

6-1-1998

Critical Tax Theory: Still Not Taken Seriously

Nancy E. Shurtz

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Nancy E. Shurtz, *Critical Tax Theory: Still Not Taken Seriously*, 76 N.C. L. REV. 1837 (1998).Available at: <http://scholarship.law.unc.edu/nclr/vol76/iss5/17>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

CRITICAL TAX THEORY: STILL NOT TAKEN SERIOUSLY

NANCY E. SHURTZ*

[F]eminism is about taking *all* women seriously, which requires eliciting the differences and conflicts among women.¹

But in the overall feminist scheme of things, any arguable injustice caused by QTIPs to affluent (and overwhelmingly white) widows is simply trivial.²

Justice Oliver Wendell Holmes once said: "Taxes are what we pay for civilized society . . ."³ In many dimensions of our collective daily lives it is clear that many among us have been denied access to the fruits of civilized existence. The American ideal of every citizen enjoying an equal opportunity to exercise actively the rights to "life, liberty, and the pursuit of happiness" is not and has not been the reality for women, people of color, or children either today or yesterday.⁴ The "civilized society" to which Justice Holmes alluded

* Nancy E. Shurtz is a professor at the University of Oregon School of Law, where she teaches taxation, estate planning, and women and the law. I would like to thank my research assistant Scot Ferguson for rendering invaluable assistance in the preparation of this article.

1. Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, 116. "[B]y urging modes of analysis that pay attention to the varieties of human experience and to the complex interplay between experience and knowledge, feminists dispute the first premises against which consistency and coherence are typically measured." *Id.* at 137.

2. Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521 (1998).

3. *Compañía de Tabacos v. Collector*, 275 U.S. 87, 100 (1927).

4. See Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 384, 394-99 (1994). Despite record numbers employed in the paid labor force, women still experience high rates of poverty across all age groups, most concentrated among African-Americans. Professor Williams traces the origins of this widespread deprivation to historical practices that denied women access to property ownership. See *id.* at 385-90. She argues that in contemporary society, the majority of assets that constitute "wealth" take the form of human capital (education, skills, work experience, etc.), which in turn are translated into the ability to command resources in the marketplace. See *id.* at 392-96. Due to the constraining influences of socially prescribed gender roles that maintain women's primary responsibility for childcare and legal doctrines in family and divorce law that limit women's claims to the fruits of human capital, women and their children are particularly vulnerable to the ravages of poverty, with bleak prospects of escape. See *id.* at 396-402.

may rightly be said to be inhabited chiefly by men, and most prominently by affluent, powerful white men.⁵ Several currents of feminist thought,⁶ as well as Critical Race Theory,⁷ dedicate much of

Though it is projected that by the year 2000 more than half the paid labor force will come from households comprised of dual-earner married couples, household labor remains decidedly an unpaid, one-worker affair—the woman's. Data from recent surveys of married couples analyzed by sociologist Patricia Ulbrich revealed that wives averaged some 32.3 hours of housework per week, compared with only 8.7 hours for their husbands. These figures applied only to housework, and did not include child care. See Jim Thornton, *Time to Re-Examine Your Division of Household Labor and Work Toward Domestic Détente*, SEATTLE TIMES, Sept. 2, 1997, at F1.

5. Despite comprising 53% of the American electorate, women are grossly underrepresented in the halls of government at both the national and state levels. Women currently occupy less than 12% of the total seats (60 of 535) in Congress—including only 9 (of 100) in the Senate. At the state level, women are governors in but 2 of the 50 states, and though they are somewhat more visible in state legislative assemblies, they still hold only 21.5% of these seats nationwide. See John S. Day, *Women Senators Seek Common Political Agenda*, BANGOR DAILY NEWS, Nov. 20, 1997, at A2.

Women and minorities are also all but locked out of the boardrooms of the nation's largest corporations. More than 95% of top-level management of Fortune 500 companies are white men, while less than one-half of one percent of these firms are headed by women. See Barbara Jones, *Giving Women the Business: On Winning, Losing and Leaving the Corporate Game*, HARPER'S MAG., Dec. 1997, at 47, 47. Racial minorities are also minor presences on the boards of America's corporations. Of 7000 corporate directors across the nation, fewer than 250 are African-American—less than four percent. Even smaller numbers of Latinos and Asians are represented on corporate boards. See William Reed, *Blacks and Corporate Boards*, TENN. TRIB., Feb. 6, 1997, at 18.

6. Early feminist thought was influenced and inspired by successes of the civil rights movement of the 1950s and '60s that secured formal recognition of African-Americans' equal rights under the law. Feminists' own efforts focused on achieving formal equality for women in areas widely acknowledged to be men's domains, particularly in the paid labor market. Divergent views sprouted over the desirability of having women become "just like men," and ushered in a new era of feminist exploration of the nature of womanhood and women's relationships to established social, political, and economic institutions. This expansion of feminist inquiry continues unabated, as evidenced by the number of feminist "schools" of thought represented in the literature. Feminist methodology varies widely as well, much of it still devoted to advancing women's standing relative to men's within the prevailing social and institutional framework, while others seek to "deconstruct" these same fixtures for being bastions of oppression in their own right. See MARY FRANCIS BERRY, *WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION* 59-63 (1986); FLORA DAVIS, *MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICA SINCE 1960*, at 33-48, 69-80 (1991).

For an excellent sampling of the rich variety of contemporary feminist thought, see MARY BECKER ET AL., *CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 50-154 (1994), presenting excerpts from the works of Catharine A. MacKinnon (representing "dominance" theory, which regards gender as a system of male supremacy and female subordination), see *id.* at 52, Sylvia A. Law (representing the "formal equality" school, which seeks explicit legal recognition of women's rights to equal treatment with men), see *id.* at 82, Robin West (representing "hedonic" feminism, which emphasizes women's real experiences of pain and pleasure), see *id.* at 90, Margaret Jane Radin (representing "pragmatic" theory, a highly

their attention to identifying and exposing the imprint of the "power elite" on social and political institutions (and the laws that support them) that systematically relegate women and minorities to subordinate status in virtually all aspects of American life. In legal scholarship, gender and race bias has been explored extensively in such diverse areas as family,⁸ tort,⁹ contract,¹⁰ corporate,¹¹ criminal,¹²

contextualized approach which "confront[s] each dilemma separately and choose[s] the alternative that will hinder empowerment the least and further it the most"), *id.* at 98, 100, Zillah Eisenstein (representing "socialist" feminism, which "analyzes power in terms of class origins as well as its patriarchal roots"), *see id.* at 104, 105, Jane Flax (representing "postmodern" feminism, which criticizes the purported autonomy of reason, objective trust, and science, and which widely employs the method of "deconstruction"), *see id.* at 110, and Adrienne Rich (representing "lesbianism," which resists heterosexuality as an oppressive institution), *see id.* at 135. The boundaries of these categories are, of course, imprecise at the least, but suggest the dynamic tenor of contemporary feminist inquiry.

7. *See infra* notes 211-39 and accompanying text (discussing Critical Race Theory ("CRT")). For a rich and varied sampling of writings from the CRT catalog, *see* CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995).

8. *See, e.g.,* Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992); Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991); Martha Minow, "Forming Underneath Everything That Grows": Toward a History of Family Law, 1985 WIS. L. REV. 819; Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33 (1993-94); Merle H. Weiner, "We Are Family": Valuing Associationalism in Disputes Over Children's Surnames, 75 N.C. L. REV. 1625 (1997).

9. *See, e.g.,* Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848; Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994); Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1 (1995); Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761 (1996).

10. *See, e.g.,* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996); Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887 (1997); Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889 (1997); Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183 (1993).

11. *See, e.g.,* Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387 (1992); Katherine Hall, *Starting from Silence: The Future of Feminist Analysis of Corporate Law*, 7 CORP. & BUS. L.J. 149 (1994); Kathleen A. Lahey & Sarah W. Salter, *Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism*, 23 OSGOODE HALL L.J. 543 (1985); Ramona L. Paetzold, *Commentary, Feminism and Business Law: The Essential Interconnection*, 31 AM. BUS. L.J. 699 (1993).

12. *See, e.g.,* Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101 (1997); Binny Miller, *Give*

employment,¹³ and environmental law.¹⁴ This same "critical" approach of challenging the nature and character of dominant institutions has been applied across a variety of disciplines, ranging from economics¹⁵ to history,¹⁶ higher education,¹⁷ and the fields of science.¹⁸ However, largely absent from these efforts has been

Them Back Their Lives: Recognizing Client Narrative in Case Theory, 93 MICH. L. REV. 485 (1994); Tonya Plank, *How Would the Criminal Law Treat Sethe?: Reflections on Patriarchy, Child Abuse, and the Uses of Narrative to Re-Imagine Motherhood*, 12 WIS. WOMEN'S L.J. 83 (1997); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387 (1996).

13. See, e.g., Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Mary Becker, *How Free Is Speech at Work?* 29 U.C. DAVIS L. REV. 815 (1996); Ruth Colker, *Pregnancy, Parenting, and Capitalism*, 58 OHIO ST. L.J. 61 (1997); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619 (1991).

14. See Robert D. Bullard, *Environmental Justice for All: It's the Right Thing to Do*, 9 J. ENVTL. L. & LITIG. 281 (1994); Christopher C. Joyner & George E. Little, *It's Not Nice to Fool Mother Nature! The Mystique of Feminist Approaches to International Environmental Law*, 14 B.U. INT'L L.J. 223 (1996); Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J.L. & COM. 597 (1996).

15. See, e.g., BEYOND ECONOMIC MAN (Marianne A. Ferber & Julie A. Nelson eds., 1993); JULIE A. NELSON, FEMINISM, OBJECTIVITY AND ECONOMICS (1996); OUT OF THE MARGIN: FEMINIST PERSPECTIVES ON ECONOMICS (Edith Kuiper & Jolande Sap eds., 1995).

16. See, e.g., DIANA H. COOLE, WOMEN IN POLITICAL THEORY: FROM ANCIENT MISOGYNY TO CONTEMPORARY FEMINISM (1993) (tracing the origins of western women's subjugation in the literature and philosophy of ancient Greece and bringing the process through the era of classical liberalism to contemporary deconstructionist paradigms); MICHAEL LEWIS GOLDBERG, AN ARMY OF WOMEN: GENDER AND POLITICS IN GILDED AGE KANSAS (1997) (exploring the role of women's movements for suffrage and temperance in the vanguard of populist groundswells that sprang up throughout much of late nineteenth-century America, as well as examining the interplay between these well-organized and influential women's efforts and the prevailing conservative (and male) ruling order, and its parallel with features of today's feminist political struggles); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985) (tracing the development of family-law doctrine throughout the last century, a process whose legacy is still felt in what the author terms a "judicial patriarchy" in which the courts still wield enormous influence in defining the contours of considerations of both family relations and gender issues).

17. See, e.g., FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW (Anne Bottomley ed., 1996) (presenting various feminist critiques of traditional teaching contents and methods employed across a broad swath of courses offered in British law schools); ADRIANA HERNÁNDEZ, PEDAGOGY, DEMOCRACY, AND FEMINISM: RETHINKING THE PUBLIC SPHERE (1997) (arguing for a transformation of the educational mission away from a "how to" orientation, attuned to skill acquisition and employment readiness, to one in which principles of community welfare, social justice, and democratic political activism are integrated into curricula to develop a more responsible citizenry); Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61 (1988).

18. See, e.g., BODY/POLITICS: WOMEN AND THE DISCOURSE OF SCIENCE (Mary

examination of the role played by the taxation system in undergirding this hierarchy, chiefly through its subsidization of wealth acquisition and concentration (and its adjunct, social and political *power*), while concurrently exacerbating the subordinate status and relative impoverishment of the remaining sectors of society.¹⁹ Now change is afoot. This void in the catalog of taxation literature is rapidly being filled with fresh studies and commentaries on the relationships between the taxation system and the social, economic, and political standing of "traditionally subordinated groups."²⁰

Even with this recent injection of new blood into the literature, critical tax scholarship may be said still to be in an embryonic state of development. Spawned in the waters of early feminist commentaries on taxation issues, it has experienced a lengthy gestation period. Three primary factors have influenced this slow pace of evolution. First, much of early feminist work was squarely framed in a "liberal"²¹ analysis that mirrored the rights-oriented approach to

Jacobus et al. eds., 1990); FEMINISM AND SCIENCE (Evelyn Fox Keller & Helen E. Longino eds., 1996); SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM (1986); CYNTHIA EAGLE RUSSETT, SEXUAL SCIENCE: THE VICTORIAN CONSTRUCTION OF WOMANHOOD (1989); SEX AND SCIENTIFIC INQUIRY (Sandra Harding & Jean F. O'Barr eds., 1987); WOMEN LOOK AT BIOLOGY LOOKING AT WOMEN: A COLLECTION OF FEMINIST CRITIQUES (Ruth Hubbard et al. eds., 1979).

19. See Regina Austin, *Nest Eggs and Stormy Weather: Law, Culture, and Black Women's Lack of Wealth*, 65 U. CIN. L. REV. 767, 772-74 (1997). Professor Austin identifies the taxation structure as a major "structural impediment" to the accumulation of wealth-building assets by black women. See *id.* at 772-73. Many taxation provisions subsidize asset accumulation, such as deductions for home mortgage interest, see I.R.C. § 163(h)(1), (h)(2)(D) (West Supp. 1998), or for employers' contributions to qualified employee pension plans, see *id.* § 404(a). However, due to a variety of factors, including low wages, job insecurity, and discriminatory barriers to obtaining financing, such taxation benefits are largely unavailable to black women, contributing to the continuing wide gap between white and black levels of wealth and income. See Austin, *supra*, at 773-75.

20. Karen B. Brown & Mary Louise Fellows, *Introduction* to TAXING AMERICA 2 (Karen B. Brown & Mary Louise Fellows eds., 1996); see also Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, in TAXING AMERICA, *supra*, at 45; Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 753; John A. Powell, *How Government Tax and Housing Policies Have Racially Segregated America*, in TAXING AMERICA, *supra*, at 80, 83; Nancy E. Shurtz, *Gender Equity and Tax Policy: The Theory of "Taxing Men,"* 6 S. CAL. REV. L. & WOMEN'S STUD. 485 (1997). For a discussion of the Moran and Whitford article, see *infra* notes 217-39 and accompanying text.

21. In a recent article, I commented on the liberal tradition:

The liberal tradition bridges a span of time from the dawn of the Enlightenment down to the present moment, from John Locke's discourses on "natural rights" to John Rawls' statement of the "original position." Liberal thought is founded upon an acknowledgment of innate individual rights, equality between individuals and the exercise of free choice. Individual preference and action are

women's egalitarian efforts of the time. These early feminists gave primary attention to the removal of impediments to women's autonomy and exercise of liberty within established economic and social structures, principally through prescriptions that encouraged women's increased participation in market labor.²² Even though the inclusion of women's issues on the table of taxation debate was a victory in its own right, early feminist taxation analysis was shaped along decidedly standard contours. Labels have changed slightly over time, but traditional terms of analysis are for the most part variations of five principal criteria that consistently appear in taxation design discussions, and that bear a resemblance to principles

said to be a product of rationality. Rationality employs the human capacity to reason, and is the tool by which maximum self-fulfillment is pursued. Social relationships are grounded both in the establishment of respect for individual initiative and preferences and in equality of opportunity. Social institutions (government, the market, etc.) are the meeting grounds at which the disparate interests and exercise of individual preferences are arbitrated, spawning the creation of collective agreement and cooperative venture in laws, economies, and the like. The role of social institutions is not to direct or guide individual choice, but to maximize its free exercise among all the members of the community. This applies to the aggregated resources of the society, in which the dual objectives of promoting the individual pursuit of self-fulfillment and maintaining respect for one's access to a fair share of society's resources intersect. In the present inquiry, the role of tax may be seen as a tool to bridge these seemingly conflicting social objectives.

Shurtz, *supra* note 20, at 486 n.5.

22. See Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971). Blumberg identified the joint filing provision for married couples as the source of "a strong pattern of work disincentive for married women and inequitable treatment of the two-earner family," further characterizing it as "an instrument of social control." *Id.* at 49, 51-54; see also *infra* notes 64-88 and accompanying text.

Later commentaries expanded on Blumberg's finding of a work disincentive effect against married women, leading to proposals for abandonment of the marital taxation unit and a return to mandatory individual filing. See Pamela B. Gann, *Abandoning Marital Status As a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 34-39 (1980) (noting that by 1979, two-earner married couples outnumbered their single-earner married counterparts, further undermining justification for a taxation regime that benefited a shrinking minority classification of taxpayers); Linda Sands Moerschbaecher, *The Marriage Penalty and the Divorce Bonus: A Comparative Examination of the Current Legislative Proposals*, 5 REV. TAX'N INDIVIDUALS 133, 135 (1981) (contending that "no valid tax policy or reason exists for allowing a hypothetical income split with a spouse, usually a wife, where no real split of income or control of assets has occurred"); Alicia H. Munnell, *The Couple Versus the Individual Under the Federal Personal Income Tax*, in THE ECONOMICS OF TAXATION 247 (Henry J. Aaron & Michael J. Boskin eds., 1980); Laura Ann Davis, Note, *A Feminist Justification for the Adoption of an Individual Filing System*, 62 S. CAL. L. REV. 197, 198-99 (1988) (arguing that any incentive in the taxation system that discourages married women from entering the paid work force hurts the standing of all women through the reinforcement of "traditional, patriarchal stereotypes about the female role in family and society").

of classical liberalism.²³ These are: horizontal equity,²⁴ ability to pay,²⁵ neutrality,²⁶ efficiency,²⁷ and political feasibility.²⁸ These considerations relate to a given tax regime's degree of overall "fairness."²⁹ This begs the question: "Fairness to *whom*?"³⁰ The traditional liberal orientation toward the individual necessarily

23. See Shurtz, *supra* note 20, at 486 n.5.

24. "Horizontal equity" is concerned with treating equally situated taxpayers alike. It is most closely associated with liberal notions of formal equality between individual parties in a society. There are inherent difficulties attached to this principal in the federal tax system, most notably those associated with the selection of the marital unit as the taxation entity of reference for the entire system. Disparities exist both between married couples (for example, one-earner "traditional" marriages and two-earner couples) and between married and unmarried couples who may in every other respect but legal marital status be "equally situated."

25. "Ability to pay" is a principle most closely aligned with liberal ideals of equality of opportunity for all citizens. Problematic elements that accompany this concept concern *what* to tax (for example, income, consumption, wealth) as well as *whom* to tax (for example, the individual, the married couple, the household).

26. "Neutrality" relates to liberal notions of autonomy and the exercise of unconstrained choice. Taxes are, therefore, thought to be best when they exert as little influence as possible on individual choices. Even the casual observer knows, however, that the taxation system attempts to encourage certain behaviors and choices, such as saving and investment, through various tax deductions and rate reductions, while discouraging other behaviors, such as drinking, by imposing high taxes on alcoholic beverages. Such taxation features are legion.

27. "Efficiency" is closely related to neutrality and is oriented towards the workings of the free market, promoting the liberal notion of maximizing personal utility through the exercise of one's preferences. Efficiency considerations often overlap and conflict with aims of other criteria, such as ability to pay. Choice of tax base, for instance, is often argued on efficiency grounds (the consumption vs. income debate) as is the tax rate structure (flat tax vs. graduated progressive tax).

28. "Political feasibility" reflects the traditional liberal notion of government as arbitrator between the competing interests of a diverse citizenry and as a guarantor of access to a basic share of collective resources necessary for the exercise of individual liberty. Critics of this ideal charge that government cannot be a fair broker for a diverse population because its authority is vested in the interests of the dominant social class. For radical feminists such as Catharine MacKinnon, for instance, *all* established social and political institutions are permeated with a "male" soul that is oppressive to women. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 215, 237 (1989). "In male supremacist societies, the male standpoint dominates civil society in the form of the objective standard—that standpoint which, because it dominates in the world, does not appear to function as a standpoint at all." *Id.* at 237.

29. Professors Brown and Fellows consider three criteria to be central to traditional tax analysis: economic neutrality, objectivity, and progressivity. Their stated orientation, however, is toward elements in taxation design that retard the causes of social justice. See Brown & Fellows, *supra* note 20, at 3-4.

30. See Williams, *supra* note 10, at 187-88. Williams stresses the importance of the role of law in shaping the moral posture of society. With regard to race relations, for instance, law that tolerates discrimination denies claims of a fair and just society, denies a social makeup that "is quickly becoming a nation of minorities," and is ineffective and inefficient. *Id.* at 188. He was referring specifically to contract law, but these principles are equally applicable in the construction of taxation law.

limited the scope of analysis to taxation's effect on women at the micro-level,³¹ but did not address or consider women as a subjugated class. Of course, there is a host of other criteria that are of some importance to creation of a well-designed taxation system, but many of these are not the foci of contentious discourse.³²

In addition to the influence of liberalism in defining its orientation, much of tax scholarship tends to view the tax system as being in isolation³³—separated from the dynamics of the sociopolitical realm, and largely unrelated to other sectors in the galaxy of legal discourse.³⁴ This separation stems significantly from traditional views that taxation law reflects principles of objective neutrality, and in this resembles other pseudo-sciences such as economics.³⁵ Hence taxation has been viewed to be largely unrelated

31. See, e.g., Blumberg, *supra* note 22, at 54-56 (principally focusing on identifying features in the tax code that inhibited women's exercise of autonomy). Blumberg points out that from the time the 1948 tax reforms were enacted until 1971, income splitting was almost universally viewed to be an advantage to married couples, even though it always conferred its greatest tax benefits on one-earner couples, "reflecting and reinforcing a traditional and, arguably, outmoded family pattern." *Id.* at 55-56.

32. The obvious need for a levy to generate adequate revenues, as well as a reliable method of collection, are among the other vital, but less controversial, issues of consideration in taxation design. There are also a number of what have been termed "micro-criteria" for evaluating tax structures. For the classic presentation of these themes, see Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567 (1965). See also Nancy E. Shurtz, *A Critical View of Traditional Tax Policy Theory: A Pragmatic Alternative*, 31 VILL. L. REV. 1665 (1986) (criticizing traditional tax policy criteria for representing conflicting principles that preclude the creation and implementation of a coherent, unified taxation structure, and arguing that a central focus on efficient revenue generation would yield a far better tax system than the current regime composed of ad hoc measures).

33. See Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259, 260-61 (1988).

34. In the policymaking realm, this perceived separation of tax law from other areas of law constitutes what is termed a "tax myopia." See Paul L. Caron, *Tax Myopia, or Mama Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517 (1994). "Tax myopia," Professor Caron explains, is grounded in the perpetuation of two myths: "The first myth is that tax lawyers are somehow *different* from other lawyers. . . . [T]he related second myth [is] that tax law is somehow *different* from other areas of the law." *Id.* at 518. These myths, in turn, are products of non-integrated application and consideration of tax and non-tax law in all three branches of the federal government, resulting in a sort of "separate spheres" mindset that Professor Caron identifies as crippling to the creation of effective legislation in many vital areas of the public interest. See *id.* at 531-54 (Congress); *id.* at 554-73 (Treasury Department); *id.* at 573-89 (courts). Caron calls for efforts to adopt "synergistic approaches" to tax and non-tax considerations that can materially improve the legislative and judicial processes. See *id.* at 574-89 (discussing reform options).

35. See NELSON, *supra* note 15, at 22. As applied in standard contemporary economics,

[o]bjectivity is assumed to be assured by adherence to positive (that is, value-

to more volatile (politically charged) areas of law and has been underutilized as a tool of more general legal reform, but this scene is beginning to change.³⁶ Third, women, minorities, and those of modest financial means are underrepresented in the taxation field,³⁷ relative to other areas of law, and in the halls of legal education, where feminist and critical race scholarship has been marginalized by established denizens of the academy.³⁸ Initially, dismissal came in the form of non-acknowledgment.³⁹ When these movements did not fade

free) analysis, an arm's-length detachment from practical or political concerns, the use of formal and mathematical methods, and the search for ever more general theories. This image is defined in opposition to notions of intuition, vagueness, subjectivity, political concern, verbal and informal analysis, and explanations of particular phenomena, all of which are assumed to be less than scientific.

Id. Within taxation policy, Nelson believes these notions influence a tax structure that is oriented toward autonomy and individuality rather than toward honoring the web of relationships that comprises a society. She advocates adoption of a taxation system featuring the individual "in relation" as her unit of reference. See Julie A. Nelson, *Tax Reform and Feminist Theory in the United States: Incorporating Human Connection*, 18 J. ECON. STUD. 11, 23 (1991).

36. See Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996). Silbaugh ties the sources of nonrecognition of the economic value of housework (reflected in such features of the tax system as the nontaxability of imputed income and the marital taxation "bonus" that accrues to married couples with stay-at-home wives) to similar legal nonrecognition in other areas of law, such as labor law. Paid domestic workers are not only one of the lowest-paid professional populations, but are among the least protected by law, being exempt from "all of the National Labor Relations Act, from coverage under the Occupational Safety and Health Act coverage [sic], and from much of workers' compensation law." *Id.* at 72.

Mary Heen has examined the role the tax system may play in integrating child care provisions more effectively in ongoing welfare reform efforts. Current child care assistance programs suffer from insufficient funding at both the state and federal levels, making mandatory work requirements inherent in welfare reform difficult for poor parents to successfully satisfy. Nonintegration of the welfare reform system with an effective child care assistance system (which could include refundable tax credits, direct subsidies, or a combination thereof) inhibits the successful attainment of policy goals on both fronts. See Mary L. Heen, *Welfare Reform, Child Care Costs, and Taxes: Delivering Increased Work-Related Child Care Benefits to Low-Income Families*, 13 YALE L. & POL'Y REV. 173 (1995).

37. See Caron, *supra* note 34, at 526-31. Professor Caron notes that even as women are increasing their ranks in the legal profession generally, "tax practice has become more isolated from other areas of law by remaining primarily a men's club." *Id.* at 526; see also Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 767 (1997) (noting that while ethnic minorities comprise about 25% of the population of the United States, they comprise only about 8% of the total population of lawyers, and only 2% of the partners in the nation's largest law firms).

38. See Paetzold, *supra* note 11, at 700.

39. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561-66 (1984).

into oblivion but garnered new adherents and became impossible to ignore, mainstream scholars employed new and varied strategies to devalue the content of critical commentary.⁴⁰

Such attention, albeit of a variety intended to dismiss and discredit, may be seen as a sign of progress. If imitation is truly the sincerest form of flattery, then open resistance from those who have previously ignored you must, in some quarters, rank a close runner-up. In this light, the fledgling realm of critical tax scholarship may have graduated to a higher level of maturation, as evidenced by the appearance of a review of its literature by Lawrence Zelenak,⁴¹ a leading fixture in the firmament of taxation scholarship. This article examines the character and content of present critical tax scholarship, employing Zelenak's commentary as a point of departure and of constructive comparison and as a foundation for a glimpse at future avenues of inquiry for this exciting and emerging area of law.

Zelenak examines an array of feminist writings (as well as one entry from the critical race perspective) that relate to several leading and controversial issues in the taxation field, and renders his opinions on the relative virtues and demerits of these offerings. While he acknowledges that academic address of taxation's relationship to matters of class, race, and gender "is long overdue,"⁴² he is generally dismayed by the content of critical tax literature, "troubled that much of the work has not been carefully done."⁴³ He states four general criticisms of feminist/critical tax analysis. First, he believes that the literature is too eager to accuse the law of being openly hostile to women and blacks.⁴⁴ He ascribes this wayward tendency to a failure to view the inherent conflict in feminist doctrine of encouraging women in traditional gender roles to assume new roles while at the same time composing programs designed to help the material position of these same women in their traditional roles.⁴⁵ Related to this criticism is his second charge that feminist commentators often do not examine the criticisms of other feminists when shaping their opinions.⁴⁶ Third, he believes that (especially) the critical race theorists are arbitrary in the choice of laws they examine, and that

40. See Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1352-68 (1992).

41. See Zelenak, *supra* note 2.

42. *Id.* at 1522.

43. *Id.* at 1523.

44. *See id.*

45. *See id.*

46. *See id.*

this leads to biased analyses.⁴⁷ Finally, he believes that not enough thought goes into constructing solutions to the problems these authors set forth.⁴⁸

Through examination of the works that reside at the epicenter of these criticisms—articles by Marjorie Kornhauser,⁴⁹ Gwen Thayer Handelman,⁵⁰ Mary Louise Fellows,⁵¹ Wendy Gerzog,⁵² Nancy Staudt,⁵³ and Beverly Moran and William Whitford⁵⁴—I will demonstrate that Zelenak misses important substantive elements of the pieces he reviews, revealing a basic misunderstanding of the mission of critical scholarship. I believe this misunderstanding owes much to his adherence to a form of normative discourse⁵⁵ that

47. See *id.* at 1523-24.

48. See *id.* at 1524.

49. See Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987).

50. See Gwen Thayer Handelman, *Sisters in Law: Gender and the Interpretation of Tax Statutes*, 3 UCLA WOMEN'S L.J. 39 (1993).

51. See Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 LAW & INEQ. J. 137 (1991).

52. See Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301 (1995).

53. See Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996).

54. See Moran & Whitford, *supra* note 20.

55. The standard form of normative legal analysis is said to follow the form of the lawyer's brief. See Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 930 (1991) ("The lawyer's brief begins with a statement of jurisdiction, a statement of the issues, the discussion of the fact, the argument of law, and then the request for judicial relief. Normative legal thought closely tracks this structure, and when it is complete, there is a conclusion.")

Paul Brest echoes this characterization, concluding that "most of our writings are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good." Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981). Normative legal analysis "assesses decisionmaking authority, competence, procedures, criteria, and results." *Id.* at 1063 n.1.

Cognitive model theory employs the metaphor of "purposes are destinations" to construct a "source-path-goal schema" that closely parallels the form of normative legal theory. GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 275 (1987). Lakoff's construct consists of a *source* ("[t]he state where the desire [purpose] is unfulfilled and no action toward fulfilling it has been taken"), a *path* ("[t]he sequence of actions that allow one to achieve the purpose"), and a *goal* ("[t]he desired state is the endpoint"). *Id.* at 278. These constructs are powerful devices because they often correspond with sequences of personal experiences. Because of this correspondence, such schemata seem to represent *natural* processes of inquiry that are viewed in some quarters as intrinsically superior paths to knowledge. See *id.* Professor Zelenak labels such a tightly constrained mode of discourse as the "right way" to approach issues of taxation policy. See *infra* notes 81-90 and accompanying text.

suggests employment of a universal blueprint⁵⁶ for scholarship which allows scant room for deviation from the mold. Zelenak's stringent observance of a prescribed discursive form precludes him from discerning some of the intended meanings projected in these pieces by the authors whom he criticizes—in short, he “misses the point.”⁵⁷

56. Normative models employing universally applied principles are not new, of course. Kant, for instance, developed a sophisticated theory of ethics based on individual autonomy and free will, elements filtered, however, through individuals' experiences of nurturance and interaction with others. An individuality defined by social interaction breeds a commonality of interests known to advance human experience, and provides the foundation for the application of universal principles to guide individual conduct. See IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* (Thomas Kingsmill Abbot trans., Longmans, Green and Co. 1923). Kant viewed moral actions as those that are based on the application of principles, the force enabling such applications being *reason*. See *id.* at 29. Reason, in turn, is subject to the commands of necessity, which Kant divided into those required to achieve a particular end (for example, happiness), and those which are considered necessary of themselves “without reference to another end, i.e. as objectively necessary.” *Id.* at 31. This latter variety reflects the essence of the “categorical imperative.” *Id.* Translated to the field of action, this imperative commands one to “[a]ct as if the maxim of thy action were to become by thy will a universal law of nature.” *Id.* at 39. For an overview of the development of normative concepts in Western philosophy, see Christine M. Korsgaard, *The Normative Question, in THE SOURCES OF NORMATIVITY* 7, 7-48 (Onora O'Neill ed., 1996).

This common orientation of both the autonomous individual and the larger social construct lends itself to examination of social phenomena through modes of rational thought, most conspicuously embodied in the scientific method. See GEORGE H. MEAD, *MIND, SELF & SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* 388 (Charles W. Morris ed., 1934). In addressing ethical social questions,

[s]cience . . . can give a method for approach: recognize all the facts that belong to the problem, so that the hypothesis will be a consistent, rational one. . . . The only rule that an ethics can present is that an individual should rationally deal with all the values that are found in a specific problem . . . and then make out a plan of action which will rationally deal with those interests. That is the only method that ethics can bring to the individual.

Id.

A modern theory that employs universality is discourse theory, identified principally with the works of Jürgen Habermas. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996). In this construct, norms in any social context are justified through consensus. Consensus is often a process of compromise, a product of interplay between what Habermas calls “facticity and validity,” or the tension that exists between the real life experiences of disparate groups in society, and the sets of idealized standards against which shared perspectives are deemed reasonable. See *id.* at 21-24. Rules and standards are fair and just when the widest and freest participation in the processes of interpersonal exchange and discourse is encouraged and facilitated. These processes require popular access to the workings of the “political public sphere,” which consists of the political, institutional and “private sectors of the lifeworld” which includes the mass communication media. See *id.* at 373, 376-79. For a treatment of the theoretical underpinnings of discourse theory, see JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (1984).

57. Richard Delgado believes this ability to misread the work of outsider legal scholars is characteristic of a group of “old-line, inner-circle scholars” who “resort to an

This failure is particularly evident in his criticism that proposed solutions to taxation problems are inadequately considered or are absent altogether,⁵⁸ a lament decrying the sad state of critical scholarship that is reminiscent of criticisms by other mainstream scholars who resisted the insurgency into the academy of the critical legal studies movement in the 1980s.⁵⁹ Zelenak also misreads these works through a phenomenon Patricia Cain calls "gendered misunderstanding,"⁶⁰ produced by the inability of many men to identify with accounts of reality based on women's experiences and perspectives. In addition, on more than one occasion he "selectively ignores"⁶¹ passages from the authors that would otherwise refute one or more of the critical claims he levels at their arguments, and in his discussion of difference feminism, he engages in discourse laced with

arsenal of mechanisms to reduce its [outsider scholarship] impact." Delgado, *supra* note 40, at 1358.

At least one other tax scholar believes that Professor Zelenak has grossly misread his work through the imposition of normative positions upon arguments that were never intended to reflect normative postures or prescribe policy. See Louis Kaplow, *The Income Tax Versus the Consumption Tax and the Tax Treatment of Human Capital*, 51 TAX L. REV. 35, 35-36, 39 (1995) (responding to a commentary by Professor Zelenak); Lawrence Zelenak, *The Reification of Metaphor: Income Taxes, Consumption Taxes and Human Capital*, 51 TAX L. REV. 1 (1995) (commenting on Kaplow's thinking).

58. See Zelenak, *supra* note 2, at 1524. "It is unfair to criticize current law for its effects on women or blacks without showing a way to do better; more important, mere critique without a workable solution does nothing to better anyone's situation." *Id.*

Much of outsider jurisprudential writing is deliberately nonprescriptive in form, however. A substantial reason for this is that many outsider scholars believe that before substantive political and policy changes can occur that will yield tangible benefits to traditionally oppressed populations, these people's perspectives must be heard and their experiences known on a wide scale. See Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 429-32 (1987). Williams writes that the narratives of blacks serve both to empower them in claiming their full measure of the rights of citizenship and to help whites to "learn to appreciate the communion of blacks in more than body, as more than the perpetually neotenzioned, mothering non-mother. They must recognize us as kin. . . . They must learn to listen and speak to the grieving, *enraged* black-people-within-themselves and within our society." *Id.* at 429.

59. See Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (labeling critical legal studies writers "nihilists" who "engage in teaching that knowingly dispirits students or disables them from doing the work for which they are trained," adding that in their "honest effort to proclaim a need for revolution, nihilist teachers are more likely to train crooks than radicals").

60. Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 33 (1991) (stating that the risk for men in the legal academy to discount, dismiss, or not comprehend feminist scholarship is "greater in the case of conclusions based on women's experiences because much of women's experience has been buried from male view").

61. Delgado, *supra* note 40, at 1362 (identifying this practice as another device of the "neo-imperial scholars" to resist outsider scholarship).

an "us versus them" (men versus women) mentality.⁶²

These biases preclude a clear understanding of the messages of critical scholarship, which are expressed in a variety of communicative styles. These styles are grounded not in abstract theory but in the everyday reality of women, people of color, and other disenfranchised groups whose experiences of struggle are always juxtaposed against the reality of a dominant social, economic, and political matrix that would otherwise ignore their experiences and silence their messages.

The feminist and critical tax literature is ultimately well served in a forum such as this. The path of knowledge has never detoured around controversy, and as a result, new strains of thought will emerge from the cloudy wort of conflicting ideas. In the conclusion of this article, I offer a few thoughts about what alternative scholarship can provide to the advancement of more constructive and sensitive taxation policies.

I. NORMS AND LIBERALISM, OR "THE MORE THINGS CHANGE . . ."

Liberal feminism was the dominant strain in the women's movement in the 1960s and 1970s, owing much to strategies adopted by women's groups that were modeled after the civil rights movement that preceded it. The prevailing goal that feminists adopted was formal legal recognition of their equal standing with men. One consequence is that liberal feminism has focused upon the commonalities of women and men, rather than their differences, with particular emphasis on women as *individuals*. Women in the 1960s and 1970s were engaged in the market labor force and were pursuing higher education in greater numbers than ever before, necessarily bringing them into domains previously reserved almost exclusively for men. Concerns over the independent financial station of women emerged as an issue, eventually finding their way into the academic writings, including the taxation literature.⁶³

Most notable among the tax literature of the liberal feminist ilk is a 1971 piece written by Grace Blumberg.⁶⁴ This trailblazing article on the disincentive effects of the tax code on working wives is a classic. Blumberg outlined the taxation structure for married couples and then demonstrated that for a wife who wished to perform market

62. Cain identifies the "us-versus-them" perspective as a favorite device of male academicians to dismiss feminist scholarship. See Cain, *supra* note 60, at 33.

63. See BERRY, *supra* note 6, at 33-48, 69-80; DAVIS, *supra* note 6, at 59-63.

64. See Blumberg, *supra* note 22.

labor, the graduated rate structure taxed her first earned dollar at the marginal rate of the last earned dollar of her husband.⁶⁵ She traced the development of this phenomenon to its origins in the 1948 tax reforms.⁶⁶ In addition, she offered an enlightening analysis of the provisions of the (now rescinded) Section 214 dependent care deduction.⁶⁷ Blumberg found disincentive effects in Section 214 as well, again due to the aggregation of marital income. The deduction was available only up to an income ceiling above which it was unavailable, serving as a further discouragement to married women to work in the paid labor market.⁶⁸ Because of these dual disincentive effects, she called for elimination of the income splitting provision and a return to the pre-1948 practice of individual taxation filing,⁶⁹ as well as a lifting of the maximum qualifying income requirement for married couples to claim the childcare deduction.⁷⁰ Blumberg believed that women's increased participation in the labor market was advantageous because it increased their level of autonomy. This market entry both bolstered women's financial security interests and helped them to "get a sense of themselves from the productive work they do."⁷¹ Housework, on the other hand, was characterized as "redundant and stultifying."⁷²

Anne Alstott borrows from the analytical approach employed by

65. See *id.* at 52-53.

66. See *id.* at 50-58.

67. See *id.* at 67-80. The section 214 deduction has been replaced by the section 21 dependent care credit, see I.R.C. § 21 (West Supp. 1998), which is calculated as a percentage of childcare expenses (30% for a person with an Adjusted Gross Income of \$10,000 per year) incurred as a necessary expense of the taxpayer's gainful employment. This credit is not refundable, and is phased out as income increases (reduced by one percent for each \$2000 of income exceeding \$10,000).

68. The original section 214 deduction carried no maximum income limitation for gainfully employed single taxpayers with children under the age of 12 or other dependents who could not care for themselves. See Blumberg, *supra* note 22, at 67.

69. See *id.* at 95. Individual filing was also advocated by Davis, Gann, and Munnell. See Davis, *supra* note 22, at 198-99; Gann, *supra* note 22, at 39; Munnell, *supra* note 22, at 278.

70. Blumberg believed that retention of the maximum income limitation applied to married couples claiming the section 214 deduction should have been tied only to the working wife's income, because her function as the sole provider of child care subjected only *her* prospective income to expenses associated with securing such care for the purpose of engaging in gainful employment. This argument, which recognized the wife's legitimate claim to the dependent care deduction, served as an additional justification for Blumberg's call for a return to mandatory individual tax returns. See Blumberg, *supra* note 22, at 79.

71. *Id.* at 94.

72. *Id.* at 94-95; see Maureen Maloney, *Women and the Income Tax Act: Marriage, Motherhood and Divorce*, 3 CANADIAN J. WOMEN & L. 182-210 (1989) (discussing household income and how to reconcile individual taxation with ability to pay objectives).

Blumberg, extending and expanding its scope for the 1990s in her recent article *Tax Policy and Feminism: Competing Goals and Institutional Choices*.⁷³ Alstott employs elements of a liberal analysis in that she does not challenge the validity of the existing social or institutional order but seeks approaches to securing feminist goals within the present structure.⁷⁴ Her comparative study of tax policy options seeks to promote three feminist goals. The first two—achieving equal treatment and encouraging market work⁷⁵—come directly out of the liberal legacy. The third goal—assisting caregivers⁷⁶—reflects a basic change of attention in defining feminist priorities, and has become a leading feminist theme this decade.⁷⁷ Alstott's main argument underlines the trade-offs and compromises inherent in pursuing multiple goals simultaneously,⁷⁸ and in this she reveals herself to be eminently pragmatic.⁷⁹ The limitations of approaches that strike compromise are obvious, and will not be to the liking of certain feminists who seek sweeping institutional change, but many will not reject a measured approach to change, as reflected in the notion of accepting "non-ideal justice."⁸⁰

Zelenak greets the Blumberg work with high praise for being "careful to distinguish between intended and accidental ways in which the tax laws discourage wives from working outside the home."⁸¹ This seems to comport with his personal preference for

73. Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001 (1996).

74. Alstott refers to the traditional tax policy criteria of "neutrality," "efficiency," "political feasibility," and "ability to pay," throughout her piece. *See id.*

75. *See id.* at 2004.

76. *See id.*

77. *See, e.g.,* Staudt, *supra* note 53.

78. She examines five proposals employing different tools available within the tax system: (1) individual filing, (2) reduction of tax rates for working married women, (3) caregiver support through family allowances, (4) a combination of a revamped dependent care credit and Social Security reform, and (5) establishment of a Child Support Assurance System (CSAS) that uses tax law and reformed family law in tandem. *See* Alstott, *supra* note 73, at 2006-66.

79. Alstott states that her "[a]rticle focuses on relatively incremental tax proposals because they have been most often discussed and because they are at least in the ballpark of politically feasible changes." *Id.* at 2022.

80. Alstott's article invokes the spirit of what Margaret Jane Radin calls "non-ideal justice," which involves the process of asking: "[G]iven where we now find ourselves, what is the better decision? In making this decision, we think about what actions can bring us closer to ideal justice." Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1700 (1990).

81. Zelenak, *supra* note 2, at 1574. Professor Zelenak does not explain the significance of separating the accidental from the intentional origins of disadvantageous legislation. It seems to me that in either case the immediate concern is to address the

seeking solutions within the existing political order to secure the best chance to arrive at "reasonable—and politically feasible—reform proposals."⁸² He tips his hat to Alstott as well for her approach that "emphasizes the dilemmas posed by conflicting feminist goals and the limitations of tax-based solutions."⁸³

Zelenak praises these works for reflecting his favored approach, employing his ideal of approaching tax law with a "detached and disinterested frame of mind."⁸⁴ These are road markers for Zelenak's liberal paradigm of taxation analysis that constitutes the only "right way"⁸⁵ to proceed. "Detached and disinterested" may be taken to mean "neutral" and "objective."⁸⁶ Within the liberal normative structure, taxation must be "neutral" because neutrality reflects the role of government as a fair broker between parties with competing interests.⁸⁷ This belief in neutrality in turn implies that in a society of autonomous individuals, these competing interests are the products of their free and unconstrained social preferences, thus restricting the legitimate role of taxation policy to self-contained, "tax-internal" considerations.⁸⁸ By extension, this liberal approach is a recipe for

harm and remedy its cause, regardless of intent.

82. *Id.* at 1576.

83. *Id.* at 1525.

84. *Id.* at 1578.

85. *Id.* at 1575. This process of examining tax provisions with undesirable effects for disadvantaged populations involves another prescribed procedure. Zelenak writes that one should "[f]irst, ask if the impact was intended by Congress. If it was not, ask what legitimate purpose the provision serves. Finally, try to find the best balance between eliminating or ameliorating the adverse impact, and serving the provision's legitimate purpose." *Id.*

86. See Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 175 (1990). Professor Schlag comments on the assumptions of normative legal thought:

The very first move of normative legal thought has been to assume automatically, *as a matter of its own form*, that it is authored by and addressed to an autonomous, coherent, integrated, rational, originary self, receptive to moral argument through a medium of language that is itself weightless and neutral.

Id.

87. See *supra* note 21 (commenting on the liberal tradition).

88. See Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994). Zelenak favors eliminating the joint marital tax return, but in reformulating allocation rules for income from property, rejects proposals that would explicitly encourage the transfer of property ownership from higher income spouses (typically husbands) to their lower earning partners (typically wives) for the purpose of increasing women's property ownership and attendant economic and social power. See *id.* at 380 ("A feature as central to the individual income tax as the treatment of spouses should be designed to produce appropriate tax policy results, not to push the ownership of marital property in any particular direction."). Professor Zelenak expresses no objection to the prospect of property acquisition by wives from their husbands, so long as it is not a product of deliberate design in tax legislation. See *id.* at 385. He does not state his criteria for what constitute "appropriate tax policy results," however.

only modest, piecemeal reform of the taxation system at any given time, since the political imperatives in enacting adjustments to the taxation structure require legislators to weigh carefully the competing goals and adopt measures that will really create the desired effects and which are arrived at by careful and reasonable means.

Zelenak embraces those articles that do not "rock the boat," so to speak, that frame their arguments within the safe contours of the existing political agenda and the terms of established tax policy criteria,⁸⁹ seeking reforms that do not jeopardize the status quo. He rejects out of hand those pieces that share the common thread of challenging the basic premises of taxation policy, most notably some variation of the theme that taxation, far from being a neutral instrument of the polity, is permeated with all the biases of the ruling class that shapes and maintains its contours. Being first a product of politics, taxation's most conspicuous characteristics are those of the political power represented in its provisions. The works that Zelenak criticizes question the foundations of convention, and in so doing, are breaking the prescribed rules of "proper" legal discourse, and therefore, according to Zelenak, must be accorded their proper disposal in the academic dustbin. It is ironic that he celebrates that "the days of such rarefied formalism are gone forever,"⁹⁰ for through his own insistence upon a narrow path of discourse, he demonstrates that those days have not quite departed the scene.

II. WHO NEEDS HISTORY?

Women's history provides vital links in the process of feminist discovery, supplying revelatory perspectives on the everyday obstacles that have confronted women over the centuries—from the viewpoint of *women*. Moreover, women's history provides continuity and purpose to the pursuit of our contemporary feminist endeavors. The face of patriarchal oppression may change over time, but its character is as consistent and reliable as the inevitable darkness of night. Stepping out of place and time into another's shoes in a different day casts fresh light on our own world and recontours its landscape.

Feminist historical studies have permeated the legal literature for some years now, and have plotted new directions in areas as diverse as tort,⁹¹ family law,⁹² and criminal law.⁹³ Feminist historical

89. See *supra* notes 24-28 and accompanying text.

90. Zelenak, *supra* note 2, at 1580.

91. See, e.g., Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of*

scholarship in tax law has produced a relatively small body of work to date, but what has been produced has offered invaluable insights⁹⁴ into the cracks of what often seems an impermeable casing surrounding the taxation structure that defies understanding. Of particular merit is the pioneering work of Carolyn C. Jones, whose 1988 article on the history of the joint marital tax return⁹⁵ revealed the largely unexplored influence of popular attitudes about "the proper roles of women and men in society"⁹⁶ on the policy process that ultimately resulted in the 1948 reforms that gave us the "marriage bonus/penalty."⁹⁷ Her discoveries of what conventional

Fright: A History, 88 MICH. L. REV. 814 (1990); A.J. King, *Constructing Gender: Sexual Slander in Nineteenth-Century America*, 13 LAW & HIST. REV. 63 (1995); Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359 (1989).

92. See, e.g., B. Brooklyn, *Nothing to Lose: Women and Divorce in South Australia, 1859-1918*, 8 LAW CONTEXT 5 (1990); Gwendolyn Mink, *Welfare Reform in Historical Perspective*, 26 CONN. L. REV. 879 (1994); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994); Symposium, *Women, Legal History and the American West*, 7 W. LEGAL HIST. 193 (1994).

93. See Jeffrey P. Gray, *Was the First Woman Hanged in North Carolina a "Battered Spouse"?*, 19 CAMPBELL L. REV. 311 (1997).

94. One of the slogans utilized by leaders of the nineteenth-century suffrage movement was the "no taxation without representation" battle cry borrowed from the American Revolution. There was vigorous anti-tax sentiment during this period, particularly among middle and upper class women who owned property. See Carolyn C. Jones, *Dollars and Selves: Women's Tax Criticism and Resistance in the 1870s*, 1994 U. ILL. L. REV. 265, 269-71. Professor Jones explores the metaphorical meaning of tax resistance efforts as well as that contained within the word *taxation* to represent the systematic denial of women's standing as sovereign individuals and their exclusion from participation in the affairs of state through maintenance of the mythic "separate spheres" doctrine that consigned women almost exclusively to the "private" realm of hearth and home. For a broad examination of the foundations of the suffrage movement, see ELLEN C. DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869* (1978).

95. See Jones, *supra* note 33.

96. *Id.* at 261.

97. *Id.* at 260. Previous scholarly analyses focused almost exclusively on formal legislative and judicial processes. Jones's inquiry revealed that this style of scholarship "neither carefully considered why we have the joint return nor the ways in which the joint return and other income-splitting decisions reflect societal assumptions." *Id.* Her extensive research into the popular discourse of the time, through magazine and newspaper articles, speeches, and personal correspondence, showed that the invocation of the income-splitting joint return was driven largely by a desire to preserve traditional gender roles in a post-war era that had not yet come to grips with women's large-scale entry into the "male" realms of labor and commerce. See *id.* at 92.

In a well-known passage of his commentary on the 1948 tax revisions, Stanley Surrey wrote about the probable effects of the income-splitting joint return: "Wives need not continue to master the details of the retail drug business, electrical equipment business, or construction business, but may turn from their partnership 'duties' to the pursuit of homemaking." Stanley S. Surrey, *Federal Taxation of the Family—The Revenue Act of*

historical analyses of taxation were *not* turning up yielded her important insight about the nature of tax scholarship—its tendency “to view the tax system as a virtually self-contained world.”⁹⁸ This tendency has retarded development and acceptance of feminist taxation perspectives because the prevailing methodology employed within the taxation academy is conspicuously disconnected from the experiences of real life.⁹⁹ This prompted Jones to express her “hope to develop a view of the tax system that is more exogenous than those usually presented—one that is more connected to society’s concerns and beliefs.”¹⁰⁰

Mary Louise Fellows employs such exogenous factors—in this case the marital customs of fourteenth century England—to search out the historical foundations of current practices in marital and inheritance law in her important and stimulating study *Wills and Trusts: The Kingdom of the Fathers*.¹⁰¹ History is especially relevant here, for the controversy involves the tension between apparently neutral contemporary marital laws based on the notion that marriage is a partnership of equals and centuries of marital reality (also buttressed by law) that dispensed with any pretense that wives were equal to their husbands.¹⁰² Fellows focuses particularly on the

1948, 61 HARV. L. REV. 1097, 1111 (1948).

Jones also points to the reluctance with which states with common-law marital property systems adopted community property regimes in the pre-1948 era, even though the promise of significant tax reductions attendant to such a conversion provided a powerful incentive for such action. She ascribes this reluctance to “a hostility toward a wife’s present interest in community earnings and property, which were usually thought of as being the product of the husband’s labors.” Jones, *supra* note 33, at 270.

98. Jones, *supra* note 33, at 260-61. To illustrate this point, Jones notes that contemporary defenses of the joint return have employed, for example, a certain reading of the Haig-Simons definition of income, an after-the-fact argument that makes income-splitting substantially a technical consideration within the realms of standard economic and taxation study. See Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573 (1977).

99. See Jones, *supra* note 33, at 261. Professor Jones writes:

Even those scholars who have recognized the importance of societal assumptions about marriage and the family have not used a methodology designed to expose assumptions held by the general public. Their sources have been limited to legislative histories and United States Supreme Court cases, documents that may not reveal the ideas of average taxpayers or the ideas with which the average citizen comes into contact.

Id.

100. Jones, *supra* note 33, at 262.

101. See Fellows, *supra* note 51.

102. Women have historically been treated under the law like personal property. African-American slave women were subjected to the double indignity of racial oppression and sexual domination. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 217 (1991) (discussing her great-great-grandmother’s purchase at the age of

English common-law doctrine of dower, the principal means by which wives held security interests in their husbands' property.¹⁰³ Because wives' maintenance claims were exercised against the corpus of the husband's real property, transfers of properties upon the death of the husband were often complicated affairs. This inspired the development of practices that acted much like the modern trust—husbands selected third parties to hold title to properties while still maintaining effective control. Since dower rights applied only to property held in the husband's name, he could dispose of his properties as he pleased, freed from any of his wife's claims against them.¹⁰⁴ The similarity in character that Fellows poses here between common practices of five centuries ago and its vestiges in the present day, manifested in such contrivances as the QTIP, is chilling.¹⁰⁵

Zelenak "selectively ignores"¹⁰⁶ Fellows' powerful historical critique of the QTIP, choosing to remain firmly rooted in the here-and-now. From this comfortable perspective he can safely admit that QTIP trusts are a poor representation of the principle of marital partnership,¹⁰⁷ but still maintain that this downturn in no way impeaches them for being sexist, "in either their premises or their effects."¹⁰⁸ To prove the benign premises of the QTIP, Zelenak turns his eye against another critical commentary, this one written by Wendy Gerzog.¹⁰⁹ He contends that Gerzog relies excessively on a

11 by a white lawyer and her "immediate impregnation").

103. See Fellows, *supra* note 51, at 146-47. Dower rights vested wives with claims to lifetime maintenance through a one-third interest in the marital estate.

104. See *id.* at 147.

105. Even in more modern times, women have struggled to gain even a modicum of control over properties within the marital estate. In the nineteenth century, legislation such as the Married Women's Property Acts granted women greater nominal independence, but such gains in formal law were severely checked by a number of factors. For instance, nineteenth-century courts rendered strict readings of wives' legal marital obligations, which obliged them to perform domestic services and provide sexual access in exchange for material support by the husband. See Sara L. Zeigler, *Wifely Duties*, 20 SOC. SCI. HIST. 63 (1996) ("Her compensation for this labor was her support and maintenance—room, board and other 'necessities.' The husband, in essence, hired a woman to care for himself and his household."). Another critical factor limiting women's financial independence was that they were locked out of the political process because they lacked access to the ballot box. See Jones, *supra* note 94, at 275.

106. Delgado, *supra* note 40, at 1362.

107. See Zelenak, *supra* note 2, at 1543-44. Professor Zelenak believes distrust to be the primary motivation for a husband to use a QTIP trust for his widow. "[T]he only reason a husband would use a QTIP trust, rather than an outright spousal bequest or a general power of appointment trust, is because the husband fears his wife will not share his views on the proper ultimate destination of his assets." *Id.* at 1544.

108. *Id.* at 1544.

109. See Gerzog, *supra* note 52; see also Wendy C. Gerzog, Estate of Clack: *Adding*

passage in an article by John Beveridge¹¹⁰ proclaiming the dangers of rules that grant widows general powers of appointment over their deceased husbands' estates, a passage she allegedly identifies as the "smoking gun"¹¹¹ that proves that the QTIP provisions were conceived under a pall of paternalism. It is clear that Zelenak completely misinterprets Gerzog's use of this quotation in attacking the premises of the QTIP, believing that Gerzog found Beveridge's paternalistic posture protecting widows against the intrigues of charlatans the source of her judgment that the premises of the QTIP are "degrading to women."¹¹² He finds Beveridge's statement in support of the principle of the QTIP reflective of a "non-degrading" view that "widows have minds of their own," and accords this the stature of a near compliment.¹¹³ However, he misses the key implication of this thought. To be sure, it is not degrading to acknowledge that widows have minds of their own. But as Gerzog (and virtually any woman) would contend, it is *decidedly* degrading to pronounce that if widows indeed possess these faculties, they should be legally barred from using them. One can readily see that Gerzog has no cause to rely on shaky evidence, as is made clear in her discussion prior to the appearance of the passage in question. In examining the features unique to the QTIP, Gerzog compares it unfavorably to the terminable interest rule, which generally grants the estate and gift tax marital deduction only in the event of "the transfer of property ownership itself from one spouse to the other."¹¹⁴

Insult to Injury, or More Problems with the QTIP Tax Provisions, 6 S. CAL REV. L. & WOMEN'S STUD. 221 (1996).

110. John W. Beveridge, *The Estate Tax Marital Deduction—Beneficent Intent, Baneful Result*, 44 TAXES 283 (1966). Arguing that widows are often ill-equipped to deal with managing large sums of money and property, as well as being vulnerable to the possible intrigues of outsiders, Beveridge supported the principles of the QTIP design, stating: "The tax law should not offer a premium to a husband who ignores his better judgment and grants his widow a general power of appointment leaving his children at the mercy of any charlatan who has his widow's ear." *Id.* at 284.

111. See Zelenak, *supra* note 2, at 1544.

112. *Id.*

113. *Id.* at 1545.

114. Gerzog, *supra* note 52, at 302. Other types of terminable interests (such as a life estate) do not qualify for the marital deduction because the surviving spouse obtains only an *income* interest in the underlying property. Exceptions to this rule that grant the marital deduction are operative when the surviving spouse is given a general power of appointment in tandem with the income interest, the combination of which is deemed to "constitute sufficient ownership and control to require their possessor to include such property in her estate at death." *Id.* at 311.

Gerzog goes on to point out that the "current distribution requirement of the QTIP provisions is identical to the current distribution requirement of the power of appointment exception to the terminable interest rule." *Id.* at 314. The difference with

The QTIP is not intended to impart *any* approximation of ownership and control powers upon the surviving spouse, raising serious suspicions regarding the motives behind its structure,¹¹⁵ and creating the sadly ironic scenario that some long-suffering wives could best see to their future financial stability by divorcing their husbands *before* they die and leave them with a QTIP—or worse.¹¹⁶

As to the effects of the QTIP for those wives who endure to the end, Zelenak suggests that widows are probably better off in a world with QTIPs than in one without them, contending that in the case of no QTIP option, a husband may “decide that control over the destination of his estate is more important than tax benefits. Instead of the outright bequest . . . the widow may get nothing.”¹¹⁷ He acknowledges that this is an unlikely prospect, because the widow can elect against the husband’s will under the forced share rules, but even in this event Zelenak defends the virtues of the QTIP as superior to forced share statutes that may be defeated through the husband’s “clever planning” utilizing will substitutes.¹¹⁸ He then attempts to illustrate that in many cases the present value of the future earnings from a QTIP will exceed the value of the forced share garnered by the widow, leaving the widow “better off” through employment of the QTIP.¹¹⁹ Even if Zelenak’s numbers are correct, absolute

regard to the power-of-appointment exception to the terminable interest rule is that in the case of property over which the surviving spouse may exercise control of final transfer, guaranteed receipt of an income stream from said property is considered a substantively relevant aspect of ownership powers or its equivalent.

115. See *id.* at 314.

116. Labeling it “window dressing,” Gerzog attacks the QTIP distribution scheme for its deceptive intent, meant to “pretend to give the surviving spouse . . . equivalence of ownership.” *Id.* at 315.

117. Zelenak, *supra* note 2, at 1546. Zelenak suggests that in the case that a husband is as likely as not to leave his wife either \$1 million or leave her nothing, and the wife is asked whether QTIP provisions are a good idea, “[s]he will be their most fervent supporter.” *Id.* It is noteworthy that in Zelenak’s example, the wife has no wealth of her own, save through her marital association, and this only a potentiality. It is also ironic that the widow could garner as much as half the marital estate in a divorce action through execution of equitable distribution statutes, but can run the risk of complete disinheritance if she endures the marriage “until death do you part,” illustrating the lack of protections for women’s well-being *within* marriage, and providing another example of how “gender-neutral” law can be degrading to women.

118. To be sure, the non-tax elective share rules in most states do not give women the choice to elect against such trusts, but this does not diminish the case against the QTIP. Rather, it makes more urgent the adoption of rules more in line with those drawn up in the 1993 Uniform Probate Code revisions that would, if adopted, protect a widow’s right to control her share of the marital estate outright. See Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567, 587-88 (1995).

119. Zelenak crafts an example in which a husband has a \$10 million estate, and his

monetary sums are not the most important measuring rods of well-being. For a great many women, *control* of their own resources is itself a resource worth vastly more than a dollar sign with an extra zero behind it. Zelenak's "intuition"¹²⁰ did not pick up on this consideration.¹²¹ His statement that for a widow "[h]aving her needs met for the rest of her life is far more important than whether or not she is able to control the fate of the \$1 million upon her death"¹²² carries an air of paternalism with it, and never entertains the very real possibility that the exercise of independent judgment regarding the use of one's life resources is a vital "need" the QTIP in no way satisfies.

Finally, Zelenak dismisses the feminist criticisms of Gerzog and Fellows by insisting that "any arguable injustice caused by QTIPs to affluent (and overwhelmingly white) widows is simply trivial."¹²³ He simply *doesn't get it*.¹²⁴ Gerzog and Fellows focus on the QTIP provisions not out of a misplaced concern for affluent white women, but because these provisions were drafted by *affluent white men* for the benefit of other affluent white men. In a society in which wealth is translated into social and political power, challenging the devices of those entrenched at the head of a hierarchy oppressive to women of every stripe is not a trivial exercise but a necessary one.

III. WHAT'S THE "DIFFERENCE"?

In the wake of a decade that had seen America embittered and embattled over the outcome of the Vietnam War, the Watergate

wife has no money in her estate. After giving \$600,000 to his children, he places the remaining \$9.4 million in a QTIP. In the absence of a QTIP the husband leaves the wife nothing, prompting her to elect a forced share of one-third of the estate, or \$3.3 million. Assuming a 5% discount rate on the QTIP, the present value of her life estate (projected over 11 years) is \$3.9 million. Zelenak claims this illustrates how a QTIP "may redound to the benefit of widows." Zelenak, *supra* note 2, at 1548. On the other hand, his illustration does not project the future value of her forced share amount, which if invested wisely, could amount to considerably more than the sum garnered through the QTIP after the same 11 year period.

120. Zelenak, *supra* note 2, at 1546 ("[M]y intuition is that widows probably fare better with the QTIP than they would without.").

121. It is noteworthy that Zelenak is quite cognizant of the importance of control of the disposition of assets to husbands who opt for QTIP trusts for their spouses, yet curiously indicates that widows probably would (and perhaps should) place a lesser premium upon control of their portions of the marital estate, and might do "less well" if they did opt for control. *Id.* at 1547.

122. *Id.*

123. *Id.* at 1549.

124. This is another instance of "gendered misunderstanding." See Cain, *supra* note 60, at 33.

scandal, the Arab oil embargo, a crippling recession with high inflation, and finally the Iran hostage crisis, a conservative social and political backlash occurred that swept Ronald Reagan to the White House and inspired the nostalgia craze that permeated everything from clothing to television shows, but which also sanctioned a tolerance for selfishness, the so-called "Me Generation."

Amidst this climate of self-indulgence, psychologist Carol Gilligan published in 1982 her now classic work *In a Different Voice*,¹²⁵ which immediately inspired a new wave of literature appearing under the general heading of "cultural feminism."¹²⁶ In circles of legal criticism, commentators began to argue that a jurisprudence grounded in an ethos of care will result in different (and often better) legal rules than those spawned from an ethos of rights.¹²⁷ Some scholars have used Gilligan's research to attribute greater values to women's nurturing characteristics and roles.¹²⁸ Others employed Gilligan's findings to critique the dominant ideology¹²⁹ in such areas as: legal education,¹³⁰ legal practice,¹³¹

125. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). This book sets forth differences in the approaches of girls and boys to moral reasoning. In general, the males emphasized the autonomy of the individual and the ethos of rights, whereas the females emphasized communitarian values and the ethos of care. Gilligan noted that studies of moral development throughout the history of modern psychology (represented by Freud, Piaget, and Kohlberg) have equated "normal" human moral development with the ultimate adoption of universal principles of justice based on rules and rights, which happen to reflect the development path followed by boys. Girls, meanwhile, are often found to deviate from this path, leading to Gilligan's summation that "when women do not conform to the standards of psychological expectation, the conclusion has generally been that something is wrong with the women." *Id.* at 14. Gilligan believes that this skewed orientation in development theory is reflective of a societal structure that emphasizes individual identity and achievement rather than a human nature that displays a balance between attachment and separation, identity and intimacy, and love and work. *See id.* at 151.

126. *See* Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 835-38 (1990) (describing cultural feminists as those focusing on women's differences from men and embracing "woman's different voice" as "good").

127. *See* GILLIGAN, *supra* note 125, at 73, 100. Gilligan considered neither approach superior—seeing both as useful, but different, ways of resolving moral and social issues.

128. *See* Lisa R. Pruitt, *A Survey of Feminist Jurisprudence*, 16 U. ARK. LITTLE ROCK L.J. 183, 193 (1994).

129. Scholars have pointed out the importance of exploring the "ethic of care," independent from its connection to gender. *See* JOAN TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993) (examining at a philosophical level what an ethic of care would be); Stephen Ellman, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993); Carrie Menkel-Meadow, *Portia Redux: Another Look At Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75, 77 (1994).

130. *See, e.g.,* Christine M. Wiseman, *The Legal Education of Women: From "Treason Against Nature" to Sounding a "Different Voice,"* 74 MARQ. L. REV. 325 (1991).

131. *See, e.g.,* Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal*

children's rights,¹³² employment discrimination,¹³³ sexual harassment,¹³⁴ mediation,¹³⁵ reasoning,¹³⁶ corporate law,¹³⁷ tort¹³⁸ (including negligence¹³⁹), contract law,¹⁴⁰ racial discrimination,¹⁴¹ and rights of AIDS victims.¹⁴² Other works focused attention on countering the conservative ascendancy in the political and popular cultural realms during these years, including works advocating progressive taxation and distributive justice.¹⁴³

Marjorie Kornhauser's article in defense of the principle of progressive taxation, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*,¹⁴⁴ has become a classic in both the taxation and feminist catalogs. What makes this article unique is Kornhauser's ability to incorporate a feminist principle (the "ethic of care")¹⁴⁵ into the philosophical framework of those whom

Profession Making New Voices in the Law, 42 U. MIAMI L. REV. 29 (1987); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853 (1992).

132. See, e.g., Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 15 (1986).

133. See, e.g., Paul Spiegelman, *Court-Ordered Hiring Quotas After Stotts: A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine*, 20 HARV. C.R.-C.L. L. REV. 339 (1985).

134. See, e.g., Note, *The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace*, 18 WM. MITCHELL L. REV. 795 (1992) (discussing men's and women's different perceptions of sexual harassment).

135. See, e.g., Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQ. J. 21 (1984).

136. See, e.g., Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989).

137. See, e.g., Lahey & Salter, *supra* note 11.

138. See, e.g., Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989).

139. See, e.g., Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988).

140. See, e.g., Dalton, *supra* note 10; Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue, and Norms*, 28 HOUS. L. REV. 791 (1991).

141. See, e.g., Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447.

142. See Judith Areen, *A Need for Caring*, 86 MICH. L. REV. 1067 (1988).

143. See Handelman, *supra* note 50. Handelman uses Gilligan's work *In a Different Voice* to argue against the ABA's position that an attorney should be free to advise a client to take a client-favorable undisclosed position on a tax return, even if the position is probably wrong, as long as the client's position would have a "realistic possibility of success" in litigation. See *id.* at 54 n.76. She believes that a return position which "challenges . . . politically authorized judgments" (legislative, judicial, or administrative) should be permissible only if the challenge is disclosed on the return. *Id.* at 64.

144. Kornhauser, *supra* note 49.

145. See GILLIGAN, *supra* note 125, at 74. Kornhauser writes: "Women perceive themselves, and their place in the world, in terms of caring for others, whereas men

she is criticizing (whom she terms the "neoconservatives"),¹⁴⁶ all the while drawing her feminist case for progressive taxation in non-gendered dimensions. Zelenak's critique of this work fails to recognize these elements, and grossly mischaracterizes both Kornhauser's notion of feminism as being essentialist¹⁴⁷ and her interpretation of Carol Gilligan's work¹⁴⁸ as a justification for extending the ethic of care to include care for the "nonproximate stranger."¹⁴⁹

Zelenak's first misreading pertains to Kornhauser's reference to feminism being "less a theory than a way of knowing and of being, experienced by a large segment of the world's population."¹⁵⁰ Zelenak takes this to mean that Kornhauser's notion of feminism is reduced "to a matter of one's sex."¹⁵¹ This interpretation is patently ludicrous and is a conspicuous example of "gendered misunderstanding."¹⁵² Kornhauser was merely placing feminism within a vast spectrum of philosophies that are centered around concepts of mutual help and commitment to community,¹⁵³ in contradistinction to philosophies that are based on separative, individualistic models of human nature.¹⁵⁴ Kornhauser notes that philosophies abound that feature a feminist notion of interconnectedness of humanity, in direct opposition to Zelenak's

perceive themselves and the world in terms of separateness, autonomy and universal rules and rights." Kornhauser, *supra* note 49, at 508 (citing GILLIGAN, *supra* note 125, at 25-51). Specifically, Kornhauser cites Gilligan's profile of two 11-year-old children (a girl, Amy, and a boy Jake) in her study of the development of the moral concepts of rights and responsibilities, the results of which influenced Gilligan's assertions of differing modes of moral development between males and females. *See id.*

146. *See* Kornhauser, *supra* note 49, at 469.

147. *See* Zelenak, *supra* note 2, at 1550 ("To Kornhauser, all females are necessarily feminist, and all males are necessarily not feminist.").

148. *See* GILLIGAN, *supra* note 125.

149. *See* Kornhauser, *supra* note 49, at 510.

150. *Id.* at 506-07. In Zelenak's quote of this passage he presumptuously inserts "approximately 50%" in brackets to quantify Kornhauser's use of the term "large segment of the world's population." Zelenak, *supra* note 2, at 1550. It is clear from prefacing this statement that she had a much higher percentage in mind.

151. Zelenak, *supra* note 2, at 1550.

152. *See* Cain, *supra* note 60, at 33. Professor Cain believes that much of the resistance to feminist scholarship by the predominantly male legal academy is a product of "gendered misunderstanding," created by men's difficulty in relating to women's experiences and by rigid adherence to an "objective" scholarship style that trivializes feminist scholarship that is based on those same personal experiences. *See id.*

153. *See* Kornhauser, *supra* note 49, at 504-07.

154. Kornhauser portrays feminism, therefore, as being capable of representing the way most people actually live their lives—in varying degrees of interrelation with others. This is what is behind her belief that "feminism provides a flexibility that is compatible with the idea of a variety of connections to others." *Id.* at 507.

charges that Kornhauser's feminism is restricted to women's experiences. Kornhauser cites the actions of, among others, Albert Schweitzer and Martin Luther King, Jr., as reflecting philosophies oriented in terms of people's needs and obligation to others as well as themselves.¹⁵⁵ With all due respect, the last time I checked, both of these individuals were men in their lifetimes.

Zelenak goes on to examine Kornhauser's employment of Carol Gilligan's famous work *In a Different Voice*¹⁵⁶ as part of her construction of a case for progressivity. Zelenak zeros in specifically on the concept of an "ethic of care"¹⁵⁷ that is a constituent part of Kornhauser's communitarian view for society. The ethic of care emanates from the personal "realization that the self is not immured in a nonpermeable plastic bubble."¹⁵⁸ Such a revelation is not an experience consigned exclusively to the female domain,¹⁵⁹ and opens the door for expression of a "proactive" voice that initiates actions of care for others that also enhance our sense of fulfillment.¹⁶⁰ This "proactive" voice is what Kornhauser terms the "female" voice,¹⁶¹ but she is careful to point out that "[t]he 'male' and 'female' voices, of course, do not belong exclusively to males and females, respectively,"¹⁶² although the separative, " 'male' voice traditionally is the dominant, valued one."¹⁶³ If the "female" voice is given permission to be heard in our lives, we expand our personal spheres to include consideration and care for those whom we do not even

155. *See id.* at 505.

156. GILLIGAN, *supra* note 125.

157. *Id.* at 74. Gilligan describes the "ethic of care" as underlain by a "psychological logic of relationships," which shapes the contours of women's approaches to moral problems along lines that primarily consider one's responsibilities to others. This is in contrast to an orientation toward moral questions articulated by use of formal logic to achieve justice, an orientation associated with men. Zelenak takes pains to emphasize that Gilligan's theory of difference between the patterns of moral development followed by boys and girls, respectively, is "purely descriptive with respect to children; she writes not of how children *ought* to develop, but of the different ways in which boys and girls *do* develop." Zelenak, *supra* note 2, at 1550.

158. Kornhauser, *supra* note 49, at 508. Adhering to this view means being responsible not only to oneself but to others.

159. Kornhauser notes that this knowledge of concurrent autonomy and connection reveals that "the 'male' distinction between self-interest and altruism is a false one which disappears." *Id.* at 508.

160. *See id.* at 509.

161. *See id.*

162. *Id.* at 511.

163. *Id.* The male voice, when utilized as a controlling force, "informs our view of law as a domain of rules, rights and blind justice: we are autonomous, independent beings and the law as fashioned by men helps maintain that separateness." *Id.*

know, the "nonproximate stranger."¹⁶⁴ Zelenak attacks Kornhauser for extending Gilligan's concept of the ethic of care to include strangers,¹⁶⁵ suggesting that she is taking unwarranted liberties with the concept by stating an "imperative"¹⁶⁶ that "[w]e also must maintain a minimal, less burdensome connectedness to the nonproximate stranger."¹⁶⁷ Zelenak cites a passage from *In a Different Voice* that describes the social orientation of girls in Gilligan's study as that of the highly personalized "particular other," to discount the notion that the "female" voice is inclined toward sensitivity for "the generalized other" (the nonproximate stranger).¹⁶⁸ But this criticism misses the mark as well.

Kornhauser writes that one's concern for strangers comes out of an omnipresent possibility that any of them may be transformed into someone with whom we have close contact—a spouse, close friend, work companion: "every current stranger is perhaps a person who will one day be within the inner circle of caring."¹⁶⁹ It is this acknowledgment that any other person may be a contributor to one's highest attainment of well-being that becomes the basis for a progressive structure of taxation. If taxation is necessary (in part) in order to see to the minimum needs of others, a minimum level of care exhibited by any one of us will grow as our material means (and level of well-being) grow. Also, increasing one's rate of contribution as discretionary income increases is a contribution aimed at enhancing other's opportunities to achieve similar levels of self-fulfillment.¹⁷⁰

164. See *id.* at 510.

165. See Zelenak, *supra* note 2, at 1551 ("Her assertion is not supported by any citation to Gilligan . . .").

166. *Id.*

167. Kornhauser, *supra* note 49, at 510.

168. See Zelenak, *supra* note 2, at 1551. Professor Zelenak believes that Kornhauser misreads Gilligan by adopting a version of the ethic of care that "is no longer in Gilligan's world of describing how girls and women actually *are*; she is in Kornhauser's world of how 'we' *ought to be*." *Id.*

However, Gilligan's study of the 11-year-old girl Amy reveals an orientation by which she "locates herself in relation to the world, describing herself in relation to the world, describing herself through actions that bring her into connection with others, elaborating ties through her ability to provide help." GILLIGAN, *supra* note 79, at 35. For her part, Amy said she wanted "to do something to help other people . . . because I think that this world has a lot of problems, and I think that everybody should try to help somebody else in some way, and the way I'm choosing is through science." *Id.* at 34. Science would appear to be a realm in which the ethic of care is extended to the "nonproximate stranger."

169. Kornhauser, *supra* note 49, at 510.

170. See *id.* at 511. Kornhauser views progressivity not as a means to redistribute wealth, but as a way to acknowledge the support society provides that allows one to attain a certain level of well-being; therefore, progressivity constitutes "a paying of my 'just

Zelenak then takes a strange turn and suggests that designing a taxation rate structure based on an interest in helping others enhance their opportunities is a "romantic view of governmental expenditures," when in reality the federal government spends large percentages of its budget on items such as the national debt and the military.¹⁷¹ I am not sure of the point he is trying to make.¹⁷² He seems to be criticizing Kornhauser for not explaining the use of expenditures for "non-caring" uses, but this line of reasoning is ill-founded because he is attempting to graft Kornhauser's vision of the "ethic of care" onto his own normative model of government expenditure that obviously does not feature care as its centerpiece. I am sure that she was not expecting to be called upon to justify expenditures on price supports for winter wheat or the next space shuttle mission. Does some other rate structure, such as the flat tax, better explain any of the vagaries of a fickle Congress in its management of the nation's purse? Zelenak's criticism on this point seems not only misplaced, but is indicative of his descent into the realm of "nit-picking."

He concludes this myopic critique by opining that Kornhauser believes that "the ethic of care" should govern the choice of tax rate structure because she thinks the feminine ethic of care is morally superior to the masculine ethic of rights.¹⁷³ Zelenak's retrenchment into an "us versus them"¹⁷⁴ perspective leads him to conclude that the "perfect solution" to the rate structure dilemma would be to have a flat rate tax for everyone, and that women inspired by the ethic of care could make the system progressive by volunteering more funds as they deem appropriate.¹⁷⁵ Zelenak's facetious (read: condescending) "solution" actually reveals more truth than one

debts' to others." *Id.* Other means of achieving these ends are through tax incentives or through direct government subsidy. For a classic treatment of these alternative policy avenues, see Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970). As a general proposition, Surrey finds direct subsidies far more effective tools in achieving policy objectives than tax incentives.

171. Zelenak, *supra* note 2, at 1554.

172. But it certainly looks like more "gendered misunderstanding." See Cain, *supra* note 60, at 22.

173. See Zelenak, *supra* note 2, at 1555. Kornhauser views the ethic of care as being made active through the sounding of the "female" voice. This voice is *not* merely the voice of women, but is the driving force behind "parents' actions towards their children, charitable giving, 'heroic' savings of people and animals, and volunteer services." Kornhauser, *supra* note 49, at 513.

174. Cain, *supra* note 60, at 33.

175. See Zelenak, *supra* note 2, at 1556.

might imagine at first glance. His call for women to "contribute more"¹⁷⁶ to the comprehensive system out of a spirit of volunteerism already comports with women's reality today, which sees them contribute more on both the job and family fronts than ever before, but without benefit of the type of support needed and offered in Kornhauser's elegant vision.

Zelenak continues his crusade against the alleged menace posed by difference feminism in his treatment of an essay by Gwen Thayer Handelman¹⁷⁷ concerning the disparate approaches taken by lawyers in advising their clients on gray areas of the tax laws. She focuses primarily on an ethics opinion issued by the American Bar Association that tells attorneys that they should feel free to advise their clients to report, without disclosure, positions on their tax returns that are favorable to the client but probably wrong legally, provided that the client's position has a reasonable prospect of being upheld in litigation.¹⁷⁸ Handelman believes such dubious positions should not go unreported without documented authority undergirding them.¹⁷⁹

Handelman rests her position on a conception of "civic obligation"¹⁸⁰ that reflects a commitment to "a comfort with and trust in collective decisionmaking mechanisms,"¹⁸¹ including the legislative processes that produce laws. By extension, if one feels a connection with the processes that produce laws, then one is more likely to endorse their dictates. With reference to taxation law, this philosophy posits that "for a national community to endure, the unifying energy of the federal income tax 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."¹⁸²

Even though he acknowledges that Handelman makes a strong case against the ABA position based on the inconsistency that "it is based on a litigation model, which return preparation does not fit,"¹⁸³

176. *Id.*

177. See Handelman, *supra* note 50.

178. See *id.* at 64 (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 352 (1985)).

179. See *id.* ("Any position may be reported that could be argued in court, that is, any position that is not itself arbitrary and unreasonable."). Handelman argues that "challenges to politically authorized judgments be identified as [not arbitrary and unreasonable]." *Id.*

180. *Id.* at 56.

181. *Id.*

182. *Id.* at 56-57.

183. Zelenak, *supra* note 2, at 1558. He even concedes that she states her argument "quite eloquently." *Id.*

Zelenak focuses on Handelman's employment of the "ethic of care" emanating from Gilligan's work as a weakness to any argument advocating a political remedy to this issue. He states:

If her preferred rules are peculiarly feminist, then her opponents can reasonably ask why feminist values should be imposed on male attorneys with their own ethic of autonomy. The only plausible answer is that the ethic of care is better than the ethic of autonomy—and by extension women are better than men.¹⁸⁴

Zelenak suddenly engages in "us versus them" discourse—yet again.

Note how Zelenak prefaced his statement: "If her preferred rules are *peculiarly feminist* . . ." Handelman's preferred rules are not *peculiarly feminist*. Indeed, she devoted an entire previous article to the development of her position, which is based upon her belief in understanding the legislative intentions undergirding law.¹⁸⁵ For Handelman, understanding the "communicative content"¹⁸⁶ of a statute constitutes an act of connection with the process of law and, therefore, enhances her ability to perform her duties as a lawyer in a more ethical, socially responsible manner. In advocating a position that the intentions of a law substantially define it in application, she relies not on Carol Gilligan, but, among others, John Locke,¹⁸⁷ who cannot reasonably be classified as a difference feminist. Handelman's employment of Gilligan in her later article was one of corroboration of earlier, independent discoveries, not the source of fresh revelations. Zelenak's decision to "selectively ignore"¹⁸⁸ Handelman's earlier work seriously undermines his claim that she is attempting to "invoke female superiority"¹⁸⁹ to justify her position. Indeed, in contradistinction to certain claims he makes about the deficiencies of critical tax scholarship, it may be fruitful to ask who is really guilty of "selection bias."¹⁹⁰

184. *Id.* at 1559.

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

186. *Id.* at 651.

187. See *id.* at 616 n.21. Handelman refers to Locke's *An Essay Concerning the True Original Extent and End of Civil Government* as the foundation for her statement that "[a]ny authority that the words of the statute possess to bind us to a course of conduct or afford legal protection is attributable to the authority of their source." *Id.* at 616.

188. See Delgado, *supra* note 40, at 1362.

189. Zelenak, *supra* note 2, at 1559.

190. *Id.* at 1523. In the culmination of his attack on "the dangers of difference feminism," it is instructive to note the legal case he employs to illustrate his charge. In *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988), a sex discrimination claim against Sears for underrepresentation of women in the ranks of commission sales

IV. HOUSEWORK AND SOCIAL (IN)SECURITY

One of the outcomes of the introduction of the "ethic of care" to the feminist discussion is that the idea of care quite naturally settles around those close to us, beginning at home. The 1990s have seen the emergence of important new scholarship in the areas of child care and home labor.¹⁹¹ Nancy Staudt deserves high praise for addressing an under-discussed and very difficult subject: the valuation and taxation of unpaid domestic labor. Her 1996 article, *Taxing Housework*,¹⁹² outlines a framework for taxing imputed income generated by women's performance of housework and childcare. Staudt's work constitutes a giant step forward in advancing the discourse on the vital issues of women's financial security and dignity.

In his review of this work, Zelenak defines Staudt's goal as an attempt "to improve the lives of women who choose to devote much of their time to unpaid domestic labor."¹⁹³ To be sure, advancing women's welfare is the chief aim, but a significant reason Staudt focuses attention on this issue is that for many, unpaid labor on the home front is *not* a choice, regardless of marital, familial, or employment status.¹⁹⁴ Zelenak pays attention to two goals that he believes are of principal concern to feminists—"changing gender roles, and improving the lives of women in traditional gender roles."¹⁹⁵ Although he gives Staudt credit for focusing her efforts toward "helping women as they are,"¹⁹⁶ her proposals address issues of much broader scope than this. Chief among these is bolstering the dignity of women with home responsibilities.¹⁹⁷ Staudt proposes

positions was dismissed when the court found that women generally did not want to work in such high-pressure employment positions. See *id.* at 304. Zelenak uses this case to illustrate that feminist arguments for women's "difference" actually work *against* women's efforts to achieve equality with men, leading him to warn: "A feminist who is interested in equal rights for women would do well to stay far away from Gilligan's work; it has more potential for harm than for good." Zelenak, *supra* note 2, at 1561 (footnote omitted). This might be true, but only for women for whom "equal rights" means possessing the freedom to become *just like men*.

191. See, e.g., Silbaugh, *supra* note 36.

192. Staudt, *supra* note 53.

193. Zelenak, *supra* note 2, at 1527.

194. See Staudt, *supra* note 53, at 1573. Even though the majority of women of most every classification are engaged in market labor, Staudt notes that they are still responsible for the vast bulk (70 to 80%) of domestic labor responsibilities. See *id.* Greater wage-earning ability, therefore, "does not cause a corresponding decrease in the level of women's housework." *Id.*

195. Zelenak, *supra* note 2, at 1528.

196. *Id.*

197. Some feminists have (arguably) contributed to the marginalization of women who perform substantial labors in the home by insisting that such work is "redundant and

levying Social Security taxes on non-market domestic labor according to a set of formulas, thereby bringing women into positions in which they may accrue their own retirement benefits, and fostering greater societal recognition and acceptance of women's valuable and productive contributions.¹⁹⁸

Zelenak rejects the idea that counting the value of housework as taxable income can enhance societal respect for women, finding "[h]er claims for the symbolic value of taxing housework are dubious."¹⁹⁹ Staudt's concerns for the welfare of women who perform vast amounts of unpaid labor are far more substantive than symbolic. The economic value of unpaid labor in the United States has been estimated to range as high as 60% of Gross Domestic Product.²⁰⁰ This does not count the value of unpaid labor to those paid workers (for example, husbands) who are freed to devote extra time to produce additional economic value in the marketplace, extra labor that is compensated at high marginal rates.²⁰¹ Despite the manifest significance of work that is not only uncompensated but largely taken for granted, Zelenak writes of these (predominantly) women: "It is not obvious that a group widely viewed as performing gratuitous services out of love is in need of public relations assistance."²⁰² Indeed, he believes women would view such taxation as a "double insult."²⁰³ But contrary to Zelenak's limited consideration of only two feminist goals involving tax policy (changing gender roles and helping women in traditional stations—both of which comport with his liberal normative perspective), Staudt has several good reasons for wanting to use the tax system as an instrument of valuation for housework. Placing more women on the tax rolls advances other important feminist goals. First, people who pay taxes have a greater stake in the decisions and outcomes of policy deliberations that affect them. Conversely, taxpayers are more visible constituents to policymakers than those who do not pay taxes. Staudt, in another recent article, argues that poor citizens in particular who are left off the tax ledgers are largely ignored in the

stultifying." Blumberg, *supra* note 22, at 94-95. Staudt believes such viewpoints do not capture "the valuable and productive aspects of the labor that many women . . . find important." Staudt, *supra* note 53, at 1573.

198. See Staudt, *supra* note 53, at 1574.

199. Zelenak, *supra* note 2, at 1528.

200. See Silbaugh, *supra* note 36, at 1-2.

201. See Shurtz, *supra* note 20, at 516.

202. Zelenak, *supra* note 2, at 1528.

203. *Id.* at 1529. In addition to the "insult" of being taxed, a tax directed exclusively at women might also draw their ire.

policy process by default, leaving the interests of the wealthy at the forefront of legislative consideration.²⁰⁴ Moreover, official recognition of the productive nature of domestic labor can aid financially vulnerable women in numerous contexts.²⁰⁵

Despite some technical and practical difficulties in implementing certain aspects of Staudt's proposals,²⁰⁶ this does not significantly diminish the impact of her central statement, which is "that to improve women's economic security, housework must be recognized as valuable and productive."²⁰⁷ Whether one agrees with the specific method employed in meeting these ends is ultimately of secondary importance if the key issue is lost in blind pursuit of technical or methodological perfection. Staudt's proposals are not, as Zelenak charges, merely "a political ploy."²⁰⁸ She truly believes in the concepts represented in her proposals, but more importantly, she understands the importance of presenting a vision that represents a new way of looking at a problem. I also do not agree with Zelenak's judgment that a "critique without a workable solution does nothing

204. See Nancy C. Staudt, *The Hidden Costs of the Progressivity Debate*, 50 VAND. L. REV. 919, 922 (1997). Staudt notes that "by drawing lines and divisions between taxpayers and non-taxpayers, traditional tax theorists have enabled relatively wealthy individuals to participate in society as full citizens. At the same time, the lines have virtually bound the poor to a subordinate position in society." *Id.* at 923.

205. At divorce, for instance, valuation of housework lags far below that for market labor work, deflating the wife's contribution to the accumulation of joint property, thereby weakening her claims to marital assets under equitable distribution statutes. See Silbaugh, *supra* note 36, at 55-67.

The view of domestic labor as being grounded in love and familial affections has negative repercussions for women working outside the home as well. Waged domestic workers are among the lowest paid of any professional classification and are exempt from worker protection laws under the National Labor Relations Act. The Act excludes "any individual employed . . . in the domestic service of any family or person at his home." 29 U.S.C. § 152(3) (1994). Also expressly limited are many regulations under the Occupational Safety and Health Act ("OSHA"). OSHA exempts employers who are defined as "individuals who, in their own residences, privately employ persons for the purposes of performing . . . what are commonly regarded as ordinary domestic household tasks, such as house cleaning, cooking, and caring for children." 29 C.F.R. § 1975.6 (1995). Additionally, most states exempt such employers from mandatory participation in workers' compensation programs. See Silbaugh, *supra* note 36, at 78.

206. Staudt's proposals have a number of structural problems that Professor Zelenak has correctly identified, such as those associated with creating what would essentially be a separate (but revenue-neutral) income tax on non-market household income. See Staudt, *supra* note 53, at 1643. Aside from its function of legitimizing such income for Social Security purposes (Social Security taxes can be levied only on earned income), such a separate tax would serve no fiscal purpose and would generate additional administrative overhead.

207. *Id.* at 1647.

208. Zelenak, *supra* note 2, at 1531.

to better anyone's situation."²⁰⁹ Staudt's work has sparked increased debate and attention on the vital issues of household labor, its valuation, childcare, and women's financial security interests.²¹⁰ In these dimensions, her work is a great boon to feminist inquiry.

V. BIAS IN THE CODE: IN BLACK AND WHITE

Over the past decade or so, a burgeoning catalog of critical writings on matters of race and civil rights has developed, amalgamated under the banner of Critical Race Theory ("CRT").²¹¹ A consistent theme that characterizes this literature is that racism is an inherent and deeply ingrained feature of American society, and is therefore active in the composition and character of virtually all social institutions.²¹² A corollary to this theme is that legal and political institutions, and the laws and rules created by them, also

209. *Id.* at 1524. Zelenak's repeated emphasis on the correctness, reasonability, and political feasibility of remedial proposals assumes some qualities of an addiction to normativity. See Schlag, *supra* note 55, at 929 ("Normative legal thought is conclusion-oriented. Among other things, this means that normative legal thought works very hard to reach this point (the 'Conclusion'). This is the point where the payoff is to be found—the what to do?, the prescription, the recommendation.").

210. See, e.g., Rebecca Korzec, *Working on the "Mommy-Track": Motherhood and Women Lawyers*, 8 HASTINGS WOMEN'S L.J. 117 (1997); James A. McKenna, *Housekeeping Ain't No Joke: How Maine's Child Support Guidelines Can Be Biased Against Mothers*, 49 ME. L. REV. 281 (1997). For a discussion of her caregiver allowance, see Alstott, *supra* note 73.

211. Professor John Calmore describes Critical Race Theory as a scholarship of opposition that "challenges the universality of white experience/judgment as the authoritative standard that binds people of color and normatively measures, directs, controls, and regulates the terms of proper thought, expression, presentment, and behavior. As represented by legal scholars, critical race theory challenges the dominant discourses on race and racism as they relate to law." John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992).

212. See Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767, 768 (1988). Professor Bell points to the pivotal role played by the slavery compromises in the processes that led to the adoption of the Constitution by all 13 colonial delegations in 1787. The deference of Northern delegates towards their Southern brethren over their insistence to exercise their "right" to maintain the institution of slavery "set a precedent under which black rights have been sacrificed throughout the nation's history to further white interests. Those compromises are far more than an embarrassing blot on our national history. Rather they are the original and still definitive examples of the ongoing economic struggle between individual rights reform and the maintenance of the socio-economic *status quo*." *Id.* at 768. The rule of law has also been vigorously employed throughout American history to promote majoritarian interests (primarily those of the wealthy white class) at terrible expense to other ethnic populations, including Native Americans, Chinese immigrants, and Mexican Americans. See Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990).

bear the stamp of racial bias, even when couched in formally neutral or "color-blind" terms that embrace egalitarian principles.²¹³ Such critiques have recently been applied to features of the taxation system that produce different effects (generally negative) for black taxpayers relative to their white counterparts in provisions related to home ownership,²¹⁴ the tax treatment of married couples,²¹⁵ and asset (and wealth) accumulation.²¹⁶ One of the most provocative contributions to this emerging branch of critical commentary was presented by Beverly I. Moran and William Whitford in their article entitled *A Black Critique of the Internal Revenue Code*.²¹⁷

Moran and Whitford tested their premise that many provisions of the Internal Revenue Code are skewed to the benefit of white people relative to black people. Starting with an oft-cited definition of income²¹⁸ for purposes of comparison, they select for examination a number of tax "benefits"²¹⁹ (exclusions from income, deductions, favorable rates for certain types of income, etc.) that apply to four different areas of the Code: (1) wealth and wealth transfers,²²⁰ (2)

213. See Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992). Professor Lawrence challenges the "understanding that the dominant legal discourse is premised upon the claim to knowledge of objective truths and the existence of neutral principles." *Id.* at 2253. The language of law must necessarily contain the "positioned perspective" of those who create it, a reality that reveals "the impossibility of distance and impartiality in the observation of a play in which the observers must also be actors." *Id.* at 2252. One of the methods of Critical Race scholarship is to overtly reject any pretense of neutrality in the expression of majoritarian or outsider perspectives, for the act of assuming a consciously selected position is "the first enunciating act of self-definition, and . . . is testimony to the importance of the symbolism of language in the political/cultural hegemony of American racism." *Id.* at 2267.

214. See, e.g., Powell, *supra* note 20, at 80.

215. See, e.g., Brown, *supra* note 20, at 45.

216. See, e.g., Austin, *supra* note 19.

217. Moran & Whitford, *supra* note 20.

218. See *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) (defining income as "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion").

219. See Moran & Whitford, *supra* note 20, at 753-54 ("We define as a tax benefit any opportunity for deductions or exclusions from income that deviate from the idea of a comprehensive income tax base, or opportunities to postpone reporting income to a time later than when it should be reported according to the ideal of the comprehensive tax base.").

220. See *id.* at 755. Moran and Whitford selected four areas of the Code relevant to the tax treatment of wealth: (1) the gift exclusion, see I.R.C. § 102(a) (1994); (2) the basis adjustment rules at time of gift and at death, see I.R.C. §§ 1014(a), 1015(a) (1994 & West Supp. 1998); (3) reduced capital gains rates, see I.R.C. § 1(h) (West Supp. 1998); and (4) the realization requirement for taxation of wealth accession of many assets. See Moran & Whitford, *supra* note 20, at 755.

home ownership;²²¹ (3) retirement plans and employment benefits;²²² and (4) the marital taxation unit.²²³ They aimed to measure the comparative levels at which these benefits are utilized by black and white taxpayers. General results of their study lead the authors to conclude that "members of the black community receive, on average, fewer of the tax benefits we have studied than the average member of the white community."²²⁴

221. See Moran & Whitford, *supra* note 20, at 755. Four principal provisions were examined there: (1) the home mortgage interest deduction, see I.R.C. § 163(h)(1), (h)(2)(D) (West Supp. 1998); (2) the deduction for state and local property taxes, see *id.* § 164(a)(1); (3) the rollover of gains on the sale of principal residences, see I.R.C. § 1034(a), *repealed by* Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 312(b), 111 Stat. 788, 839; and (4) the exclusion of the gain from the sale of principal residences, see I.R.C. § 121(a)-(b) (West Supp. 1998), a provision greatly expanded under terms of the Taxpayer Relief Act of 1997.

222. See Moran & Whitford, *supra* note 20, at 755. There are four areas of focus there as well: (1) Keogh plans, see I.R.C. § 401(c) (West Supp. 1998); (2) IRAs, see *id.* §§ 219, 408, an area that underwent some liberalization under the Taxpayer Relief Act of 1997; (3) employer-provided pensions, see *id.* §§ 401(a)(1), 501(a); and (4) employer-provided health plans, see *id.* § 106.

223. See Moran & Whitford, *supra* note 20, at 755. The chief examination here is of the relative incidence of marriage "bonuses" and "penalties" among black taxpayers. See *id.*

224. *Id.* at 799. The authors found the most disparities in their studies of the taxation of wealth-producing assets, including owner-occupied homes. See *id.* at 769-78. Blacks were found to seldom hold either the types or quantities of assets subject to preferential tax treatment. See *id.* at 769-70. For instance, 1979 statistics showed certain "tax-favored" assets such as stocks and mutual funds were held by whites (as a proportion of the total population) at a rate more than six times that of the black population, and the monetary value of these assets for those households possessing them was more than five times higher for whites (just under \$34,000) than for blacks (about \$6500). See *id.* at 766 tbl.1 (reproduced from WILLIAM P. O'HARE, WEALTH AND ECONOMIC STATUS: A PERSPECTIVE ON RACIAL INEQUALITY 12 (1983)).

In the home-ownership area, not only are whites more likely than blacks to own their own homes (based on 1987 figures, 63.8% of whites are homeowners, compared to 41.6% of blacks), but white-owned properties tend to accrue value at considerably higher rates than properties owned by blacks. See *id.* at 777-78 tbl.4 (reproduced from MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL EQUALITY 109 (1995)). Home ownership carries important tax benefits, such as the home mortgage interest deduction, see I.R.C. § 163 (West Supp. 1998), and the exclusion on the gain of up to \$250,000 (\$500,000 for a married couple) on the sale of one's primary residence, see *id.* § 121. The Taxpayer Relief Act of 1997 increased this exclusion from its old level of \$125,000. The new provision also allows this exclusion to be claimed once every two years by qualifying homeowners. Because the benefits of these provisions are positively tied to property ownership and increasing property values, they are a special boon to white homeowners "whose average homeowner equity increased at significantly higher rates than their black counterparts." Moran & Whitford, *supra* note 20, at 777.

Tax benefits attached to participation in employer-provided benefits (pensions, 401(k) plans, and health insurance) revealed some level of increased benefit for white workers relative to their black counterparts, but not at levels as pronounced in the study

Zelenak contends that "their analysis is unconvincing"²²⁵ and attacks Moran and Whitford on three main points. First, he rails over their choice of the *Glenshaw Glass* definition of income. He claims that "[t]he entire analysis depends on the validity of their assumption that a comprehensive income tax base is the appropriate race-neutral standard."²²⁶ Zelenak goes on at some length comparing income with consumption taxes, instructing us on how one's normative standard for the tax base shapes the other parameters of analysis and that because of this, depending on the particular base selected, one could "conclude the Code is systematically biased against whites."²²⁷ Zelenak believes that selection of a normative model determines the parameters by which tax provisions are correctly judged, rendering racial effects essentially residual or incidental affairs.²²⁸

Zelenak ventures far afield. Once again, herding Moran and Whitford's framework into his normative corral, he asserts that their search for racial bias is ultimately a fruitless venture because it is the *wrong* search.²²⁹ However, Moran and Whitford are not corralled

areas surrounding wealth and wealth accumulation. See Moran & Whitford, *supra* note 20, at 786-88. The chief influences in white workers' greater tax preferences were their higher participation rates in pension and 401(k) programs, and greater incomes, which at higher marginal tax rates makes the exclusion from income of these tax measures more valuable relative to the value applied to the lower incomes of black employees. See *id.*

The study on the marital taxation unit revealed a most interesting fact: In 1987, income splits between black couples averaged nearly a 50/50 proportion between husbands and wives, whereas white husbands' average income was about double that of their white wives. See *id.* at 795-96. The implication of this is that given the income tax bias against two-earner couples, "black couples are more likely to suffer a marriage penalty, and a higher marriage penalty, than white couples." *Id.* at 798; see also Brown, *supra* note 20, at 49-52 (identifying black women's high participation rate in wage labor coupled with pronounced wage discrimination against black men as key components that contribute to the "marriage penalty" phenomenon for African-American taxpayers).

225. Zelenak, *supra* note 2, at 1562.

226. *Id.* at 1563. Zelenak attacks Moran and Whitford for offering "no explanation of why a decades-old Supreme Court opinion has the authority to define the race-neutral baseline for tax analysis." *Id.*

227. *Id.* at 1565 (emphasis omitted). Zelenak states that if a consumption base were adopted for construction of the ideal, then the current practice of taxing income from savings, dividends, and capital gains would constitute a deviation from the ideal, arguably constituting a tax injustice against the holders of such assets, who are predominantly white. See *id.*

228. Zelenak contends that once a normative taxation baseline is established, such as a comprehensive income base or a consumption base, any given provision measured against the adopted norm is either "normative, or it is not. If the provision is right, it makes no sense to examine it for racial bias relative to some alternative wrong approach. If the provision is wrong, it should be repealed regardless of its racial effects." *Id.* at 1567.

229. Cf. Schlag, *supra* note 55, at 932 ("Normative legal thought, of course, is also a mode of social control—both within and without the legal academy. As I've argued throughout this article, the rhetoric of normative legal thought establishes the identity

into Zelenak's normative pen because they sought no "race-neutral" standard in the form of a comprehensive income tax base. My reading of their selection of the *Glenshaw Glass* definition is that it is well-known and accepted by many tax scholars.²³⁰ More importantly, it resides in the general vicinity of what the United States government considers an appropriate tax base.²³¹ The Internal Revenue Code, being the product of Congress, bears the stamp of that politically tinged institution, and it is in its capacity as a *political* document, reflecting the biases of its creators, that it provides the foundation for their examination. Moran and Whitford *do* employ a neutral standard on which they base their findings. It is called *racial equality*.²³²

and polices the bounds of legitimate legal thought."). By the way, the culmination of Zelenak's diatribe is his judgment that "there is never a reason to examine a provision for racial effects." Zelenak, *supra* note 20, at 1567.

230. Moran and Whitford consider the *Glenshaw Glass* definition of income a "ready tool" in the service of "everyday tax policy analysis." Moran & Whitford, *supra* note 20, at 753. They note that "generations of tax scholars have used *this* definition to craft a conception of a comprehensive tax base." *Id.* (emphasis added).

Contemporary tax scholars still cite *Glenshaw Glass* as an important refinement in the treatment of income taxation in American law. William B. Barker, commenting on the development of doctrine pertaining to the mandate that taxes include "all income from whatever source derived," writes: "Any possible limitation that the notion of source might have had on this doctrine was finally put to rest by the United States Supreme Court in *Commissioner v. Glenshaw Glass Co.* In doing so, the Court provided an often quoted definition of income . . ." William B. Barker, *A Comparative Approach to Income Tax Law in the United Kingdom and the United States*, 46 CATH. U. L. REV. 7, 21 (1996) (footnote omitted); see also Patrick E. Hobbs, *The Personal Injury Exclusion: Congress Gets Physical but Leaves the Exclusion Emotionally Distressed*, 76 NEB. L. REV. 51, 69 (1997) (referring to *Glenshaw Glass* as a "landmark decision" that rendered "a far more expansive definition of income"); Steven Jay Stewart, *Damage Award Taxation Under Section 104(a)(2) of the I.R.C.—Congress Clarifies Application of the Schleier Test*, 47 SYRACUSE L. REV. 1255, 1260 (1997) (noting that *Glenshaw Glass* broadened the definition of income).

231. Items deliberately excluded from income taxation through legislative provisions constitute "tax expenditures," so named to identify these exemptions as equivalent to government subsidies in fiscal effect. The federal government officially tabulates its tax expenditure "budget" each year, a fair indication that such exclusions are considered part of the appropriate theoretical tax base. See *infra* text accompanying note 236.

232. Zelenak's application of normative "neutral" baselines as a means to invalidate Moran and Whitford's finding is reminiscent of a commentary by legal scholar Herbert Wechsler on the Supreme Court's ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954), which banned the practice of forced racial segregation in the schools. Wechsler, who supported the decision in *Brown* on moral grounds, found the Court's jurisprudential reason lacking, contending that *Brown*, rather than comprising a question of equal protection guarantees, was a question of rights of association, to be answered by applying neutral principles that would weigh the rights of black people to associate with whites against the rights of white people *not* to associate with blacks. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33-34 (1959). Professor Charles Black responded to Wechsler by illustrating that *Brown* was decided

Zelenak's second criticism is that Moran and Whitford hand-picked the provisions of the Code for examination for racial bias, thereby skewing the results in the directions they intended.²³³ He complains further that studies of provisions that may reveal benefits advantageous to blacks, such as the Earned Income Tax Credit (EITC) or the head-of-household filing category, are omitted from consideration.²³⁴ At first glance, Zelenak may appear to have a point. But if one takes more than a cursory glance at the provisions selected for study, something important is revealed. According to estimates of the federal government's Office of Management and Budget for 1996, the value to taxpayers of major portions of the tax expenditure budget studied by Moran and Whitford is staggering. Arguably the most "pro-black" provision, the EITC, was worth \$24.3 billion in 1996.²³⁵ However, the home mortgage interest deduction was valued at \$43 billion; favorable capital gains treatment on homes garnered taxpayers another \$20.1 billion; employer-paid health insurance was worth \$56.7 billion; and net itemized deductions landed a whopping \$72 billion in taxpayers' pockets, all of which are relatively more advantageous to white people than to black people.²³⁶ In light of the huge government expenditures in the areas in question, Moran and Whitford are *more than justified* in their selections.

In the third area of complaint, the solution area, Zelenak finally has discovered terra firma. In response to the proposal that a black Congress would be urged to eliminate section 401(k) as a remedy for low participation by black employees, Zelenak is correct in calling for some sort of incentive to stimulate savings behavior.²³⁷ Likewise, the proposal to alleviate the "marriage penalty" by allowing black couples a choice to file separately or jointly—whichever resulted in lower tax liability—was not a well-thought out choice for the simple reason that, all other factors being equal, the lower aggregate burdens on married couples would have to be compensated for by

with reference to a neutral standard—racial equality. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429 (1960).

233. See Zelenak, *supra* note 2, at 1567-68.

234. See *id.* at 1568.

235. See CITIZENS FOR TAX JUSTICE, TAX EXPENDITURES: THE HIDDEN ENTITLEMENTS 9 (1996) (citing U.S. Office of Management and Budget figures.)

236. See *id.*

237. See Zelenak, *supra* note 2, at 1571-72 (noting the paradox that a policy prescription designed in response to low savings behavior involves elimination of what has been elsewhere regarded as a highly successful long-term savings program—the 401(k) provisions).

single taxpayers.²³⁸ When one examines the apparent relative weakness of some of the proposals, one must keep in mind that Moran and Whitford intended the concepts of these proposals to reflect the different perspective that could be expected to emerge in their metaphor of a Black Congress. This is a powerful image, for it is juxtaposed against its counterpart in the real world, an overwhelmingly White Congress.²³⁹ The overall impact of this work is forceful at the very least and invites more exhaustive study that is sure to follow—study that is sorely needed.

VI. TAX SCHOLARSHIP: DIRECTIONS FOR THE TWENTY-FIRST CENTURY

A. *Deconstruction as Redemptive Process*

Though the critical tax movement is young, a cursory glance at the pieces examined in this Article reveals a breadth of subject matter that points to the future expansion of this endeavor to the frontiers of other outsider scholarship. These works examine the taxation system neither by haphazardly foraging for flaws in particular code provisions that do not really exist, nor by relying exclusively on standard approaches to taxation²⁴⁰ problems that would analogously always “fix” a darkened light fixture by inserting a new bulb. In the house of taxation law, the inhabitants of several rooms have been left perpetually in darkness, even after having been fitted with a variety of new, brighter, more efficient bulbs by the lords of the house. It is evident to the denizens of darkness that the

238. See *id.* at 1573-74.

239. Moran and Whitford remind us: “Black life remains largely unknown to most of the white world, and to most white legislators.” Moran & Whitford, *supra* note 20, at 758.

240. The problem posed by strict allegiance to normative liberal methodology is posed by Pierre Schlag in this way:

Suppose that you are walking on a road and you come to a fork. This calls for a decision, for a choice. So you ask your companions: “Which fork should we take? Where should we go?” You all begin to talk about it, to consider the possibilities, to weigh the considerations. Given these circumstances, given this sort of problem, the questions, “Where should we go? What should we do?” are perfectly sensible.

But now suppose that it gets dark and the terrain becomes less familiar. You are no longer sure which road you are on or even if you are on a road at all.

... The questions (Where should we go? Which fork should we take?) that seemed to make so much sense a short time back have now become a hindrance.

Schlag, *supra* note 55, at 805-06. The critical tax movement is plotting new directions on grounds far off the trodden paths and well-worn highways of academic inquiry. See *id.*

solutions to their immediate problems reside elsewhere—in the original, defective wiring that conducts the destructive currents of racism, patriarchy, homophobia, or other agents that not only do not bring illumination, but could conceivably incinerate the lives of the entire household. Such fundamental problems suggest that a comprehensive inspection of the larger structure is called for. This is the mission of the critical tax project. To carry this image one step further, when one wishes to renovate an old house, one inspects the grounds surrounding the structure, the foundation on which it sits, the original materials and internal layout employed in its makeup, and then aggressively checks for rot and decay that lie hidden from immediate view, but which can endanger the integrity of the whole dwelling.

All outsider scholarship shares one goal in common—the end of subordination. The emerging body of critical literature of the taxation area bears the stamp of commitment to this goal. That the massive effort to excavate the grounds on which the taxation structure is situated has been joined is itself evidence of the hopeful prospects that accompany these efforts. This is ultimately a redemptive endeavor. To build a more serviceable taxation structure tomorrow requires some disassemblage of the components in use today. This, in a nutshell, describes a vital focus of the critical tax mission—that of *deconstruction* of the present tax apparatus.²⁴¹

241. Deconstruction is a term closely associated with the French linguist/philosopher Jacques Derrida, who has examined the use of language in its dimension as a tool of social modulation and control, noting that “the signified is inseparable from the signifier . . . the signified and the signifier are the two sides of one and the same production.” See JACQUES DERRIDA, POSITIONS 18 (Alan Bass trans., University of Chicago Press 1981). The language of law, by extension, can be viewed as reflective of those who have crafted it. Indeed, Derrida characterizes law and the system in which it operates as forces “that both hide and reflect the economic and political interests of the dominant forces of society.” See Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* 11 CARDOZO L. REV. 919, 941 (1990).

Another pretext of this line of legal criticism is that legal language cannot be “neutral” and “objective,” resulting in privileged treatment of favored populations. Frances Olsen has examined the employment of dichotomy in construction of family law doctrine. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). Looking specifically at legal definitions that divide the “public” (market-oriented) sphere of human activity from the “private” (family-centered) sphere in a variety of applications of law, she determined that such arbitrary definitions have facilitated women’s subordinate station relative to men due to the systematic favoring of public sphere activities, in which men concentrate their activities. Antidiscrimination laws governing hiring practices and qualification requirements often do not “end the actual subordination of women in the market but instead mainly benefit[] a small percentage of women who adopt ‘male’ roles.” *Id.* at 1552. Because this public/private dichotomy is so starkly conceived, Olsen showed that

Deconstruction is a word without a firm or generally agreed upon meaning. However, use of the term in its dimension of criticizing legal doctrine should not be identified as a process of *destruction*.²⁴² Deconstruction as a methodological process flows out of the observation that if law is determined to be founded not on static principles of right reason,²⁴³ but on definitions and concepts that are inherently indeterminate, then the meaning of law can be found to mirror most closely definitions assigned it by those who have the power in society to craft policy. In this, law can be seen to be essentially political in nature.²⁴⁴ Deconstruction can, therefore, be a useful tool in the service of feminists, critical race theorists, queer legal scholars, and other schools of outsider inquiry.

In fashioning avenues of exploration for taxation scholarship, deconstructive examination of the use of reason in science²⁴⁵ and

this has severely retarded both the range and effectiveness of reform efforts aimed at elevating women's status. *See id.* at 1530-60.

242. Respected scholars have expressed similar opinions. For example, Owen Fiss once said that the scholarship associated with the Critical Legal Studies ("CLS") movement of the 1970s and '80s threatened to hasten "the death of the law, as we have known it throughout history." Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 16 (1986).

243. *See* Roberto Mangebeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 564-65 (1983). Unger identifies the primary focus of the Critical Legal Studies movement as one built on the dual critiques of formalism, which "invokes impersonal purposes, policies, and principles as an indispensable component of legal reasoning," and objectivism, "the belief that the authoritative legal materials—the system of statutes, cases, and accepted legal ideas—embody and sustain a defensible scheme of human association. They display . . . an intelligible moral order." *Id.*

244. *See* Martha Minow, *Law Turning Outward*, 73 TELOS 79, 84-85 (1987). Minow credits CLS with developing four areas of ongoing contribution to the advancement of legal scholarship. The critical scholar: (1) "seeks to demonstrate the indeterminacy of legal doctrine: any given set of legal principles can be used to yield competing or contradictory results"; (2) "engages in historical, socioeconomic analysis to identify how particular interest groups, social classes, or entrenched economic institutions benefit from legal decisions despite the indeterminacy of the legal doctrines"; (3) "tries to expose how legal analysis and legal culture mystifies outsiders and legitimizes its results"; and (4) "elucidate[s] new or previously disfavored social visions and argue[s] for their realization in legal or political practice in part by making them part of legal discourse." *Id.* at 84-85.

245. *See* Ruth Hubbard, *Have Only Men Evolved?*, in WOMEN LOOK AT BIOLOGY LOOKING AT WOMEN: A COLLECTION OF FEMINIST CRITIQUES, *supra* note 18, at 7. Hubbard examines basic assumptions of Darwinian theories of the nature of men and women, noting the parallels between the "objectivity" of the scientific observations of the time and prevailing social attitudes in mid-nineteenth-century society. *See id.* at 7-32. Mary Poovey discusses the influence of biological theories of women's sexual desire with the formation of repressive public health policies in England aimed at curbing the spread of sexually transmitted diseases through the imposition of strict regulations on prostitutes. She notes that similar penalties were not pursued against their male clientele. *See* Mary Poovey, *Speaking of the Body: Mid-Victorian Constructions of Female Desire*, in BODY/POLITICS: WOMEN AND THE DISCOURSES OF SCIENCE, *supra* note 18, at 37-38.

economics²⁴⁶ may prove instructive for altering the domain of discourse to include perspectives of previously excluded groups. Just beneath the surface of apparently innocent and reasonable taxation principles may lurk the spirit of oppression. For instance, looking at activities that are not deemed to produce taxable value (income) reveals what the prevailing social paradigm considers *valuable*. Waged or salaried labor—that which is contracted for pecuniary compensation in the market—is subject to taxation, but household labor performed by a woman for her family (perhaps to the benefit of a wage-earning husband who does not have to perform such tasks) is not taxed because it is not “work.”²⁴⁷ This judgment at first blush

While society often responds to what it deems to be “good” science, regardless of its actual merit, it can also latch onto theories that are widely known to be of dubious scientific integrity, but which are still attractive to some shadowy part of the public psyche. Derrick Bell notes that even works that feature widely discredited “scientific” methodology, if they strike the right tone with the intended reading audience, can serve to stoke the fires of a persistently smoldering racism in America. See Derrick A. Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 893-95. Professor Bell refers to the public attention paid to the best-selling book *The Bell Curve* by Richard J. Herrnstein and Charles Murray, which postulates that observable race and class differences are largely traceable to immutable genetic factors. See *id.* The book suggests that the comparatively lower I.Q. test scores registered by African-Americans relative to those of Caucasians are due substantially to inherited traits that are evident even after correcting for “oppression factors” in society that inhibit successful performance on such aptitude tests. See RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 127-55 (1994).

246. See Paula England, *The Separative Self: Androcentric Bias in Neoclassical Assumptions*, in BEYOND ECONOMIC MAN, *supra* note 15, at 37. England challenges the notion of the autonomous, rational individual that is the basis for many of the models of mainstream economic analysis. She charges that because of this concept’s construct of separative human nature and its subsequent assumptions that interpersonal utility functions cannot be compared and that personal tastes (and preferences exercised in action) are exercised in isolation (and are therefore exogenous factors), this discourages development of models based upon interactive economic units (such as the family) or those that employ elements of human cooperation or empathy.

Likewise, Michèle Pujol identifies five assumptions characteristic of neoclassical economic theory: (1) all women are (or will be) married and have children; (2) all women are economically dependent on a male relative (father or husband); (3) women are naturally oriented (by biology) toward being housewives and mothers; (4) women are unproductive in the market labor realm; and (5) women are irrational, and are, therefore, unreliable economic agents. See Michèle Pujol, *Into the Margin!*, in OUT OF THE MARGIN: FEMINIST PERSPECTIVES ON ECONOMICS 17, 18 (Edith Kuiper et al. eds., 1995).

247. See NELSON, *supra* note 15, at 104. Nelson views the “noneconomic” treatment of household production as a holdover from the common law conception of marital coverture, in which a woman’s identity (ergo, her labors) is “engulfed” by that of the husband. See Nelson, *supra* note 35, at 12. By extension, domestic work is judged to be not suitable for economic valuation, since it is performed out of love and duty. See Silbaugh, *supra* note 36, at 72-80. Silbaugh demonstrates that this view of domestic labor permeates the paid labor market as well, pointing out that paid domestic workers are

may seem benign and even "reasonable" to many, but it confers a discernible tax advantage to politically favored groups, particularly the traditional married heterosexual couple, composed of a "working" husband and a stay-at-home wife. This phenomenon is the subject of considerable attention today.²⁴⁸

This also points to another important issue—that of *who* participates in the taxation system. As we have seen previously, exemption from taxation of the value of household labor excludes those who perform such labor (typically women with young children) from participating in the nation's social insurance programs.²⁴⁹ At the same time, many of the wealthiest individuals in society also contribute nothing to the social insurance programs (by virtue of their incomes being "unearned"), yet are at the center of tax policy accommodation.²⁵⁰ The exemption from taxation of our poorest and most economically vulnerable citizens appears to be an attempt to "help" these economically disadvantaged persons, but it is help that exacts the price of sacrificing their voices in the decisionmaking process. Only those who are on the tax rolls have their interests represented at the policy construction table, which has "caused tax theorists to focus almost exclusively on the rights and responsibilities of the relatively wealthy."²⁵¹

among the most poorly compensated of any occupational group, and endure the distinction of having their work declared exempt from federal labor and work safety laws, as well as from most state workers' compensation statutes. *See id.* at 72.

248. *See* EDWARD J. MCCAFFERY, *TAXING WOMEN* (1997). Professor McCaffery examines a host of taxation factors that affect economic decisionmaking of married women, chief among these the built-in disincentives for women to perform market labor. The combination of progressive tax rates and the nontaxability of household labor combine to create a marital taxation "bonus" for couples with only one wage earner, serving to discourage married women's market labor participation. *See id.* at 66-73. *But see* Brown, *supra* note 20, at 45. Brown illustrates that due to the higher traditional market labor participation of African-American women and discrimination factors that hold wages down for African-American men, most black married couples not only have to work to generate an adequate family income, but both parties generate roughly comparable amounts of personal income. *See id.* at 49-52. At progressive rates, this creates a *higher* tax burden for most African-American married couples relative to their white counterparts. If the one-earner married couple is the politically preferred model for society to emulate, it is clear that it is the *white* version of this model that comprises the ideal. *See id.*

249. *See* Staudt, *supra* note 53, at 1589.

250. *See* Staudt, *supra* note 204, at 959. Staudt suggests that one of the prices of exemption from taxation for the poor has been exemption for many wealthy individuals from contributing to social welfare programs. *See id.* The exemption from Social Security tax for unearned income is a case in point, because the majority of earnings for the wealthiest sectors of society derive from property income.

251. *Id.* at 991.

These types of "uncovering" activities serve two ends: they brand injustices for what they are, giving faces to what has been felt but not seen. Second, they bring the legal realm generally, and the tax realm specifically, into the accessible arena of real human beings. Only when taxation is seen to be not so distant from the affairs of everyday life will active participation in its reform expand in scope. That process is underway.

B. Incorporation of New Theory

Tax law is an especially fertile ground for the exchange of diverse viewpoints encompassing virtually the entire philosophical domain of outsider scholarship. The whole of critical legal scholarship can be enhanced by incorporating taxation issues more readily into consideration of broader legal reforms. Overcoming the most limiting aspects of "tax myopia"²⁵² requires an awareness of the far-reaching effects of taxation policy. The technical dimensions of tax law should not preclude would-be reformers from incorporating tax law into general programs of change.²⁵³ For instance, what would a socialist feminist approach be to certain taxation issues?²⁵⁴ Concerning women's retirement security, such a feminist would likely not favor a linkage between Social Security taxation and sources of imputed income (such as housework or childcare) as proposed by Nancy Staudt²⁵⁵ but might endorse a program that integrates the Social Security and income tax systems and provides a retirement benefit (or demogrant²⁵⁶) to all citizens. Childcare might be targeted

252. See *supra* note 34 (explaining the concept of tax myopia).

253. Indeed, politicians are not shy about tinkering with the tax system on a regular basis, even though most lack a formal grounding in the study of taxation. On this point, Caron cites an article penned by a trio of former Treasury officials in which they reported that members of Congress rely almost exclusively on committee reports to comprehend the tax legislation they consider. See Caron, *supra* note 34, at 534-35 (citing Bradford Ferguson et al., *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 TAXES 804, (1989)). Their apparent lack of sophisticated knowledge of the tax code has not deterred them from creating the most complex legislation imaginable. Given this lack of sophistication, it is somewhat surprising that there has not been a greater body of creative commentaries on tax issues from critical legal scholars. On the other hand, for many politicians ignorance is bliss. See *id.* at 534-35.

254. For instance, how could taxation policy be employed to satisfy some of the wealth redistribution goals for women expressed by Professor Zillah Eisenstein as part of her version of a "platform of action"? See Zillah Eisenstein, *Stop Stomping on the Rest of Us: Retrieving Publicness From the Privatization of the Globe*, 4 IND. J. GLOBAL LEGAL STUD. 59 (1996).

255. See Staudt, *supra* note 53.

256. See Jonathan Barry Forman, *Using Refundable Tax Credits to Help Low-Income*

for subsidy through the taxation system as well, perhaps through earmarked support to private industry for establishment of care facilities for the children of employees, or by direct supplemental income aid to the working poor, particularly women.²⁵⁷

How would a radical feminist approach the controversy over the marital unit? Given that marriage is seen from this viewpoint as a state-endorsed institution of patriarchal hegemony, the marital taxation unit would likely be abandoned in favor of either some variation employing the individual²⁵⁸ or by recognizing intimate personal alliances through contract.²⁵⁹ Moran and Whitford hypothesized as to how a Black Congress might address this issue, as well as other taxation features such as the deduction for the interest on home mortgages.²⁶⁰ Fresh and innovative approaches can emerge simply through the process of thinking about tax. In a sense, this is a process of consciousness raising.

C. *Expanding Methodology*

Consciousness raising elevates our knowledge of ourselves, which is the prerequisite for claiming our personal and collective power. In outsider legal scholarship, no process has better promoted awareness of the need to include subordinated groups in construction of the law than the introduction of narrative forms of discourse into the academic dialogue. Storytelling is a powerful mode of communication, and is especially so when applied to legal principles. This is so because within stories abstract principles are made accessible, while at the same time revealing that the existence of such principles does not always translate to their expression in the lives of real people. Principles of personal liberty and equality of opportunity largely define the ideals of law, but are often not active in the experiences of women, people of color, gays and lesbians, and

Families, 35 LOY. L. REV. 117, 138 (1989).

257. See Heen, *supra* note 36, at 199-204, 215-16.

258. See Cynthia V. Ward, *The Radical Feminist Defense of Individualism*, 89 NW. U. L. REV. 871 (1995).

259. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 228-33 (1995) (advocating the abolition of marriage as a legal category and favoring in its stead a reconstituted legal family category exemplified in the "Mother/Child Dyad"); Brooke Oliver, *Contracting for Cohabitation: Adapting the California Statutory Marital Contract to Life Partnership Agreements Between Lesbian, Gay or Unmarried Heterosexual Couples*, 23 GOLDEN GATE U. L. REV. 899 (1993).

260. See Moran & Whitford, *supra* note 20, at 791-95 (marriage penalty); *id.* at 774-75 (home mortgage).

other people living on the margins. Narratives offer ways "to challenge the dominant mindset and present new ways of viewing the world,"²⁶¹ thus making it a preferred mode of communication for feminists,²⁶² critical race theorists,²⁶³ and gay and lesbian scholars.²⁶⁴

Narrative commentaries in the taxation literature have been conspicuously absent from the catalog, but the field would benefit greatly from the introduction of this form, for taxation offers a unique perspective in a wide range of settings from which to observe the everyday dilemmas of welfare moms,²⁶⁵ divorcees,²⁶⁶ abandoned spouses,²⁶⁷ retired homemakers,²⁶⁸ lesbian couples,²⁶⁹ and working professionals with young children.²⁷⁰

Another means of expanding the range of discourse is through the study of history.²⁷¹ Engaging the histories of subordinated populations is another means of revealing the ways in which dominance has been exercised in American society and sanctioned by law. The themes presented in these accounts can provide clues into how such dominance is carried out in more subtle ways in contemporary culture.²⁷² This is an emerging and exciting area of tax law, which has already yielded some most intriguing insights,²⁷³ and

261. Jewel Amoah, *Narrative: The Road to Black Feminist Theory*, 12 BERKELEY WOMEN'S L.J. 84, 87 (1997). "[T]he sharing of human experiences, can inform law so as to make it more humane and more responsive to human attitudes and behavior." *Id.*

262. See, e.g., Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141 (1997); Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994).

263. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); WILLIAMS, *supra* note 102; Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803 (1994).

264. See, e.g., William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994).

265. See Shurtz, *supra* note 20, at 493 n.29, 520-21, 528-30.

266. See *id.* at 517 n.145.

267. See *id.* at 501 n.67.

268. See *id.* at 517 n.146.

269. See *id.* at 496 n.42, 508-10.

270. See *id.* at 499 n.58, 519-23 & n.154.

271. See Jeanne L. Schroeder, *History's Challenge to Feminism*, 88 MICH. L. REV. 1889, 1889 (1990) (book review) (describing much of contemporary feminist scholarship as "ahistorical," and calling for an intensified search for the foundations of the social construction of women's oppression to anchor theories that she believes are excessively reliant upon the divergent personal accounts of women's experiences in modern culture).

272. See Fellows, *supra* note 51 (discussing male dominance in the law of wills and trusts).

273. See Nancy Folbre, *The Unproductive Housewife: Her Evolution in Nineteenth-*

which offers almost endless avenues of exploration.

A third and important prong of changing the direction of tax scholarship is in applying critical methods to teaching taxation. In other areas of law—constitutional law,²⁷⁴ torts,²⁷⁵ contracts,²⁷⁶ and criminal law²⁷⁷—important themes are being incorporated into law school curricula that show promise of improving the breadth and depth of the training of future lawyers. These commentaries have examined the impact of the gendered language of textbooks, the lack of history of women and non-European peoples, and the exclusion of the impact of class, race, sexual orientation, age, and physical disability on matters pertaining to the application of the law and of its composition. It is critical to be able to see the intersectionality of these various factors in navigating the legal landscape, for these are truly the complex and interwoven elements that shape both our individuality and our human community. These diverse factors are vital to the study of tax law, for taxes pertain to the activities and resources that define everyday life.

Century Economic Thought, 16 SIGNS 463 (1991). Professor Folbre traces the transformation of the treatment of household labor through the Industrial Revolution, when notions of “productive” work were transferred to stations outside the home. Housework evolved from being classified as a bona fide “occupation” to its present classification as a form of “leisure.” See *id.* at 464; Alstott, *supra* note 73, at 2023 (observing that for most women, the well-known labor/leisure choice is in reality a labor/labor decision); Jones, *supra* note 33, at 261-62 (analyzing newspaper articles, magazine pieces, and personal letters to measure the popular climate concerning marital attitudes that influenced the tax legislation that created the joint marital taxation unit that is still the reference entity in place today).

274. See Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264 (1989).

275. See, e.g., Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993) (examining the development of feminist themes in case law and scholarship); Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989) (discussing cases revealing gender bias and doctrines amenable to feminist critique, analyzing the failure of courts to address the history of sex discrimination underlying interspousal immunity doctrine, and suggesting changes with regard to the standard of care, sexual harassment, valuation of homemaker services and women's injuries); Carl Tobias, *Gender Issues and the Prosser, Wade, and Schwartz Torts Casebook*, 18 GOLDEN GATE U. L. REV. 495 (1988) (examining the treatment of women and identifying the use of gendered language in casebook materials; asserting that women's history and issues of great significance to women are excluded; exposing subtler forms of gender bias that implicate power; and identifying and rectifying relative imbalances of power); Carl Tobias, *The Case for a Feminist Torts Casebook*, 38 VILL. L. REV. 1517 (1993) (examining the need for a feminist casebook).

276. See Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

277. See, e.g., Mary I. Coombs, *Crime in the Stacks, or A Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988).

D. Reinventing Tax

The thrust of the critical tax project is directed at “reinventing” the tax system to make it more responsive—more dedicated—to the mission of employing law to help meet the basic needs and improve the opportunities of those who have been perpetually locked out of the policymaking process: the poor and the different. The key to the success of this mission is actively expanding the scope in which tax is viewed. Tax law should be integrated as much as possible with the construction of comprehensive strategies for such pressing needs as welfare reform, childcare provisions, retirement security, marital and family law, health care, and environmental policy.

Taxation should be viewed not as a neutral bystander in the execution of public policy, but as a positive, dynamic force of transformative potential—a powerful tool with the ability to encourage vital social goals and discourage undesirable outcomes, to boost the fortunes of our most needy citizens by partially equalizing the increasingly skewed distribution of wealth in this nation. It can be a galvanizing force for public participation in the affairs of the state through bringing all citizens under its canopy, and thus can be seen not as the despised beast of burden it is so often portrayed to be, but as a source of power for those whom have had power systematically stolen from them heretofore.

VII. CONCLUSION

Valuable and challenging insights from the burgeoning vaults of feminist and critical race scholarship have injected new blood into the study of tax law. Any movement that encroaches upon established boundaries is going to be resisted. Likewise, any new path blazed through the wilderness will encounter its share of obstacles. But as if riding a wave, the movement presses forward inexorably.

What will the future hold for critical tax inquiry? Will it be taken seriously? Because the effort is a serious one today, I believe recognition will come in some not-too-distant tomorrow. The chief contribution this new scholarship can make is to shift the terms of taxation discourse to bring a broader array of concerns to the policy table in the hope that taxation may be employed as a more powerful and flexible tool in the effort to elevate social welfare through a higher commitment to social justice. This shift will be accomplished not through rigid devotion to any established order or set of normative judgments, but simply by making the study and practice of law more sensitive and responsive to the lives of real people. This is

what inspires and defines the mission, described by Martha Minow as the drive to “generate ideas and practices that reinvent the terms of justice, while also remaking teaching methods and materials, reinvigorating scholarship and litigation, and demonstrating the importance and power of ‘bumbling through.’ ”²⁷⁸

278. Minow, *supra* note 1, at 138.