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# SETTING AN AGENDA FOR THE STUDY OF TAX AND BLACK CULTURE

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## I. THE TASK BEFORE US—RACIAL JUSTICE IN THE TWENTY-FIRST CENTURY

This conference commands that we explore how law can achieve racial justice in the twenty-first century. To answer that question we must first ask three questions:

- 1) What conditions stand in the way of racial justice?;
- 2) How can law address these barriers?; and
- 3) How can we shape rules that fit within our shared notions of fairness?

We ask these questions because law only promotes change when our goals are clear and packaged in our common understandings of fairness.<sup>1</sup> In asking about racial justice for black Americans, the conference reveals an interesting shift in thinking about these questions over the last fifty years.

## II. WHAT CONDITIONS STAND IN THE WAY OF RACIAL JUSTICE? SHIFTS IN UNDERSTANDING THE RACE PROBLEM

As much effort and time as we spend studying race, it is not clear that we understand where black America's race problem lies. Are we victims of genetics, history, skin color, pathology, or economic position? Over the past fifty years, I believe that our thinking has shifted on this question away from caste (i.e. race imposed inferior status) and toward class (i.e. economic condition).

### A. How Our Views Have Shifted from Caste to Class

If we were holding this conference fifty years ago, we would have

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1. See LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 67-136 (1975); Shari Seidman Diamond, *Detecting Legal Change and Its Impact*, 2 *APPLIED SOC. PSYCHOL. ANN.* 139 (1981).

expected panels on *Voting Rights, Segregation, Employment Discrimination, and Access to Education*.<sup>2</sup>

If we were holding this conference twenty-five years ago, a focus on black pathology might have inspired panels on *Drugs and Drug Abuse, Crime and the Criminal Justice System, and Welfare and the Disintegrating Black Family*.<sup>3</sup>

Now, we almost exclusively devote this conference—which bills itself as directly addressing the twenty-first century—to black capitalism. For example, the conference starts with a panel on *Tax and Business Law* and continues with a panel on *Real Property*—the largest source of wealth in the United States.<sup>4</sup> There are also panels on *Higher Education* and *Culture*, neither of which would have taken center stage twenty-five years ago.

There is no panel on *Affirmative Action*, although affirmative action has affected many blacks' lives over the past twenty-five years. There are no panels on *Voting* or *Civil Rights*.

My point is that this conference shows how thinking about racial justice has shifted away from an emphasis on caste barriers and toward explaining race problems as material success problems.

## B. Why Our Explanations for Race Problems Have Shifted

Of course, the outside world has always formed our views of race—and our strategies to overcome race problems. Fifty years ago, we faced *de jure* segregation.<sup>5</sup> Accordingly, our strategy was to attack discriminatory laws.<sup>6</sup>

2. See *Educator Says U.S. Must Erase Bias: World Watches How We Put Into Practice Promise of Equality*, *Weaver Says*, N.Y. TIMES, Feb. 16, 1949, at 21 (speaking at annual meeting of the Association for Supervision of Curriculum Development of the National Education, Robert C. Weaver calls for an end to color discrimination in economic and political institutions); Doris Greenberg, *Urban League Told of Changing South*, N.Y. TIMES, Sept. 8, 1949, at 44 (discussing projects to improve schools); John N. Popham, *Bias in South Held Harmful Abroad: Regional Council Urges Legal Protection of Rights to Tell World of Our Policy*, N.Y. TIMES, Oct. 17, 1919, at 14 (recognizing the need to help the economic position of the underprivileged, Southern Regional Council calls for legislation to ensure jobs, homes, and schools: the bases of civil rights).

3. See Paul Delaney, *Civil Rights Slowdown*, N.Y. TIMES, Aug. 3, 1974, at 26 (discussing change in the civil rights movement, legal segregation no longer barrier to blacks); Ernest Holsendolph, *Blacks Analyze Roots of Crime*, N.Y. TIMES, Dec. 9, 1974, at 40 (discussing "minority groups and justice system" at National League of Cities Conference); Shawn G. Kennedy, *Blacks Seek Solution to Rising Crime and Lack of Faith in System of Law*, N.Y. TIMES, Oct. 15, 1974, at 26 (seeking increased minority participation in judicial and law enforcement systems).

4. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH* 64 (1997).

5. See JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM* 463 (4th ed. 1974).

6. See *id.*

Today our economy has a vast black underclass coupled with a growing black middle class.<sup>7</sup> That these two groups exist side by side may explain our focus on creating and maintaining a middle class black population. Nevertheless, the black underclass is equally compelling and its survival is as much a part of racial justice.

### C. Why We Think That Law Can Solve the Problem

Given law's importance to the last part of our struggle, it is no surprise that we see law as a tool to create and maintain the black middle class. In this way, we continue our faith in law as we shift our perception of the problem. Before, we thought of black peoples' problems as caste problems and we looked for caste solutions. Now, we see black peoples' problems are class problems and we look for class solutions.

## III. HOW CAN LAW ADDRESS RACE BARRIERS? WHY IT MATTERS WHETHER WE TARGET CASTE OR CLASS

This divergence, between thinking about race as a caste issue and thinking about race as a class issue informs how we look at law and what law can do about racial justice. Our understanding of what law can do, coupled with our understanding of barriers to racial justice, shapes our proposals and our legal rules.

### A. Class-Based Solutions

Class-based solutions look at income and try to determine how to lift every boat by lifting the tide. For example, the Great Society and Affirmative Action are based, at least in part, on two views. The first view is that lack of economic and educational opportunities are barriers to full participation in American society. This view is reflected in at least one justification for both programs—that they would fade away as the black middle class began to reproduce itself.<sup>8</sup> In other words, as class status increases the barriers to entry fade and eliminate the need for legal redress. In this universe, passing—the most common traditional black American way to change social rank—is supposedly replaced by material achievement.<sup>9</sup>

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7. See David Westphal, *Black Households Reap Better Than Fair Share of Economic Bounty*, STAR TRIB., Oct. 11, 1998, at 17A.

8. See Alfred W. Blumrosen, *Expanding the Concept of Affirmative Action to Address Contemporary Conditions*, 13 N.Y.U. REV. L. & SOC. CHANGE 297, 304 (1985).

9. See E. FRANKLIN FRAZIER, *BLACK BOURGEOISIE* 20, 112-13 (1957).

A second view reflected in both programs is that law can command associations that people are not inclined to engage in themselves; and that, further—over time—things will work themselves out. That is to say, that people will find the association pleasing and will continue to associate without further legal encouragement. This is an interesting reversal of the most common use for race law in the United States—the enforced separation of the races.<sup>10</sup>

Seeing race problems as class problems leads to rules that create a middle class, nourish that class with a variety of social programs, and then eliminate the programs as the changes they fund take hold. Class issues are hard to attack by litigation. Legislative and political solutions become necessary. Because blacks are a political minority, class solutions often require coalitions and, consequently, shared benefits. In other words, less benefits for blacks. Class solutions are often administrative. For example, companies and other employers both create and enforce most affirmative action programs.<sup>11</sup>

## B. Caste-Based Solutions

Caste-based solutions try to look at people who are similar but are treated differently. The goal is to shape rules to create similar results. Contrast this with a class analysis. In a caste analysis, laws are more permanent because the cause, color, is permanent. In America, class shifts and changes more readily than race. Caste solutions are often forged through litigation. Remedies are more individualized and usually require some action by the harmed party.<sup>12</sup> It is generally hard to apply a caste solution to a rule that is race neutral on its face.<sup>13</sup>

# IV. EXAMPLES FROM THE TAX WORLD

## A. Caste-Based Solutions

In this part, I use a study I did with Professor Bill Whitford on race and tax in the Internal Revenue Code to illustrate how what we think about caste

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10. See A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 7 (1978).

11. See Lauren B. Edelman, *Legal Ambiguity and Symbolic Structure: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1542 (1992).

12. See Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 237-38 (1965).

13. See generally, Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511 (examining the Supreme Court's focus on preventing discriminatory exclusion from juries).

or class affects the tax rules we propose. In *A Black Critique of the Internal Revenue Code*, Bill and I used social science techniques to create *Sidney Poitier* blacks.<sup>14</sup> In other words, we used a series of data bases and controls to match blacks and whites by education, sex, marriage, children, region, location within a region (urban/suburban/rural), age, employment, and income.<sup>15</sup> Assuming perfect information, we found that—among these matched people—blacks were more likely to pay higher taxes than similarly situated whites.<sup>16</sup>

In making this determination, we looked at home ownership, the marriage penalty and bonus, benefits for wealth, and benefits for employment.<sup>17</sup> Taken together, these provisions represent the lion's share of items in the tax expenditure budget.<sup>18</sup>

Based on our findings, we wondered what a *Black Congress*, whose only interest was promoting black needs, would do to change the current tax system. Using the *Black Congress* metaphor, we made a series of legislative proposals.<sup>19</sup> For example, we argued that a *Black Congress* would replace the mortgage interest deduction with a credit that phased out above certain income levels.<sup>20</sup> Instead of a marriage penalty or bonus, we suggested that a *Black Congress* might allow taxpayers to select their filing status.<sup>21</sup>

Going back to our discussion of caste and class, we can see that this study is, in many ways, a caste study. We argued that blacks, who were like whites in every significant respect, received different treatment from a supposedly neutral law. In other words, we used a *Sidney Poitier* analysis, or—in tax parlance—we identified flaws in horizontal equity. That is, people with equal incomes did not pay the same amount of tax.<sup>22</sup>

## B. Class-Based Solutions

One criticism of our work was that we did not look at progressivity. Looking at progressivity invites a class-based analysis because progressivity

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

15. See *id.* at 756-58, app. at 818-20.

16. See *id.* at 799.

17. See *id.* at 755.

18. See *id.* at 755, 800-01.

19. See *id.* at 781-83, 789-91, 798-99.

20. See Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 781.

21. See *id.* at 798-99.

22. See *id.* at 801.

explicitly treats income groups differently.<sup>23</sup> This is in sharp contrast to horizontal equity where people with the same income are taxed equally.<sup>24</sup>

If we take the progressivity argument seriously and open the federal tax system to a class/caste analysis, we want to know what the tax system does to the lower classes. We might find, for example, that the overall system of federal taxation falls more heavily on the lower income groups. This finding might lead us to suggest exempting the lower classes from income taxation or revamping the federal tax system to minimize or eliminate flat and regressive taxes.<sup>25</sup>

We might also look at savings and conclude that the current system makes it hard for lower class people to save efficiently. By taxing cash savings, while deferring a tax on investments, the Internal Revenue Code favors the high income groups who invest.<sup>26</sup> This is an odd result because we generally agree that low income people should place their savings in savings accounts. Yet, the Internal Revenue Code penalizes lower income people for engaging in rational savings plans while rewarding upper income groups.

This problem might argue for faster realization rules so that we tax increases in wealth quickly.<sup>27</sup> It might also argue for a consumption tax in which savings accounts are exempt from tax.<sup>28</sup> These are some of the suggestions that I made in response to the vertical equity criticisms of *A Black Critique of the Internal Revenue Code*.<sup>29</sup>

### C. Politics

Because the Internal Revenue Code is supposedly race neutral but class sensitive, this section examines the political barriers to class-based reforms as a means of achieving race justice.

If we believe that blacks suffer from a class problem we should ask what law can do to improve that problem.

To a large extent, law's power comes from politics. As the struggle over affirmative action shows, rules that lack strong constituencies are subject to

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23. See James D. Bryce, *A Critical Evaluation of the Tax Critics*, 76 N.C. L. REV. 1687, 1689 (1998); Richard Schmalbeck, *Race and the Federal Income Tax: Has a Disparate Impact Case Been Made?*, 76 N.C. L. REV. 1817, 1834 (1998).

24. See 1 BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 3.1.4 (2d ed. 1989).

25. See Beverly I. Moran, *Exploring the Mysteries: Can We Ever Know Anything About Race and Tax?*, 76 N.C. L. REV. 1629, 1635 (1998).

26. See *id.* at 1635-36; Moran & Whitford, *supra* note 14, at 760.

27. See Mary Louise Fellows, *A Comprehensive Attack on Tax Deferral*, 88 MICH. L. REV. 722, 727 (1990).

28. See Moran, *supra* note 25, at 1637.

29. See Moran, *supra* note 25.

constant challenge. Class-based solutions raise the political question of whether America can accept a tax system that focuses on class in order to achieve race justice.

In asking whether politics makes law available for class-based solutions, we might take heart from the fact that the Code already considers class both through specific programs and progressive rates.<sup>30</sup> As a result, class targeted solutions are within the federal tax mainstream.

Another point in favor of class-based rules is that they fade as black wealth increases. If America's race problem is essentially a class problem, then as blacks move into the upper income groups, the race problem disappears. Accordingly, if we accept a class-based analysis, then our proposals should self destruct once they succeed in eliminating race-based poverty.

In favor of class-based solutions is our class-based Code and the fact that class-based solutions should die over time. Arguments against class-based solutions are our notions of fairness.

For example, we often tie taxation to citizenship.<sup>31</sup> That is, we believe that taxpayers have greater rights in relation to government than people who do not pay taxes. Whether this belief has merit under our constitutional system is not the point. The coupling of paying taxes with political rights resonates in our cultural narrative.

One class-based solution to taxation is to exempt lower income people from all federal taxes including excise and sales taxes which are generally regressive in nature. Nevertheless, exempting the lower classes from tax may be politically unacceptable because it might be coupled with less political influence. Further, our tax rhetoric calls for simplicity and regressive taxes are often easier to collect and administer than progressive tax systems.<sup>32</sup> Any proposal that complicates the tax system is going to meet with some opposition. Even keeping a black coalition together might be difficult if middle class blacks see their interests in opposition to lower income black taxpayers. This is another possible side effect of too intense a focus on class alone.

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30. The earned income credit is a low income provision, the exclusion of gain on the sale of a home is a middle class provision, and the reduced capital gains rate is an upper class provision. See BITTKER, *supra* note 24, ¶ 37.3 (earned income credit); ¶ 44A.1 (exclusion of gain on sale of principal residence); ¶ 50.2 (reduced capital gains) (1990 and Supp. 1998).

31. See Beverly I. Moran, *Income Tax Rhetoric (or Why Do We Want Tax Reform?)*, 1992 WIS. L. REV. 2063, 2063.

32. See UNITED NATIONS, GUIDELINES FOR IMPROVING TAX ADMINISTRATION IN DEVELOPING COUNTRIES 19 (1997).



## V. A THIRD ALTERNATIVE

We have rules for caste problems and rules for class problems. Yet what if blacks are suffering from an intersection of caste and class? What if caste and class mix to form something new? How does that intersection affect our proposals? Looking at how these factors create new challenges requires its own particular analysis. Where are the models that help us understand how to look at this interrelationship?

### A. The Intersection of Race and Sex

In recent years scholars have begun to focus on the intersection of race and sex.<sup>33</sup> Accordingly, we might consider that example as a model. Because tax laws were once explicitly sex conscious, looking for sex differences within the Internal Revenue Code is an obvious starting point.<sup>34</sup>

Although we now ban sex-based Code language, many income tax rules remain based on traditional sex relations. For example, the marriage bonus and penalty are structured to reward couples with only one paid spouse.<sup>35</sup> In *A Black Critique of the Internal Revenue Code*, Bill Whitford and I showed that black and white families are treated differently by the marriage benefit and bonus.<sup>36</sup>

In the estate tax area, Qualified Terminable Interests in Property (QTIPs) allow an unlimited marital deduction although the surviving spouse only retains limited property rights.<sup>37</sup> Tax scholars have shown how these rules favor husbands at the expense of wives.<sup>38</sup>

In any number of areas, the relationship of sex to taxation is clear.<sup>39</sup>

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33. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

34. See Beverly I. Moran, *From Urinal to Manicure: Challenges to the Scholarship of Tax and Gender*, 11 WIS. WOMEN'S L. J. 191, 192 (1996). For example, many years ago I used legislative histories to show how Congress explicitly shaped alimony rules to give different rewards to divorced men and women. See Beverly I. Moran, *Welcome to the Funhouse: The Incredible Maze of Modern Divorce Taxation*, 26 HARV. J. ON LEGIS. 117 (1989).

35. See Moran & Whitford, *supra* note 14, at 792.

36. See Moran & Whitford, *supra* note 14, at 797.

37. See Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Father,"* 10 LAW & INEQ. J. 137, 156-59 (1991); Wendy C. Gerzog, *The Illogical and Sexist QTIP Provisions: I Just Can't Say It Isn't So.*, 76 N.C. L. REV. 1597, 1598 (1998); Lily Kahng, *Fiction in Tax*, TAXING AMERICA 25, 38 (1996).

38. See Fellows, *supra* note 37, at 156-59; Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L. J. 301, 320-26 (1995); Kahng, *supra* note 38, at 39-40.

39. See Nancy E. Staudt, *Critical Tax Theory: Still Not Taken Seriously*, 76 N.C. L. REV.

## B. The Intersection of Caste and Class

Although the intersection of race and sex offers interesting insights into employment discrimination and feminist jurisprudence,<sup>40</sup> how much does sex add to a study of the tax system and race? In some ways, the answer to that question comes from the similarities or differences between the two subjects.

To begin with, employment discrimination laws explicitly confront race and sex issues. Unlike those laws, tax laws have no explicit race rules.<sup>41</sup> The Code's sex rules take some teasing out because of their implicit nature. The race effects require more teasing still. As a result, it is hard to make a tax/sex analysis and harder to show a race/sex/tax effect. Perhaps for this reason, we have yet to see a study that establishes this intersection by, for example, statistical modeling.<sup>42</sup>

On the other hand, we do have statistical models that demonstrate race effects within the Internal Revenue Code. We also know that the Code is explicitly created with class in mind. Further, black men and women are often reflected on the same return. My point is that tax rules interact with the way that people live. In order to change rules effectively, we have to understand that interaction.

In employment discrimination, Kim Crenshaw was able to show that court made rules to protect sex and race translate into protecting black men and white women. Because black women exist outside these two groups, the interpretation was flawed.<sup>43</sup>

In tax law we know that black people have a class problem and that the Code itself is constructed to accommodate class differences. We also know that blacks have a caste problem and this problem is reflected in how Code rules operate. We know that the Code's reporting requirements try to capture families on a single return whether joint or head of household. These factors make me think that the tax system is ripe for a study of how it operates within race as culture, that is, the intersection of caste and class.

## C. Culture

The technical reasons recited above demonstrate the usefulness of a study of the intersection of tax law and black culture. As rules interact with how

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1837, 1850-72 (1998) (discussing feminist tax scholarship).

40. See Crenshaw, *supra* note 33; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

41. See Moran, *supra* note 34, at 195-96.

42. See Moran, *supra* note 34, at n.2.

43. See Crenshaw, *supra* note 33, at 141-52.

black people live, they adversely affect the culture black men and women share. Rather than look at how black men and women move separately through the tax system, I think that we learn more if we study how they move together.

In some ways the Internal Revenue Code mandates tracking black men and women together because taxpayers are encouraged to report income on a single return.<sup>44</sup> In some ways, demographic realities mandate tracking black men and women together because they share the experience of race bias and economic marginalization. From the cultural point of view, we should look at black men and women together to help preserve the shared black culture. This is not ideology but pragmatics. The way the law operates and the way black people live intersects at this point.

## VI. WHAT WOULD A STUDY LOOK LIKE?

If we want to know more about how tax laws affect black Americans, then we need to begin with a problem. I argue that, until now, studies have conceptualized the problem as caste by looking at horizontal equity. Nevertheless, there are class, and perhaps sex, perspectives to consider as well. Although these factors standing alone can tell us important facts about how law interacts with how people live, I believe that grouping caste and class together has greater merit than looking at caste and class separately or than studying the interaction of race and sex.

### A. Why It Is Not Just Caste or Class

Race in America has never been wholly about class or caste. Even during slavery there were blacks with relative wealth.<sup>45</sup> Yet, people with wealth and accomplishment were often subject to race conscious rules that kept them from the benefits of citizenship.<sup>46</sup> In that world, skin color was a much better barometer of status than education or money.<sup>47</sup> Thus class and caste did not necessarily go hand in hand.

Today we have a black upper class and yet we still hear complaints of racial bias from such people as Vernon Jordan, O.J. Simpson, and Clarence Thomas. If class is the issue, then these men should be safe from race bias.

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44. See I.R.C. § 1 (West Supp. 1998) (married individuals filing joint returns); I.R.C. § 151 (West Supp. 1998) (exemptions).

45. See FRAZIER, *supra* note 9, at 112-13.

46. See FRANKLIN, *supra* note 5, at 240-41.

47. See FRANKLIN, *supra* note 5, at 240-41.

Yet, each man claims some public harm because of his race.<sup>48</sup> If men who rise so high still experience prejudice, then race is not simply a class problem.

On the other hand, if race is only a matter of caste, why do blacks still occupy the lower classes after almost fifty years of anti-caste laws?<sup>49</sup> I think that *A Black Critique of the Internal Revenue Code* may provide some answers to that question.

## B. What Is Race?

One of the hardest tasks we faced in studying race and tax was how to define race. For us, this was not a simple question of what someone reported in a survey. To show that race caused different incidents of taxation, we were urged to create *Sidney Poitier* blacks. That is, blacks who conform to their white counterparts in every significant way. The idea was to wash out all the consequences of race—poor schooling, substandard housing, urban living, marriage and divorce rates—to show a race effect. Even using this model, we found significant race differences in the incidence of taxation.<sup>50</sup> Nevertheless, what worried me was that, by erasing these differences, we were erasing what it means to be black in America.<sup>51</sup>

To my mind, American blacks are not simply the products of skin color or of class. Instead black America is a unique culture that reflects the interaction of caste and class. In this culture we care for our sick and our young in different ways than whites.<sup>52</sup> We own different things; we save in different ways; we have different opportunities.

Further, I believe that it does not necessarily follow that black culture is less deserving than white culture. Black married women are more likely to work than white married women.<sup>53</sup> Growing trends in the white community suggest that women working is a social good.<sup>54</sup> Blacks save in income appropriate ways.<sup>55</sup> Blacks are more likely than whites to use relatives for

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48. See Mark Sherman, *The President on Trial*, ATLANTA J. & CONST., Feb. 7, 1999, at B2; see also Courtland Milloy, *At Lunch, a Kinship to Savor*, WASH. POST, Apr. 10, 1996, at D1; Ruth Marcus, *Hill Describes Details of Alleged Harassment*, WASH. POST, Oct. 12, 1991, at A1; O.J. SIMPSON, I WANT TO TELL YOU 111-22 (1995).

49. See OLIVER & SHAPIRO, *supra* note 4, at 97-98.

50. See Moran & Whitford, *supra* note 14, at 799.

51. See IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 13-14, 178-79 (1996).

52. See Tamala M. Edwards, *Sister Power: What Turn-of-the-Century Black Women Can Teach Us*, ESSENCE, Mar. 1999, at 82.

53. See Moran & Whitford, *supra* note 14, at 794-96.

54. See Tim Cornell, *Study: Working Moms Don't Spoil the Child With Day Care*, BOSTON HERALD, Mar. 1, 1999, at 1.

55. See Moran & Whitford, *supra* note 14, at 766 T.1.

child and adult care.<sup>56</sup> These behaviors enrich the American experience and make us a more stable and prosperous nation. If we see black culture as valuable, then we might want to preserve that culture. The question is whether the federal tax system can satisfy that aspiration.

## VII. IMPLICATIONS OF A BLACK CULTURE

If the black American race problem is a problem of culture as forged by the intersection of caste and class, and if the intersection of these forces impedes black progress, then, to have a positive impact, law must accommodate black culture. Yet accommodating black culture faces major hurdles. Some of those hurdles include: the idea of race neutral laws and our aversion to outsider cultures. That aversion stands in the way of both creating and justifying culture sensitive law.

### A. Race Neutral Law

The idea that there is a race blind tax law or race blind business law is based on at least two views: 1) that there are no legal barriers to full black participation in the benefits of business and tax law, and 2) that the law as it stands is not influenced by other barriers to entry.<sup>57</sup>

As opposed to rules affecting women, it does not appear that the Internal Revenue Code is meant to treat blacks and whites differently. What we see from this panel is that the law can have different race effects without intent. Based on our study, we can fairly say that blacks and whites do receive disparate results from supposedly neutral laws.

Certainly, more studies are needed to show race disparate impacts in the Code. The fact that the first study produced positive results should encourage other scholars. Nor should the horizontal equity studies reduce interest in vertical equity studies. The point is merely that we are beyond the stage of arguing over whether there are disparate race effects within the Internal Revenue Code.

### B. Accommodating Culture: Can We Justify the Attempt?

If different results are a function of different cultures, is there anything that law can do? This raises both political and practical considerations. Can

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56. See Lisa Jones Townsel, *Extended Families of the '90s*, EBONY, Nov. 1996, at 152.

57. See Bryce, *supra* note 23, at 1693-95; Schmalbeck, *supra* note 23, at 1820-21.

law ever accommodate culture and if so, do we want law to accommodate culture here?

In asking whether law can accommodate culture we run up against an American problem. American culture is based, to a large extent, on obliterating outsider cultures. The melting pot ideal is, after all, based on the view that America's strength comes from immigrants giving up their differences in favor of an American identity. Further, the new global economy is in large part fueled by the exportation of American culture.<sup>58</sup> As a result, we see both America's internal and our external strengths fueled by the preservation and distribution of our dominant culture. Given this predisposition, we have no internal models for accommodating culture and an aversion to looking for models outside our own experience. Nevertheless, these models exist.

In the American academic tax world, we focus on whether rules are fair against some standard and whether these rules have the desired effect. We often fail to acknowledge that a tax system's main point is to raise revenues. In most of the rest of the world, that task is more formidable than in the United States for a host of reasons.<sup>59</sup> As a result, foreign tax systems are often forced to accommodate taxpayers instead of enforcing a homogeneous ideal. This alternate perspective gives us both our method and our justification.

Changing tax rules or procedures to raise more revenues fits within our notions of fairness if the targeted group does not object. There are special rules within the Internal Revenue Code for all sorts of specific behaviors. On the administrative level, the Service has special units for small business people and farmers.<sup>60</sup> We are already attuned to the idea that different people conduct their business lives in different ways. If these rules make collection more efficient by taking less government and taxpayer time and resources, then no one should object.

By borrowing from foreign systems we obtain an example for taking culture into account without violating our notions of fairness. The example is to justify cultural sensitivity by pointing to economic efficiency. To the extent that culturally sensitive laws and rules increase collection while reducing taxpayer and administrative costs, we all share the benefit. What the foreign example also shows is how to change rules and procedures to accommodate culture.

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58. See James E. Ellis, *Why Overseas? 'Cause That's Where the Sales Are*, BUS. WK., Jan. 10, 1994, at 62, 63.

59. See THE WORLD BANK, LESSONS OF TAX REFORM 3 (1991).

60. See 2 BITTKER *supra* note 24, ¶ 105.11.1 (special rules for farmers), ¶ 107.5 (estimating tips) (2d ed. 1992 & Supp. Part II 1998).

### C. Accommodating Culture: How to Begin? Research

What if there is a distinct black culture? What if black culture interacts adversely with American tax and business law? What if we can create political cover for changing the rules so that they accommodate culture? Does any of that tell us what needs changing?

Because we were schooled in the doctrine of race neutral business and tax law, we have yet to develop a broad understanding of how race interacts with tax and business law. Before we can do anything else, we need to gather information about how black people function within the tax system. In order to obtain this information, I have called for a *Race Expenditure Budget*, in which Congress would report annually on horizontal equity race effects within the Internal Revenue Code.<sup>61</sup> As I pointed out earlier, however, this solution only provides information about the caste effects of race.<sup>62</sup> If black American race problems are a function of culture, then we must do more.

One place to begin is pointed out by Professor Mathewson when he speaks of the need for black business lawyers. These lawyers possess important information about black people's dealings with the tax bureaucracy. Surveying this group can tell us where blacks encounter the most difficulty with our present business and tax laws.

Further, black business lawyers can also help shape black solutions to these dilemmas by helping the government restructure reporting and record keeping requirements to fit black life styles and business habits. Black business and tax lawyers also represent a heretofore underutilized conduit for expressing black legislative and administrative needs. If their experience is harnessed so that we know more about how blacks function within the tax system, that knowledge becomes available for lobbying efforts.

Just as Professor Mathewson's presentation offers insights into what we can do to make tax and business law more culturally sensitive, Professor Dorothy Brown's presentation illustrates the problem of lack of cultural sophistication in suggesting specific solutions.

Professor Dorothy Brown starts with Professor Karen Brown's analysis of the tax rules concerning damages for discrimination. As Professor Karen Brown correctly points out, the Internal Revenue Code allows a business that is found liable for discrimination damages to deduct those damages when paid.<sup>63</sup> Yet, the person receiving these damages must include them in

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61. See Moran, *supra* note 25, at 1634.

62. See *supra* Part IV.A.

63. See I.R.C. § 162.

income.<sup>64</sup> From this, Professor Dorothy Brown takes a step that is not justified by either the law or what we know about how black people live.

Professor Dorothy Brown assumes that black married women are more likely to work than white married women because black men are subject to job discrimination. Thus, Professor Dorothy Brown concludes that, if discrimination damage rules were changed, black men would experience less discrimination and would earn more income. Tying her idea to the marriage penalty, Professor Dorothy Brown concludes that changing the taxation of discrimination damages would allow blacks to avoid the marriage penalty because married black women would stop working once their husbands were either employed at all or were better paid.

An understanding of how the marriage penalty works reveals that more black male employment, or better salaries for black men, will only increase the number of blacks subject to the marriage penalty.

As Bill Whitford and I pointed out in *A Black Critique of the Internal Revenue Code*, the taxation of married couples is sometimes neutral when compared with single people, sometimes better when compared with single people, and sometimes worse when compared with single people. Because the Code's rates are the same for married and single people who earn below a certain amount of income. Black couples in which both spouses earn very little are never subject to the marriage penalty. Accordingly, higher salaries for black men will only push more couples into the marriage penalty.

Further, married couples in which only one spouse works are never subject to the marriage penalty. Instead, they receive a marriage bonus. Accordingly, black couples who are so discriminated against that the husband cannot find work are not subject to the marriage penalty. Moreover, black couples in which only the husband works because, according to Professor Dorothy Brown, anti-discrimination laws allow the husband to earn a good salary, would also receive a bonus.

In fact, it is only middle and upper-middle class couples where both spouses work that are subject to the marriage penalty. In other words, employed, well paid workers.

Race discrimination in employment occurs when a person is either not employed or is underpaid in his employment. People who are not employed or who are underpaid obviously have problems, but those problems do not extend to the marriage penalty. These are just the people who receive either neutral results or better results when they are married instead of single. Accordingly, tying the marriage penalty to employment discrimination is simply wrong based on how the statute operates.

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64. See I.R.C. § 104.



Further, Professor Dorothy Brown's belief that black women work to make up income that their husbands cannot earn is wrong based upon the social science studies of female work force participation. What these studies show is that black women are more likely to work the more their husbands earn, while white women are more likely to work the less their husbands earn. It is exactly because of these work force participation patterns that white couples are more likely to receive marriage bonuses and black couples are more likely to receive the marriage penalty.

Just as family income rises to the point that the marriage penalty might come into play, white women drop out of the work force and thus obtain a marriage bonus. At the same point, black women jump into the work place and subject their families to the marriage penalty.

Beyond the technical and sociological flaws in her argument, Professor Dorothy Brown's analysis also demonstrates the problems of lack of cultural sophistication. Essentially what Professor Dorothy Brown is saying is that black couples should be more like white couples and that the tax laws should help achieve this result. End employment discrimination and black wives will become white wives and thus less likely to work. But why must blacks be like whites in order to avoid the marriage penalty? This is the problem of a culturally unsophisticated analysis.

The point is that any attempt to change supposedly race neutral laws to accommodate culture is both politically and structurally difficult. The first step to overcoming these difficulties is to acquire and disseminate information. Specifically, information about how tax and business laws affect black people and where that impact is different from the law's affect on whites because blacks are culturally different from whites. Getting that information is harder work than some people are willing to do. It requires in depth studies of how people live and enough sophistication to apply that knowledge to legal rules. To some extent, this research can take place in the academy; but, at some point, that research will require government support. Gathering and analyzing the data is simply too expensive for researchers to handle out of their own budgets.

#### D. Accommodating Culture: Politics

Even if we are able to show systematically that blacks are adversely affected by tax law, we cannot count on that research to change the Code. Tax law by its nature is highly political, and race—however defined—merely adds another layer of complication to an already complicated mix. Thus, although the first step is undoubtedly the gathering of evidence, the next step—making the political case—is equally important. Without political clout, all we have

is information. Fortunately, America is changing in ways that make our task less burdensome and the prospect for change more likely.

First, we are increasingly confronted by a multicultural society. As a result, awareness of different American cultures and acceptance for these cultures is growing. As we become more comfortable with difference, we also become more attuned to adapting our institutions to difference.

Next, we are becoming more and more a part of the world. As we act on the global economy, it, in turn, acts on us, our laws and institutions. Increasingly we are aware that there are many ways to handle problems, some of which are superior to our own traditions. This awareness then allows us to look at legal rules in a fresh and more sympathetic light.

Third, our interest in class issues has shifted our focus to business oriented legal rules. Our society already accepts that law plays a vital role in race relations. With the emphasis on black capitalism, the role of tax and business law in race relations becomes easier to see.

Finally, blacks are increasing their political power through the election of black officials and through the tipping role we play in mixed-race elections. To the extent that we can educate our political leaders about the impact of tax and business laws on our economic life, we provide the rhetorical information they need to represent us better. Yet, because of our minority status, we will never be able to shape law to suit ourselves and our culture until we build the coalitions that can give our insights political force. In the end, knowledge is not enough without the power to change what is to what should be.

