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THE PAST, PRESENT, AND FUTURE OF CRITICAL TAX THEORY: A CONVERSATION

Karen B. Brown and Mary Louise Fellows with Bridget J. Crawford

INTRODUCTION (*Bridget J. Crawford*)

The publication of *Taxing America* in 1997 is a key milestone in the development of critical tax theory as an intellectual discipline. By identifying and bringing together lawyers and scholars with an interest in the political and discriminatory aspects of tax law, Professor Karen B. Brown and Professor Mary Louise Fellows created one of the first—if not the first—working group of critical tax theorists.¹ The significance of *Taxing America* is underappreciated both by self-identified critical tax scholars and by others. A published history of the “Critical Tax Conference” notes its antecedents in conferences held in 1995 and 1997, but makes no mention of *Taxing America*.² This essay endeavors to document and to preserve the story of the book’s origins, its reception, and the significance of its themes.

In May 2012, I invited Karen and Mary Lou to meet with me to talk about their work on *Taxing America*. This essay grew out of these conversations. Karen and Mary Lou jointly wrote Parts I, II, and III. In Part I, they reflect on the book’s intellectual antecedents and its material creation. In Part II, they describe the book’s reception and influence. In Part III, they consider the future of critical tax theory and predict its robust future.

¹ See CRITICAL TAX THEORY: AN INTRODUCTION (Anthony C. Infanti & Bridget J. Crawford eds., 2009).

² See, e.g., *History of the Critical Tax Conference*, SETON HALL UNIV. LAW SCH., http://law.shu.edu/About/News_Events/taxconference/index.cfm (last visited Dec. 1, 2012).

I. HISTORY OF *TAXING AMERICA*
 (Karen B. Brown and Mary Louise Fellows)

Our engagement with critical tax theory owes a substantial debt to the Society of American Law Teachers (SALT). In 1993 and 1994, SALT held several teaching conferences to assist and support law professors who wanted to inject anti-discrimination issues into the traditional law courses that they taught.³ By then, a significant number of legal academics had started to publish scholarship and teach specialized seminars using feminist legal theory and critical race theory. SALT was challenging all of us to go further and integrate these methodologies throughout the curriculum. Economic analysis had achieved a stronghold in many law school courses. The challenge SALT asked us to consider was whether critical theories could gain equivalent widespread acceptance in classrooms and published casebooks. For us, the SALT-sponsored conferences provided a welcome arena at the precise time that we became uneasy about continuing to teach and research within the parameters of traditional tax theory. Through long and short confabs in the hallway or over tea, we both were starting to appreciate how a number of topics in the basic income tax course had significant class, gender, and race implications. Karen carried that same approach into her thinking about international tax and Mary Lou did the same with her own interest in wealth transfer taxes. The SALT conferences gave us not only the opportunity to test our embryonic ideas, but they also allowed us to forge intellectual kinships with tax scholars committed to similar research and teaching agendas.

Richard Delgado and Jean Stefancic also deserve recognition for the important role they played in the development of critical tax theory. In 1994, when the Republican Congress's "Contract with America" generated interest in tax reform, Richard Delgado called Mary Lou to see if she would like to participate in the newly launched *Critical America* series, which he and Jean were editing for New York University Press. He emphasized that

³ SALT Teaching Conference: Diversity in the Law School Curriculum (Minneapolis, MN, Sept. 23–24, 1994); SALT Teaching Conference: Reimagining Traditional Law School Courses: Workshops Integrating Class, Disability, Gender, Race, and Sexual Preference and Other Issues of Social Concern into Teaching and Course Materials (Santa Clara, CA, Oct. 29–30, 1993); SALT Teaching Conference: Reimagining Traditional Law School Courses: Workshops Integrating Class, Disability, Gender, Race, and Sexual Preference into Our Teaching and Course Materials (New York, NY, May 22–23, 1993).

he hoped that an anthology injecting anti-subordination theory into tax analysis could be a catalyst for changes in tax policy, tax scholarship, and law school tax courses. What Richard and Jean proposed presented an exceptional opportunity for a small band of critical tax theorists to have their work published in a prominent press. Mary Lou knew from the outset that the project needed Karen's insights and creative energy. Richard and Jean enthusiastically agreed that the two of us could serve as co-editors of an anthology that early on acquired the title *Taxing America*.

Karen and Mary Lou quickly gathered a group of contributors who represented a wide range of experiences and intellectual interests. Notably they included tax practitioners as well as academics that had not written in the tax area, but had a deep understanding of the power and potential of the federal tax law to affect social policy. By seeking those with a commitment to integrate traditional tax theory and anti-subordination principles, we were able to assemble an exceptionally diverse group. These scholars greatly appreciated a friendly forum to pursue unconventional theses and approaches to tax law. *Taxing America*, thanks to Richard and Jean, gave each of them the freedom to challenge current tax laws and policies with the assurance, particularly important to young academics, that it would lead to a prestigious publication.

As we were working with our contributors about the contours of their chapters, Nancy Staudt organized a workshop on critical tax at the New York State University at Buffalo in the early fall of 1995. Nancy had attended one of the SALT conferences and wanted to create yet another opportunity for tax scholars to share their ideas about traditional tax theory and challenges to it. That successful workshop helped us to identify new research paths as well as more scholars who wanted to contribute to *Taxing America*.

The workshop further demonstrated, at least in the early development of a new critical methodology, how much frank and creative interchange can enhance individual projects. It became the impetus for us to bring all our contributors together later that fall to the University of Minnesota.⁴ Before arriving at this conference, contributors received drafts of

⁴ The conference titled *Taxing America: A Conference on the Social and Economic Implications of Tax Reform* took place on November 3–5, 1995, thanks to the generous support of the University of Minnesota Law School and the Center for Legal Studies.

everyone's chapters. Each of them had the opportunity to make a short presentation of his or her chapter and engage with others for an extended period of time about the chapter's central themes, directions for further research, and how the chapter related to others' work. The gathering met all our expectations and more. Discussions stayed focused and intense because everyone had a significant stake in the project as a whole. This format, where all the participants are exploring similar methodologies for a book in which each person's work enhances and is enhanced by the scholarship of the others, has not since been replicated.

Yet, more needs to be said about the history of *Taxing America*. It did not just start with SALT conferences, Contract with America, or a phone call from Richard Delgado. Early writings, which in retrospect fall within what everyone currently refers to as critical tax theory, had influenced our initial thinking, including articles by Grace Blumberg, Patricia A. Cain, and Marjorie E. Kornhauser.⁵ We attribute much of our earliest collaborative efforts, however, to Beverly Moran.⁶ Through her writings, presentations, and informal discussions, she encouraged us to consider approaches that stripped the tax law of its claim of objectivity, held it accountable for its social and economic impact on traditionally subordinated groups, and provided tax strategies that undermined, rather than reinforced marketplace discrimination. Without the work of these path-breaking scholars and the shared efforts of the contributors, *Taxing America* could not have happened.

II. RESPONSES TO TAXING AMERICA

(Karen B. Brown and Mary Louise Fellows)

Taxing America emerged at a time when tax theorists were beginning to uncover hidden biases in the tax code along a broad spectrum of measures, including issues of class, disability, gender, heteronormativity, and race. Following the 1996 publication of *Taxing America*, several anthologies acknowledged the role and importance of critical tax theory to

⁵ Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971); Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991); Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987).

⁶ Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996).

mainstream tax scholarship. Paul Caron, Karen Burke, and Grayson McCouch published their 1997 *Federal Income Tax Anthology*, which devoted one of eight parts to class, gender, and race issues. Two of the *Taxing America* chapters were excerpted in their book. Michael Graetz's 2003 *Foundations of International Income Taxation*, in an apparent nod to *Taxing America*, contained a section devoted to developing country issues, a topic largely unexplored in traditional international tax scholarship before the publication of *Taxing America*. In 2009, Anthony Infanti and Bridget Crawford published *Critical Tax Theory: An Introduction*, an anthology that took a global perspective as it considered issues of class, disability, gender, race, and sexual orientation. It included subsequent works by most of the *Taxing America* contributors. *Beyond Economic Efficiency*, a collection of essays edited by David Brennen, Karen Brown, and Darryl Jones, to be published in 2013, owes its intellectual origins to *Taxing America*. Almost all of the *Taxing America* contributors have continued to produce tax scholarship that uncovers and seeks to disrupt a variety of features in the tax law that exacerbate the subordination of economically vulnerable groups. The seeds planted in *Taxing America* apparently have nourished a younger cohort of scholars, including Bridget Crawford, Allison Christians, Anthony Infanti, Shari Motro, and Adam Rosenzweig, to name only a few. That their work builds upon the foundation laid in 1996 was brought home to us at a tax conference when one young scholar suggested that we were among the “grandmothers” of the critical tax movement (along with Blumberg, Cain, Kornhauser, Moran, and others) whose path-breaking work had opened her eyes to a mode of analysis that enabled a social justice critique of tax law, particularly regarding the impact of tax policy on emerging nations with substantial populations of color.

This is not to suggest that *Taxing America* was heralded in all quarters. A critical tax theory seeking to uncover the ways in which tax law exacerbates discrimination already embedded in society was a radical affront to some. Most notably, Lawrence Zelenak organized a law review issue devoted to critical tax theory. His lead article, expressing offense by what he perceived as an effort to read an evil intent⁷ into ostensibly neutral

⁷ Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1523 (1998) (stating that “[t]he first problem is an overeagerness to accuse the tax laws of hostility to women or blacks”). In his article, Zelenak took on essays published in *Taxing America* as well as other works. Only two *Taxing America* contributors published articles in the issue and only one (Moran) responded to Zelenak’s critique.

tax laws in selected essays published in *Taxing America* and other works, undertook to discredit gender- and race-based analysis by purporting to take “feminist and other critical tax policy analysis seriously—more seriously than its proponents have taken it in many cases.”⁸ He, and others, took issue with the “methodology” employed by critical tax scholars, suggesting that some of the approaches did not constitute sufficiently rigorous work. Yet, the biased assumptions embedded in this critique exposed its limitation. In pointing to one allegedly “pro-black” tax provision, Zelenak concluded, without offering any support, that earned income tax credit benefits “*seem[] likely* [to] go disproportionately to blacks.” In addition, he concluded, again without evidence, that “[t]he exclusion from income of welfare-type benefits *probably* disproportionately favors blacks.”⁹ This type of unsubstantiated claim that a genre of scholarship lacks rigor, while offering no independent authority other than self-proclaimed assertions about probability or suspicion, suggests that the matters uncovered by critical tax analysis evoke a visceral reaction that in some cases blocks intellectual engagement.¹⁰

There is a predictable aversion to the notion that tax law contributes to the subordination of women, people of color, and other marginalized groups. Moreover, when a large majority of the proponents of such an analysis are themselves members of subordinated groups, viewed perhaps as biased and outside of the mainstream (and suspect in a way that members of the majority and mainstream are not), unorthodox views find a reluctant

⁸ *Id.* at 1526. Marjorie E. Kornhauser in *Through the Looking Glass with Alice and Larry: The Nature of Scholarship*, 76 N.C. L. REV. 1609, 1611 (1998), described the law review issue as follows: “[T]he Symposium can hardly be viewed as a conversation among equals when the agenda is set and dominated by one person, that person devotes a long article to criticizing this mode of scholarship, and the respondents have only a short space in which to reply.”

⁹ Zelenak, *supra* note 7, at 1568 (emphasis supplied); *see also* James D. Bryce, *A Critical Evaluation of the Tax Critics*, 76 N.C. L. REV. 1687, 1687–88 (1998) (stating that “it is odd to see blacks and women, who view themselves as disadvantaged, attacking the income tax. . . . [T]he economically disadvantaged receive the benefits of general governmental benefits such as national defense and federal courts while paying only a small part of the cost of these benefits. In addition, a substantial part of the income tax revenue is used for explicitly redistributive measures . . .”).

¹⁰ Kornhauser noted this phenomenon as follows: “Zelenak’s article, in fact, reveals a misunderstanding not only of the articles he critiques and of critical tax theory more generally, but also of the very nature of scholarship. There can be numerous explanations for his misconceptions . . . which arise from a failure to understand conclusions based on the different life experiences of a person of a different gender, or similarly race-based misunderstandings.” Kornhauser, *supra* note 8, at 1611.

audience.¹¹ This, perhaps, accounts for a reception that claims it is using neutral and objective factors to evaluate critical tax theory at the same time that it steadfastly refuses to recognize the new analytical framework as intellectually legitimate.

III. THE FUTURE OF CRITICAL TAX THEORY

(Karen B. Brown and Mary Louise Fellows)

Critical tax theory has a precarious hold in legal scholarship. Most critical theorists, Richard Delgado and Jean Stefancic notwithstanding, have all but ignored the work because they have little familiarity with the technical aspects of tax law. Many tax scholars have ignored the work because they have little familiarity with the broad spectrum of critical literature relied upon by critical tax theorists. In addition, just as critical tax theory was developing, tax law and those who taught it were losing stature at many law schools, particularly elite ones. Today, many law professors view the study of tax primarily as a technical exercise and fail to appreciate the role of tax in our society. They all but ignore its potential to further social justice rather than to reinforce social injustice because most nontax scholars erroneously believe tax law's technical rules chiefly are designed to achieve nonbiased and objective purposes.

Yet, the work goes on. Today's vital, tenacious, and energetic community of critical tax theorists demonstrates the strength of the methodology. Organizers have held a critical tax conference continuously since 2000 and membership of the group keeps growing. In fact, a hallmark of the conferences is the supportive space it provides to new participants to present and to seek collaborations. In more recent years, yet another annual conference has emerged thanks to the leadership of Dorothy A. Brown. These gatherings currently named "Critical Perspectives on Tax Policy Workshops" focus exclusively on issues of "race, ethnicity or immigration status, socio-economic status, gender or gender identity/expression, sexual orientation, family status, or disability."¹² In contrast, the longer running Critical Tax Conference has intentionally encouraged a focus beyond the

¹¹ Of the 15 Taxing America contributors and editors, 12 are women and 7 are people of color.

¹² See *Call for Papers: Critical Perspectives on Tax Policy Workshop*, TAXPROF BLOG (May 29, 2012), http://taxprof.typepad.com/taxprof_blog/2012/05/call-for-papers-.html.

anti-subordination principle that initially drove critical tax theory. Its organizers have encouraged attendance of all tax scholars who are interested in cross-disciplinary work and in the identification of a broad range of hidden biases, influences, and unintended effects of the law or proposed reforms to it. Additionally, for a number of years, Neil H. Buchanan has worked hard to give critical tax theory a prominent presence at Law and Society's annual meetings. His efforts encourage cross-disciplinary dialogue and provide yet another forum for critical tax theorists to get feedback on their work. All three of these annual gatherings signal the continuing enthusiasm for and scholarly depth of the critical tax movement. Add to this intellectual interaction an array of published work and it is easy to argue that critical tax theory has a bright future.

Nevertheless, after nearly twenty years, critical tax theory has made few inroads into traditional tax enclaves. With only a few exceptions, policy makers ignore the work of critical tax theorists and have not embraced the anti-subordination principle as essential to the evaluation of any proposed tax reform. Casebooks on taxation, whether having to do with income, wealth transfers, international, or entity taxation, have changed considerably over the last twenty years, but, with few exceptions, authors of the leading texts generally have not injected critical tax theory into their pedagogical approaches. The next generation of tax practitioners and policy makers are able to appreciate the explanatory power of critical tax theory only if they happen to have a professor who extends and challenges these basic texts. Now that there is a well-defined group of critical tax theorists and a significant body of scholarship, perhaps the time has come to organize ourselves at one of the annual conferences to focus on strategies to influence tax policy and classroom content. The possibilities for success seem greater than ever if we can harness social networking and developments in digital pedagogy.

CONCLUSION

(Bridget J. Crawford)

Until taxation is understood as an integral part of a comprehensive social justice movement, critical tax theory will remain an academic enterprise. And even as an academic enterprise, I suspect that it is straying too far from a commitment to considerations of class, disability, gender, race, sexual orientation, and other so-called "outsider" perspectives to retain much intellectual coherence as a discipline. In this sense, I am less

sanguine than Karen and Mary Lou about the future of critical tax theory. Where they see a “vital, tenacious, and energetic community of critical tax theorists,” I fear widespread (and perhaps diluted) liberal interests united by a commitment to *anything other* than a consumption tax. To be sure, this commitment is often compatible with an approach that places the concerns of the least advantaged members of society at the center of the tax analysis. But the liberal commitment is not the same as the progressive one. There is much real, exhausting work still to be done to unmask the discriminatory bias in the tax law. For those doing the work, books like *Taxing America* are the lodestars. Thank you, Karen and Mary Lou.