

DOROTHY A. BROWN*

SPLIT PERSONALITIES: TAX LAW AND CRITICAL
RACE THEORY**

The following is a mythical conversation:

[FOURTH WHITE COLLEAGUE]: *I don't think that there can be a black legal income tax law or a black economics separate from white economics. Should blacks have additional deductions to take account of racism? Or should there be a longer period for blacks to file their returns because many of their ancestors were slaves?*

[JEROME CULP]: *I don't know if blacks should have more deductions than whites, I haven't made a detailed study of how the income laws impact blacks.*

[FOURTH WHITE COLLEAGUE]: *Not enough is known. Certainly, we could help to do more and better studies on blacks and income taxes, but I take it that is not Black Legal Scholarship.*

[SECOND WHITE COLLEAGUE]: *There aren't very many blacks who teach tax law or do research in that area. Is that part of your point?*

[JEROME CULP]: *Yes. But my point is more complex. My tax colleagues have stated these arguments in their most negative terms. There may be a [sic] income tax problem that would benefit from being viewed in a black perspective, but until you look, how will anyone know? To what extent have our tax laws been distorted now and historically by the question of slavery and continuing racism?¹*

Although the above conversation never took place, it had a profound impact on my thinking. When I read Professor Jerome Culp's challenge,² I knew that it was one which I had to accept.

* Associate Professor, University of Cincinnati College of Law. B.S., 1980, Fordham University; J.D., 1983, Georgetown University Law Center; LL.M., 1984, New York University School of Law. I owe a tremendous thanks to Mr. Mark Carozza and the Institute for Policy Research for their excellent research support. I would also like to especially thank Professors Karen Brown and Mary Lou Fellows for their continued support and encouragement. I dedicate this work to Professor Jerome Culp, whose vision created the space for this work.

** The following version of the author's remarks has been edited and footnoted by the author.

1. Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 101. The quoted material is "[a] mythical conversation in Duke Law School Faculty Lounge shortly after *Toward a Black Legal Scholarship* was completed and circulated." *Id.* at 99.

2. See *id.* at 105 ("everybody has to do black scholarship if it is to succeed").

Ever since that day, I have dedicated myself to exploring issues of race and ethnic origin in my tax courses and scholarship. The focus of this speech will be federal income taxation, or the tax treatment of individuals. More specifically, this speech will focus on both the marriage penalty paid and the marriage bonus received by married couples.

I have been thinking about these issues since 1991, yet I have just begun to write about them. That is a function of the classes that I have taught over my brief five years in the legal academy. I taught Partnership Tax for three years and was unable to unmask the racial and ethnic issues in that course. I taught Deferred Compensation once and didn't really attempt to unmask those issues, since my scholarship interests lie elsewhere. It wasn't until the fall of 1994 when I began teaching the courses I wanted to teach, namely Tax Policy and Federal Income Taxation, that I put on my "race lenses," as Professor James Hackney has described it, and went looking to unmask the racial implications of the federal income tax system.

Unmasking racial and ethnic issues in the federal tax laws is a difficult and arduous task. Very few scholars have attempted to publish in this area.³ I understand why that phenomenon has occurred. First, tax law has a myth about it that suggests that it is different than other areas of the law.⁴ My tax colleague at Cincinnati, Professor Paul Caron, has eloquently referred to this phenomenon as "tax myopia," and observed that there are "serious consequences caused by the . . . myth that tax law is somehow *different* from other areas of the law."⁵ One such consequence is per-

3. *But see* Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, in *TAXING AMERICA* 45, 45-57 (Karen B. Brown & Mary Louise Fellows eds., 1996) (discussing the differences between black and white households concerning their payment of the marriage penalty or their receipt of the marriage bonus); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (discussing the differences between black and white households concerning the tax treatment of wealth); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996) (acknowledging the differences between black and white women that previously have been ignored by tax scholars).

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

5. *Id.* at 518. *See also* Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 OHIO ST. L.J. 637, 637 (1996) (Wherein author observes: "I previously have criticized what I call 'tax myopia'—the tendency of the tax law to view itself as an isolated body of law separate from other areas of law." (footnote omitted)). Additional authors have also observed the tax myopia phenomenon. *See, e.g.,* Lily Kahng, *Fiction in Tax*, in *TAXING*

petuating the myth that tax law is neutral and objective. To the extent that tax law is assumed to be different, it is not examined the way other areas of the law have been examined through racial and ethnic lenses.⁶ To the extent that tax law is assumed to be different, any disparate impact based upon race or ethnicity will continue unabated. My scholarship is dedicated to forever eradicating the belief that tax law is somehow different, that it has no differing impact based upon race, ethnicity, or any other characteristic.⁷

Taxation is the result of a body of law including congressional statutes, the Internal Revenue Code of 1986, as amended (the "Code"), interpretive agency pronouncements, and judicial decision-making.⁸ Given that description, it is no surprise that tax laws will have differing impacts based upon race, gender, and other defining characteristics. Knowing that race matters and proving that race matters, however, are separate endeavors.

In order to unmask how race operates in the tax laws, I had to begin outside of the federal tax laws. I have consulted historical, political, and sociological materials, to name a few. I have become relentless in the pursuit of information. I find myself talking to complete strangers on airplanes the minute I find out that they are involved in one of the above-mentioned areas. I have found obtaining information in those areas just as difficult as it has been unmasking the racism that operates in the tax laws.

I believe that there is an important story to tell, just with respect to the difficulty of obtaining information. For example, the Internal Revenue Service does not keep tax return data by race.⁹ I am not suggesting that it is a good idea for revenue agents to know the racial or ethnic identity of a taxpayer when deciding when to

AMERICA, *supra* note 3, at 25, 26 (Stating that "tax fictions can be dangerous. They can mask underlying motives and biases and they can cause unforeseen harms.").

6. See, e.g., Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; 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; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

7. Legal scholarship exists on the relationship between sexual orientation and tax law. See, e.g., Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991).

8. See JOSEPH M. DODGE ET AL., *FEDERAL INCOME TAX: DOCTRINE, STRUCTURE AND POLICY* 6-14 (1995).

9. Telephone Interview with John Kaminsky, IRS Statistics Branch (Nov. 8, 1996) (stating that the IRS does not ask for any racial identity information).

audit that taxpayer. What I am saying is that if I cannot uncover data as to who pays taxes by racial and ethnic identity, I will never be able to rise to Professor Culp's earlier challenge. The good news is that the Census Bureau collects more data than you will probably ever have time to analyze. It is that data base and an angel in the form of Mark Carozza, who works at the Institute for Policy Research at the University of Cincinnati, that have enabled me to do the preliminary work that I have done.

The United States Census Bureau collects household information data by race and ethnic identity. The Bureau's individual records are available in the Public Use Micro-Data Sample. As I state in my forthcoming book chapter entitled *The Marriage Bonus/Penalty in Black and White*, I found that black couples are more likely to pay a marriage penalty and white couples are more likely to receive a marriage bonus.¹⁰ The marriage bonus/penalty analysis is a result of the convergence of three different factors, namely: how the Code is written and interpreted; the employment discrimination experienced by black workers and white women in the labor market; and the differing marriage rates of black and white women. Let us examine each in turn.

First, the tax laws. The disparate impact of the marriage bonus/penalty is attributable to three tax principles. The Code allows married couples to file joint returns.¹¹ Husbands and wives can allocate up to one-half of their income to a non-working spouse and have that assigned income taxed at a rate lower than if that spouse were single.¹² That lower tax liability is referred to herein as a marriage bonus. The Code rewards those families whose income is earned by only one spouse.

Alternatively, if husbands and wives both work, and earn roughly equal amounts, they will pay taxes as a couple that is considerably higher than those they would pay as single adults.¹³ That higher tax liability is referred to herein as the marriage penalty. The Code penalizes those families with two wage earners. I would note that for purposes of the Code, who is married and eligible to

10. See Brown, *supra* note 3, at 45. Although a more complete analysis would take into account racial and ethnic differences affecting Hispanic-American, Asian-American, and Native-American families, the book chapter was a preliminary step in that direction.

11. See I.R.C. § 1(a) (1994). Joint returns are not mandatory and the alternative of filing "married filing separately" is available.

12. See DODGE ET AL., *supra* note 8, at 138.

13. See *id.* at 139.

file a joint return is determined by reference to state law.¹⁴ That makes same-sex and opposite-sex couples only eligible for joint filing status if recognized as married under state or local law.

The second tax principle that is a factor in this analysis is that the Code taxes income at progressive rates. As a result, the marriage penalty is the highest on the two-income family that earns roughly equal amounts of income.¹⁵ The second wage earner's first dollar of income is added on top of the spouse's salary and taxed at the spouse's highest marginal tax rate. The second wage earner does not receive the benefit of the lower tax rate that was applied to the spouse's first dollar of wage income. Progressive tax rates penalize the second wage earner. Alternatively, to the extent that there is only one wage earner in the household, progressive tax rates coupled with the joint tax return provisions afford that household a marriage bonus.

The third tax principle is that the judiciary allows the value of services, such as child care, provided by family members to the household to go untaxed.¹⁶ As a result, those three principles result in marriage tax penalties and marriage bonuses. A married couple can pay a higher tax when they marry or receive a reduced tax liability when they marry. The Code is not marriage neutral, and as previously mentioned, my research indicates that the marriage penalty couple is more likely to be black, and the marriage bonus couple is more likely to be white. This is not because the Code explicitly limits its penalties to blacks and bonuses to whites, but because the Code operates in the context of larger societal issues. I will next address those larger societal issues, namely employment discrimination and differing marriage rates.

I will focus on two aspects of employment discrimination, specifically, wage discrimination and differing labor participation rates. First, "[f]or every dollar earned by a white man, a white woman earned 78¢, a black man earned 74.8¢, and a black woman earned 66¢."¹⁷ Second, the labor force participation rates of married women differ according to race. In 1990, "73 percent of married black

14. See 4 BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 111.3.6 (1992); Cain, *supra* note 7, at 97; Toni Robinson & Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant*, 8 VA. TAX REV. 773, 792-95 (1989).

15. See John Brozovsky & A.J. Cataldo II, *A Historical Analysis of the "Marriage Tax Penalty"*, 21 ACCT. HISTORIANS J. 163, 166 (1994).

16. See, e.g., Staudt, *supra* note 3, at 1576.

17. Brown, *supra* note 3, at 52 (footnotes omitted).

women were in the waged labor force, compared to 64 percent for married white women."¹⁸ The labor force participation rates for men have declined over the past twenty years, but this decline has been greater for black men than for white men.¹⁹

Finally, we observe differing marriage rates. Thirty-six percent of black women and sixty-eight percent of white women were in married-couple households in 1990.²⁰ Assuming that taxes affect behavior, including the decision to marry,²¹ could the tax laws be operating in a way that discourages black women from marrying and encourages white women to marry? Additional empirical work needs to be done, but I suggest that it will yield some fruitful results.

Now we are ready to examine how the convergence of the tax principles, employment discrimination, and differing marital rates result in black couples being more likely to pay a higher marriage penalty and white couples being more likely to receive a marriage bonus. As a result of wage discrimination, black men and women earn wages closer in amounts than white men and women. This assumes, however, that black men marry black women and white men marry white women. Given that interracial marriages are still rare, this is a safe assumption.²² In addition, more black married women are in the labor force. Accordingly, black couples are more likely to have household income split roughly equal. Given that the greatest marriage penalty exists in households where two wage earner couples earn equal amounts, married black couples, with a higher percentage of two wage earners, with salaries closer than white couples, are more likely to pay a marriage penalty than white couples.

Yet an additional factor in the analysis is that most black wo-

18. *Id.* at 49.

19. *See id.* at 51. The decline in labor participation rates for younger, white men has been attributed to advanced educational opportunities. *See* BETTE WOODY, *BLACK WOMEN IN THE WORKPLACE: IMPACTS OF STRUCTURAL CHANGE IN THE ECONOMY* 147 (1992).

20. *See* Reynolds Farley, *The Common Destiny of Blacks and Whites: Observations about the Social and Economic Status of the Races*, in *RACE IN AMERICA* 197, 212 (Herbert Hill & James E. Jones, Jr. eds., 1993).

21. *See* James Alm & Leslie A. Whittington, *Does the Income Tax Affect Marital Decisions?*, 48 *NAT'L TAX J.* 565, 571 (1995) (finding that "the probability of marriage falls as the marriage tax increases").

22. *See* Robert G. Wood, *Marriage Rates and Marriageable Men: A Test of the Wilson Hypothesis*, 30 *J. HUM. RESOURCES* 163, 172 (1995) (reporting that "in 1985, 98.9 percent of black married women and 96.6 percent of black married men had a black spouse").

men are not married, and most white women are married. Therefore, most black women receive neither the marriage penalty nor the marriage bonus. Recall the question I posed earlier: Does the Code play a role in the marriage decision? As heads-of-households, black women are disproportionately poor.²³ Eighty percent of families headed by black women were in poverty, while fifty-five percent of families headed by white women were in poverty.²⁴

White men and women earn wages further apart in amounts. Therefore, even if they pay a marriage penalty, it will not be nearly as great as black couples. Given that 74.8¢ is closer to 66¢ than 78¢ is closer to one dollar, black couples are more likely to pay a higher marriage penalty than white couples.

Is it just a coincidence that the most penalized married couple would be that of a black man and a white woman? Seventy-eight cents is even closer to 74.8¢ than those wages of a black married couple. In that household, however, white women would make more than their black male husbands.

As a result of wage discrimination, white males earn the highest salaries. One dollar can buy more than the 74.8¢ black men can earn. White men can more economically afford to provide for their families based upon their salaries alone. Accordingly, white wives do not have to work for the family to survive economically, and if they do work, they will receive less wages, again a result of employment discrimination. Those two instances of discrimination, coupled with the exclusion from taxable income of the value of the services that wives provide for the family, provide incentives for white women to work inside the home, and for the family to receive a marriage bonus.²⁵ As noted earlier, we observe that married white women are not in the labor force to as great an extent as married black women.

Although far more research needs to be done, it seems clear that the Code has a different impact on black and white households where both marriage penalties and marriage bonuses are analyzed. Although the Code did not cause the societal racism that results in employment discrimination and differing marriage rates, the Code is operating to exacerbate that racism by penalizing black couples and benefitting white couples. Accordingly, the Code's role in reinforcing societal racism must be challenged and eliminated.

23. See Farley, *supra* note 20, at 213-17.

24. See *id.*

25. See Brown, *supra* note 3, at 53.

I will conclude with a brief discussion of how I teach sensitive issues involving racial and ethnic identity. First, I have only recently begun to explore issues of race and tax law, and anticipate incorporating some of these ideas in my Tax Policy course this Fall. What I have always done in Tax Policy that has met with the most resistance, however, is to critique the print media. I generally find newspaper clippings on relevant tax topics, and proceed to rip apart the newspaper articles in class. I encourage the students to do the same. What I have observed is that those who agree with the *Wall Street Journal* don't like it when I rip the *Journal's* views apart, and those who agree with the *New York Times* don't like it when I rip apart the *Times's* views. Yet, by the time the semester is complete, I find less resistance, given that I am an equal opportunity criticizer. I manage to annoy all of my students. That's when I know that I have had a good semester. As an aside, I also know whether I have had a good semester outside of the classroom by counting the number of colleagues that I have managed to annoy. In the five years that I have spent in the legal academy, I have had an extraordinary number of good semesters both inside and outside of class.

In my State and Local Finance course, which I have taught for five years, I spend a few weeks carefully examining education funding cases. Those cases involve issues of race and ethnicity, taxes and education—a fairly volatile mix. So it is important that I set a respectful tone early in the semester, which I do by inviting student's views, but challenging them to unmask their underlying assumptions—but doing so with the utmost respect for those assumptions. I find students are as respectful to you as you are to them.

In the early part of the State and Local Finance course, we don't touch upon racially sensitive matters, but we do touch upon politically sensitive matters—which are often just as volatile. At the first class, we discuss which branch of government the student's fear the most: the federal, state, local, or judiciary. When students respond (and they do respond) I seek to get them to understand that their colleagues' views are just as important, and just as biased as their own. The biases come out slowly, but they come out. I usually unmask the biases by challenging their underlying beliefs. I ask, "What is your cite for that proposition?" When they concede that they have no cite, but that it is based upon personal observations, that is an important moment in class. I ask them if they can understand how that might not be persuasive to those with different

experiences, different personal observations. How will you reach them? What if those with different experiences are the judges considering your client's case? How can you best represent your client given the judiciary's bias? Of course, this assumes that we spend a good part of the semester critically evaluating the court's decisions.

Students react in a variety of ways to the process, however. They tend to be rather cynical by the time I get them and actually enjoy shooting at judicial decisions. They tend to like this exercise less when the judge has the same bias that they have, although rarely do they see it as a bias until a colleague points it out in the class discussion. They usually resist. I don't try to change their minds. I just ask, "Do you see how your belief is formed upon an assumption that others may not share? That if you continue to make arguments based upon that unshared assumption you may lose your audience?" That is the most that I can hope for. I have however, had the gratifying experience of having my students come to me after the semester is over and say that I made them think about things they never thought about. It is such moments that make this process worthwhile.

To summarize, I recommend putting your race lenses on, relentlessly exposing the disparate impact that your intuition tells you is there in whatever subject you teach, and surrounding yourselves with scholars that are supportive of your work. Thank you and happy hunting.