triggered by the obligations imposed by tax statutes, and perhaps a less confrontational statement of a tax adviser's responsibility than that articulated in *Zen* may be more fruitful. Such an approach is suggested in George Will's reflections on the motion picture version of *The Last of the Mohicans*.¹⁴⁷ He finds significant that, in response to a British officer's indignant query, "'You call yourself a patriot and loyal subject to the crown?'" Hawkeye replies, "'Don't call myself subject to much at all.'" ¹⁴⁸ Noting that "[i]t is hard to govern a nation of Hawkeyes," the columnist advises that "[p]oliticians must tread lightly lest they arouse the Hawkeye . . . who sleeps lightly, when he sleeps at all, in all [sic] of us."¹⁴⁹

An issue for the tax system is whether it is important for tax practitioners to acknowledge that they do *not* get to make law unless they are hired into public service for that purpose. I have my doubts as to the efficacy of avoiding the issue in addressing the current crisis in compliance. After all, the Internal Revenue Code's

five knots and see if we can move in and reacquire him from his reactor plant noise." *Id.* at 21. The Commander proceeds on the assumption of commonalities between himself and the Soviet sub captain to win at the game. This attempt at empathic understanding is somewhat different from the later effort which involves another commander putting himself in the other's shoes, rather than assuming the other will respond like himself.

147. George F. Will, *To Govern a Nation of Hawkeyes*, WASH. POST, Oct. 8, 1992, at A21.

148. *Id.*

149. *Id.*

notoriously odd syntax is peculiarly nonconfrontational and may indeed result from sensitivity to the need for delicacy. The central command of the income tax laws is phrased in the passive voice: tax "is imposed" on "taxable income,"¹⁵⁰ and the rest is definitions. Further, the language of the Code is notoriously impersonal. The technical terminology may helpfully camouflage its human source to deflect resistance. However, the very features of federal tax statutes that may serve to accommodate an ethic of autonomy—the stilted and impersonal tone, the passive voice construction, the technical and precise terminology—may also be alienating. There may be need instead to accommodate in the substantive tax law and the standards of tax practice those oriented toward connection.

VI. CONCLUSION

This Essay is an introductory look at the ways in which gender may influence our work as lawyers, leaving for another day discussion of the implications for the definition of professional responsibility. It seems apparent, however, that the different choices and voices brought to the profession by women expand the ways of being effective lawyers. It may be that the different voice in tax law is a cautious one, and those of us who speak that tongue should be alert to the legacy of oppression that may incline us to tend too strongly to defer to the power structure. Still, there are clients who want the sort of assurance that a woman's perspective may supply particularly convincingly. Moreover, our tendency to please clients and colleagues may serve as adequate counterweight to any tendency to defer excessively to political authority.

Deborah Tannen observes that recognition of differences allows for not only self-understanding but also "freedom to try doing things differently if automatic ways of doing them aren't having entirely successful results."¹⁵¹ There seems to have been a void in the practitioner community. Almost entirely absent from at least the vocal tax bar was an awareness of the appearance of lawlessness in the insistence on broad discretion to supply to ambiguous statutory terms any content most favorable to clients. Stridency has cost us credibility. Now, the tax journals are replete with articles explaining the harsh consequences that may attend such conduct under the new penalty legislation. In other fields, such as banking and environmental practice, the specter of criminal liability looms. There

150. See, e.g., I.R.C. §§ 1, 11 (1988).

151. TANNEN II, *supra* note 10, at 294.

seem to have been few who saw it coming, suggesting an alienation from the greater society that may be reflected in the lawyer-bashing that has become popular sport. It may be time for the bar, and particularly tax lawyers whose work is at the heart of the democratic process, to hear and sometimes speak in a different voice.