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TAX THEORY AND “MERE CRITIQUE”: A REPLY TO PROFESSOR ZELENAK

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In *Taking Critical Tax Theory Seriously*,¹ Professor Zelenak outlines a number of problems with feminist and race theory scholarship. His central criticism is that scholars writing in these fields have failed to devise acceptable solutions to difficult policy questions.² Indeed, Zelenak goes so far as to claim that “[i]t is unfair to criticize current law . . . without showing a way to do better; . . . mere critique without a workable solution does nothing to better anyone’s situation.”³ Scholars must focus on “solutions rather than on complaints,”⁴ he argues, if they are to provide a balanced and complete analysis of the issues at hand.

Zelenak’s single-minded focus on solutions is both ironic and bizarre. First, it is ironic because he critiques the policy proposals contained in the literature, yet he fails to offer any workable solutions of his own. If “mere critique” truly does not represent valuable scholarship, then Zelenak’s article is one of the most problematic essays contained in this Symposium. At the same time, Zelenak’s difficulty with critical analysis is bizarre given that most theorists would defend critical thinking as essential not only to tax scholarship but to scholarship in virtually every discipline in the academy.

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1. Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521 (1998).

2. *See id.* at 1524. Zelenak notes:

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

Id. (footnote omitted).

3. *Id.*

4. *Id.* at 1578.

In this essay, I briefly explore the usefulness of critical scholarship generally and then point to the manner in which this type of analysis can (and does) advance Zelenak's aim of devising technical solutions to difficult policy problems. I then turn to Zelenak's critique of my article, *Taxing Housework*.⁵ I argue that far from undermining my proposal to tax imputed income, Zelenak's work highlights several reasons for considering the proposal as an alternative to the existing tax structure. Importantly, I do not claim that taxing women's household labor is a perfect solution to the social and economic problems that women suffer. Rather, I hope that this exchange is part of a larger debate that ultimately facilitates a greater understanding of feminist issues in the context of federal taxation.

I. CRITICAL SCHOLARSHIP AND REASONED DEBATE

Critical analysis of the law (or a text of any kind) entails identifying underlying assumptions and premises as well as offering a careful judgment and a reasoned opinion about the subject matter at hand. This type of analysis enables theorists to clarify the social and economic realities of various legal arrangements; it situates individuals and groups into a context that is often hidden from the very agents who are most affected. Critical analysis, of course, often does not lead to a neat, unified account of the truth or, for that matter, an easily identifiable solution to the matters under consideration. Indeed, the analysis often raises more controversy and debate than it settles—it is widely understood that competent analysts can and will disagree about fundamental matters.

Zelenak, however, is uninterested in a reasoned debate with regard to the underlying premises and assumptions of the existing legal order. Instead, he argues that critically analyzing the laws is a pointless endeavor which does “nothing to better anyone's situation.”⁶ This unfortunate claim ignores the value of knowledge and information as well as the advantages we obtain from heightened consciousness and a deeper understanding of the world around us.

Not only does Zelenak fail to recognize the importance of critical thinking on its own terms, but he also fails to understand its importance for initiating the very legal reform that he argues is so essential to rigorous tax scholarship. A critical analysis of the existing legal arrangements must take place prior to developing the

5. Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996).

6. Zelenak, *supra* note 1, at 1524.

social policies that remedy the perceived problems with the law. After all, without fully understanding the problem, analysts could not hope to remedy it. Put differently, Zelenak's goal of devising workable legal reform is unattainable without the preexisting critique that so disturbs him. His argument for more solutions and less criticism defeats itself.

Moreover, Zelenak's focus on policy initiatives leads him to disregard a number of important insights in the work he criticizes. Consider his criticism of my article *Taxing Housework*. Zelenak argues that my proposal to tax imputed income, like all proposals in the tax literature, "is supposed to be merely a means to an end."⁷ Yet he points out that if my aim is to empower women, then my proposal will not accomplish this end given the significant costs associated with taxation. I readily concede that taxing housework raises a number of difficult issues; Zelenak's exclusive focus on these problems, however, causes him to miss the nuance of my argument. In the article, I explore the paradox of Congress's decision to tax the profits of domestic labor performed in the market while ignoring the value of identical services performed for one's own family. I first note that generations of tax scholars, including Zelenak,⁸ have defended this market/nonmarket distinction given the administrative difficulties of measuring and valuing household labor, the potential economic hardships of paying a tax on nonmarket labor, and the social dangers associated with commodification.⁹ Upon a close inspection of each of these objections, I suggest that they are based upon erroneous assumptions and faulty logic.¹⁰ Without a persuasive rationale for the nontaxation of housework, my article suggests that a dramatic and controversial change in the tax laws is warranted—regardless of its effect on women. This is no small claim given the universal acceptance of the existing market/nonmarket binarism as applied to housework.¹¹ Moreover, this approach is not pragmatism as Zelenak suggests (although it has practical feminist implications), but a theoretical argument that easily fits within the traditional tax policy debates concerning the proper scope of the tax base.¹²

7. *Id.* at 1535.

8. See Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 404 (1994) (arguing that a tax on imputed income would seriously distort the Code).

9. See Staudt, *supra* note 5, at 1576-79 (discussing various policy problems associated with taxing housework).

10. See *id.* at 1618-40.

11. See *id.* at 1577 n.23.

12. See, e.g., HENRY SIMONS, *PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY* (1938) (exploring the arguments for a

Zelenak dismisses my interest in the tax base as mere fascination with academic issues largely unrelated to the tax reform I propose.¹³ Yet my analysis regarding the illogical exclusion of women's household labor from the tax base is key to the claims I make throughout the article. Once it becomes clear that scholars and policymakers have defended an incoherent tax structure, the obvious question is why does the system continue to exist with such widespread support? The answer, I argue, can be traced to the popular and scholarly perception of women's nonmarket labor. Rather than having economic value, housework is viewed as simply the extension of the love and compassion that women have for their families.¹⁴ Housework, in other words, is more often identified with nontaxable items such as leisure than it is with taxable items such as the profits obtained through market labor. The refusal to acknowledge the productive aspects of women's labor through taxation, in turn, works to further marginalize women, economically, politically, and socially. Thus, in exploring the costs of nontaxation, I develop a contentious point: Taxation may actually afford significant (yet unexplored) advantages to the taxpayer.

Zelenak does not address my claim that Congress's failure to tax housework contributes to the marginalization of women; instead, he simply insists that taxing housework is a flawed solution to the problem I identify.¹⁵ This claim, however, evades the difficult question that I raise with regard to the impact of the current legal structure upon women. At most, Zelenak suggests that I have not found the "right answer" to a difficult policy problem (that is, women's marginalization). He does not demonstrate that the underlying problem does not exist, nor does he challenge my claim that the tax structure seriously exacerbates this problem. If my analysis convinces the legal world (or at least my readers) that the tax laws are both incoherent and unfair to women, then society will be one step closer to gender justice. Only a thorough understanding of the existing inequities, after all, will allow us to devise laws that will promote greater equality between men and women. In short, even if my solution to this policy problem is inchoate or even entirely

comprehensive tax base). For a critique of Simons's work, see Nancy C. Staudt, *The Political Economy of Taxation: A Critical Review of a Classic*, 30 L. & SOC'Y REV. 657, 654-55, 662-64 (1996).

13. See Zelenak, *supra* note 1, at 1535.

14. For an excellent discussion of this phenomenon in the law generally, see Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 25-79 (1997).

15. See Zelenak, *supra* note 1, at 1527-42.

impractical,¹⁶ the analytical insights that lie beneath it should be of value to any scholar or practitioner interested in legal reform.

II. ZELENAK ON HOUSEWORK

In addition to Zelenak's failure to understand the broader goals and aims of critical theory, his detailed investigation of the policy reform proposals he finds in the literature has serious drawbacks. His work reflects a number of mischaracterizations and inconsistencies as well as an incomplete analysis of many of the issues he raises. Consider again his critique of my article *Taxing Housework*. Zelenak identifies four potential problems for legal reformers seeking to account for the value of housework: (1) constitutional limitations may prevent sex-based legislation but not sex-neutral legislation, thereby preventing Congress from taxing women's housework; (2) various strands of feminist theory exist and, thus, feminists will fail to reach a consensus on the proposal to tax housework; (3) contrary to my argument, taxing housework will not convey the view that the work has value; and (4) taxation will not award economic benefits to women but will impose economic harm. Because the first two points are rather obvious, I will comment only briefly upon them and then turn quickly to points three and four.

Zelenak is, of course, correct when he states that given the current constitutional doctrine, both Congress and the courts will resist explicitly sex-based legislation.¹⁷ Zelenak errs, however, when he claims that I "contemplate[] an explicitly sex-based tax and benefits system" thereby raising serious constitutional problems.¹⁸ In fact, I never take a position on the issue. In writing *Taxing Housework*, I intentionally declined to propose legislation or to explore the specific details of any statute that would impose a tax on housework for two reasons. First, the article was written to highlight the problems with the current tax regime—both its general incoherence and its harmful impact upon women. Rather than hoping to convince Congress to adopt a specific housework tax, I hoped to convince scholars and policymakers that the treatment of

16. I note in my article that Congress may very well choose not to tax housework—even if the legislators are convinced that my underlying analysis is correct. See Staudt, *supra* note 5, at 1579; see also Michael Livingston, *Radical Scholars, Conservative Field: Putting "Critical Scholarship" in Perspective*, 76 N.C. L. REV. 1791, 1798 (1998) (correctly interpreting the argument in *Taxing Housework* as an effort to raise consciousness rather than to promote a particular legal reform).

17. See Zelenak, *supra* note 1, at 1540-42.

18. *Id.* at 1540.

this income was driven more by the underlying assumptions about the value of household labor than by logic. Second, I recognized that the technical drafting issues would be of little substantive importance. Regardless of how Congress drafted the legislation that imposed a tax upon housework (that is, with sex-based or sex-neutral language), the impact upon men and women would be very similar. As Anne Alstott has pointed out, “[o]nce we recognize that women are more likely than men to be primary caregivers,” phrasing legislation in gender-neutral language will not change the fact that it is women who will largely be subject to the benefits and the burdens of taxation.¹⁹ Recognizing this fact himself, Zelenak ultimately disregards the so-called constitutional problem and is left making the rather banal statement that he does not “like” my proposal in either the sex-neutral or sex-based form.²⁰

Zelenak’s second point—that feminists have not reached a consensus on the proper legal treatment of women—is, of course, not a new insight. Indeed, in the introduction to *Taxing Housework*, I highlight various strands of feminist theory and then refer to them throughout the article.²¹ What makes Zelenak’s point surprising is not that he echoes what countless theorists before him have pointed out, but his solution to the difficulty of addressing divergent views within the feminist literature. In his words: “All I suggest is that, given the inevitable tradeoffs between different feminist goals, feminists . . . [must] moderate the rhetoric in their criticisms of current law.”²² Zelenak suggests further that feminist theorists consider the possibility that Congress is “making a good faith effort to address a feminist dilemma.”²³

Worried about the frustration that legislators must experience when dealing with competing constituent interests, Zelenak, in effect, suggests that feminist theorists be kinder and gentler in their critical analysis of the laws. Given that Zelenak fails to point to any rhetoric that he finds inappropriate or excessive,²⁴ it is impossible to know

19. Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2046 (1996).

20. See Zelenak, *supra* note 1, at 1542.

21. See Staudt, *supra* note 5, at 1571-73. Zelenak may have missed this point given that I describe the various feminist theoretical perspectives in language that does not mirror his.

22. Zelenak, *supra* note 1, at 1540.

23. *Id.*

24. Zelenak notes that I do not write at the “rhetorical level of some feminist tax policy critics,” but he does argue that I “offer[] dubious characterizations of congressional behavior,” *id.* at 1540 n.97, and suggests the same about Edward McCaffery. He notes,

what exactly he finds problematic—unless it is critical analysis itself. Moreover, the absurdity of his proposal becomes all too apparent if we imagine Zelenak making this same plea to the economists who harshly criticize Congress for adopting inefficient and irrational tax laws, despite the fact that the legislature cannot possibly satisfy the various strands of contemporary economic theory in devising tax legislation.

The third difficulty with *Taxing Housework*, according to Zelenak, is the problem of symbolic politics. Zelenak agrees with my conclusion that broadening the tax base to include the value of women's household labor will have symbolic effects. The dispute revolves around the question of what precisely taxation will symbolize. Zelenak's own view on the issue is difficult to discern given that he makes inconsistent claims. He first notes that because individuals dislike paying taxes, a tax on imputed income will symbolize a legislative "insult" to household workers, thereby symbolizing a lack of respect for the work itself.²⁵ He later argues, however, that taxing housework is a form of special legislation which will signal "official validation" of the work that women do in the home.²⁶

Initially, it appears that neither of Zelenak's claims addresses my argument that taxation will reinforce the idea that housework has *economic* value and is not merely a gift of love or a leisurely activity. Zelenak's first observation that few, if any, individuals enjoy paying taxes (and thus are "insulted" when they must do so) does not lead to the conclusion that taxpayers believe they have nothing of value. Indeed, just the opposite is true. Most individuals seek to avoid paying taxes not because they believe the government has affronted their dignity, but because they hope to reserve the value of their property for themselves. Zelenak's second claim suggests that by taxing housework, Congress will sanction women's roles in the home (and thus discourage them from working in the market).²⁷ Even if Zelenak is correct that taxation would promote a gendered division of labor, his claim does not imply anything about the underlying

for example, that I argue Congress harms women in "refusing to count unpaid household labor in the calculation of retirement benefits," *id.* (emphasis in original) (quoting Staudt, *supra* note 5, at 1598-99), and that McCaffery "attributes 'the basic structure of our laws' to 'a highly gendered patriarchic world,'" *id.* (quoting EDWARD J. MCCAFFERY, *TAXING WOMEN* 1058 (1997)). Zelenak fails to explain why these statements are "dubious" or why he finds them problematic.

25. See Zelenak, *supra* note 1, at 1528-29.

26. *Id.* at 1539.

27. See *id.* at 1539-40.

economic value of housework itself. Put differently, a gendered division of labor may promote gender stereotypes, but it suggests very little about the economic value of the work being done.

Ironically, however, Zelenak's first claim strongly supports my argument that taxation symbolizes economic value. Consider again the burden ("insult") that taxpayers experience when the government levies a tax upon them. Because only those individuals who own valuable assets are subject to the burden, a tax on housework will necessarily highlight the fact that the work has economic value. Taxpayers may not enjoy paying the tax, but it unambiguously will convey the view that housework has more in common with market labor than with leisurely activities.

Zelenak would have been more successful in criticizing the symbolic aspects of taxing housework if he had explored the flip side of the above argument (the flip side being that Congress's refusal to tax housework may actually convey the view that the work has economic value). While it is clear that Congress taxes only economically valuable items, it is far from clear that nontaxation implies a lack of value. Consider, for example, the exclusion of a taxpayer's economic gains on property obtained through market appreciation, or the countless deductions, exclusions, and exemptions offered to encourage various taxpayer activities. In many contexts nontaxation symbolizes the economic importance of the work to society. Indeed, economists have long argued that Congress should continue to devise an incentive structure that awards tax benefits to individuals engaged in activities deemed important for the growth and stability of the national economy. Throughout *Taxing Housework*, however, I argue that given the historical perception of housework, it is unlikely that the exemption from taxation symbolizes the value of the labor to the market economy.²⁸ My argument that nontaxation symbolizes a devaluing of the work may have convinced Zelenak, but it is equally likely that his single-minded focus on solutions (and his easy dismissal of the underlying critical analysis) causes him to miss the more vulnerable claims.

Zelenak's fourth and final point suggests that even if taxation improves the popular perception of housework, it will not necessarily afford women greater economic benefits. In writing *Taxing Housework*, I devised three hypothetical taxpayers to demonstrate the economic advantages of my proposal for women in various

28. See Staudt, *supra* note 5, at 1627.

socioeconomic circumstances.²⁹ In seeking to demonstrate the disadvantages of my proposal, Zelenak compares the economic position of these three hypothetical taxpayers under current law and under my proposal. His technical analysis provides a useful tool for understanding the issues that are often obscured in a more theoretical analysis of the law. In this way, Zelenak's criticism adds to my own analysis—indeed, this is the very value of a critical debate. As I demonstrate below, however, Zelenak's technical work tends to bolster rather than weaken my claims.

In the first hypothetical, Ellen (a married woman with two children and a part-time job) will pay income and Social Security taxes in the short term and will receive at least \$730 per month in retirement benefits for the work she performs as a mother. If Ellen were subject to current law, her retirement benefits would be tied to her marital status rather than to the actual labor she performs. Given this difference in treatment, my proposal will ensure that Ellen gets a greater level of benefits in all five of the following situations: she stays married; she gets a divorce without having been married for ten years; she gets a divorce after ten years of marriage and remains single; she gets a divorce after ten years of marriage and remarries; or she is widowed and remarries.³⁰ The only situation in which Ellen will be economically worse off under my plan than under current law is if she is widowed and never remarries. As Zelenak puts it, a homemaker in Ellen's position who "thinks the most likely outcome is that she will be a widow for ten or twenty years, . . . will not want to trade her right under current law . . . [for the rights] under Staudt's plan."³¹ Of course, the number of women who will gain under my proposal will most likely far exceed the number who will lose.³² Indeed, it is unlikely that even the women who are better off under the current law expect to remain single for "ten or twenty years," suggesting that all women in Ellen's position will gamble on my proposal.

Because Zelenak's comparison clearly suggests that Ellen is unlikely to prefer current law as far as retirement benefits are

29. See *id.* at 1645-47.

30. See Zelenak, *supra* note 1, at 1534-35 (discussing the current Social Security rules and their impact upon the hypothetical taxpayer, Ellen).

31. *Id.* at 1535.

32. In any given year, the vast majority of Americans are married. See, e.g., BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1997 tbls.58, 60. And of those women who divorce, the majority remarry. See, e.g., *id.* at tbl.151.

concerned, he turns to the taxes that the government must levy to ensure a taxpayer's access to the benefits. Zelenak argues that many individuals in Ellen's position will view the costs of taxation as greater than the benefits and thus will prefer the current regime.³³ Yet this criticism is directed to the Social Security laws in general and not to my proposal specifically. If the costs of Social Security exceed the benefits that are paid out in retirement, then all taxpayers (not just Ellen) will object. My proposal, however, is an attempt to ensure that women are put into the system that policymakers have long viewed as advantageous to market workers, not to question the system itself.

Zelenak, of course, may be correct that rational individuals would not choose to be in the current system, but he fails to put forth an argument that Congress should immediately dismantle the Social Security structure. Moreover, his own analysis suggests that he would not take this position. Zelenak points out that if the tax on housework were written in gender-based language, we could expect men who perform household labor to challenge the system as unconstitutionally denying them access to valuable state benefits.³⁴

33. See Zelenak, *supra* note 1, at 1535.

34. While many tax policy analysts argue that women will be encouraged to participate in the wage labor market if Congress taxes household labor, Zelenak argues just the opposite. See *id.* at 1539. In making his claim with regard to the behavioral effects of taxing housework, Zelenak notes that the Social Security laws award decreasing retirement benefits for each additional dollar paid into the system; the first dollars are replaced at 90%, then 32%, then 15%. Thus, while the absolute level of the Social Security burden remains the same regardless of the replacement percentage used, workers receive a higher return on the first dollar paid into the system. Zelenak argues that if women work in the home paying Social Security taxes and receiving benefits at the replacement value of 90% and 32%, they may be discouraged from going into the market given the fact that they will incur only a 15% return on every additional dollar contributed. See *id.* While I do not take a position that women should undertake market work, Zelenak seems to suggest that if my proposal discourages this work it is problematic from a gender perspective. Zelenak's claim is unconvincing for a number of reasons—I will name just a few.

First, he ignores the fact that a tax on housework may itself push women into the market. Without a wage for the housework performed, many women will be unable to pay the tax burden without working in the market. Indeed, many academics find the idea of taxing imputed income problematic precisely because it will provide an incentive for waged labor rather than a disincentive as Zelenak claims. See, e.g., 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, 838 (1979). Second, even if we focus only upon the *benefits* associated with taxation (that is, the Social Security benefits) as Zelenak does, it is clear that Zelenak's claim is far too simplistic. Women who are already in the market may seek to avoid undertaking housework as a means of avoiding any further taxation, rather than vice versa as Zelenak claims. In short, the housework tax may discourage women from undertaking *household* labor

Suppose, however, that the costs and benefits were such that no rational individual would want to participate in the Social Security system. Market workers, unfortunately, cannot opt out of the system. Household laborers, however, could oppose a policy reform that pushes them into the existing tax structure that imposes a greater level of burdens than benefits. Yet, as a strategic matter, it is not at all clear that this is the best option for women to pursue. As I note throughout *Taxing Housework*, remaining at the margins of the law ensures that women remain at the margins of society generally.³⁵ Put differently, the short-term costs that women will incur may be worth the long-term advantages they will gain. Moreover, should Congress devise an alternative, and more economically rational, system for ensuring retirement benefits in the future, it is more likely that women will be included in the new system if their concerns have already been identified and addressed.³⁶

With regard to the second hypothetical taxpayer, Deborah (a middle-income, single mother), Zelenak's comparison unambiguously indicates she will gain a greater level of retirement benefits under my proposal than under current law. In commenting on this, Zelenak first notes that Deborah may not want to pay greater taxes for the greater benefits she receives upon retirement.³⁷ Again, while this argument suggests that Congress should dismantle the Social Security laws, it does not defeat my argument that Congress should subject both men and women to the same benefits and burdens of the existing system.

Zelenak, however, goes on to argue that even if Deborah wanted to be in the system, it is not clear as a matter of tax policy why

rather than market labor. Moreover, women who have high-income jobs may have an incentive to provide a greater number of hours to the waged labor force despite the decreasing level of benefits attached to each dollar paid into the Social Security system. This incentive will come about because once the value of household labor and the market wage are stacked on top of each other, the women may come close to \$61,200—the point at which a worker is no longer assessed a Social Security tax. At this point, the worker will have a greater incentive to work because her marginal tax rate will decrease due to the elimination of the Social Security tax on all income above \$61,200. Finally, the tax on housework may disrupt the gendered division of labor, leading men to do more housework and women to do less. This phenomenon will also occur because of the \$61,200 cut-off point. The wage-earner who earns this level of income can undertake household chores and at the same time avoid the Social Security tax. Because the higher-earning spouse is often the male, the couple may allocate household labor to him. Freed of these time-consuming chores, women may work in the market at greater levels.

35. See Staudt, *supra* note 5, at 1589-99.

36. See Kathleen Fieldstein, *Social Security's Gender Gap*, N.Y. TIMES, Apr. 13, 1998, at A27.

37. See Zelenak, *supra* note 1, at 1536.

Congress should impose the housework tax upon her. He points out that the existence of children does not reflect an increased ability to pay taxes, nor does it suggest that women will have a greater need for income in retirement.³⁸ These claims are surprising for a number of reasons.

With regard to the ability-to-pay issue, it is unclear whether Zelenak makes this claim because he believes the work has no economic value or because he believes the labor does not provide cash income to the household. If it is the former, countless empirical studies have proven otherwise.³⁹ If it is the latter, then Zelenak, of course, is correct that household labor does not afford women cash income, but Zelenak must then explain why this fact *necessarily* defeats the argument for taxation. In other contexts, Congress has imposed a tax on valuable items (such as individual pension plans and stock options) despite the fact that the items do not contribute to the taxpayer's immediate cash flow. Zelenak, therefore, must do more than simply raise the ability-to-pay problem; he must explain why it settles the issue.

In addition to practical cash flow problems, the ability-to-pay theory also implies a principle of tax fairness that requires Congress to apportion tax burdens according to each individual's ability to pay. Theorists and policymakers generally have used the theory to justify the progressive income tax rate system. High-income individuals, it is argued, have a greater ability to pay and thus should suffer a higher marginal tax rate. Despite its prominence in the income tax policy debates, the concept has not played a central role in the Social Security context. Under the Social Security rules, for example, individuals (at all income levels) must pay taxes at a rate of 7.65% on income up to \$61,200, and any income above this amount is exempt from the tax entirely.⁴⁰ In short, the Social Security laws impose a regressive marginal tax rate—just the opposite of what the ability-to-pay norm would mandate. While tax programs, such as the Earned Income Tax Credit ("EITC") program, may offset some of the Social Security costs for low-income individuals, these programs are entirely

38. *See id.*

39. *See, e.g.,* EUSTON QUAH, ECONOMICS AND HOME PRODUCTION 79-101 (1993) (citing studies that estimate the value of women's household labor to the market economy).

40. Employers and employees must pay Social Security and Medicare hospital insurance taxes (collectively known as FICA) at a rate of 7.64%. The Social Security tax is 6.2% of gross wages up to \$61,200 of the employees' wages. *See* I.R.C. §§ 3101(a), 3111(a) (1994). An additional Medicare tax of 1.45%, again payable by both the employer and employee, is imposed on all wages. *See id.* §§ 3101(b), 3111(b).

independent of the Social Security laws. Indeed, many theorists have argued that the EITC should be dismantled despite the fact that such a repeal would leave low-income individuals with a significant tax burden under the mandatory retirement system that currently exists.

Zelenak's second claim with regard to the hypothetical taxpayer Deborah (that is, the claim that the existence of children does not mean women have a greater need for retirement income) is contradicted by a number of empirical studies. These studies suggest that women are likely to live in poverty precisely because children impinge upon their ability to earn and to save for retirement.⁴¹ Compared to the male breadwinner, women are far more likely to live in poverty in old age.⁴² Zelenak's claim that children have no impact upon women's economic need not only is inaccurate, but it may also be of little relevance to the issue at hand. Just as Congress has ignored the ability-to-pay theory in devising the Social Security laws, it has disregarded economic need in allocating the tax burden. Although early legislators' concern for elderly individuals living in poverty led to the adoption of the Social Security laws in the first place, this concern did not define the scope of the laws. All workers, regardless of their potential income in retirement, must pay the tax while working in the waged labor force. Indeed, failure to do so could lead to the imposition of significant federal penalties.⁴³

Unless Zelenak is prepared to challenge the operation of the Social Security laws, his point that Deborah does not have a greater ability to pay or greater economic need in retirement is something of a non sequitur to my argument that Deborah should be included in the system as it is currently set up. My argument rests primarily on the claim that Deborah has performed the type of labor that should

41. See Staudt, *supra* note 5, at 1596-99 & nn.104-12. The underlying reason for this decreased earning capacity is apparent: children reduce the caretaker's ability to earn a salary on the market. See, e.g., SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 149-56 (1989) (discussing housework and the cycle of vulnerability). Women who maintain low-paying and part-time jobs, in turn, are unable to amass retirement savings. As Richard Burkhauser and Karen Holden have pointed out, high wages and high levels of market participation correspond to greater Social Security benefits. See RICHARD V. BURKHAUSER & KAREN C. HOLDEN, *A CHALLENGE TO SOCIAL SECURITY: THE CHANGING ROLES OF WOMEN AND MEN IN AMERICAN SOCIETY* 1-4 (1982).

42. See Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264, 277 (1989); Fieldstein, *supra* note 36, at A27.

43. See, e.g., Joseph Radtke, *S.C. v. United States*, 712 F. Supp. 143, 146 (E.D. Wis. 1989), *aff'd*, 895 F.2d 1196 (7th Cir. 1990) (holding that Social Security taxation cannot be avoided through complicated avoidance schemes).

subject her to the burdens and the benefits of the existing legal structure. Although Zelenak may be correct that Congress should reform the system to impose Social Security taxation upon only the relatively wealthy (those with the ability to pay) and award benefits only to those in need, these proposals do not undermine my claims in *Taxing Housework*.

Finally, Zelenak considers the third hypothetical taxpayer, Martha (an unemployed, single mother), who will be entitled to \$6240 annually upon retirement under my proposed plan. Zelenak pursues an unusual strategy in attacking my argument for providing Martha retirement benefits that are tied to her household labor. He first suggests that a taxpayer in Martha's position (unemployed and single) may not need the assistance that my proposal offers—the current law may be sufficient. This suggestion is surprising given the overwhelming evidence indicating that women who are poor during their working years are likely to live in poverty in old age.⁴⁴ Nevertheless, to support his claim, Zelenak notes that the Social Security laws mandate that the five lowest earning years be dropped from the calculation of one's retirement benefits. Thus, Zelenak notes, Martha could be a nonworking single mother for five years and not suffer a reduction in her retirement benefits under current law.

Here again, Zelenak forgets that Social Security taxes are imposed not only upon those in need, but on any individual who has performed the requisite labor. Because Martha will have performed household labor for at least eighteen years (regardless of whether she is in or out of the market), she should be entitled to the benefits of the labor regardless of how she prospers in retirement under current law. Moreover, Zelenak ignores the reality of a single mother's life when he suggests that Martha could easily go into the workforce five years after having children. Given the difficulty and expense of hiring childcare, many single mothers are forced either to stay out of the workforce or to work part-time jobs for a significant period of time. Accordingly, even if the five lowest earning years are dropped, many women will be unable to obtain the level of retirement benefits that ensures economic security in old age.

Zelenak goes on to argue that even if my proposal ensures that women have access to much-needed Social Security benefits, I have not proven that my proposal ensures economic security in old age for taxpayers in Martha's position. Although countless theorists have debated the level of income necessary to ensure access to basic

44. See *supra* notes 41-42 and accompanying text.

human needs, the claim that an annual income of \$6240 is negligible to an elderly individual with no income is disingenuous. This level of transfer may not lift her out of poverty but would come close—and it would be significantly better than receiving nothing at all.⁴⁵

III. CONCLUSION

Many theorists and commentators have noted that the existing tax structure works to the disadvantage of women in a variety of ways.⁴⁶ Given the importance of these issues to society in general and to women in particular, I wrote *Taxing Housework* in an effort to challenge the traditional thinking that has contributed to women's marginalization in the first place. At the same time, I sought to facilitate debate and deliberation on difficult social issues. While I certainly do not know whether taxing women's household labor is the only "right answer," or possibly even the "best answer," to the problems that I identify in my article, it is clear that my proposal to tax imputed income has sparked a productive and useful debate among tax scholars.

45. The poverty line designated by the U.S. Census Bureau varies according to family size and composition. In 1995, the federal government considered a married couple with income equal to or over \$12,590 and a single person earning \$7470 to be outside the boundaries of poverty. See U.S. Dep't of Health & Human Servs., Annual Update of the HHS Poverty Guidelines, 60 Fed. Reg. 7772 (1995).

46. For the most thorough discussion of these issues, see MCCAFFERY, *supra* note 24. For a review of McCaffery's book, see Nancy C. Staudt, *The Theory and Practice of Taxing Difference*, U. CHI. L. REV. (forthcoming).

