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TEACHING CRITICAL TAX: WHAT, WHY, & HOW

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*Diane Kemker**

INTRODUCTION

“Critical tax” is an approach to the analysis of tax law and policy that takes race, gender, sexual orientation, disability, citizenship/immigrant status, and other historically marginalized statuses into account, and does so in a way that is centrally focused on the role of tax law in creating and perpetuating persistent economic inequality and disadvantage. This descendant of Critical Legal Studies and Critical Race Theory has been around for more than twenty years.¹ And yet, critical tax is almost entirely absent from the casebooks and syllabi used for the teaching of the core tax courses.² This can and should change, and this Article is a practical guide to both why and how teachers of tax law should integrate critical tax perspectives into their courses.

Part I explores a basic question: What is “critical tax”? Part II advocates for the addition of critical tax perspectives to the teaching of tax law by describing some of the intellectual, pedagogical, and professional benefits associated with it. Finally, Part III shows tax teachers how to add these perspectives relatively seamlessly into traditional tax courses by providing an annotated bibliography of readily available readings that can be added to syllabi for the basic Federal Income Tax course. This bibliography is

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¹ Karen B. Brown et al., *The Past, Present, and Future of Critical Tax Theory: A Conversation*, 10 PITT. TAX REV. 59, 62 (2012).

² Notably, tax law is also left out of critical legal theory. In fact, it is not even an item in the *index* of the RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY (Emilios Christodoulidis et al. eds., 2019).

intended to provide some points of access to the critical tax literature; it is only a starting point, of course, and is neither comprehensive nor exhaustive.

The recommendation to include critical tax perspectives has precursors. In 2010, Professor Dorothy Brown published an essay titled “Teaching Civil Rights Through the Basic Tax Course” in the *St. Louis University Law Journal*.³ Professor Brown, at that point, framed her approach as “how to incorporate race and class into the basic tax course,”⁴ which she paraphrases in her title as “civil rights.” She was *not*, at that stage, arguing for the inclusion of distinctively *critical* tax perspectives; it was challenging enough at that time simply to advocate that race (and class and, in some cases, gender) be taken into account at all. Similarly, while Anthony Infanti and Bridget Crawford’s 2009 anthology *Critical Tax Theory: An Introduction* collects many important early works of feminist, queer, and other “outsider” tax scholarship, it too is now more than a decade old,⁵ a decade during which the editors and many others have made numerous very substantive contributions to the literature.⁶ The legal academic and pedagogical landscape has also changed in the past decade, and Critical Race Theory is currently on everyone’s radar. This Article, and particularly Part III, the critical tax bibliography, is intended to reflect this.

I. WHAT IS CRITICAL TAX?

What makes a work of tax theory or scholarship “critical”? The answer is not at all clear. Critical tax theory and scholarship are ill-defined. Too often, “critical tax” seems to be used as an all-purpose honorific, to mean just any (smart) scholarship that is in some way “critical” of tax law and policy.

Consider the titles of the papers presented at the 2021 Critical Tax Conference (held at UC Irvine School of Law on April 9, 2021) (also

³ Dorothy A. Brown, *Teaching Civil Rights Through the Basic Tax Course*, 54 ST. LOUIS U. L.J. 809 (2010).

⁴ *Id.* at 812.

⁵ See generally CRITICAL TAX THEORY: AN INTRODUCTION (Anthony C. Infanti & Bridget J. Crawford eds., 2009).

⁶ See *infra* Part III.

variously referred to as the Critical Tax *Theory* Conference,⁷ with no acknowledgement that those terms might not be synonymous):

- Administrative Burdens, Sludge, and Individual Taxpayer Rights
- Subsidizing Gentrification: A Spatial Analysis of Place-Based Tax Incentives
- When We Breathe: Reinventing the EITC for a More Just and Caring World
- A Scalar Conception of Tax Residence for Individuals
- Residency in Transition
- Taxing Teleworkers
- The Role of Taxation in Support of EU Cybersecurity Initiatives for Sustainable Futures
- Constitutional Review of Federal Fiscal Legislation
- Presidential Tax Transparency
- Taxes by Omission
- “Slack” in the Data Age
- Serenity Now! The (Not So) Inclusive Framework and the Multilateral Instrument
- Who Joins the OECD/G20 BEPS Inclusive Framework? An Event History Analysis
- Uniform International Tax Collection and Distribution for Global Development, a *(**)*topian BEPS Alternative
- Attracting Tech Giants thru Fiscal State-Aid

⁷ See, e.g., Paul Caron, *24th Annual Critical Tax Theory Conference at UC-Irvine*, TAXPROF BLOG (Apr. 9, 2021) [hereinafter Caron, *24th Annual Conference*], https://taxprof.typepad.com/taxprof_blog/2021/04/24nd-annual-critical-tax-theory-conference-at-uc-irvine.html; U.C. IRVINE SCH. OF L., *THE 24TH ANNUAL CRITICAL TAX CONFERENCE: SCHEDULE* (2021), <https://taxprof.typepad.com/files/critical-tax-conference-schedule-final-no-links.pdf>. For links to prior conferences, see Paul Caron, *Save the Date: 25th Critical Tax Conference at Villanova*, TAXPROF BLOG (Dec. 29, 2021), https://taxprof.typepad.com/taxprof_blog/2021/12/save-the-date-25th-critical-tax-conference-at-villanova.html?fbclid=IwAR06MGC1kk0zwI8eHYIVbitCDbaJQUSJp2s6bA2aHh0dVWLw4ZHoAmEOeLA.

- Exploring the Dichotomous Tax Treatment of Investment Versus Trade or Business Expenses Under the Internal Revenue Code
- Free Enterprise: A Panacea for Racial and Wealth Inequality?
- Captured: Section 45Q and Escaping from the Code’s Confused Energy Market Regulation
- Prepaid Death
- Nixon’s VAT: The Rise and Fall of the 1970s Value-Added Tax for Education
- Of Risks and Remedies: Best Practices in Tax Rulings Transparency
- The Information Content of the Tax Return⁸

The 2021 event was not anomalous. The 2022 iteration (held at Villanova University Charles Widger School of Law March 31–April 2, 2022) featured these titles:

- A Red Herring that Shaped Tax Jurisprudence
- AI, Taxation, and Valuation
- Megacompany Employee Churn Meets 401(K) Vesting Schedules: A Sabotage on Workers’ Retirement Wealth
- Automated Agencies
- Delaware the Pirate State
- Taxpayer Bill of Rights—Moving Beyond the Procedural
- Public Finance and Racism
- Block Rewards, Carried Interests, and Other Valuation Quandaries in Taxing Compensation
- Democracy as Criteria for Taxation
- Wage Enslavement: How the Tax System Holds Back Historically Disadvantaged Groups of Americans

⁸ Caron, *24th Annual Conference*, *supra* note 7.

- The S Corporation: A License to Steal
- Opportunity Zones as Reparations
- Pay Less, Smile More: Taxpayer Subsidies of the Amazon Workforce
- “Taxpayer First” Innocent Spouse Adjudication
- Appalachian Tax
- Tax, Class, and Early Education Access
- Justifying Social Safety Nets
- When the Tax Man Is Jim Crow: A Critical Tax Analysis of Earned Income Credit Audit Practices (How Stereotypes and Racist Tropes Intersect to Produce an Irrational, Inefficient Audit Regime)
- Federal Taxation of State Compensation for Forced Sterilizations
- Why Developing Countries Should Avoid the Global “Agreement,” and How They Can Get Away with It
- How Universal Is the Murphy/Nagel Framework?
- The Dark Side of the EITC: Eliminating Incentives and Opportunities for Malfeasant Tax Return Preparers by Considering Lederman’s Fraud Triangle and the Recent Evolution of the Refundable Tax Credit
- State Level Taxpayer Rights
- Partnering to Deliver a Lifeline: Lessons from the US and Italian Tax Systems
- Do Taxing Systems Impact Income and Wealth Inequality? Investigating Disparities in OECD Member and Contributing Countries⁹

If one were to attempt to use lists of paper topics from this conference or its prior iterations (or the papers themselves) to understand what critical tax includes, it would be extremely challenging. While some of these works

⁹ Agenda, 25th Annual Critical Tax Conference, Villanova Univ. Charles Widger Sch. of L. (Mar. 31–Apr. 2, 2022) (on file with author).

at least allude to marginalized groups or outsider jurisprudence, nothing suggests any greater theoretical, political, or intellectual connection between the papers beyond an interest in taxes, tax law, and economics more generally.

I will not use the term in that loose way here. One is not engaged in critical tax scholarship (and certainly not in critical tax *theory*) simply because one is *criticizing* tax law and policy, or because one is *critical of* current or proposed law and policy, regardless of the basis of that critique. It matters how a critique is mounted; towards what ends; and with what theoretical premises and methods. As obvious as this may sound to those well-versed in critical theory (of any kind), either this is not obvious on the ground, or this type of disciplinary gatekeeping has been subordinated to other (perhaps quite worthy) ends.

Here is one way the organizers of the Critical Tax Conference have described the event:

The Critical Tax Theory Conference has a long history of fostering the work of both established and emerging scholars whose research challenges and enriches the tax law and policy literature. Critical tax scholars question assumptions of objectivity in tax, as their work explores how tax law and policy impact historically marginalized groups. At a time when tax policy is once again at the forefront of politics and public discourse, the work of these and other critical tax scholars supports a more robust discussion of the role for tax law in current and future social and economic policy.¹⁰

As capacious as this definition is, it was not obviously actually used as a selection criterion. Does a paper on “Attracting Tech Giants thru Fiscal State-Aid,” “The Role of Taxation in Support of EU Cybersecurity Initiatives for Sustainable Futures,” “Block Rewards, Carried Interests, and Other Valuation Quandaries in Taxing Compensation,” or “Automated Agencies” question assumptions of objectivity in tax? Do those papers need to do so? Beyond this, although the description mentions the “impact” of tax policy on “historically marginalized groups” as something critical tax scholars “explore,” it implies no particular stance towards those impacts, even if (for example) they increase inequality or marginalization or perpetuate

¹⁰ *Id.*

discrimination or immiseration of the worst off in the service of enriching the powerful and privileged.¹¹

A focus on “historically marginalized groups” without theoretical underpinnings or ideological or methodological commitments is thus both over- and underinclusive. The dangers of such an approach are reflected by this claim, made by Professor Leo Martinez in a 2018 article: “the premise underlying critical tax scholarship is simple,” he says.¹² “The premise is that subpopulations of taxpayers are treated differently.”¹³ Standing alone, of course, this premise is not merely, as he calls it, “uncontroversial.”¹⁴ It is so obvious and tautological as to be nearly vacuous. But Professor Martinez then pivots from this too-broad definition to one that is far narrower, but not clearly more defensible: the task of critical tax scholarship, he alleges, is “highlighting racial [and ethnic] inequities in the Code.”¹⁵

¹¹ It is also possible to give the term even *less* meaning. The conference description for the event in 2011 described its origins (without attribution or citation) this way:

The Critical Tax Conference originated in 1995. The principal organizer of the first conference was Professor Nancy Staudt, then on the faculty at The State University of New York at Buffalo. Most of the papers presented there focused on tax law as it relates to gender, race, and sexual orientation. One of Professor Staudt’s colleagues coined the term “critical tax theory” to describe their approach. The name was particularly apt because Buffalo was well known as one of the original schools to advance critical legal studies. Professor Staudt organized another conference in 1997, inviting many of the same people, and called it “Democracy and Taxation.” That conference focused on political science and taxation.

In 2000, Professor Beverly Moran approached Professor Staudt about her willingness to work together to organize a third conference and make the conference an annual event. The 2000 conference was held at the University of Wisconsin–Madison, where Professor Moran was teaching at the time. They named the annual event the “Critical Tax Theory Conference,” harkening back to the original conference in 1995. However, they did not intend the name to restrict the content of the conference. In fact, Professor Staudt hoped the conference would develop beyond any narrow focus.

Critical Tax Conference: Conference Schedule, SANTA CLARA UNIV. SCH. OF L., <https://law.scu.edu/criticaltax/> (last visited Feb. 16, 2022).

¹² Leo P. Martinez, *A Critique of Critical Tax Policy Critiques (Or, You’ve Got To Speak Out Against the Madness)*, 28 BERKELEY LA RAZA L.J. 49, 49 (2018).

¹³ *Id.*

¹⁴ *Id.* at 50.

¹⁵ *Id.* at 52.

Compare, or better yet, *contrast*, these vague and anodyne statements about critical tax (or critical tax theory), with the full-fledged program of LatCrit, which emerged at about the same time. Unlike critical tax, “LatCrit is . . . one of the most highly self-aware and highly theorized projects in contemporary legal discourse,” one in which the “group sense of self-awareness and criticality was manifest . . . almost from the outset.”¹⁶ As described by Francisco Valdes and Steven Bender,¹⁷ the participants at the LatCrit Planning Retreat in 2001 identified “ten ‘nonnegotiable’ shared commitments as the collectivizing foundation of LatCrit theory, community, and praxis.”¹⁸ These ten commitments are “intergroup justice, antisubordination, antiessentialism, multidimensionality, praxis/solidarity, community-building, critical/self-critical, ethical, transnational, and interdisciplinary.”¹⁹ The scholarship and knowledge the LatCrit practitioners aim to produce has a purpose: “the advancement of material and structural transformation to disrupt and dismantle historical patterns of subjugation along identity lines.”²⁰ In addition to various “functions” and “guideposts,” Valdes and Bender also distill certain “postulates derived from the collective efforts of LatCrit’s initial twenty-five-plus years,”²¹ the first of which is that “our shared goal is a postsubordination society.”²² Valdes and Bender also identify “ten key hallmarks in the body of work produced by critical scholars of color in the United States” that falls within the LatCrit project, which can be summarized this way: normative antisubordination, transformative, shifting the starting point of inquiry to “reveal fresh antisubordination insights and discourses,” a bottom-up analytic approach to law and policy, “doctrinal realism” as a tool against legal fictions, counter-disciplinarity,

¹⁶ FRANCISCO VALDES & STEVEN W. BENDER, LATCRIT: FROM CRITICAL LEGAL THEORY TO ACADEMIC ACTIVISM 7 (2021).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 7–8.

²⁰ *Id.* at 9.

²¹ *Id.* at 12.

²² *Id.*

critical historicism, social justice empiricism, and “non-traditional” forms of knowledge production (such as storytelling).²³

This is a dramatically more substantive theoretical and scholarly approach than all-inclusive antidiscrimination, suggested by phrases like “highlighting . . . inequities,” “question[ing] assumptions of objectivity,” “explor[ing] how tax law and policy impact historically marginalized groups” and “tax law as it relates to gender, race, and sexual orientation.”²⁴ Notably, LatCrit is also the product of intentional organizing across legal academia to center and amplify the voices of traditionally marginalized people and communities. It attends to the “who,” and not just the “what,” of the scholarship under its rubric.

Regrettably, the history of critical tax is nothing like this. It is not unified by any such principles, much less “nonnegotiable commitments”²⁵ explicitly agreed upon and adhered to for decades. From the point of view of organizing a conference, of course, such definitional precision, much less doctrinal orthodoxy, is not (necessarily) very important or desirable. But in understanding a theoretical approach to the analysis of tax law, it matters. If the label is misapplied, or applied in wildly varying ways depending on who is using it (and why), it reflects poorly on the intellectual coherence of the field, and exposes it to fair, if sometimes overstated, criticism.²⁶ In some cases, it results in the misidentification of works and scholars that are actually better understood as *anticritical* in their premises, methodology, and goals.

Scholars drawn to critical tax by a desire to bring an interest in a specific form of antisubordination (feminism, queer theory, Critical Race Theory) into tax scholarship do not necessarily share any well-articulated theoretical, methodological, or doctrinal commitments. Tax law and policy relates to wealth, power, and inequality in myriad ways, which is what makes it such a fertile field of endeavor for critical scholarship. At the same time, it is worth distinguishing critical tax from other approaches that attend to categories of

²³ See *id.* at 12–13.

²⁴ Martinez, *supra* note 12, at 52; Caron, *24th Annual Conference*, *supra* note 7; *Critical Tax Conference*, *supra* note 11.

²⁵ VALDES & BENDER, *supra* note 16, at 7.

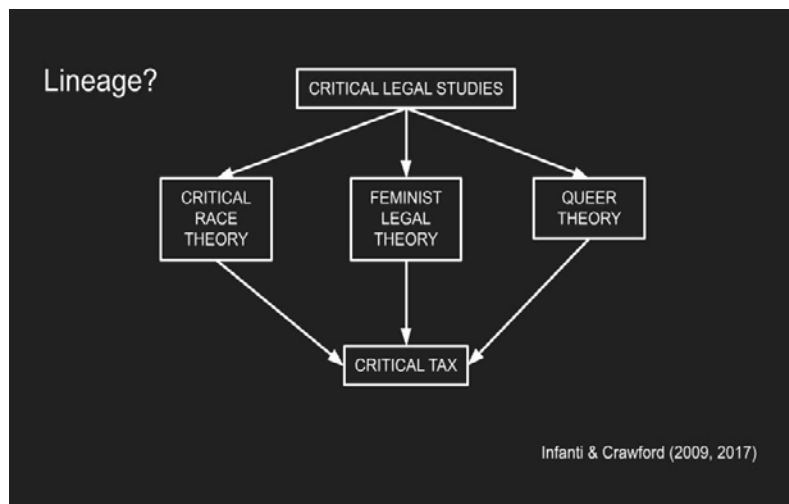
²⁶ See generally Symposium, *Critical Tax Theory: Criticism and Response*, 76 N.C. L. REV. 1519 (1998).

subordination in U.S. law in other ways, for the sake of academic and intellectual clarity, and to allow those with shared political projects to identify one another and work towards shared goals.

I will not attempt here to propose anything like the ten “hallmarks” of LatCrit scholarship for critical tax scholarship. That is the project for a group of dedicated practitioners of critical tax, not for this author. However, at least three overlapping and nonexclusive approaches can be taken to identifying critical tax theory and scholarship that may help to distinguish it from other varieties of tax scholarship: lineage, method, and goals.

A. Lineage

As a matter of intellectual history, critical tax scholarship can be defined in the first instance by its historic and intellectual *lineage*. In the introduction to their anthology, Crawford and Infanti point to “the seismic intellectual shifts in the legal academy that occurred from the 1970s through the 1990s, namely, the critical legal studies movement and its progeny—critical race theory, feminist legal theory, and queer theory.”²⁷



²⁷ CRITICAL TAX THEORY, *supra* note 5, at xxi.

The problem with this model is that it is not as historically precise as we might wish. Feminist legal theory (and queer theory) are not the “progeny” of critical legal studies (CLS); feminist legal theory and CLS developed *at the same time*, in parallel and arguably in tension, to the extent that second-wave legal feminists endorsed liberal, autonomy- and rights-centered approaches, which CLS scholars criticized as formalistic and ineffective.²⁸ On the very first page of *Critical Tax Theory: An Introduction*, Infanti and Crawford call Grace Ganz Blumberg “the original critical tax theorist.”²⁹ Blumberg’s epochal “Sexism in the Code,” the *locus classicus* of Code-centric antidiscrimination tax scholarship, was published in 1971.³⁰ *Reed v. Reed*, the first major Fourteenth Amendment gender equity case, with Ruth Bader Ginsberg on the brief for the ACLU, was decided by the U.S. Supreme Court in 1971, the culmination of litigation that began in 1967.³¹ But Roberto Mangabeira Unger, the leading exponent of CLS, had just earned his LLM at the Harvard Law School in 1970.³² His first book, *Knowledge and Politics*, was not published until 1975, and his second, *Law in Modern Society*, was published in 1976.³³ The early landmark cases and scholarship in feminist jurisprudence are in no way the “progeny” of CLS (much less the Frankfurt School Marxism from which CLS itself derives). But just as important as timing is approach. Blumberg and Ginsberg shared an equalitarian, formalist, rights-oriented approach to gender equality. Both placed tremendous faith in the Civil Rights Act of 1964, in Title VII as the reflection of both national policy and national sentiment in favor of gender equity and women’s rights. Both seemed optimistic (at least at that stage) about the power of empirically

²⁸ See, e.g., ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 8–11 (1986).

²⁹ *CRITICAL TAX THEORY*, *supra* note 5, at 1.

³⁰ Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 *BUFF. L. REV.* 49 (1971).

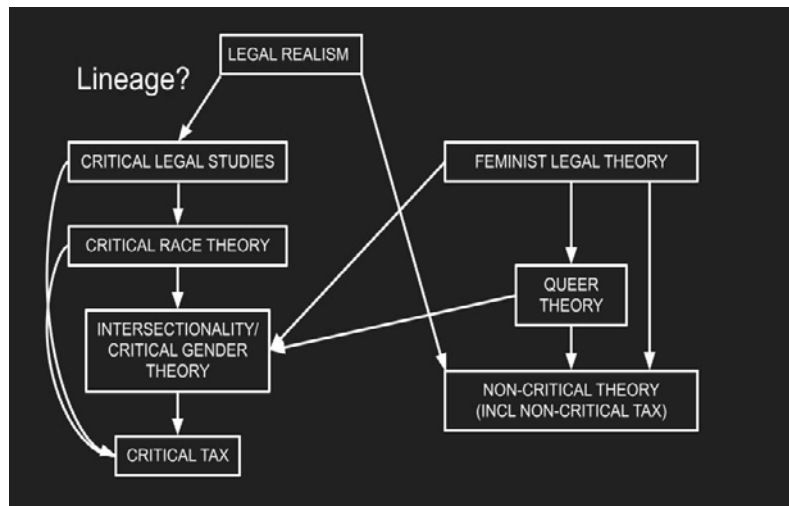
³¹ *Reed v. Reed*, 404 U.S. 71 (1971).

³² *Roberto Mangabeira Unger*, HARV. L. SCH., <https://hls.harvard.edu/faculty/directory/10910/Unger/background> (last visited Feb. 18, 2021).

³³ ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (1975); ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* (1976).

demonstrable, but unjustifiable, gender inequity to motivate change. That is to say, both were legal feminists who were not crits.

A more accurate (albeit complicated!) account of the lineage of critical tax theory might look more like this:³⁴



This account of the lineage and sources of critical tax theory and scholarship makes more explicit the fact that not all tax scholarship that in some way takes account of race, gender, or sexuality is *per se* “critical.” It is more accurate, more helpful, and avoids the difficulty of classifying scholars or scholarship as critical when they themselves would reject that label. I think Blumberg at least implicitly does so in her 1996 piece, which is quite derisive about what she calls “feminist theory” and “feminist jurisprudence.” These approaches she regards as excessively focused on “reading texts” and insufficiently concerned with “figuring out how laws and legal institutions can be recast to diminish and overcome gender inequality.”³⁵

³⁴ If LatCrit were added to this diagram, it would derive from CRT and feminist legal theory. See VALDES & BENDER, *supra* note 16, at 5, 10 (indicating that “LatCrit looked to CRT and legal feminism for lessons and insights” and that LatCrit’s “guideposts emerged from the basic theoretical premises firmly established by the earlier works of legal realists and critical pioneers”).

³⁵ Grace Ganz Blumberg, *Women and the Law: Taking Stock After Twenty-Five Years*, 6 UCLA WOMEN’S L.J. 279, 285 (1996).

This approach also makes clear(er) that a purely Marxist theoretical approach to tax, or an approach centered on class, is (at least potentially) a form of critical tax that (intentionally or otherwise) does *not* focus on the historically marginalized groups specifically protected by American antidiscrimination law (which focuses primarily on race and gender). A class analysis, or a race/class analysis, could center on a group explicitly *not* so protected: the poor.³⁶ A more historically precise and theoretically explicit exploration of the lineage of critical tax can therefore be used to identify works falling within this category and those that fall outside it in a more effective way.

B. Method

Critical tax scholarship shares methodological approaches with other critical and outsider styles of jurisprudence, including LatCrit. One of these is narrative or storytelling. In 1998, Professor Marjorie Kornhauser described an approach “relatively new to the tax field” this way:

Recently, however, more tax scholars have been looking at the non-technical sides of tax and looking at them from different points of view. As they do so, they discover new stories or new interpretations of old stories. This is what feminist and critical race scholars are doing in “critical tax theory.”³⁷

While this might overstate the centrality of storytelling in feminist and CRT scholarship, the acknowledgement is appropriate. As Infanti notes in his 2005 article, “tax crits often use different methods (e.g., narrative, feminist, and minority perspectives) than those employed by mainstream tax academics.”³⁸

Storytelling, narrative, and any style of legal scholarship in which the author “outs” their own identity are all unquestionably untraditional and unconventional. The standard law review article in any subject is written in the third person objective point of view, with the rarest of first-person

³⁶ See, e.g., *Harris v. McRae*, 448 U.S. 297, 323 (1980) (“[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification.”).

³⁷ Marjorie E. Kornhauser, *Through the Looking Glass with Alice and Larry: The Nature of Scholarship*, 76 N.C. L. REV. 1609, 1609–10 (1998).

³⁸ Anthony C. Infanti, *A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity*, 26 WHITTIER L. REV. 707, 819 (2005).

intrusions.³⁹ The author and their forms of social identity (race, gender, sexual orientation, and so on) are invisible and never mentioned, implying their irrelevance. If the first person is used at all, it refers only to a sort of disembodied Cartesian authorial subject. One of the most-cited law review articles of all time,⁴⁰ Ronald Coase’s “The Problem of Social Cost,” begins with this line: “This paper is concerned with those actions of business firms which have harmful effects on others.”⁴¹ The phrase “I am” appears just three times in this article. In the very first footnote, a place where law review article authors conventionally speak in the first person, sometimes thanking individuals who assisted with the paper or recounting its evolution, Coase refers to a study “I am now conducting.”⁴² Very near the end of the paper, in discussing an approach to the tax law that reflected certain externalized costs, Coase remarks, “I am unable to imagine how the data needed for such a taxation system could be assembled.”⁴³ Finally, Coase appears in the very last sentence of the paper: “In devising and choosing between social arrangements we should have regard for the total effect. This, above all, is the change in approach which I am advocating.”⁴⁴ Coase the economist and Coase the thinker are present in every line. Coase the disabled child, Coase the immigrant, and Coase the childless married man, are not.⁴⁵

On the same 2012 list topped by Coase, the highest-ranked article authored by a Black female law professor (ranked eighteenth) is strikingly

³⁹ For an exception that proves the rule, consider Alex Kozinski & Eugene Volokh, *Lawsuit, Shmawsuit*, 103 YALE L.J. 463 (1993), a short article surveying the use of Yiddish in reported U.S. judicial opinions. The article is written in the first-person plural by Kozinski, a Romanian Jewish immigrant and now-disgraced Ninth Circuit judge, and his then-clerk, Ukrainian Jewish immigrant Volokh. Neither author mentions their Jewishness or immigrant status, but these are well-known facts about them among the likely readers of this article.

⁴⁰ Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 tbl.1 (2012).

⁴¹ R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1 (1960).

⁴² *Id.* at 1 n.1.

⁴³ *Id.* at 41.

⁴⁴ *Id.* at 44.

⁴⁵ See Patrick J. Lyons, *Ronald H. Coase, a Law Professor and Leading Economist, Dies at 102*, N.Y. TIMES, Sept. 4, 2013, at A20.

different.⁴⁶ Angela Harris’s “Race and Essentialism in Feminist Legal Theory”⁴⁷ begins with this epigraph from poet and playwright Ntozake Shange: “bein alive & bein a woman & bein colored is a metaphysical dilemma.”⁴⁸ While Professor Harris never explicitly identifies herself as a Black woman, these aspects of her own identity permeate the article. She quotes Audre Lorde,⁴⁹ Zora Neale Hurston,⁵⁰ and Toni Morrison.⁵¹ She tells:

A personal story. . . to illustrate the point. At a 1988 meeting of the West Coast “fem-crits,” Pat Cain and Trina Grillo asked all the women present to pick out two or three words to describe who they were. None of the white women mentioned their race; all of the women of color did.⁵²

But the use of narrative, storytelling, or personal information about an article’s author is not *per se* “critical.” Valdes and Bender identify storytelling as a hallmark of critical scholarship, insofar as it exemplifies “‘non-traditional’ . . . [forms of] *production of legal knowledge* such as legal storytelling.”⁵³ By describing storytelling this way, not as entertainment or diversion or as an alternative to scholarship, the LatCrit movement elevates and dignifies this device and demonstrates its operation critically, enabling storytelling to interrogate more conventional forms of knowledge production, provoking us to ask, for example, why law review authors typically omit or conceal their identities and what purpose this might serve.⁵⁴

⁴⁶ See Shapiro & Pearse, *supra* note 40.

⁴⁷ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 581 (1990).

⁴⁸ *Id.*

⁴⁹ *Id.* at 586, 608.

⁵⁰ *Id.* at 610–11, 613.

⁵¹ *Id.* at 597, 612.

⁵² *Id.* at 604.

⁵³ VALDES & BENDER, *supra* note 16, at 13 (emphasis added).

⁵⁴ In my own very first work of published legal scholarship, under the influence of the postmodern legal feminism of Mary Jo Frug and others, I deliberately identified myself in my first line: “While a first-year law student and the mother of a young son and daughter, I was constantly struck by the frequent appearance in the torts casebook of boys suffering injuries as the result of their own or another boy’s seeming foolhardiness.” Diane Klein, *Distorted Reasoning: Gender, Risk-Aversion, and Negligence Law*, 30 SUFFOLK U. L. REV. 629, 629 (1997).

Harris, writing in the *Stanford Law Review* in 1990, used the device very modestly, as an “illustrat[ion]” of a point also shown other ways.⁵⁵ She explicitly foregrounded very little of her own identity yet nevertheless made her own subject position perfectly clear. She sacrificed no rigor or depth of analysis in simultaneously allowing herself to be present in the piece, forcing us to think about what is or is not relevant about an author’s own identity. By 2021, Dorothy Brown could begin *The Whiteness of Wealth* much more openly:

I became a tax lawyer to get away from race. I was born and raised in the South Bronx in New York City. My father, James, was a plumber who worked, without benefits, for a private company, because black men couldn’t join the union that controlled the good public sector jobs

And that’s how I became a tax lawyer. Because I learned early on that people might look at me and see black, but as far as tax law was concerned, the only color that mattered was green Tax law was about math, and I was sure I’d chosen a career where race had nothing to do with my work.

I have never been more wrong about anything in my life.⁵⁶

At the same time, authorial identity in a historically marginalized group, even when made explicit, does not ensure or amount to a critical approach by itself. In his introduction to the 2019 *Critical Analysis of Law* special issue on queer legal studies, “Practicing Queer Legal Theory Critically,”⁵⁷ Kendall Thomas, a founder of Critical Race Theory, explores what distinguishes critical queer legal theory, on the one hand, from noncritical or even anticritical queer legal theory (“inquiry, interpretation and argument”⁵⁸), on the other.⁵⁹ For Thomas, not all queer legal theory is *per se* critical. He first explains: “[W]e can parse the distinction between ‘critical’ and ‘non-critical’ queer legal imaginaries and analysis by looking at whether and (if so) how particular queer theory arguments engage the question of *power*.”⁶⁰

⁵⁵ Harris, *supra* note 47, at 604.

⁵⁶ DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* 3, 5 (2021).

⁵⁷ Kendall Thomas, *Practicing Queer Legal Theory Critically*, 6 *CRITICAL ANALYSIS L.* 8 (2019).

⁵⁸ *Id.* at 9.

⁵⁹ *Id.*

⁶⁰ *Id.* at 10.

Engagement with “power” has a variety of meanings, but one of the clearest and most accessible is exhibiting awareness (and self-awareness) that law is political, legal scholarship is political, and writing in particular areas is political.

One of the insights which makes critical queer legal studies critical in the sense that interests me here . . . is the recognition that the field of legal practices in which queer legal theory work takes place is not just an intellectual but a political domain; what this means, specifically, is that no truly critical analysis of law is possible that fails to reckon with and provide an account of the “economy of power relations” to which legal theory and legal practice belong.⁶¹

This is no less true of tax theory, where the “economy” is not (just) a metaphor. Moreover, the relationship between the state and the taxed subject is no less complex than that between the state and the sexed subject. What works of critical legal theory must then

share [is] a common interest in a critical study of law that views law internally and externally, approaches law as a site for a double analytical procedure that marshals both theoretical and practical methods, and seeks to locate legal events and legal discourses (including its own) in the relations of power-knowledge from which they emerge.⁶²

He identifies

what is or should be *critical* about the interdiscipline of queer legal studies: theorization not only of the subjectification of subjects of gender and sexual regulation (spouses, singles, you and me), but also theorization of the subjectification of power (here, state power and state formation). What kind of state, and what kind of power, materialize through the governance of sex, intimacy, and coupledness?⁶³

In practicing critical *tax* theory, we might reframe this to ask, what kind of state and what kind of power materialize through the determination of who and what is to be taxed, and the governance of those events, transactions, and entities? The U.S. government pays for itself largely through tax revenue;⁶⁴

⁶¹ *Id.* at 14 (emphasis omitted).

⁶² *Id.* at 22.

⁶³ *Id.* at 8 (abstract).

⁶⁴ *Your Guide to America's Finances: How Much Money Did the Federal Government Collect and Spend in 2021?*, DATALAB, <https://datalab.usaspending.gov/americas-finance-guide/> (last visited

approximately fifty percent of that revenue is raised through individual income taxes.⁶⁵ “The top 50% of all taxpayers” contributed ninety-seven percent of that revenue.⁶⁶ The taxation of individuals—and of some individuals more than others—literally, not (only) metaphorically, sustains the state that taxes them. For Thomas, the criticality of an approach depends on how fully it articulates this two-way relationship between state and subject, the subjectification of individuals through legal regulation, but also “the state-making power of sex and gender”⁶⁷ in queer legal theory, and of the taxed (tax-paying, tax-avoiding, tax-evading) subject, in critical tax.

This type of distinction between critical and anti-/noncritical legal theory, with its focus on discourse, power, knowledge, and the two-way relationship between the state and the regulated subject, may seem highly abstract, and may set the bar for genuine critical scholarship too high, or define it too narrowly. Still, it can fruitfully be deployed to distinguish works of critical tax from other valuable approaches to tax scholarship. Whether one shares Thomas’s approach or not, it clearly demands a far more serious engagement with theory than advocacy for equity by “highlighting racial [and ethnic] inequities in the Code.”⁶⁸ Thomas’s approach rightly asks of those who would practice critical legal theory, in whatever setting, that they employ methodologies that focus in a politically and theoretically sophisticated way on remedying substantive inequality beyond legal formalities; that they engage with realities of power and politics; and that they display an openness to employing personal, outsider, and/or marginalized perspectives together with skepticism about apparently impersonal or objective ones.

Mar. 9, 2022) (indicating \$4.05 trillion in revenue raised and \$6.82 trillion spent in 2021, creating a deficit of \$2.77 trillion that was covered through borrowing).

⁶⁵ *Policy Basics: Where Do Federal Tax Revenues Come From?*, CTR. ON BUDGET & POL’Y PRIORITIES (Aug. 6, 2020), <https://www.cbpp.org/research/federal-tax/where-do-federal-tax-revenues-come-from>.

⁶⁶ Erica York, *Summary of the Latest Federal Income Tax Data, 2022 Update*, TAX FOUND. (Jan. 20, 2022), <https://taxfoundation.org/publications/latest-federal-income-tax-data/>.

⁶⁷ Thomas, *supra* note 57.

⁶⁸ Martinez, *supra* note 12, at 52.

C. Goals

While some of the goals of critical tax theory and scholarship emerge directly from its lineage and methods, others benefit from more explicit articulation. More than a decade ago, Crawford and Infanti, in characterizing what was then still “an incipient body of ‘critical tax scholarship,’” identified three broad goals: “(1) to uncover bias in the tax laws; (2) to explore and expose how the tax laws both reflect and construct social meaning; and (3) to educate nontax scholars and lawyers about the interconnectedness of taxation, social justice, and progressive political movements.”⁶⁹

The first goal they identify, much like Martinez’s task of “highlighting” inequity, is not necessarily distinctive to critical scholarship. For those who seek to bring about change, “uncovering” or “highlighting” a wrong is both a means to that end and a form of achieving it (as consciousness-raising). Inside a liberal-legal paradigm, there is an overly-optimistic belief that once inequity or bias is demonstrated, there will be the political will and the means to remedy the situation. In this form, this goal recapitulates an approach of the civil rights movement from which CRT diverges, and about which all critical approaches should be deeply skeptical. It was the optimistic view of many in the civil rights movement that if people outside the Jim Crow South (for example) could simply *see* the conditions in place there, this would be enough to stimulate and mobilize the national will to end segregation. The work of famous photographers like Gordon Parks reflects this view.⁷⁰ A critical approach knows better than to underestimate the forces of reaction this way. Glossing Marx on Feuerbach as well as finding common ground with LatCrit, insofar as critical tax scholarship “highlights” or “uncovers” a problem in the world of tax, it is most useful when it at least foreshadows how we might *change* it, and change it in a way that reflects critical values.⁷¹

⁶⁹ Bridget J. Crawford & Anthony C. Infanti, *Introduction to the Feminist Judgments: Rewritten Tax Opinions Project*, in *FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS* 3, 9 (Bridget J. Crawford & Anthony C. Infanti eds., 2017) (citing *CRITICAL TAX THEORY*, *supra* note 5, at xxi).

⁷⁰ See, e.g., *Segregation in the South, 1956*, GORDON PARKS FOUND., <https://www.gordonparksfoundation.org/gordon-parks/photography-archive/segregation-in-the-south-1956> (last visited Feb. 18, 2022).

⁷¹ See Karl Marx, *Theses on Feuerbach*, <https://www.marxists.org/archive/marx/works/1845/theses/index.htm> (last visited Mar. 4, 2022).

It must show a mature awareness that revealing a problem, especially one related to structural inequality, is a long way from solving it, and that not all responses to a problem so revealed will be equally satisfactory from a critical point of view.

Crawford and Infanti identify a second goal of critical tax scholarship as “explor[ing] and expos[ing] how the tax laws both reflect and construct social meaning.”⁷² The notion of social meaning, and its construction by and through law, introduces a crucial discursive element into critical scholarship. Critical tax scholarship, like critical legal scholarship of all kinds, begins with what laws and opinions *say*, but does not take this as a transparent indication of what they *mean*, or how they operate (i.e., what they do). (It is this focus on language that Blumberg correctly notes but, I would suggest, partially mischaracterizes as taking the place of substantive understanding of the law.⁷³)

The third goal they identify, educating “nontax scholars and lawyers about the interconnectedness of taxation, social justice, and progressive political movements,”⁷⁴ while a worthy undertaking, is not a distinctively *critical* one. This goal is presumably shared by a broad swath of more general progressive or antidiscrimination tax scholarship, little of which is inherently or intentionally critical in the relevant sense.

In identifying these goals, one senses that in the hopes of not scaring away tax scholars unfamiliar with the core concepts (much less the outer reaches) of critical theory, Crawford and Infanti have cast a net so wide it might catch almost any well-meaning tax scholar, just as the 2011 Critical Tax Conference hosts reminded participants that earlier organizers “did not intend the name to restrict the content of the conference” (!), and “hoped the conference would develop beyond any narrow focus.”⁷⁵ This left Crawford and Infanti to attempt to draw a sense of what seem to be shared goals from the then-extant literature.

A decade on, we find ourselves in a political, intellectual, and academic moment in which arguably the most important movement in the analysis of

⁷² See *supra* note 69 and accompanying text.

⁷³ Blumberg, *supra* note 35.

⁷⁴ See *supra* note 69 and accompanying text.

⁷⁵ *Critical Tax Conference*, *supra* note 11.

American law to emerge in the second half of the twentieth century—Critical Race Theory—is widely and seriously misunderstood not just by its enemies, but even by its alleged friends and supporters. Many of those who believe themselves sympathetic to its goals have no idea that there is a difference between opposing discrimination, or grappling with racism in American history, and Critical Race Theory. Widespread internet memes suggesting that CRT just means “telling the truth” about history, or some other simple-minded gloss on it, do not begin to do justice to the intellectual and historical sophistication of the approach, or to the ways in which it distinguished itself from, and even criticized, much of the accepted wisdom of the civil rights activists of prior eras.⁷⁶

Practitioners of critical tax should not fear a too-narrow focus, or a conference restricted to the work its name describes. Widespread misunderstanding, even inside the legal academy, about what a critical approach actually *is*, is a much more significant problem. Here again, critical tax can learn from LatCrit, both substantively and organizationally. Recall again its commitments and purpose: “intergroup justice, antisubordination, antiessentialism, multidimensionality, praxis/solidarity, community-building, critical/self-critical, ethical, transnational, and interdisciplinary,”⁷⁷ for “the advancement of material and structural transformation to disrupt and dismantle historical patterns of subjugation along identity lines.”⁷⁸ And recall, as well, that these emerged intentionally from a series of meetings of scholars and teachers aimed at identifying such commitments.⁷⁹ Whether these (or some of these) specific traits and aims are shared by critical tax theory and scholarship, or whether other goals better describe it, critical tax would be benefited by greater self-awareness of its own project.

⁷⁶ See, e.g., African American Policy Forum, *#TruthBeTold: What Is Critical Race Theory?*, YOUTUBE (July 14, 2021), https://www.youtube.com/watch?v=_N7fkc1eN4E; Henry Louis Gates, Jr., *Critical Race Theory and the First Amendment*, in *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES 17* (Henry Louis Gates, Jr. et al. eds., 1994). See generally *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995).

⁷⁷ VALDES & BENDER, *supra* note 16, at 7–8.

⁷⁸ *Id.* at 9.

⁷⁹ *Id.* at 1–8 (describing the 1995 colloquium and the 2001 LatCrit Planning Retreat from which LatCrit emerged).

II. WHY TEACH CRITICAL TAX?

I have identified four independent and nonexhaustive reasons to add critical tax perspectives to the basic tax courses: an intellectual/academic reason, two related pedagogical reasons, and a professional reason. Each, standing alone, would be sufficient to justify their inclusion; taken together, the case for this approach is, I believe, a very strong one.

A. Intellectual Reasons

The first reason is purely intellectual and academic. Tax courses are already typically seen as demanding, both by the students who enroll and by those who choose not to. The tax law is complex, and solving problems in taxation often requires a use of mathematics that many law students do not enjoy. But the addition of critical tax materials to the course adds intellectual heft and challenge of a different kind than is usually encountered in tax courses. Critical tax scholarship is also some of the most interesting, groundbreaking, and challenging scholarship in the tax field today. It requires students to think differently about the materials they encounter, and about the tax law itself.

Those of us who share a critical perspective, whether explicitly informed by legal realism, CLS, CRT, queer or feminist theory, or any other source, understand that these insights do not stop at the door of the tax class, nor is the tax system immune from critiques originally directed at other legal institutions and bodies of law. The best critical tax scholarship demonstrates for us all how to bring these bodies of thought together creatively and inspires us to emulate it and enrich the field.

B. Pedagogical Reasons

The second and third reasons are pedagogical, and complementary to one another. On the one hand, because tax courses are generally non-bar-exam electives into which students self-select, the inclusion of critical tax materials exposes students to progressive and even radical perspectives on the law that they might not otherwise encounter. To the extent that it is safe to assume that students in tax courses do not overlap a great deal with those in Critical Race Theory seminars or movement lawyering clinics, it seems likely that many tax students may not otherwise encounter legal approaches centering on race, sex/gender, and other marginalized statuses, or read legal materials that feature large-scale critique of our legal and economic system.

But if adding critical tax materials exposes the tax students to more radical thought, it also has the potential to do the reverse: to bring more radical (or politically progressive) students into tax courses. The authors and topics included on syllabi and discussed during our precious in-class time communicate to students not just what, but *who*, matters. The complementary reason to teach critical tax is to make the tax classroom a more congenial place for students from historically underrepresented groups, including groups disadvantaged or ignored by the Internal Revenue Code, and for students whose legal interests focus on those groups and issues. By integrating critical tax perspectives into the tax curriculum, we ensure that *all* students, whatever their specific interests, come to a deeper understanding of the interaction between American law, including tax law, and race, gender, and other important identity categories in American life.⁸⁰

Some of my evidence for the value of such approaches is admittedly anecdotal. Twenty years ago, I was a new teacher of Wills and Trusts at Thurgood Marshall School of Law, an HBCU law school in Houston, Texas. Adrienne Davis's article "The Private Law of Race and Sex: An Antebellum Perspective"⁸¹ had been published in the *Stanford Law Review* just a year before, and I added it to the syllabus as part of the unit on intestacy, the first unit in the course. I used the article, first of all, to teach enslaved status as a bar to succession, after teaching other bars (such as advancements, simultaneous death, disclaimer, and spousal waiver). I also used it to teach some of the history of wills and trusts law, specifically, testamentary manumission in the antebellum period, as an example of the tension between testamentary autonomy and public policy. I used it to encourage students to think about appropriate statutory limits on what can or cannot be done by will, and the interaction between private and public law in the property and wills contexts. The article is also a masterful piece of scholarship by a Black woman law professor, a person even rarer in the legal academy at that time than today.

⁸⁰ For a related but distinct analysis of how the way tax is taught affects which students study tax in law school, and the consequences for lack of diversity of the tax bar, see Alice G. Abreu & Richard K. Greenstein, *Rebranding Tax/Increasing Diversity*, 96 DENV. U. L. REV. 1, 23–30, 43–45 (2018).

⁸¹ Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999).

The effect on the first class to whom I taught it was so powerful and electric it has remained in the syllabus ever since. I still remember a Black student approaching me after class and saying, in effect, “I thought wills and trusts was just about rich White people.” That mistaken belief is all too common among students, especially students of color, and may itself contribute to the underrepresentation of lawyers of color in the estate-planning bar.⁸² By now, Professor Davis’s article is more canonical than groundbreaking, but its impact has never waned. Exposure to these dramatic cases, and the skillful analysis provided by Professor Davis, reorients the course for the rest of the semester, and allows me to share some deep intellectual and political commitments of mine within the confines of this traditional bar-examined course.

This is the effect I seek to replicate by introducing critical tax concepts and materials into the tax course, and I believe it works. In spring 2021, I taught Advanced Federal Taxation at the Dale E. Fowler School of Law (Chapman University), a private university law school in Orange County, California. Although the focus of the class was of course on the Code, I infused some of my teaching with critical tax ideas. For example, in our discussion of Social Security, I presented data on American life expectancy by race and gender, and asked students to consider the possible unfairness of Social Security’s uniform eligibility age.⁸³ Because of life expectancy differences, Black people who pay into the Social Security system for just as long as similar White earners statistically receive much less back. I asked students to assess whether Social Security eligibility should be based not just on age but also on life expectancy—administratively complicated, perhaps, but possibly fairer. Here is one of the responses I received:

After I sent my answer, I thought about the clear inequality of my suggestion given the large discrepancy in life expectancies between white Americans and Americans of color, especially Black Americans. I really appreciate how you flesh out the inequalities of the seemingly race/gender neutral tax system. You are the first tax law professor I’ve had who regularly discusses it. As a Black woman at

⁸² As do outdated antisolicitation rules. See Diane J. Klein, *Knocking on Heaven’s Door: Ending the Ban on Live Person-to-Person Solicitation to Close the Racial Estate-Planning Gap*, 44 J. LEGAL PRO. 3 (2019).

⁸³ 20 C.F.R. § 404.409 (2003); see, e.g., *Understanding Supplemental Security Income Social Security Entitlement—2021 Edition*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/text-entitle-ussi.htm> (last visited Feb. 24, 2022).

an overwhelmingly white school, it is honestly really nice to have a professor who talks about how something as seemingly innocuous as the tax code also works to further disadvantage marginalized communities.⁸⁴

While Wills and Trusts is a required course in some institutions, and strongly recommended in most because it is a bar-examined subject, tax courses are generally electives. Although the evidence may not be more than anecdotal, it is reasonable to suppose that tax classes do not necessarily attract students with a social justice orientation in law school. Students with those interests will self-select into courses in antidiscrimination law, civil rights law, social justice-oriented clinics, or Critical Race Theory. Students with different interests will self-select into tax classes. The overlap may not be very significant in either direction.

By exposing tax students to critical perspectives and making tax courses more attractive to students who already find critical perspectives appealing and congenial, we ensure that more students are exposed both to critical scholarship and to tax law. It is thus a service to all of the students in tax classes that their readings and class discussions include critical perspectives.

C. Professional

Finally, a professional reason. The inclusion of critical tax perspectives is one of the most important ways the legal academy can help students from groups historically underrepresented in the legal profession generally, and the tax bar specifically, feel “seen” in the class, the curriculum, and the profession. This has the prospect of further diversifying the bar, and especially the tax bar. Currently, about five percent of all attorneys in the United States identify as Black, and about two percent as Asian—numbers that haven’t budged in at least ten years.⁸⁵ The percentage of lawyers identifying as Hispanic has gone up, but only from four percent to five percent in the past ten years.⁸⁶ There is no reason to think the tax bar is any

⁸⁴ E-mail from student to Diane Klein, Lecturer Dale E. Fowler School of Law, Chapman University (Feb. 17, 2021) (on file with author, reprinted with permission).

⁸⁵ AM. BAR ASS’N, ABA NATIONAL LAWYER POPULATION SURVEY: LAWYER POPULATION BY STATE (2021), https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf.

⁸⁶ *Id.*

more diverse, and good reason to suspect it may be considerably *less* so.⁸⁷ Concerns about this have led Fred T. Goldberg, Jr., former IRS chief counsel (1984–1986), IRS commissioner (1989–1992), and Department of the Treasury assistant secretary for tax policy (1992), currently Of Counsel at Skadden, Arps, to serve as “co-chair of the tax working group committee of the Law Firm Anti-Racism Alliance, a coalition of more than 290 law firms around the country donating *pro bono* service to matters addressing racial justice issues.”⁸⁸ While scholars may present various theories about *why* the tax bar is so White, none dispute that it is. Professors Alice Abreu and Richard Greenstein began their 2018 article, “Rebranding Tax/Increasing Diversity,” by asking “Why is the tax bar so white?”⁸⁹ In December 2021, *Tax Notes* published an article called “The Whiteness of Tax and How to Narrow the Race Gap.”⁹⁰ The American Bar Association’s “Goal III Report” for 2021 reported that just 1.4% of the Tax Section membership identify as Black or African American (although nearly two-thirds of those surveyed did not report their race,⁹¹ and fewer than one-third of all U.S. lawyers are members of the ABA at all⁹²). Even if the true number is two to three times that, it would still be below five percent. A happy exception to this is the IRS Office of Chief Counsel, which was fourteen percent Black as of September 2020.⁹³

⁸⁷ See Eric A. Lustig, *Who We Are: An Empirical Study of the Tax Law Professoriate*, 1 PITT. TAX REV. 85, 94–97 (2003).

⁸⁸ *Fred T. Goldberg, Jr., Of Counsel, Tax*, SKADDEN, <https://www.skadden.com/professionals/goldberg-jr-fred-t> (last visited May 2, 2022).

⁸⁹ Abreu & Greenstein, *supra* note 80, at 1.

⁹⁰ Amanda Athanasiou, *The Whiteness of Tax and How to Narrow the Race Gap*, TAX NOTES (Dec. 8, 2021), <https://www.taxnotes.com/featured-analysis/whiteness-tax-and-how-narrow-race-gap/2021/12/07/7cmjb>.

⁹¹ AM. BAR ASS’N, GOAL III REPORT 2021: THE DEMOGRAPHIC DIVERSITY OF THE ABA’S LEADERSHIP AND MEMBERS 16 (2021), <https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/2021-aba-goal-III-report-final.pdf>. Only 31.6% reported their race as White, which presumably undercounts White tax lawyers by a factor of two to three times. *Id.* Similarly, the Young Lawyers Section also reported just 1.4% of members are Black or African American, but nearly 90% of the section members did not report their race at all. *Id.*

⁹² Abreu & Greenstein, *supra* note 80, at 25.

⁹³ Athanasiou, *supra* note 90.

Nearly everyone agrees that a more diverse tax bar, whose members reflect a greater range of American experience, is among the most important ways to achieve greater equity in the administration and practice of tax law itself. Changing what happens inside the law school tax classroom is one crucial intervention in that effort.⁹⁴

III. HOW TO ADD CRITICAL TAX PERSPECTIVES TO YOUR FEDERAL INCOME TAX COURSE

There is, as yet, no critical tax counterpart to *Critical Race Theory: The Key Writings That Formed the Movement*.⁹⁵ This anthology, which collects important and influential materials created in the early years of CRT, is so widely known both inside and outside the legal academy that it appears in a 2003 painting by Kerry James Marshall, “SOB SOB,” that now hangs in the Smithsonian.⁹⁶ Although there are some collections of writings in critical tax,⁹⁷ none have achieved the canonical status of the “big red book.”⁹⁸

So rather than adding another book for students to buy,⁹⁹ I recommend adding selected works of scholarship to the existing syllabus, as appropriate. Nearly all are available at no additional charge to anyone with a Westlaw or Lexis subscription; many are also free in open-source formats as well, and thus add no cost to the required course materials.

One way to add selected materials might involve matching articles tightly to specific Code provisions (for example, *O’Donnabhain v.*

⁹⁴ Adding critical perspectives is of course not the only (or necessarily the best) way to accomplish this. Other promising approaches are presented in this volume, including Alice G. Abreu, *Tax on the Ground: How a VITA Course Enhances the Law School Curriculum*, 19 PITT. TAX REV. 101 (2022).

⁹⁵ CRITICAL RACE THEORY, *supra* note 76.

⁹⁶ See *SOB, SOB*, SMITHSONIAN AM. ART MUSEUM (Aug. 1, 2013), <https://americanart.si.edu/artwork/sob-sob-78744> (*Critical Race Theory* can be seen on the third shelf from the top, the third book from the left).

⁹⁷ See, e.g., CRITICAL TAX THEORY, *supra* note 5; Symposium, *supra* note 26.

⁹⁸ I have expressed my concerns with Infanti and Crawford. See *supra* Part I.C.

⁹⁹ This bibliography also includes a few books, with a brief description of their contents. See *infra* Appendix.

Commissioner and § 213, for a unit on deductions¹⁰⁰). Alternatively, one might assign articles about broader topics that run through the Code, like the tax consequences of marriage or homeownership.

Another of the reasons I prefer individual articles to anthologies parallels my preference for cases over casebooks. Expecting students to read articles in their entirety, even when they exceed fifty pages, demonstrates an appropriate level of respect for the authors, and is not unreasonable in an upper-division elective course. Students, especially those facing an upper-class writing requirement,¹⁰¹ benefit from experiencing an argument unspooling at its own pace, and at its full length. Excerpts necessarily reflect the priorities and choices of the editor, rather than those of the author, and to the extent that critical tax allows marginalized and unheard voices to speak, there is a benefit to permitting them to do so in full, as intended. This is especially true for the materials that are now artifacts of a prior time in legal history, to allow them to convey the legal, social, and political environment in which the author was writing.

What I provide in the following bibliography are selections from (and additions to) my online bibliography,¹⁰² an idiosyncratic and evolving list of materials that can readily be added to a standard introductory Federal Income Tax course.

A final note about the bibliography: This Article argues for a somewhat narrower definition of “critical tax” than has been adopted by others. As a result, some of the materials listed below, including some of the older pieces, might not qualify as “critical” in the sense in which I urge that it be used, particularly going forward. However, they have been included because of their unquestionable influence (including on critical tax) or because others regard them as paradigm examples of critical tax. Pieces like this also allow a faculty member explicitly to address the question of what qualifies as “critical,” and whether, for example, all tax scholarship focusing on marginalized/outsider/minority identities is *per se* critical tax. Although that

¹⁰⁰ *O’Donnabhain v. Comm’r*, 134 T.C. 34 (2010); I.R.C. § 213.

¹⁰¹ AM. BAR ASS’N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 18 (2021).

¹⁰² See Diane Kemker, *Critical Tax Bibliography*, <https://www.criticaltaxbibliography.com> (last visited May 2, 2022). Where available, the online bibliography provides links to openly accessible versions of the articles.

is not my view, I would not want to exclude important material used by those who do have that view.

Bibliography¹⁰³

A. Criticality

1. In Tax

- Anthony C. Infanti, *A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity*, 26 WHITTIER L. REV. 707 (2005). This article includes a very helpful discussion of “marginality” and also demonstrates and embodies some of the critical methods it discusses (including personal narrative).

2. In Queer Theory

- Kendall Thomas, *Practicing Queer Legal Theory Critically*, 6 CRITICAL ANALYSIS L. 8 (2019). This article by a founder of CRT includes a very useful discussion of critical vs. noncritical/anticritical scholarship, specifically in the queer theory context and, more specifically, about same-sex marriage.

B. Gender (Feminism)

- Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971). This groundbreaking article analyzes a variety of provisions of the Code to uncover and critically evaluate the incentives it created for secondary earners (primarily wives/mothers) to remain at home rather than participate in the wage labor force. It includes concrete proposals for changes in the Code to remediate this, as a form of equal opportunity/antidiscrimination based on gender. It includes an accessible discussion of a wide variety of basic income tax topics (what income is, rate schedules, progressivity, the standard deduction, nondeductibility of personal expenses), which can serve as introduction or review, depending on when it is assigned in the course. Methodologically and in its subject matter, the article demonstrates a rigorous attention to the ways in which apparently neutral laws and tax principles such as “aggregation” reproduce gender hierarchy, create inappropriate disincentives for women’s

¹⁰³ See *supra* note 102 and accompanying text.

workforce participation, and favor “traditional” familial and economic choices and structures (marriage over single status, women leaving the paid workforce upon marriage). It also is relentlessly concerned with a variety of forms of equity, including between married and unmarried women and families; between poor, middle class, and well-to-do families; and between recipients of earned and unearned income. The article is also historically important. It introduces students to Blumberg’s work and the style of legal feminism she practices. Despite its serious and explicit attention to the needs of the poor and of “welfare mothers” (mothers who are recipients of public assistance) (p. 93), it is entirely devoid of any mention of race. Despite its strong empirical focus, it includes no data at all about differential labor force participation by women of color, especially Black women. It seems to assume that heterosexuality is universal, heterosexual marriage is the only form of partnership, and mothers’ disproportionate responsibility for childrearing is unchanging and unchangeable. It also uncritically seems to accept the idea that paid work is the sole and appropriate source of “dignity and sense of self-worth,” and that “[h]ousework is not only redundant and stultifying” but “also lacks the financial reward by which we measure achievement and independence.” (pp. 94–95) It concludes with an exemplar of liberal legalism, with its faith in formal legal equality embodied in civil rights legislation as the key precondition for substantive equality.

To assign excerpts: Deductions (I.R.C. §§ 62, 162), pp. 63–66; historical comparative income tax law (Canada, England, Sweden), pp. 80–88.

- Grace Ganz Blumberg, *Women and the Law: Taking Stock After Twenty-Five Years*, 6 UCLA WOMEN’S L.J. 279 (1996). This short piece (6 pages) contains interesting reflections from Blumberg twenty-five years after *Sexism in the Code*. Notably, she expresses some intellectual and practical disdain for the more totalizing and theoretical perspectives that might today fall under the rubric of critical tax.
- Bridget J. Crawford & Anthony C. Infanti, *Introduction to the Feminist Judgements: Rewritten Tax Opinions Project*, in FEMINIST JUDGEMENTS: REWRITTEN TAX OPINIONS 3 (Bridget J.

Crawford & Anthony C. Infanti eds., 2017). This volume contains “rewritten” versions of majority and dissenting opinions in eleven important federal tax cases, including five from the U.S. Supreme Court, intended to answer the questions, “Could a feminist perspective change the shape of the tax law?” and “How would judicial opinions change if the judges used feminist methods and perspectives deciding cases?” (p. 3) Each of the chapters consists of commentary, including a description of the case’s background, the original opinion, and the feminist judgment that follows. Chapters of this book can most usefully be assigned together with the landmark cases they address, many of which (including *Welch v. Helvering* and *Lucas v. Earl*) are included in most basic tax casebooks.

C. Race (CRT, LatCrit)

- Alice G. Abreu, *Tax Counts: Bringing Money-Law to LatCrit*, 78 DENV. U. L. REV. 575 (2001). Professor Margaret Montoya describes this article as follows:

[A] superb example of weaving traditional legal analysis with LatCrit perspectives and methodologies . . . Professor Abreu convincingly demonstrates why it is important for LatCrit and other progressive theorists to develop what she terms “a second generation of critical analysis”—the areas associated with business, tax policy, money, and economic wellbeing. Her paper, written in an accessible style for tax novices, examines how power is allocated (and how hierarchies are re/produced) through the design of taxation systems. Her analysis of income and tax burden distributions provides the type of data that inform and particularize a critical analysis of class hierarchies in the US. This numerical analysis when told against her personal narrative that has Fidel Castro dismissing such concerns as “*preocupaciones burgesas*” is illuminating for two reasons. One, she gives those of us who don’t share the cultural lens of Cuban émigrés the detail and nuance of good stories and, two, she explains why business- and tax-based analyses are not trivial bourgeois concerns. Her skill in using storytelling, one of the signature tools of critical theory, is evident in her technique of engaging the reader with her stories while effectively demonstrating how tax law can be a tool for class-based analysis. Her story conveys rich details about her “subject position” as a member of an immigrant family, as a Spanish speaker, and as

someone who values the family as a social unit. This information about citizenship, language and culture provides the nuance to her more quantified legal analysis and provides a template for other LatCritters who are interested in working in these somewhat arcane areas of law.

Professor Abreu juxtaposes her first person narrative with the formal expository tone of tax policy. She shows why those who earn more have the ability, through changes in economic behavior, to decrease tax burdens and to benefit from tax credits, deductions and myriad loopholes. Those who earn less, a category that includes most populations of color, don't have that power of choice. Thus, Professor Abreu shows us why and how the design of tax systems is an exercise in the state's allocation of power through the mechanism of tax-structured economic choice.¹⁰⁴

- Dorothy A. Brown, *Teaching Civil Rights Through the Basic Tax Course*, 54 ST. LOUIS U. L.J. 809 (2010).
- Francine Lipman, *Tax Audits, Economics, and Racism*, in OXFORD RESEARCH ENCYCLOPEDIA OF ECONOMICS AND FINANCE (forthcoming 2022). This article collects the most current, best available quantitative data about the “tax gap,” the underenforcement of tax law with respect to corporations and high-income individuals, and the defunding of IRS enforcement. It also addresses the Earned Income Tax Credit (EITC) and EITC overaudits, including critical tax/race-based analyses of these audit patterns.
- Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751. This deeply researched article, more than five years in the making and about fifty pages long (plus appendices with tables of data), was the first to explicitly apply a CRT approach to significant portions of the Internal Revenue Code.

¹⁰⁴ Margaret Montoya, *Class in LatCrit: Theory and Praxis in a World of Economic Inequality (Forward)*, 78 DENV. U. L. REV. 467, 471–72 (2001).

D. Race/Gender (Intersectional CRT)

- DOROTHY A. BROWN, *THE WHITENESS OF WEALTH* (2021). This concise (225-page) volume is written in an accessible, readable style, and presents several of Professor Brown’s key contributions to critical tax scholarship. Its subtitle, “How the Tax System Impoverishes Black Americans—and How We Can Fix It,” aptly describes its contents. Chapter One, “Married While Black,” addresses the tax system’s treatment of married couples and the damaging effects of those apparently race-neutral rules on Black couples and families. Chapter Two, “Black House/White Market,” incisively analyzes the causes and effects of housing segregation on Black wealth accumulation. Chapter Three, “The Great *Un*-Equalizer,” considers the effect of debt-financed higher education on the life prospects of Black people, and the role played by the tax system in this situation. Chapter Four, “The Best Jobs,” focuses on [the racial dimensions of] employer-provided benefits such as pensions and health insurance. Chapter Five, “Legacy,” addresses inheritance, as well as tax-free intrafamily transfers and the capital gains tax rate. Finally, Chapter Six, “What’s Next,” includes several concrete, and frequently quite radical, suggestions to close the Black-White wealth gap through tax reform. These include the elimination of all exclusions (“All income is taxable”) and all deductions (“Repeal[] all existing deductions”); adding a living allowance deduction or credit; and imposing a single progressive rate system on all accessions to wealth (including “all wage income that is over the living allowance deduction . . . investment income, inheritances, and property sales would be taxed the same way”). (pp. 200–26) Professor Brown is also the author of many law review articles on these topics (listed below), to which students will typically have free access through online databases. However, the book represents Professor Brown’s most current thinking and may be more accessible, and its footnotes include copious citations to the law review literature. One limitation of the book is that it does not have a list of Code sections or other statutes it addresses.
- Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329 (2010).
- Dorothy A. Brown, *Tax Law: Implicit Bias and the Earned Income Tax Credit*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 164–78 (Justin D. Levinson & Robert J. Smith eds., 2012).

- Dorothy A. Brown, *Race, Class, and the Obama Tax Plan*, 86 DENV. U. L. REV. 575 (2009).
- Dorothy A. Brown, *Split Personalities: Tax Law and Critical Race Theory*, 19 W. NEW ENG. L. REV. 89 (1997). This short (less than ten pages) autobiographical piece, from the very early years of Critical Race Theory, usefully motivates Professor Brown's entire scholarly career.
- Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007).
- Dorothy A. Brown, *Pensions and Risk Aversion: The Influence of Race, Ethnicity, and Class on Investor Behavior*, 11 LEWIS & CLARK L. REV. 385 (2007).
- Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501 (2004).
- Dorothy A. Brown, *Social Security and Marriage in Black and White*, 65 OHIO ST. L.J. 111 (2004).
- Dorothy A. Brown et al., *Social Security Reform: Risks, Returns, and Race*, 9 CORNELL J.L. & PUB. POL'Y 633 (2000).
- Diane Klein, *U.S. v. Davis and Prof. Cain's Rewritten Opinion: An Intersectional Argument for Capping Section 1041*, 16 PITT. TAX REV. 135 (2019). The *Feminist Judgments* volume includes a rewritten opinion in *United States v. Davis*, 370 U.S. 65 (1962), a case that addressed interspousal property transfers incident to divorce and treated the transfer as taxable gain to the transferor-husband. This article assesses Professor Cain's opinion, which focuses heavily on both gender and the nature of the marriage relationship but omits to address race and class.
- Leo P. Martinez & Jennifer M. Martinez, *The Internal Revenue Code and Latino Realities: A Critical Perspective*, 22 U. FLA. J.L. & PUB. POL'Y 377 (2011).

E. Sexual Orientation (Queer Theory/Feminism)

Because of the significance of marriage in the Internal Revenue Code, the sea-change for sexual orientation and tax law scholarship was the two-part overruling of the Defense of Marriage Act (DOMA), in *Windsor v. United States*, 570 U.S. 744 (2013), and in *Obergefell v. Hodges*, 576 U.S. 644 (2015). Scholarship before *Windsor* and between *Windsor* and *Obergefell* is, in pure tax law terms, superseded and thus of predominantly historical interest, but is potentially pedagogically valuable nevertheless.

1. Pre-*Windsor*

- Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 L. & SEXUALITY 97 (1991). This early piece advocating for recognition of same-sex marriages offers a highly nuanced and well-informed analysis of the mixed tax consequences of marriage. It encourages students to think creatively about the appropriate “unit” of taxation (individual, couple, family?), and allows Cain to explicate what she calls the “fallacy of individualism” in tax law and policy. She articulates a feminist position in her focus on what she calls “the reality of personal relationships,” a reality contrary to the assumptions of liberal economic individualism that persons are “rational market actors, attempting to maximize their individual utility.” (pp. 101–02) At a time when any state recognition of same-sex marriage was still more than a decade away, Cain openly asserted that “my preference would be to redraft the entire Internal Revenue Code so that it recognized the existence of lesbian and gay families and treated them with dignity” (p. 102), a commonplace sentiment today but a radical one at the time. This article contains a useful analysis of gift tax law and the limits of its conceptual apparatus, especially in the context of intimate relationships, families, and what she describes as “support transfers.”

Specific topics: assignment of income doctrine and taxation of gifts (I.R.C. § 102) (pp. 109 et seq.)

- Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763 (2004). This compelling article describes both the direct tax treatment of gay men and lesbians, and other much less obvious ways in which the Code’s preference for heterosexuality is expressed. This highly readable article will be especially useful as more and more of our students come of age in

a legal environment in which same-sex marriage is taken for granted.

- Anthony C. Infanti, *A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity*, 26 WHITTIER L. REV. 707 (2005). This article could be excerpted and assigned for its discussion of same-sex marriage.
- Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605. Although this is a pre-*Windsor* article (and thus outdated in its treatment of same-sex marriage), Infanti’s proposal to abolish joint tax returns is perennially relevant and provocative, and the connection to nontraditional families continues to be relevant and accessible to students.

2. Post-*Windsor*, pre-*Obergefell*

- Patricia A. Cain, *Taxation of Same-Sex Couples After United States v. Windsor: Did the IRS Get It Right in Revenue Ruling 2013-17*, 6 ELON L. REV. 269 (2014). This article is especially useful in exposing students to the complexities of retroactivity in a rapidly-changing legal environment, where Supreme Court decisions have dramatic and complex tax consequences. It is also useful paired with Infanti’s “Hegemonic Marriage,” *infra*, which addresses this issue with the hindsight of *Obergefell*.

3. Post-*Obergefell*

- Anthony C. Infanti, *Hegemonic Marriage: The Collision of “Transformative” Same-Sex Marriage with Reactionary Tax Law*, 74 TAX LAW. 411 (2021). This article usefully retraces the internal debate about pursuing same-sex marriage rights within the LGBT community, a story not widely known, and also reflects Infanti’s mature post-*Obergefell* thinking. The article also introduces students to some of the details of IRS rulemaking, including revenue rulings, proposed regulations, and public comments, and some of the important actors (the ABA Tax Section, law professors, the IRS Advisory Council, and interest groups like the Human Rights Campaign) who make up the “behind the scenes” aspects of tax law.

F. Gender Identity (Queer Theory)

- David B. Cruz, *O'Donnabhain v. Commissioner*, 134 T.C. 34 (2010), *acq.*, 2011-47 I.R.B., in *FEMINIST JUDGEMENTS: REWRITTEN TAX OPINIONS* (Bridget J. Crawford & Anthony C. Infanti eds., 2017). *O'Donnabhain* is the leading current case on the deductibility under § 213 of medical expenses related to gender-confirming surgery. The Tax Court permitted deduction of the costs of vaginoplasty and hormone treatment (but not breast augmentation) under § 213. Professor David Cruz “rewrites” this opinion in a way determined to focus on *O'Donnabhain* the taxpayer, without pathologizing her or the condition for which tax-deductible medical care was sought. The chapter includes useful commentary from Prof. Nancy Knauer.
- David B. Cruz, *O'Donnabhain v. Commissioner of Internal Revenue*, in *GENDER IDENTITY AND THE LAW* 606–32 (David B. Cruz & Jillian T. Weiss eds., 2021). This section includes an introductory “Reading Guide,” covering the logical structure of the deduction provision and a number of questions to guide readers through operative or interesting parts of the various judges’ opinions; the edited majority opinion and edited excerpts from the Halpern and Holmes concurrences and Gustafson partial concurrence-partial dissent; and about a page of “Discussion” at the end (including citations to a number of selected articles centrally about the case).
- Lindsey Dennis, “*I Do Not Suffer from Gender Dysphoria. I Suffer from Bureaucratic Dysphoria*”: *An Analysis of the Tax Treatment of Gender Affirmation Procedures Under the Medical Expense Deduction*, 34 BERKELEY J. GENDER L. & JUST. 215 (2019). This article, by a recent law school graduate, also evaluates *O'Donnabhain*. What distinguishes Dennis’s piece as “critical,” unlike many positive articles written in the aftermath of the case, is the attention paid to “normative ideals of gender performance and the gender binary.” (p. 222)

G. Immigration Status

- Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1 (2006). Although it is now more than fifteen years old, this article addresses issues of continuing relevance, and ones many

tax students may never have considered, including whether undocumented immigrants pay taxes (they do), and whether this comports with ideals of either our tax or immigration systems.

H. Non-Tax Materials

These materials are not specifically about tax law but are good companions for some of the other material.

1. History of Legal Education

- Patricia A. Cain & Jean C. Love, *Cincinnati: Before and After (A Love Story)*, 66 J. LEGAL EDUC. 460 (2017). This discursive, narrative piece is not focused on tax law, although a number of LGBT tax law professors feature in it. However, it provides very useful context for the development of LGBT critical tax in American law schools over the period it covers (approximately 1974–1995).

2. Critical Legal Pedagogy

- Chantal Thomas, *Reloading the Canon: Thoughts on Critical Legal Pedagogy*, 92 U. COLO. L. REV. 955 (2021). This article, by a contracts professor, surveys key aspects of critical pedagogy (not specific to tax law).

