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# TARGETS MISSED AND TARGETS HIT: CRITICAL TAX STUDIES AND EFFECTIVE TAX REFORM

STEVE R. JOHNSON\*

Medieval alchemy is popularly associated with attempts to become rich by transmuting base elements into gold. Such attempts were less than universally successful. Yet, alchemy yielded great benefits in other areas. For instance, alchemy was one of the sources of modern sciences such as pharmacology and metallurgy.<sup>1</sup> Also, the rich and profound symbology of alchemy has influenced modern psychology.<sup>2</sup>

Something similar may be said of critical tax studies. Such studies have argued that the Internal Revenue Code as a whole, or significant features of it, disadvantage—intentionally or unintentionally—groups historically oppressed or ignored by American society. Some of these arguments have had force, but many, I believe, have failed to present a persuasive case. However, that does not mean that even those efforts have been wasted. Like alchemy, those efforts have been worthwhile because they have hit unintended but still important targets.

To be fully persuasive, an argument that the Code discriminates against, or systematically disadvantages, particular groups should establish all of four elements:

(1) There is some particular Code feature that operates to the substantial disadvantage of some group. Typically, this would involve showing that, as a result of the Code feature, group members pay

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1. See CHERRY GILCHRIST, *ALCHEMY: THE GREAT WORK* 126 (1984). Specific contributions of alchemy to science include the production of potassium lye and tin monoxide, the discovery of sodium sulphate and benzoic acid, and the recognition of many gases. See *id.* at 127. Also, the works of Isaac Newton and Robert Boyle were significantly influenced by alchemical procedures and theories. See *id.* at 127-29.

2. See, e.g., C.G. JUNG, *MEMORIES, DREAMS, REFLECTIONS* 202-13 (Aniela Jaffé ed., Richard Winston & Clara Winston trans., Pantheon rev. ed. 1973) (1961).

proportionately more tax than non-members.

(2) The offending Code feature is not compensated for by other aspects of the Code that disproportionately benefit the group in question. That is, there must be an on-balance or on-net evaluation, a showing that the unfavorable Code aspects hurt group members more than the favorable Code aspects help them.

(3) The appropriate way to redress the problem would be changing the Code, rather than changing non-tax rules or practices.<sup>3</sup>

(4) A reasonable solution exists. That is, a way exists to reform the offending Code section, and that way is technically feasible, efficacious, and unlikely to create other serious problems.

More often than not, critical tax commentators have failed to satisfy one or another (sometimes several) of these elements. In the space available, I can defend this assertion only illustratively, not comprehensively. Part I discusses critical sexual-orientation studies, emphasizing the first and second elements above. Part II discusses critical race studies as to home ownership. Although the second element is implicated here as well, the principal focus of Part II is on the third and fourth elements.<sup>4</sup> Finally, Part III explains why, these failures notwithstanding, these and other critical efforts are beneficial. Specifically, the perspectives they develop can profitably inform tax reform initiatives, providing additional intellectual and political support for worthwhile change.

## I. CRITICAL SEXUAL-ORIENTATION STUDIES

Although the bulk of critical tax scholarship involves gender or race, sexual orientation also has received attention.<sup>5</sup> One argument that has been advanced by advocates of gay and lesbian marriage is that same-sex couples should be able to receive tax benefits that married different-sex couples receive. This point was aired during

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3. If there is a superior non-Code solution, a useful critical case may well have been made, but it is not a critical *tax* case. At most, the interaction of the Code with the non-tax rule would strengthen the need for reform of that non-tax rule.

4. I omit gender studies because that already has been the most discussed area of critical tax work and because I intend to treat the area in detail in a future article.

5. In addition, writings of broader scope may have particular significance in the sexual-orientation context. See, e.g., Joan B. Ellsworth, *Prescribing TUMS: An Alternative to the Marital Deduction for Unmarried Cohabitants*, 11 VA. TAX REV. 137 (1991). Professor Ellsworth proposes that the tax law recognize a new device: the so-called Trust for an Unmarried Survivor. See *id.* at 138. The purpose of this device would be to approximate for nontraditional, nonmarital families the estate tax benefit available to married persons as a result of the marital deduction. See *id.* Her piece does not emphasize same-sex couples, but it clearly would have tax implications for them.

Congress's consideration of the (ill-advised) Defense of Marriage Act,<sup>6</sup> and echoes of it have been audible in the Hawaii same-sex marriage litigation.<sup>7</sup>

In the scholarly literature, two significant articles are by Patricia A. Cain<sup>8</sup> and Adam Chase.<sup>9</sup> Cain, while interested in more general reform of the Code as it relates to gay and lesbian families, proposes changes in two specific areas: (1) income tax treatment of the household income of such families under the joint-return and assignment-of-income rules, and (2) gift tax treatment of wealth transfers within such families.<sup>10</sup> Chase focuses on how gay and lesbian couples, through contracting and tax planning, can achieve parallel rights and benefits to those of married couples.<sup>11</sup>

Neither Cain nor Chase explicitly states whether, in her or his view, same-sex couples as a whole pay more or less in federal income tax than comparable married couples. However, both seem to imply that same-sex couples, on balance, do worse. I argue below that both the failure to explicitly address the question and the implied answer given are problematic.

#### A. *Necessity of the Comparative Evaluation*

In one respect, I understand Cain's and Chase's decision not to expressly offer an on-balance conclusion as to whether same-sex couples pay more or less federal tax than comparable married couples. At least in part, these authors seem to appeal to the classical

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6. Pub. L. No. 104-199, sec. 2, § 1738C, 110 Stat. 2419, 2419 (1996) (to be codified at 28 U.S.C. § 1738C); *id.* sec. 3, § 7, 110 Stat. at 2419-2420 (to be codified at 1 U.S.C. § 7); *Defense of Marriage Act: Hearings on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 171 (1996) (statement of Professor Lynn D. Wardle); 142 CONG. REC. S10,079 (daily ed. Sept. 9, 1996) (letter from Herma Hill Kay); 142 CONG. REC. E1299-04 (daily ed. July 17, 1996) (remarks of Rep. Waxman).

7. In describing "a number of the most salient marital rights and benefits," the Supreme Court of Hawaii listed first "a variety of state income tax advantages, including deductions, credits, rates, exemptions, and estimates." *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993). These advantages are like those under federal tax law because the Hawaiian income tax law adopts the Internal Revenue Code with some modifications. *See* HAW. REV. STAT. §§ 235-2.3, -2.5 (1993 & Supp. 1995).

8. *See* Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991).

9. *See* Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359 (1995).

10. *See* Cain, *supra* note 8, at 101-02.

11. *See* Chase, *supra* note 9.

liberal value of equality.<sup>12</sup> From that perspective, it arguably does not matter which group is treated better now—they should be treated the same.<sup>13</sup>

However, I think that is a less than complete answer. Assume for argument's sake that same-sex couples actually pay less now in total tax than comparable married couples. That fact would call into question both general and specific efforts for reform.

Under this assumption, the general reform of treating committed same-sex couples the same as married couples for all Code purposes would be financially harmful to the group Cain and Chase wish to benefit. For reasons of fairness and dignity, some members of the group might be willing to accept this bargain. Others, however, might feel: "Don't do me any such favors."

The matter stands even worse as to specific reforms, whether statutory, as advocated by Cain, or self-help, as described by Chase. If, as assumed for the purpose of argument, the tax system already treats same-sex couples better than married couples, further particular reforms tax-beneficial to same-sex couples—without other compensatory changes adverse to them—would exacerbate existing inequality. Indeed, under our assumption, the question for those interested in equality would be how to reform the Code detrimentally to same-sex couples (in terms of how much tax they pay compared to married couples), not how to reform it beneficially to them.

In short, we cannot escape asking the comparative question. When considering tax law changes to benefit same-sex couples, we need to ascertain, as a background matter, whether such couples now pay more or less in tax than married couples do.

### *B. The Comparative Evaluation*

Cain and Chase do not completely shy away from the comparative assessment. While they do not say so unequivocally, both seem to imply that, in their view, same-sex couples bear a

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12. See Cain, *supra* note 8, at 130 ("In an ideal world the tax law would not discriminate against same-sex couples who are similarly situated to married couples."); Chase, *supra* note 9, at 401 ("Although legalizing same-sex marriages would effectively remove many of the discriminatory legal barriers [including tax barriers] faced by lesbian women and gay men, it would not remove discrimination altogether.").

13. At the level of principle, I am much in sympathy with this. I agree that there is no sound reason why the Code should treat people differently because of their sexual orientation. As a corollary, I agree that, assuming satisfactory indicia of commitment can be developed, the Code should not treat committed same-sex couples differently from married couples.

disproportionately large tax burden,<sup>14</sup> and both catalog various tax benefits available only to married taxpayers.<sup>15</sup> Pooling Cain's and Chase's lists, these benefits are said to include:

(1) The right to file joint returns under I.R.C. § 6013 and the sometimes preferential rates for married taxpayers under § 1;<sup>16</sup>

(2) Beneficial adjustments for gift taxes paid by a decedent spouse under I.R.C. § 2001(d) and gift-splitting under § 2513;<sup>17</sup>

(3) Inter-spousal wealth transfers free of income, estate, and gift taxes under I.R.C. §§ 1041(a)(1), 2056, and 2523;<sup>18</sup>

(4) Special estate tax treatment of jointly owned property under I.R.C. § 2040(b);<sup>19</sup>

(5) Exclusion from income of certain benefits furnished by employers to employees and their spouses and dependents under I.R.C. §§ 105(b) and 106;<sup>20</sup> and

(6) Non-recognition of gain on property transfers incident to divorce under I.R.C. § 1041(a)(2) and some flexibility as to post-divorce support payments under I.R.C. §§ 71 and 215.<sup>21</sup>

However, these contentions are undercut by the failure to establish the first and second elements of the persuasive case described above. At least some of the Code features noted by Cain

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14. Chase makes the general (non-tax) statement that "[t]he government . . . treats married couples more favorably than it does same-sex couples," Chase, *supra* note 9, at 361, which he immediately follows with examples of allegedly discriminatory tax provisions, *see id.* at 361-62.

Cain properly takes to task advocates of lesbian and gay marriages for "overlook[ing] the fact that the federal tax laws do not always bestow benefits on married couples," Cain, *supra* note 8, at 98, and she notes a number of tax provisions that penalize, not benefit, such couples, *see id.* at 98-99. But she immediately follows this by saying, "Nonetheless, married couples do receive considerable tax benefits," *id.* at 99, and she makes other comments that point in the same direction, *see, e.g., id.* at 129 ("[L]esbian and gay couples, who are prevented by state law from marrying, are harmed by tax laws that limit tax benefits to married couples.").

15. *See* Cain, *supra* note 8, at 99; Chase, *supra* note 9, at 361-62.

16. *See* Cain, *supra* note 8, at 99; Chase, *supra* note 9, at 361.

17. *See* Cain, *supra* note 8, at 123-29; Chase, *supra* note 9, at 362.

18. *See* Cain, *supra* note 8, at 99; Chase, *supra* note 9, at 362.

19. *See* Cain, *supra* note 8, at 123-29; Chase, *supra* note 9, at 361.

20. *See* Cain, *supra* note 8, at 99; Chase, *supra* note 9, at 363-64; Treas. Reg. § 1.106-1 (1956); *cf.* I.R.C. § 213(a) (West Supp. 1998) (allowing a deduction for certain medical expenses of the taxpayer, spouse, and dependents). Based on the Defense of Marriage Act, the IRS has ruled that the § 106 exclusion is not available with respect to employer-provided coverage of domestic partners because domestic partners are not spouses. *See* Priv. Ltr. Rul. 97-17-018 (Jan. 22, 1997).

21. *See* Cain, *supra* note 8, at 99, 115; Chase, *supra* note 9, at 367. In a related vein, I.R.C. § 152(e) gives divorced parents some flexibility as to which of them may claim dependency exemptions for their children. *See* I.R.C. § 152(e) (West Supp. 1998).

and Chase may not substantially disadvantage same-sex couples (especially those who engage in careful tax planning), and those that do may be offset by Code features beneficial to them.

### 1. Limited Disadvantage

It is possible to overstate the significance of some of the asserted advantages available to married couples. For example, the estate and gift tax considerations mentioned above do not matter for the clear majority of Americans, including (presumably) the majority of same-sex partners.<sup>22</sup>

Moreover, if the transferor is subject to gift tax, the blow is somewhat cushioned by the fact that the transferee's basis in the property is increased to reflect gift tax paid.<sup>23</sup> If the transferee later sells that property, her higher basis may decrease taxable income on the sale or produce a deductible loss.<sup>24</sup> There also is a basis tie-in if the transfer was by bequest or inheritance.<sup>25</sup>

Similarly, the § 1041 income tax exclusion will not always be crucial. Exclusion is of little import if the transferor is in a low bracket for the year, as is possible, for instance, if he is an independent contractor in a cyclical business or if he has unusually high deductions for the year. Indeed, taxability may even be preferable if the transferor has otherwise expiring net operating loss carrybacks.<sup>26</sup>

And, basis matters here, too. The concomitant of non-recognition of gain on spousal transfers or divorce transfers of appreciated property is substituted basis. The transferee takes as her basis in the property the transferor's adjusted basis.<sup>27</sup> As a result, the

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22. Because of the annual exclusion under § 2503(b) and the unified credit under §§ 2010 and 2505, fewer than three percent of decedents' estates will pay federal estate tax and only a small percentage of taxpayers will pay federal gift tax. *See* I.R.C. §§ 2010, 2503(b), 2505 (West Supp. 1998); BORIS I. BITTKER ET AL., *FEDERAL ESTATE AND GIFT TAXATION* 8 (7th ed. 1996). Fewer still will pay such taxes as a result of the Taxpayer Relief Act of 1997, which raises the unified credit exemption-equivalent amount from \$600,000 to \$1,000,000 over a period of 10 years and excludes an additional \$300,000 of closely held business interests from estate taxation. *See* Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §§ 501-502, 111 Stat. 788, 845-52 (amending I.R.C. §§ 2001(c), 2010(c)-(d), 2032A(a), 2503(b), 2505(a), and 2631(c), and creating new I.R.C. § 2033A).

23. *See* I.R.C. § 1015(d) (1994).

24. *See* I.R.C. §§ 61(a)(3), 165(a)-(c), 1001(a) (West Supp. 1998).

25. *See id.* § 1014(a).

26. *See id.* § 172.

27. *See id.* § 1041(b)(2). In contrast, if the transfer is treated as a taxable exchange, the transferee's basis in the property should reflect the appreciation element. *See* I.R.C. § 1012 (1994).

transferee typically will pay tax on the appreciation when she sells the property. In part, therefore, tax saved by the transferor will be paid by the transferee.<sup>28</sup>

## 2. Planning Possibilities

In situations in which married status might be beneficial, it sometimes is possible for same-sex couples to obtain similar benefits as a result of effective tax planning. Indeed, the thrust of Chase's article is to explore precisely such planning possibilities.<sup>29</sup> Because of transaction costs and efficacy limitations, such expedients cannot be a complete answer. Nonetheless, their availability and partial effectiveness do minimize tax disparities between same-sex and different-sex couples.

## 3. Offsetting Advantages

Although tax provisions sometimes advantage married couples, they sometimes disadvantage them. First, several Code sections bar favorable tax results if related parties—including spouses—are involved in a transaction.<sup>30</sup> Cohabiting but unmarried persons—including same-sex couples—are not subject to these sections, and so they have greater flexibility to arrange transactions to produce favorable tax results.

Second, some of the sections purportedly advantageous to marrieds actually are double-edged. Section 1041(a), for instance, prevents non-recognition of losses as well as of gains.<sup>31</sup> As a consequence, it sometimes is the married couple, not the same-sex couple, that suffers a tax disadvantage because of the existence of § 1041.

Similarly, rate differences for married taxpayers and joint filing

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28. For a variety of reasons, the offset is unlikely to be complete: (1) the transferee sometimes will be in a lower bracket than the transferor; (2) the property may depreciate before being sold; (3) the transferee may not sell the property at all—if she holds it until death, the property's basis in the hands of her beneficiary will be stepped up to include the appreciation element, *see* I.R.C. § 1014(a) (West Supp. 1998); and (4) even if the transferee's recognized gain nominally equals the transferor's non-recognized gain, any substantial interval between transfer and sale would produce a time-value-of-money disparity.

29. Chase describes the varying levels of tax effectiveness of such strategies as contractual arrangements, domestic partnerships, joint property ownership, adult adoption, insurance, wills, and other arrangements. *See* Chase, *supra* note 9, at 373-400.

30. *See, e.g.*, I.R.C. §§ 267 (losses and other deductions), 318 (attribution rules), 453(e) (installment sale dispositions), 704(e) (partnership allocations), and 1366(e) (S corporation allocations) (West Supp. 1998).

31. *See id.* § 1041(a).



status often are disadvantages, not benefits. Depending on the spouses' income levels, marriage may entail a "marriage penalty"—the spouses pay more in income tax than they would have had they stayed single—instead of a "marriage bonus."<sup>32</sup> Indeed, the tax balance may tip against marriage. According to one study, for over sixty percent of couples, marriage *increases* their federal income tax.<sup>33</sup>

Moreover, tax rates alone do not fully explain why marriage is dangerous from a tax standpoint. Filing jointly makes each spouse jointly and severally liable for any taxes, deficiencies, interest, and penalties for the year.<sup>34</sup> When the partners own assets separately or when divorce has occurred or looms, this joint liability can create an unpleasant surprise for one or the other of the spouses.<sup>35</sup> By not being married for income tax purposes, lack of joint liability is a surprise same-sex partners avoid—a considerable advantage.

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32. See generally Richard B. Malamud, *Allocation of the Joint Return Marriage Penalty and Bonus*, 15 VA. TAX REV. 489, 491-97 (1996) (providing an overview of the marriage penalty and the marriage bonus); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 988-94 (1993) (discussing the negative effects of income tax on married couples); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 339-42 (1994) (describing the marriage penalty and the marriage bonus). For a critical race perspective on the issue, see Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, in TAXING AMERICA 45 (Karen B. Brown & Mary Louise Fellows eds., 1996).

33. See Daniel R. Feenberg & Harvey S. Rosen, *Recent Developments in the Marriage Tax*, 48 NAT'L TAX J. 91, 99-100 (1995). Another study concluded that, of couples with over \$50,000 in adjusted gross income, 54% experienced a marriage penalty, but that at lower income levels, more experienced a bonus than a penalty. See CONGRESSIONAL BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX ch. 3, tbl.5 (1997). Overall, it concluded, 42% of all couples suffered a penalty, 51% enjoyed a bonus, and 6% were unaffected. See *id.*

34. See I.R.C. § 6013(d)(3) (West Supp. 1998). Relief is afforded to so-called "innocent spouses" by § 6013(e), but that relief is unreliable. See Richard C.E. Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed*, 43 VAND. L. REV. 317, 348-69 (1990); Jerome Borison, *Getting Equity from the Tax Court in Innocent Spouse Cases*, 72 TAX NOTES 1787 (1996).

The Internal Revenue Service Restructuring and Reform Act passed by the House in November 1997 would amend the innocent spouse rules. See H.R. 2676, 105th Cong. § 321 (1997). Some version of this measure was expected to be enacted in spring or summer 1998. However, it is probable that the measure will fall short of solving all the problems with innocent spouse relief.

35. Indeed, "[g]iven the questionable defenses available for relief from joint tax return liability, practitioners should question the wisdom of filing a joint tax return at all." Theodore M. David, *Counseling Women with IRS Tax Problems*, PRAC. TAX L., Winter 1995, at 33, 36.

The IRS restructuring bill passed by the House would require the IRS to "establish procedures to clearly alert married taxpayers of their joint and several liabilities on all appropriate publications and instructions." H.R. 2676 § 351. This is a recognition of the peril joint filing may entail.

Put the foregoing points together. I am not arguing that the Code actually discriminates against married couples relative to unmarried (including same-sex) couples. I *am* arguing that a welter of provisions with diverse and uncertain effects are at play. A full attempt to reach an on-balance conclusion would have to consider all of these provisions and apply them in light of the actual facts of same-sex partners' lives.

For example, ascertaining whether joint filing rates would produce a net penalty or bonus for same-sex couples would require considering how income levels and disparities among same-sex partners compare to those of married persons. Ascertaining the tax effects of provisions relating to property transfers would require considering, among other things, how wealth is distributed between same-sex partners relative to how wealth is distributed between spouses. Additional relevant empirical questions could be raised.

Obtaining the data to make some of the relevant comparisons might be difficult. Certainly, I have not conducted the research and made the evaluations that would be necessary to draw reliable conclusions. But—and this is the important point—neither have those who have tried to make the critical sexual-orientation case, and it is on them that the burden of persuasion lies.

For these reasons, I believe that scholars and advocates have not yet convincingly demonstrated that, on net, the failure to recognize same-sex couples as married hurts them by imposing substantially higher federal income tax liabilities on them.

## II. CRITICAL RACE STUDIES AS TO HOME OWNERSHIP

As part of a more general examination of the effect of government policies in the area, Professor John A. Powell has considered how the tax benefits of home ownership have been distributed among races and classes.<sup>36</sup> He looked at the home mortgage interest deduction, the long-term capital gains preference, the § 121 one-time exclusion, the § 1034 non-recognition rule, the § 1014 rule adjusting basis to fair market value, the deduction for state and local real estate taxes, and the Code's failure to tax the imputed rental value of self-owned housing.<sup>37</sup> Professor Powell

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36. See John A. Powell, *How Government Tax and Housing Policies Have Racially Segregated America*, in *TAXING AMERICA*, *supra* note 32, at 80.

37. See *id.* at 92-95. The Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (codified in scattered sections of 26 U.S.C.A.), affected these provisions. It reduced the top capital gains rate, formerly 28%, generally to 20% (10% for taxpayers in the 15% bracket). See *id.* § 311, 111 Stat. at 831-36. It also amended § 121 and repealed § 1034. In

maintains that "because home ownership is highly correlated with race, subsequent 'neutral' tax deductions benefiting home owners have operated to the disproportionate benefit of whites, exacerbating the disparity between black and white opportunity structures."<sup>38</sup>

A work of wider scope is Professors Beverly I. Moran and William Whitford's *A Black Critique of the Internal Revenue Code*.<sup>39</sup> Moran and Whitford put their work in the following context:

One main thrust of critical race theory is a belief that racial subordination is everywhere, a structural aspect of all parts of American society. If this part of critical race theory has merit, then every important American institution should reflect racial subordination, even such a seemingly neutral institution as the American tax system.<sup>40</sup>

Moran and Whitford do not claim that their work proves that, on the whole, the Code is systematically biased in favor of whites over blacks, although they think their work provides some evidence in that direction.<sup>41</sup> That evidence emerges, they believe, from four aspects of the Code: (1) rules as to wealth transfers; (2) rules as to home ownership (largely the same rules considered by powell); (3) certain employee benefit rules; and (4) the marriage penalty.<sup>42</sup>

Because it is not feasible here to comprehensively review Moran and Whitford's article, I will confine my discussion to the area common to their article and powell's piece: Code features relating to home ownership. As to that area, Moran and Whitford contend that, while many blacks benefit from the home ownership tax rules, "whites benefit even more."<sup>43</sup>

It is true that whites own proportionately more homes than do

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their place, the Act created a new § 121 exclusion allowing tax-free sale of a home every two years for up to \$250,000 of gain (\$500,000 for married couples). See *id.* § 312, 111 Stat. at 836-41. On balance, these changes should not appreciably reduce, and may increase, the attractiveness of residences for tax purposes. Thus, the 1997 changes do not moot the issues raised by powell.

38. powell, *supra* note 36, at 93.

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

40. *Id.* at 751-52 (footnote omitted). This formulation raises the stakes. Should the Code be found, after full review of all of its aspects, not to discriminate against blacks, then "racial subordination is [not] everywhere, [not] a structural aspect of all parts of American society." *Id.* Apparently, failure to make the case as to the Code would, at least in Moran and Whitford's eyes, undermine "[o]ne main thrust of critical race theory." *Id.* at 751.

41. See *id.* at 754-55.

42. See *id.* at 755.

43. *Id.* at 780.

blacks, that those homes are proportionately more valuable, and that those homes appreciate more rapidly.<sup>44</sup> But the interesting and important question involves cause: *Why* do whites own more housing than blacks?

One reason, of course, is that whites have higher incomes. By itself, however, such an explanation would not be critically exciting. To the extent differential enjoyment of tax benefits is income-dependent, the Code sections in question may be the result of social-class preference, not race preference.

Moreover, on a net basis, the Code is not stacked against the less affluent. The ramshackle Code contains something good for almost everyone, and something bad for almost everyone. If the more affluent (and disproportionately white) have more home ownership tax benefits, they also are burdened by progressive rates under § 1; limits on deductions as a percentage of adjusted gross income under, among others, §§ 67, 170, and 213; income-triggered deduction phase-outs under, among others, §§ 68 and 151(d)(3); and wealth transfer taxes.<sup>45</sup> If the less affluent (and disproportionately black) have less in home ownership tax benefits, they do have an inflation-adjusted standard deduction under § 63(c) and a substantial refundable earned income credit under § 32.<sup>46</sup> In so marbled a system, to say that one set of Code rules (those related to home ownership) has disparate class-based effect is not a powerful statement, especially since the federal income tax is, on net, progressive.<sup>47</sup>

Given the weakness of a class-based argument, Moran and Whitford attempt to control for income levels<sup>48</sup> and still find disparate racial impact as a result of the home ownership tax sections.

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44. See *id.* at 775-79 (citing studies). Also, as an incident of progressive rates, deductions of all kinds are more valuable to high-income taxpayers than to lower-income taxpayers, so deductions benefit whites as a whole more than blacks as a whole.

45. "[F]ederal estate and gift taxes historically have made a significant contribution to the overall progressivity of the tax system." MICHAEL J. GRAETZ & DEBORAH H. SCHENK, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 43 (3d ed. 1995).

46. This credit was projected to be worth about \$135 billion to beneficiaries over a five-year period. See JOINT COMM. ON TAXATION, 104TH CONG., *ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 1997-2001*, at 23 & n.6 (Comm. Print 1996).

47. See, e.g., Charles E. Scott & Robert K. Triest, *The Relationship Between Federal and State Individual Income Tax Progressivity*, 46 NAT'L TAX J. 95, 99-104 (1993). Professor Moran has acknowledged this argument against class-based race criticism of the Code, although she stopped short of embracing it. See Beverly Moran, *From Urinal to Manicure: Challenges to the Scholarship of Tax and Gender*, 11 WIS. WOMEN'S L.J. 191, 196 (1996).

48. See Moran & Whitford, *supra* note 39, at 756-57, 776-79.

However, even this more sophisticated version of the argument is unsatisfactory. It is shaky in terms of the third and fourth elements of a persuasive case outlined above. That is, (1) this version does not explain why changing the Code is the appropriate remedy, and (2) the recommended solutions are of dubious benefit.

### A. *Appropriate Remedy*

Moran and Whitford's article does not purport to explain why, on an income-controlled basis, blacks own less housing and less valuable housing than whites. However, in a roughly contemporaneous article, Professor Moran locates the cause in the "fact that the real estate markets have been historically closed to blacks."<sup>49</sup> Professor Powell emphasizes government policies.<sup>50</sup> His discussion of taxes comprises only a minority of his entry in *Taxing America*—the bulk of it considers the effect of non-tax government policies on housing opportunities.<sup>51</sup>

If they are right, why is changing the Code the appropriate response? If unequal housing opportunities for blacks and whites are caused by private real estate market discrimination and/or by wrong-headed or counterproductive government housing policies, the direct response would be to strengthen and enforce anti-discrimination laws and to alter or abolish unfair housing programs. The energies and resources available for reform should be directed at the cause of the problem, not diverted to a secondary arena.<sup>52</sup>

It may well be that the home ownership tax sections should be changed. I disliked the Code sections Powell complained of—and I dislike them as revised by the 1997 legislation—because they create market inefficiencies, discriminate among taxpayers based on personal lifestyle choices, substantially depress revenues, and add to the complexity of the Code. But these are non-critical concerns. The

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49. Moran, *supra* note 47, at 196.

50. See generally Powell, *supra* note 36 (focusing on the influence of government policies, including finance and exclusionary zoning, on location of housing).

51. See *id.* at 92-95 (discussing taxation in only a short section entitled "Tax Benefits of Home Ownership").

52. The following objection might be made to my position. If sufficient political force cannot be mustered to attack racial subordination directly (such as by enacting tougher housing discrimination laws), perhaps it would be better than nothing to attack it indirectly (by appropriately managing ostensibly neutral tax rules that have racially disparate impacts). But the very complaints of critical race scholars about the Code show that such indirect attacks have been no more successful than direct attacks. This is hardly surprising since the same Congress enacts both tax and non-tax statutes. If opponents of subordination can marshal the political will and capital to change the tax laws, should they not be able to do the same to change non-tax laws?

critical tax cases advanced by powell and Moran and Whitford are weakened by the failure to show that the appropriate remedy involves altering the Code, rather than pursuing non-tax remedies.

### *B. Satisfactory Solution*

In addition to describing the purported anti-black effects of the Code, Moran and Whitford offer reforms that a hypothetical Black Congress might enact.<sup>53</sup> They make five suggestions as to the combined areas of wealth and home ownership: (1) replace the home mortgage interest deduction and the real property tax deduction with a credit, with a phase-out based on income, (2) maintain the § 121 exclusion and the § 1034 nonrecognition rule, (3) eliminate the realization requirement for publicly traded securities and nonresidential real estate, (4) repeal the capital gains preference, and (5) maintain the § 102 exclusion.<sup>54</sup>

I have two concerns about these recommendations. One is practical, relating to complexity. The other is conceptual, relating to the internal coherence of the proposed package of solutions.

#### 1. Complexity

As I argue in subpart III-B, the Code's complexity has become intolerable. Moran and Whitford's suggestion to repeal the preference for long-term capital gains would be an important step towards simplification. However, the other aspects of their proposed package would be less salutary. They would retain tax benefits reflecting mortgage interest and property taxes (although converting them from deductions to a credit); they would maintain two exclusions (§ 102 and former § 121); and they would maintain an exception from the rule that realized gains are recognized (former § 1034).<sup>55</sup> These measures would perpetuate major causes of the Code's complexity: the premise that the Code should be used for subsidy purposes and the large number of structural devices developed for these purposes.

I think Moran and Whitford make a mistake in ratifying the foundations of a complex Code. They and others who believe the allegedly discriminatory features of the Code reflect the prevalent power distribution of society should prefer simplification to continued complexity. Consciously or unconsciously held

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53. See Moran & Whitford, *supra* note 39, at 779-83.

54. See *id.* at 781-83.

55. See *id.*

dominance/subordination preferences are likely to operate more effectively in obscurity than out in the open. A complex Code creates such obscurity, masking and thus perpetuating harmful provisions.<sup>56</sup> In this regard, Moran and Whitford's proposal would foster an environment congenial to the very problems they seek to solve.

## 2. Internal Conceptual Tension

Moran and Whitford's recommendations as to wealth and home ownership reflect two different and not fully compatible approaches. On the one hand, some of the proposals would limit tax breaks because blacks do not use them much, especially compared to whites. The proposal to repeal the realization requirement as to publicly traded securities and nonresidential real property bottoms on the observation that blacks own little of such assets.<sup>57</sup> The proposal to repeal the capital gains preference reflects the observation that blacks have few capital assets except for homes (and homes can be tax-advantaged through other means).<sup>58</sup>

On the other hand, other proposals by Moran and Whitford would preserve tax breaks even though blacks do not use them much. Retention of the § 102 income tax exclusion for gifts and inheritances would, the authors hope, permit blacks in the future to amass wealth and transmit it intergenerationally even though, as matters stand now, "blacks receive few gifts or bequests that benefit from this exclusion."<sup>59</sup> Retention of former §§ 121 and 1034 is similarly defended even though whites benefit more from these provisions than do blacks.<sup>60</sup>

Individually, both of these approaches are understandable, but their combination is problematic. A tension exists in critical gender studies between, on the one hand, trying to help women in the status

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56. This is a familiar idea. The tax expenditures concept, developed in the 1960s, has become a significant tool of tax policy. That concept is based on the perception that subsidies buried in the Code are more likely to escape effective public and congressional scrutiny than are subsidies that must pass through the appropriations process. See, e.g., Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244, 244 (1969). But see Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1166 (1993) (arguing against the tax expenditure critique "insofar as it is premised on the asserted expertise of direct expenditure institutions").

57. See Moran & Whitford, *supra* note 39, at 782.

58. See *id.* at 782-83.

59. *Id.* at 783.

60. See *id.* at 782.

and roles in which they now find themselves and, on the other hand, trying to transform that status and those roles. Feminists coming from one of these perspectives sometimes advocate changes that feminists coming from the other perspective oppose.<sup>61</sup>

Moran and Whitford's proposals show a similar tension within critical race studies. Their proposals to limit tax benefits little used now by blacks emphasize the current realities of life for many blacks (little investable surplus), while their proposal to retain the § 102 exclusion reflects a hope that that reality will change.

Combining these approaches results in a package that lacks internal coherence. For example, from whence will come the wealth Moran and Whitford hope someday will be transmitted intergenerationally under the § 102 exclusion? Presumably, it would not come entirely from housing or saved wages. Investments in stocks, bonds, nonresidential real estate, and the like historically have been major avenues of wealth building.<sup>62</sup> Thus, the very hope that prompts Moran and Whitford to urge retention of § 102 (to facilitate wealth transmission) would seem also to counsel for retention of the realization requirement and the capital gains preference (to facilitate accumulation of the wealth to be transmitted). Moran and Whitford's proposed solutions operate at cross-purposes.

### III. NON-CRITICAL BENEFITS

The fact that critical scholars sometimes have failed to persuasively indict the Code on their own terms does not mean their work has been profitless. Politically and intellectually, our country is now engaged in an important debate about fundamental tax reform, focusing on revising the income tax or replacing it with some variety of consumption-based tax. The main currents of that debate have involved economics and traditional tax policy arguments. However, the perspectives developed in critical tax work can help to shape the debate in at least two ways, by emphasizing the need to proceed in a systemic, not piecemeal, fashion and by reinforcing the importance of

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61. See, e.g., Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2002-33 (1996).

62. Eventually, this will be true for blacks as well as non-blacks. The August 4, 1997, issue of *Fortune* has as its focus the generation of African-Americans who are gaining power in the business world. See *The New Black Power*, FORTUNE, Aug. 4, 1997, at 46, 46. If that is so, with it will come bonus stock, mutual funds, and all the customary capital asset trappings of success. The "Lifetime Planning Guide" of a magazine devoted to minority entrepreneurship advises its readers: "By now, it's clear that for the long run, stocks . . . are the best vehicle around." Judith Aidoo, *Money Matters for Generation X*, BLACK ENTERPRISE, Sept. 1997, at 123, 124.



simplification as an objective of reform.

### A. Systemic Approach

Ad hoc tax changes have long been the norm and, on net, have been counterproductive. In the main, the tax enactments of recent decades have been aggregations of piecemeal, often unrelated provisions rather than sets of interrelated and well-coordinated changes. This fragmented, disjointed approach has produced a Code that is worse now than it was twenty years ago.<sup>63</sup>

However, a hallmark of the current tax reform debate is a broader orientation. Critical tax scholarship buttresses this trend. Many critical pieces, including pieces discussed in Parts I and II, are thematic in character, looking at multiple Code sections producing related effects rather than at individual sections in isolation. Such work complements, and hopefully will further stimulate, what I see as a strong and growing interest among non-critical writers in thematic tax studies.<sup>64</sup>

Moreover, other critical works have gone even further. Instead of restricting their analysis to the Code, they have looked to the interactions between the tax law and related non-tax laws. As examples, I point to powell's discussion of tax law and non-tax housing policy, other critical work stressing the interrelation of Social Security taxes and Social Security benefit structures,<sup>65</sup> and several studies exploring the relationship between the earned income tax credit and non-Code social welfare expenditure programs.<sup>66</sup>

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63. Two leading tax scholars use the same word, "monstrous," to describe what the Code has become. MICHAEL J. GRAETZ, *THE DECLINE (AND FALL?) OF THE INCOME TAX* 7 (1997) (describing the Code as "this monstrous statute"); Erwin N. Griswold, *Is the Tax Law Going to Seed?*, 11 AM. J. TAX POL'Y 1, 11 (1994) ("[O]ur present tax system, which worked very well during the first third of this century, and struggled along during the second third of the century, has now come to the place where it is simply monstrous."). Former IRS Commissioner Shirley Peterson opines: "I would repeal the Internal Revenue Code and start over." Rob Norton, *Our Screwed-Up Tax Code*, *FORTUNE*, Sept. 6, 1993, at 34, 34 (quoting Shirley Peterson).

64. Such studies have included examination of tax rules affecting families, children, and the elderly. See, e.g., Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975); Jonathan Barry Forman, *Reconsidering the Income Tax Treatment of the Elderly: It's Time for the Elderly to Pay Their Fair Share*, 56 U. PITT. L. REV. 589 (1995); Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573 (1977); Gail Levin Richmond, *Taxes and the Elderly: An Introduction*, 19 NOVA L. REV. 587 (1995); Lawrence Zelenak, *Children and the Income Tax*, 49 TAX L. REV. 349 (1994).

65. See Moran, *supra* note 47, at 194; June O'Neill, *Family Issues in Taxation*, in *TAXING THE FAMILY* 1, 15-19 (Rudolph G. Penner ed., 1983).

66. See, e.g., Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of*

In these respects, critical tax studies—including some discussed in Parts I and II—call us to a broad vision in tax reform, reinforcing desirable trends in tax scholarship generally.

### B. Simplification

I have long believed that meaningful simplification is the most pressing need in tax reform. The Code is now so complex that it cannot be effectively administered by the IRS;<sup>67</sup> it imposes exorbitant compliance costs; it spawns inequities since different taxpayers have different abilities to understand and manipulate the rules; and it is losing the popular and political support necessary to its effective operation.<sup>68</sup>

Although lip service often is paid to tax simplification, powerful philosophical, behavioral, and political obstacles exist.<sup>69</sup> One problem is that constituencies seeking special (and complicating) tax rules are well organized, while “there is no effective political constituency for tax simplification.”<sup>70</sup> That being the case, it is particularly incumbent on tax scholars and practitioners to keep the spotlight fixed brightly on the necessity of real simplification.<sup>71</sup>

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*Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995); Mary L. Heen, *Welfare Reform, Child Care Costs, and Taxes: Delivering Increased Work-Related Child Care Benefits to Low-Income Families*, 13 YALE L. & POL’Y REV. 173 (1995); Mary L. Heen, *Welfare Reform, the Child Care Dilemma, and the Tax Code*, in TAXING AMERICA, *supra* note 32, at 322.

67. See, e.g., Joseph Isenbergh, *The End of Income Taxation*, 45 TAX L. REV. 283, 314-15 (1990).

68. See GRAETZ, *supra* note 63, at 13-35. See generally Gregory A. Carnes & Andrew D. Cuccia, *An Analysis of the Effect of Tax Complexity and Its Perceived Justification on Equity Judgments*, J. AM. TAX ASS’N, Fall 1996, at 40, 54 (“Legislators and tax commentators alike commonly argue that the tax law is overly complex. In fact, the desire for simplification may be the one overriding goal on which supporters of all current tax reform proposals agree.”).

69. See, e.g., Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267, 1275-1318.

70. GRAETZ & SCHENK, *supra* note 45, at 34.

71. Recent events underscore the magnitude of the challenge. In June 1997, the Kerrey-Portman Commission issued its report. Among its conclusions, “[t]he Commission found a clear connection between the complexity of the Internal Revenue Code and the difficulty of tax law administration and taxpayer frustration. Compounding the problem of administration is the frequency with which Congress and the President change the tax law.” NATIONAL COMMISSION ON RESTRUCTURING THE INTERNAL REVENUE SERVICE, A VISION FOR A NEW IRS § 6, at 35 (1997). Yet, two months later, Congress changed the Code again, through an act containing 824 amendments to the Code and nearly 300 new provisions. See Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (codified in scattered sections of 26 U.S.C.A.). The 1997 Act is a catastrophe for those interested in Code simplification.

Five months thereafter, the House overwhelmingly passed a bill based on the

Some critical work already has contributed to the cause of simplification. An example involves the married-filing-jointly option under I.R.C. § 6013(a). Abolition of that option has been urged in various non-critical works.<sup>72</sup> It also has become an objective for many critical scholars,<sup>73</sup> including Moran and Whitford.<sup>74</sup> As a combined result, the intellectual case for abolition of the option is overwhelming. In time, the political firmament will align with this intellectual case and the option will be abolished, reducing the Code's complexity.<sup>75</sup>

Many similar opportunities should be available. As I argued in subpart II-B, critical scholars should have common cause with traditional scholars with regard to simplification. For instance, as seen in powell's work, part of the critical argument is at base a structural criticism of deductions and exclusions. In a progressive-rate system, those mechanisms benefit affluent taxpayers more than

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Kerrey-Portman Commission's report. However, the bill contained only two of the Commission's recommendations as to simplification, *see* H.R. 2676, 105th Cong. §§ 421-22 (1997), and it ignored important simplification recommendations, such as paring the IRS's non-core functions, quadrennial simplification review, broadening the income tax base, and eliminating the alternative minimum tax. The bill also included a provision purportedly altering the burden of proof in civil tax litigation, *see id.* § 301, which was not recommended by the Commission and which would produce more confusion and expense for the government and taxpayers alike. *See, e.g., Current and Quotable*, 77 TAX NOTES 619-24 (1997); *Tax Profs Urge Rejection of Burden-of-Proof Shift*, 78 TAX NOTES 755-758 (1998) (letter from 97 tax law professors to members of the Senate Finance Committee).

72. *See, e.g., Zelenak, supra* note 32, at 342; *IRS Tax Correspondence*, 72 TAX NOTES 422, 422 (1996) (summarizing letter from Richard Beck to the IRS).

73. *See, e.g., Pamela B. Gann, Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 32-69 (1980); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 107-11 (1993); Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413, 1449-50 (1996); Toni Robinson & Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant*, 8 VA. TAX REV. 773, 850-53 (1989); Laura Ann Davis, Note, *A Feminist Justification for the Adoption of an Individual Filing System*, 62 S. CAL. L. REV. 197 (1988); *cf. Lily Kahng, Fiction in Tax*, in *TAXING AMERICA, supra* note 32, at 25 (discussing the fiction of marital unity in the federal income and transfer taxes).

As noted previously, critical sexual-preference advocates take a different tack, seeking to extend the joint-filing option to same-sex couples. *See supra* text accompanying notes 10-11. Because it is far from clear that this would benefit same-sex couples financially, I suspect that such advocates are drawn by the symbolism of joint filing. However, parity between different-sex couples and same-sex couples could be achieved by abolishing joint filing for all, rather than extending it to all.

74. *See Moran & Whitford, supra* note 39, at 798-99.

75. Abolition of joint filing will eliminate the need for the detailed filing rules contained in I.R.C. §§ 6013(a)-(d) and (f)-(h) and the complex and unsatisfactory "innocent spouse" rules of § 6013(e), thus simplifying the Code.

poorer taxpayers.<sup>76</sup> To the extent women, blacks, and others are disproportionately in the second group, deductions and exclusions are problematic for them.<sup>77</sup> Serious simplification will require paring many deductions and exclusions from the Code. Critical arguments add another voice for that result.

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76. *But see* Deborah M. Weiss, *Tax Incentives Without Inequity*, 41 UCLA L. REV. 1949, 1950-74, 1987 (1994) (suggesting that the tension between progressivity and incentive provisions has been overstated and could be resolved by certain structural changes).

77. *See supra* text accompanying notes 44-47. Moran and Whitford's proposal to replace the home mortgage interest deduction and the state real property tax deduction with a credit reflects the same understanding. *See* Moran & Whitford, *supra* note 39, at 781; *supra* text accompanying note 44.