

FEMINISM AND “SAFE SUBJECTS LIKE THE TAX CODE”

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At two points in *Taxing Women*,¹ Edward McCaffery presents himself as a sort of feminist Byronic hero (if such a thing is possible), persevering against “[o]pposition . . . from all quarters”² to expose the gender biases of tax. From the right, he is suspected of currying favor with the politically correct crowd.³ From the left, he is told he is wasting his time trying to reform a hopelessly corrupt system.⁴ And men who write from a feminist perspective are objects of suspicion, perhaps to both sides.⁵ Despite repeated encounters with hostile scholars, McCaffery reports that he “continued to believe in [his] story, and . . . remained true to it throughout.”⁶ Although he tells all this with a certain amount of irony—he suggests a young Jimmy Stewart might play McCaffery in the movie version⁷—he also clearly means it.

At first reading, McCaffery’s tale of adversity is not easy to credit. After all, he is a tenured professor at a leading law school, and his three major works of feminist tax analysis have been published by a prestigious university press and two prestigious law reviews.⁸ Nor is McCaffery the only scholar who has succeeded in publishing feminist tax scholarship (and closely related critical race theory tax scholarship) with prestigious journals and presses. At a time when leading

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1. EDWARD J. McCAFFERY, *TAXING WOMEN* 165-67, 281-82 (1997) [hereinafter *TAXING WOMEN*], reviewed in Lawrence Zelenak, *Tax and the Married Woman*, 70 S. CAL. L. REV. 1021 (1997).

2. *TAXING WOMEN*, *supra* note 1 at 281.

3. *See id.* at 165.

4. *See id.* at 281.

5. *See id.* at 166.

6. *Id.* at 167.

7. *Id.*

8. Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595 (1993); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Gender Bias in the Code*, 40 UCLA L. REV. 983 (1993).

law reviews publish few tax articles of any kind,⁹ a substantial portion of the tax articles which have appeared in top journals are feminist.¹⁰ In addition, a major university press has just published *Taxing America*, a collection of essays whose stated purpose is “to change the tax discourse to include issues of disability discrimination, economic exploitation, heterosexism, sexism, and racism.”¹¹ It hardly seems, from this record, that those making feminist and other left-liberal critiques of the tax laws must struggle to be heard.

On reflection, however, McCaffery's story rings true.¹² Not surprisingly, those at the top of the tax law professor hierarchy are overwhelmingly white men. It is simply a fact that ideas cannot be taken seriously by tax academia, as it is now constituted, unless those ideas are taken seriously by white men. And it seems as if feminist tax analysis has barely dented the consciousness of most of those men. With the exception of McCaffery, all the feminist tax articles in leading journals have been written by women.¹³ Of the fourteen contributors to *Taxing America*, only three are men, and only one is a white man. Moreover, none of the three essays by men is feminist. Apparently men, except for McCaffery, just say no to feminist tax analysis.

The male response to the feminist tax project has been silence—a silence more dismissive than criticism.

At the same time the academic tax establishment is ignoring feminist work, feminist tax analysis is being ignored—in a subtler sense—even within the movement. There is very little dialogue in print among feminist tax scholars analyzing the strengths and weaknesses of

9. William J. Turner, *Federal Income Tax Anthology*, 74 TAX NOTES 1343, 1345 (1997) (reviewing PAUL L. CARON ET AL., FEDERAL INCOME TAX ANTHOLOGY (1997)).

10. In addition to McCaffery's own work, *supra* note 8, feminist articles include: Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001 (1996); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1 (1980); Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996). Critical race tax analysis appears in Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751.

11. TAXING AMERICA 2 (Karen B. Brown & Mary Louise Fellows eds., 1996).

12. Which is not to say McCaffery makes a very compelling object of sympathy. He concedes he “cannot ultimately complain about [his] personal academic good fortune.” TAXING WOMEN, *supra* note 1, at 165.

13. See *supra* note 10. If I have missed any other feminist tax articles by men, my apologies.

one another's work (although two articles published in 1996 give reason to hope a dialogue may be beginning).¹⁴ Ironically, this unwillingness to criticize from within is a different way of not taking feminist tax analysis seriously. Reluctance to criticize from within is certainly understandable. Given the small size and outsider status of the movement, support may seem more important than criticism. The editors of *Taxing America* suggest this when they report that a series of workshops and conferences "brought together a group of tax scholars in which each of us who previously had felt isolated by the traditional tax analysis that dominated the legal literature and tax conferences now had found intellectual kinship."¹⁵

Actually, these scholars would have good reason to feel doubly marginalized, in much the same way McCaffery describes his own situation. Their interest in feminism and critical theory puts them on the fringe of tax scholars, while their interest in the technicalities of tax puts them outside the mainstream of feminist legal scholars. McCaffery notes the latter problem when he describes *Taxing Women* as "a sort of wake-up call for feminists to pay more attention to large socio-economic systems like tax."¹⁶

The assumption that tax is of no concern to feminists is nicely illustrated by a survey of feminist and other "outsider" legal scholars which asked "whether a colleague had ever suggested the author refrain from writing about critical theory or feminism but write instead about safe subjects like the tax code."¹⁷ The question assumes that there is nothing of interest to feminists in "safe subjects like the tax code."

As one would expect of any body of scholarship, and especially of scholarship in an emerging field, the quality of feminist tax scholarship varies widely. In itself that is not a problem. What makes it a problem, however, is that the usual method of winnowing—critical analysis of scholarship in print—is not working very well. Those outside the movement have chosen to ignore it rather than begin a debate, and those within have chosen support at the expense of debate. What feminist tax analysis needs now is to be taken seriously within the

14. Alstott, *supra* note 10; Staudt, *supra* note 10.

15. *TAXING AMERICA*, *supra* note 11, at vii-viii.

16. *TAXING WOMEN*, *supra* note 1, at 7.

17. Jean Stefancic & Richard Delgado, *Outsider Scholars: The Early Stories*, 71 *CHI.-KENT L. REV.* 1001, 1006 (1996).

academy, which means there needs to be a discussion about both feminist objectives and the ability of tax reform to achieve those objectives. In my review of *Taxing Women*,¹⁸ and in my earlier article on the tax treatment of marriage,¹⁹ I have tried to do that—to join in debate with McCaffery and other feminist tax scholars from the point of view of someone sympathetic to the feminist movement but not wholly identified with it. McCaffery's book is an invitation to discussion; I hope many tax scholars—feminist and non-feminist—accept that invitation.

Incidentally, feminist tax scholarship provides a good case study in the value of student-edited law reviews. The paradox that feminist tax analysis can succeed so well in law review placement, and yet be so shut out by the tax academic establishment, is explained by “the most remarkable institution of the law school world”²⁰—the student-edited law review. Student editors are open to feminist approaches to tax, even if most of their tax professors are not.²¹ Defenders of the student-edited law review model have claimed, as one of its major virtues, that student editors are “less dominated by ‘methodological and intellectual orthodoxies’ than peer review journals in some disciplines seem to be.”²² This virtue has attendant vices—student editors are more likely to be seduced by mere faddishness,²³ and they are less

18. Zelenak, *supra* note 1.

19. Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994).

20. Earl Warren, *Messages of Greeting to the U.C.L.A. Law Review*, 1 UCLA L. REV. 1 (1953).

21. TAXING AMERICA's route to publication bypassed the tax academic establishment in a different way. It is part of a series called “Critical America,” edited by Richard Delgado and Jean Stefancic, which takes a “critical” approach to analyzing many areas of the law.

22. Wendy J. Gordon, *Counter-Manifesto: Student-Edited Reviews and the Intellectual Properties of Scholarship*, 61 U. CHI. L. REV. 541, 545-46 (1994) (quoting K.R. ST. ONGE, *THE MELANCHOLY ANATOMY OF PLAGIARISM* 29-30 (1988)). Other mentions of this virtue of student-edited journals include: James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527, 534-35 (1994) (prejudices of faculty editors may bias article selection); Articles Editors, *A Response*, 61 U. CHI. L. REV. 553, 554 (1994) (student editors more likely than faculty editors to seek out new topics); see also Paul D. Carrington, *The Dangers of the Graduate School Model*, 36 J. LEGAL EDUC. 11, 12 (1986) (juried journals may “exclude some divergent views or fashions”); John Henry Schlegel, *An Endangered Species?* 36 J. LEGAL EDUC. 18, 20 (1986) (peer review may make journals “more narrow and stultifying”). A study of symposium issues of student-edited law reviews found that “[o]utsider scholars [including feminists] did appear less frequently in symposium issues than their numbers and overall rate of production would lead one to predict.” Jean Stefancic, *The Law Review Symposium: A Hard Party to Crash for Critics, Feminists, and Other Outsiders*, 71 CHI.-KENT L. REV. 989, 990 (1996). Stefancic speculates this may be due, in part, to “the sometimes greater role of faculty in selecting symposium topics and authors.” *Id.*

23. See Roger C. Cramton, “The Most Remarkable Institution”: *The American Law Review*, 36 J. LEGAL EDUC. 1, 8 (1986).

likely to recognize technical competency (or its absence). The quality of the feminist tax articles published by leading student-edited law reviews is uneven; there is certainly an argument that some articles have been "over-placed." Still, if the choice is between the risk that student editors might publish some feminist tax scholarship of dubious merit and the risk that faculty editors might ignore feminist tax scholarship, I will take the risk of student editors.

A HISTORICAL OUTLOOK

