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Through the Looking Glass with Alice and Larry: The Nature of Scholarship

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Oliver Wendell Holmes once said that taxes are the price of civilization; they are also the story of civilization, or rather the stories of civilization. For example, taxes trace the history of wars, and even explain some of our physical surroundings by their effects on architecture. Taxes also tell us more generally about our society since what we tax and how we tax reflect a multitude of philosophical, social, and political choices. Some of these tax stories have long been known even if we sometimes ignore or forget them due to our concern for the technical aspects of revenue raising and the heavy emphasis on economic efficiency. Recently, however, more tax scholars have been looking at the non-technical sides of tax
and looking at them from different points of view. As they do so, they discover new stories or new interpretations of old stories. This is what feminist and critical race scholars are doing in "critical tax theory."  

Critical scholarship is relatively new to the tax field, but it has existed in other legal areas such as torts, contracts, and constitutional law for some time. Initially it was resisted, ignored, dismissed, or trivialized, but today critical scholarship can be found in the top journals. Scholars such as Patricia Cain and Richard Delgado, however, have noted that this is a sign of only superficial acceptance by academia. They state that the legal academy often ignores or trivializes feminist scholarship and has failed to integrate critical scholars "fully into [its] conversations, colloquies, footnotes, [etc.]."  

At first glance, then, my receipt of a draft of Professor Lawrence Zelenak's article Taking Critical Tax Theory Seriously accompanied by an offer from the North Carolina Law Review to participate in a symposium on critical tax theory indicates a remarkably early acceptance of critical tax theory. A second glance, however, reveals a less sanguine view, one more in keeping with Cain's and Delgado's descriptions of the reception of critical scholarship in general. Zelenak's critique calls into question his claim to value this type of

5. In this Article I use the phrase "critical tax theory" to mean feminist and critical race scholarship because Professor Zelenak does so. I believe, however, that all tax scholarship, like all scholarship, should be critical in the sense that it should use logic and rational thought to evaluate a problem. I am a critical scholar in this larger sense but probably not in the narrow sense Zelenak uses it to mean either a critical race tax scholar or a feminist tax scholar. I discuss the nature of feminist tax scholarship more generally in Marjorie E. Kornhauser, A Taxing Woman: The Relationship of Feminist Scholarship to Tax, 6 S. CAL. REV. L. & WOMEN'S STUD. 301 (1997).  


7. Richard Delgado, The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later, 140 U. PA. L. REV. 1349, 1350 (1992). Professor Frances Olsen, writing for a recent symposium on "Trends in Legal Citations and Scholarship," states that "for the first time, 'outsider' scholarship is being cited with significant frequency." Frances Olsen, Affirmative Action: Necessary but Not Sufficient, 71 CHI.-KENT L. REV. 937, 937 (1996). She says there are three views, each with some support, regarding the relationship of these increased citations to the academy's acceptance of outsiders: (1) increased citations indicate that outsiders have been accepted; (2) increased citations "foreshadow a change about to occur"; and (3) increased citations do not indicate an increased acceptance because standards will change and outsiders will remain outsiders. See id. As evidence of continued marginalization of outsiders, she says that although the number of women professors in law schools has increased, a disproportionate number of them teach at less prestigious schools. See id. at 938.  

Moreover, the Symposium can hardly be viewed as a conversation among equals when the agenda is set and dominated by one person, that person devotes a long article to criticizing this mode of scholarship, and the respondents have only a short space in which to reply.

Zelenak's article, in fact, reveals a misunderstanding not only of the articles he critiques and of critical tax theory more generally, but also of the very nature of scholarship. There can be numerous explanations for his misconceptions, such as good-faith differences of opinion, lack of ability to understand, careless reading, Cain's "gendered misunderstandings," which arise from a failure to understand conclusions based on the different life experiences of a person of a different gender, or similarly race-based misunderstandings. Lack of ability is not Zelenak's problem; rather, his difficulty seems to stem from all of the other sources. His misconceptions are not unique to him, as Professors Cain and Delgado have indicated. Moreover, many of the same misconceptions arise not only in connection with feminist and critical race scholarship, but with other "outsider" scholarship as well.

Zelenak's article exemplifies a common phenomenon in which outsider scholarship is critiqued in a manner that leads the author to wonder whether the commentator has read a different article from the one she wrote; or at a minimum, if it is the same article, whether he read it through a looking glass (and darkly at that). The reader,
Zelenak in this case, is so divorced from the author and her text that the reader can serve as a model for an anarchical deconstructionism which places few, if any, constraints upon the reader. Surely, all texts have some ambiguity and must be deconstructed to some extent. This is not a new idea, just a currently fashionable one. Ambiguity, however, does not usually lead to anarchy because the reader belongs to a community whose customs and understandings the reader uses to narrow the numerous alternative meanings and to interpret the text. Problems often arise, however, when the community breaks down or when a reader from one community encounters the text of an unfamiliar community.

A century-old example illustrates the ubiquity of ambiguity, the existence of commonalities—or communities—of understanding which limit the chaos ambiguity creates, and the expansion of the chaos as those communities break down:

Suppose a housekeeper says to a domestic: "fetch some soup-meat" accompanying the act with giving some money to the latter; he will be unable to execute the order without interpretation, however easy and, consequently, rapid the performance of the process may be. Common sense and good faith tell the domestic, that the housekeeper's meaning was this: 1. He should go immediately, or as soon as his other occupations are finished; ... 2. that the money handed him by the housekeeper is intended to pay for the meat thus ordered, and not as a present to him; 3. that he should buy such meat and of such parts of the animal, as to his knowledge, has commonly been used in the house he stays at, for making soup; 4. that he buy the best meat he can obtain, for a fair price; 5. that he go to that butcher who usually provides the family, with whom the domestic resides, with meat, or to some convenient stall ...; 6. that he return the rest of the money; 7. that he bring home the meat in good faith, neither adding anything disagreeable nor injurious; 8. that he fetch the meat for the use of the family and not for himself ...15

15. FRANCIS LEIBER, LEGAL AND POLITICAL HERMENEUTICS 18 (William G. Hammond ed., 3d ed. 1880), quoted in MICHAEL ZANDER, THE LAW-MAKING PROCESS 105 (4th ed. 1994). The example Fish uses in Is There a Text in This Class? is a student on the first day of school who has just finished a class with Professor Fish. See FISH, supra note 14, at 305. In her next course, the student asks another professor: "Is there a text in this class?" The professor says that the text is the Norton Anthology of Literature, but
Today's reader understands this passage only imperfectly because she does not belong to the community which provided the underlying customs and meanings. Contrary to the writer's assumption that the interpretation will be easy, common sense and good faith do not yield complete understanding. For example, housekeepers and domestics differ today from those of 100 years ago in various aspects: function, place in society, and even identity. Few people make homemade soup and therefore most would be hard-pressed to identify the appropriate quantity or type of meat for the soup. Nevertheless, today's society is sufficiently similar to Victorian times that most people could read the passage and comprehend its general meaning. In fact, the similarities of the two communities can be dangerous because they can cause the reader not to notice the differences. Thus, today's domestic (the woman who comes in to clean one morning a week) may take the money the housekeeper (the "lady of the house") gives her and use it (minus an amount she keeps for "gas" money and a "tip" that the housekeeper forgot to give her) to buy three pounds of prime rib roast at the local A&P which she delivers the next week she comes to the house. But even in 1880, not everyone would have given the same interpretations to the implicit assumptions: the appropriate quantity and quality of meat to buy varied depending on one's economic status, as did whether there was a domestic to send for the meat, or even whether meat was affordable.

There is not, in short, one homogeneous community; there never was. There are only overlapping communities, each with a different perspective. Unlike other areas of the law, tax has just begun to realize that its community consists of various communities and that underlying assumptions are not as universal as people once thought (at least the people who wrote the laws).

Zelenak's misreading and numerous misunderstandings result from his failure to grasp this fact completely when he surveys critical tax scholarship. He is like Alice who steps through the Looking Glass into a world so similar to her own but so different because it is seen from a slightly different perspective. The two worlds are overlapping communities, and their very similarities cause misunderstandings. Through the Looking Glass, words lose their

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the student replies: "'No, no,... I mean in this class do we believe in poems and things, or is it just us?'" Id. (quoting a student at Johns Hopkins University).

16. For example, domestics today, whatever their definition, generally are females and not males; relatively few people have live-in help.
common meanings and are taken literally,\textsuperscript{17} and rules (even basic ones) turn out to be maddeningly different.\textsuperscript{18} The result for Alice is often a state of confusion and semi-understanding. As she states after reading the poem \textit{Jabberwocky}: "It seems very pretty . . . but it's \textit{rather} hard to understand. . . . Somehow it seems to fill my head with ideas—only I don't exactly know what they are."\textsuperscript{19} Zelenak has a similar response. He likes the general idea of critical theory, but his comprehension of its meaning is clouded by the assumptions of his own world. For example, he states that critical tax theory is important work, but he is "troubled that much of the work has not been carefully done."\textsuperscript{20} Yet, he himself has not read carefully the articles he criticizes. This is especially unfortunate since, as the housekeeper example shows, an excursion into another similar, but different, world requires extra care if it is to be properly appreciated and understood. More generally and importantly, his fundamental objections to critical tax theory reflect his own failure to understand completely the multiplicity of communities, the relativity of tax, and the nature of scholarship.

Zelenak's failure reveals itself in his very reproach of critical tax theory which he rests on four grounds: (1) "an over-eagerness to accuse the tax laws of hostility to women or blacks;"\textsuperscript{21} (2) "a failure to recognize the diversity within feminist thought;"\textsuperscript{22} (3) "selection bias, both in the aspects of the tax laws chosen for study, and in the analysis of those chosen aspects;"\textsuperscript{23} and (4) "[t]he most serious problem is the failure to think through proposed solutions with

\begin{itemize}
\item \textsuperscript{17} See Martin Gardner, Annotation to \textit{Carroll}, supra note 13, at 280 n.5. This is perhaps an example of the breakdown in communication that occurs when communities overlap—they are similar but are seen from a different perspective. Zelenak demonstrates this characteristic. See infra notes 39-41. Anyone who has studied a foreign language knows the difficulty of speaking words when she is not grounded in the culture that shapes them. This problem also arises in one's native language for children who frequently know words but take them literally, for example, giving the house a coat of paint. Some children's literature focuses on this aspect of language cognition. See, for example, the Amelia Bedelia books about a maid who performs such tasks as drawing the drapes, dressing the turkey, and dusting the furniture in a literal, but unusual fashion. See, e.g., \textit{Peggy Parish, Amelia Bedelia} (1963).
\item \textsuperscript{18} For example, in the \textit{Looking Glass}, running doesn't get you anywhere: "[I]t takes all the running you can do to keep in the same place." \textit{Carroll}, supra note 13, at 210. A personal favorite rule of mine is the one that gives you jam every other day: "[J]am tomorrow and jam yesterday—but never jam \textit{to-day}.” \textit{Id.} at 247. This is a good metaphor of how laws often apply to powerless groups such as women.
\item \textsuperscript{19} \textit{Id.} at 197.
\item \textsuperscript{20} Zelenak, supra note 8, at 1523.
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Id.}
\end{itemize}
sufficient care”—"[i]t is unfair to criticize current law for its effects on women or blacks without showing a way to do better." Each of his objections is itself objectionable.

I. OVEREAGERNESS TO ACCUSE THE TAX LAWS OF HOSTILITY TO WOMEN OR BLACKS

Most tax scholarship concentrates on economic, technical, or practical issues of tax. Even articles involving political issues tend to stress the legislative process rather than more deep-seated issues of the nature of government and society. However, since the tax laws are products of a particular time and place, they do not represent Truth—only truth. An important goal of tax scholarship, then, is to unravel the story about that particular truth—to show that it is only a story and to reveal its origins and its effects, which may be unintended. This unraveling can be done in a number of ways, for example by philosophic or historical examinations. Critical tax theory also does this by using non-traditional views and theories to examine provisions frequently enacted in far different times by people with world views not representative of all taxpayers back then (let alone now). Thus, Zelenak’s complaint that critical tax theorists are overeager to accuse the tax laws of hostility to blacks and women (as well as his third charge that they show “selection bias” in that they pay no attention to tax provisions favorable to them) is strange. Someone, Professor Zelenak for example, may want to write an article that points out favorable provisions, but that is not the purpose of critical tax theory. Moreover, unless all critical tax theory claims that the entire tax code relentlessly affects women and minorities adversely, the fact that there may be provisions favorable to these groups does not discredit the value of articles that show how some tax provisions hurt some women or some groups.

24. Id. at 1524.
25. See, e.g., HAROLD M. GROVES, TAX PHILOSOPHERS 24 (Donald Curran ed., 1974) (“Taxation is an art and a technique as well as a science, and it always needs to be judged against the conditions of time and place.”).
26. See, e.g., Donna M. Byrne, Progressive Taxation Revisited, 37 ARIZ. L. REV. 739, 773-86 (1995); Marc Linder, Eisenhower-Era Marxist-Confiscatory Taxation, 70 TUL. L. REV. 905, 943-86 (1996); see also infra note 48 (citing my own work on the topic).
27. To my knowledge, all critical tax theory does not make this claim, but my knowledge is limited. I did not even know that I was a critical tax theorist, and I have not read all the articles Zelenak cites. Perhaps his statement is a reference to Professors Moran and Whittford, whom he later cites for the statement that the Code is likely skewed in favor of whites. See Zelenak, supra note 8, at 1567. Zelenak’s statement, however, is broader than this. Moreover, even if that is what he intended, Moran and Whittford’s suggestion seems very possible since most other systems and institutions in any society
Zelenak's choice of the word "hostile" is also interesting since it implies personal animus. Critical tax theory, by its nature, explores tax provisions that have sexist or racist effects, but these effects can be adverse without being hostile in a personal sense. Sexism and racism can be unintentional; they can be institutional rather than individual, and the effect may be adverse at one point in time rather than another. To describe critical tax theory as evidencing "hostility" and "readiness to accuse Congress" surely overstates the facts since not all the literature Zelenak places within this category displays this hostility. An analysis that describes negative effects is not necessarily hostile, even if it may be unsettling because it shows a heretofore hidden truth or problem.

As to the charge of "over-eagerness," most (if not all) writers—including Zelenak—sometimes over-generalize or overstate their case. This overeagerness may be true and more understandable for writers in a new and developing field, including critical tax, because they are struggling to define that field and to be heard. Sometimes this leads to over-broad or somewhat inaccurate statements, and Zelenak is right to point that out. Sometimes, however, Zelenak's charges are themselves overeager and therefore wrong. His citation of my article, for example, to illustrate his statement that other types of feminism are ignored is irrelevant since I am merely using difference feminism as an example of a philosophy that can support progressivity. The existence of other types of feminism does not cancel the existence of difference feminism or the fact that its beliefs can logically lead to a support of progressivity.

II. FAILURE TO RECOGNIZE THE DIVERSITY WITHIN FEMINIST THOUGHT

In his over-broad inclusion of all critical tax theory in this reproach, Zelenak is guilty of his second accusation against the critical tax theorists: failure to recognize the many strands of feminist thought. This criticism also exists within the feminist movement itself, and his use of it is a common technique to tend to be weighted against the less powerful groups. Even if the tax system were neutral on balance, there is still merit in examining individual provisions to see their effects on different segments of the population. The prevalence of gender bias in the tax systems of many countries is discussed in Janet G. Stotsky, Gender Bias in Tax Systems, 14 Tax Notes Int'l 1913 (1997). She does note, however, that a tax can be biased against males as well as females. Id. at 1913-16.

28. Zelenak, supra note 8, at 1523.
29. See, e.g., Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42
disparage or discount feminism. Yet the existence of many branches of feminism does not negate the value of feminist tax scholarship generally, nor the value of particular variants of feminism. Certainly, feminist scholars should recognize differences among branches of feminism where appropriate and be careful not to over-generalize to all women when inappropriate. Sometimes, however, a broad brush is useful since, as I have stated elsewhere, we all experience life through a prism composed of many lenses such as gender, race, and class.30 One person’s particular combination of lenses will refract life slightly differently than another person’s set of lenses, but the existence of a particular lens in any set will influence a person’s range on the spectrum. In other words, although each woman may have a unique refraction due to her particular combination of lenses, the gender lens creates certain similarities. Despite their differences, a high income white woman and a middle income black woman (or vice versa) have much in common vis-à-vis a male of either economic class or race.

Furthermore, all feminist analysis need not discuss all types of feminism just as a discussion of Greek philosophy, for example, may focus on Aristotle but not Plato. A focus on one particular branch of feminism has legitimate functions such as critiquing a current position, serving as an example of an alternative mode of analysis, or simply contributing to the marketplace of ideas. Moreover, in some instances the different types of feminism may come to the same conclusion even if for different reasons.

Finally, Zelenak himself understands and uses feminist theory

30. See Kornhauser, supra note 5, at 307 n.17. Many feminists reject gender essentialism because they believe that womanhood is not biologically based but a societal construct and thus there is no “inner nature to be discovered beneath the social construction.” Cain, supra note 6, at 28. It is unnecessary to decide whether the commonalities I describe are biologically or socially determined. Similarly, this seems true for the gender experiences that Cain refers to as the basis of gendered misunderstanding.

The hiring decision illustrates how the broad brush of gender or race can influence what we see and do. Many white men, for example, note the difficulty that white men have getting jobs now that employers are concerned about diversity. Yet white men continue to be statistically over-represented in most situations. See, e.g., Olsen, supra note 7, at 939-40. Professor Olsen tells of a recent appointments committee at UCLA Law School that had no women on it. See id. at 939. At a time when women represented 30-40% of law school classes, all the entry level candidates that the committee invited for interviews were males. See id. Perhaps a more common illustration of the gender lens is the common perception that a behavior performed by a male is assertive but the same behavior performed by a female is aggressive (or “bitchy”).
strangely. For example, he claims that my article, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction* ("Income Tax Rhetoric")\(^{31}\) is a "proposal[] based on difference feminism... for increased progressivity."\(^{32}\) In fact, the article is not a proposal for anything, let alone increased progressive rates. Rather, the article is primarily about rhetoric, as are many of my articles.\(^{33}\)

Specifically, the main themes of the article are: (1) that the neutral-sounding language of economic efficiency frequently used to promote a flat tax is rhetoric which masks an underlying philosophy; (2) that there are other philosophies that can support progressivity; and (3) that a loosely described web-of-care feminism, rooted in, but not limited to, Carol Gilligan's writings is but one example of such a philosophy. *Income Tax Rhetoric* could have conveyed the same point by omitting the feminist discussion entirely and using another example, communitarianism for instance.

Given the themes and content of *Income Tax Rhetoric*, Zelenak makes several other incorrect criticisms of my use of feminism. For example, he irrelevantly criticizes the article for ignoring branches of feminism other than "difference feminism."\(^{34}\) This criticism is meaningless since the article uses difference feminism only as an example of a particular type of philosophy. He also mistakenly treats Carol Gilligan's *In a Different Voice: Psychological Theory and Women's Development*\(^{35}\) as a Bible that *Income Tax Rhetoric* (and difference feminism) must interpret literally so that each statement it makes must be found in her work. The theory, however, has grown beyond Gilligan's original work and includes works of many other


\(^{32}\) Zelenak, *supra* note 8, at 1524 n.23. Another example of Zelenak's misunderstandings is his claim that I misread Carol Gilligan by moving from her description of "what is" to a prescription of "what ought to be." *Id.* at 1551. On the contrary, this move to "what ought to be" is made by Zelenak himself because he reads *Income Tax Rhetoric* as a proposal rather than what it is—a description of a way of viewing the world. Moreover, only two pages later he reverses his own reading of my article and claims that "Kornhauser's argument depends on the claim that it is based on how women really are, not on... how they ought to be." *Id.* at 1552.


\(^{34}\) See Zelenak, *supra* note 8, at 1523.

\(^{35}\) CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).
Not only is Zelenak’s charge of selection bias peculiar, as described above, but he himself engages in repeated selection bias. His continual reading of phrases hyper-literally and out of context causes him to ignore what the author actually does say. This leads to a sound bite interpretation of articles which ultimately distorts their meanings. A basic example of this problem is his exclusive focus on only the small portion (approximately one-sixth) of *Income Tax Rhetoric* that discusses feminist theory. By reading this section out of the context of the rest of the article, he misapprehends the purpose of the article which in turn facilitates his other misunderstandings.

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37. See infra notes 44, 46, and accompanying text. Thus, to have a whole section on “Kornhauser’s Misreadings of Gilligan,” see Zelenak, *supra* note 8, at 1551-53, reflects a monumental misreading itself. It causes Zelenak, for example, to discredit my statements about extended circles of care which include strangers because Gilligan does not speak of them. Such a charge has no meaning since other feminists do talk of concentric circles of care which include strangers. These feminists are appropriately cited in *Income Tax Rhetoric*. See Kornhauser, *supra* note 31, at 510 n.148 (citing Noddings, *supra* note 36). Noddings speaks of concentric circles of care, including the proximate stranger, and I built on that idea to show that a progressive tax could be a non-intrusive, non-burdensome way to care for the non-proximate stranger as well.

38. See *supra* notes 27-28 and accompanying text (discussing selection bias in the context of reproach number one).

39. For example, Zelenak states that my “feminist case for progression is based on a particular use of tax revenues—providing the financial opportunity for self-fulfillment to the poor.” Zelenak, *supra* note 8, at 1554. He continues that this is a “rather romantic view of governmental expenditures,” since almost half the expenditures are for national defense and interest on the national debt, about which the ethic of care says “[p]robably nothing.” *Id.* Here Zelenak ignores my statement elsewhere in the article that how the government obtains the revenue is not necessarily tied to how the government spends it. See Kornhauser, *supra* note 31, at 473 (noting that a progressive tax, for example, can be spent in a regressive manner). Zelenak then compounds his problem with his narrow and literal interpretation of how one can help others by assuming that this assistance must occur via a direct transfer to the other. As every tax professor knows, however, a taxpayer may receive a real economic benefit by means of an indirect transfer. *See, e.g., Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 729-30 (1929).* Consider the situation in which there are two taxpayers: B, a low income taxpayer, and C, a high
Zelenak’s treatment of *Income Tax Rhetoric’s* discussion of who uses a "feminine voice" also illustrates his non-contextual, hyper-literal reading and the resulting distortions of meaning. He states that “[t]o Kornhauser, all females are necessarily feminist, and all males are necessarily not feminist,” and quotes a statement I wrote about women seeing themselves and the world through different eyes than men. He quotes accurately in the same sense that a movie advertisement accurately excerpts from a critic’s review. That is, the words are literally accurate, but the meaning only tangentially so, if at all. First of all, the statement is not necessarily a profession of my beliefs, but part of my explanation of what difference feminists believe. More importantly, Zelenak takes the statement out of the context of this broader discussion. Like most discussions, this one began with a general statement and then proceeded to refine it. Thus, *Income Tax Rhetoric* later refines or modifies the sentence by stating:

The “male” and “female” voices, of course, do not belong exclusively to males and females, respectively. In fact, by the time people are adults, most use both voices.

income taxpayer. Assume further that the government must raise $20,000 to pay for some service that benefits all equally. (Zelenak ignores the possibility that national defense and debt payments might benefit higher income taxpayers more than lower income ones—a possibility I discuss in another part of *Income Tax Rhetoric* that he ignores.) B would pay less under a progressive tax than a proportionate one. Surely, such a progressive tax would benefit B and is an indirect way in which C can care for another.

Another example of Zelenak’s selection bias is his focus only on a small portion (approximately one-sixth) of *Income Tax Rhetoric*. This unduly narrow focus creates a fundamental misapprehension of the article that causes many of his misunderstandings. See, e.g., *supra* notes 32, 37. In fact, it leads him to include the article in the feminist wing of critical tax theory. In reality, it is not a critical tax article in the sense in which he and many critical tax theorists seem to define the term—an article in which feminist or critical theory is a central organizing force. For example, I was not invited to participate in either the 1995 workshop on “Critical Tax Theory” at SUNY-Buffalo or the anthology *Taxing America* edited by Karen B. Brown and Mary Louise Fellows that Zelenak mentions. See Zelenak, *supra* note 8, at 1522 (citing *Taxing America* (Karen B. Brown & Mary Louise Fellows eds., 1996)). It is interesting that many of the people who label me a feminist scholar seem to be those who criticize feminist scholarship. See, e.g., William Turnier et al., *Redistributive Justice and Cultural Feminism*, 45 Am. U. L. Rev. 1275, 1292 (1996). This brings up the issue of the value and purpose of labels.

Whether *Income Tax Rhetoric* is feminist scholarship at all is not clear, especially since it is not clear what feminist scholarship is. That I believe in feminism, of whatever sort, is irrelevant. An article written by a feminist is not necessarily feminist scholarship. I discuss the article and feminist tax scholarship more generally in Kornhauser, *supra* note 5, at 303-09.


41. As it so happens, I do feel that a person’s view of the world is affected by many factors, and gender is one of them. See *supra* note 30 and accompanying text. Such a confluence of beliefs, however, is not necessary.
However, approximately seventy percent of those who use both focus on one voice, using the other minimally. As their labels imply, the female voice is predominantly the domain of women and the male voice belongs to males.\textsuperscript{42}

This passage is integral to the statement Zelenak quotes in his text, but he acknowledges it in a mere note in which he admits only that I "back[] off a little from [my] claim of universality."\textsuperscript{43} "Back off a little" is a curious description, but then the note is curious in other respects. For example, Zelenak selectively reads the sentences in \textit{Income Tax Rhetoric} to get the result he wants, ignoring some so that he can take the ones he wants out of context. The only sentence he actually cites or quotes to reach the conclusion in his note is the last one. He thus ignores important parts of what I say, and even more curiously, ignores cites that \textit{Income Tax Rhetoric} makes to Gilligan (the writer I am accused of misreading). It is Gilligan herself who is authority for the statement that although most people use both voices, a large majority (about seventy percent of those who use both voices) use one voice predominantly.\textsuperscript{44} Shortly after this, Zelenak once again ignores my statement that most adults use both voices to claim that I overstate the gender difference, and that Gilligan sees a difference of degree rather than kind.\textsuperscript{45} Here he disregards not only what I say, but also what Gilligan has said, albeit not in \textit{In a Different Voice}. Gilligan is very clear that although each gender is familiar with both voices, women largely use a "feminine voice," and this affects how they define a problem, analyze it, and come to a solution.\textsuperscript{46} Zelenak simply ignores this.

\section*{IV. PURPOSE OF SCHOLARSHIP}

Zelenak's last and biggest reproach of critical tax theorists is that many of them fail "to think through proposed solutions with sufficient care. . . . It is unfair to criticize current law for its effects on women or blacks without showing a way to do better; . . ."\textsuperscript{47} This criticism reveals a far larger and more important failure by Zelenak than any alleged failure by the critical theorists: his failure to

\begin{itemize}
\item \textsuperscript{42} Kornhauser, \textit{supra} note 31, at 511 (footnote omitted) (citing Gilligan, \textit{supra} note 35); see infra note 44 and accompanying text.
\item \textsuperscript{43} Zelenak, \textit{supra} note 8, at 1550 n.148.
\item \textsuperscript{44} See Kornhauser, \textit{supra} note 31, at 511 n.150 (citing remarks of Carol J. Gilligan in Feminist Discourse, Moral Values and the Law—A Conversation, 34 Buff. L. Rev. 11, 48 (1985) [hereinafter Feminist Discourse]).
\item \textsuperscript{45} See Zelenak, \textit{supra} note 8, at 1552-53.
\item \textsuperscript{46} Feminist Discourse, \textit{supra} note 44, at 47-49.
\item \textsuperscript{47} Zelenak, \textit{supra} note 8, at 1524.
\end{itemize}
understand the nature of scholarship and the role of theory. Certainly, one role of scholarship is to propose solutions to problems, but it is not the only one. There are many other valid purposes of scholarship, such as describing what actually exists, exploring historical origins, and identifying problems. Consequently, a blanket criticism that the scholarship fails to offer solutions indicates a far too narrow view of scholarship.

When a proposed solution is the main purpose of an article, it ought, as Zelenak notes, to be offered thoughtfully and with as much care as possible. But what is a "proposed solution" and what is "sufficient care"? As previously stated, Zelenak sometimes sees proposed solutions when they are not there. Moreover, his statements suggest that a solution has shown sufficient care only when it entirely solves the problem. For example, he criticizes some articles for not looking outside the tax code for solutions, but this shortcoming is true of many tax articles, not just critical tax articles, because they are, after all, articles about tax. He criticizes other articles, such as Professor Staudt's, because their proposals help some women but not others. However, scholars in tax and other fields frequently offer incomplete solutions. This occurrence is not surprising. In a complicated, multi-cultural, multi-class, multi-raced, multi-everything world, there are bound to be conflicts no matter

48. For example, Zelenak's incorrect view of Income Tax Rhetoric as a proposal, see supra note 32, leads him to accuse me of "a sort of 'tax myopia' " by proposing a solution with "minimal consideration" of whether the author's goal is best achieved through the tax system rather than through non-tax legal reform. Zelenak, supra note 8, at 1524. Since the article is not a proposal but a discussion of underlying philosophies that support progressive and flat taxes, his statement makes no sense in regard to that article. Moreover, his statement is somewhat ironic since I believe social policy generally ought not be implemented through tax laws. See, e.g., Marjorie E. Kornhauser, Theory Versus Reality: The Partnership Model of Marriage in Family and Tax Law, 69 TEMP. L. REV. 1413, 1435-36, 1446, 1448 (1996).

Although I believe that it is desirable to implement social policy through non-tax means, it is impossible to do so entirely since basic choices—such as what to tax and how—inevitably reflect social, philosophical, and political beliefs. See supra note 25. Indeed, a principal point of Income Tax Rhetoric, as well as much of my other scholarship, is the inter-relatedness of tax and other elements of our society, such as history and politics. See, e.g., Marjorie E. Kornhauser, Corporate Regulation and the Origins of the Corporate Income Tax, 66 IND. L.J. 53, 82-94 (1990); Marjorie E. Kornhauser, Section 1031: We Don't Need Another Hero, 60 S. CAL. L. REV. 397, 433-40 (1987); Kornhauser, The Morality of Money, supra note 33, at 122-28, 132-66; Marjorie E. Kornhauser, The Origins of Capital Gains Taxation: What's Law Got to Do with It?, 39 SW. L.J. 869, 871-74, 905-10 (1985). This long-standing theme in my scholarship makes Zelenak's description of my work as myopic distinctly odd, especially since he is only suggesting looking in other legal areas, whereas my work suggests that we must also look to non-legal areas of society to understand legal problems and find their solutions.
what the solution. One merit of critical tax scholarship is that it has encouraged scholars and legislators to consider all these subgroups instead of viewing taxpayers as a group undifferentiated except in economic terms.

A primary virtue of critical tax theory is that it, like any outsider theory, reveals the assumptions hidden behind established thought and institutions. The very dominance of the established culture often makes its assumptions invisible. People consequently tend to view them as inevitable, objective, and true for all members of society, if not at all times. Outsider theory helps strip away the dominant culture's mask of objectivity and universality. Thus, Zelenak's charge that critical tax theory contains an unduly large amount of "one-sided[] and incomplete analysis" which is due, in part, to its failure to "approach the tax laws in a detached and disinterested frame of mind" displays a profound failure to understand the nature of tax and of scholarship—a detached, disinterested frame of mind may be a goal, but it is an illusory one. The Looking Glass again illustrates this point. When Alice complains that she has lost her way, the Red Queen responds: "I don't know what you mean by your way, ... all the ways ... belong to me." Similarly, the detached, disinterested mindset Zelenak yearns for exists only for those who believe that there is but one correct view, a universal Truth. Regardless of whether such universality exists at the abstract level, our current society has not achieved it.

What Zelenak describes as detached and disinterested is simply the dominant mode of thinking whose ideas, assumptions, and presumptions are so deeply embedded in the culture that they have become transparent. In reality, people do not all have the same view, and they cannot entirely shed their own subjectivity. Our lives are multi-layered and so are our truths.

Zelenak's vision of detached and disinterested may be the

49. Zelenak, supra note 8, at 1578.
50. See, e.g., Feminist Discourse, supra note 44, at 49. As Carol Gilligan has said: If you want to support what has been in the Western tradition since Plato—that is, the notion of a unitary truth, that virtue is one, that its name is justice, that it is part of the sense of one right answer upon which we all, in the end, can agree—then you will select an all-male sample.

Id. Ann Scales says that the analysis of "what the facts are is too often taken for granted." Ann Scales, Feminist Legal Method: Not So Scary, 2 UCLA WOMEN'S L.J. 1, 23 (1992).
51. CARROLL, supra note 13, at 206.
52. Outsider scholarship such as critical tax theory unmasks these assumptions. As Scales says: "Feminist Method unlocks objective reality and posits alternative claims to truth . . . ." Scales, supra note 50, at 23.
empirical study with its scientific approach, because science is frequently viewed as the ultimate representative of Objective Truth in our culture. He is certainly quick to discredit my theoretical explanation of how feminism can support a progressive income tax with an empirical study by William Turnier, Pamela Johnston Conover, and David Lowery. Turnier et al. claim that their study proves that cultural feminists, difference feminists in Zelenak’s terminology, show no statistically significant greater support for progressivity than non-feminists. They then urge scholars to shift their attention from feminist theory to empirical studies because “[t]o allow theorists, regardless of their good intentions, to articulate their version of the message of previously excluded voices is merely to substitute a new form of dominance for an old one. It is far more preferable to allow all excluded components to speak for themselves.”

There are, however, grave problems not only with the Turnier poll results but also with their exaltation of empirical studies and corresponding denigration of theory. As I have stated elsewhere, polls have inherent limitations that make them a poor method to explore complicated ideas. For example, what questions are asked and how they are phrased can lead to very different responses. The Turnier poll in particular was deeply flawed by, among other things, its use of self-identification as the method to identify who is a feminist. This method is especially unreliable when the identifying label is one to which many people attach such negative connotations that they profess the beliefs but deny the label. But even if this particular poll were not so defective and polls in general were less flawed, one must remember that science may look more detached and disinterested because it uses numbers, but it does not necessarily yield a more certain truth than other methods of inquiry.

53. See Turnier et al., supra note 39, at 1312. Professor Zelenak does note in a footnote, however, that another recent study found otherwise. See Zelenak, supra note 8, at 1551 n.155 (citing Michael L. Roberts & Peggy A. Hite, Progressive Taxation, Fairness and Compliance, 16 L. & POL’Y 27, 36 (1994)).
54. Turnier et al., supra note 39, at 1317-18.
56. See, e.g., Thomas Petzinger, Jr., The Front Lines: Carol Latham Knows the Spoils Go to Those Who Cross Boundaries, WALL ST. J., May 10, 1997, at B1 (“‘I am not a woman’s libber and never will be,’ ... ‘I just wanted to be taken seriously.’” (quoting Carol Latham, a scientist who felt patronized in a predominantly male field)). I always thought that this was the essence of feminism that Latham is disclaiming.
57. Although statistical data may look more precise than “subjective” evaluations, this is not always true. Most people can more readily agree on the “fact” that Rembrandt
who has followed the capital gains debates knows that for every study that shows how a cut in capital gains will produce increased revenues, there is at least one other that proves the opposite. Frequently these studies are based on very similar models with only slight changes in a few assumptions.

Science is not the only Truth; it is but one of many truths. It is not absolute but fallible, tentative, and evolving. Science does not operate separately and in isolation from society, but rather it is a part of the social process. As a consequence, concepts embedded in society are also reflected in science. Thus, science is not detached and disinterested, but like the society of which it is a part, it has a point of view, and it can be racist, classist, and/or gendered.

Since science, like other truths, is a partial and imperfect truth, it would be unwise to abandon other techniques for searching for truths

Recognizing this, the economist Deirdre McCloskey has said:

"Even if it were true that regression is more precise, this would not be a good argument for economists to abandon introspection in economics. Introspections, even if imprecise, can be better than regression estimates infected with mis-specifications and errors in the variables. That the regression uses numbers, precise as they look, is irrelevant. To speak precisely, precision means low variance of estimation; but if the estimate is greatly biased, it will tell precisely nothing."


58. See id. at 32-34.

59. The investigation of science as part of the cultural and social science owes a large debt to the seminal work by Thomas Kuhn. See THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

60. See, e.g., SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM (1986) (examining feminist critiques of science). Among other things, Harding questions the alleged neutrality and objectivity of science. See id. at 34-35. First, she disputes the use of physics as the paradigm of objective science since it differs from most sciences (such as biology) in that it examines only "simple systems or simple aspects of complex systems" that are separated from social constraints. Id. at 44-45. Even physics, however, cannot be totally separated from the larger society. Long formulas produced and read by computers are not explanations; the formulas are meaningless without interpretation. For example: The formula "1 + 1 = 2" is meaningless unless we are told what is to count as a case of 1, of +, of =, and so on. The history of chemistry can be understood in part as the struggle to determine what should count as the 1's, the +'s, and the '='s of chemical "addition." And it is not just in physics and chemistry that the appropriate meanings and referents for such apparently obvious terms are debated. As a famous physicist is alleged to have remarked, if we put one lion and one rabbit in a cage, we rarely find two animals there one hour later! Scientific formulas are like legal judgments: the laws become meaningful only through learning (or deciding) how to apply them, and doing so is a process of social interpretation.

Id. at 45.
or even to privilege empirical studies over other methods, as Turnier et al. suggest. Not only would it be unwise, but it would be impossible because empirical studies cannot exist without theory.61 Without theory, empirical data is an unintelligible tangle of unrelated bits. At every critical point theory influences empiricism—what to study, how to study it, and how to interpret the results are all influenced by theory. Empirical results can refine theory, which in turn refines the empirical studies, and so on in a synergistic spiral that brings us closer to an ever-changing truth. It is, therefore, impossible to abandon theory, but it is also unwise to de-emphasize theory. To do so would be like throwing out the baby with the bath water; to neglect one part of the process is to thwart the whole. To use only science, or some other “detached and disinterested” technique, is to silence other viewpoints behind a mask of unanimity and objectiveness. Not only is this oppressive, but it denies everybody of the insights, knowledge, and possible solutions that the alternative communities can provide.

Critical tax scholarship is valuable precisely because it helps explode the myth of neutrality. Like any product of mortals, however, it has flaws. Perhaps it may even have more than others because it is still in its infancy. Professor Zelenak is right to point these flaws out, but his criticisms overstep their rightful bounds. Since critical tax theory challenges accepted views, mainstream readers such as Zelenak must read with particular attention and receptivity to new ideas. They must try to overcome the gender/race misunderstanding. In other words, they must be willing to step through the Looking Glass, suspend long-standing assumptions, and view the world from a slightly different perspective. Critical tax theory then will yield new insights. It may show us problems where we did not see any before; it may produce some answers, but it may not. Even if it produces only problems and no answers (what Zelenak most complains about), it has provided a valuable service.

Contrary to Zelenak’s implication, all scholarship need not (and does not) produce solutions. Before a solution can be found, a problem must be identified. Critical tax theory, like other outsider theory, is especially good at identifying problems. By viewing the world from a vantage point other than the established one, it lays bare our assumptions and forces us to examine what we previously took for granted. It thus reveals heretofore hidden problems. By

61. See ALASDAIR MACINTYRE, AFTER VIRTUE 79 (2d ed. 1984) (“Perceivers without concepts, as Kant almost said, are blind.”).
examining a topic from a new angle, it may also free people to seek and find new and better solutions. A better solution may not be possible; sometimes there is no way to solve one problem without creating another. Yet critical tax theory’s different perspective is still useful. By revealing the multiplicity of viewpoints and problems, it will have shown us that whatever solution we have chosen is only a partial solution—that problems still exist (or that the solution itself creates problems) and that we must search for other ways to ameliorate those problems. It will remind us, as we must be reminded, that our solutions are partial and evolving.

As more and more outsider scholars, such as critical tax scholars, examine a subject, it may seem that only more problems are produced—that shared assumptions that provide common understanding are disintegrating and that we are descending into chaos. In fact, the opposite is true. The problems always existed; we just did not recognize them. The chaos of competing communities and views has always been there, just held at bay by the dominance of one viewpoint. Since such dominance is no longer possible or desirable in our multi-cultural world, the only way to limit the chaos is to create bridges of understanding among communities, to encourage a process of compromise and balance so that all share society’s benefits and burdens. In the tax world, this approach means that we must constantly be aware that the tax laws reflect social and political choices, not just economic ones, and that all these choices have different impacts on different groups. Our awareness of these facts can help us deal with any resultant inequities either through the tax code, through other laws or institutions, or simply by reminding us that currently unsolvable inequities are present so that we must remain tolerant and compassionate while we continue to seek solutions. Critical tax theory is an important tool in achieving this goal.

62. Gilligan illustrates the transformative nature of a discourse that includes both male and female voices with an example of two four-year olds playing together but each wanting to play a different game. The boy wants to play “pirates” and the girl “neighbors.” One solution to their dilemma would be for the children to alternate games: 10 minutes of pirates followed by 10 minutes of neighbors. Instead, at the girl’s suggestion, they played a new game: pirates who live next door to each other. See Feminist Discourse, supra note 44, at 45. What holds true for moral discourse holds true for tax: different voices and different viewpoints have the potential to transform the discourse.