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ENOUGH INSANITY? A CALL FOR A (MORE) CRITICAL TAX THEORY

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ENOUGH INSANITY? A CALL FOR A (MORE) CRITICAL TAX THEORY

*Edward J. McCaffery**

I am delighted to be at this Conference on *Protecting Dynastic Wealth: Perspectives on the Role of Estate and Gift Tax in Perpetuating Inequality* and to be giving this talk, for several reasons. One, the setting brings back fond memories of Larry Frolik and Bill Brown, wonderful tax scholars whom I almost joined on the Pittsburgh Law School faculty way back in the 1980s. Two, the excellent speakers here today, leading estate planning practitioners and academics alike, including a former student and even a near namesake of mine, inspire me to think anew about old and intransigent problems. And three, the topic itself calls me back home to themes I have contemplated for decades.

The specific calls of the question for the two panels at the Conference are:

The estate and gift tax law has been critiqued as ineffective in curbing the growth of dynastic wealth. What goals are well served by the current law of wealth transfer taxation? Who benefits the most from the current tax structure? How might estate and gift tax laws be more effective as a backstop for the income tax? What role do lawyers play in the tax system, and how does that uniquely manifest in the wealth transfer tax context?

and

There are tremendous gaps in income and wealth in the United States. What role does the tax law play in wealth transfers? How might the tax law be reformed? What are the roles that wealthy individuals, lawyers, lawmakers and others play in the development of the tax law?

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I have been thinking, writing, and talking about just these questions at least since the time in the 1980s when I met Bill and Larry. As I commenced my journey as a legal academic, my “job talk” centered on the idea that the gift and estate tax was not, in practice, working towards any compelling normative end. It was not raising revenue. It was not “backing up” the income tax. It was not breaking up concentrations of wealth. Indeed, a compelling case was already building that the seeds of a massive dynastic trust movement had been planted, by the very existence and structure of the wealth transfer tax system itself: in other words, that the wealth tax system was precisely counter-productive to its leading reason for existence. The system was perpetuating inequality, not reducing it.

This was a fact, or set of facts, that I had learned first-hand from being a practicing estate planning lawyer for several years after graduating from law school. That experience had already answered for me the questions of the Conference today: wealth transfer taxation does not work, and never has worked, to meaningfully address wealth inequality or dynastic wealth, and is doing exactly the opposite of what its most passionate advocates desire it to do. It is well past time to come up with better ideas for taxing wealth and its dynastic transmission.

And so, the call to this Conference led me to revisit a personal journey in my mind and to reflect on how the academy and the real world have developed—or failed to develop—along divergent tracks over these many decades since I last visited Pitt’s Law School. The setting, the people, and the call of the topic have each compelled me to set out these thoughts in strong terms. Old age, after all, should not go gently: consider this a rage against the dying of the light.¹

I. SUFFERINGS OF THE YOUNG ME

I do not intend this Article to be personal for its own sake; my story is of little interest even to me. But to the critical theorist whom I mean to inspire to carry the torch forward, the personal is the political, and vice versa. Acting as if “Tax” is some kind of impersonal, neutral, quasi-scientific subject matter to be worked out in a purely logical fashion has been a significant part of the problem all along. I have been addressing the topic of this Conference

¹ DYLAN THOMAS, DO NOT GO GENTLE INTO THAT GOOD NIGHT (1951), *reprinted in* THE POEMS OF DYLAN THOMAS 239, 239 (Daniel Jones ed., 2003).

for over thirty years, and I have learned much along the way and gained what feels to me like some wisdom. I write to share my journey (and to rage).

We continue my story, now in the academic year 1993–1994. After a stint teaching high school Latin, I graduated from law school, practiced tax and estate planning for a few years, and started my academic career at the University of Southern California. As noted, I had learned first-hand that the wealth transfer tax system was not working in the way that its liberal academic supporters desired it to work—and I count myself as a proud liberal, even a “progressive” one. Developing my job talk ideas, I had written up a full-blown law review article, *The Uneasy Case for Wealth Transfer Taxation*,² echoing a famous title from the tax law scholars Walter Blum and Harry Kalven.³ I was young(ish), untenured, and excited to have my piece accepted by the *Yale Law Journal*; I was visiting at Yale Law School at the time.

Alas, my excitement soon turned to puzzlement. The *Uneasy Case* drew rather intense opposition. I learned that some professors pushed the student editors at the *Journal* to recant its acceptance. Friends and colleagues suggested to me that I should withdraw the piece—or at least change the ending—on my own. The stated worry was that if Newt Gingrich—then the Speaker of the House—read the article, he would soon move to repeal the so-called death tax. (Only later did I learn that academics never have such grandiose impacts.)

I took these comments and concerns seriously, in part out of a youthful naiveté that academic words might really matter. What if the critics were right, and my arguments would lead to the repeal of the wealth transfer tax system, without anything else being done? (I was then and am now calling for consideration of a progressive spending tax, which I maintain does not require a separate, free-standing wealth transfer tax component.⁴) My goal as a normative legal scholar was and has always been to offer ideas into the public political discourse that might improve our collective social life, in the

² Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 283 (1994).

³ Walter J. Blum & Harry Kalven Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952).

⁴ See McCaffery, *supra* note 2, at 345–58; Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807 (2005).

great Enlightenment spirit of obtaining greater freedom and equality for all. What if my work would do the *opposite*?

These thoughts haunted me for some time. Then I woke up one night with an answer. I had heard and taken seriously my critics' concerns. But the wealth transfer tax system was not in fact working. That was then, and is now, a truth. I was coming to see that the system would *never* work and that it might not even be a good thing if it *did* work, in part because the normative assumptions about what a "good" outcome might be were unclear and underdeveloped. I personally believed that a better alternative existed, and—most strongly—that liberals and progressives needed to be more creative, to come up with better, more popular, and practicable means for advancing their ends. The wealth transfer tax system was a symbol and an empty one at that. The young(er) me concluded that the liberal cause did not need meaningless symbols but rather real solutions.

And so I revised the ending of my Article after all, but to strengthen, not weaken, its key insights (years later, this would come to be known as "doubling down."). Addressing empirical uncertainty about the effects of the tax, which some invoked to bring critical thinking about reform to a halt—after all, my critics were worried that my ideas might lead to a worse, more unequal, state of the world—I wrote:

We do know some things. We know, for example, that wealth inequality remains rather severe, regardless of the presence of a nominally steep gift and estate tax. We know that the estate tax raises little revenue, in absolute or relative terms, with or without adjusting for administrative costs and possible income tax losses. We know that individuals are making large inter vivos gifts, and that they are taking many other steps to avoid the sting of the tax. . . . And we know that wealth transfer taxation is not popular, even though it applies only to a tiny segment of society.⁵

I took this mid-1990s status quo as reason to at least *think* better, more creatively, about how to address persistent problems of wealth inequality:

These known facts ought to cast some doubt on the received wisdom and heighten the call for alternative approaches. The case for a change of approach is all the more compelling when we can reason our way toward alternative means for furthering liberal goals and achieving some of the aims that matter to wealth taxation advocates, such as greater equality of opportunity and the improved

⁵ McCaffery, *supra* note 2, at 363.

welfare of the lower classes. Questioning the estate tax does not require that we fall into naïve libertarianism or the comforting arms of trickle-down theory. We can design a tax system that constrains the private use of wealth without creating all of the perverse incentives and resource costs of the status quo. This is the point of the progressive consumption-without-estate tax. Is not this—or something—worth a try?⁶

This was my view of the wealth transfer tax system thirty years ago: it was not working for its own intended ends and was unpopular to boot. I took this, then and now, as a call for thinking better and more creatively about solutions to the problems posed by massive and growing wealth inequality.

I could write the same paragraphs in response to the call of the questions for this Conference today.

Back to the 1990s, in my youthful exuberance I saw the story of the estate tax and its failures as a case study of more general problems with liberal political theory. Too often, the status quo held a chokehold on our imaginations. What started as a means—such as the estate tax—first lost its connection to any plausible end, and then became an end unto itself. The basic contours of the law became fixed facts, a delusion of false necessity.⁷ No one questioned the law’s very existence anymore.

At the time, and to me ironically, liberal and progressive normative legal theory were flourishing. John Rawls had published *Political Liberalism* in 1993,⁸ continuing themes developed in *A Theory of Justice* from 1971,⁹ centered on addressing the problems and possibilities of a “reasonably pluralist” society. Rawls had come to see justice itself as “political, not metaphysical,” meaning the subject of reasonable agreement among free and equal persons holding differing comprehensive conceptions of the good.¹⁰ The critical legal theorist Roberto Unger, who had published his three-

⁶ *Id.*

⁷ ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY, *in* POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY 1 (2004).

⁸ JOHN RAWLS, POLITICAL LIBERALISM, at xiv (1993).

⁹ JOHN RAWLS, A THEORY OF JUSTICE 31(1971).

¹⁰ John Rawls, *Justice as Fairness: Political, not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 223 (1985).

volume *Politics* in the 1980s,¹¹ authored *Democracy Realized: The Progressive Alternative* in 2000, setting out his sense of the terms and conditions for an “ultra-liberal” society (and, in doing so, advocating a progressive spending tax).¹² The world of *theory* seemed full of hope and possibility as we emerged from the wars and disasters of the mid-20th century with greater wealth, greater global connectedness, and greater hope for a more enlightened democracy.

But the real world? Not so much. Actual liberal politicians clung to the same basic contours of a tax system put in place in the World War I era, what I shall call the income-plus-estate tax paradigm. The people did not particularly like income-plus-estate taxes, and so, from Ronald Reagan in California to Ronald Reagan in Washington, D.C., the country swept out the liberal tax-and-spend Democrats, such as Michael Dukakis from “Taxachusetts.”¹³ It was the supposedly “liberal” tax system(s) that voters rejected, and Republicans’ antitax stance—both vis-à-vis the size or quantity of taxes *and* the nature or quality of them—gave conservatives power from which they could launch other social initiatives, many in conflict with the more generally liberal values of the American people. These trends have continued, through and during the presidency of Donald Trump and beyond.¹⁴

Back to 1994, the younger me was puzzled that America could not produce a more genuinely liberal, redistributive tax system. Is not this what a reasonable democratic society would endorse? Why were progressives insisting on upholding an unpopular tax system that was not in fact working to redistribute wealth as a *sine qua non* of joining their club, all to disastrous electoral results? I ended the *Uneasy Case* reflecting on these bigger themes:

In conclusion, I want to generalize the story a bit, to move to an even larger plane. Here is a bigger puzzle: At the very time that our leading liberal political philosophers are telling us that it’s all politics, our practical liberal politics are in disarray and retreat. Republicans and centrist Democrats have occupied the White House for nearly three decades, and an anti-government, anti-taxation fervor has

¹¹ ROBERTO MANGABEIRA UNGER, *POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987).

¹² ROBERTO MANGABEIRA UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* 139 (2000).

¹³ See Edward J. McCaffery, *The Missing Links in Tax Reform*, 2 CHAP. L. REV. 233 (1999).

¹⁴ See generally Edward J. McCaffery, *The Death of the Income Tax (or, The Rise of America’s Universal Wage Tax)*, 95 IND. L.J. 1233, 1238 (2020).

been shaping state and national politics, with no apparent end in sight. This history is a bit odd, for a commonsensical view would predict that a reasonable liberal politics, say in a Rawlsian vein, would be redistributive—that, even if we did not take matters all the way to the radical redistributive point inherent in Rawls’ difference principle, modern democracies would at least tend toward exacting a greater sacrifice from the wealthy. Yet our actual tax systems are at best only weakly progressive, and at worst not progressive at all. This Article suggests one rather large part of an answer to the puzzle. Practical liberal politics have gotten our objective social values wrong, have dwelled on poor institutional means for advancing the liberal program, have put the people to hard choices between progressivity and productivity, and have, most and worst of all, failed to listen. The people are not illiberal; their liberal leaders have failed them.¹⁵

A major theme of the *Uneasy Case* had been the substantive and methodological one that high theory ought to pay respectful attention to popular morality, an idea implicit in Rawls’s concept of reflective equilibrium, adapted from Nelson Goodman.¹⁶ The wealth transfer tax system has long been among the most unpopular of American taxes. Progressive defenders of it have tended to dismiss this popular opinion. An advisor to the presidential candidate George McGovern, who had to walk back his call for a near confiscatory estate tax within hours of making it, attributed the unpopularity of the estate tax to the notion that “every slob in the street thinks that if he hits the lottery big, he may be able to leave half a million to his family.”¹⁷ I dubbed this the “lottery” or “slob in the street” hypothesis, and I critiqued it rather harshly.

To me, then and now, it seemed that we should respect the people’s opposition to a particular tax, and come up with better, more attractive means of serving their legitimate ends. If important social systems such as tax were “political” all the way down, I felt that liberal political leaders had to do a better political job of devising acceptable means of effecting liberal ends. But “traditional” tax scholarship continued to cling to fixed foundational ideas, such as working out the logic of a “comprehensive income” tax, as if that

¹⁵ McCaffery, *supra* note 2, at 364.

¹⁶ See John Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHIL. REV. 177, 184 (1951).

¹⁷ See Edward J. McCaffery, *The Political Liberal Case Against the Estate Tax*, 23 PHIL. & PUB. AFF. 281, 286 n.10 (citing THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT* 1972, at 156) (1973).

were a normative necessity, or stubbornly following the failed real-world attempts at taxing wealth.¹⁸

The gap between the possibilities of liberal political theory and the realities of actual liberal policies puzzled and depressed me. I awoke in the middle of the night to write this, the Article's final paragraph:

In the beginning and in the end, tax is politics. It is all politics, politics through and through. No dictionary definitions, no metaphysics of natural rights or entitlements theory, no quasi-science of individual utility functions, can see us through, can dictate the choices we must make. But while it is often thought or said that all reason and logic stop at the point where we reach the conclusion that something is all politics—as if all politics meant just politics, in some trivializing sense—the trend in modern liberal theory points decisively otherwise. If tax is indeed all politics, we have all the more reason both to probe our liberal reasons and to pay careful, respectful attention to our practices. This logic is even, and indeed especially, true where such attention to practices takes us to surprising, counterintuitive places, as in the case of estate taxation. If liberal politicians are to use the power implicit in the emergent program of political liberalism wisely and well, they must try harder to get it right. It is too important not to do so.¹⁹

These youthful 1994 rhetorical flourishes give my answers to the specific questions in the call of the Conference. This Article is thus an intellectual coming home for me. But it is also more than a little puzzling, and sad, that the same facts persist at thirty years removed. Since 1994, wealth inequality has gotten dramatically worse while wealth transfer taxation has dramatically weakened. The tax system is not working to check economic inequality but rather is exacerbating it. These truths continue while we ask the same questions, and contemplate the same answers, or types of answers. Eliminating “zeroed out GRATs”²⁰ or attacking the use of minority discounts in family-held entities may or may not be good ideas, in isolation. But it has become silly to think that such incremental, ad hoc, and reactive moves within an existing and largely unchallenged paradigm will check the tide of rising wealth inequality. If insanity is trying the same thing over and

¹⁸ See Edward J. McCaffery & James R. Hines Jr., *The Last Best Hope for Progressivity in Tax*, 83 S. CAL. L. REV. 1031 (2010) [hereinafter McCaffery & Hines, *The Last Best*]; Edward J. McCaffery, *The Paradox of Taxing the Rich*, FLA. TAX REV. (forthcoming 2023).

¹⁹ McCaffery, *supra* note 2, at 365.

²⁰ See Zachary R. Mider, *GRAT Shelters: An Accidental Tax Break for America's Wealthiest*, WASH. POST (Dec. 28, 2013).

over and expecting a different result,²¹ then the very idea of this Conference is insane.

Meanwhile, my well-meaning critics of the mid-1990s were right in one important regard. After my article *Uneasy Case* was published, I got called to testify by *Republican* lawmakers, and to speak before “conservative” crowds. Fortunately, or not, conservatives did not come to take up any of my actual suggestions, either.²² Already stigmatized for being “against” the estate tax, speaking to conservatives led me to be more suspect by my liberal and progressive friends and colleagues, whom I was trying to help all along.²³

II. BACK TO THE PRESENT

By 1994, I had given my answers in print to the specific questions asked by this Conference. The wealth transfer tax system was not working. Lawyers and estate planning professionals had cleverly—and legally—worked around it. The estate tax was and always had been “voluntary,” as George Cooper had described it in the 1970s,²⁴ and America clearly lacked the political will to tighten it. Inequality was getting worse with no end in sight. Better answers to the pressing problems of dynastic wealth—whose seeds had been planted in the gift and estate tax law itself—would have to come from “outside the box” of the current- and long-standing wealth transfer tax system.

What do I think now? Everything I thought then, only more so. The wealth transfer taxation has been weakened considerably since the 1990s, and in a bipartisan fashion, with legislative changes under George W. Bush,

²¹ This is the sense of “insanity” to which I allude in my title: “Insanity is doing the same thing over and over and expecting different results.” It is not completely clear where this quotation originated; it is often attributed to Einstein. Frank Wilczek, *Einstein’s Parable of Quantum Insanity*, SCI. AM.: QUANTA MAG. (Sept. 23, 2015), <https://www.scientificamerican.com>.

²² See, e.g., EDWARD J. McCAFFERY, FAIR NOT FLAT: HOW TO MAKE THE TAX SYSTEM BETTER AND SIMPLER (2002); McCaffery & Hines, *supra* note 18, at 1098.

²³ For more on the reaction to *Uneasy Case*, see the issue of the *Tax Law Review* printing papers from a symposium held at NYU Law School on the piece, including my own reply, Edward J. McCaffery, *Being the Best We Can Be (A Response to My Critics)*, 51 TAX L. REV. 615 (1996).

²⁴ George Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, 77 COLUM. L. REV. 161, 221 (1977).

Barack Obama, and Donald Trump consistently moving against the tax.²⁵ The Obama 2010 change—to make permanent a \$5 million estate tax exemption, indexed for inflation, with a continued stepped-up basis under § 1014—was especially significant because it *quintupled* the gift tax exemption, which had been set at \$1 million throughout Bush’s ten-year Economic Growth and Tax Relief Reconciliation Act (EGTRRA).²⁶ This move opened a gold rush to South Dakota and other exotic realms to book up the benefits of perpetual or dynastic trusts.²⁷ Then Trump’s Tax Cuts and Jobs Act (TCJA) simply doubled the whole thing.²⁸ A tax that “only morons pay,” as Trump’s chief economic advisor, Gary Cohn, had put it while he worked in the White House, is now a tax that only *extremely* wealthy morons pay.²⁹ And, of course, wealth inequality has gotten essentially monotonically worse since *Uneasy Case* was published.³⁰

Back to the narrowly personal, after the *Uneasy Case*, my thinking and scholarship took a turn towards a wider, more comprehensive view of tax. My more general work on the income tax turned to the *systematic* way that our tax system, writ large, fails to tax capital or its yield, through the trivial tax planning steps of *Buy, Borrow, Die*.³¹ By purchasing assets that rise in value without producing taxable dividends (such as growth stocks), borrowing, and dying to get the stepped-up basis, the wealthy can avoid *all* federal taxation. In *Voluntary Tax, Revisited*, I argued that *all* taxes on capital or financial wealth were essentially voluntary in the sense that Cooper meant: one could live off capital without *ever* paying tax.³² This insight too was

²⁵ McCaffery, *supra* note 14.

²⁶ See Edward J. McCaffery, *Distraught from Distraction by Distraction: Reimagining Estate Tax Reform*, 40 PEPP. L. REV. 1235, 1241 (2013).

²⁷ *Id.* See generally Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303 (2003).

²⁸ McCaffery, *supra* note 14.

²⁹ *Id.*

³⁰ See Edward J. McCaffery, *Piketty Revisited: The Meaning of “Capital in the Twenty-First Century,”* 2021 MICH. ST. L.J. 31, a review essay of THOMAS PIKETTY, *CAPITAL IN THE TWENTY FIRST CENTURY* (Arthur Goldhammer trans., Belknap Press: An Imprint of Harvard Univ. Press) (2013).

³¹ See McCaffery, *supra* note 4.

³² Edward J. McCaffery, *A Voluntary Tax? Revisited*, 93 ANN. CONF. ON TAX’N AND MINUTES OF THE ANN. MEETING OF THE NAT’L TAX ASS’N 268, 268–74 (2000).

treated with skepticism or indifference by traditional income tax scholars until the summer of 2021, when reporters from *ProPublica* obtained the tax returns and financial records of the twenty-five wealthiest Americans to demonstrate that most billionaires in fact follow some variant of *Buy, Borrow, Die* to pay little if any taxes.³³

I have watched with some bemusement as scholars and politicians have now rushed in to fill the void, with the most obvious solutions—mark-to-market or wealth taxation, repeal stepped-up basis on death, or tax gains at death³⁴—being trotted out. While flattered with the attention to my phrase at least, I am also puzzled by the monolithic response. I had coined *Buy, Borrow, Die* decades ago, out of my classroom teaching of basic tax, but the law behind *Buy, Borrow, Die* has been in place for a century and counting.³⁵ In my opinion, the mere existence and persistence of *Buy, Borrow, Die* is a deep criticism of the status quo. For not only has *Buy, Borrow, Die* persisted for over a century, but solutions to *Buy, Borrow, Die* have existed for just as long. Yet we *never* have taken even simple steps, such as repealing the stepped-up basis rule of § 1014; indeed, it is the *repeal* of stepped-up basis that has been repealed, twice already, first by Ronald Reagan after Jimmy Carter tried it, and then by Barack Obama, after George W. Bush tried it.³⁶

Why would anyone think that things would really change now, just because we have gotten the description of basic tax-planning steps down to three simple words?

³³ Mauricio Rodriguez & Nadia Sussman, *Buy, Borrow, Die: How America's Ultrawealthy Stay That Way*, PROPUBLICA (June 8, 2021, 12:23 PM), <https://www.propublica.org/video/buy-borrow-die-how-americas-ultrawealthy-stay-that-way#:~:text=Some%20of%20the%20wealthiest%20Americans,the%20wealthiest%20avoid%20income%20tax.>

³⁴ I discuss these and other “solutions” to *Buy Borrow Die* in Edward J. McCaffrey, *Taxing Wealth Seriously*, 70 TAX L. REV. 305 (2017). See also Edward J. McCaffery & David Gamage, *Twenty-First Century Income Taxation: Buy Borrow Die and Beyond* (2023) (unpublished manuscript) (available from authors).

³⁵ Matthew Kredell, ‘Buy, borrow, die’ gains new life, USC GOULD SCHOOL OF LAW (Aug. 30, 2021), <https://gould.usc.edu/about/news/?id=4887>.

³⁶ See McCaffery, *supra* note 26.

In *Taxing Wealth Seriously*,³⁷ I set forth, in historical and analytic terms, the ways in which America has *never* meaningfully taxed capital. Analytically, *Buy, Borrow, Die* has been in place for over a century, unchecked. Historically, I relied, as I often do, on the work of Carolyn C. Jones, who had shown that Franklin Delano Roosevelt’s tax policy featured *symbolic* taxes on the rich and *real* taxes on labor—the pattern for American tax policy throughout the entire existence of the income tax.³⁸

Then I broadened my thinking one further step. If an income tax is supposed to tax capital and labor, and ours is not taxing capital, we have a wage tax. *Death of the Income Tax (or, the Rise of America’s Universal Wage Tax)*, followed.³⁹

And then, coming to this Conference, I thought more broadly still. Capital or wealth taxation—source-based taxation—has *never* worked to curtail wealth inequality. Never means never. No advanced society, at any time in history, has ever used taxation to significantly tax capital or to reduce wealth inequality. Thomas Piketty, who has looked at patterns of income and wealth inequality across economies over millennia, was unable to locate a “low wealth inequality” state, *anywhere anytime*.⁴⁰ Massive inequality has led to rebellions, wars, and economic collapses. Tax reform? Not so much. There simply has never been a materially equal capitalist society of any significant scale at all, and tax has never played a significant role in reducing wealth inequality.

Given the utter absence of precedent, it seems silly—insane, again—to think that any direct tax on wealth or wealth transfers will *ever* work. The American wealth transfer tax system remains symbolic and seems to endure mainly because there are well-heeled special interests on both sides of the issue—wealthy individuals and families willing to pay to end the tax, and financial institutions, insurance companies, and large nonprofits who are

³⁷ McCaffery, *supra* note 34.

³⁸ Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax during World War II*, 37 BUFF. L. REV. 685, 685, 699 (1988).

³⁹ McCaffery, *supra* note 14.

⁴⁰ PIKETTY, *supra* note 30, at 309–11.

willing to pay to keep the tax.⁴¹ The equipoise of the situation is to leave a tax that raises little revenue but pushes its targets to establish dynastic and/or philanthropic trusts, and all sides to continue to contribute generously to legislators.⁴²

Turning to a narrower conception of the topic, the curious case of dynasty trusts shows the irony and limitations of the status quo. Such perpetual trusts were caused, or at least propelled, by the new generation-skipping tax put in place in the Tax Reform Act of 1986.⁴³ That tax was meant to prevent wealthy families from “skipping” generations by giving wealth to grandchildren or lower generations. But with the “Gallo amendment” allowing for one-time exceptions of up to \$2 million per grandchild (the Gallo family, vintners from California, had many grandchildren), a script was laid out for setting up long-lived trusts.⁴⁴ Soon, the hallowed rule against perpetuities had fallen, as states such as South Dakota, Alaska, Delaware, and others became dynasty trust havens in our own midst.⁴⁵ As the *inter vivos* gift exemption rose, first to \$5 million in 2010 under Obama, then to \$10 million in 2017 under Trump, all indexed for inflation, a dynasty trust boom exploded.⁴⁶ Throughout the existence and persistence of a nominal—and

⁴¹ See Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159, 1165 (2006); see also Edward J. McCaffery, *The Dirty Little Secret of (Estate) Tax Reform*, 65 STAN. L. REV. 21, 23 (2012). See generally MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (Univ. of Ill. Press 1965).

⁴² See generally EDELMAN, *supra* note 41. Of course, symbols can have unintended and even contrary effects. The mere existence of the wealth transfer—or “death”—tax system may contribute to political attitudes that we are overtaxing the rich. I thank Tony Infanti for pointing this out.

⁴³ See Dukeminier & Krier, *supra* note 27; see also McCaffery, *supra* note 26.

⁴⁴ Albert B. Crenshaw, *Gallo Tax Exemption Works for the Very Rich!: Regulations: A Grandparent may give \$2 Million to each Grandchild and Pay no More than the Standard Gift-Estate Taxes, but only Until Dec. 31.*, L.A. TIMES (Nov. 7, 1989), <https://www.latimes.com/archives/la-xpm-1989-11-07-fi-1110-story.html>.

⁴⁵ See Robert Sitkoff & Max Schanzbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 376 (2005); see also Zachary Mider, *South Dakota Address Helps Richest Shelter Wealth Forever: Taxes*, BLOOMBERG (Dec. 27, 2013, 12:01 PM), <https://www.bloomberg.com/news/articles/2013-12-27/moguls-rent-south-dakota-addresses-to-dodge-taxes-forever?leadSource=uverify%20wall>.

⁴⁶ McCaffery, *supra* note 26, at 1243.

fully avoidable—wealth transfer tax helped to spur and define the trend over the years.

Continuing the irony—and continuing to point to the lack of solid normative analysis undergirding the field—we can now ask what, exactly, is wrong with dynastic trusts? It has always been the case that our normative theories about wealth and its unequal possession remain underdeveloped.⁴⁷ In *Uneasy Case*, I contemplated a world with a truly confiscatory estate tax, as some scholars periodically propose.⁴⁸ Such a tax would obviously generate massive incentives to spend it all and die broke, the simplest way to avoid wealth transfer taxation, such as by running for president. In the 1990s, we had Ross Perot; more recently, we had Michael Bloomberg.⁴⁹ Is it a better world in which we see billionaires such as Jeff Bezos or Elon Musk hell-bent on missions to spend hundreds of billions of dollars in their own lifetimes? The problem of intergenerational wealth inequality is large and looming, but is it made worse with dynasty trusts, which at least impose some restraint on the remote beneficiaries' *use* of the capital? It is possible, in a deeply unequal and flawed economic landscape, that dynasty trusts, *per se*, might be better than the alternatives. We need to think better, and more critically, from the ground up.

I have also come to see that the smaller questions of this Conference can be too small, blinding in their particularity, because they presume so much. At this point, it is simply insane to think that inframarginal changes to the wealth transfer tax system will do anything much at all about the larger forces of wealth inequality. There is of course a case to clarify and improve the rules of the existing regime, such that, say, assets transferred via intentionally defective grantor trusts should not receive a stepped-up basis on death.⁵⁰ But it is insane to think that such refinements will meaningfully check the ever-

⁴⁷ See McCaffery, *supra* note 17, at 290–92.

⁴⁸ See, e.g., Mark Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 73 (1990).

⁴⁹ See McCaffery, *supra* note 2, at 321 (discussing Perot); Edward J. McCaffery, *Mike Bloomberg's Presidential Run Could Cost Taxpayers Billions*, CNN (Feb 28, 2020, 11:59 AM), <https://www.cnn.com/2020/02/28/opinions/bloomberg-presidential-run-could-cost-taxpayers-billions-mccaffery/index.html> (discussing Bloomberg).

⁵⁰ Personal Financial Planning, *How to Determine the Basis of IDGT Property at Death*, AICPA, at 09:15 (Aug. 7, 2020), <https://www.aicpa.org/resources/podcast/how-to-determine-the-basis-of-idgt-property-at-death>.

growing stores of wealth, dynastic or otherwise. They never have, and it is time to just face up to the fact that they never will.

III. LOOKING BACKWARDS: ANOTHER CRITICAL OPPORTUNITY LOST

Let us return now to the 1990s. Beyond questioning the role of the wealth transfer tax system in the progressive cause, my major academic focus was pursuing gendered biases and assumptions in the tax laws, inspired by seminal work of Grace Blumberg that I had read in law school.⁵¹ This led to my first book, *Taxing Women*.⁵² It also led to an invitation to a conference on *Critical Tax Theory*, held at SUNY-Buffalo Law School in 1995, hosted by a young legal academic, Nancy Staudt.⁵³ I enjoyed myself immensely at that conference, too, and felt that an exciting intellectual movement was being born. An inspiring collection of essays, *Taxing America*, edited by Mary Louise Fellows and Karen Brown, was published in 1997, with important work from many of the SUNY conference participants.⁵⁴ The aforementioned Grace Blumberg and Carolyn C. Jones, along with Marjorie Kornhauser and many others, were writing about tax—of all things!—from interesting and critical perspectives.⁵⁵ It seemed that a new spirit was coming to tax law scholarship. Maybe, just maybe, this critical movement would help inspire thought to escape from the insanity of clinging to a taxing paradigm that did not tax capital at all.

⁵¹ Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971). Credit is due to my tax law professor, a very young Louis Kaplow, for assigning the work.

⁵² EDWARD J. MCCAFFERY, *TAXING WOMEN* (Univ. of Chi. Press 1997).

⁵³ The Critical Tax Theory Conference is discussed in the Preface of KAREN B. BROWN & MARY LOUISE FELLOWS, *TAXING AMERICA* vii-ix (Karen B. Brown & Mary Louise Fellows eds., N.Y. Univ. Press 1997). Nancy herself was working on what was to become Nancy Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1995). I later had the good fortune to be Nancy's colleague at USC Gould School of Law for many years, before she left to become a highly successful Dean at Washington University School of Law. *Nancy Staudt Named Dean of Pardee RAND Graduate School*, RAND Corp. (Aug. 11, 2021), <https://www.rand.org/news/press/2021/08/11/index1.html>. She now serves as Dean of the Graduate School of the Rand Institute in Santa Monica, California. *Id.* I add these biographical details because, in my opinion, Nancy and her scholarship were treated badly by the anti-crits who later attacked her.

⁵⁴ BROWN & FELLOWS, *supra* note 53.

⁵⁵ See Blumberg, *supra* note 51; Jones, *supra* note 38; Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987).

But once again, my scholarly joy and hope turned to bemusement and despair. The empire struck back. Soon, and sadly enough predictably, critical tax theory itself came under attack. Lawrence Zelenak organized a paper symposium at the University of North Carolina Law School, the articles running in a law review volume.⁵⁶ Zelenak himself, taking the lead, leveled four criticisms against the emergent critical voice in tax in *Taking Critical Tax Theory Seriously*:⁵⁷

- “The first problem is an over eagerness to accuse the tax laws of hostility to women or blacks.”
- “Closely related to the first problem is a failure to recognize the diversity within feminist thought.”
- “A third problem (also closely related to the first) is selection bias, both in the aspects of the tax laws chosen for study, and in the analysis of those chosen aspects.”
- “The most serious problem is the failure to think through proposed solutions with sufficient care.”

Other anticrits, such as Erik Jensen, were less charitable, and even openly hostile. (Zelenak had positive things to say here and there about his foils.) Jensen saw academic trendiness as the root cause of critical tax theory:

My first thesis—ultimately unprovable, I admit—is that the emergence of *New Criticism* writing is attributable to the fact that tax professors are often isolated within their faculties, set apart by a sense that tax law is fundamentally different from other law school subjects.⁵⁸

In other words, tax professors like me who were writing about tax from a critical perspective just wanted to make friends. Law review editors, of all people, are part of the problem:

⁵⁶ Not all scholars approved of the effort. Marjorie E. Kornhauser wrote “[T]he Symposium can hardly be viewed as a conversation among equals when the agenda is set and dominated by one person, that person devotes a long article to criticizing this mode of scholarship, and the respondents have only a short space in which to reply.” *Through the Looking Glass with Alice and Larry: The Nature of Scholarship*, 76 N.C. L. REV. 1609, 1611 (1998).

⁵⁷ Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1523–24 (1998).

⁵⁸ Eric M. Jensen, *Critical Theory and the Loneliness of the Tax Prof*, 76 N.C. L. REV. 1753, 1753 (1998).

By throwing in a little feminism and critical race theory, you can make waves that the legal academy is afraid not to reward and that law review editors adore.⁵⁹

After this *ad hominem* attack on the motives of the critical scholars, Jensen gets to the real point—that the critical tax theorists are just not helpful:

My second thesis is that the New Criticism isn't taking us in a desirable direction.⁶⁰

Why? And what is the “desirable direction” for “us”—the tax policy establishment—to take?

We ought to be able to evaluate the merits of legal policy without using trendy (and divisive) language, conspiratorial theories, otherworldly standards, and all the rest of what too often is represented by the New Criticism.⁶¹

In other words, the crits should shut up and stop complaining, so that the real experts can get back to their jobs.

I do not mean here to rehash the merits of the comments and criticisms from decades past; there were fair and reasonable arguments made on all sides.⁶² But the dominant theme—in a way, the *raison d'être* of the *Taking Critical Tax Theory Seriously* issue—was an obvious lack of charity⁶³ and respect towards critical tax theory. It is striking how many of the criticisms seem irrelevant, even running afoul of basic debating rules: *ad hominem* attacks and misplaced cries of victimhood, on behalf of the “tax laws.” (As in, those nasty crits were mean to Tax, personified.) But who cares what the motive behind a work of scholarship is—a quest for money, power, fame,

⁵⁹ *Id.* at 1756.

⁶⁰ *Id.*

⁶¹ *Id.* at 1770.

⁶² For a more extended and systematic criticism of the “anti-crits,” see Leo P. Martinez, *A Critique of Critical Tax Policy Critiques (Or, You've Got to Speak Out Against the Madness)*, 28 BERK. LA RAZA L.J. 49 (2018).

⁶³ Here, I mean charity in a philosophical sense that requires interpreting one's statements in the most rational way possible. See SIMON BLACKBURN, *Principle of Charity*, in A DICTIONARY OF PHILOSOPHY 79 (3d ed. 2016).

citation counts, or whatnot.⁶⁴ Every scholar has their reasons for writing what they do, and it is up to us as readers to consider the truth and relevance of what is written. After all, “currying favor with the establishment” can be thrown out as a motive for the anticrits if the crits wanted to play that game.

Even more strange and irrelevant is the defensiveness on behalf of an institutionalized “Tax” system. What does it mean to be “over-eager” to “accuse the tax laws” of racism or sexism? If an element of tax law has disparate, adverse impacts along racial or gendered lines, does it matter whether the “tax laws” *intended* to be racist or sexist? And what would that even mean? In the 1990s, and certainly since, serious normative thought had already moved beyond narrowly limited notions of “intent.”⁶⁵ Who cares if the elements of sexism in the Code were “intentionally” put in place or not? Certainly not those adversely affected by the policies in the present tense. Throughout history, oppressors often have (or think or say that they have) good intentions and cry foul when the oppressed question their motives. But it would be insane if we could never critically examine a social practice because the “intent” behind the initial establishment of the practice was somehow pure in our minds.

In a wider context, many of the anticrit critics sounded like what defenders of a status quo always say to critics of that status quo—shut up, stop complaining, and stop making us feel bad about ourselves. There was irony too. Zelenak, a critic of the crits, accuses them of tax myopia, citing a wonderful essay from Paul Caron,⁶⁶ for looking for tax solutions to social problems. But at the same time Zelenak and Jensen and others bask in the myopia: by putting up formidable entry barriers to the discussion, the anticrits knowingly or not entrench the few over many, and the status quo—

⁶⁴ I explore this theme of motive in my work, where I defend Ronald Dworkin against what I take to be unfair *ad hominem* attacks. Edward J. McCaffery, *Ronald Dworkin, Inside-Out*, 85 CALIF. L. REV. 1043 (1997).

⁶⁵ See, e.g., Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (N.Y. Univ. Press 1997). Jody Armour was a Professor at Pittsburgh when he did most of the work on *Negrophobia*; he soon thereafter joined me on the USC faculty and has taught me a great deal about the importance of getting beyond “intent” in our critical thinking about race and society.

⁶⁶ See Paul L. Caron, *Tax Myopia, or Mamas Don’t Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517, 517–18 (1994).

Tax—over all else. Michael Livingston, writing in the same law review issue, put it well:

Zelenak’s criticisms are, of course, not unique. They are the tax equivalent of the attacks that have been leveled for years at critical (and especially feminist) legal scholars in fields far removed from taxation. In essence, they boil down to the idea that critical scholars elevate emotion over thought and political rhetoric over balanced and reasoned analysis. Augmenting this idea—and here the special history of the tax field becomes important—is the sense that the radicals have broken the rules of tax scholarship, making politically impractical proposals and failing to show adequate respect for previous generations of tax scholars.⁶⁷

It is a long way and more than a quarter-century, but all this is on a path to the anti-“woke,” anti-critical race theory, book banning that we see today.⁶⁸

But the worst of the anticrit points may be Zelenak’s last, that the crits, in their eagerness to get published by accusing the poor, innocent “tax laws” of bias, have failed to “think through [their] proposed solutions with sufficient care.”⁶⁹ But much of normative legal theory should be about *questions*.⁷⁰ It is absurd—insane?—to think that we cannot set forth questions

⁶⁷ Michael A. Livingston, *Radical Scholars, Conservative Field: Putting Critical Tax Scholarship in Perspective*, 76 N.C. L. REV. 1791, 1800–01 (1998) (citations omitted).

⁶⁸ “Recently, Republicans have tapped into . . . social conservatives’ opposition to certain teachings on race that are broadly labeled as critical race theory, a way of thinking about America’s history through the lens of racism.” Stephen Groves, *House Republicans Pass ‘Parents’ Rights’ Bill in Fight over Schools*, PBS (Mar. 24, 2023, 2:45 PM), <https://www.pbs.org/newshour/education/house-republicans-pass-parents-rights-bill-in-fight-over-schools>. See Alexandra E. Petri, *Book Bans are on the Rise in U.S. Schools, Fueled by New Laws in Republican-Led States*, L.A. TIMES (Apr. 22, 2023, 5:00 AM), <https://www.latimes.com/world-nation/story/2023-04-22/book-bans-soaring-schools-new-laws-republican-states>; Shawna Mizelle, *Missouri Bill Would Ban Critical Race Theory in Schools and Offer Teacher Training in ‘Patriotism,’* CNN POLITICS (Jan. 20, 2023, 12:54 PM), <https://www.cnn.com/2023/01/20/politics/missouri-critical-race-theory-ban/index.html>.

⁶⁹ Zelenak, *supra* note 57, at 1524.

⁷⁰ Einstein also said: “If I had an hour to solve a problem I’d spend 55 minutes thinking about the problem and 5 minutes thinking about solutions.” Nell Derick Debevoise, *The Third Critical Step In Problem Solving That Einstein Missed*, FORBES (Jan. 26, 2021, 04:50 PM), <https://www.forbes.com/sites/nelldebevoise/2021/01/26/the-third-critical-step-in-problem-solving-that-einstein-missed/?sh=6e2d2d203807>. For just a few examples of great work on thinking about problems in critical tax see Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996); Patricia A. Cain, *Same Sex Couples and the Federal Tax Laws*, 1 L. & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 97 (1991); DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS* (2021); Leo P. Martinez & Jennifer M. Martinez, *The Internal Revenue Code and Latino Realities: A Critical Perspective*, 23 UNIV. OF FLA. J.L. & PUB. POL’Y

until we have worked out technically realistic answers. This is how paradigms become entrenched. Further, what Zelenak, Jensen, and other anticrits are at least implicitly saying is that the technical solutions must lie within the paradigm of the income-plus-estate tax. This just perpetuates the insanity. We keep trying the same solutions, which have *never* worked, because we have not thought through other solutions with sufficient technical rigor and care. The child screaming out that the emperor has no clothes gets told to go home and come back when they can speak like an adult while the experts are left to debate the subtleties of their boss's fashion on their own.

Over the decades since the bright shining moment in the 1990s, critical perspectives on tax have been rare, kept alive by the work of fine scholars such as Bridget Crawford and Anthony Infanti, both here today.⁷¹ But theirs has been the path less chosen. Tax law scholarship has become more interdisciplinary, even if not as fully as Caron and others might have hoped, with gifted economists, theorists, historians, and empiricists joining the discussions. But most tax policy still transpires within the income-plus-estate tax, or source-based, paradigm. The utter failure of that paradigm over a century or millennia should have led to a vibrant counterattack, or at a minimum raised profound—radical—questions. It has not.

As time has passed on the 1990s moment, what seemed true then is glaringly obvious now: *the Crits were right all along*. The “Tax System”—the income-plus-estate tax paradigm, promoted and defended by traditional tax policy from Henry Simons to Stanley Surrey and beyond—is a complete failure in taxing wealth or breaking up its dynastic concentration. Instead, the “Tax System” further entrenches power and privilege while leading to discriminatory impacts that have long been the focus of critical tax scholars. It does not tax capital. It was never intended to tax capital. The American tax system is a *cause* of, not a cure for, wealth inequality: tax is a critical element of a socioeconomic system that greatly favors capital and highly burdens labor. Of course, such a system will have disparate impacts along many dimensions, including race, class, gender, sexual orientation, and more. The technocratic project of “perfecting” the logic of an income tax was blind to

377 (2011); Mylinh Uy, *Tax and Race: The Impact on Asian Americans*, 11 ASIAN L.J. 117 (2004); Francine J. Lipman, *The Working Poor Are Paying for Government Benefits: Fixing the Hole in the Anti-Poverty Purse*, 2003 WIS. L. REV. 461 (2003).

⁷¹ ANTHONY C. INFANTI & BRIDGET J. CRAWFORD, *CRITICAL TAX THEORY: AN INTRODUCTION* (Anthony C. Infanti & Bridget J. Crawford eds., Cambridge Univ. Press 2009).

all this. Normal scientists had taken over and controlled access to places of power within the tax policy community. We got incremental, ad hoc reform, when what we needed was a paradigm shift.

The normative logic of the anticrits like Jensen and Zelenak is to prioritize and privilege the status quo. The reigning income-plus-estate tax is fine—one of the best systems we have for adding progressivity and redistribution—until critics can prove that something is better. (And, too often, the critics were not even allowed to talk unless they proved their technical expertise within the status quo.) “We can’t solve problems by using the same kind of thinking we used when we created them,” as Einstein put it.⁷² Yet anticrits insist on just that: that critics must present themselves as knowledgeable members of the club, showing “adequate respect for previous generations of tax scholars.”⁷³ While the broader tax policy establishment continues to lionize its own, such as Stanley Surrey,⁷⁴ the crits have been relegated to the margins. No *Trashing* allowed in Tax.⁷⁵

But what if all the previous generations of tax scholars were *wrong* in a fundamental way? Let us open our minds and subject the wider tax laws—not just the wealth transfer tax system, the narrow focus of this Conference—to a thorough trashing and see what emerges.

IV. A CRITICAL TAX THEORY METHOD: TRASHING THE CODE

And so let us get to it, after all these years. Critical tax theory has endured, kept alive by wonderful scholars such as Infanti and Crawford.⁷⁶ Yet critical theory remains a distinct minority voice in tax policy and has

⁷² *Albert Einstein Quotes*, BRAINY QUOTE, https://www.brainyquote.com/quotes/albert_einstein_385842 (last visited on (July 18, 2023)).

⁷³ Livingston, *supra* note 67, at 1801.

⁷⁴ Tax Notes, *Stanley S. Surrey—The Greatest U.S. Tax Scholar?*, YOUTUBE (May 25, 2022), https://www.youtube.com/watch?v=mu_hFQAFCCQ.

⁷⁵ See Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 324 (1984). Ironically, Kelman had begun his career as a legal academic writing about tax. See Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an Ideal Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831 (1979).

⁷⁶ INFANTI & CRAWFORD, *supra* note 71.

tended to center on how the tax laws affect various historically subordinated groups, a point of criticism for Zelenak and Jensen.⁷⁷ This critical work is important and valuable, and I count myself, on account of *Taxing Women* and my other feminist scholarship, as a proud member of any club concerned with fundamental fairness in tax. But my call here today, in the light of this Conference and its questions, is about a critical tax theory *method*, a way of thinking about social systems and their potential reconstruction that characterized the critical legal theory movement of my youth.⁷⁸ It is this critical voice that the Conference’s call asks for, and yet it is also the voice that has been silenced.

For convenience, we adopt a method sketched out by Mark Kelman in his 1984 essay, *Trashing*, which begins:

Here’s one account of the technique that we in Critical Legal Studies often use in analyzing legal texts, a technique I call “Trashing”: Take specific arguments *very seriously* in their own terms . . . then discover that they are actually *foolish* . . . and then look for some . . . *order* (not the germ of *truth*) in the internally contradictory, incoherent chaos we’ve found.⁷⁹

We shall use Kelman’s three-step template in critiquing the reigning income-plus-estate tax paradigm. First, however, we add several substantive thematic elements to inform the critique. Space precludes a fuller elaboration of a critical tax methodology—and there is nothing wrong, and a good deal right, about not having a single, canonical methodology in any event—but we highlight a few elements, using the vocabulary of the original crits and their invocation of strands of continental European critical philosophy.

One, *Deconstruction*: In the tradition of David Hume, critical theory pivots on the idea that human laws are conventional.⁸⁰ It rejects natural law and other types of foundationalist thought (Kelman’s “not the germ of

⁷⁷ See most of the essays in INFANTI & CRAWFORD, *id.*; BROWN & FELLOWS, *supra* note 53.

⁷⁸ See Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); see generally ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996). I was fortunate to be a student of and assistant for Unger while I was a student at Harvard Law School in the 1980s.

⁷⁹ Kelman, *Trashing*, *supra* note 75, at 293.

⁸⁰ DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS, Section III, Of Justice (1751); RUSSELL HARDIN, DAVID HUME: MORAL AND POLITICAL THEORIST 81–104 (2007).

truth.”)⁸¹ Jacques Derrida’s influential essay *The Force of Law*, translated into English, helped to bring the idea of “deconstruction” to American legal thought.⁸² “Deconstruction” can be used at different levels and in different ways, but the key insight is that laws are human made: We have constructed them. And in theory—which is what we are doing in normative legal theory—what has been constructed can be deconstructed. We can critique existing institutions and structures of power and then reconstruct them from the scattered pieces of the status quo.

Two, *Material Critique*: Critical theory borrows from a materialist European political-economic tradition harking back to John Stuart Mill and Karl Marx.⁸³ The idea is to look at the role of the major material factors of production—capital and labor—in social systems. This is, of course, not the only or necessarily even the best way to analyze society or particular social systems. But when it comes to *tax*, which is—inevitably—about the relative taxation of the factors of production, *some* view towards the differing fates of capital and labor seems essential to the *questions* we ought to ask. Follow the money, as they say.

Finally, *Demythologizing* Another canonical element of the early critical studies movement was to debunk all forms of exalted claims on behalf of the law, and to challenge the received wisdom of “experts” of all sorts.⁸⁴ And yet in tax policy we keep leaving matters to those with the most technical tax knowledge. Caron’s “tax myopia” was predicated on tax scholars, whom Caron accused of failing to look outside their narrow domains of expertise to see how other disciplines might help them to be better tax experts. But the “loneliness of the tax professor” that Jensen noted is a two-way street. Tax myopia is complemented by tax blindness, as those outside of “tax”—both

⁸¹ Kelman, *Trashing*, *supra* note 75, at 293.

⁸² Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, 11 CARDOZO L. REV. 920 (trans. Mary Quaintance 1989–1990), *reprinted in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE (Drucilla Cornell, Michel Rosenfeld & David Carlson eds., 1992).

⁸³ JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY (1848); KARL MARX, DAS CAPITAL: A CRITIQUE OF POLITICAL ECONOMY (1867).

⁸⁴ See Frank S. Alexander, *Demythologizing Law*, 3 J.L. & RELIGION 167 (1985).

within the academy and in the wider society—feel impotent to critique tax, at least in any kind of detail, and so leave tax to the “experts.”

Yet the idea that tax is somehow special, that tax laws must be drafted and critiqued only by those with a technical background—like a medical disease best left to the top physicians—is silly. The broad contours of a tax system are clearly susceptible to reasoned analysis in acts of public reason. In contrast to the uncharitable treatment of the young crits, the top scholars from within the paradigm, such as Stanley Surrey, are lionized. But *any* tax scholar of the twentieth or twenty-first centuries has faced a tax system fatally unable to tax wealth.⁸⁵ However gifted they were at analyzing the status quo—at being “normal scientists”⁸⁶—they were unable to see the problems at the root of tax. This is exactly what a “radical” take asks for. Everyone is blinded by some lights: How often must we sit by as the “best and the brightest,” left alone, lead the great democratic project astray?⁸⁷

So now let us turn to the task at hand, of trashing the Tax Code. We follow the Kelman template. We first choose a “legal text.” Here we take the same “tax system” writ large that Zelenak and Jensen defended against the early crit attacks, the income-plus-estate tax paradigm. (Note that we have gone beyond the narrow call of the Conference questions, in moving to the wider tax system of which wealth transfer taxes are but a part.) We “read”

⁸⁵ One of my other mentors at Harvard Law School in the 1980s, William D. Andrews, did notice that the “worst distortions and inequities” of the current income tax system came with regard to the treatment of savings, or accumulation. William D. Andrews, *A Consumption-Type or Cash-Flow Personal Income Tax*, 87 HARV. L. REV. 1113, 1113 (1974) [hereinafter *A Consumption-Type*]. But Andrews did not push the case for a progressive consumption or spending tax to any extreme, fearing that tax-rate progressivity would impede on the equivalence of presence and deferred taxation, a point made in Alvin C. Warren, *Fairness and a Consumption-Type or Cash Flow Personal Income Tax*, 88 HARV. L. REV. 931, 945 (1975). See William D. Andrews, *Fairness and the Personal Income Tax: A Reply to Professor Warren*, 88 HARV. L. REV. 947 (1975). I discuss this famous “income versus consumption” debate—and what I consider that it missed—most extensively in *A New Understanding of Tax*, McCaffery, *supra* note 4. For some personal reflections on Andrews himself, see Edward J. McCaffery, *On the Right Side of the Equation*, HARV. L. BULL. (July 1, 2007), <https://hls.harvard.edu/today/windfalls-realized-two-giants-of-tax-law-retire/>.

⁸⁶ The concept of “normal science” follows from THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1970). See DAVID R. EWOLDSSEN, *NORMAL SCIENCE AND PARADIGM SHIFT* (2017).

⁸⁷ DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* (1972) (chronicling the role of well-educated elites in the American foreign policy behind the Vietnam War).

the income-plus-estate tax in light of its own foundational commitments to taxing wealth and ameliorating inequality.

Now, beginning the critique, we take “*very seriously*” the arguments of the paradigm. (This is not the kind of quick and sloppy critique that Zelenak imagines against Tax.) We see that the U.S. tax system nominally features an income-plus-wealth transfer tax, as its main tool for raising revenue and effecting redistribution. Any income tax is supposed to fall on all sources, the gains to capital or labor or both combined, as *Eisner v. Macomber* had put it.⁸⁸ But in taking this claim “*very seriously*,” we soon note that the income tax has never fully reached capital because *Macomber* itself had given us the realization requirement, the first of the income tax’s Achilles’ heels.⁸⁹ We keep analyzing, very seriously, and add on the income tax’s systematic nontaxation of debt to see how the wealthy can monetize their tax-deferred gains. In considering how the game might end, we come to § 1014, the “Angel of Death” stepped-up basis on death rule. All the tax deferral countenanced by *Macomber* becomes a matter of escape.⁹⁰

Examining the tax system seriously, we see quickly enough that all the elements of *Buy, Borrow, Die*, a thirty-year-old coinage of mine,⁹¹ *have always been in place*. The taxation of capital has always been voluntary. Cynics called for data, as if billionaires would not somehow discover and exploit perfectly legal steps to avoid taxes.⁹² We now have that data, in public reporting.⁹³ In fact, the rich pay no taxes. They play *Buy, Borrow, Die*.

Still taking the status quo and its claims to fairness very seriously, we go back to first principles. If an income tax is supposed to tax the gains from capital and from labor, and ours is not taxing the gains to capital, then we

⁸⁸ *Eisner v. Macomber*, 252 U.S. 189, 190 (1920).

⁸⁹ William D. Andrews, *The Achilles’ Heel of the Comprehensive Income Tax*, in *NEW DIRECTIONS IN FEDERAL TAX POLICY FOR THE 1980s*, at 278 (Charles E. Walker & Mark A. Bloomfield eds., 1983); McCaffery, *supra* note 14.

⁹⁰ See McCaffery & Gamage, *supra* note 34.

⁹¹ See Kredell, *supra* note 35.

⁹² See McCaffery, *Taxing Wealth Seriously*, *supra* note 34.

⁹³ Rodriguez & Sussman, *supra* note 33.

must only be taxing labor. The relics of an income tax add to the growing payroll tax to create an inescapable and onerous wage tax for the masses.⁹⁴

It gets worse. If we are only taxing labor, then we are constrained in our attempts to impose progressive rates because of the inefficiency of high marginal rates on labor decisions.⁹⁵ Our universal wage tax is a flattened one, mimicking the rate structure suggested by optimal income tax theory.⁹⁶

Finally, we consider the “plus estate” aspect of the “income-plus-estate tax” paradigm. But as everyone attending this Conference knows, there has been no real, effective taxation of wealth transfers, before or after the great practitioner Jonathan Blattmachr—the bookend keynote speaker at this Conference—started to perform his magic.⁹⁷ The tax has always been a voluntary one that only morons pay.

And so, we arrive at the second stage of Kelman’s trashing script, where things have begun to look “actually *foolish*.” Indeed, we are long since passed this point. Theory tells us that an income-plus-estate tax will burden the wealthy and alleviate inequality. Reality is precisely backwards to theory: We are not taxing capital at all. We are defending a system for taxing capital that does not in fact tax capital, and a system for taxing wealth transfers that does not in fact tax wealth transfers. And out of our insanity we keep trying the same tactics.

In the final step of Kelman’s method, we look for “some *order* (not the germ of *truth*).” We are not searching for some natural law foundation, but some *human* behavior that could possibly explain the status quo. And here, with our eyes wide open to the truth of the American tax system being a flattened wage tax, we see the light: this is what the capitalists have wanted

⁹⁴ McCaffery, *supra* note 14.

⁹⁵ See McCaffery & Hines, *The Last Best*, *supra* note 18, at 1070; see also McCaffery, *supra* note 18.

⁹⁶ McCaffery, *supra* note 14; James Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUDIES 175 (1971).

⁹⁷ See DAVID CAY JOHNSTON, PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE (2005); Zachary Mider, *GRAT shelters: An Accidental Tax Break for America’s Wealthiest*, WASH. POST (Dec. 28, 2013), https://www.washingtonpost.com/business/grat-shelters-an-accidental-tax-break-for-americas-wealthiest/2013/12/27/936bffc8-6c05-11e3-a523-fe73f0ff6b8d_story.html.

all along, as Carolyn Jones’s work helped reveal decades ago.⁹⁸ Polite and proper scholars often try to avoid the language of “class warfare,” but we can thank one of America’s richest men, Warren Buffett, for his honesty:

There’s class warfare, all right, but it’s my class, the rich class, that’s making war, and we’re winning.⁹⁹

The rich have known that the tax system does not apply to them forever. They have been able to sit back—winning the war—while a tax policy establishment that has stayed close to the practicing bar has done their bidding, acting as tailors to a naked emperor. Jensen and others had questioned the critics’ motives, accusing them of pandering to politically correct law review editors. But the fact of the matter is that there is plenty of money in defending and working within the status quo—the technical moves whose ends are to avoid wealth transfer and indeed all capital taxation pay well. The royalties from critical tax texts? Not so much.

And so, the century-old income-plus-estate tax paradigm cannot survive a few moments of rigorous trashing. Its claims to taxing capital are foolish. It has provided cover to a capitalist class winning the war against workers for over a century. Attempts to change course within the paradigm are by now demonstrably insane. It is time to stop thinking in the manner that caused the problem and to try something else. It is time to get a more critical voice in tax policy.

V. LOOKING FORWARD, BEYOND INSANITY

Nearly thirty years ago, I lost sleep over the answers to today’s Conference questions. What role does the tax system play in perpetuating wealth inequality, and what can be done to reform it? We are still asking those questions, and we still have nominally an income-plus-estate tax. I have decided to wake up from my dogmatic slumber and put matters in strong terms:

⁹⁸ Jones, *supra* note 38, at 733.

⁹⁹ Max Zahn & Andy Serwer, *Warren Buffett “extraordinary” for Acknowledging Class War by the Rich*: Kurt Anderson, YAHOO! (Oct. 7, 2020), Yahoo.com (type “Warren Buffett ‘extraordinary’ for acknowledging class war by the rich: Kurt Anderson” into search bar, select corresponding link).

The income-plus-estate tax paradigm is not working.

It has never worked.

It was not intended to work.

None of the ideas floated to fix it have ever worked.

When is the insanity enough? When have we had enough Conferences about the role of tax in perpetuating inequality? Something must change, beginning with the way we think about tax.

The crises of our times—the crises of all times—are at least accompanied by massive inequality of material resources. Our tax systems are not a cure for wealth inequality. They *never* have been. Even a casual critical commentator can see this. It is time to stop trying the same thing and expecting a different result. The current result—capital wins, labor loses—*is* what the rich intended all along. This is what a modicum of critical thought reveals. It is time to get more critical and to devise new solutions before the tides of history do the work of deconstruction for us. The emperor has no clothes; we desperately need sensible tailors.

Meanwhile, I intend to keep raging into that good night.