



Volume 10 (2012) | ISSN 1932-1821 (print) 1932-1996 (online)
DOI 10.5195/taxreview.2012.9 | <http://taxreview.law.pitt.edu>

TALES FROM A TAX CRIT

Dorothy A. Brown



This work is licensed under a Creative Commons Attribution-NonCommercial-No Derivative Works 3.0 United States License.



This journal is published by the [University Library System](#) of the [University of Pittsburgh](#) as part of its [D-Scribe Digital Publishing Program](#), and is cosponsored by the [University of Pittsburgh Press](#).

TALES FROM A TAX CRIT

Dorothy A. Brown *

I would like to thank the Dean and the Seton Hall faculty, especially Tracy Kaye for hosting this year's Critical Tax Conference and inviting me to give today's keynote address. I haven't been to a Critical Tax Conference since April 2005 when I was called a shill for Karl Rove. . . . But I'm getting ahead of my story.

I want to take us back in time to January 2002, and the Tax Section program at the AALS annual meeting. I was then a faculty member at Cincinnati and my fellow panelists included Leandra Lederman, George Yin, Reed Shuldiner, and Michael Graetz. Leandra spoke first and did a fabulous job. I was next to present. My research illustrated that married black couples were more likely to pay a marriage penalty than married white couples because black husbands and wives were more likely to contribute roughly equal amounts to household income—the instance where the marriage penalty was the greatest. My research also showed that while white married couples were most likely to receive a marriage bonus when they married, there was a group left behind. That group included white married couples with household income between \$60,000 and \$90,000 because those households had the highest percentage of husbands and wives contributing roughly equal amounts to household income.

After each of the panelists had spoken, we opened the floor for questions. The first question came from Calvin Johnson and went something like this:

“Dorothy, everyone knows that your work is irrelevant because blacks are poor and don't pay a lot in taxes.”

Welcome to my world. After a brilliant presentation (if I say so myself) on a panel of heavy hitters, the first question is directed at me and it's devastating. To hear in a room full of your peers that your work is

* Professor of Law Emory University. Originally presented as a Keynote Speech on March 30, 2012. I would especially like to thank Professor Anthony Infanti and the Pittsburgh Tax Review for inviting me to publish this speech.

irrelevant is hard to take. Calvin went on to attack Reed's presentation but my head was spinning so I wasn't listening. I did what comes naturally when I am insulted: I smiled, broadly.

The first responder was Michael Graetz who happened to be a fan of my research. Michael's response was along the lines of the comment being ridiculous because understanding the race effects of federal tax policy was a worthwhile endeavor. Michael later told me that he did not want me to have to be the first to speak after the insult was hurled my way.

Then it was my turn. I leaned into the microphone and said, "If you're right, then what we all want is for our kids to grow up to be poor so they don't have to pay a lot in taxes." Peels of laughter spread across the room. Mission accomplished. You see, when I am insulted, the next thing I do after smiling, is to get everyone in the room laughing at the one who just insulted me.

I continued, "No. What we want is to have lots of income that is excluded from taxation and not subject to the alternative minimum tax." At that point I had the audience. There were lots of nods. The audience questions continued, but thankfully, there were no more questions for me.

If confronted with Calvin's comment today, my response would be slightly different. First, I would say that we all want our children to grow up to be like Warren Buffett—or Mitt Romney. Warren Buffett and Mitt Romney have lots of income but pay very little in taxes and their income is not subject to the alternative minimum tax. To be poor and not pay a lot in taxes is not a good thing. That just means that our tax laws are not cruel. To be rich and not pay a lot of taxes is the gold standard.

Second I would remind Calvin that my research also showed that certain white, middle-income taxpayers were paying large marriage penalties. Everyone has a race, and scholarship that looks at race does not focus exclusively on blacks.

Finally, I would question the notion that the poor do not pay a lot in taxes. First, every dollar they earn is subject not only to federal income taxes, but social security taxes as well. Incomes greater than \$106,800 are not subject to social security withholding—the 1.4% Medicare tax, yes, but not the higher social security taxes. Second, if you belong to the working poor and are eligible for the earned income tax credit, then you have lots of other problems. The Earned Income Tax Credit (EITC) is more complicated than most of the provisions in the Internal Revenue Code. EITC claimants

are audited more than just about any other taxpayer group. And worst of all, many on Capitol Hill refer to the EITC as welfare. Finally, I would point out that EITC taxpayers in the phase-out range face significantly higher marginal tax rates than 35%.

As a black woman in America, dismissive treatment is a part of my life—both inside the academy and out. Inside the academy I am particularly vulnerable because I write about race and have done so consistently since 1996. Yet, it has never occurred to me to stop writing about race. The dismissive comments have, however, changed the way that I write. But the question remains, why do I continue to write about race and tax since I am subjecting myself to a higher level of scrutiny than if I wrote about subchapter K? I might add that writing about subchapter K would be a lot easier too.

I came to this project by accident when I moved back home to the South Bronx with my parents in the late 1980s. I helped out my parents by preparing their tax returns, but whenever I filled out their returns I was always left with a question that nearly drove me crazy: *Why do my parents pay so much in taxes?*

Our progressive tax rate structure is supposed to mean that the more money you make, the higher the rate that applies to you. Yet my income was greater than either of my parents' and so was my IRS refund. My mother was a nurse in a nursing home and my father was a plumber for the NYC housing authority, and I was an investment banker on Wall Street. Something was wrong with this picture. Let me add that I did not get capital gains income. All of my income came from wages—just like my parents. I majored in accounting, had a master's degree in tax law, and still could not figure it out. This mystery would be solved several years later in a most unexpected way.

It was the early 1990s and I no longer lived at home with my parents in the South Bronx, but on my own in Arlington, Virginia. I was now a tax law professor at George Mason not an investment banker. I decided to spend the afternoon in my office reading something fun for a change and knew exactly what it would be. I had been saving a particular article for just such an occasion and found it under the pile of papers on my desk. It was perfect because it had nothing to do with tax and it was written by a friend, the late Jerome Culp, whose work I greatly admired. What I never suspected, however, is the article would give me the first piece towards solving the puzzle that plagued me for years.

I had almost finished reading the article when I saw this line “*There may be [an] income tax problem that would benefit from being viewed in a black perspective, but until you look, how will anyone know?*” Could race have something to do with tax law? Could my friend have stumbled onto something? Could race be the reason why my parents paid so much in taxes?

Before reading that article, it was inconceivable to me that tax law could operate differently based upon race. I picked tax law—or perhaps tax law picked me—so that I could get away from race. Growing up in the South Bronx and experiencing racism made me feel angry, frustrated and powerless. Specializing in an area of law that I believed had nothing to do with race was to quote Martha Stewart, “a good thing.” Tax law was all about numbers and I loved numbers. Numbers are neutral and objective. Green was the only relevant color, right? But that afternoon I began to question everything.

After I finished reading, I called Jerome and made him a promise: I would look to see if tax laws impact taxpayers differently depending upon their race. Keeping that promise was not easy because the IRS does not collect statistics by race. I had to find other data sets that would be good proxies for taxable income. My first project took forever to finish. But it was well worth the wait, because that first project solved the mystery of why my working class parents paid so much more in taxes than I did. My parents paid a high price for being married to each other. My mother and father contributed roughly equal amounts to household income. Some years my mother nosed out my father by a few dollars, while other years my father nosed out my mother. But in the end, they were the poster children for the highest marriage penalties under the tax law.

Once I decided to write about race, I anticipated a backlash of sorts. I knew that most whites, including academics by and large, do not want to hear about race. So I made a decision to never overshoot my target and to always use empirical data. If I needed to find co-authors, then I was more than willing to do so. From my perspective, being a careful scholar was the most important thing.

At least one Supreme Court Justice can relate. In 1976, Justice Blackmun recognized, in *Washington v. Davis*, that “tax . . . statutes . . . may be more burdensome to the poor and to the average black than to the more affluent white.” Uncovering racial disparities in tax statutes therefore should come as no surprise to tax scholars—yet it did.

When my first piece on the marriage penalty/bonus issue was published, a book chapter in Mary Lou and Karen's edited volume *Taxing America*, followed up by a longer law review article, I received some criticism. The first was that I should not have published the article until I had analyzed the entire Internal Revenue Code. That was the funniest. According to this critic, I had nothing valid to offer until I studied the entire Code and if that took 10 years, well it took 10 years. Because we all know how well that would have worked out for me—no publications for a decade. If our paths ever crossed, it would be because I just asked you, “Do you want fries with that?”

The second criticism was that I had identified a problem, but not a solution. My instincts told me that the problem was more structural and until I had examined more code provisions I was very uncomfortable talking about a solution. Identifying a solution in one area could create a problem in another. I was on a march to eat the elephant one spoonful at a time. I was untenured when I published my book chapter, but by the time the longer law review article was published, I had received tenure. That meant I could decide the contours of my research agenda. I was also fortunate to be at a law school, Cincinnati, where I found lots of support for my writing about race and tax.

The third criticism, which was far more common, was “Dorothy isn't it about class, not race?” I recall getting that comment after publishing my book chapter and decided from then on whenever I talk about race, I must also talk about class. I needed to be able to show which piece was about race and which piece was about class. My book chapter was entitled the “Marriage Penalty/Bonus in Black and White,” but my subsequent law review article on the topic had “Race” and “Class” in the title. This last criticism is hard to shake even when I include class data because of the unwillingness of whites to see race as well as the lack of experience of most whites in thinking and talking about race.

My march to eat the elephant spoonful by spoonful continued. After writing about the marriage penalty/bonus issue in both the income tax and social security tax area, I was casting about for my next topic and saw a symposium organized by Lawrence Zelenak, a then North Carolina Law professor that criticized critical tax theory. Who knew that publishing an article ripping apart scholarship on race and gender would get you a job at Columbia? But I digress. The following lines caught my attention: “It is not hard to think of provisions which appear to be pro-black. . . . The earned income tax credit . . . is one obvious candidate. This is a massive subsidy

... for the working poor. It seems likely the benefits go disproportionately to blacks.”

Those lines were particularly galling to me because Zelenak had no citation. He just declared the earned income tax credit to be pro-black. That, in my view, represents how academics devalue race scholarship. They think it isn't real scholarship; that it doesn't take intellectual heft; that anyone can do it. So who needs a citation? I can do this off the top of my head, proving the point that race scholarship isn't rigorous. Well, the way Zelenak does it—it isn't. But the way I just did it—where I engaged the Institute for Policy Research at Cincinnati to run Census Bureau data to show household income contributions by husbands and wives at all levels, by black as well as white married couples, took an enormous amount of time and care. Zelenak just placed studying the earned income tax credit at the top of my list. That decision led to my next story.

This story starts with my decision to use an early draft of my EITC research as my job talk at Washington & Lee. That decision almost cost me the job. The first sign of trouble showed up the morning of my job talk. It was a white, male colleague coming into my office, pretty enraged. His comment that I reminded him of his ex-wife was my clue. He proceeded to lecture me on how to write a law review article. Now mind you, he was junior to me, with an inferior publication record, and yet, he was lecturing me. He said you should never call someone a racist in print. I said something along the lines of, “Heavens, no. Please show me where that's in the draft and I'll delete it immediately, since I had no intention of calling Zelenak a racist.” He started flipping through the pages, and then stammered, “Well you don't say it that often.” I replied, “Oh no, I don't want to say it at all. So please show me where I do, so I can make sure I delete it.” There was a long pause and more flipping of pages before he said, “I can't find it now.” He stammered. By now he was red-faced; not from embarrassment, but rage. I actually had the temerity to question him, or as I was told he put it later at the faculty discussion surrounding my candidacy, “If she acts like this when she's a supplicant, what will she be like when she comes here with tenure.” If he only knew the half.

I then said something to the effect, “I don't think it's in the paper, but if you find it later please feel free to let me know.” This “meeting” on the morning of my job talk was not designed to help, but derail my talk. Undaunted, this colleague, however, was afraid of the racial politics of a white male confronting a black female during my talk, especially at a

school named for a General in the Confederate army, so I believe he got his friend, a black male colleague, to do it for him.

Shortly into my talk, the black male colleague said, “Dorothy, isn’t it obvious that blacks disproportionately benefit from the EITC?” I then responded, “What’s your cite? I’m a scholar and deal with data . . . so what’s your cite?” That was the end of that, but the talk went downhill. As a former colleague described my talk later, “Dorothy, you were mugged, but you managed to hang onto your purse.” That was a pretty accurate description. Several Washington & Lee faculty members behaved very badly during my talk. In fact, at one point a member of the faculty yelled out “Why don’t you let her talk about her paper?” Since I’m used to talking in a combat zone, I didn’t think it was that bad, until the following day when a steady stream of white men came to my office, congratulating me on how well I had handled myself in such a difficult situation. They apologized for their colleagues and said they didn’t understand why it happened.

Apparently Washington & Lee is known for genteel job talks. They let the presenter talk for about 30 minutes then the questions begin. In my case, I think I got three sentences out before I got the first missive. One of the early comments on one of my power point slides was by the junior colleague who lectured me on scholarship earlier in the day, who questioned whether the math on one of my slides added up. He blurted out, “That doesn’t add up.” It did and I told him so, but to have him question my competency to add numbers in a column was incredible.

Then the battle was afoot. That junior faculty member had to vindicate himself by seeing to it that I did not get a job at Washington & Lee. In December of 2001 there was a vote and Washington & Lee requires a 2/3 vote for appointments and I missed it by one vote—I was told. The length of the meeting was unprecedented. It was a marathon session that required a break for lunch . . . and by the end of the day, I would not be getting an offer from Washington & Lee. For those of you who know the end of this story, you must be thinking, but you were at Washington & Lee for five years. What happened? Answer: A miracle. The Washington & Lee faculty did what no other faculty I know has ever done: They admitted that they made a mistake.

Apparently over the ensuing weeks, the Malcolm and Martin strategy went to work—effectively. Most people don’t remember that when Martin Luther King, Jr. first came on the scene people thought he was a radical . . .

but when Malcolm X and his “blue-eyed devils” talk appeared, Martin became a reasonable Negro. Well, the Malcolm of Washington & Lee sent an e-mail memo to his colleagues. (I was forwarded at least 3 copies by different faculty members.) The e-mail documented how poorly I had been treated compared with lesser-qualified applicants who received offers, and as a result, he was planning on leaving the faculty. We need to pause here for a moment.

In this instance, Malcolm was a white man who never knew me before I spent a semester visiting and said he was leaving over how poorly I was treated during the appointments process. In my experience, this kind of courage is rarely found in the academy.

Martin, on the other hand was a white man who spent the first month of his sabbatical separately meeting with over 20 of his colleagues to tell them that they needed to fix this. Well that’s exactly what happened—there was a re-vote and I got an offer. One member of the faculty who originally voted against me sent me an e-mail saying, “Dorothy, sometimes faculties make mistakes, I made a mistake, we made a mistake, and I hope you can forgive us.” I was overwhelmed and in a pretty good negotiating position!

What that job talk taught me, however, was that I needed empirical data, and I found a couple of economists who provided that for me. I also came across another study that showed more than half of all EITC claimants were white, and 25% were black and 18% were latino. The greatest beneficiaries of the earned income tax credit were white. Surprise! Although the race scholar in me wasn’t the least bit surprised.

If I were to pick a provision that would disproportionately benefit blacks it would not be one that was tied to the paid labor market. Employment discrimination in the labor market would have given me pause to make such a blanket statement. In fact, if you look at what happened after President Clinton’s so-called welfare reform was enacted, in many states for the first time ever, the majority of welfare recipients were Americans of color because white welfare recipients had an easier time finding jobs than their counterparts of color.

The EITC research took some time, and in the interim, I went to work on employer provided pensions, which had a lot of published data already in existence. To provide some contemporary data, in 2009, according to the EBRI, almost 73% of public sector workers participated in an employment based retirement plan compared with 39% of private sector workers.

According to the Urban Institute's analysis of Current Population Survey data, 65% of white workers were eligible to participate in employer-sponsored plans, compared with 56% for blacks and 38% for Hispanics. The data showed that higher income white men benefitted the most from the exclusion for employer provided pensions. That there was no income level at which white participation levels were roughly equal to black, Hispanic, or Asian participation levels. Once again it was race and class.

After the pension articles and the EITC articles, I wrote a piece on homeownership, titled *Shades of the American Dream*, which showed that even when you had black homeowners getting the advantage of the mortgage interest deduction, they weren't getting the full benefit of the exclusion for gains upon sale, because most black homeowners live in majority minority neighborhoods where housing appreciation is very low. Studies document that once more than 10% of your neighbors are black, the value of your home decreases. Studies also show that when more than 20% of your neighbors are black, the value of your home decreases significantly. Since most blacks prefer to live in racially diverse neighborhoods, most black homeowners are not reaping the same tax benefits that most white homeowners are—or at least were before the housing crash.

While recent events show the down side of homeownership for many Americans, for African-Americans generally, homeownership has always been a mixed blessing. Most African-Americans do not live in overwhelmingly white, wealthy neighborhoods where housing appreciation is the greatest. For the majority of blacks, homeownership is a poor financial investment because we tend to live in predominantly black neighborhoods and suffer a market penalty because of it.

To be sure, there are other non-financial benefits received by black homeowners, including better neighborhoods, better schools, and less crime. But the vast majority of whites receive better neighborhoods, better schools, less crime, and a good financial investment when they become homeowners.

It is estimated that for fiscal year 2013 the loss in tax revenues from the subsidies for the mortgage interest deduction will exceed \$100 billion. Adding insult to injury, economists agree that virtually no one buys a house because of those tax subsidies, but the subsidies do increase the cost of housing. Federal tax subsidies for homeownership are expensive *and* inefficient with race and class key determinants of their receipt.

Most low-income taxpayers are renters and are not eligible for federal tax benefits—so are most blacks and latinos. For those low-income taxpayers who are homeowners, many don't itemize deductions and can't receive the benefits of the mortgage interest deduction, which has been included in the price of the asset that they've purchased. Increased housing costs caused by the tax subsidy make it more difficult for low-income taxpayers to become homeowners. Also, the 2005 Bush Tax Reform Advisory Panel showed that only 54% of all homeowners with a mortgage receive a tax benefit for their mortgage interest. Finally, low-income homeowners often sell their homes at a loss that the tax laws do not allow them to deduct.

This brings me to my current research project, which takes on the progressive tax system and Calvin's critique that I began with this afternoon. First, deductions.

I have two primary critiques on the issue of deductions supposedly utilized more by poor people. First, a dollar of deduction paid by a high-income taxpayer is worth more than a dollar of deduction paid by a lower income taxpayer. This is how a progressive tax system is designed to operate.

Second, Congress decides which expenses are allowable deductions. Congressional decision-making can have racially disparate impacts. Take the provision that denies a deduction for personal, family or living expenses. Congress decides an exception should be made for housing costs, but only if the costs are paid by homeowners. If the payments are for rent, they are suddenly not deductible. The majority of blacks and latinos are renters, while the majority of Whites and Asians are homeowners. I could say more, but for the sake of time, I now turn to the income side.

Internal Revenue Service statistics show that as income rises, so do effective tax rates *until* household income reaches roughly \$1 million, then we start to actually see a *decrease* in effective tax rates. Remember, ours is a progressive tax rate structure where the rate is supposed to rise as income rises and the maximum rate is 35%. However, once income reaches \$1 million—effective tax rates go down. This is true because households with \$1 million of income receive about a quarter of their income from 15% money—capital gains and corporate dividends. Households with at least \$1 million have an effective tax rate of 24%, while households with at least \$5 million have an effective tax rate of 22%, and households with more than \$10 million have an effective tax rate of 19.7%. The rates are going the

wrong way; for the very rich in America, our tax rates are regressive. But all millionaires are not created equal.

A couple of years ago I wrote a piece for Tax Notes titled *Why The Obamas Paid Too Much in Taxes*. President and Mrs. Obama had about \$5 million of income in 2009, most of it from his book royalties. His effective tax rate was 32%. The typical \$5 million man, however, has an effective tax rate 10 percentage points lower—22%. Were the Obama's single handedly trying to get the deficit under control? No. It's because President Obama worked for his money and most \$5 million men let their money work for them. Most taxpayers with at least \$5 million of income receive 45% of their income from 15% money. President Obama's single stock sale was at a loss of stock that he inherited from his white grandmother.

The 15% flat rate that applies to stock sales and dividend income can only benefit the less than 1 in 5 Americans who own stock outside of their retirement accounts. The progressive tax rate is raced and classed, but not the way Calvin thinks.

A Pew Research report released last July showed that in 2009, 27% of whites owned stock outside of their retirement accounts compared with 24% for Asians, 7% for blacks and 5% for Hispanics. For the vast majority (over 90%) of Americans who earn less than \$200,000, we see very little stock ownership. According to the Internal Revenue Service statistics, for households with \$50,000 or less, no more than 2% of their income comes from capital gains and corporate dividends. In households earning between \$50,000 to \$100,000, no more than 3% of their income comes from capital gains and corporate dividends. In households between \$100,000 and \$200,000, 5.5% of their income comes from 15% rate money. These taxpayers represent over 90% of all Americans.

The tax man comes early and often for most of us. The lion's share of our income comes from wages and is taxed at up to 35%.

My race and class analysis of tax policy has shown that while taxpayers of color are disadvantaged under our tax laws, so are many middle and low-income white taxpayers. The real winners are the Mitt Romney's and Warren Buffett's of the world—the real losers are the rest of us.

As I conclude, you may ask, "What should we make of all this?" My answer is simple and brief: Making our tax laws fairer and simpler would benefit not only taxpayers of color, but white taxpayers too. So instead of

everyone being afraid of race scholarship in the area of tax, we should all embrace it. After all, every one of us has a race.

Thank you.