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TAKING CRITICAL TAX THEORY SERIOUSLY

LAWRENCE ZELENAK*

I. INTRODUCTION

Among the most interesting and important developments in tax scholarship in recent years has been the growth of feminist tax policy analysis. The basic insight of this analysis—that the tax treatment of work, family, and children has a significant effect on the lives of women—traces back a quarter century to Grace Blumberg's 1971 article detailing the work disincentives for married women imposed by the federal income tax.¹ Blumberg was ahead of her time, however, and her work remained largely ignored for the rest of the 1970s. But beginning in the 1980s, and continuing into the 1990s, increasing numbers of tax academics have followed her lead. Like Blumberg, they have examined the feminist implications of joint returns,² second-earner deductions,³ and family allowances.⁴ They also have gone beyond Blumberg to consider the effect on women—rich, poor, and middle class, married and single—of many other aspects of the tax system, including the estate tax marital deduction,⁵ the progressivity of the income tax,⁶ tax return preparation

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1. See Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971).

2. See EDWARD J. MCCAFFERY, *TAXING WOMEN* (1997); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 5-31 (1980); Marjorie E. Kornhauser, *Love, Money and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1993); Laura Ann Davis, Note, *A Feminist Justification for the Adoption of an Individual Filing System*, 62 S. CAL. L. REV. 197, 208-19 (1988).

3. See Pamela B. Gann, *The Earned Income Deduction: Congress's 1981 Response to the "Marriage Penalty" Tax*, 68 CORNELL L. REV. 468 (1983).

4. See Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2042-55 (1996).

5. See Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 LAW & INEQ. J. 137 (1991); Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301 (1995).

6. See Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 504-18 (1987).

standards,⁷ the taxation of imputed income,⁸ the earned income tax credit,⁹ and the Social Security tax-benefit structure.¹⁰

Very recently, several examples of critical race theory tax analysis have also appeared.¹¹ Using methods similar to those of feminists, critical race theorists have explored the effects on African-Americans of tax rules governing wealth, homeownership, and marriage. There also have been several articles proposing reforms in the taxation of same-sex couples.¹² In their introduction to *Taxing America*, a collection of essays on "critical" approaches to tax policy, Karen B. Brown and Mary Louise Fellows view feminist and critical race approaches to tax policy as part of an emerging project of exploring how the tax system treats all "traditionally subordinated groups."¹³ They describe the goals of their anthology as "chang[ing] the tax discourse to include issues of disability discrimination, economic exploitation, heterosexism, sexism, and racism," and presenting a "perspective that emphasizes the exploitive and discriminatory aspects of the tax code."¹⁴ All these approaches can be subsumed under the label of critical tax analysis.¹⁵

I agree with Edward McCaffery that the interest of tax academics in such issues is long overdue: "The puzzle and surprise

7. See Gwen Thayer Handelman, *Sisters in Law: Gender and the Interpretation of Tax Statutes*, 3 UCLA WOMEN'S L.J. 39, 51-75 (1993).

8. See Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1589-1613, 1643-47 (1996).

9. See McCaffery, *supra* note 2, at 995-96, 1014-20.

10. See Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264, 276-88 (1989); Grace Ganz Blumberg, *Adult Derivative Benefits in Social Security*, 32 STAN. L. REV. 233 (1980); Staudt, *supra* note 8, at 1642-47.

11. See Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, in TAXING AMERICA 45 (Karen B. Brown & Mary Louise Fellows eds., 1996); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751; John A. Powell, *How Government Tax and Housing Policies Have Racially Segregated America*, in TAXING AMERICA, *supra*, at 80.

12. See Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 472-76 (1996); Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359 (1995); Christopher J. Hayes, Note, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 HASTINGS L.J. 1593 (1996).

13. Karen B. Brown & Mary Louise Fellows, *Introduction to TAXING AMERICA*, *supra* note 11, at 1, 2.

14. *Id.*

15. Many of the essays in *Taxing America* had been presented in draft form at a 1995 workshop on "critical tax theory" at the State University of New York at Buffalo. See Karen B. Brown & Mary Louise Fellows, *Preface to TAXING AMERICA*, *supra* note 11, at vii, viii.

is that the tax law academy has for the most part avoided the topic of taxation and the family, and important issues such as gender bias, . . . race and class, . . . and has focused on more narrow and technical issues in business and financial taxation.' ”¹⁶ Precisely because of the importance of the endeavor, however, I am troubled that much of the work has not been carefully done. Four problems, in particular, weaken much of the literature.

The first problem is an overeagerness to accuse the tax laws of hostility to women or blacks. In the case of feminist analysis, this often results from failure to acknowledge the fundamental conflict between the feminist goals of changing traditional gender roles and helping those women who are already committed to traditional roles. It is difficult—sometimes impossible—to pursue one goal without interfering with pursuit of the other goal. Yet much feminist tax policy analysis pays scant attention to this dilemma. This is sometimes reflected in a readiness to accuse Congress of sexism (conscious or unconscious) whenever it acts to pursue one feminist goal at the expense of the other.¹⁷

Closely related to the first problem is a failure to recognize the diversity within feminist thought. This has sometimes led to adoption of difference feminism¹⁸ as a guide to tax policy, without considering the powerful critiques *within feminism* of difference feminism, and without considering the likelihood that public policy founded on this version of feminism will prove counterproductive for women.¹⁹

A third problem (also closely related to the first) is selection bias, both in the aspects of the tax laws chosen for study, and in the analysis of those chosen aspects. This is especially true of critical race theorists, who focus on Tax Code provisions arguably disadvantageous to blacks, but pay no attention to Code provisions

16. Edward McCaffery, Statement at “Taxation and the Family” Conference at Lewis and Clark Northwestern School of Law (Oct. 6, 1995), *quoted in* Rebecca S. Rudnick, *Taxation and the Family*, 69 TAX NOTES 421, 421 (1995).

17. A classic example is the differing views of Edward McCaffery and Nancy Staudt on the feminist implications of Social Security benefits for housewives, discussed *infra* in text accompanying notes 91-97.

18. Difference feminism has grown out of Carol Gilligan’s study of differences in the developmental psychology of girls and boys. *See* CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982). Its adherents generally claim that the world views of women and men are fundamentally different, with women oriented towards caring and connectedness with others, and men oriented towards autonomy. A frequent implication is that women are not merely different from men, but better. Difference feminism is discussed *infra* in text accompanying notes 140-202.

19. This aspect of the work of Marjorie Kornhauser and Gwen Thayer Handelman is discussed *infra* in text accompanying notes 194-202.

arguably favorable to blacks.²⁰ The same problem also appears in the feminist literature, when the possibility that a criticized provision may have pro-feminist effects is disregarded.²¹

The most serious problem is the failure to think through proposed solutions with sufficient care. The solutions are often presented as afterthoughts, with minimal consideration of whether the author's goal is best achieved through the tax system rather than through non-tax legal reform (a sort of "tax myopia"),²² and with minimal consideration of whether the proposed tax solution will have the desired effects.²³ 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.²⁴

These are only tendencies, of course, rather than features of

20. This is discussed in detail *infra* in text accompanying notes 203-69.

21. Examples include the disregard of the possibility that the qualified terminable interest property ("QTIP") rules work to the advantage of widows, *see infra* text accompanying notes 126-39, and the possibility that current tax return preparation standards are consistent with a feminist ethic of care, *see infra* text accompanying notes 178-93.

22. Examples of this in the work of Nancy Staudt, and Beverly Moran and William Whitford are discussed *infra* in text accompanying notes 73-78 (Staudt) and 255-69 (Moran and Whitford). An important exception is Alstott, *supra* note 4. Comparing tax and non-tax means of achieving feminist goals is a major part of Alstott's analysis. *See id.* at 2066-80.

The term "tax myopia" was coined by Paul Caron to describe a tendency among tax professionals to view tax law as unconnected with the rest of the legal world. *See* Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517, 517-18 (1994).

23. Dubious proposed solutions include Nancy Staudt's plan to improve the retirement security of homemakers, *see infra* text accompanying notes 38-107, and proposals to repeal the gift and estate tax QTIP provisions, *see infra* text accompanying notes 108-39. Some of these plans may even backfire, leaving the intended beneficiaries in a worse position than under current law. *See infra* text accompanying notes 262-69 (explaining how proposals by Moran and Whitford would harm unmarried blacks). Similarly, the proposals based on difference feminism—Marjorie Kornhauser's for increased progressivity, *see infra* text accompanying notes 142-77, and Gwen Thayer Handleman's for higher return preparation standards, *see infra* text accompanying notes 178-93—would not produce results consistent with the premises of difference feminism.

24. My concern here is with what might be called technical realism—that is, whether a proposed solution, if enacted, would have the desired feminist effect. Technical realism is essential to any serious proposal. I am less concerned with political realism—whether a proposal has any chance of actually being enacted. Academics should feel free to pursue good policy regardless of the current state of public opinion. Moreover, what is politically unrealistic this year may become realistic surprisingly quickly. When, however, a feminist tax proposal is advocated precisely because of its alleged political realism, then it deserves to be critiqued in those terms. *See infra* text accompanying notes 53-60 for an example of the alleged political advantages for women of taxing imputed income.

every feminist tax analysis. The early feminist work of Grace Blumberg, and the recent writings on same-sex couples by Patricia Cain and David Chambers, are creative, balanced, and thoughtful.²⁵ And Anne Alstott's recent article emphasizes the dilemmas posed by conflicting feminist goals and the limitations of tax-based solutions.²⁶ Still, most feminist and critical race tax analyses feature one or more of these problems.

The plan of this Article is to discuss a small number of articles in some detail to illustrate the above points. First, the Article considers a proposal by Nancy C. Staudt to tax the imputed income of homemakers in order to provide them with income security in retirement.²⁷ Next, it considers arguments by Mary Louise Fellows and Wendy C. Gerzog that the qualified terminable interest property ("QTIP") rules of the estate tax are sexist in design and effect.²⁸ After that, it examines the claims of Marjorie Kornhauser and Gwen Thayer Handelman that difference feminism has important implications for the progressivity of the tax system and for tax return preparation standards.²⁹ The Article then considers the argument of Beverly Moran and William Whitford that the tax laws are systematically biased against blacks.³⁰ Finally, the Article considers three examples—by Blumberg, Cain, and Chambers—of critical tax analysis carefully done.³¹ The conclusion suggests why the identified problems are common in the critical tax literature, and how critical tax analysis might be improved.

Given the sensitivity of the topic, and the critical nature of most of my analysis, the risk of misunderstanding is high. Accordingly, it is

25. See Blumberg, *supra* note 1; Cain, *supra* note 12; Chambers, *supra* note 12.

26. See Alstott, *supra* note 4, at 2004. Alstott argues that much prior scholarship has "overlooked important conflicts among feminist goals" and has not fully appreciated the "institutional complexity of translating feminist goals into concrete policy prescriptions." *Id.* These are also important themes in my analysis. This Article differs from Alstott's, however, in several ways. Alstott's article is limited to feminism; it does not consider other varieties of critical tax theory. Alstott does not, for the most part, consider individual feminist tax articles in depth. Instead, she analyzes categories of feminist reform proposals, including separate filing by spouses, family allowances, dependent care credits, and Social Security reform. See *id.* at 2042-66. Her interest is in the substance of the proposals, rather than in the literature per se. Thus, she does not, for example, convey or remark on the air of grievance that runs through most of the literature. Finally, except for Social Security reform, there is no overlap between the reform proposals discussed by Alstott and the proposals of the articles considered here.

27. See *infra* text accompanying notes 38-107.

28. See *infra* text accompanying notes 108-39.

29. See *infra* text accompanying notes 140-202.

30. See *infra* text accompanying notes 203-69.

31. See *infra* text accompanying notes 270-90.

important to offer at the outset a brief explanation of where I am coming from. I think the basic project of feminist tax policy analysis, as begun by Blumberg and continued by many others, is worthwhile and important.³² (I am less convinced of the merits of the critical race tax project, although it is too early to dismiss the approach.) It may be the most exciting area in legal tax scholarship today. But the few easy battles—against tax provisions clearly sexist in language³³ or intent³⁴—already have been fought and won. The problems that remain require careful balancing of conflicting feminist goals and careful development of legislative proposals that will actually further those goals. What I propose is to take feminist and other critical tax policy analysis seriously—more seriously than its proponents have taken it in many cases.

Finally, before beginning to examine the articles in detail, a few words about my own position on feminism. For whatever it may be worth, I have been identified in print as a feminist tax scholar.³⁵ I earned this designation for arguing that the tax laws should reflect governmental neutrality between one- and two-earner couples, and that the present joint return system inappropriately (albeit unintentionally) favors the one-earner model.³⁶ I leave it for others to decide whether that is sufficient to make me a liberal feminist,³⁷ or

32. In the past few years, the work of Edward McCaffery has been especially impressive. His work is conspicuously absent from the feminist tax literature considered in detail in this Article because I have discussed it at length elsewhere. See Lawrence Zelenak, *Tax and the Married Woman*, 70 S. CAL. L. REV. 1021 (1997) (reviewing MCCAFFERY, *supra* note 2). Although I greatly admire McCaffery's work, at times he is too ready to accuse Congress of hostility to women, and he does not examine proposed solutions with the same care he devotes to his critique of existing law. See *id.* at 1039-40.

33. For a case striking down an explicitly sex-based tax provision, see *Moritz v. Commissioner*, 469 F.2d 466, 470 (10th Cir. 1972), discussed *infra* in text accompanying notes 98-99.

34. The child care deduction in effect at the time Blumberg wrote (former I.R.C. § 214 (1954)) was phased out for two-earner couples as their adjusted gross income exceeded \$6000. See Blumberg, *supra* note 1, at 68. Blumberg demonstrates convincingly that this was premised on the assumption that "a married mother with a husband capable of support will not or should not work unless her income is absolutely necessary to provide for basic family needs." *Id.* at 71. By contrast, the current child care credit (at the 20% level) and the exclusion for employer-provided dependent care assistance are available without regard to whether the wife "needs" to work. See I.R.C. §§ 21, 129 (West Supp. 1998).

35. See Staudt, *supra* note 8, at 1590.

36. See Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 363-72 (1994).

37. Liberal feminism emphasizes women's autonomy and their right to equal treatment under the law. For discussions of liberal feminism, see Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 829-32 (1990), and Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH.

whether feminism requires calling for more than merely an end to tax distortion of women's choices. In any event, I am comfortable with the feminist perspectives of most of the authors discussed in this Article; my criticism is mostly of the underexamined links between means and ends. In the few cases where I disagree on basic premises—most notably with unnuanced versions of difference feminism—I will note my disagreement, but I will also accept those premises for the sake of argument and attempt to engage the authors on their own terms to determine what those premises imply for tax policy.

II. THE FEMINIST CASE FOR TAXING IMPUTED INCOME

In a recent article, Nancy C. Staudt presents a feminist case for taxing the imputed income from housework and child care performed by women.³⁸ Her argument is unusual because it is *not* based on the familiar point that the nontaxation of imputed income creates a bias in favor of traditional one-earner couples.³⁹

Staudt's goal is not to push homemakers into the paid labor force, but to improve the lives of women who choose to devote much of their time to unpaid domestic labor. It may seem strange that taxing these women would be doing them a favor, but Staudt argues taxation would help them in two ways. Taxation will serve the symbolic function of ending the "invisibility of housework."⁴⁰ With visibility will come greater societal appreciation of that work.⁴¹ In addition, taxing housework will entitle homemakers to "access to substantial, independent social welfare benefits in retirement" (Social Security and Medicare), eligibility for which is keyed to a history of taxable earned income.⁴² The idea of giving Social Security benefits based on unpaid work as a homemaker is not new; the idea of a Social Security homemaker credit has been around for many years.⁴³

L. REV. 1155, 1207-19 (1991).

38. See Staudt, *supra* note 8, at 1573-75.

39. See Blumberg, *supra* note 1, at 61-62; McCaffery, *supra* note 2, at 1001-05; Richard Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191, 193.

40. Staudt, *supra* note 8, at 1573.

41. See *id.* at 1574 ("Once [housework is] formally recognized, society is likely to value nonmarket housework activities similarly to market activities . . ."); *id.* at 1618 (noting that taxation of housework, with resulting social welfare benefits, "would represent a congressional recognition of caretaking responsibilities as valuable and productive labor").

42. *Id.* at 1618.

43. See Karen C. Holden, *Supplemental OASI Benefits to Homemakers Through Current Spouse Benefits, a Homemaker Credit, and Childcare Drop-Out Years*, in A CHALLENGE TO SOCIAL SECURITY: THE CHANGING ROLES OF WOMEN AND MEN IN

What is original in Staudt's proposal is the linkage between taxation of imputed income and Social Security benefits.

Broadly speaking, feminism has two sometimes conflicting goals—changing gender roles, and improving the lives of women in traditional gender roles. Feminist tax policy analysis has focused overwhelmingly on changing gender roles; Staudt deserves credit for bringing the other goal—of helping women as they are—into the discussion.⁴⁴ As a proposal for legislative action, however, her plan for taxing housework has major weaknesses. Her claims for the symbolic value of taxing housework are dubious, and her analysis of the effect of her proposal on the retirement income security of homemakers has serious inadequacies.

A. *"But They Have One Thing You Haven't Got—A Testimonial"*⁴⁵

Will having an official dollar value attached to their labor, with resulting tax liability, really make women feel more valued and appreciated? Staudt thinks it might: "[B]ecause it would *value* work otherwise considered economically worthless, taxing women's household labor could, on balance, empower rather than oppress women."⁴⁶ She believes it could lead to a change in the way homemakers are viewed by the rest of society: "Rather than perceiving women only as nurturing caregivers providing gratuitous services to the home out of love, duty, and custom, women would be viewed as autonomous individuals with economic rights."⁴⁷

These are surprising claims. It is not obvious that a group widely viewed as performing gratuitous services out of love is in need of public relations assistance. It is even less obvious that the way to make them feel more valued is to tax them. Exemption from taxation is not usually considered a sign of insufficient respect. More commonly, it is taxation that is considered insulting.⁴⁸

AMERICAN SOCIETY 41 (Richard V. Burkhauser & Karen C. Holden eds., 1982). Homemaker credits are discussed in Alstott, *supra* note 4, at 2063-64.

44. She shares the credit with Anne Alstott, who considers in detail how feminist tax policy analysis should proceed in light of the frequent conflicts between the two goals. See Alstott, *supra* note 4.

45. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939) (the Wizard of Oz to the Tin Man, comparing him with philanthropists or, in the Wizard's words, "good-deed-doers").

46. Staudt, *supra* note 8, at 1620-21.

47. *Id.* at 1619.

48. When Congress decided to tax the interest income on certain debt obligations of the states, South Carolina felt sufficiently insulted to take the case to the Supreme Court. See *South Carolina v. Baker*, 485 U.S. 505, 524-25 (1988) (holding that there is no constitutional impediment to the taxation of municipal bond interest). When Congress added employer reporting requirements to enforce the theoretical taxability of tip

Far from being taken as a sign of respect, the taxation of women's imputed income from homemaking is more likely to be taken as a double insult. Unless the system for taxing imputed income is made somehow formally gender neutral,⁴⁹ many women will be offended by an official government determination that housework is a woman's responsibility. That offense will only be aggravated when the official determination is accompanied by a tax bill. The taxed women probably will feel something like the man in Abraham Lincoln's story who was tarred and feathered and run out of town on a rail. When asked how he liked it, he said that "if it was not for the honor of the thing, he would much rather walk."⁵⁰

Under Staudt's plan, only middle and upper class women would be presented with a real tax bill. For low income women, the tax on their imputed income would be offset fully by a household income tax credit ("HITC") loosely modeled after the earned income tax credit.⁵¹ Although this eliminates the financial insult of the tax, it is hard to believe that the resulting non-tax will convey a symbolic message of any kind.

I am aware of only one piece of evidence in support of Staudt's position. Heidi Brennan, the Co-Executive Director of Mothers at Home, told a House Committee in 1991 that under current law, "we not only ignore the value and necessity of [homemaking], but we suggest that the unpaid labor of nurturing is beneath our national dignity. We suggest that only income, which can be taxed, is a pursuit worthy of political and social recognition."⁵² Taken out of context, this *sounds* like a claim that homemakers would feel more respected

income, waiters and waitresses were greatly offended by the loss of their de facto tax exemption. Letters to the IRS from angry waitpersons are quoted in Joel S. Newman, *Waiter, There's an IRS Agent in My Soup*, 40 TAX NOTES 861 (1988). Newman characterizes the letters as "long, handwritten, and very angry." *Id.* at 864. One letter warned, "there may be a very hot, steaming bowl of soup fall on your lap next time you do dine," *id.* at 865 (quoting Letter from "Sad and Disappointed" to I.R.S. (Jan. 21, 1983)), and another suggested, "Why don't you just take a gun and shoot us!," *id.* at 865 (quoting Letter from Velma Lynch to I.R.S. (Mar. 14, 1983)). These letters are indicative of the likely response of homemakers to the imputed income tax. To a large extent, homemakers and servers are in similar socioeconomic circumstances; in many cases, for that matter, they are the same people. If they were outraged by a tax on cash, imagine their reaction to a tax on imputed income.

49. Whether her proposal could or should be implemented on a formally gender neutral basis is an important issue Staudt does not discuss. It is considered, however, *infra* in text accompanying notes 98-107.

50. LINCOLN TALKS: A BIOGRAPHY IN ANECDOTE 59 (Emanuel Hertz ed., 1939).

51. See Staudt, *supra* note 8, at 1636-40.

52. *Reclaiming the Tax Code for American Families: Hearings Before the House Select Comm. on Children, Youth, and Families*, 102d Cong. 77 (1991).

if the government did them the favor of taxing their imputed income. In fact, however, Brennan was testifying in support of a universal young child credit, which would be available even to parents with no cash expenditures for child care. In other words, she was making the familiar taxpayer claim that she would feel more respected if Congress gave her a special tax *break*, not if Congress did her the honor of increasing her tax liability.

Maybe Staudt is right; maybe taxing the imputed income of homemakers will be a way of giving them the respect they deserve. But she does not prove it, and I am not persuaded.

B. The Link Between Taxing Imputed Income and Social Security Benefits

Staudt is less concerned, however, with the purely symbolic effects of her proposal than with the link between the proposed tax and the receipt of Social Security benefits (and Medicare coverage) by homemakers upon retirement. I agree with her that Social Security coverage of homemakers is an important issue, but I disagree with much of her analysis. She does not demonstrate that, as a political matter, taxing imputed income is the best way to provide increased retirement security for homemakers. Even more important, her proposal is so sketchy on the benefits side (as contrasted with her detailed consideration of the imputed income tax) that it is not clear that her proposal would be an improvement over current law, let alone over other possible reforms.

1. The Politics of the Link

Under current law, an elderly person's entitlement to Social Security depends on that person (or the person's spouse) having paid Social Security tax on earned income. But the linkage between tax and benefits is not a law of nature; it would be possible to provide homemakers greater Social Security benefits without requiring them to have paid tax on imputed income. Staudt proposes the linkage only because of her reading of the political climate. She is concerned about current public hostility to anything that resembles welfare, and she believes that "[i]ncorporating the value of women's labor into the current tax structure has the potential to transcend the current social welfare discourse,"⁵³ with its hostility to "proposals that award benefits without burdens."⁵⁴ In that case, "Congress would treat [and

53. Staudt, *supra* note 8, at 1630.

54. *Id.*

the public would perceive] women who perform household labor as having *earned* their benefits.”⁵⁵ The linkage is *only* a matter of public perception for Staudt; she does *not* see the tax on housework as the source of funding for homemaker retirement benefits.⁵⁶ Incidentally, I do not understand why Staudt proposes subjecting imputed income to the income tax as well as to the payroll tax.⁵⁷ Only payroll taxation is relevant on the linkage question, and payroll taxation alone should be sufficient for symbolic purposes.

Apart from the supposed virtue of a tax on housework as a pure symbol of respect, Staudt’s only reason for taxing housework is as a political ploy to obtain better Social Security benefits for homemakers. If she is wrong about the politics, then her reason for taxing imputed income disappears. There may still be good reasons to fight for better Social Security benefits, but not for taxing imputed income.

I am not a political expert (neither is Staudt), but I strongly suspect her reading of the political situation is wrong. Staudt’s proposal divides homemakers into two groups—the low income, who pay no tax because of the HITC, and the rest, who really do pay tax on their imputed income. As for the low income women, Congress and the public will easily understand that the proposal gives them retirement benefits which they have not “earned” by paying tax. Whatever political stigma is attached to welfare will attach to their proposed benefits. A nominal tax, fully offset by a credit, will not help.

But middle class homemakers really will pay tax under Staudt’s proposal. Although Staudt sees them as beneficiaries of her proposal, it is unlikely they will agree. Will women—many of whom are in families which struggle every month to make ends meet—be happy about paying additional tax now in exchange for the prospect of more retirement income decades hence?⁵⁸ They may not agree with Staudt’s ideas on how they should allocate their resources

55. *Id.* at 1631.

56. “Because taxing household income is not intended to produce additional revenue, Congress could impose a minimal, flat tax upon household labor.” *Id.* at 1643. Staudt never does explain how the benefits would be funded. If she is concerned about the politics of retirement security for homemakers, she cannot ignore the financing of her proposal.

57. She clearly contemplates imposing both taxes on household income. *See id.* at 1641-43 (identifying the appropriate taxpayer for purposes of income and payroll taxation).

58. They certainly will not be happy about paying more *income* tax. That is pure burden, without even the hope of future benefit.

between present and future consumption. And it will not help that the tax is imposed on some theoretical concept labelled imputed income, which they probably do not believe is really income at all. But the biggest problem will be the distrust of Social Security shared by most baby boomers and members of Generation X.⁵⁹ They are unhappy already about paying taxes into a system they think will be broke by the time it is their turn to collect. Widespread distrust of the system means younger earners want *out* of the system, not in. If the intended beneficiaries of Staudt's plan oppose it, it is unlikely to become law.

Staudt is noncommittal as to whether imputed income should be subject to the same payroll and income tax rates as other income, or merely a "minimal, flat tax."⁶⁰ If the tax were sufficiently minimal and the promised benefits sufficiently great, women might support the proposal despite their doubts about the long-term solvency of Social Security. But in that case Congress would probably reject the proposal. The women would not have sufficiently earned their benefits by paying a merely nominal tax.

2. Staudt's Underdeveloped Analysis of the Benefits Side of Her Proposal

Although Staudt views taxing housework primarily as a means to an end—improving the retirement security of women who perform unpaid domestic labor—her article provides only a cursory analysis of how taxing housework would affect Social Security benefits and Medicare coverage. She barely mentions—and makes no attempt to compare with her proposal—the spousal benefits available under current law.⁶¹ A married woman who has paid no Social Security tax of her own is entitled to old-age benefits equal to 50% of her

59. An ABC News survey of non-retired adults, taken in August 1995, asked, "Do you think that by the time you retire there will be enough money in the [Social Security] system to pay you the benefits you are entitled to, or do you think there will not be enough money?" Almost three-quarters (73%) of respondents thought there would not be enough money (23% thought there would be enough, and 4% had no opinion). *See ABC News Poll*, Sept. 18, 1995, available in LEXIS, News Library, Rpoll File. The distrust of Social Security probably would have been even greater if the survey had been limited to younger workers.

60. Staudt, *supra* note 8, at 1643.

61. Staudt's most thorough discussion of current law spousal benefits is a seven line footnote. *See id.* at 1597 n.105. There is also a very brief textual mention. *See id.* at 1598. Finally, in a hypothetical explaining how her proposal would apply to married taxpayer Ellen, Staudt mentions that Ellen would be entitled to spousal benefits under current law, but she offers no description of what those benefits would be. *See id.* at 1646.

husband's benefits (the "primary insurance amount," or "PIA").⁶² Her eligibility for Social Security also makes her eligible for Medicare hospital insurance benefits.⁶³ If her husband has died, she is entitled to monthly old-age benefits equal to 100% of his PIA⁶⁴ (unless she remarries before reaching age sixty, in which case she will generally be entitled to nothing).⁶⁵ A divorced homemaker may fare less well. She will be entitled to old-age benefits based on the earnings of her ex-husband only if they were married for at least ten years.⁶⁶ The amount of benefits is half of her ex-husband's PIA if he is alive,⁶⁷ but she is entitled to this amount only if she is not remarried.⁶⁸ If her ex-husband has died she is entitled to 100% of his PIA, but only if she has not remarried before age sixty.⁶⁹

These rules fall far short of treating a traditional marriage as an equal partnership between employed husband and homemaking wife.⁷⁰ While the couple remains married, the husband receives twice the benefits received by the wife. Divorce before the marriage has lasted ten years is a Social Security disaster for the wife, but has no effect on the husband. Remarriage also can be a Social Security disaster for the wife, but never adversely affects the husband. Reforms have been proposed to equalize the treatment of husbands and wives by earnings sharing, under which earnings by either spouse during marriage would be credited half to each for purposes of calculating Social Security benefits.⁷¹ Thus, the wife would be entitled to benefits just as large, and just as vested, as the husband's.

62. See 42 U.S.C. § 402(b)(2) (1994).

63. See *id.* § 426.

64. See *id.* § 402(e)(2)(A).

65. See *id.* § 402(e)(1), (3).

66. See *id.* § 416(d)(1)-(2).

67. See *id.* § 402(b)(2).

68. See *id.* § 402(b)(1)(C).

69. See *id.* § 402(e)(1)(A), (2)-(3).

70. The effect of these rules on homemaking wives is extensively criticized in Becker, *supra* note 10, at 276-85.

71. See *id.* at 285-88 (describing earnings sharing proposals). Becker also suggests, as a partial solution, that Congress authorize state courts to divide Social Security benefits between divorcing spouses. See *id.* at 288. This practice currently is barred by a Supreme Court opinion. See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 587-90 (1979) (involving the railroad retirement system, but with reasoning clearly applicable to Social Security as well). Congress has not followed Becker's suggestion. In fact, it has clarified its intent to the contrary. See Social Security Amendments of 1983, Pub. L. No. 98-21, § 335(a), 97 Stat. 65, 130 (codified at 42 U.S.C. § 407(b) (1994)). Nevertheless, a few state courts have held that in equitably dividing marital property upon divorce, a court can take into account that the husband will receive greater Social Security benefits than the wife, even though the court may not divide the benefits themselves. See *In re Boyer*, 538 N.W.2d 293, 293-94 (Iowa 1995); *In re Brane*, 908 P.2d 625, 626 (Kan. Ct. App. 1995).

Even without earnings sharing, reform could move toward greater vesting of the wife's rights.

Despite the shortcomings of current law, it is necessary to compare the spousal benefits homemakers receive under current law with those they would receive under Staudt's proposal, in order to evaluate the merits of her plan.⁷² It also would be worthwhile to compare the results under her plan with the results under earnings sharing; hers is not the only possible reform. Although Staudt briefly describes how three hypothetical women would fare under her proposal, she makes almost no effort to show that those results are better than the results under current law.

a. Wife of Middle Income Couple, Little Wage Income of Her Own

Staudt's first hypothetical is Ellen, a married woman with two children.⁷³ Her (unnamed) husband earns \$42,500 a year, and Ellen has part-time work paying \$7500. Staudt assumes Ellen performs forty-seven hours per week of domestic labor, which at the minimum wage results in \$10,387 of imputed income. Thus, Ellen's total earnings subject to Social Security tax are \$17,887, or about \$1490 per month. The determination of the PIA is based on "average indexed monthly earnings" ("AIME") over a person's earning years. Assuming this year is representative of all years, so that Ellen's AIME upon retirement is \$1490, and assuming the rules for eligibility year 1996 apply in calculating her benefits, Ellen's earnings (combined actual and imputed) would entitle her to a monthly benefit of \$730.⁷⁴

Staudt notes that, by contrast, under current law Ellen "would instead be forced to rely on her husband for spousal benefits earned through his market wages,"⁷⁵ but she makes no attempt to determine what those benefits would be. Again assuming this year is representative of all years, Ellen's husband's AIME is \$3542, and calculating his benefits under the 1996 rules his PIA is \$1233. While

72. This assumes Staudt envisions her plan as a replacement for current spousal benefits. Since the purpose of each is retirement security for homemakers, presumably that is her intent. In keeping with the extreme sketchiness of her treatment of benefits, however, she never explains how her proposal would affect current spousal benefits.

73. See Staudt, *supra* note 8, at 1645.

74. For eligibility year 1996, the formula for computing a worker's PIA is: 90% of the first \$437 of AIME, 32% of AIME above \$437 to \$2635, and 15% of AIME above \$2635. See 42 U.S.C. § 415(a)(1); 1996 Cost of Living Increase and Other Determinations, 60 Fed. Reg. 54,751, 54,754 (1995).

75. Staudt, *supra* note 8, at 1646.

both are alive and married to each other, Ellen's monthly benefit will be half of his—about \$616. If Ellen is no longer married to her husband, she will receive either \$1233, \$616, or nothing, depending on the circumstances. Staudt's proposal has the significant advantage to Ellen of guaranteeing she will receive benefits regardless of what happens to her marriage. On the other hand, if Ellen thinks the most likely outcome is that she will be a widow for ten or twenty years, she will not want to trade her right under current law to \$1233 per month for a mere \$730 under Staudt's plan. And even if Ellen does prefer the Staudt benefits structure, she may not prefer it enough to think it is worth the extra tax she has to pay now. In short, the Staudt plan is a mixed bag for someone like Ellen.⁷⁶

My point is not that Ellen should necessarily prefer current law; one can argue that either way, and different Ellens will probably have different views. My point is that it is only by doing this comparison—and similar comparisons for differently situated women—that one can form an opinion of the merits of Staudt's proposal. Yet Staudt herself fails to do the comparison, possibly due to a sort of tax myopia. Coming at the issue from the perspective of a tax specialist, she is fascinated by questions relating to the tax base. Thus, she discusses in great detail how the amount of imputed income should be determined.⁷⁷ She has less interest in what rates should apply,⁷⁸ and almost none in how all this will affect the amount of women's Social Security benefits. This is an understandable hierarchy of interests for a tax academic, but it is inappropriate for a proposal whose purpose is retirement security. Taxing imputed income is supposed to be merely a means to an end for Staudt. But as her title—*Taxing Housework*—suggests, she is more interested in the means than in the goal.

b. Middle Income Single Mother

Staudt's second hypothetical is Deborah, a single mother, who

76. Under earnings sharing, without consideration of imputed income, Ellen and her husband would each be credited with \$2083 monthly earnings, which would produce monthly retirement benefits of \$920 for each. Ellen would certainly prefer this result to Staudt's proposal; she might or might not prefer it to current law, depending on what she expects her future situation to be.

77. See Staudt, *supra* note 8, at 1618-27.

78. I return again to her comment: "Because taxing household income is not intended to produce additional revenue, Congress could impose a minimal, flat tax upon household labor." *Id.* at 1643. I do not understand the point of all the effort to get the tax base right, if only a nominal tax is to be applied to the base.

has a job paying \$30,000 per year.⁷⁹ Staudt calculates the value of her household services at \$8177. Because of the highly progressive nature of the formula for calculating PIA, the increased AIME under the Staudt plan increases Deborah's expected monthly benefits by only \$126—from \$1053 to \$1179. The imputed income is stacked on top of her other income, and the other income has absorbed all of the 90% earnings replacement bracket, and most of the 32% bracket as well. Thus, most of the imputed income generates only 15% replacement. For this small incremental retirement benefit, Deborah must pay substantial tax now. Staudt calculates annual payroll tax, after HITC, of \$607—a little over \$50 per month.⁸⁰ That tax alone almost certainly would be sufficient to make this a bad deal for Deborah, but there is also an income tax burden. Assuming the \$8177 is all taxed at 15%, that is an additional tax burden of \$1227 per year, or \$102 per month.⁸¹ Staudt's proposal would be a terrible deal for Deborah.

It would be possible, of course, to tinker with the tax and benefit formulas until they gave Deborah a reasonable benefits return on her housework tax. There still would be, however, a fundamental question. Unlike Ellen, Deborah is already entitled to substantial, non-derivative Social Security benefits based on her \$30,000 wages. Why is it desirable that she should pay additional tax now to receive additional benefits later? Staudt would have Deborah pay more tax, and receive more Social Security, than a childless woman with \$30,000 wages.⁸² It is not clear why that would be desirable. Certainly the existence of a child does not increase Deborah's ability to pay tax now (quite the opposite), nor does it obviously increase her need for retirement income later. So what is the point of applying the housework tax to Deborah?

A similar question applies to the effect of Staudt's proposal on a married woman with substantial wages of her own. Imagine a

79. *See id.* at 1646.

80. *See id.*

81. *See id.* These tax burden calculations are all subject to the caveat that Staudt also suggests the possibility of "a minimal, flat tax upon household labor." *Id.* at 1643.

82. Actually, it is not clear that a childless, single woman would be excluded from Staudt's proposal. All three hypotheticals offered by Staudt involve women with children. However, her estimates of hours of household labor per week are not limited to labor performed for children (or husbands); they include labor performed for the benefit of the woman herself. *See id.* at 1644. Either the childless worker should be included in Staudt's system (but with fewer hours of household work per week), or the hours of household labor taken into account for Deborah should be only the marginal hours attributable to work for the benefit of her child.

husband and wife, each of whom earns \$40,000 a year. Under current law they pay equal tax and are entitled to equal retirement benefits, not dependent on the future of the marriage. But Staudt would subject the wife to greater tax than the husband, and eventually would give the wife greater Social Security benefits. Again, it is not clear why.

c. Unemployed Single Mother

Staudt's final hypothetical is Martha, an unemployed single mother.⁸³ She has imputed income of \$9282, the tax on which is entirely offset by the HITC. On the assumption that "as her household labor decreases her waged labor will increase to equal approximately \$10,000 per year,"⁸⁴ Staudt estimates Martha will be entitled to \$520 per month in Social Security benefits. Since Martha pays no tax, the only policy question is on the benefits side. The question is whether we should provide some minimal level of retirement security for unemployed single mothers when unemployment otherwise results in no Social Security benefits.⁸⁵ There is certainly a plausible argument that we should because, by spending their time raising their children, the mothers are conferring a benefit on society.⁸⁶ Even accepting that argument, however, current law may already do enough for such mothers. In the AIME calculation, one's five lowest (or zero) earning years are dropped out.⁸⁷ Thus, a single mother can be unemployed for a total of five years without suffering any Social Security detriment. In the current mood of society, in which a five-year lifetime limit on welfare benefits recently has become law,⁸⁸ anything more than the current five-year allowance seems politically unrealistic.

But the real problem with Staudt's analysis of Martha is that it continues the cursory treatment of benefits, even in a situation where benefits are the only real issue. Staudt tells us that the resulting \$520 per month benefits "could ensure Martha's economic security in old

83. *See id.* at 1646.

84. *Id.* at 1646 n.315.

85. This assumes Staudt's proposal would not cover childless single women. That question is discussed *supra* in note 82.

86. Of course, the Staudt plan includes no way to monitor either the quality or the quantity of their child care labor.

87. *See* 42 U.S.C. § 415(b) (1994).

88. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103(a), 110 Stat. 2105, 2137-38 (codified at 42 U.S.C.A. § 608(a)(7) (West Supp. 1998)).

age.”⁸⁹ But this analysis is lacking in two ways. First, much of the \$520 is not due to Martha’s imputed income; Staudt assumes Martha will have wage income at other stages of her life, which would entitle her to some benefits in any event. Second, Staudt offers no analysis of whether \$520 per month is an appropriate level of benefit. Assuming unemployed mothers deserve retirement income security, it is unlikely that \$6240 per year is enough to provide it.

C. *The Pitfalls of Helping Women as They Are*

Although I applaud Staudt’s concern for helping women as they are, any attempt to do so involves dangers for feminists. The basic problem is that although it is intellectually consistent to want both to change gender roles and to help women in traditional gender roles, in practice many attempts to further one goal interfere with pursuit of the other goal. Anne Alstott discusses this problem at length in her article, and uses Social Security reform as an example.⁹⁰ Here I will briefly comment on two ways in which Staudt’s article illustrates the conflict: the likelihood that Social Security benefits for homemakers will discourage some women from working outside the home, and the question of whether Staudt’s plan could or should be implemented in a formally gender neutral way.

1. Damned If You Do, Damned If You Don’t

Although barely acknowledged by Staudt, the spousal benefits of current law are an attempt—flawed, but much better than nothing—to provide retirement security for homemakers. At least in broad outline, they further the feminist goal of helping women as they are. They have been strongly criticized, however, from the feminist perspective of changing gender roles. Edward McCaffery notes that the tax-benefit structure of current law encourages women to stay home. Their first dollars of market earnings are taxed, but they receive no benefit from that tax because the benefits associated with their own earnings are less than the spousal benefits to which they were already entitled.⁹¹ Thus, a law which achieves some good in terms of helping women as they are, comes under criticism for perpetuating gender role stereotypes.

89. Staudt, *supra* note 8, at 1647.

90. See Alstott, *supra* note 4, at 2059-66.

91. See McCaffery, *supra* note 2, at 999-1000. McCaffery slightly overstates his case. The wife derives benefit from even her first dollars of earnings, in the sense that Social Security based on her own earnings is not at risk in case of divorce.

It is often difficult or impossible to further one feminist goal without impinging on the other. Like current law, Staudt's proposal would discourage women from working outside the home because they would derive little additional Social Security coverage from the significant additional tax they would be required to pay. The effect would not be as dramatic as under current law, but it would exist. Recall the highly progressive nature of the Social Security benefits program: the first dollars of AIME are replaced at 90%, then 32%, and finally only 15%.⁹² The wife's market earnings will be stacked on top of her imputed income, which will have absorbed all of the 90% bracket and much of the 32% bracket.⁹³ She must pay the full payroll tax rate on her market earnings, but because of the stacking effect they will be replaced at only 32% or 15%. The same problem also exists under earnings sharing. The wife's half share of her own earnings is stacked on top of her half share of her husband's earnings, thus producing little benefit—possibly no benefit at all if her share of her husband's earnings already puts her at the maximum benefit level.⁹⁴ And apart from the practical disincentive effect, there is the matter of symbolism. Any special legislative provision for homemakers constitutes official validation of traditional gender roles.

No matter what Congress does in this area, it will be subject to attack from some feminist perspective. If it does not protect homemakers, it is valuing only the male version of work. If it does protect homemakers, it is perpetuating sexist stereotypes.⁹⁵ I am not

92. See *supra* note 74.

93. The stacking effect would not exist to the extent the wife's labor force participation caused a decrease in her imputed income. Staudt suggests, however, that the decrease should be small. She cites studies indicating that a full-time homemaker performs 50 hours of housework per week, and a woman with a full-time job performs 35 hours of housework. See Staudt, *supra* note 8, at 1644.

94. McCaffery claims earnings sharing would not have the effect of "detering secondary earners from labor force participation," except in the limiting case where her share of the husband's earnings puts the wife at the maximum benefit level. McCaffery, *supra* note 2, at 1001. This ignores the stacking effect that occurs even when the wife has not reached the maximum benefit level.

95. Nevertheless, some compromises are better than others. Probably the best compromise on this issue is McCaffery's recent suggestion of retaining spousal Social Security benefits, and imposing no Social Security tax on the earnings of a secondary earner spouse until her earnings are at a level where they produce an increase in Social Security benefits (relative to the spousal benefits to which she is already entitled). See MCCAFFERY, *supra* note 2, at 102. Under this approach, wives would not be discouraged from paid labor by the prospect of Social Security taxation without corresponding benefits. Even this proposal, however, is subject to the feminist criticism that it perpetuates the gendered division of labor by providing special protection for housewives. I discuss the proposal in more detail in Zelenak, *supra* note 32, at 1044.

suggesting feminism need be monolithic. Some people can place the highest priority on changing gender roles, others can consider protecting those in traditional gender roles more important, and both can legitimately call themselves feminist. Moreover, feminists may value both goals, recognize the inevitable conflicts between them,⁹⁶ and search for the best possible compromises. All I suggest is that, given the inevitable tradeoffs between different feminist goals, feminists be conscious of those tradeoffs in designing their proposals, and that they moderate the rhetoric in their criticisms of current law.⁹⁷ Rather than being motivated by sexism, Congress may be making a good faith effort to address a feminist dilemma.

2. The Question of Formal Sex Neutrality

Staudt contemplates an explicitly sex-based tax and benefits system. Under her proposal, women would be subject to the housework tax and entitled to resulting benefits; there would be no tax on or benefit for men. I believe an explicitly sex-based system can only be a disaster. At the symbolic level, it sends the message that the government has determined officially that housework is a woman's job. That message is remarkable for its capacity to offend almost everyone. Feminists may take the message as normative—not just that women in fact perform most housework, but that they *should* have that burden. Men may take the message as descriptive—that men do not perform any housework—and be offended if the description is not true of them.

Since the plan combines burdens and benefits, we can expect constitutional challenges both from women who do not perform housework and want to be excluded from the system, and from men who perform housework and want to be included. Those challenges probably would succeed. In the most similar decided case, *Moritz v. Commissioner*,⁹⁸ the Tenth Circuit ruled that former I.R.C. § 214 violated the Constitution by discriminating against men. The provision allowed a deduction for dependent care expenses for never-married women, but not for never-married men. The court

96. See McCaffery, *supra* note 2, at 1000 ("There is a trade off between designing rules for existing social arrangements and influencing the course of prospective ones.").

97. To their credit, neither Staudt nor McCaffery writes at the rhetorical level of some feminist tax policy critics. Even so, Staudt occasionally offers dubious characterizations of congressional behavior—she describes Congress as "*refusing* to count unpaid household labor in the calculation of retirement benefits," Staudt, *supra* note 8, at 1598-99 (emphasis added)—and McCaffery attributes "the basic structure of our laws" to "a highly gendered, patriarchic world," McCaffery, *supra* note 2, at 1058.

98. 469 F.2d 466 (10th Cir. 1972).

explained: "The statute did not make the challenged distinction as part of a scheme dealing with the varying burdens of dependents' care borne of taxpayers, but instead made a special discrimination premised on sex alone, which cannot stand."⁹⁹ The taxpayer in *Moritz* was represented by Ruth Bader Ginsburg. Most likely we would never see a constitutional challenge to Staudt's explicitly sex-based law because the same problems that would make it unconstitutional would prevent its enactment.

Given the continued prevalence of gendered behavior, it is often possible to write laws in formally sex-neutral terms, which have effects similar to sex-specific laws. The current Social Security spousal benefits are a classic example. Either spouse is entitled to benefits based on the earnings of the other, but the intended and actual beneficiaries are overwhelmingly women.¹⁰⁰ Similarly, the second-earner income tax deduction (10% of the earned income of the lower-earning spouse), in effect from 1981 to 1986, was officially sex-neutral.¹⁰¹ But it functioned primarily as a reduction in the burden on wives' earnings because the vast majority of lower-earning spouses were wives.¹⁰² Edward McCaffery has proposed, for feminist reasons, "taxing married men more, possibly much more, than married women."¹⁰³ Rather than explicitly tying tax rates to sex, however, he suggests different tax schedules for the higher- and lower-earning spouses, in order to "finesse constitutional norms."¹⁰⁴

I am not sure whether a law could be drafted in sex-neutral terms which would be acceptable to Staudt.¹⁰⁵ With respect to single

99. *Id.* at 470.

100. In 1985, over 99% of the persons receiving benefits as surviving spouses were women. See Becker, *supra* note 10, at 273 (citing SOCIAL SEC. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., SOC. SEC. BULL.: 1987 ANN. STATISTICAL SUPP. 154 tbl.70).

101. See I.R.C. § 221 (1981) (repealed 1986).

102. According to the Bureau of Labor Statistics, in 1993, the wife earned more than the husband in only 23% of married couples. See Tamar Lewin, *Women Are Becoming Equal Providers*, N.Y. TIMES, May 11, 1995, at A27. However, in a 1994 survey by Louis Harris & Associates, 48% of employed married women reported providing half or more of their families' income. See FAMILIES AND WORK INST., WOMEN: THE NEW PROVIDERS: A STUDY OF WOMEN'S VIEWS ON FAMILY, WORK, SOCIETY, AND THE FUTURE 33 (1995).

103. Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 656 (1993).

104. *Id.* at 662.

105. The mere fact that a law with differential effects on men and women is written in sex-neutral terms is not a guarantee of its constitutionality. A formally neutral law should survive constitutional challenge, however, when that formal neutrality is not a subterfuge for sex discrimination. Retirement income security for non-market workers is clearly a legitimate public policy goal, even if most of the beneficiaries happen to be women.

custodial parents, I see no reason for including a single mother in the tax-benefits system, while excluding a single father similarly situated in all ways but sex. But single fathers never make an appearance in Staudt's analysis, so I do not know if she would agree. As for married men, it certainly would be possible to identify the houseworking spouse in some sex-neutral way, such as by comparing the market earnings of the two spouses.¹⁰⁶ Again, I do not know whether Staudt would accept that approach. She might respond with sociological studies indicating that wives often do most of the housework even when they are the higher-earning spouse, and so reject the sex-neutral approach.¹⁰⁷

Since I do not like Staudt's proposal, in either sex-specific or sex-neutral form, I am not the one to choose between the two approaches. I do, however, have one prediction and one comment. The prediction is that if anything resembling Staudt's proposal is ever enacted, it will be formally sex-neutral. The comment is that Staudt's failure even to note the clear non-viability of a sex-specific proposal, or to discuss the possibility of a sex-neutral substitute, is another example of her inadequate consideration of her own proposal.

III. THE ALLEGEDLY SEXIST QTIP

As part of extensive changes to the estate and gift tax laws in 1981, Congress made two major structural changes in the taxation of transfers between spouses.¹⁰⁸ First, it treated a married couple as a taxable unit for transfer tax purposes by providing for an unlimited marital deduction for transfers to a spouse.¹⁰⁹ Second, it provided that the marital deduction would be available not only for outright

There are no reported cases challenging the constitutionality of the current formally sex-neutral Social Security spousal benefits on sex discrimination grounds.

106. Comparing their hours of market labor might be a more accurate sex-neutral means of identifying the primary houseworker, but it would be much harder to do.

107. As noted earlier, I do not understand the point of including anyone with substantial market earnings in the housework tax-benefits system, but Staudt clearly wants to do so. See *supra* text accompanying note 58.

108. See Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403, 95 Stat. 172, 301-04 (codified as amended in scattered sections of 26 U.S.C.).

109. See I.R.C. § 2056 (West Supp. 1998) (estate tax marital deduction); *id.* § 2523 (gift tax marital deduction). Before 1981, the marital deduction generally was limited to half of a decedent's adjusted gross estate. See STAFF OF THE JOINT COMM. ON TAXATION, 97TH CONG., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, at 231 (Comm. Print 1981). The purpose of this limited deduction was roughly to equalize the transfer tax treatment of spouses in separate property and community property jurisdictions. See H.R. REP. NO. 80-1274, at 21, 24-26 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1163, 1184, 1188-91; S. REP. NO. 80-1013, at 22, 26-29 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1258, 1270, 1271-72.

transfers to a spouse, and for transfers to trusts over which the recipient spouse has a general power of appointment,¹¹⁰ but also for transfers to a new kind of spousal trust, the QTIP. Under the QTIP rules, if a decedent leaves property to a trust, with income to his surviving spouse for life and remainder to anyone chosen by the decedent, and the decedent's executor makes a QTIP election, then the property will not be included in the decedent's taxable estate.¹¹¹ Upon the death of the surviving spouse, however, the value of the QTIP property at the time of her death must be included in her taxable estate.¹¹² Similar rules apply under the gift tax for lifetime gifts to QTIP trusts, and for lifetime dispositions of interests in QTIP trusts.¹¹³

The QTIP rules have been criticized as sexist in articles by Professors Wendy C. Gerzog and Mary Louise Fellows.¹¹⁴ Gerzog argues that the QTIP provisions are based on sexist stereotypes; she claims the rules grew out of a "climate of paternalism, which is degrading to women."¹¹⁵ In addition, both Gerzog and Fellows argue that these rules have caused financial injury to widows by encouraging husbands to leave them only life estates, rather than outright ownership of property. Gerzog says the framers of the rules "degraded women because they assumed that widows would be content with receiving only one of the indicia of property."¹¹⁶ In equally strong language, Fellows brands the QTIP rules as "especially revealing of the patriarchy's subversion of married women's property rights."¹¹⁷ She accuses those responsible for the rules of "moral stupidity."¹¹⁸ Although the rules are formally gender neutral, Gerzog and Fellows base their criticisms on the effect of the rules in the usual situation in which the propertied husband is the decedent and the wife is the surviving spouse.¹¹⁹

I am no great fan of the QTIP rules. It seems unreasonably generous to exclude from a husband's estate property he owned at

110. See I.R.C. § 2056(b)(5) (West Supp. 1998) (estate tax); *id.* § 2523(e) (gift tax).

111. See *id.* § 2056(b)(7).

112. See I.R.C. § 2044 (1994).

113. See I.R.C. § 2523(f) (West Supp. 1998) (gift tax deduction for donor spouse); *id.* § 2519 (taxable gift by donee spouse who makes a lifetime disposition of an interest in a QTIP trust).

114. See Gerzog, *supra* note 5; Fellows, *supra* note 5, at 156-59.

115. Gerzog, *supra* note 5, at 320.

116. *Id.*

117. Fellows, *supra* note 5, at 158.

118. *Id.* (borrowing the term from Adrienne Rich).

119. See Gerzog, *supra* note 5, at 305 n.11.

death, and the destination of which in the next generation has been determined by the husband. Moreover, as Gerzog points out, there is a logical inconsistency between the basic premise of the unlimited marital deduction, and the premise of the QTIP provisions.¹²⁰ The unlimited marital deduction is premised on the assumption that the two are as one; husband and wife are so much a single unit that it is only fair to disregard transfers between them. But the 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. The fact that the husband has chosen a QTIP trust disproves the assumption of spousal unity upon which the marital deduction is based.¹²¹ It does not necessarily follow, however, that the QTIP rules are sexist, in either their premises or their effects. Gerzog and Fellows fail to prove their *feminist* cases against the QTIP.

A. Sexist Premises?

Gerzog's claim that the rules rest on sexist premises is based largely on a quotation from a 1966 article in a publication for tax practitioners. The author of that article argued for something like the QTIP rules because "[t]he 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."¹²² Gerzog sees this as the smoking gun which proves her case that the QTIP rules originated "admidst [a] climate of paternalism, . . . degrading to women."¹²³ But she has to go back fifteen years before the QTIP rules were enacted, to an article by someone with no official status in the process leading to those rules, to find the gun. It is certainly true that the QTIP is responsive to male fears that widows will not have the same objects of their bounty as would their deceased husbands. But the major concern was the possibility that the widow might genuinely have a mind of her own, *not* the influence of charlatans. The most obvious setting for this concern—frequently referred to around the time of enactment—is second marriages, in which the husband's children are

120. See *id.* at 318-19, 326.

121. For a detailed criticism of the QTIP rules as being based on a fiction of marital unity, see Lily Kahng, *Fiction in Tax*, in TAXING AMERICA, *supra* note 11, at 25.

122. John W. Beveridge, *The Estate Tax Marital Deduction—Beneficent Intent, Baneful Result*, 44 TAXES 283, 284 (1966), *quoted in* Gerzog, *supra* note 5, at 320.

123. Gerzog, *supra* note 5, at 320.

not the wife's.¹²⁴ The husband expects his widow will prefer her own children (or a later husband) to his children. Perhaps the husband's estate does not deserve a marital deduction if the husband is not willing to trust the second wife's ultimate decision, but that is not the question at the moment. The question is whether it is degrading to assume the second wife may not share the husband's feelings toward his children. And the answer, of course, is no.

But what if the husband and wife do share the same children? The husband may fear the wife will prefer her new husband to the couple's children, not because she has no mind of her own, but because she has (in his view) too much mind of her own. This is not a model of trust and unity in marriage and his estate may not deserve a marital deduction if he is unwilling to trust her, but it is not demeaning to women. It comes closer to being a compliment.¹²⁵ In short, the QTIP rules are based much more on the non-degrading view that widows have minds of their own, than on the degrading view that they are at the mercy of charlatans.

And even to the limited extent the QTIP rules are based on the mercy-of-charlatans concern, one should not be too quick to label that concern sexist. It is not degrading to note that many elderly widows may be quite unsophisticated economically—and that was even more true in 1981 than it is today. We may not like the kind of marriage that made them unsophisticated, but it does not follow that the law should blind itself to social reality. A rule which assumes that women have financial sophistication they do not have may be worse for women than one that takes them as they are.

B. Do Widows Lose Out with QTIPs?

Gerzog and Fellows both claim that QTIPs hurt widows economically.¹²⁶ With a QTIP, a husband planning his estate does not have to choose between the estate tax advantages of the marital

124. See *Major Estate and Gift Tax Issues: Hearings Before the Subcomm. on Estate and Gift Taxation of the Senate Comm. on Finance, 97th Cong.* 349 (1981) (statement of Malcolm A. Moore), quoted in Fellows, *supra* note 5, at 158; 127 CONG. REC. 17,288, 17,289 (1981) (statement of Sen. Symms), quoted in Gerzog, *supra* note 5, at 310.

125. Ironically, Gerzog herself makes an assumption more insulting to women than anything implicit in the QTIP provisions. According to her, "The QTIP's requirement of giving the surviving spouse less than full ownership reveals an intention to delude the surviving spouse into accepting QTIP treatment as if she truly owned the property." Gerzog, *supra* note 5, at 325. Gerzog apparently assumes widows are too ignorant or too stupid to understand the difference between outright ownership and an income interest for life.

126. See *id.* at 320-25; Fellows, *supra* note 5, at 158-59.

deduction and the non-tax advantage of being assured of his assets' ultimate destination. As Gerzog notes, the QTIP enables him to have his cake and eat it too.¹²⁷ Both Gerzog and Fellows assume that widows would fare better in a world without QTIPs because in that case their husbands would choose the estate tax benefits of the marital deduction and leave their wives outright bequests.¹²⁸ But if a husband is forced to choose, he may make any choice. Contrary to their assumption, he may decide that control over the destination of his estate is more important than tax benefits. Instead of the outright bequest that Gerzog and Fellows imagine, or the life estate the husband would choose if he had the QTIP option, the widow may get nothing. Intermediate choices are also possible. For example, the husband might decide to leave his widow enough to buy an annuity for life equal in value to the life estate she would have received in a world with QTIPs. In that case, the widow's welfare would be unaffected by the QTIP rules.

It is a difficult empirical question whether widows would fare better with or without a QTIP provision. A complete analysis would require study of how husbands would choose between the marital deduction and control if they could not have both, information on the risk aversion of widows, and consideration of the rules in each state concerning a widow's forced share election. I am not at all sure what the result would be, although my intuition is that widows probably fare better with the QTIP than they would without. But Gerzog and Fellows consider none of this. By making the unwarranted assumption that husbands would choose the marital deduction over control, they ignore the real possibility that QTIPs are a boon to widows. Many widows might be sorry if this academic feminist argument were to prevail.

Imagine a husband who would leave his wife \$1 million in a QTIP trust, if the QTIP option were available. Suppose empirical research indicates that, in the absence of that option, it is a coin flip whether the husband will leave his wife \$1 million outright or leave her nothing. Now suppose we ask that wife whether the QTIP provisions are a good idea. She will be their most fervent supporter. Given the well-known (and well-justified) risk aversion of the

127. See Gerzog, *supra* note 5, at 319.

128. See *id.* at 321. "[W]omen's interests would be better served by requiring husbands to make outright transfers of property to their wives." *Id.* "Ultimately, the QTIP in theory and practice means that wives are not considered worthy of being property owners or of exercising their rights to make wills." Fellows, *supra* note 5, at 159.

elderly,¹²⁹ she certainly will prefer the guarantee of the income on \$1 million for life to a 50-50 chance of \$1 million outright or nothing. Having 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.

The analysis is complicated by a widow's right to elect against the will and take a forced share in the vast majority of states.¹³⁰ Forced share legislation varies greatly from state to state, but typically a widow is entitled to elect to receive between one-third and one-half of the value of the net estate.¹³¹ If such a statute exists and is not easily avoided, and if the wife makes an election under the statute, then she does not run the risk of complete disinheritance. In many jurisdictions, however, forced share statutes apply only to the husband's probate estate, so that the wife's rights under the statute can be readily defeated by the use of will substitutes, such as revocable trusts and life insurance.¹³² Moreover, as Fellows herself notes (in another context), a wife may be unwilling for social, psychological, or moral reasons to elect against her husband's will, even when it would be in her financial interest to do so.¹³³

Even if the forced share is not defeated by the husband's clever planning or the widow's own inhibitions, the widow may do less well under it than with a QTIP. Suppose a husband has a \$10 million estate, and his wife has no wealth of her own. If the QTIP option is available, and if his estate planning strategy is maximum deferral,¹³⁴

129. See Paul L. Menchik & Martin David, *Income Distribution, Lifetime Savings, and Bequests*, 73 AM. ECON. REV. 672, 688 (1983) ("[P]ersons become more and more averse to risk as they age."). It is also commonly thought that women are more risk averse than men. See Kerry Hannon, *Why the Rules Are Different for Women*, WORKING WOMAN, Sept. 1995, at 20, 78; Clint Willis, *How Much Risk Should You Take*, WORKING WOMAN, Sept. 1994, at 45, 46.

130. See PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 150-64 (2d ed. 1994).

131. See *id.* at 151.

132. Courts in some jurisdictions have brought some kinds of will substitutes within the scope of the forced share legislation, despite the absence of support for that approach in the statutory language. See *id.* at 155. The version of the Uniform Probate Code in effect in several states specifically exempts life insurance from the scope of the forced share rules. See *id.* at 152; UNIF. PROBATE CODE § 2-202(1) (pre-1990 version), 8 U.L.A. 297 (1998). In virtually all jurisdictions, a widow has no forced share rights in outright gifts made by her husband more than two years before his death. See HASKELL, *supra* note 130, at 156. Thus, a husband willing to transfer the bulk of his assets to his children while he is still alive (and reasonably healthy) can almost always defeat his wife's forced share rights. In addition, a husband who plans far enough ahead may be able to obtain a release of all forced share claims by premarital agreement. See *id.* at 161-64.

133. See Fellows, *supra* note 5, at 152.

134. Maximum deferral is a very popular marital estate planning strategy, despite the

he will leave \$600,000 outright to his children,¹³⁵ and the remaining \$9.4 million in a QTIP. If the QTIP is not available, he will leave nothing to his wife, and she will elect a forced share of, for example, \$3.33 million. Assuming she survives him by eleven years—the median length of survival of husbands by widows¹³⁶—and assuming a modest 5% discount rate, the present value of her life estate in \$9.4 million is about \$3.9 million. Despite the protection of the forced share, she will lose more than half a million dollars if the QTIP does not permit the husband to have his cake and eat it too. Increasing the size of the husband's estate, the length of the widow's survival, or the discount rate would all make the advantage of the QTIP to the widow more dramatic.

Thus, even if the QTIP is viewed as an undeserved tax benefit to the husband, it may redound to the benefit of widows. I do not know for a fact that widows do better with the QTIP rules than they would do without. But it is quite possible that the QTIP rules do widows more good than harm. The resolution of that empirical issue is crucial to the validity of the feminist attack on QTIPs, yet Gerzog and Fellows simply assume QTIPs have "adverse economic consequences for women."¹³⁷

C. *QTIP Widows and a Hierarchy of Feminist Concerns*

Even if the QTIP provisions were as insulting and costly to women as Gerzog and Fellows claim, QTIP widows would be low on the list of feminist concerns. The principal of a QTIP trust will usually be at least \$600,000 (the minimum needed to ensure that none of the widow's unified credit is wasted),¹³⁸ so the primary objects of Gerzog's and Fellows's concern are elderly women living off of the income of \$600,000 or more (often much more), plus Social Security. This places the vast majority of QTIP widows safely within

fact that an estate equalization strategy may result in a lower combined tax burden on the two estates. See JOHN R. PRICE, PRICE ON CONTEMPORARY ESTATE PLANNING 357-65 (1992).

135. So as not to waste his \$600,000 transfer tax exemption. See I.R.C. §§ 2001, 2010 (West Supp. 1998).

136. At least it was the median length in the 1960s. See U.S. TREASURY DEP'T, TAX REFORM STUDIES AND PROPOSALS 360 (1969).

137. Gerzog, *supra* note 5, at 327. Fellows makes the same assumption. See Fellows, *supra* note 5, at 158-59.

138. The exception would be the widow of a husband with an estate of more than \$600,000 but less than \$1.2 million. With an estate of \$900,000, for example, the husband might leave \$600,000 to his children (tax-free under the unified credit), and \$300,000 to a QTIP trust. For the unified credit, see I.R.C. § 2010.

the middle class, or better. I am not urging a strict intellectual triage; if someone points out a real injustice, it is not an answer that somewhere in the world there is a greater injustice. But in the overall feminist scheme of things, any arguable injustice caused by QTIPs to affluent (and overwhelmingly white) widows is simply trivial. Critical race feminists argue that many feminists pay too much attention to concerns peculiar to affluent white women;¹³⁹ the attack on QTIPs is almost a parody of the kind of feminism to which the critical race theorists object.

IV. DIFFERENCE FEMINISM AND TAX POLICY

Two feminist tax scholars have found guidance for tax policy in difference feminism, particularly in the work of psychologist Carol Gilligan. Marjorie Kornhauser uses this material to construct an argument for progressive taxation,¹⁴⁰ and Gwen Thayer Handelman finds guidance in establishing tax return preparation standards.¹⁴¹ I find both arguments unconvincing. What follows is a description and critique of each article, and a comment on a feature common to both.

A. *Different Voices and Progressive Taxation*

In *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, Marjorie Kornhauser constructs an argument for a progressive income tax based on Carol Gilligan's book, *In a Different Voice: Psychological Theory and Women's Development*. Gilligan's work describes differences in the developmental psychology of boys (and young men) and girls (and young women). The ethical development of boys centers on a "morality of rights,"¹⁴² which emphasizes the separateness and autonomy of individuals. Under this morality, duties to others are only negative—duties of noninterference. By contrast, girls' development is founded on an "ethic of care,"¹⁴³ which emphasizes interdependence, the web of human connectedness, and responsibility toward others. Although she has a normative vision of

139. See Crain, *supra* note 37, at 1191-92 (describing critical race feminism). Leading works in this school of feminist thought include the following: BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (1984); ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); and Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

140. See Kornhauser, *supra* note 6, at 470.

141. See Handelman, *supra* note 7, at 41-42.

142. GILLIGAN, *supra* note 18, at 19.

143. *Id.* at 74.

psychologically integrated men and women,¹⁴⁴ Gilligan claims to be 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.¹⁴⁵

Kornhauser characterizes Gilligan's ethic of care as feminist,¹⁴⁶ and describes feminism as "less a theory than a way of knowing and of being, experienced by a large segment [approximately 50%] of the world's population."¹⁴⁷ This is peculiar usage because it seems to reduce feminism to a matter of one's sex. To Kornhauser, all females are necessarily feminist, and all males are necessarily not feminist. She is explicit on this point:

Women see themselves and the world with different eyes and, therefore, they speak with a different voice. Women perceive themselves, and thus the world, in terms of caring for others, in terms of responsibility to others, in terms of connectedness to others, whereas men perceive themselves and the world in terms of separateness, autonomy, and universal rules and rights.¹⁴⁸

It follows from the ethic of care, according to Kornhauser, that responsibility to others extends beyond friends and relations: "We also must maintain a minimal, less burdensome connectedness to the nonproximate stranger."¹⁴⁹ What does this entail? "It . . . require[s] that as my discretionary income grows, I contribute money at a greater rate than previously to help others. . . . Thus, a progressive income tax rate satisfies my obligation to myself and others. It is not a redistribution of wealth, merely a paying of my 'just debts' to others."¹⁵⁰

144. See *id.* at 151-74.

145. In a "Letter to Readers" printed as the introduction to the 1993 edition of *In a Different Voice*, Gilligan emphasizes that her "work is grounded in listening," and that when she hears her work "being cast in terms of . . . who is better than whom, I know that I have lost my voice, because [that] is not my question." CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT xiii (1993 ed.).

146. See Kornhauser, *supra* note 6, at 506-07.

147. *Id.*

148. *Id.* at 508. Later, Kornhauser backs off a little from this claim of universality, acknowledging that the use of "male" and "female" voices is not determined solely by one's chromosomes. See *id.* at 511. Nevertheless, "[a]s their labels imply, the female voice is predominantly the domain of women and the male voice belongs to males." *Id.*

149. *Id.* at 510.

150. *Id.* at 511.

1. Kornhauser's Misreadings of Gilligan

a. The Leap from the Particular to the General

When Kornhauser claims, "We also must maintain a ... connectedness to the nonproximate stranger,"¹⁵¹ she moves from the indicative to the imperative. She 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*. Her assertion is not supported by any citation to Gilligan—which is not surprising because *In a Different Voice* offers virtually no support for the proposition that the female ethic of care extends to the "nonproximate stranger." The girls and women Gilligan describes see their responsibilities as being toward those closest to them—family, friends, and lovers. Girls, in fact, tend to avoid taking the role of the "generalized other," and resist the "abstraction of human relationships."¹⁵² Instead, girls learn "the empathy and sensitivity necessary for taking the role of 'the particular other.'"¹⁵³ If anything, it might be easier to base support for a duty to abstract others in Gilligan's description of boys viewing the world "impersonally through systems of logic and law."¹⁵⁴

Given the lack of empirical foundation for Kornhauser's claim, it is not surprising that a recent study, based on opinion polling, found no significant difference in men's and women's attitudes towards progressive taxation.¹⁵⁵ Women indicated greater support than men

151. *Id.* at 510.

152. GILLIGAN, *supra* note 18, at 11.

153. *Id.* Eleven-year-old Amy, the most compelling subject in Gilligan's book, explains that the ethic of care is quite diluted even with respect to casual acquaintances. This is in response to a question about how one should choose when responsibility to self and others conflict:

Like, I don't think your job is as important as somebody you really love, like your husband or your parent or a very close friend. Somebody that you really care for—or if it's just your responsibility to your job or somebody that you barely know, then maybe you go first—but if it's somebody that you really love and love as much or even more than you love yourself, you've got to decide what you really love more, that person, or that thing, or yourself.

Id. at 36.

It is not clear that Amy would recognize any responsibility to a total stranger. In the entire book, the only statement that provides any support for Kornhauser's position is that of college student Claire: "The stranger is still another person belonging to that group, people you are connected to by virtue of being another person." *Id.* at 57. Even here, Claire seems to have in mind a proximate stranger, not an abstraction. In any event, Claire later describes an incident in which she wrote a less-than-honest letter of recommendation for a friend, thus favoring the friend over the unknown people who would be adversely affected if the friend got the job. *See id.* at 59-60.

154. *Id.* at 29.

155. *See* William J. Turnier et al., *Redistributive Justice and Cultural Feminism*, 45 AM.

for progressive taxation, but only by a statistically insignificant "very narrow margin."¹⁵⁶ One might, of course, construct a normative argument—feminist or otherwise—for progressive taxation, the force of which would be unaffected by survey data of what opinions people actually hold. If the argument were feminist, and most women did not in fact agree with it, they could be dismissed as victims of false consciousness. But the force of Kornhauser's argument depends on the claim that it is based on how women really are, *not* on an idea of how they ought to be. To this argument, the survey results are very damaging.

b. The Overstated Difference

In the final chapter of *In a Different Voice*, "Visions of Maturity," Gilligan goes beyond her descriptive approach to a normative vision of fully integrated adults.¹⁵⁷ She explains: "In the transition from adolescence to adulthood, the dilemma itself is the same for both sexes, a conflict between integrity and care. But approached from different perspectives, the dilemma generates the recognition of opposite truths."¹⁵⁸ A young woman, who already has a strong sense of responsibility to others, must temper that ethic of care with a morality of rights. In particular, she must claim "the right to include herself among the people whom she now considers it moral not to hurt."¹⁵⁹ A young man, by contrast, must transform "the ideological morality of adolescence into the adult ethic of taking care."¹⁶⁰ Thus, despite the different routes they take, each finally recognizes "two different moralities whose complementarity is the discovery of maturity."¹⁶¹ Even after this "convergence in judgment,"¹⁶² differences remain. Men are still founded in

U. L. REV. 1275, 1315 (1996). The results of another survey, however, were that "relatively more females tended to prefer more progressive tax rates." Michael L. Roberts & Peggy A. Hite, *Progressive Taxation, Fairness, and Compliance*, 16 LAW & POL'Y 27, 36 (1994).

156. Turnier et al., *supra* note 155, at 1312. The authors hypothesize that "while men and women might speak in different voices on the micro-social level, they may not do so on the macro [national] level." *Id.* at 1315. Interestingly, however, the authors "were able to conclude with a high degree of confidence that women are more supportive than men of redistributive social spending," although even this difference they describe as modest. *Id.* at 1307.

157. See GILLIGAN, *supra* note 18, at 151-74.

158. *Id.* at 164.

159. *Id.* at 165.

160. *Id.* at 164.

161. *Id.* at 165.

162. *Id.* at 167.

separation, women in attachment.¹⁶³ But it is now more a difference of degree or emphasis, rather than a radical difference in kind.

To my mind, this convergence should be good news for anyone trying to find support in Gilligan for progressive taxation. The male capacity for abstraction brings the nonproximate stranger into one's range of vision, and the female capacity for care suggests a responsibility to that stranger.¹⁶⁴ But this is a humanist case for progression, not a feminist one. To Kornhauser, who wants to construct a peculiarly feminist case for progression, the convergence is a problem.

2. The Implications of Kornhauser's Reading of Gilligan

Suppose that *In a Different Voice* really said what Kornhauser takes it to say—that women, with their ethic of care, feel a sense of responsibility to the nonproximate stranger, and men do not. What guidance, if any, would that information provide in designing a tax system? In particular, what would it tell us about progressive rates? It would not tell me nearly as much as it tells Kornhauser, for several reasons.

a. Progressivity or Proportionality?

Kornhauser believes that everyone is entitled to the financial preconditions for self-fulfillment—enough money not just for survival, but also for “some level of personal safety and comfort.”¹⁶⁵ Obviously, the money to provide this to those who have less than enough must come from those who have more than enough. But how do we tell whether those with a surplus should contribute in proportion to their surplus, or progressively?¹⁶⁶ Either kind of system could satisfy the societal duty to the needy. According to Kornhauser, the tax should be progressive because “[a]s my income grows, it is easier for me to contribute more without impinging on my

163. See *id.* at 167-74.

164. It also avoids the problem of explaining why men should accept a theory of taxation based on a view of the world unique to women. That problem is discussed *infra* in text accompanying notes 170-77.

165. Kornhauser, *supra* note 6, at 510-11.

166. To the vast majority of commentators, proportionality and progressivity have been the only two approaches worthy of serious discussion. For a recent contrary view, see Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 AM. J. TAX POL'Y 221 (1995) (arguing that the only fair tax is a head tax, in which each taxpayer pays the same absolute dollar amount, regardless of income).

ability to reach my own goals."¹⁶⁷ That is her entire argument as to why the feminist ethics of care calls for progressivity rather than proportionality: an appeal to the declining marginal utility of money, with interpersonal comparisons permitted. I have no problem with the argument. At bottom, it is *the* case for progressivity. What it gains from association with *In a Different Voice*, however, is not apparent.

b. Where the Money Really Goes

Kornhauser's feminist case for progression is based on a particular use of tax revenues—providing the financial opportunity for self-fulfillment to the poor. To use an analysis premised on this use of tax revenues as a justification for any particular tax system design is to adopt a rather romantic view of governmental expenditures. At most only about 40% of the expenditures to which income tax revenue is devoted fit Kornhauser's model of the function of government.¹⁶⁸ By contrast, almost half of the expenditures are for national defense and interest on the national debt.¹⁶⁹ What does the ethic of care say about the proper tax system for raising money to pay for a nuclear submarine or to cover the cost of federal borrowing? Probably nothing, since it is doubtful that the ethic of care approves of either nuclear weapons or mortgaging our children's futures, regardless of financing methods. But in that case, the ethic of care has nothing to tell us about how half of general federal tax revenues should be raised.

167. Kornhauser, *supra* note 6, at 511.

168. Excluding Social Security and Medicare (because they are not financed by income tax revenue), total federal outlays in 1994 were \$996.602 billion. *See* [Historical Tables Volume] BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1996, at 42 tbl.3.1. Of that total, \$405.106 billion (40.6%) were classified as "human resources" expenditures. *See id.* That category includes: education, training, employment, social services, health, income security, and veterans benefits and services. *See id.* Even under the extremely generous assumption that everything in the human resources category is the kind of expenditure Kornhauser has in mind, that is only two-fifths of total expenditures. It is less than the 48.7% of the budget devoted to national defense (\$281.563 billion) and interest on the national debt (\$202.957 billion). *See id.* Taking a narrower view of the relevant redistributive spending—as expenditures on means-tested entitlements other than Medicare—1994 federal redistribution expenses were only \$88.4 billion. *See id.* at 95 tbl.8.1 (\$170.4 billion on all means-tested entitlements), 103 tbl.8.5 (\$82 billion on Medicare). This is less than 10% of total federal outlays. The entitlements included in the \$88.4 billion are food stamps, AFDC, supplemental security income, child nutrition programs, the earned income tax credit, and veterans pensions. *See id.* at 95.

169. *See id.* at 42.

c. "One Law for the Lion & Ox is Oppression"¹⁷⁰

If Kornhauser is descriptively correct, and men and women really do have fundamentally different beliefs as to the rightness of progressive taxation, what is to be done? Apparently the tax system has to have either a male (flat) or a female (progressive) rate structure, and either way half the population will be disenfranchised. Kornhauser does not frame the dilemma so starkly, but her answer appears to be that the feminine approach should prevail because it is objectively right: "The female voice not only fits reality, but is the best interpretation of reality in that it 'fits' what we see."¹⁷¹ Its fit is best because there really is altruism in the world, a few examples of which Kornhauser cites.¹⁷² But this appeal to altruism solves nothing, for two reasons. First, she makes no attempt to quantify altruism compared with selfishness; altruism may exist but be uncommon. Second, she does not tell us whether these examples of altruism are disproportionately female, or whether they are equally the work of women and men. If disproportionately female, we are back in the original dilemma. If equally divided between the sexes, then her entire premise—that hers is a *feminist* case for progression—collapses.¹⁷³

Given the obvious failure of the existence of altruism to prove Kornhauser's case, I suspect she really thinks 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. In fact, she says nearly as much: "I believe the choice should be progressivity with its vision of consideration for others and its sense of common humanity rather than proportionality and its narrow vision of the self-interested man."¹⁷⁴ But if that is what all women think, and if all men think the opposite, it is cultural imperialism for either sex to impose its views on the other. How does an ethic of care, however morally commendable it may be, justify coercing the selfish into being altruistic? For that matter, how is coerced altruism altruism at all? Perhaps the idea is along the lines

170. WILLIAM BLAKE, *The Marriage of Heaven and Hell*, in BLAKE: COMPLETE WRITINGS WITH VARIANT READINGS 148, 158 (Geoffrey Keynes ed., 1972).

171. Kornhauser, *supra* note 6, at 513.

172. *See id.* at 513-14.

173. Joan C. Williams persuasively argues that "[r]elational feminism," derived from Gilligan, "is better understood as a critique of possessive individualism than as a description of what men and women are actually like." Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 813 (1989).

174. Kornhauser, *supra* note 6, at 523.

of Hamlet's advice to Gertrude: "Assume a virtue, if you have it not. . . . For use almost can change the stamp of nature."¹⁷⁵ By being compelled to pay a progressive tax, selfish men will gradually become altruistic. Unfortunately, I am unaware of any evidence that opponents of progression become supporters after they have paid a progressive tax long enough. And even if it were true, there would still be the question of the ethics of this attitude modification.

Actually, there *are* ways out of the dilemma. If the ethics of men call for payment of proportional taxes (at most), while the ethics of women call for progressive taxation, then we could have separate rate schedules—flat for men, progressive for women. Or if for some reason that seems objectionable, we could have a flat tax for all; and if women felt the need to do more to satisfy their responsibility of care to the nonproximate stranger, they could voluntarily give more to their favorite charities or to the government.¹⁷⁶ This is the perfect solution. No one is coerced into paying more than he or she believes is appropriate, but everyone is free to contribute more if he or she feels the tax payment alone is not enough. The fact that the payments above the flat tax rate are voluntary makes it clear that women are choosing to care rather than responding to governmental force. And the ability to choose the object of their generosity means their money will not be diverted from the poor to nuclear submarines.

This proposal, rather than coercive progressive taxation, is what logically follows from Kornhauser's premises. A system very like this has been championed by a group not normally thought of as feminist—Republicans. Their advocacy of flat taxes, supplemented by "a thousand points of light,"¹⁷⁷ could have been inspired by Kornhauser's analysis.

B. The Feminist View of Tax Return Preparation Standards

In a formal ethics opinion, the American Bar Association has concluded that an attorney should be free to advise a client to take a

175. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 4 (T.J.B. Spencer ed., Penguin Books 1980).

176. If Kornhauser is correct that women feel a greater obligation to nonproximate strangers than do men, one would expect that even now women would give more generously to charities than do men. It would be difficult to research this question, both because of the difficulty in determining the moving force in gifts by spouses, and because of the need to control for levels of income and wealth. Kornhauser cites, and I am aware of, no studies on this question.

177. George Bush, *Presidential Nomination Acceptance Speech* (Aug. 18, 1988), in *N.Y. TIMES*, Aug. 19, 1988, at A14.

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.¹⁷⁸ Gwen Thayer Handelman has used *In a Different Voice* to argue against the ABA's conclusion.¹⁷⁹ Handelman 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.¹⁸⁰ However, she would permit an undisclosed return position as long as the position is supported by even one relevant authority.¹⁸¹

Handelman claims that her stricter standard¹⁸² is based on a

178. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 352 (1985) (emphasis omitted), reprinted in 39 TAX LAW. 631, 631 (1986). The practical constraints on aggressive return preparation come not from the ABA, but from the preparer penalty of I.R.C. § 6694, and from the Treasury Department's Circular 230 (governing practice before the IRS). However, the standards of the preparer penalty closely resemble the ABA Opinion. The statute imposes a \$250 penalty on the preparer of a return which includes an undisclosed position "for which there was not a realistic possibility of being sustained on its merits." I.R.C. § 6694(a)(1) (West Supp. 1998). The regulations state that a position must have "approximately a one in three, or greater, likelihood of being sustained on its merits" to satisfy the realistic possibility standard. Treas. Reg. § 1.6694-2(b)(1) (as amended in 1992). In addition to the \$250 penalty of I.R.C. § 6694(a), I.R.C. § 6694(b) imposes a \$1000 penalty for a return position which constitutes "reckless or intentional disregard of rules or regulations." I.R.C. § 6694(b) (West Supp. 1998). As interpreted by the regulations, this is not as similar to Handelman's position, see *infra* text accompanying notes 180-81, as it may appear. "Rules or regulations" is defined rather narrowly as the Internal Revenue Code itself, Treasury regulations, and revenue rulings and notices. See Treas. Reg. § 1.6694-3(f) (1991). Court opinions and committee reports, for example, do not count. Moreover, a position contrary to a revenue ruling or notice is not subject to the penalty, even if undisclosed, if the position satisfies the realistic possibility standard. See *id.* § 1.6694-3(c)(3). Thus, the regulation applies the Handelman approach only to the disregard of the statute itself and of regulations. (A position contrary to a regulation is not subject to the penalty if it is adequately disclosed and "represents a good faith challenge to the validity of the regulation." *Id.* § 1.6694-3(c)(2).)

The realistic possibility standard of the preparer penalty is adopted by Treasury Department Circular 230, 31 C.F.R. § 10.34 (1997). A willful, reckless, or grossly incompetent violation of § 10.34 can result in disbarment or suspension from practice before the IRS. See *id.* § 10.52.

179. See Handelman, *supra* note 7, at 47-49 (summarizing *In a Different Voice*). Handelman also relies on DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990) (describing different conversational styles and assumptions of men and women), but Gilligan's work is more central to her critique of the ABA's position.

180. Handelman, *supra* note 7, at 64.

181. See Gwen Thayer Handelman, *Constraining Aggressive Return Advice*, 9 VA. TAX REV. 77, 103-04 (1989).

182. Actually, it will not always be true that Handelman's standard is more demanding than the ABA's. If the only relevant authority is a revenue ruling adverse to the taxpayer's position, and the attorney believes the taxpayer's position would have a realistic possibility of success in litigation, then Handelman's assumption—that hers is the

conception of "civic obligation" which "quite obviously reflect[s] an orientation toward connection and an ethic of care and responsibility."¹⁸³ It grows out of "a complex of values derived from a social orientation associated with women, but . . . is problematic under a [male-oriented] morality premised on autonomy."¹⁸⁴ In much the same way that Kornhauser derives tax rates from Gilligan's work, Handelman derives return preparation standards.¹⁸⁵

One certainly does not *need* to invoke a feminine ethic of care in order to criticize the ABA position on return preparation. The problem with the ABA position is that it is based on a litigation model, which return preparation does not fit. In litigation an attorney may advocate a position, even though she thinks it is probably wrong, because there is another attorney arguing against the position and a judge to decide who is right.¹⁸⁶ But in return preparation, most of the time the return will never be audited, and even if it is audited the revenue agent may not notice the dubious position (especially if it is a failure to include an item in income).¹⁸⁷ Only if the dubious position is disclosed on the return—in effect, a "please audit me" message to the IRS—does return preparation fit the litigation model. That is the core of the argument against the ABA position, and Handelman herself makes it quite eloquently.¹⁸⁸ One can agree with that critique—as I do—without ever having heard of different voices. Congress itself has expressed limited agreement with the critique, by penalizing return preparers who take

stricter standard—is correct. Under the ABA Opinion, an undisclosed taxpayer-favorable return position would be proper; under Handelman's approach it would not. But suppose there are numerous authorities on point. The IRS position is supported by regulations, by legislative history, by the Tax Court, and by the five Federal Courts of Appeals that have considered the issue. The only support for the taxpayer's position is a poorly reasoned opinion from the United States District Court for the District of North Dakota (not the taxpayer's district). Handelman would permit an undisclosed taxpayer-favorable return position; the ABA Opinion probably would not.

183. Handelman, *supra* note 7, at 56.

184. *Id.*

185. Despite the similarity of their approaches, Handelman does not cite Kornhauser's article.

186. The classic statement of this position is Samuel Johnson's response to Boswell's question about how a lawyer can ethically support a cause which he knows to be bad: "Sir, you do not know it to be good or bad till the judge determines it." JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON, LL.D.* 153 (London, Spottiswoode 1859).

187. In 1995, 1.67% of all individual income tax returns were audited. *See IRS Auditing More Poor People, Fewer Rich People, GAO Says*, 71 TAX NOTES 1212, 1212 (1996). It is probable, however, that the odds of being audited are higher for the more complicated returns as to which attorneys give advice.

188. *See* Handelman, *supra* note 7, at 62.

undisclosed positions contrary to regulations.¹⁸⁹ The legislative history of this penalty makes no mention of Carol Gilligan.¹⁹⁰

Of course, the ethic of care might supply additional support for the critique of the ABA position. But as a matter of practical politics—and Handelman gives every indication of wanting her critique to produce results—invoking difference feminism runs a major risk of being counterproductive. 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. Whatever the merits of that position, it is not a recipe for success in the legislative arena. It is questionable strategy to invoke female superiority to support a position which can be powerfully advocated on gender-free terms.

Finally, Handelman's argument is not even a persuasive reading of *In a Different Voice*. The lawyer assisting in return preparation has two objects of care, with competing interests—the lawyer's client and the fisc. Handelman's reading of Gilligan is that the ethic of care requires special solicitude for the fisc; the lawyer's responsibility to care for her client escapes Handelman's attention completely. Yet Gilligan's work indicates that the ethic of care applies overwhelmingly to concrete individuals with whom a woman has a personal relationship, not to remote abstractions.¹⁹¹ If anything, *In a Different Voice* supports the ABA position, which favors the interest of the particular client over the generalized needs of the fisc.¹⁹²

Handelman's reliance on *In a Different Voice* thus backfires in two ways: politically it creates a battle of the sexes where none need exist, and analytically it ignores a lawyer's ethic of care towards her own client.¹⁹³

189. See I.R.C. § 6694(b)(2) (West Supp. 1998) (as interpreted by Treas. Reg. § 1.6694-3(c)(2) (1991)).

190. The relevant void is in H.R. REP. NO. 101-247, at 1394-1401 (1989), reprinted in 1989 U.S.C.A.N. 1906, 2864-71.

191. This is discussed *supra* in text accompanying notes 151-54.

192. In this respect it resembles the analysis (not from a feminist perspective) in Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

193. In another part of her article, Handelman describes a feminist method of interpreting tax legislation. See Handelman, *supra* note 7, at 64-75. I find aspects of her approach attractive, but as with Kornhauser's title reference to typical male reactions, I am surprised and offended by her gratuitous anti-male rhetoric. She contends that men may find it "extremely emotionally difficult" to "[a]dmit that they are not in possession of important information and attend to another who is," to empathize, and to acknowledge

C. *The Dangers of Difference Feminism*

Both Kornhauser and Handelman accept Gilligan's work as something close to gospel. Yet the tentative nature of her work is apparent from simply reading *In a Different Voice*; Gilligan draws her conclusions about differences between males and females from interviews with thirty-two study participants, only four of whom are male.¹⁹⁴ In fact, Gilligan's methodology and conclusions have been the subject of numerous serious critiques,¹⁹⁵ none of which either Kornhauser or Handelman considers.

Assuming Gilligan is right as a matter of description, there is a debate raging among feminists as to the normative implications of that difference. Some follow the Kornhauser and Handelman approach of celebrating the female ethic of care, and implicitly or explicitly viewing it as superior.¹⁹⁶ But others view the different voice as the result of the oppression of women, and see celebrating that voice as playing into the hands of the oppressor. According to Catharine MacKinnon, "[w]hen difference means dominance as it does with gender, for women to affirm differences is to affirm the qualities and characteristics of powerlessness."¹⁹⁷ The classic example of the dangers of difference feminism is *EEOC v. Sears, Roebuck & Co.*¹⁹⁸ The EEOC sued Sears for sex discrimination, based on the underrepresentation of women in highly-paid commission sales positions.¹⁹⁹ Sears succeeded in arguing that the ethic of care made women uninterested in the high-pressure

that their autonomy is not absolute. *Id.* at 69-70. She concedes, however, that "men are not entirely incapable of attentiveness to others and empathic understanding if not demanded in a context that requires that they assume a one-down position." *Id.* at 72. Imagine the response to a comment in a law review article that "women are not entirely incapable of logical thought, if placed in a supportive and non-threatening environment."

194. See GILLIGAN, *supra* note 18, at 181 (index of study participants).

195. Some are cited in Williams, *supra* note 173, at 840 n.181. All of the critiques cited by Williams predate the articles of both Kornhauser and Handelman. A more recent critique is Lawrence J. Walker, *Sex Differences in the Development of Moral Reasoning: A Critical Review*, in AN ETHIC OF CARE: FEMINIST AND INTERDISCIPLINARY PERSPECTIVES 157, 164-76 (Mary Jeanne Larrabee ed., 1993) (reporting no difference in male and female moral reasoning through adolescence, and no significant post-adolescent difference after adjustment for differences in educational attainment).

196. For one example among many, see Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 849 (arguing for the superiority of the female perspective on tort law).

197. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 51 (1989).

198. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). *Sears* is discussed at length in Williams, *supra* note 173, at 813-21.

199. See *Sears*, 628 F. Supp. at 1270-71.

competitive world of commission sales.²⁰⁰ As Joan C. Williams observes, “[r]elational feminists delude themselves if they think they can rehabilitate domesticity’s compliments without its insults. To relational feminists, the key point of domesticity [the ethic of care] may be women’s higher morality; to Sears managers, it was that women are weak and dependent, delicate and passive.”²⁰¹

A feminist who is interested in equal rights for women²⁰² would do well to stay far away from Gilligan’s work; it has more potential for harm than for good.

V. CRITICAL RACE THEORY AND THE INTERNAL REVENUE CODE

In *A Black Critique of the Internal Revenue Code*,²⁰³ Beverly I. Moran and William Whitford investigate “whether the Internal Revenue Code systematically favors whites over blacks.”²⁰⁴ They consider their study a test of the claim of critical race theory that “racial subordination is everywhere” in American society.²⁰⁵ To perform the test, they adopt the hypothesis that “deviations from the ideal of a comprehensive income tax systematically favor whites over blacks,”²⁰⁶ and select four aspects of the Code for analysis.²⁰⁷ The four aspects are: various benefits granted to owners of wealth, including the exclusion of gifts from income, the failure to tax unrealized appreciation, and the reduced rate for capital gains; the tax benefits for homeownership, including the interest and property tax deductions;²⁰⁸ tax-favored employee benefits, especially retirement savings; and the marriage penalty imposed by joint returns on many two-earner couples.²⁰⁹

200. See *id.* at 1308-10, 1352-53.

201. Williams, *supra* note 173, at 816.

202. As I believe Kornhauser and Handelman are. That certainly appears to be Kornhauser’s position in her later work on the tax treatment of marriage. See Kornhauser, *supra* note 2. For example, she writes disparagingly of the control of income by the earner spouse (the husband in a “traditional” marriage) “[b]ehind the facade of sharing.” *Id.* at 91. She also criticizes the joint return system for “discourag[ing] some women from working outside the home who might otherwise do so for economic and social reasons.” *Id.* at 108.

203. Moran & Whitford, *supra* note 11.

204. *Id.* at 751.

205. *Id.* at 751-52.

206. *Id.* at 753.

207. See *id.* at 755 (providing a brief summary of the four aspects).

208. A similar—but less developed—racial critique of the tax benefits of homeownership appears in Powell, *supra* note 11, at 80, 92-95. The reference to tax in Powell’s title is rather misleading; the discussion of tax benefits occupies less than three pages of a 30-page article.

209. A similar race-based critique of the income tax treatment of married couples

According to Moran and Whitford, all four aspects of the Code work to the detriment of blacks. They apply the same basic analysis to each of the first three aspects. The Code provides tax benefits for the ownership of certain kinds of assets, and blacks are less likely than whites to own such assets. This is not merely a matter of the tax benefits being skewed toward higher-income taxpayers. Even controlling for income, blacks own fewer assets in general, and fewer tax-favored assets in particular, than whites.²¹⁰ Their analysis of the fourth aspect—the marriage penalty—is different. When persons with roughly equal incomes marry, they suffer a marriage penalty; their tax liability increases. When persons with very unequal incomes marry, they enjoy a marriage bonus; their tax liability goes down. Since black spouses tend to have more equal incomes than white spouses, black married couples are disproportionately victims of the marriage penalty.²¹¹

Throughout the article, Moran and Whitford offer statistical data on black-white differences in income and asset ownership. Some of the data come from the existing social science literature; but where previous studies are inadequate for their purposes, Moran and Whitford perform their own data analysis. The information they provide is consistently interesting and well-presented.

Because they have not tested the hypothesis of pervasive racial subordination against the entire Internal Revenue Code, Moran and Whitford refrain from claiming that the Code “as a whole subordinates black economic interests.”²¹² They do, however, think that the results of their sample of four aspects of the Code indicate “the entire Code is likely skewed in favor of whites.”²¹³

As explained below, their analysis is unconvincing. First, it depends on the unexamined assumption that a comprehensive income tax is a neutral baseline. Second, the Code provisions sampled are not randomly selected. By considering other provisions, one can just as plausibly argue the Code is skewed against whites. In one case (the tax treatment of marriage), it is even possible to argue that a provision considered by Moran and Whitford is really anti-white. Finally, many of the solutions proposed for the supposed anti-black effects of the Code would be more harmful to blacks than current law.

appears in Brown, *supra* note 11, at 45.

210. See Moran & Whitford, *supra* note 11, at 757.

211. See *id.* at 797-98.

212. *Id.* at 800.

213. *Id.* at 801.

A. An Arbitrary Choice of Baseline

1. The Income Tax and Consumption Tax Ideals

Except for the marriage penalty, all the tax provisions investigated by Moran and Whitford are "tax benefits." They define a tax benefit as "any opportunity for deductions or exclusions from income that deviate from the ideal of a comprehensive income tax base."²¹⁴ If a deviation from that ideal disproportionately favors whites, that is evidence in favor of the critical race theory hypothesis. The entire analysis depends on the validity of their assumption that a comprehensive income tax base is the appropriate race-neutral standard. For the Code to be skewed in favor of whites, it must be skewed relative to some standard. That standard, according to Moran and Whitford, is a comprehensive income tax.²¹⁵ They make no attempt to justify their choice of baseline, except to quote the Supreme Court's reference in *Glenshaw Glass* to "'accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.'"²¹⁶ But *Glenshaw Glass* does not describe what Moran and Whitford mean by a comprehensive income tax,²¹⁷ and even if it did, they offer no explanation of why a decades-old Supreme Court opinion has the authority to define the race-neutral baseline for tax analysis.

Unmentioned by Moran and Whitford, there is an ongoing debate—academic and political—between those who believe income is the appropriate tax base, and those who believe the tax base should be consumption.²¹⁸ Under a cash-flow consumption tax, saved

214. *Id.* at 753.

215. *See id.*

216. *Id.* (quoting *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955)).

217. The nontaxation of unrealized appreciation is the first departure from a comprehensive income tax considered by Moran and Whitford, *see id.* at 759-60, yet *Glenshaw Glass* describes income as that which is "clearly realized," *Glenshaw Glass*, 348 U.S. at 431.

218. A few highlights from the extensive literature include the following: William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113 (1974) (offering the first detailed case for a consumption tax in the legal literature); Barbara H. Fried, *Fairness and the Consumption Tax*, 44 STAN. L. REV. 961 (1992) (defending income tax); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994) (advocating a progressive consumption tax without an estate tax); and Alvin C. Warren, Jr., *Fairness and a Consumption-Type or Cash Flow Personal Income Tax*, 88 HARV. L. REV. 931 (1975) (responding to Andrews and defending the income tax). There have been several recent legislative proposals to replace the income tax with a consumption tax. The most prominent are: Freedom and Fairness Restoration Act of 1995, H.R. 2060 and S. 1050, 104th Cong. (following the yield exemption model, sponsored by Rep. Arney and Sens. Shelby, Craig, and Helms); and

income is not taxed until it is consumed. Results equivalent to cash-flow tax treatment can be obtained by the yield-exemption method: taxing earned income even if it is saved, but then taxing neither the income from the investment nor the conversion of the investment to consumption.²¹⁹ Most of the deviations from a comprehensive income tax criticized by Moran and Whitford are consistent with one or the other of these two methods of implementing a consumption tax. Tax deferral for unrealized appreciation and retirement savings, for example, is consistent with a cash-flow consumption tax. The reduced rate on capital gains, and the permanent forgiveness of tax on unrealized appreciation held at death, are moves in the direction of the yield-exemption method. Because of these consumption tax features, the current "income tax" is really a hybrid income-consumption tax. By one estimate, actual law is roughly equiposed between a comprehensive income tax and a consumption tax.²²⁰

Proponents of a consumption tax argue that it is fairer than an income tax for two reasons. First, they claim that savings serve the public good and so should remain untaxed until converted to private consumption.²²¹ Second, they argue that a consumption tax imposes equivalent tax burdens on current consumption and deferred consumption, whereas an income tax unfairly imposes a heavier burden on those who save for future consumption.²²² Income tax adherents have responses, of course. The most important response is simple: "[T]ax burdens should be distributed in accordance with ability to pay, and . . . saved income creates ability to pay to the same extent as consumed income."²²³ In addition to the arguments for the normativity of each polar tax model, in recent years defenses of the

USA Tax Act of 1995, S. 722, 104th Cong. (following the cash flow model, sponsored by Sens. Nunn, Kerrey, and Domenici).

219. See DAVID F. BRADFORD ET AL., BLUEPRINTS FOR BASIC TAX REFORM 110-11 (2d ed. 1984) (explaining that a consumption tax can be implemented either by allowing a deduction for savings and taxing dissavings ("qualified accounts treatment"), or by allowing no deduction for savings but imposing no tax on investment income or on the conversion of the investment to consumption ("tax prepayment approach")).

220. See Don Fullerton, *The Consumption Tax: An Idea Whose Time Has Come?*, 27 TAX NOTES 435, 438 (1985), cited in Edward J. McCaffery, *Tax Policy Under a Hybrid Income-Consumption Tax*, 70 TEX. L. REV. 1145, 1153 (1992).

221. This argument traces back to THOMAS HOBBES, *LEVIATHAN* 238-39 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651). A leading modern statement of the argument is in Andrews, *supra* note 218, at 1164-67.

222. See MARVIN A. CHIRELSTEIN, *FEDERAL INCOME TAXATION* 305-06 (7th ed. 1994) (providing a simple numerical illustration); McCaffery, *supra* note 220, at 1185.

223. Lawrence Zelenak, *The Reification of Metaphor: Income Taxes, Consumption Taxes and Human Capital*, 51 TAX L. REV. 1, 7 (1995) (citing various statements of the position).

normativity of something resembling the actual hybrid system have appeared.²²⁴

Given these different views of the ideal tax system, it is not enough simply to *assume* an income tax ideal and label as suspect any tax provision which departs from that ideal. Instead, the first steps in the analysis should be the choice of baseline and a defense of that choice. Consider how Moran and Whitford's analysis would change if the suspect provisions of current law were those that departed from a consumption tax ideal. Tax deferral for retirement savings and unrealized appreciation would not be suspect provisions, but provisions that taxed investment income would be suspect. Key suspect provisions would include the taxation of interest, dividends, rents, and capital gains.²²⁵ If these forms of income are realized disproportionately by whites—as they almost certainly are—then starting from a consumption tax ideal, Moran and Whitford would have to conclude the Code is systematically biased against *whites*.

Without an explanation of why a comprehensive income tax is the appropriate starting point, the consumption tax argument that the Code is anti-white is just as persuasive as the income tax argument that the Code is anti-black. I suspect Moran and Whitford chose the income tax starting point because the existing income-consumption tax hybrid is called an income tax. But it is hard to believe that the choice of labels determines whether the Code discriminates against blacks. If it does, Moran and Whitford should be satisfied by renaming our income tax (with consumption tax features) a consumption tax (with income tax features).

My view is that it makes no sense to search the Code for hidden racial bias from *either* starting point. The arguments between income tax and consumption tax proponents are close to a standoff, both intellectually and politically. Given that standoff, there is no reason to privilege either extreme position as the proper starting point in a search for hidden discrimination. Without a good reason to start from either extreme, there is no reason to accuse the actual hybrid tax of discrimination against any race.

224. See McCaffery, *supra* note 220, at 1147 (beginning the project of “a principled mapping of the central relations between the normative ideals implicit in the income-consumption hybrid and practical tax policy issues”); Zelenak, *supra* note 223, at 11 (noting there may be normative reasons for taxing some kinds of savings under the income tax model and other types of savings under the consumption tax model).

225. Starting from an income tax ideal, the suspect feature of capital gains taxation is that capital gains are taxed at a reduced rate. Starting from a consumption tax ideal, the suspect feature is that they are taxed at all.

Moran and Whitford's unexamined reliance on the comprehensive income tax as the neutral standard puts them at odds with other critical tax scholars. In their introduction to *Taxing America*—which serves as a sort of statement of principles for the critical tax movement—Brown and Fellows complain that traditional tax scholars have relied on a fiction of tax objectivity, which “allows the participants in tax discourse to claim a position of innocence and avoid accountability for the role the tax law may play in perpetuating social injustices.”²²⁶ How do traditional scholars claim this fictional objectivity? “Tax objectivity is achieved by relying on the ideal [comprehensive] income tax base ... as a starting point for analysis.”²²⁷

2. A Normative Hybrid Tax

Suppose a society were trying to design from scratch the best possible tax system. Even if the society agreed with Moran and Whitford that a comprehensive income tax should be the starting point in the design process, almost certainly the final design would include some consumption tax features. For example, unrealized appreciation might escape tax based on concerns about liquidity and difficulty of valuation. And retirement savings might merit deferral out of concern that applying comprehensive income tax treatment would create an inappropriate tax bias against saving for the golden years.²²⁸ By hypothesis, the goal is to create the best possible real world tax system, so the resulting hybrid would be normative. While I am not prepared to defend every aspect of the existing Internal Revenue Code, I agree with Edward McCaffery that there is no reason to assume the ideal tax system is to be found at either the income pole or the consumption pole.²²⁹

This makes it even more difficult to perform Moran and Whitford's exercise of identifying deviations from the norm and examining those deviations for racial effects. Even with a comprehensive income tax as a starting point, the mere fact that a

226. Brown & Fellows, *supra* note 13, at 6.

227. *Id.*

228. See McCaffery, *supra* note 220, at 1185 (“[P]erhaps the easiest and strongest argument for favoring life cycle savings is that the income tax distorts the choice of present versus deferred consumption by double-taxing the latter.”).

229. See *id.* at 1148 (“[B]ecause of the different values we place on different types of savings, some form of a hybrid may in fact be ideal and not merely a practical necessity.”). I would go beyond McCaffery in one respect—part of designing an ideal tax system for the real world is designing a system that works, so rules dictated by practical necessity are a part of the normative tax structure.

particular provision deviates from the *starting point* does not establish that it deviates from the *norm*. For any provision studied by Moran and Whitford, there are two possibilities. Either the provision is 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.

The cold logic of those two possibilities indicates there is never a reason to examine a provision for racial effects. Actually, I would not go that far. One may have strong arguments that a provision of the tax laws is wrong, yet find that those arguments are insufficient to overcome legislative inertia. In that case, evidence of disparate racial effects may make a crucial political difference. "This provision is wrong, *and* its effects are biased against blacks" may succeed with Congress when a simple "This provision is wrong" would not. Such an argument could be made with respect to several of the provisions Moran and Whitford consider—such as the failure to tax unrealized appreciation on publicly traded securities, and the marriage penalty of joint returns. Moran and Whitford lay the groundwork for such an argument, but they do not complete it; they do not demonstrate that the provisions are wrong.

B. *Sampling Bias*

1. Nonrandom Choice of Provisions

Moran and Whitford present their study as a quasi-scientific test of the critical race theory hypothesis of universal racial subordination.²³⁰ Although the test samples only a few Code provisions, they believe the results—of racial subordination in every Code aspect studied—are striking enough to support a tentative conclusion: "The entire Code is likely skewed in the favor of whites."²³¹ That inference is not justified if the provisions studied were not randomly selected. There is nothing in the article, however, to suggest the selection was random. To the contrary, at two points Moran and Whitford mention tax benefits (the earned income tax credit²³² and head-of-household filing status²³³), which may benefit

230. See Moran & Whitford, *supra* note 11, at 799 ("We have tested this hypothesis against the Internal Revenue Code.").

231. *Id.* at 801.

232. See *id.* at 754.

233. See *id.* at 793 n.148. I do not understand why they think head-of-household filing status disproportionately benefits blacks. For it to be a benefit, it must be a departure

blacks more than whites, and then announce their study will *not* consider those provisions. Setting aside provisions likely to work against the hypothesis is not an application of the scientific method.

They admit the possibility that “[f]urther study of other provisions may discover some which favor blacks over whites.”²³⁴ It is not hard to think of provisions which appear to be pro-black, by the standards of their analysis. The earned income tax credit,²³⁵ which they mention in passing, is one obvious candidate. This is a massive subsidy—almost \$27 billion in 1997²³⁶—for the working poor. It seems likely the benefits go disproportionately to blacks. Moran and Whitford claim they “have studied some of the most significant tax benefits applicable to the individual income tax,”²³⁷ yet they do not study a \$27 billion tax benefit, which they are aware may be pro-black by their standards.

Other likely candidates for pro-black provisions, which Moran and Whitford do not mention, come readily to mind. The exclusion from income of welfare-type benefits probably disproportionately favors blacks.²³⁸ The very existence of the wealth transfer taxes (estate, gift, and generation-skipping) disproportionately burdens whites, since whites transfer a disproportionate share of total wealth.²³⁹ Even more significant is the disproportionate burden placed on whites by progressive marginal tax rates.²⁴⁰ Progressive marginal rates mean that whites, with their higher average income than blacks, must pay a share of the total tax burden that is greater than their share of total income. This is a massive anti-white aspect of the Code. Similarly, whites are disadvantaged by the phasing out

from some neutral baseline, and they offer no suggestion of what that neutral baseline might be. The key point, however, is that when they identify a provision they believe may be pro-black, they do not include it in their study.

234. *Id.* at 800.

235. See I.R.C. § 32 (West Supp. 1998).

236. See *Tax Expenditures Chapter from the President's Fiscal 1998 Budget*, 74 TAX NOTES 915, 920 (1997) (noting that the refundable credit reduces tax revenues by \$5.653 billion and costs \$21.163 billion in outlays).

237. Moran & Whitford, *supra* note 11, at 800-01.

238. No specific provision in the Code authorizes this exclusion, but it is the long-standing administrative practice. See BORIS I. BITTKER & MARTIN J. MCMAHON, JR., *FEDERAL INCOME TAXATION OF INDIVIDUALS* 9-1 (1995).

239. Moran and Whitford state that the federal transfer taxes are beyond the scope of their article. See Moran & Whitford, *supra* note 11, at 783. It is unduly narrow, however, to consider the exclusion of gratuitous transfers under the income tax without considering that gratuitous transfers are subject to a separate federal tax.

240. The explicit provision of progressive marginal rates is at I.R.C. § 1(a)-(d) (West Supp. 1998). In addition, the standard deduction and personal exemptions function as a zero tax rate on the lowest income levels. See I.R.C. §§ 63(c), 151 (West Supp. 1998).

of personal exemptions²⁴¹ and of itemized deductions.²⁴² These provisions function as hidden marginal rate increases on high income taxpayers.

There are two sides to the coin of progressive marginal rates. On the income side, progressive rates burden high income taxpayers (who are disproportionately white). On the deduction side, progressive rates mean that a deduction of any given dollar amount is more valuable to a high income taxpayer than to a low income taxpayer. Moran and Whitford claim that the use of deductions in a progressive rate system—their particular interest is the home mortgage interest and property tax deductions—is unfair to blacks.²⁴³ To remedy this injustice, they call for conversion of the deductions to credits.²⁴⁴ They make the deduction-side argument that progressive rates are anti-black, but do not mention the income-side argument that progressive rates are anti-white.

An alert reader may have noticed a weakness in the racial analysis of progressive rates. In the same way Moran and Whitford choose a comprehensive income tax as a neutral baseline without justifying that choice, the arguments about the racial effects of progressivity implicitly adopt a flat tax (or a flat credit) as the neutral baseline without justification. Although the neutrality of a flat tax is often assumed by tax analysts, the assumption cannot survive careful analysis. Joseph Bankman and Thomas Griffith have critiqued that assumption to devastating effect.²⁴⁵ They note that a flat tax may appear to be a principled compromise “between the perceived efficiency costs of a progressive tax and the perceived inequities of a lump sum tax.”²⁴⁶ The problem is that this “does not explain what conceptions of fairness and justice are strong enough to rule out a regressive tax but not strong enough to justify a progressive tax. It would appear mere chance that the opposing goals of efficiency and justice should reach equipoise at a proportionate tax.”²⁴⁷ They conclude that “the most realistic, but least satisfying explanation for the appeal of a proportionate tax lies in the concept of ‘prominence.’”²⁴⁸ In other words, the idea of a flat tax is simple and

241. See I.R.C. § 151(d)(3) (West Supp. 1998).

242. See *id.* § 68.

243. See Moran & Whitford, *supra* note 11, at 774-75, 788.

244. See *id.* at 781.

245. See Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1910-15 (1987).

246. *Id.* at 1913.

247. *Id.* at 1913-14.

248. *Id.* at 1914.

obvious. But simplicity is not enough to justify the choice of a flat tax as a neutral baseline. If the choice of a flat tax as a baseline is not justified, neither is the choice of any other rate structure.²⁴⁹ Because I do not have confidence in the normativity of any rate structure, I do not contend that progressive rates are unfair to whites. Nevertheless, the claim that progressivity is anti-white follows from the analysis of Moran and Whitford.²⁵⁰

There are two lessons from the racial analysis of progressivity. First, it provides more evidence that Moran and Whitford's sample systematically excludes provisions that arguably have anti-white effects. Second, progressivity provides another example of the difficulty (or impossibility) of finding neutral baselines from which to begin the search for discriminatory effects.

2. Nonrandom Choice of Arguments

In addition to nonrandomly selecting Code sections for study, Moran and Whitford also nonrandomly select from among possible racial analyses of the provisions they do study. They claim that the joint return system disproportionately burdens black married couples.²⁵¹ The system creates marriage penalties when husband and wife have roughly equal incomes, and marriage bonuses when husband and wife have very unequal incomes. Since the incomes of black spouses tend to be more nearly equal than the incomes of white spouses, Moran and Whitford argue the system discriminates against blacks.

One can argue equally well, however, based on the same law and the same facts, that joint returns are biased against whites. In *Taxing Women*, Edward McCaffery claims that the most significant problem with joint returns is the stacking effect—the fact that joint returns tax the income of a secondary earner in a marriage (traditionally the wife) much more heavily than the income of the primary earner.²⁵² The stacking effect discourages wives from working outside the home, *in the case of wives who view themselves as secondary earners*.

249. Optimal tax theory attempts to determine normative tax rate structures by determining what rate structure maximizes social welfare under specified value judgments and empirical assumptions. *See id.* at 1945-58. The results are too sensitive to debatable value judgments and empirical assumptions, however, for optimal tax theory to establish the clear normativity of any particular rate structure.

250. Their assumption of the normativity of flatness on the deduction side implies flatness is also normative on the income side. *See Moran & Whitford, supra* note 11, at 774-75, 781.

251. *See id.* at 791-99.

252. *See* MCCAFFERY, *supra* note 2, at 11-85.

McCaffery finds marriage penalties less important than the stacking effect.²⁵³ But if, as Moran and Whitford's evidence suggests, black married women are generally *not* secondary earners, then from the point of view of the stacking effect it is *white* wives who are disproportionately harmed by joint returns.

The two arguments are not logically inconsistent. It is possible for joint returns to harm blacks in one way and to harm white women in another. The problem, again, is with the selection bias that permeates Moran and Whitford's analysis. Arguments that the tax laws are anti-black are explored in depth; equally plausible arguments pointing the other way are not.

Apart from the issue of selection bias, however, their analysis of the racial effect of marriage penalties is a good example of the kind of situation in which their approach may be politically effective. The joint return system is a bad idea on several grounds, quite apart from consideration of racial effects;²⁵⁴ mandatory separate returns would be better tax policy. The demise of a provision that is objectionable even apart from racial effects may be hastened by their demonstration that the provision is especially harmful to black couples.

C. *The Problems with the Solutions*

1. To Change Behavior or to Accommodate Behavior?

Even conceding, for the sake of argument, that Moran and Whitford have identified instances of troubling racial skewing in the Code, some of their solutions are also troubling. For example, they present evidence that black employees participate in 401(k) voluntary retirement savings plans at a rate lower than white employees, even controlling for income.²⁵⁵ The lesson they draw is that § 401(k) should probably be repealed.²⁵⁶ This is more a surrender than a solution. If the basic problem is that blacks do not save enough,²⁵⁷ changing the tax laws to make it harder for blacks to

253. See *id.* at 19 ("[T]he marriage penalty is *not* a major part of the story of taxing women generally.").

254. I advocate mandatory separate filing for married couples—for reasons unrelated to racial effects—in Zelenak, *supra* note 36.

255. See Moran & Whitford, *supra* note 11, at 787.

256. See *id.* at 790-91. They suggest that other forms of tax-favored voluntary retirement savings, including individual retirement accounts, also should be repealed. See *id.* at 791 n.140.

257. Moran and Whitford seem to agree with this diagnosis. See *id.* at 802.

save is not a helpful response. A better approach would be to retain tax incentives for savings (especially retirement savings), and to use education and exhortation to increase black response to those incentives. There appears to be growing interest among blacks in saving and investment strategies.²⁵⁸ Removing tax incentives for savings, at the very time a movement for increased black savings is gaining momentum, would be counterproductive.

The general question is whether the tax laws should be changed to accommodate black consumption patterns and low savings rates, when those patterns are of doubtful utility. Most of the time, including the example of § 401(k), Moran and Whitford favor accommodating current behavior. I disagree. Interestingly, even Moran and Whitford implicitly reject accommodation in one important instance. They point out that blacks hold a greater percentage of their wealth in personal-use cars and trucks than do whites.²⁵⁹ They find it ironic that this "one category of assets which blacks favor in their investment behavior, in comparison with white investment behavior, receives no tax benefits."²⁶⁰ The characterization of buying cars as "investment behavior" is dubious, and the statement that car ownership confers no tax benefit is incorrect—the imputed rental income produced by cars is tax-exempt. But what if this black-favored behavior really were uniquely tax-disadvantaged under current law (as Moran and Whitford suppose)? By the same logic that calls for the repeal of § 401(k), one would expect Moran and Whitford to call for some sort of new tax benefit for people whose major "investment" is a personal-use automobile. Yet they make no such proposal.²⁶¹ They do not explain the absence of a proposal, but a reason suggests itself. They probably believe it is not a good thing that blacks devote so high a percentage of their net worth to cars, and that tax laws designed to accommodate that behavior would do more harm than good. Why they do not

258. The unofficial spokesperson for the movement is Kelvin Boston, host of the PBS show "The Color of Money," and author of the popular book *KELVIN BOSTON, SMART MONEY MOVES FOR AFRICAN-AMERICANS* (1996) (urging blacks to save and invest and giving practical advice on how to do so). According to a recent national survey, middle class African-Americans report saving at almost as high a rate as other middle class Americans (11% versus 12%), but they tend to choose more conservative (and poorer-performing) investment vehicles. See *Ariel Mutual Funds Releases First National Investment Survey of African-Americans*, BUSINESS WIRE, Feb. 12, 1997, available in LEXIS, NEWS Library, CURNWS File.

259. See Moran & Whitford, *supra* note 11, at 770.

260. *Id.* at 780.

261. See *id.* at 779-83 (describing ways in which a "Black Congress" might change the taxation of wealth, and including no proposals relating to cars and trucks).

embrace accommodation in this case, while embracing it in most other cases (including retirement savings), I do not understand.

2. Solutions with Black Victims

After explaining how blacks are disproportionately burdened by the marriage penalty of joint returns, Moran and Whitford suggest three possible legislative solutions.²⁶² The solutions resemble those in much of the feminist tax policy literature, in that they are described only in broad outline, and their implications are not carefully explored. The first solution (which I favor even apart from the racial critique of joint returns²⁶³) is mandatory separate filing for spouses. But they go on to propose two alternate solutions, in case a "Black Congress"²⁶⁴ would want to encourage marriage by eliminating marriage penalties while preserving marriage bonuses.

The first alternate solution would give married taxpayers the choice of filing two returns as if they were single, or of filing a joint return, depending on which choice resulted in a lower tax liability.²⁶⁵ Solely from a black perspective, would this be desirable? Assuming no change in tax rate schedules, the result of the proposal would be a decrease in taxes paid by married couples as a group. Couples currently suffering a marriage penalty would reduce their taxes by filing separately, and couples currently enjoying a marriage bonus would have no change in their taxes. In addition to a drop in total tax revenues, this would mean single persons would bear a larger portion of the total tax burden. As Moran and Whitford themselves point out, single persons are disproportionately black.²⁶⁶ The appeal to a Black Congress of increasing the share of the tax burden imposed on a group disproportionately black is not readily apparent.

The second alternate solution would give married couples the same choice as the first, but would extend that choice of filing status to unmarried couples as well.²⁶⁷ In addition to having marriage bonuses without marriage penalties, the system would have cohabitation bonuses without penalties. This proposal would increase the portion of the total tax burden falling on the "truly single." Although it is impossible to count the truly single without

262. See *id.* at 798-99.

263. See Zelenak, *supra* note 36.

264. See Moran & Whitford, *supra* note 11, at 758 ("We have invented a metaphor of a Black Congress that is exclusively oriented to the interests of blacks as a group.").

265. See *id.* at 798-99.

266. See *id.* at 797 n.163.

267. See *id.* at 799.

knowing exactly how they would be defined for tax purposes,²⁶⁸ they are probably disproportionately black (because singles in general are disproportionately black). We do know that a major component of the truly single—and a group in especially difficult circumstances—is single mothers living with children under eighteen. Black women are hugely overrepresented in this category.²⁶⁹ Would a Black Congress really want to help couples—married and unmarried—at the expense of single parents?

VI. DOING IT RIGHT—A FEW EXAMPLES

It is possible to practice critical tax analysis without falling into the traps of one-sidedness and incomplete analysis. The feminist work of Grace Blumberg, and the more recent work by Patricia A. Cain and David L. Chambers on the tax treatment of same-sex couples, are good examples.

A. *Grace Blumberg and Sexism in the Code*

In her pioneering work of feminist tax analysis,²⁷⁰ Grace Blumberg is careful to distinguish between intended and accidental ways in which the tax laws discourage wives from working outside the home. She criticizes the joint return system for taxing wives' earnings at high marginal rates, but she is careful to explain that Congress did not adopt joint returns for the purpose of discouraging married women from working. She acknowledges the legitimate case for joint returns: "Aggregation of spousal income . . . is based on the indisputable economic unity of the family. Since resources are generally pooled by spouses, their ability to pay taxes is best measured in terms of family rather than individual income."²⁷¹

Where she does find evidence of sexist intent, she presents her case fairly and forcefully. At the time she was writing, the child care deduction available to a two-earner couple was phased out as their

268. See *id.* ("We do not know whether there are more black than white couples who are living together but unmarried and who would enjoy a marriage bonus if they did marry.").

269. In 1994, 60% of all black families with children under 18 were headed by a single mother. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995 tbl.72. The equivalent figure for white family groups was 21%. See *id.*

270. See Blumberg, *supra* note 1. In a recent appreciation of Blumberg's article, Edward McCaffery describes it as "pathbreaking." Edward J. McCaffery, *Tax's Empire*, 85 GEO. L.J. 71, 147 (1996). McCaffery and I are both at some pains to avoid the obvious, yet singularly inappropriate, adjective.

271. Blumberg, *supra* note 1, at 52.

adjusted gross income exceeded \$6000; Blumberg demonstrates that the phase-out was motivated by a congressional belief that "a married mother with a husband capable of support will not or should not work unless her income is absolutely necessary to provide for basic family needs."²⁷²

She does not simply note the difference in the motives underlying the two provisions; she insists on the significance of the difference: "The [child care deduction] income limitation can profitably be contrasted with spousal aggregation. Aggregation, while tending to act as a work deterrent for secondary earners, is supported by the clearly legitimate legislative goal of taxing each economic unit according to its ability to pay."²⁷³ This difference makes a difference in her proposed reforms. She has no patience with the sexist intent behind the income limitation on the child care deduction; in addition to calling for its repeal,²⁷⁴ she argues it is unconstitutional.²⁷⁵ Because she views joint returns as serving a legitimate and important purpose, however, she is open to the possibility of retaining joint returns—as long as their effect on wives' work decisions is ameliorated by other reforms, such as an earned income allowance and expanded deductibility of child care expenses.²⁷⁶

Blumberg's is the right way to think about Code provisions with adverse impact on women, racial minorities, and other disadvantaged groups. First, 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.²⁷⁷ The best balance may or may not involve repeal of the offending provision.

My point is not that Blumberg is necessarily right in accepting the continued existence of joint returns.²⁷⁸ The point is that her

272. *Id.* at 71.

273. *Id.* at 74.

274. *See id.* at 78-79, 95.

275. *See id.* at 72-74.

276. *See id.* at 54, 58. In her very brief conclusion, she calls—without explanation—for abandonment of joint returns in favor of "individual taxation for all wage earners." *Id.* at 95. This is inconsistent with the analysis in the rest of the article, which indicates retention of joint returns would be acceptable if other reforms were adopted.

277. Blumberg's interest in the details of practical reform is also demonstrated by her careful examination of how the tax laws of several other countries affect working wives, *see id.* at 80-88, and by her draft of a proposed revision of the child care deduction, *see id.* at 96-98.

278. Actually, I do not consider taxing spouses as an economic unit as important a goal

careful analytical approach is more likely to result in reasonable—and politically feasible—reform proposals than the one-sided analyses and inadequately considered proposals typical of the subsequent critical tax literature.

B. Same-Sex Couples and the Tax Laws

More recent examples of careful critical tax analysis can be found in articles on the tax treatment of same-sex couples. If one wants to feel aggrieved by the Internal Revenue Code on behalf of same-sex couples, it is easy to make a list of situations in which married couples receive better tax treatment than same-sex couples. Same-sex couples cannot enjoy the marriage bonus that sometimes comes with joint returns, and they cannot take advantage of the provisions which exempt transfers between spouses from income tax and estate and gift tax.²⁷⁹ In addition, many fringe benefits which would be tax-free if received by an employee's spouse are taxable if received by an employee's unmarried partner.²⁸⁰ Some commentators make such a list and complain of the unfairness to same-sex couples.²⁸¹

But other commentators—most notably Patricia A. Cain²⁸² and David L. Chambers²⁸³—are too careful to commit a selection bias error. They note that for tax purposes marriage is a bundle of benefits and burdens. Married couples cannot recognize a loss on a transfer of property between them, married couples are subject to various disadvantageous attribution rules, and, most important, joint returns often result in marriage penalties.²⁸⁴ Chambers goes so far as

as does Blumberg. See Zelenak, *supra* note 36, at 358-63 (arguing that elimination of marriage penalties and bonuses is more important than equal tax on equal income couples).

279. See I.R.C. § 1041 (West Supp. 1998) (no recognition of gain or loss on transfers of property between spouses); *id.* § 2056 (estate tax marital deduction); *id.* § 2523 (income tax marital deduction).

280. See *id.* § 132(h)(2) (miscellaneous fringe benefits); *id.* § 117(d)(2)(B) (qualified tuition reductions). The most important example is health insurance. Oddly, the spousal limitation on the exclusion for employer-provided health insurance appears only in the regulations. See Treas. Reg. § 1.106-1 (1997).

281. See, e.g., Chase, *supra* note 12, at 361 (stating that "the generous provisions offered by the Code [to married couples] . . . include the right to file joint returns," with no mention of the fact that joint returns often result in marriage penalties); Hayes, *supra* note 12, at 1600 (noting the possibility of marriage penalties, but asserting without evidence that "for most taxpayers, the financial benefits of married status far outweigh the cost of the marriage penalty").

282. See Cain, *supra* note 12.

283. See Chambers, *supra* note 12.

284. See Cain, *supra* note 12, at 98-99; Chambers, *supra* note 12, at 475.

to speculate that joint returns might be especially *unfavorable* to same-sex couples.²⁸⁵ Most two-earner couples are disadvantaged by joint returns, and same-sex couples are likely to have two earners.

Having noted this bundle of burdens and benefits afforded marriage by the tax laws, Cain and Chambers have different responses. Chambers suggests that there is residual discrimination against same-sex couples because, unlike heterosexual couples, they cannot choose between married and unmarried tax regimes: "[T]he opportunity for legal marriage, at the very least, provides a choice to opposite-sex couples whether to marry or not, a choice from which lesbian and gay couples could benefit for the same sorts of reasons."²⁸⁶ By focusing on the question of choice, Chambers constructs a reasonable argument that there is a tax bias against same-sex couples, even if most same-sex couples receive better tax treatment as unmarried cohabitants than they would as spouses. This is a thoughtful and sophisticated version of the usually naive argument that same-sex couples are harmed by not being able to file joint returns.²⁸⁷

Cain takes a principled position that same-sex and opposite-sex couples are similarly situated for tax purposes, and that if joint returns are appropriate for married heterosexual couples, they are also appropriate for equally committed same-sex couples—regardless of whether the effect is to increase or decrease the tax liabilities of same-sex couples.²⁸⁸ She does not, however, argue at length for a goal that is politically unrealistic (at least in the short term). Instead, she identifies the most serious tax problems facing same-sex couples, and proposes more politically feasible solutions tailored to those problems.

The most serious problem is the possibility that income earned by one partner, and used to support the other partner, may be taxable income to both partners. For this problem, she advances a solid

285. See Chambers, *supra* note 12, at 475.

286. *Id.* at 476.

287. There is, however, a subtle response to Chambers's argument. Personal morals or social pressures may make the unmarried cohabitation option illusory for many married couples, no matter how much less tax they would pay if unmarried. If same-sex marriage were legally recognized for tax and other purposes, same-sex couples might find their choice of tax status illusory if personal morality or social pressure forced them to marry. The point is that choosing to marry has important non-tax consequences that may deprive the couple of a *tax* choice; being taxed as married or unmarried is not the equivalent of check-the-box classification of business organizations. See Treas. Reg. § 301.7701-3(c) (as amended in 1997).

288. See Cain, *supra* note 12, at 102, 130-31.

technical argument that current law can and should be interpreted not to tax the supported partner.²⁸⁹ The second problem Cain addresses is that even if income earned by one partner and used to support the other partner is not double taxed under current law, it is taxed at the higher marginal rate of the supporting partner. For this problem, Cain proposes a narrow legislative solution—either taxing support payments only to the supported spouse, or allowing the supporting spouse an increased dependency exemption.²⁹⁰ Cain's focus on solutions rather than on complaints, and her interest in the politically possible, distinguish her work from much of the critical tax policy literature.

VII. CONCLUSION

Even if a reader agrees with every specific criticism I have made, she may still question whether I have established any broader point about critical approaches to tax policy. Some critical tax analysis is impressive—including the pioneering work of Grace Ganz Blumberg, the recent feminist efforts of Anne Alstott and Edward McCaffery,²⁹¹ and the recent work on the taxation of same-sex couples by Patricia Cain and David Chambers. And critical tax analysts certainly have no monopoly on one-sided analysis or inadequately considered reform proposals. Is there really anything special about the faults of the critical tax literature? Although I cannot offer definitive proof, I believe there is something special—that problems of one-sidedness and incomplete analysis are more common in the critical tax literature than in the general academic tax policy literature.

If that is true, *why* is it true? One reason may be that participants in the critical tax project do not approach the tax laws in a detached and disinterested frame of mind. In their introduction to *Taxing America*, Brown and Fellows present “those interested in joining in this project” with “the challenge of . . . uncovering bias and discrimination in the tax law.”²⁹² Within the critical tax movement, there is a reward for examining a tax provision and finding it guilty of hidden discrimination; there is no reward for discovering a provision is innocent.

In reading much of the critical tax literature, one comes away

289. See *id.* at 114-16.

290. See *id.* at 118-23.

291. I say this despite the fact that McCaffery and Alstott disagree more often than they agree. See Alstott, *supra* note 4, at 2033-42 (providing a detailed analysis and criticism of McCaffery's proposal to reduce marginal tax rates on wives).

292. Brown & Fellows, *supra* note 13, at 20-21.

with the impression the authors set out on the sort of search for hidden discrimination called for by Brown and Fellows. In the case of Moran and Whitford, they acknowledge as much.²⁹³ By contrast, in reading Blumberg, Chambers, and Cain, one has the impression that the problems they address came naturally to their attention. Although Blumberg does not explain how the income tax work disincentives for wives came to her attention, she comments that "[a]ny wife contemplating work or actually working will compare her disposable income (after taxation without exemptions at her husband's marginal rate) with the additional expenses incurred because of her daily departure from the home."²⁹⁴ This suggests the work disincentives of the tax system presented themselves to her in the course of her consideration of the work decisions of married women, and not that she went looking for sexism in the Code.²⁹⁵ With Chambers and Cain, there is even more clearly no search for hidden discrimination. A same-sex couple could not help but notice they do not file joint returns like their married friends.

It is probably not a coincidence that the stronger analyses tend to be in articles where the authors did not set out looking for hidden discrimination. While it is certainly possible that a search will find legitimate grievances, the nature of the project creates a great danger of unfounded complaints and poorly considered reform proposals. This problem is not unique to critical tax theory²⁹⁶—other tax academics also have axes to grind—but it seems especially pervasive here.

The biggest problem, however, is that almost no one is engaging critical tax theorists in the scholarly dialogue needed in order to test their arguments and proposals.²⁹⁷ Those outside the movement have

293. See Moran & Whitford, *supra* note 11, at 753-55.

294. Blumberg, *supra* note 1, at 89.

295. Certainly she did not have to hunt much for the discrimination against working wives then embodied in the income limitation on the child care deduction; the discriminatory intent behind the provision is hard to miss. See *id.* at 70-72. In a sense, it was easier for Blumberg to make the important distinction between intended and unintended anti-feminist effects of tax legislation because she was faced with an example of a clearly intended effect. More recent commentators have seldom had that "luxury."

296. "Scholarship is expected to be original, and defense of the conventional wisdom provides few opportunities for brilliance. The professor seeking scholarly recognition is well-advised to steer away from the true but trite, in favor of the false but novel." Daniel A. Farber, *Gresham's Law of Legal Scholarship*, 3 CONST. COMMENTARY 307, 310 (1986).

297. This problem also is not unique to the critical tax literature. "In law, unlike some other fields, it is rare for a professor to attack a colleague's work in print. Such attacks, when they occur at all, are likely to be restrained and extremely polite." *Id.* at 310-11 (footnote omitted).

simply ignored it, while those within have mostly chosen support at the expense of discussion and debate.²⁹⁸ This is understandable, given the small size and outsider status of the movement.²⁹⁹ What is needed now is vigorous discussion among those both within and outside the critical tax movement. Two articles published in 1996—by Nancy Staudt and Anne Alstott³⁰⁰—are encouraging signs of the beginning of debate within the movement. I hope this article—by someone outside the movement but sympathetic to some of its goals—will expand the dialogue.

Not that long ago, a leading commentator on taxation of the family could confidently write, "If a married woman, because of a stereotyped view of marriage, views herself as the marginal worker, we might bemoan the social conventions that have encouraged that perspective, but we have no cause for complaint against the tax system."³⁰¹ It is the great accomplishment of the feminist branch of critical tax analysis that the days of such rarefied formalism are gone forever. With the growing influence of critical analysis—and with its potential to affect the development of the tax laws—comes responsibility. That responsibility is to examine more carefully which criticisms of current law are legitimate, and to consider more thoroughly which proposed reforms would have the desired effects. That should be the next step in the development of a new kind of tax policy analysis.

298. I develop this point more fully in Lawrence Zelenak, *Feminism and "Safe Subjects Like the Tax Code,"* 6 S. CAL. REV. L. & WOMEN'S STUD. 323 (1997).

299. Brown and Fellows suggest this when they write that workshops and conferences "brought together a group of tax scholars in which each of us who previously felt isolated by the traditional tax analysis that dominated the legal literature and tax conferences now have found intellectual kinship." Brown & Fellows, *supra* note 15, at vii-viii.

300. See Staudt, *supra* note 8, at 1605-14 (arguing that tax reform to benefit homemakers is a more important feminist issue than the repeal of joint returns); Alstott, *supra* note 4 (devoting entire article to consideration of the merits—from a feminist perspective—of various feminist tax reform proposals).

301. Michael J. McIntyre, *Individual Filing in the Personal Income Tax: Prolegomena to Future Discussion*, 58 N.C. L. REV. 469, 484 (1980). Earlier, McIntyre had co-authored Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573 (1977).