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Tax Reform *Dis*course

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"Any measure that values a gun several hundred times more than a bottle of milk is bound to raise serious questions about its relevance for human progress. It is no surprise, then, that since the emergence of national income accounts, there has been considerable dissatisfaction with gross national product as a measure of human welfare. GNP reflects market prices in monetary terms. Those prices quietly register the prevailing economic and purchasing power in the system—but they are silent about the distribution, character or quality of economic growth. GNP also leaves out all activities that are not monetized—household work, subsistence agriculture, unpaid services. And what is more serious, GNP is one-dimensional: it fails to capture the cultural, social, political and many other choices that people make."

–Mahbub ul Haq[1]

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1 MAHBUB UL HAQ, REFLECTIONS ON HUMAN DEVELOPMENT 46 (1995).

I. INTRODUCTION

Tax reform equals economic growth. This simple equation captures both the essence of, and the essential problem with, recent debates over tax reform.[2] As the Organisation for Economic Co-

[2] My primary focus in this article is on U.S. domestic tax reform debates, even though the obsession with pro-growth tax reform is by no means a uniquely American phenomenon. *See infra* Part II.B. For an interesting discussion of the troubling aspects of the tax reform discourse regarding so-called developing or transition countries, *see* Miranda Stewart, *Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries*, 44 HARV. INT'L L.J. 139 (2003).

operation and Development (OECD) has succinctly stated, "[t]ax systems are primarily aimed at financing public expenditures."[3] Or, in the words of President Bush's Advisory Panel on Federal Tax Reform, "[T]he interests of a few should not stand in the way of the tax code's primary goal: to raise funds efficiently for the common defense, vital social programs, and other goals of shared purpose."[4] Yet, debates over reforming our tax system tend to focus not on the public good — that is, on advancing human development — but narrowly on facilitating economic growth. In this article, I propose shifting the tax reform discourse away from a nearly unwavering focus on economic growth toward a broader focus on people, and, more particularly, on those in our society who are disadvantaged.[5]

Economic growth can be important to human development, but it is far from all that there is to development.[6] Indeed, economists Anthony Atkinson, Thomas Piketty, and Emmanuel Saez have shown how recent periods of economic growth have redounded primarily to the benefit of the privileged few at the top of the income scale. In a comparative study using income tax data, they have shown that the share of income going to the top ten percent of the population in the United States experienced a precipitous decline during World War II, leveled off in the postwar decades, and significantly spiked beginning in the 1970s.[7] The share of total income going to the top ten percent reached nearly fifty percent by 2007, which is "the highest level on

[3] Org. for Econ. Co-operation & Dev. [OECD], *Tax Policy Reform and Economic Growth*, OECD Tax Policy Studies No. 20, at 18 (2010); *see, e.g.*, Alice G. Abreu & Richard K. Greenstein, *Defining Income*, 11 FLA. TAX REV. 295, 334 (2011) ("[T]he tax system exists to raise revenue.").

[4] Letter from the President's Advisory Panel on Fed. Tax Reform to John W. Snow, Sec'y of the Treasury (Nov. 1, 2005), *in* PRESIDENT'S ADVISORY PANEL ON FED. TAX REFORM, SIMPLE, FAIR, AND PRO-GROWTH: PROPOSALS TO FIX AMERICA'S TAX SYSTEM 7, 9 (2005).

[5] I use the term "disadvantaged" here in a broad sense. It is meant to capture the disadvantage experienced by traditionally subordinated groups, including women, racial and ethnic minorities, sexual minorities, the poor, and those with physical disabilities. It is also meant to capture other groups — for example, undocumented immigrants and those in rural communities — who experience comparative disadvantage in terms of their sharing in the overall human development that we experience as a society.

[6] U.N. DEV. PROGRAM, HUMAN DEVELOPMENT REPORT 2010: THE REAL WEALTH OF NATIONS: PATHWAYS TO HUMAN DEVELOPMENT 5 (2010) [hereinafter 2010 HDR] ("[H]uman development is different from economic growth and . . . substantial achievements are possible even without fast growth.").

[7] Anthony B. Atkinson, Thomas Piketty & Emmanuel Saez, *Top Incomes in the Long Run of History*, 49 J. ECON. LITERATURE 3, 6 (2011).

record."[8] Most of this change benefited the top one percent, which saw its share of income increase "from 8.9 percent in 1976 to 23.5 percent in 2007."[9] The top 0.1% has done even better, with its share of income having "more than quadrupled from 2.6 percent to 12.3 percent over this period."[10] As a result, "the top 1 percent captured 58 percent of real economic growth" during this period.[11]

The picture becomes even more striking when one focuses on Saez and Piketty's work regarding the two most recent periods of economic growth (i.e., 1993–2000 and 2002–2007). During the period from 1993–2008, the "top 1 percent incomes captured slightly more than half of the overall economic growth."[12] During the period from 2002–2007, "the top 1 percent captured two thirds of income growth."[13] As expected, the top one percent saw its share of income drop during the recession — from 23% in 2007 to 17% in 2009.[14] Importantly, however, according to Saez:

> [T]he Great Recession is unlikely to have a very large impact on top income shares and will certainly not undo much of the dramatic increase in top income shares that has taken place since the 1970s. . . . [B]ased on the US historical record, falls in income concentration due to economic downturns are temporary unless drastic regulation and tax policy changes are implemented and prevent income concentration from bouncing back.[15]

In fact, in 2010, the top one percent saw its share of income "gr[o]w by

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 8.

[12] Emmanuel Saez, *Striking It Richer: The Evolution of Top Incomes in the United States (Updated with 2008 Estimates)*, ECONOMETRICS LABORATORY SOFTWARE ARCHIVE AT U.C. BERKELEY, at 3 (July 17, 2010), http://elsa.berkeley.edu/~saez/saez-UStopincomes-2008.pdf. In this article, Saez builds upon and updates earlier work he did with Thomas Piketty. *See* Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 Q.J. ECON. 1 (2003).

[13] Saez, *supra* note 12, at 3.

[14] Jason DeParle, *Top Earners Not So Lofty in the Days of Recession*, N.Y. TIMES, Dec. 13, 2011, at B1; *see also* Emmanuel Saez, *Striking It Richer: The Evolution of Top Incomes in the United States (Updated with 2009 and 2010 Estimates)*, ECONOMETRICS LABORATORY SOFTWARE ARCHIVE AT U.C. BERKELEY, at 1 (March 2, 2012), *http://elsa.berkeley.edu/~saez/saez-UStopincomes-2010.pdf* (reporting a decline in the top percentile's share of income from 23.5% to 18.1%).

[15] Saez, *supra* note 12, at 1.

11.6% while bottom 99% incomes grew only by 0.2%."[16] In other words, "the top 1% captured 93% of the income gains in the first year of recovery."[17]

The Congressional Budget Office reached similar conclusions in a study of the distribution of household income from 1979 to 2007.[18] Additionally, in the context of a broader study of inequality across its member countries,[19] the OECD observed that "[t]he United States is the country with the highest inequality level and poverty rate across the OECD, Mexico and Turkey excepted."[20] The OECD further noted that, in the United States, "[t]he average income of the richest 10% is . . . in purchasing power parities, the highest level in the OECD. However, the poorest 10% of the US citizens have an income . . . about 20% lower than the average for OECD countries."[21]

As Saez has asserted, the results of such studies "may help explain the disconnect between the economic experiences of the public and the solid macroeconomic growth posted by the U.S. economy from 2002 to 2007"[22] as well as "the recent public demonstrations against

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16 Saez, *supra* note 14, at 1; *see also* DeParle, *supra* note 14.

17 Saez, *supra* note 14, at 1.

18 CONG. BUDGET OFFICE, PUB. NO. 4031, TRENDS IN THE DISTRIBUTION OF HOUSEHOLD INCOME BETWEEN 1979 AND 2007, at 5 (2011) (mentioning Piketty & Saez, *supra* note 12). For a summary of this study's findings, see *infra* text accompanying notes 85–88.

19 OECD, *Growing Unequal? Income Distribution and Poverty in OECD Countries* (2008).

20 OECD, *Country Note: United States* (2008), http://www.oecd.org/dataoecd/47/2/41528678.pdf.

21 *Id.* (emphasis omitted).

22 Saez, *supra* note 12, at 3. Atkinson, Saez, and Piketty put this in perspective by comparing the growth in U.S. income over this time period with the growth in income in France over the same period:

> [A]verage real incomes per family in the United States grew by 32.2 percent from 1975 to 2006 while they grew only by 27.1 percent in France during the same period . . . showing that the macroeconomic performance in the United States was better than the French one during this period. Excluding the top percentile, average U.S. real incomes grew only 17.9 percent during the period while average French real incomes—excluding the top percentile—still grew at much the same rate (26.4 percent) as for the whole French population. Therefore, the better macroeconomic performance of the United States versus France is reversed when excluding the top 1 percent.

Atkinson, Piketty & Saez, *supra* note 7, at 9 (citation and footnote omitted).

inequality."[23] The results of these studies have also set off alarm bells in some quarters, leading to calls for reform that encourages "broad-based" economic growth.[24] But achieving broad-based economic growth is no panacea because human development is about much more than just increasing incomes and economic growth.[25] Put differently, even under the best of conditions, economic growth is an impoverished proxy for human development. Under current conditions, its value as a proxy for human development has been completely spent. The time has come to shift the focus of tax reform debates toward advancing human development — with a special focus on aiding those who are disadvantaged in our society — and away from further entrenching the privilege of a wealthy few.

The remainder of this article is divided into four parts. Part II illustrates how tax reform debates in the United States (and abroad) have come to revolve around spurring economic growth. Part III then draws on the development literature to show how there is far more to human development than just economic growth. By tracing the journey in this literature away from an unbending focus on economic growth toward broader notions (and measures) of human development, Part III directly undermines the equation of tax reform with efforts to stimulate economic growth. Having broken the link between tax reform and economic growth, Part IV then turns to considering how the tax reform debate might change if the unbending focus on economic growth were replaced with a broader focus on advancing human development. In particular, and keeping in mind the

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[23] Saez, *supra* note 14, at 1.

[24] ROGER C. ALTMAN, MICHAEL GREENSTONE, ROBERT E. RUBIN & SARAH CANNON, BROOKINGS INST., FROM RECESSION TO RECOVERY TO RENEWAL: AN ECONOMIC STRATEGY TO ACHIEVE BROADLY SHARED GROWTH (2010), *available at* www.brookings.edu/~/media/research/files/papers/2010/4/economic%20recovery%20 greenstone/04_economic_recovery_greenstone.pdf; *see* Richard V. Burkhauser, Jeff Larrimore & Kosali I. Simon, *A "Second Opinion" on the Economic Health of the American Middle Class*, 65 NAT'L TAX J. 7, 8 (2012) (in the context of calling the approach of Piketty and Saez's research into question, discussing how the narrow sharing of economic growth has gained the attention of the popular press and led to calls for more broad-based sharing of economic growth); *see also* Floyd Norris, *As Corporate Profits Rise, Workers' Income Declines*, N.Y. TIMES, Aug. 6, 2011, at B3 (indicating that "corporate profits accounted for 14 percent of the total national income in 2010, the highest proportion ever recorded," while, in that same year, employees received less than half of total national income for the first time, which "may help explain the economic worries of many Americans who have jobs but still fear they are falling behind.").

[25] *See infra* Part III.

lessons learned from the development literature, Part IV considers the impact of such a shift on the debate about eliminating tax expenditures — that is, the tax "loopholes" that always seem to be in the crosshairs of tax reformers. Part V provides brief concluding remarks.

II. THE MANTRA OF ECONOMIC GROWTH

In the introduction to their book *Fundamental Tax Reform*, John Diamond and George Zodrow observe:

> The current tax reform discussion in the United States and around the world differs to some extent from earlier debates on tax reform, in that much of the current interest in changing the tax structure focuses on improving the tax climate for business in order to stimulate additional saving, investment, employment, wages, and economic growth.[26]

A few examples will help to underscore Diamond and Zodrow's point. To this end, the first section of this Part includes several recent examples from the United States that illustrate how economic growth has become the buzzword of our tax reform debates. The second section of this Part provides a few brief examples illustrating how the idea that tax reform should be used to stimulate economic growth has spread beyond the United States, especially in the wake of the global financial and economic crisis.

A. *The American Experience*

In 2005, President George W. Bush's Advisory Panel on Federal Tax Reform issued its report. Three principles typically guide any tax policy inquiry: (1) efficiency, (2) equity, and (3) administrability. In other words, when formulating tax policy, we usually "strive for a tax system that (1) minimizes interference with economic decisionmaking [sic], (2) is fair, and (3) is easy to administer and comply with."[27] Echoing the executive order establishing the panel,[28] the title of the panel's report — *Simple, Fair, and Pro-Growth: Proposals to Fix America's Tax System* — repeats these three principles, but with one

[26] John W. Diamond & George R. Zodrow, *Introduction: Is It Time for Fundamental Tax Reform?*, *in* FUNDAMENTAL TAX REFORM: ISSUES, CHOICES, AND IMPLICATIONS 2, 3 (2008).

[27] Anthony C. Infanti, *Tax ~~Equity~~*, 55 BUFF. L. REV. 1191, 1192 (2008).

[28] Exec. Order No. 13,369, 70 Fed. Reg. 2323 (2005).

significant modification. Rather than striving for a tax system that refrains from tinkering with economic decision making to the greatest extent possible, the panel (and President Bush) saw its purpose as tilting the economic playing field to encourage "growth." In fact, one of the two reform proposals put forward by the panel was labeled the "Growth and Investment Tax Plan."[29] After all, as the panel counterfactually contended,[30] "[g]reater economic growth should . . . benefit all Americans."[31]

For instance, the panel made a number of recommendations that were intended to create strong incentives for taxpayers to save or make investments, rather than to consume now.[32] It also recommended that small businesses be permitted to immediately expense most asset purchases in order to "encourage new investment and capital formation by growing businesses."[33] Such generous expensing (e.g., the "bonus" depreciation provision in § 168(k)) has been criticized in the past for encouraging investment in capital at the expense of investment in labor (i.e., hiring), leading to jobless economic recoveries following economic downturns.[34] Perhaps more astonishingly, the panel made this recommendation despite its own deprecation of the inefficiencies created by our extant depreciation system, which favors investments in certain types of assets over others.[35] Thus, far from removing the tax "thumb" from the scales, these examples illustrate tax reform proposals that either move the tax "thumb" from one side of the scales to the other or place an even heavier weight on one side over the other.

Similarly, a few years later, Professor Michael Graetz put forward his own tax reform plan.[36] As the centerpiece of his plan, Professor

[29] PRESIDENT'S ADVISORY PANEL ON FED. TAX REFORM, *supra* note 4, at 59. The other was the "Simplified Income Tax Plan." *Id.*

[30] *See supra* text accompanying notes 12–24.

[31] PRESIDENT'S ADVISORY PANEL ON FED. TAX REFORM, *supra* note 4, at 138; *see also id.* at 178 ("Greater economic growth, which is projected to occur under the Growth and Investment Tax Plan, would also generally benefit all Americans by increasing their incomes.").

[32] *Id.* at 89–93.

[33] *Id.* at 95.

[34] Theodore P. Seto, *The Problem with Bonus Depreciation*, 126 TAX NOTES 782, 782 (Feb. 8, 2010). For a more general critique of accelerated depreciation that questions its relationship to economic growth, see Yoram Margalioth, *Not a Panacea for Economic Growth: The Case of Accelerated Depreciation*, 26 VA. TAX REV. 493 (2007).

[35] PRESIDENT'S ADVISORY PANEL ON FED. TAX REFORM, *supra* note 4, at 95–98.

[36] MICHAEL J. GRAETZ, 100 MILLION UNNECESSARY RETURNS: A SIMPLE, FAIR,

Graetz suggested scaling back the income tax, so that it applies only to those with higher incomes, and enacting a value-added tax to make up for the loss in revenue.[37] In the third paragraph of his book making the case for this proposal, Professor Graetz wrote the following illuminating passage:

> The time for fundamental reform has come. In a world immeasurably more interdependent than the world of the mid-twentieth century, when our current system of taxation took shape, a vital question for any reform proposal is: Will it make American workers and businesses more competitive in the global economy, while maintaining the progressive structure consistent with our nation's historical insistence on fairness? The proposal I offer in this book—what I will call the Competitive Tax—does just that.[38]

Despite acknowledging the importance of a "progressive structure" to our tax system,[39] Professor Graetz's primary focus is on enhancing competitiveness. This is clear both from his phrasing of the "vital question" and from the fact that he denominates his plan the "Competitive Tax" rather than the "Competitive and Fair Tax" or the "Fair and Competitive Tax" or even the "Fair Competitive Tax."

When he later opens his discussion of "[f]irst [p]rinciples of [r]esponsible [r]eform,"[40] Professor Graetz describes the "traditional goals of tax reform" as follows: "produce adequate revenue; promote economic growth; increase international competitiveness of U.S. products, workers, and businesses; minimize interference with private

AND COMPETITIVE TAX PLAN FOR THE UNITED STATES (2008).

[37] For a summary of Professor Graetz's plan, see *id.* at 197–213.

[38] *Id.* at 4; *see also id.* at 16 ("We need a tax system that will encourage investment in the United States to create good jobs and will help make the goods and services our businesses and workers produce more affordable to consumers around the world.").

[39] To achieve a "progressive structure" in his Competitive Tax, Professor Graetz retains the income tax on higher-income earners and proposes either a "payroll adjustment" targeted at lower-income earners or the distribution of "'smart' cards that would be scanned by retailers to eliminate VAT on either a specified amount of purchases or on purchases of specific goods and services." *Id.* at 170–71, 178; *see id.* at 170–81 (explaining both possibilities).

Professor Graetz's choice of words here is quite intriguing because there is a difference between a tax system with a "progressive structure" and a tax system that actually operates in a progressive fashion. Infanti, *supra* note 27, at 1251–52.

[40] GRAETZ, *supra* note 36, at 52.

decision making; streamline compliance and administration; and, finally, distribute the burden of taxation fairly in accordance with people's ability to pay."[41] In this litany of principles, setting aside the obvious goal of producing revenue, Professor Graetz first mentions economic growth and next increasing competitiveness. He only then reiterates the three principles that typically guide tax policy inquiries, mentioning the efficiency or neutrality of the tax system first, simplification second, and fairness last of all. Again, the primary focus is on economic growth.

More recently, the topic of tax reform has surfaced in connection with discussions of deficit reduction. The need for tax reform to increase or enhance the nation's economic growth often surfaces in these discussions. For example, Erskine Bowles and Alan Simpson, co-chairmen of the National Commission on Fiscal Responsibility and Reform, penned an op-ed piece in *The New York Times* on the summer 2011 deal to increase the debt ceiling, in which they stated:

> And we must address the tax code. We need new revenue to finance the increasing costs of our health care system and an aging population — but it should come from reducing or eliminating tax breaks, not from higher rates. The tax code is riddled with annual tax breaks amounting to $1 trillion — most of which are just government spending in disguise. By reforming them, we can reduce individual and corporate tax rates in a way that keeps the tax code progressive while promoting economic growth and reducing the deficit at the same time.[42]

In an op-ed piece published in *The Wall Street Journal* in the wake of the debt-ceiling debate, Kevin Warsh, a former Governor of the Federal Reserve, and Jeb Bush, former Governor of Florida, suggested that the nation's "economic grand strategy" should be, "[i]n a word: growth."[43] They explained that:

> An effective growth strategy confronts tough challenges before they become intractable. The strategy is a threat to those who take refuge in our burdensome tax code, and it is a

[41] *Id.*

[42] Erskine B. Bowles & Alan K. Simpson, Op-Ed., *A Crisis Merely Postponed*, N.Y. TIMES, Aug. 3, 2011, at A25.

[43] Kevin Warsh & Jeb Bush, Op-Ed., *A New Strategy for Economic Growth*, WALL ST. J., Aug. 10, 2011, at A15.

> great source of encouragement to those who seek higher rates of return on physical and human capital. Hence, fundamental tax reform—dramatically lowering tax rates for individuals and companies while eliminating loopholes, deductions and credits—is critical to economic growth.[44]

In an op-ed piece published in *The Washington Post* to explain and "sell" the agreement reached to end the showdown over raising the debt ceiling, Timothy Geithner, the Secretary of the Treasury, wrote that "[t]he agreement sets up a powerful mechanism for agreement on tax reforms to strengthen growth."[45] Similarly, Pennsylvania Senator Pat Toomey, one of the members of the congressional "super committee" created as part of this agreement, reportedly stated that "his 'guiding principles' on the committee will be 'the twin goals of reducing the deficit and continuing to promote economic growth.' To that end, he hopes to reform the tax code in order to broaden the base while lowering rates and growing the economy."[46] Moreover, John Boehner, Speaker of the U.S. House of Representatives, urged the super committee to tackle tax reform in an effort to "improve the environment for economic growth."[47] Similarly, a group of thirty-six senators (including all but one member of the so-called Gang of Six) called on the super committee to "'focus on the major parts of the budget and include long-term entitlement reforms and pro-growth tax reform.'"[48]

B. International Experience

This focus on tax reform as a potential driver of economic growth is by no means a uniquely American phenomenon, especially with the advent of the global financial and economic crisis. For instance, in 2010, the OECD issued a report aptly titled *Tax Policy Reform and Economic Growth*.[49] In this report, the OECD investigated what it described as a "key issue for tax policy making"; namely, "how tax

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[44] *Id.*

[45] Timothy Geithner, Op-Ed., *Compromise Achieved, Reform's The Next Chapter*, WASH. POST, Aug. 2, 2011, at A15.

[46] Andrew Stiles, *Toomey Outlines Goals for Debt Committee*, NATIONAL REVIEW ONLINE (Aug. 10, 2011, 3:16 PM), http://www.nationalreview.com/corner/274254/toomey-outlines-goals-debt-committee-andrew-stiles#.

[47] Michael M. Gleeson & Drew Pierson, *Boehner Pushes Supercommittee to Take on Tax Reform*, 132 TAX NOTES 1204, 1204 (Sept. 19, 2011).

[48] *Id.* (quoting from a release issued by Sen. Daniel Coats).

[49] OECD, *supra* note 3.

structures could best be designed to promote economic growth."[50] Notwithstanding an acknowledgment that tax systems are used to achieve objectives other than economic growth, the OECD generally ignored these other objectives in preparing its report, "except when there is a clear trade off between them and tax reforms aimed at raising GDP per capita."[51] In explaining its focus on economic growth, the OECD stated that, even though "there is not necessarily a direct link between economic growth and overall well-being," economic growth "should increase the level of public expenditure that can be regarded as 'affordable' and make it easier to keep public debt within sustainable bounds."[52]

In its report, the OECD considered "four broad groups of taxes — consumption, property, personal income and corporate/capital income taxes."[53] Of these four groups, the OECD concluded that taxes on corporate and capital income are the most damaging to economic growth, followed by personal income taxes.[54] A pro-growth tax reform would, according to the OECD, involve "shifting the balance of taxation away from income taxes and towards a mixture of consumption taxes and taxes on immovable property, particularly on residential property."[55] Such a tax reform would be even "more effective in increasing growth if the design of the VAT were improved at the same time — by removing exemptions, zero-rating and reduced rates."[56] Similarly, to the extent that income taxes are retained in the reform, the OECD advocated in favor of broadening the income tax base and lowering the rates, particularly the top rates.[57]

The OECD examined tax reform trends in its member countries to determine the extent to which they followed its "'tax and growth' recommendations."[58] It concluded that many OECD member states had "cut personal and corporate tax rates while broadening the tax base" and that there was a trend toward "increased use of value-

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[50] *Id.* at 18.

[51] *Id.* The OECD did this for the sake of confining itself to a "manageable" task and because the OECD had earlier produced studies covering other objectives (e.g., equity and environmental matters). *Id.*

[52] *Id.* at 9.

[53] *Id.* at 40.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*; *see also id.* at 20–23 (discussing the points made in this paragraph in detail).

[58] *Id.* at 21 box 1.2.

added taxes," though there was "a general trend to higher VAT rates."[59] With these trends in mind, the OECD then spent the following chapters identifying the obstacles to tax reform and providing recommendations on how to surmount them in order to implement pro-growth tax reforms.[60]

Similarly, the European Commission issued a report in October 2011 outlining tax reforms in European Union member states that, for the first time, bore the subtitle "Tax Policy Challenges for Economic Growth and Fiscal Sustainability."[61] After surveying the tax reform trends in European Union member states since the onset of the global financial and economic crisis,[62] the European Commission discussed what it called the "quality of taxation" with a "focus on the effects of taxation on GDP and on long-term and sustainable economic growth. This reflects the key priority for Europe of achieving smart, sustainable and inclusive growth."[63] The European Commission then screened member states to determine which could benefit from "improving the structure of taxation to enhance economic growth."[64] In keeping with its focus on "smart, sustainable, and inclusive growth," the European Commission made recommendations for relieving the tax burden on labor — particularly the tax burden on low-skilled workers and secondary earners (who are primarily women) — and shifting toward a greater reliance on taxes on property and consumption (especially where the level of these taxes is relatively low).[65] Having earlier dismissed concerns about the regressivity of these taxes, the European Commission advocated this shift because property and consumption taxes "are the least detrimental to growth."[66]

Outside of the OECD and the European Union, in late 2011, Prime Minister Vladimir Putin added his voice to the international chorus linking tax reform with economic growth when he stated that

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[59] *Id.* at 26; *see also id.* at 40–43 (providing greater detail in summarizing these trends).

[60] *Id.* at 48–80.

[61] *Tax Reforms in EU Member States 2011: Tax Policy Challenges for Economic Growth and Fiscal Sustainability*, EUR. COMM'N, 9, 13 (May 2011), http://ec.europa.eu/economy_finance/publications/european_economy/2011/pdf/ee-2011-5_en.pdf.

[62] *Id.* at 31–46.

[63] *Id.* at 47.

[64] *Id.* at 86.

[65] *Id.*; *see generally id.* at 86–98.

[66] *Id.* at 86; *see id.* at 60–62.

Russia "needs a resolute tax maneuver. It needs a modern structure of the tax system; we have to think about optimizing the taxes which are crucial for quality economic growth."[67] Economic growth is on the minds of tax reformers not only in the United States but also around the world.

III. TAX REFORM ≠ ECONOMIC GROWTH

As mentioned in the introduction to this article, the general aim of tax systems is to finance *public* expenditures.[68] Put differently, "[t]ax law is a basic institution that shapes society and must serve the *public good*."[69] Yet, our tax reform discourse does not focus directly on how reform can be used as a vehicle for advancing the public good. Instead, calling to mind a phrase often attributed to John F. Kennedy — "A rising tide raises all the boats"[70] — tax reform discourse in the United States has come to focus on advancing economic growth as a proxy or indirect route for advancing the public good. But, as the studies cited in the introduction to this article highlight, advancing economic growth is not necessarily and ineluctably an end that serves the good of the *public*. In fact, in recent decades, a very small (and wealthy) slice of the population has reaped the lion's share of the rewards of economic growth, which makes the goal of advancing economic growth appear to be one that primarily serves the *private* good of an already privileged few.

This Part draws on the development literature to break the connection between tax reform and economic growth. The first section briefly explores why: (1) under the best of conditions, economic growth is a poor proxy for human development; and (2) under current conditions, it is a highly misleading proxy for human development. The next section describes the journey of important contributors to the development literature away from a narrow focus on economic growth and per capita income toward a broader view

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[67] *Putin Promises "Tax Maneuver,"* ITAR-TASS (Dec. 21, 2011, 5:22 PM), http://www.itar-tass.com/en/c32/303232.html.

[68] *See supra* note 3 and accompanying text.

[69] Alice Gresham Bullock, *Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle- and Low-Income Generosity*, 6 CORNELL J.L. & PUB. POL'Y 325, 361 (1997) (emphasis added); *see also* Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807, 829–30 (2005) ("On reflection, the principal end of broad-based, comprehensive tax systems is to finance the provision of public goods, the central activity of the modern democratic state. . . .").

[70] THE YALE BOOK OF QUOTATIONS 422 (Fred R. Shapiro ed., 2006).

(and the creation of broader measures) of human development. It then turns to describing what this broader view of human development looks like as well as some of the metrics that have been developed to measure it. This Part closes with a description of the lessons that those who participate in tax reform debates can learn from the journey in the development literature away from a singular focus on economic growth and toward a broader view of human development.

A. Economic Growth as a Poor Proxy for Development

Even when the rising tide is raising all the boats, economic growth falls short as a proxy for human development. For example, the economist and philosopher Amartya Sen has persuasively argued that:

> An adequate conception of development must go much beyond the accumulation of wealth and the growth of gross national product and other income-related variables. Without ignoring the importance of economic growth, we must look well beyond it.
>
> The ends and means of development require examination and scrutiny for a fuller understanding of the development process; it is simply not adequate to take as our basic objective just the maximization of income or wealth, which is, as Aristotle noted, "merely useful and for the sake of something else." For the same reason, economic growth cannot sensibly be treated as an end in itself.[71]

Economist Sabina Alkire has further enumerated the shortcomings of economic growth as a measure of human development:

> Yet dissatisfaction with GDP and economic growth rates as adequate metrics of well-being is rising for several reasons. First, although GDP is useful for many purposes, it does not reflect equity nor the composition of growth. Second, some high GDP growth strategies have created financial instabilities and crises. Third, GDP does not reflect the burden on the earth's resources. Fourth, people often value achievements that do not show up immediately or at all in high income and growth figures: health; knowledge;

[71] AMARTYA SEN, DEVELOPMENT AS FREEDOM 14 (1999); *see id.* at 3, 8–9, 90, 131, 290–92.

> livelihoods; relationships; safety; art and culture; happiness, self-direction; and political freedoms. Naturally people want good incomes and work hard to obtain them. But income is not the sum total of human life.[72]

And economists Gustav Ranis, Frances Stewart, and Yili Dong have concluded, based on a group of country studies, that countries cannot move into a virtuous cycle where human development and economic growth are mutually supporting and reinforcing "by according sole priority to [economic growth]."[73] Instead, to enter a virtuous cycle, countries have to place priority on human development.[74]

But what is, in the best of conditions, a partial and imperfect proxy for human development now provides nothing less than a highly misleading and distorted picture of human development in the United States. The distortion stems from the fact that, as demonstrated by the economic work discussed in the introduction to this article,[75] the rising tide has "swamped the majority of people"[76] while raising only the yachts of the wealthiest and most privileged.[77] It has become nearly impossible to open the newspaper each morning, whether physically or virtually, without seeing a story that reinforces this feeling. To list but a few examples of stories appearing in newspapers around the country:

- An Economic Policy Institute study of census data revealed that incomes have declined significantly more in the two years following the end of the 2007–2009 recession (by 6.7%) than they did during the recession itself (by 3.2%),

[72] United Nations Dev. Programme [UNDP], *Human Development: Definitions, Critiques, and Related Concepts*, at 38, Research Paper 2010/01 (June 2010), http://hdr.undp.org/en/reports/global/hdr2010/papers/HDRP_2010_01.pdf (by Sabina Alkire); *see* HAQ, *supra* note 1, at 14–15 (similarly describing why economic growth does not necessarily expand people's other choices).

[73] Gustav Ranis, Frances Stewart & Yili Dong, *Successful Transition Towards a Virtuous Cycle of Human Development and Economic Growth: Country Studies*, *in* PIONEERING THE HUMAN DEVELOPMENT REVOLUTION: AN INTELLECTUAL BIOGRAPHY OF MAHBUB UL HAQ 171, 216 (Khadija Haq & Richard Ponzio eds., 2008); *see* HAQ, *supra* note 1, at 40–41 (providing examples of countries with identical per capita GNP but radically different levels of human development).

[74] Ranis, Stewart & Dong, *supra* note 73, at 216.

[75] *See supra* Part I.

[76] Liz Hrenda, Letter to the Editor, *Most Are Swamped*, PITTSBURGH POST-GAZETTE, Sept. 23, 2011, at B6.

[77] *See supra* notes 12–24 and accompanying text.

with greater declines experienced by (1) African Americans and Latino/as than by whites and (2) those who already had lower incomes.[78]

- A Census Bureau report indicated that nearly one in six Americans lived in poverty in 2010, with disproportionate effects felt by African Americans, Latino/as, and women.[79] Reinforcing the feeling of growing income inequality, the Census Bureau report further noted that median household income has declined by 7.1% since 1999, but that the decline for the bottom ten percent was a much higher 12.1% in contrast to a much smaller decline of 1.5% for the top ten percent and an increase in income for the top one percent.[80]

- A Pew Research Center report analyzing census data found that the wealth gap between whites, on the one hand, and African Americans (with 1/20th the wealth of whites) and Latino/as (with 1/18th of the wealth of whites), on the other, was wider at the end of the 2007–2009 recession than it had been at any time since the Census Bureau began collecting this data.[81] And, "[i]n every ethnic group, the Pew researchers found, the poorest fared worst."[82]

- An Economic Policy Institute snapshot showed that from 1983–2009 nearly 82% of the gains in wealth went to the wealthiest five percent of households (with nearly half of that amount going to the top one percent while the other half was split by the top four percent); in contrast, the bottom sixty percent of households experienced a 7.5% decline in wealth.[83] Or, put differently, "[t]he bottom 60 percent of households actually had *less* wealth in 2009 than

[78] Robert Pear, *Median Incomes Shrank Further After Recession*, N.Y. TIMES, Oct. 10, 2011, at A1.

[79] Michael A. Fletcher, *Census Shows Impact of Recession*, WASH. POST, Sept. 14, 2011, at A1.

[80] *Id.*

[81] Kate Santich, *Study: Black, Hispanic Wealth Takes Bigger Hit*, CHI. TRIB., July 27, 2011, at C17.

[82] *Id.*

[83] Robert Frank, *The Wealthiest 5% Grabbed Most of the America's Gains*, WALL ST. J. BLOGS (Sept. 16, 2011, 12:24 PM), http://blogs.wsj.com/wealth/2011/09/16/the-top-5-grabbed-most-of-the-americas-gains/.

in 1983, meaning they did not participate at all in the growth of wealth over this period."[84]

- A Congressional Budget Office report found that, from 1979 through 2007, "[t]he top 1 percent of earners more than doubled their share of the nation's income" and "government policy [is] . . . doing less to reduce the concentration of income."[85] In particular, the report noted that federal tax policy has had a smaller equalizing effect, given a shift during that time period away from income taxes and toward payroll taxes.[86] During those three decades, the top one percent saw their "average inflation-adjusted after-tax income [grow] by 275 percent."[87] In contrast, the poorest twenty percent of the population saw their income grow by only 18% during that period.[88]

Instead of using such a deeply flawed proxy, the time has come to focus on advancing human development more directly. The development literature has already undergone a similar transformation, with important contributors moving away from an unbending focus on economic growth and toward a more holistic view of development.[89] For instance, Amartya Sen regards "identifying development with the growth of gross national product, or with the rise in personal incomes" as examples of "narrower views of development."[90] And Mahbub ul Haq has observed:

> [A]fter many decades of development, we are rediscovering the obvious — that people are both the means and the end of economic development. Often, this simple truth gets obscured because we are used to talking in abstractions, in aggregates, in numbers. Human beings, fortunately too stubborn to lend

[84] Lawrence Mishel, *Huge Disparity in Share of Total Wealth Gain Since 1983*, ECON. POL'Y INST. (Sept. 15, 2011), http://www.epi.org/publication/large-disparity-share-total-wealth-gain/.

[85] Robert Pear, *It's Official: The Rich Get Richer*, N.Y. TIMES, Oct. 26, 2011, at A20.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] Anthony C. Infanti, *Internation Equity and Human Development*, *in* TAX LAW AND DEVELOPMENT (Yariv Brauner & Miranda Stewart, eds., forthcoming Feb. 2013). The discussion in this Part draws from, and expands upon, this earlier work.

[90] SEN, *supra* note 71, at 3.

themselves to becoming a mere abstraction, are conveniently forgotten.[91]

Other participants in debates over development policy have similarly expanded their horizons beyond economic growth.[92] The next section briefly traces this journey toward a more expansive view of human development.

B. Emergence of the Idea of Human Development

Although "[m]eeting . . . basic human needs became the dominant development priority" in the 1970s, this "strategy was killed off within five years" due to "a return to economic orthodoxy" in the 1980s.[93] During the 1980s and 1990s, in response to the debt crisis, "[s]tructural adjustment dominated economic policymaking in Latin America and Africa,"[94] leading to a rise in poverty.[95] Alongside this "ideological shift in favour of the role of markets in economic management, there was an important evolution in development thinking — focusing on people-centred approaches. The work of the human development approach contributed significantly to this trend."[96] Then, in 1990, a team working under the auspices of the United Nations Development Program (UNDP), with Amartya Sen as an adviser,[97] issued the first

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[91] HAQ, *supra* note 1, at 3.

[92] Though certainly not all of them. RICHARD JOLLY, LOUIS EMMERIJ & THOMAS G. WEISS, UN IDEAS THAT CHANGED THE WORLD 193 (2009) ("Many still argue that economic growth will bring the other things necessary for people to live the good life. The appeal of 'trickle-down' — like neoclassical economics — is not just the analytical strength of the economic theory, which was developed in some of the best universities of the world, but also the way that its priorities match the economic and political interests and economic ideology of the major powers and more developed countries."); *see* Desmond McNeill, *"Human Development": The Power of the Idea*, 8 J. HUM. DEV. 5, 13 (2007) ("[T]he concept human development, being more explicitly opposed to another — arguably the dominant — perspective, is less susceptible to distortion.").

[93] JOLLY, EMMERIJ & WEISS, *supra* note 92, at 187; *see id.* at 193 (further explaining this point).

[94] *Id.* at 187; *see id.* at 193 (further explaining this point).

[95] Richard Ponzio, *The Advent of the Human Development Report*, *in* PIONEERING THE HUMAN DEVELOPMENT REVOLUTION, *supra* note 73, at 88, 90.

[96] Sakiko Fukuda-Parr, *The Intellectual Journey Continues: Today's Global Agenda and the New Frontiers of Human Development*, *in* PIONEERING THE HUMAN DEVELOPMENT REVOLUTION, *supra* note 73, at 223, 246–47; *see* HAQ, *supra* note 1, at 24–25; Ranis, Stewart & Dong, *supra* note 73, at 171–72.

[97] JOLLY, EMMERIJ & WEISS, *supra* note 92, at 188; *see* Fukuda-Parr, *supra* note

Human Development Report (HDR) "partly in response to this inhospitable environment."[98]

> [T]he first annual Human Development Report . . . promoted a comprehensive vision and an alternative to neoliberal analysis and policy. The reports of the series brought the concept of human development to worldwide attention and gave it economic breadth and philosophical depth. They also attracted exceptional media attention in both developed and developing countries. In addition to presenting a new paradigm for economic and social development, successive reports expounded the approach in relation to key areas:

96, at 226 (describing Amartya Sen as a "long standing friend" of Mahbub ul Haq who "played a key role in developing the *HDR*s and in defining the concept and measurement of human development"; Sen is also described as playing an important role in three HDRs that "expanded the conceptual foundations of the human development approach" in the early 2000s by focusing on human rights, cultural liberty, and democracy).

The HDRs typically contain a caveat that they do not necessarily reflect the views of the UNDP but only those of the team that produced them. Yet, "[t]he independence and integrity of its authors has indeed been the strength of the HDR." McNeill, *supra* note 92, at 11–12. In fact, when describing the history leading up to the first HDRs, Richard Ponzio states:

> To serve the interests of the global community, [Mahbub ul Haq] felt that the report would need to promote a candid, uninhibited policy dialogue on the state of people's well-being instead of only on the state of national economies. Consequently, Haq sought and successfully secured from Draper [the UNDP administrator] complete intellectual freedom and editorial independence.

Ponzio, *supra* note 95, at 89. For example, the 1990 HDR contains the following caveat in its foreword: "The views expressed in this Report are those of the team and not necessarily shared by UNDP or its Governing Council or the member governments of UNDP. The essence of any such report must be its independence and its intellectual integrity." William H. Draper III, *Foreword* to U.N. DEV. PROGRAM, HUMAN DEVELOPMENT REPORT 1990, at iii, iv (1990) [hereinafter 1990 HDR].

[98] JOLLY, EMMERIJ & WEISS, *supra* note 92, at 187.

> What was the state of the world — or, more specifically, the world of development policy — at that time (i.e. the late 1980s)? This was the period of structural adjustment, and human development can rightly be seen as a reaction against these policies, and the ideas on which they were based. It was also a reaction against the predominance of concern for economic growth, and more specifically against the policies of structural adjustment.

McNeill, *supra* note 92, at 10. For further description of the motivation behind the creation of the HDRs, *see generally* Ponzio, *supra* note 95.

> inequality, public finance, participation, gender, economic growth, consumption, globalization, technology, culture, human rights, and international reform and cooperation.[99]

The introduction of the HDR led to the production of individual country human development reports, to the writing of "[n]umerous books and articles about human development," to the launch of the *Journal of Human Development* in 2000, and to the creation of "[a]n International Association for Human Development Capabilities [that] now has a membership approaching a thousand or so members in seventy countries . . . ."[100] In short, "[t]here can be little doubt that the concept of 'human development' has had a profound influence on thinking about development."[101]

Even though the HDRs are produced independently of the UNDP,[102] the United Nations' imprimatur has been instrumental in the rapid spread of the idea of human development:

> The UNDP's administrative and financial support proved critical for the rapidity with which human development ideas were promoted and caught on worldwide. This made possible a widespread program of advocacy and outreach. If the ideas of human development had been developed and promoted

[99] JOLLY, EMMERIJ & WEISS, *supra* note 92, at 187.

[100] *Id.* at 187–88. "In addition to the HDR, nearly 500 *National Human Development Reports* have been produced. In his history of the UNDP, Craig Murphy notes that on 29 November 2005, the Google search engine found two million pages that mention at least one HDR — an indicator of its extraordinary success." McNeill, *supra* note 92, at 10 (citation omitted). Copies of more than 600 national human development reports can be accessed through the UNDP's web site. *Human Development Reports*, UNDP, http://hdr.undp.org/en/reports (follow "National Reports" in the left frame) (last visited Aug. 5, 2012).

[101] McNeill, *supra* note 92, at 6. Or, as Mahbub ul Haq himself put it:

> "This book traces my intellectual journey — and the world's — through a profound transition in development thinking in recent decades . . . on the quiet emergence of human development as a major focus of economic thinking. Only 30 years ago, it would have been heresy to challenge the economic growth school's tacit assumption that the purpose of development is to increase national income. Today, it is widely accepted that the real purpose of development is to enlarge people's choices in all fields — economic, political, cultural."

Fukuda-Parr, *supra* note 96, at 224 (quoting HAQ, *supra* note 1, at xvii); *see* HAQ, *supra* note 1, at 43–45 (further describing the impact of the HDRs).

[102] *See supra* note 97.

> only in a university or research institute, the results would most probably never have been the same. The UN gave them legitimacy and the media gave them attention.[103]

C. Defining Human Development

1. A Starting Point

Despite a lack of consensus regarding development policy,[104] the previous section demonstrates that "new trends are emerging" in the development literature, including an increasing recognition that (1) there is more to development than economic growth and per capita income and (2) "captur[ing] the 'missing' dimensions . . . is increasingly feasible."[105] But if economic growth provides us with a narrow view of human development and there is a trend toward taking a broader view, then what does that broader view of human development look like?

To begin this description, let us start with a statement from the first HDR:

> People are the real wealth of a nation. The basic objective of development is to create an enabling environment for people to enjoy long, healthy and creative lives. This may appear to be a simple truth. But it is often forgotten in the immediate concern with the accumulation of commodities and financial wealth.[106]

It is worth quoting further from the 1990 HDR because it contains the "richest introduction of any of the reports."[107] In an especially relevant passage, the 1990 HDR explains how people are often forgotten in debates over development:

> Technical considerations of the means to achieve human development — and the use of statistical aggregates to

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[103] JOLLY, EMMERIJ & WEISS, *supra* note 92, at 191; *see also* Ponzio, *supra* note 95, at 105.

[104] *See supra* note 92.

[105] 2010 HDR, *supra* note 6, at 19–20; *see* Fukuda-Parr, *supra* note 96, at 251 (describing the different competing/intertwined strands of the current development discourse).

[106] 1990 HDR, *supra* note 97, at 9.

[107] UNDP, *supra* note 72, at 3.

> measure national income and its growth — have at times obscured the fact that the primary objective of development is to benefit people. There are two reasons for this. First, national income figures, useful though they are for many purposes, do not reveal the composition of income or the real beneficiaries. Second, people often value achievements that do not show up at all, or not immediately, in higher measured income or growth figures: better nutrition and health services, greater access to knowledge, more secure livelihoods, better working conditions, security against crime and physical violence, satisfying leisure hours, and a sense of participating in the economic, cultural and political activities of their communities. Of course, people also want higher incomes as one of their options. But income is not the sum total of human life.[108]

As this passage makes clear, economic growth is a means of advancing human development but not the end of human development. In other words, "[t]he purpose of development is to enlarge all human choices, not just income."[109] Far from being "antigrowth," however, the human development approach focuses on both the quality and the distribution of growth because, "to fully exploit the opportunities for improved well-being that growth offers, it needs to be properly managed."[110] Attention must be paid to enhancing people's ability to participate in growth, to the distribution of income and assets, to using growth to support and sustain advances in human development that could (and did) begin without economic growth, and to the empowerment of people.[111] Empowerment is important because, "[i]f people can exercise their choices in the political, social and economic spheres, there is a good prospect that growth will be strong, democratic, participatory and durable."[112]

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[108] 1990 HDR, *supra* note 97, at 9; *see* Fukuda-Parr, *supra* note 96, at 236 (quoting HAQ, *supra* note 1, at 14) (similar statement).

[109] HAQ, *supra* note 1, at 21.

[110] *Id.*; *see id.* at 15 ("Rejecting an automatic link between income expansion and flourishing human lives is not rejecting growth itself."); *see id.* at 16 ("[T]he human development paradigm embraces all of society — not just the economy. The political, cultural and social factors are given as much attention as the economic factors. In fact, study of the link between the economic and the non-economic environment is one of the most fascinating and rewarding aspects of this new analysis . . . .").

[111] *Id.* at 20–21.

[112] *Id.* at 22.

2. A Dynamic Approach: Stability and Flexibility

Over the years, the individual HDRs have "emphasized different aspects of human development," but "the definition of human development has been fairly stable over time."[113] Development economist Sakiko Fukuda-Parr nicely encapsulates the coexistence of stability and flexibility in the human development approach when she states that "[t]he evolution of the human development approach has been a process where the ends have been defined consistently while means have changed in response to new policy challenges."[114] In keeping with the "dynamic, not calcified" approach of human development, the 2010 HDR reaffirmed and refined the definition of human development:

> Human development is the expansion of people's freedoms to live long, healthy and creative lives; to advance other goals they have reason to value; and to engage actively in shaping development equitably and sustainably on a shared planet. People are both the beneficiaries and drivers of human development, as individuals and in groups.[115]

As this passage indicates, political participation, cultural expression, empowerment, and each individual's role as an agent of change — and not just "as [a] beneficiar[y] of economic and social processes" — are all important components of human development.[116] Conversely, the concentration of political power in the hands of a few is worrisome, making "changes in power relations central to the agenda for human development."[117] In other words, democratic participation and debate are centrally important to human development.[118]

3. Intellectual Grounding: Sen's Capability Approach

This people-centered conceptualization of human development is strongly grounded in Amartya Sen's capability approach,[119] which

[113] UNDP, *supra* note 72, at 12. For a survey of the definition of human development in each of these reports, see *id.* at 5–12.

[114] Fukuda-Parr, *supra* note 96, at 235.

[115] 2010 HDR, *supra* note 6, at 22; *see* UNDP, *supra* note 72, at 40.

[116] Fukuda-Parr, *supra* note 96, at 237–38.

[117] *Id.* at 240; *see id.* at 238.

[118] SEN, *supra* note 71, at 31–34, 146–59; *see generally* AMARTYA SEN, THE IDEA OF JUSTICE 321–54 (2009).

[119] 2010 HDR, *supra* note 6, at 16; *see* HAQ, *supra* note 1, at 16 ("[P]eople are

focuses on "the 'capabilities' of persons to lead the kind of lives they value — and have reason to value."[120] This notion of "capabilities" is, in turn, grounded in the lived reality; that is, "[a] person's 'capability' refers to the alternative combinations of functionings that are feasible for her to achieve."[121] For example, if we are to focus on a disabled individual's "real opportunity to pursue her objectives," then we must account for the fact that she might, in reality, have a lesser chance to achieve her objectives than would "an able-bodied person with a smaller basket of primary goods."[122] "Capability is thus a kind of freedom: the substantive freedom to achieve alternative functioning combinations (or, less formally put, the freedom to achieve various lifestyles)."[123]

Applying this approach to the development context, Sen "treats the freedoms of individuals as the basic building blocks."[124] He views individual freedoms as having both a constitutive and an instrumental role in development.[125] Sen explains the constitutive role of freedom as follows:

> The constitutive role of freedom relates to the importance of substantive freedom in enriching human life. The substantive freedoms include elementary capabilities like being able to avoid such deprivations as starvation, undernourishment, escapable morbidity and premature mortality, as well as the freedoms that are associated with being literate and numerate, enjoying political participation and uncensored speech and so on.[126]

Yet freedom is not only the "*primary end*" of development but also its

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moved to centre stage. Development is analysed and understood in terms of people."); *see generally* Amartya Sen, *Capability and Well-Being*, *in* THE QUALITY OF LIFE 30 (Martha Nussbaum & Amartya Sen eds., 1993). For a summary of Sen's work on the capability approach as it relates to human development, tracing it from the publication of a 1979 lecture through the publication of THE IDEA OF JUSTICE in 2009, see UNDP, *supra* note 72, at 24–30. For a more general survey of Sen's and others' work on the capability approach, see Ingrid Robeyns, *The Capability Approach: A Theoretical Survey*, 6 J. HUM. DEV. 93 (2005).

120 SEN, *supra* note 71, at 18.

121 *Id.* at 75.

122 *Id.* at 74.

123 *Id.* at 75.

124 *Id.* at 18.

125 *Id.* at 18–19, 36–40, 246.

126 *Id.* at 36.

"*principal means*."[127] Thus, freedoms also have a role to play in contributing, "directly or indirectly, to the overall freedom people have to live the way they would like to live."[128] For example, "development *of* the people . . . also facilitate[s] development *by* the people; healthy and educated people [are] better able to make choices for themselves."[129] Sen groups instrumental freedoms into five basic categories: political freedoms (e.g., civil rights, democracy, and freedom of the press), economic facilities ("opportunities . . . to utilize economic resources for the purpose of consumption, or production, or exchange"), social opportunities (e.g., education and health care), transparency guarantees (i.e., the openness necessary for mutual trust), and protective security (i.e., the social safety net).[130]

4. The Dimensions of Human Development

As Fukuda-Parr explains, "the different dimensions of human development are complementary. Much of the policy challenge for human development lies in understanding the instrumentality of these different dimensions."[131] Similarly, Sabina Alkire has observed:

> Human development is multidimensional and its components are interconnected. Thus analyses and policies to advance human development take a holistic view. They identify how powerful means such as economic growth best advance human development across time. They clarify the sequence and type of investments that expand key capabilities most effectively. And they engage in periodic public debate about values and priorities.[132]

Echoing the definition of human development quoted above from the 2010 HDR, Alkire also notes that "[p]olicies to advance human development often consider principles such as poverty reduction, equity, efficiency, participation, the sustainability of outcomes across time and on this planet, responsibility and respect for human rights."[133]

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[127] *Id.*
[128] *Id.* at 38.
[129] Fukuda-Parr, *supra* note 96, at 241.
[130] SEN, *supra* note 71, at 38–40.
[131] Fukuda-Parr, *supra* note 96, at 236.
[132] UNDP, *supra* note 72, at 44.
[133] *Id.* at 42.

Because human development is an ongoing project, sustainability is a key concern, and one that is intimately linked with equity.[134] After all, if current advances come at the expense of future generations, then "future generations are exposed to possibly catastrophic losses in human development."[135] By the same token, however, "in our anxiety to protect the future generations, we must not overlook the pressing claims of the less privileged today."[136] Thus, we must be concerned both about the equitable distribution of human development — that is, of the opportunity to lead worthwhile lives — among those currently inhabiting our planet (intragenerational equity) and about its equitable distribution between current and future generations (intergenerational equity).[137] Or, as Helen Clark has pointedly put it, "[w]e have a collective responsibility towards the least privileged among us today and in the future around the world — and a moral imperative to ensure that the present is not the enemy of the

[134] *See generally* U.N. DEV. PROGRAM, HUMAN DEVELOPMENT REPORT 2011: SUSTAINABILITY AND EQUITY: A BETTER FUTURE FOR ALL (2011) [hereinafter 2011 HDR] (focusing on issues of equity and sustainability, particularly as they relate to the environment).

[135] 2010 HDR, *supra* note 6, at 78.

[136] Sudhir Anand & Amartya Sen, *Human Development and Economic Sustainability*, 28 WORLD DEV. 2029, 2030 (2000).

[137] *See* 2010 HDR, *supra* note 6, at 72 ("Human development cannot be built on exploitation of some groups by others or on greater access to resources and power by some groups. Inequitable development is not human development."); *id.* at 19 ("Human development requires that people have the freedoms and choices to fulfil [sic] their needs, desires and wants. Of course, people still unborn cannot make decisions for themselves — but we can preserve the conditions of their future agency. Human development also signals that intragenerational equity is as important as intergenerational equity.").

> We have emphasized that sustainability is a matter of distributional equity in a very broad sense, that is, of sharing the capacity for well-being between present people and future people in an acceptable way—that is in a way which neither the present generation nor the future generations can readily *reject* . . . .
>
> There would, however, be something distinctly odd if we were deeply concerned for the well-being of the future — and as yet unborn — generations while ignoring the plight of the poor today. The moral obligation underlying sustainability is an injunction to preserve the capacity for future people to be as well off as we are. This has a terribly hollow ring if it is not accompanied by a moral obligation to protect and enhance the well-being of *present* people who are poor and deprived.

Anand & Sen, *supra* note 136, at 2038 (emphasis omitted); *see generally* SEN, *supra* note 71, at 248–52 (discussing sustainability).

future."[138]

D. Measuring Human Development

1. The Human Development Index

Contributors to the development literature have not only discussed this broader view of human development in the abstract, but they have also attempted to craft concrete metrics for measuring human development. For example, in 1990, the first HDR introduced the Human Development Index (HDI) in an effort to move past the development literature's narrow focus on economic growth and to expand the scope of development measures.[139] The HDI "proved to be a very powerful complement to the concept of human development," turning out to be both eye-catching and controversial.[140] The human development approach was successful because of "its ability to bridge the gap between research and policy. The concept 'human development', and the associated HDI, are seen as very relevant to development policy, while firmly grounded in academic terms."[141]

To better measure human development, the HDI combines information along three different dimensions. Recognizing that income has a role (but not the only role) to play in development, the HDI considers (1) per capita income, (2) schooling (both mean years of schooling and expected years of schooling), and (3) health (life expectancy at birth).[142] The HDI is meant to rival "the handy usability of the crude GNP . . . but, unlike GNP, without being oblivious of everything other than incomes and commodities."[143] Yet, as Sen himself has cautioned, "the huge breadth of the human development approach must not be confused, as it sometimes is, with the slender limits of the HDI."[144]

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[138] Helen Clark, *Foreword* to 2011 HDR, *supra* note 134, at iv, v.

[139] Amartya Sen, *Introduction* to 2010 HDR, *supra* note 6, at vi, vi. For a description of the thinking behind the creation of the HDI, *see generally* HAQ, *supra* note 1, at 47–50.

[140] McNeill, *supra* note 92, at 7.

[141] *Id.*

[142] 2010 HDR, *supra* note 6, at 13 fig.1.1, 15 box 1.2.

[143] Sen, *supra* note 139, at vi; *see also* JOLLY, EMMERIJ & WEISS, *supra* note 92, at 191 (quoting Mahbub ul Haq making a statement to the same effect).

[144] Sen, *supra* note 139, at vi. Indeed, in explaining why he opposes a "canonical" list of capabilities but supports the use of lists of capabilities for specific purposes, Sen relied upon the HDI as an example:

The 2010 HDR marked the twentieth anniversary of the HDI's introduction. The team writing the 2010 HDR took this occasion to engage in some retrospection and found a "lack of a significant correlation between economic growth and improvements in health and education."[145] For instance, the 2010 HDR compared and contrasted two countries—China and Tunisia—to demonstrate the disconnect between economic growth and improvements in health and education:

> In 1970 a baby girl born in Tunisia could expect to live 55 years; one born in China, 63 years. Since then, China's per capita GDP has grown at a breakneck pace of 8 percent annually, while Tunisia's has grown at 3 percent. But a girl born today in Tunisia can expect to live 76 years, a year longer than a girl born in China. And while only 52 percent of Tunisian children were enrolled in school in 1970, today's gross enrolment ratio is 78 percent, considerably higher than China's 68 percent.[146]

> [The HDI] was based on a very minimal listing of capabilities, with a particular focus on getting at a minimally basic quality of life, calculable from available statistics, in a way that the GNP or GDP failed to capture. Lists of capabilities have to be used for various purposes, and so long as we understand what we are doing (and in particular that we are getting a list for a particular reason, related to a particular assessment, evaluation, or critique), we do not put ourselves against other lists that may be relevant or useful for other purposes.

Amartya Sen, *Capabilities, Lists, and Public Reason: Continuing the Conversation*, FEMINIST ECON., Nov. 2004, at 77, 79; *see generally* Gustav Ranis, Frances Stewart & Emma Samman, *Human Development: Beyond the Human Development Index*, 7 J. HUM. DEV. 323 (2006) (demonstrating that a broader set of measures is necessary to assess a fuller definition of human development than the basic one employed for purposes of the HDI, but concluding that the HDI is superior to both per capita income and under-five mortality rates as a measure of a fuller definition of human development).

[145] 2010 HDR, *supra* note 6, at 4; *see id.* at 46–64 (explaining the data and reasoning supporting this conclusion). The 2010 HDR draws a distinction between levels of income and health and education, on the one hand, and changes in income and health and education, on the other. There is a positive correlation between a nation's level of income and its level of health and education; however, there is no significant correlation between change in income and change in health and education. *Id.* at 47.

[146] *Id.* at 47; *see* HAQ, *supra* note 1, at 40 ("For a long time, it was quietly assumed that high levels of economic growth would automatically translate into high

In fact, the 2010 HDR concluded that "human development is different from economic growth and substantial achievements are possible even without fast growth."[147]

2. Unmasking Unequal Distribution of Human Development

Economic measures may not only be limiting but also misleading. Per capita income, for instance, is nothing more than average income. Averages such as this can mask as much — or sometimes more — than they reveal.[148] In the case of income, averaging can mask profound levels of inequality in a society — and, of course, will completely miss inequalities along other lines (e.g., health, education, employment, and social acceptance).[149] Indeed, in discussing the ways in which average income can be misleading, the 2010 HDR points to the United States as an example of a country where "mean income is almost a third higher than median income, and the gap is growing."[150]

a. Taking Inequality into Account

To address such concerns, the 2010 HDR introduced a refined version of the HDI — the Inequality-adjusted HDI (IHDI).[151] After taking inequality along each of the dimensions of the HDI into account, "the global HDI of 0.62 in 2010 would fall to 0.49, which

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levels of human development. But that does not necessarily happen, so there is no automatic link between economic growth and human lives."); *id.* at 40–41 (providing examples).

[147] 2010 HDR, *supra* note 6, at 5.

> Although there is weak correlation between [economic prosperity and human development], the data shows that many developing countries do poorly on many social and human rights indicators in spite of growth. The obverse is true as well; with clear priorities, countries can make significant progress in human development even with slow economic growth, at least for a decade or so. Yet the pursuit of growth is typically taken as the central goal of economic policymaking. In contrast, the human development approach concentrates on people-focused objectives and emphasizes that economic and political actions should be treated as means to these human ends, not as ends in themselves.

JOLLY, EMMERIJ & WEISS, *supra* note 92, at 190.

[148] 2010 HDR, *supra* note 6, at 87.

[149] SEN, *supra* note 71, at 107–10.

[150] 2010 HDR, *supra* note 6, at 72.

[151] *Id.* at 7.

represents a drop from the high to the medium HDI category."[152] In 2010, the average loss in HDI due to inequality was 22%, and the losses ranged from a low of 6% to a high of 45%.[153]

A few examples may help to underscore the impact of inequality on measuring human development. Taking inequality into account, the United States would see its HDI drop by more than 11%, and it would fall nine places in the HDI ranking.[154] The Republic of Korea would see its HDI drop by nearly 17%, and it would fall 18 places in the HDI ranking.[155] Brazil would see its HDI drop by 27%, and it would fall 15 places in the HDI ranking.[156]

b. Taking Gender Inequality into Account

The 2010 HDR also introduced a more refined measure of gender inequality — the Gender Inequality Index (GII).[157] The GII takes account of three dimensions: (1) women's reproductive health (through maternal mortality ratios and adolescent fertility rates), (2) women's empowerment (through national parliamentary representation and educational attainment), and (3) women's labor force participation.[158] As measured by the GII, the average loss in achievement for the ten countries closest to gender equality was 23% while the average loss in achievement for the ten countries farthest from gender equality was 79%.[159]

Again, a few examples will help to underscore the impact of gender inequality on measuring human development. The United States ranks 4th in the HDI but only 37th in the GII, with a 40% loss in achievement due to gender inequality.[160] Qatar ranks 38th in the HDI (placing it in the very high human development category) but ranks 94th in the GII, with a 67% loss in achievement due to gender

152 *Id.*
153 *Id.* at 87.
154 *Id.* at 152.
155 *Id.*
156 *Id.* at 153.
157 *Id.* at 89–94.
158 *Id.* at 91 fig.5.3. Naturally, this measure fails to capture other dimensions of gender inequality, including occupational segregation, the gender wage gap, and the experience of non-elites as well as women's "time use, access to assets, domestic violence and local-level empowerment." *Id.* at 92, 94.
159 *Id.* at 93.
160 *Id.* at 156.

inequality.[161] More startlingly, Saudi Arabia ranks 55th in the HDI (placing it in the high human development category) but ranks 128th in the GII, with a 76% loss in achievement due to gender inequality.[162] Mexico ranks 56th in the HDI (also placing it in the high human development category) but ranks 68th in the GII, with a nearly 58% loss in achievement due to gender inequality.[163]

3. Further Enriching Human Development Measures

The 2010 HDR candidly recognizes the limits of these measures, stating that, "as with any aggregate measure and international comparison, it simplifies and captures only part of what human development entails."[164] There is much more to human development "than basic needs and social sector development."[165] Thus, the purpose of the HDI and the related measures discussed above "is not to build an unassailable indicator of well-being — it is to redirect attention towards human-centred development and to promote debate over how we advance the progress of societies."[166] Among other dimensions that the 2010 HDR acknowledges are important to human development are human rights and the political and social empowerment of groups of people, sustainability of production and impact on the environment, well-being, the availability of decent work, and addressing threats to the human development that has already been achieved.[167] In fact, the 2010 HDR included six new statistical tables that cover these additional dimensions.[168]

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[161] *Id.*

[162] *Id.* at 157.

[163] *Id.*

[164] *Id.* at 13.

[165] Fukuda-Parr, *supra* note 96, at 237.

[166] 2010 HDR, *supra* note 6, at 13; *see* Amartya Sen, *Human Rights and Capabilities*, 6 J. HUM. DEV. 151, 159 (2005) ("[T]he 'Human Development Index' was based on a very minimal listing of capabilities, with a particular focus on getting at a minimally basic quality of life, calculable from available statistics, in a way that the Gross National Product or Gross Domestic Product failed to capture.").

[167] 2010 HDR, *supra* note 6, at 17–19, 22, 85; *see generally* Sen, *supra* note 166 (describing the separate, yet complementary nature of human rights and the capabilities approach).

[168] 2010 HDR, *supra* note 6, at 137; *see* HAQ, *supra* note 1, at 67–75 (discussing the importance of, and potential metrics to be included in, a political freedom index, notwithstanding the controversy surrounding the creation of such an index). *But cf.* Philip Alston, *Towards a Human Rights Accountability Index*, 1 J. HUM. DEV. 249 (2000) (prepared for the UNDP Human Development Report Office) (questioning the feasibility of constructing an index comparing human rights performance among

Moreover, as mentioned above,[169] "there is not one 'fixed and forever' list of relevant dimensions or capabilities. This flexibility allows human development to be relevant in different cultural and national contexts. It also enables applications that address 'rich' countries and persons as well as poorer people and countries."[170] Providing the intellectual basis for this observation, Amartya Sen opposed a fixed list of dimensions of human development because that would be "to deny the possibility of fruitful public participation on what should be included and why."[171] Mahbub ul Haq, "the pioneer of the 'human development revolution,'"[172] also "often spoke about human development as an 'intellectual journey', along which new concepts, measures, and policy proposals would emerge."[173]

E. Lessons from the Development Literature

This "intellectual journey" has much to teach contributors to tax reform debates. Most immediately, the human development approach helps us to recognize that economic growth is a poor proxy for human progress. Yet, notwithstanding that the human development approach is designed to displace economic growth as *the* measure of human development, it does *not* reject the importance of economic growth to human development. Rather, the human development approach takes a holistic view and situates economic growth in context by recognizing that, even though economic growth may be a means to advance human development, there is far more to human progress than merely increasing average income.[174] It will be important for us to carry this idea of a more holistic view with us as we move into a discussion (in the next Part of this article) of what effects a more people-centered approach might have on tax reform debates.

As we consider these effects, the human development approach also has important lessons for us to keep in mind regarding the quality

countries and instead proposing an index of government accountability for human rights performance — initially to the international community and eventually to the people of the individual nation as well).

[169] *See supra* note 144 and accompanying text.

[170] UNDP, *supra* note 72, at 15 (citation omitted).

[171] Sen, *supra* note 144, at 77; *see also* Sen, *supra* note 166, at 157–60.

[172] Amartya Sen, *Foreword* to PIONEERING THE HUMAN DEVELOPMENT REVOLUTION, *supra* note 73, at x, x.

[173] Fukuda-Parr, *supra* note 96, at 223.

[174] As discussed above, this is a measure that, in any event, means little to those on the wrong side of the average and to those who value aspects of their lives that are unrelated to income.

and distribution of development. In contrast to measures of economic growth, which turn a blind eye to how the benefits of that growth are distributed among the populace, the human development approach recognizes that "[h]uman development is about sustaining positive outcomes steadily over time and combating processes that impoverish people or underpin oppression and structural injustice. Plural principles such as equity, sustainability and respect for human rights are thus key."[175] In keeping with these principles, the human development approach further recognizes the importance of intergenerational equity:

> If the basic concept is sustainable human development, each generation must meet its needs without incurring debts it cannot repay. That means avoiding the accumulation of environmental debts (by polluting or exhausting natural resources) as well as financial debts (through unsustainable borrowing), social debts (by neglecting to invest in human development) and demographic debts (by permitting unchecked population growth or urbanization).[176]

To anticipate the inevitable critiques from defenders of the status quo, let me clearly state that, viewed from this perspective, human development is not just a project for so-called developing countries.[177] In reality, all countries are "developing":

> [H]uman development pertains to all countries at all levels of development and, indeed, to all people including the wealthy and elite. Whereas the decision to give priority attention to the poor or relatively deprived may be one feature of human

[175] 2010 HDR, *supra* note 6, at 2; *see* HAQ, *supra* note 1, at 16–20 (enumerating equity, sustainability, productivity, and empowerment as key concepts for the human development approach); Sen, *supra* note 172, at xi–xii ("The *Human Development Reports* have to be judged, ultimately, not just as contributions to our knowledge and understanding (which, of course, they are), but also as robust instruments for making the world more liveable [sic] and less unjust. Not only did Mahbub make a path-breaking contribution to an epistemological advance, but he also helped to turn a page in informed practical reasoning.").

[176] HAQ, *supra* note 1, at 78.

[177] *See* Stewart, *supra* note 2, at 173 ("Tax reform discourse . . . participates in the conceptualization of developing and transition countries as '"backward," "primitive," "feudal," "medieval," "developing country," and "pre-industrial,"' hence representing them as deficient in relation to a 'Western' (i.e., 'developed,' or 'international') norm." (quoting SARA MILLS, DISCOURSE: THE NEW CRITICAL IDIOM 114, 117 (1997)).

> development in national applications — and commendable in them — one could also imagine a group meeting of OECD country leaders who wished to support the well-being of their citizens rather than merely add to their GDP. This too, would be human development.[178]

In emphasizing the universality of the human development approach, this passage unfortunately glosses over the fact that countries are not monoliths but groups of people. In other words, the divide between wealthier and poorer countries is not the only important divide. Even within wealthier countries such as the United States, the wealthy and privileged are only a portion of the population (and, numerically, may constitute only a small portion of the population). These internal divisions are also important to discussions of human development because "[t]he discipline of universalism requires us to extend the same concern for all human beings — irrespective of race, class, gender, nationality, or generation."[179] Or, as Sen has put it, even though the human development approach applies to all countries, it "is first and foremost an ally of the poor" and disadvantaged.[180]

Indeed, by some measures of human development, there are segments of the U.S. population that are worse off than those in so-called developing countries. For example, Amartya Sen points out that, although African Americans are on average richer than people in the so-called third world, they "have an *absolutely* lower chance of reaching mature ages than do people of many third world societies, such as China, or Sri Lanka, or parts of India."[181] Sen correctly notes that "the presence of such intergroup contrasts within the richer countries can be seen to be an important aspect of the understanding of development and underdevelopment."[182] Mahbub ul Haq notes that the 1993 HDR "brought out the HDI disparity among whites, blacks and hispanics [sic] in the United States. It pointed out that, if considered as separate nations, whites would outrank all other countries, blacks would rank number 31 (after Trinidad and Tobago),

[178] UNDP, *supra* note 72, at 53; *see* 1990 HDR, *supra* note 97, at 11 ("Human development is, moreover, concerned not only with basic needs satisfaction but also with human development as a participatory and dynamic process. It applies equally to less developed and highly developed countries."); SEN, *supra* note 71, at 6, 21–24, 126–27, 240–42, 285, 297–98.

[179] Anand & Sen, *supra* note 136, at 2040.

[180] SEN, *supra* note 71, at 144.

[181] *Id.* at 6; *see id.* at 21–24 (containing a fuller explanation of this point).

[182] *Id.* at 6.

and hispanics [sic] would rank number 35 (next to Estonia)."[183] Haq also notes that "gender-adjusted HDI comparisons have revealed the shocking reality that no country treats women as well as men."[184] Thus, it is worth underscoring that, by eschewing misleading averages and placing people at the center of the discussion, the human development approach helps us to bring the most vulnerable — for example, the poor, women, ethnic and racial minorities, and sexual minorities — to the front and center of discussions about development, no matter what country is concerned.[185]

At the beginning of his book *Reflections on Human Development*, Mahbub ul Haq makes an interesting observation that applied to the development debate then and applies equally to our tax reform debates now:

> Yet our preoccupation as economists is largely with saving and investment, exports and imports — and, of course, with that most convenient abstraction of all: the gross national product. When we do come to recognize the contributions of human beings as a means of development, we tend to treat them as almost residual elements.[186]

Rather than focusing on economic abstractions and treating real people as residual elements of development, the time has come for us to stop chanting the mantra of economic growth, to learn from the journey in the development literature away from an unbending focus on economic growth, and to return to an old idea that is new again by placing people at the heart of tax reform debates.[187] It is to this task that we turn next.

IV. SHIFTING THE FOCUS OF THE TAX REFORM DEBATE

What would the tax system look like if we put people (rather than

[183] HAQ, *supra* note 1, at 55.

[184] *Id.*

[185] 2010 HDR, *supra* note 6, at 5–6; *see* 2011 HDR, *supra* note 134, at 1 ("Disadvantaged people are a central focus of human development.").

[186] HAQ, *supra* note 1, at 4.

[187] "The rediscovery of human development is not a new invention." *Id.* at 13. Haq traces "[t]he idea that social arrangements must be judged by the extent to which they promote 'human good' . . . [back] to Aristotle." *Id.* He then traces it forward through the writings of Immanuel Kant, Adam Smith, Robert Malthus, Karl Marx, and John Stuart Mill. *Id.* For a similar tracing, see Anand & Sen, *supra* note 136, at 2030–31.

economic growth) at the center of tax reform debates? How would our tax system change if it were viewed not simply as a means of encouraging economic growth for the benefit of a few but as one instrument (among many) for advancing human development for all? What changes would be made to the tax system if we were to place those who are most disadvantaged in our society (instead of those who are most privileged) at the center of the debate?

These are the basic questions raised by this fundamental shift in the focus of the tax reform debate. In this short space, I can only hope to begin to ponder these questions. Thus, I have chosen to offer some preliminary thoughts in just one specific area, albeit an area of now seemingly perennial concern in U.S. debates over tax reform. This Part discusses the once again rising din of calls to eliminate tax expenditures. Eliminating tax expenditures — what are commonly referred to as tax "loopholes" or, even more pejoratively, "special interest loopholes"[188] — has become the holy grail of tax reform. Often, the crusade to close loopholes is portrayed as a means to an end — broadening the tax base in order to lower tax rates as a growth-enhancing measure.[189] As we will see, placing people at the center of tax reform debates has important ramifications in this area.

A bit of background is necessary before entering into a discussion of what a people-centered approach might have to say about tax expenditures. Accordingly, this section begins with a discussion of the popularization of tax expenditure analysis during the 1960s and 1970s as well as antecedent debates regarding the need to close loopholes in an effort to move toward a comprehensive tax base. Given that background and taking a holistic view that is in keeping with the human development approach, I then proceed to suggest that we

[188] "Too often the term 'special interest loopholes' has been used as a synonym for tax expenditures." John L. Buckley, *Tax Expenditure Reform: Some Common Misconceptions*, 132 TAX NOTES 255, 256 (July 18, 2011).

[189] "The Tax Reform Act of 1986 represented the crowning achievement in the forty-year effort to accomplish rate reduction alongside meaningful base broadening." Dennis J. Ventry, Jr., *The Accidental Deduction: A History and Critique of the Tax Subsidy for Home Mortgage Interest*, 73 LAW & CONTEMP. PROBS. 233, 274 (2010) (footnote omitted); *see also id.* at 255 ("Trading tax reform for tax cuts became the rallying cry for reformers of all stripes."); OECD, *supra* note 3, at 84 ("[A] broadening of the tax base increases tax revenues which can finance tax rate reductions, leading to further efficiency gains and reductions in tax avoidance and evasion incentives."); Gleeson & Pierson, *supra* note 47 ("House Speaker John A. Boehner, R-Ohio, on September 15 called for the Joint Select Committee on Deficit Reduction to propose broad-based tax reform that would lower income tax rates for individuals and corporations.").

should call a truce in the war on tax loopholes because tax expenditures are not some alien presence invading the tax domain but are a normal and natural part of the tax laws. Finally, I turn to discussing the impact on tax expenditures (and tax reform debates more generally) of shifting people — and, particularly, the most disadvantaged among us — to the center of the debate.

A. Tax Expenditures: Some Necessary Background

During the 1960s and 1970s, Stanley Surrey (at times, along with co-author Paul McDaniel) popularized tax expenditure analysis.[190] Surrey began speaking about the tax expenditure concept while serving in the Treasury Department in 1967.[191] In less than a decade, he spurred Congress to incorporate tax expenditure analysis into the annual budgeting process.[192] As Bernard Wolfman has remarked:

> Writers have not generally used quotation marks around the term "tax expenditure" since 1974, when Congress, spurred by Surrey, adopted the first tax expenditure budget. A rather broad spectrum of people now understand that the income tax system is used extensively to confer monetary benefits as real and as preferential as those conferred by direct expenditure, and that tax expenditures may be less open to debate, to scrutiny, and to review because they are tucked away in the 3,000-page tax code.[193]

Simply put, tax expenditure analysis "bifurcates tax provisions into two categories: (1) structural provisions and (2) tax preferences or tax penalties."[194] Structural provisions are those that form a

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[190] Anthony C. Infanti, *A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity*, 26 WHITTIER L. REV. 707, 717–19 (2005); *see* J. Clifton Fleming, Jr. & Robert J. Peroni, *Reinvigorating Tax Expenditure Analysis and Its International Dimension*, 27 VA. TAX REV. 437, 441 (2008) (stating that Surrey and McDaniel's work "succeeded in making TEA [tax expenditure analysis] a fixture in American income tax debates.").

[191] Bernard Wolfman, *Tax Expenditures: From Idea to Ideology*, 99 HARV. L. REV. 491, 491 (1985) (reviewing STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES (1985)).

[192] Infanti, *supra* note 190, at 717–19; Wolfman, *supra* note 191, at 497; Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §§ 3, 202, 301, 308, 88 Stat. 297, 299, 304, 306, 313 (codified as amended at 31 U.S.C. § 1302, 2 U.S.C. § 602, 31 U.S.C. §§ 1322, 1329 (2011)).

[193] Wolfman, *supra* note 191, at 497.

[194] Infanti, *supra* note 190, at 719.

necessary part of the revenue-raising structure of the tax.[195]

> In contrast, tax preferences and penalties constitute a residual category and include all provisions that are not considered to be structural in nature. Because tax preferences and penalties depart from the normative tax structure, they have the effect of either (1) providing governmental assistance to taxpayers by reducing their normative tax burden or (2) exacting a penalty from taxpayers by increasing their normative tax burden. Proponents of the tax expenditure concept reach this conclusion by separating tax preferences and penalties into their component parts.
>
> Under tax expenditure analysis, each taxpayer can be viewed as paying to the government the tax due under the normative income tax. Then, taxpayers who are entitled to tax preferences can be viewed as having received a payment from the government equal to the amount of the preference, and taxpayers who are subject to tax penalties can be viewed as having been required to make an additional payment to the government equal to the amount of the penalty. In the case of tax preferences, these two payments are, in practice, simply netted out for the sake of expediency (i.e., the tax payment from the taxpayer is simply reduced by the amount that the government owes the taxpayer). Thus, under tax expenditure analysis, tax preferences and penalties are the equivalent of direct expenditure programs and penalties, respectively.[196]

Focusing their attention mainly on tax preferences rather than tax penalties,[197] Surrey and McDaniel sometimes described tax expenditure analysis as a neutral tool to aid policymakers in deciding between spending through direct programs and spending through tax preferences.[198] Quite often, however, they embraced a more absolutist view of tax preferences, touting their endemic inequity and inefficiency and calling for a nearly blanket elimination of them.[199]

[195] *Id.* at 720.

[196] *Id.* at 721–22 (footnotes omitted).

[197] *Id.* at 725.

[198] *Id.* at 730–31.

[199] *Id.* at 731–36; *see* Fleming & Peroni, *supra* note 190, at 441–42 ("Indeed, for Surrey, the list of acceptable tax expenditures was so short that the practical effect of TEA was to reject almost any income tax provision characterized as a tax

The following paragraphs briefly summarize the reasons why Surrey and McDaniel took such a dim view of tax preferences on equity and efficiency grounds.

Surrey and McDaniel found tax preferences to be inequitable for a number of reasons. First, tax preferences that take the form of an exclusion or deduction result in an "upside-down" distribution of the tax benefit.[200] In other words, because the value of deductions and exclusions is directly related to a taxpayer's marginal tax rate, taxpayers with higher marginal tax rates reap greater benefits from deductions and exclusions than taxpayers with lower marginal tax rates.[201] Second, tax preferences that take the form of exclusions, deductions, or exemptions "automatically exclude nontaxpayers from receiving any benefits whatsoever."[202] Third, tax preferences treat "taxpayers with the same level of income differently based on the uses to which they put their income."[203]

Surrey and McDaniel found tax preferences to be inefficient on a number of different grounds. They argued that some tax preferences are inefficient because they do not induce the desired behavior but merely pay the taxpayer to engage in behavior that she would have engaged in even without the tax benefit.[204] They argued that other tax preferences are inefficient because their cost (i.e., the foregone tax revenue) exceeds their benefit (i.e., the value of the behavior induced).[205] And they argued that some tax preferences are inefficient because they provide a tax benefit to middlemen who are to deliver the government assistance to the intended beneficiary.[206]

For Surrey and McDaniel, eliminating tax preferences would have the collateral benefit of simplifying the tax system.[207] The tax system is inherently complex because it "must track the complexity of the myriad of economic arrangements that taxpayers create."[208] Surrey and McDaniel argued that tax preferences unnecessarily add to this complexity by importing into the income tax all of the additional

expenditure.").

200 Infanti, *supra* note 190, at 732.

201 *Id.* at 728.

202 *Id.* at 732.

203 *Id.* at 733.

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

208 *Id.*

complexities associated with spending programs.[209] They further argued that these additional complexities are multiplied when "tax reformers seek to limit the adverse effects of the tax expenditure on tax equity. The net result is a tax system of ever-increasing complexity and financial assistance programs that are often irrational and sometimes counterproductive."[210]

Even before Stanley Surrey coined the term "tax expenditure,"[211] however, Boris Bittker had penned an article describing the repeated attacks on "the 'exceptions,' 'preferences,' 'loopholes,' and 'leakages' in the income tax provisions of the Internal Revenue Code" following World War II.[212] According to Bittker, the "'comprehensive tax base' . . . ha[d] come to be the major organizing concept in most serious discussions of our federal income tax structure" during that period.[213] In fact, many of the same arguments that Surrey and McDaniel later proffered against tax preferences had already been made by these CTB advocates.[214]

In contrast to Surrey and McDaniel and the earlier CTB advocates, Bittker argued that moving toward a CTB patterned after the Schanz-Haig-Simons economic definition of income would be no panacea.[215] He contended that a CTB would not improve our tax system by reducing its complexity.[216] To the contrary, he argued that a

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[209] *Id.*

[210] SURREY & MCDANIEL, *supra* note 191, at 93.

[211] Infanti, *supra* note 190, at 717; Daniel N. Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 TAX L. REV. 187, 200 (2004) (dating Surrey's speech in which he called for a "tax expenditure budget" to November 1967). Bittker's article appeared months earlier in the March 1967 issue of the *Harvard Law Review*. *See infra* note 212.

[212] Boris I. Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925, 925 (1967).

[213] *Id.*

[214] *Compare id.* at 926–27 *with* Infanti, *supra* note 190, at 731–36.

[215] *See* Bittker, *supra* note 212, at 933 ("I do not suggest that the advocates of the 'broad base' approach have explicitly asserted that the way to extirpate all 'preferences' and thus to 'restore' the tax base is to repeal all substantive parts of existing law except section 61(a) and the business expense and loss provisions, or to enact the Haig-Simons or National Income Division definition. These seem to me the directions in which they point, however, and I have found in their writings no other standards by which 'preferences' can be infallibly identified."). Notably, Bittker employed the Schanz-Haig-Simons definition of income as a foil throughout his article, and Surrey and McDaniel clearly adopted that definition as their starting point in separating out the structural provisions of the income tax from tax preferences and penalties. *Id. passim*; Infanti, *supra* note 190, at 720.

[216] Bittker, *supra* note 212, at 934 ("[T]hose who continue, in defiance of all

CTB "would be a disaster" because tax preferences are an unavoidable part of our tax system. The key is not to eliminate all preferences but to examine each of them separately to determine which should be kept and which should be discarded. Or, in Bittker's own words: "[T]here are 'preferences' and 'preferences'; some are objectionable, some are tolerable, some are unavoidable, and some are indispensable. A truly 'comprehensive' base, in short, would be a disaster."[217]

Bittker further criticized the CTB advocates for their logical inconsistency. CTB advocates openly attacked some preferences and loopholes (e.g., the exclusions for municipal bond interest and social security payments)[218] but ignored others that a rigorous application of CTB would also require to be eliminated (e.g., the personal and dependency exemptions, the exclusion for life insurance, and the exclusion for gifts and bequests).[219] But logical inconsistency was not unique to CTB advocates operating before Stanley Surrey came onto the scene. The Tax Reform Act of 1986 (1986 Act), which is now often remembered as a golden moment of base broadening through the closing of loopholes,[220] was more an exercise in political horse trading

experience, to hope for a simplified tax structure in a complex society are doubly deluded, in my view, if they believe that a CTB will make a significant contribution to simplification. Most of our troublesome complexities concern issues that are either independent of the definitional criteria or unavoidable once we accept the departures that even the most committed believers in a CTB accept as desirable or necessary.").

217 *Id.* at 982.

218 *Id.* at 934.

219 *Id.* at 940–46.

220 *See, e.g.*, Jeremy Scott, *How Much of TRA '86 Remains Intact After 25 Years?*, 133 TAX NOTES 261, 261 (Oct. 17, 2011) ("The Tax Reform Act of 1986 was a landmark achievement. It greatly simplified the tax code, eliminating numerous tax expenditures and lowering rates. . . . [T]he ghost of 1986 still haunts tax reform efforts today. But repeating the success of 1986 in today's climate might not be possible."); Jeremy Scott, *Taxes, Debt, and Passing the Buck*, 131 TAX NOTES 773, 773 (May 23, 2011) ("Much of the tax reform debate seems to be focused on how to recreate the 1986 effort to broaden the base and lower rates. In fact, the Simpson-Bowles commission's proposal essentially tried to do just that by eliminating tax expenditures and dramatically lowering personal and corporate income tax rates."); Daniel N. Shaviro, *1986-Style Tax Reform: A Good Idea Whose Time Has Passed*, 131 TAX NOTES 817, 817 (May 23, 2011) ("TRA 1986 has remained a canonical symbol of high-minded legislative achievement."); *id.* at 842 ("The startling success of the 1986 tax reform process continues to transfix modern-day proponents of income tax base broadening."); Joseph J. Thorndike, *Historical Perspective: Why Liberals Should Like Tax Reform*, 129 TAX NOTES 1172, 1172 (Dec. 13, 2010) ("In 1986 the stars aligned and champions of classic tax reform found an opening for their agenda. Leveraging popular outrage over 'loopholes,' the reformers of 1986 defied the iron rules of

than an attempt to move toward a theoretically perfect and logically consistent CTB devoid of tax expenditures.[221]

Bittker was an early — but far from the only — critic of tax expenditure analysis.[222] I have undertaken a relatively comprehensive summary of these critiques elsewhere.[223] For purposes of this discussion, it is important to note that many of the critiques of tax expenditure analysis revolve around the (in)feasibility of drawing a line between (1) the structural provisions of the income tax and (2) tax preferences.[224] Yet, notwithstanding a long parade of critics over a span of decades, talk of closing loopholes and broadening the tax base has not abated, but only grown more frequent.

The increasing focus on tax expenditures should come as no surprise. After all, the absolute number of tax expenditures doubled between 1974 and 2004.[225] In addition, measuring the resulting revenue losses as a share of gross domestic product, tax expenditures recovered more than half of the decline that followed the 1986 Act's hallowed efforts at closing loopholes.[226] Furthermore, from 1996 through 2003, the outlay equivalent for tax expenditures (i.e., the amount that it would cost to operate an equivalent direct spending

lawmaking and influence peddling. It was truly remarkable, a once-in-a-generation achievement.").

[221] *See generally* JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM (1987).

[222] J. Clifton Fleming, Jr. & Robert J. Peroni, *Can Tax Expenditure Analysis Be Divorced from a Normative Tax Base?: A Critique of the "New Paradigm" and Its Denouement*, 30 VA. TAX REV. 135, 140–41 (2010) (describing the general tone of the literature on tax expenditures as "disparaging").

[223] Infanti, *supra* note 190, at 736–44; *see* Fleming & Peroni, *supra* note 190, at 443 ("TEA was rigorously criticized from its inception and continues to draw negative reviews.").

[224] Infanti, *supra* note 190, at 737; Fleming & Peroni, *supra* note 222, at 142 ("The strongest attacks . . . have focused on the TEA baseline.").

[225] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-690, GOVERNMENT PERFORMANCE AND ACCOUNTABILITY: TAX EXPENDITURES REPRESENT A SUBSTANTIAL FEDERAL COMMITMENT AND NEED TO BE REEXAMINED 19, 21–22 (2005). Interestingly, "[o]f the 146 tax expenditures listed by Treasury in the President's fiscal year 2006 budget, 32 percent were on the first list in 1974, 23 percent were added between 1975 and 1986, and 45 percent were added since 1986." *Id.* at 22.

[226] Allison Rogers & Eric Toder, *Trends in Tax Expenditures: 1985–2016*, TAX POLICY CTR. 8 (Sept. 16, 2011), http://www.taxpolicycenter.org/UploadedPDF/412404-Tax-Expenditure-Trends.pdf. For a discussion of the problems inherent in summing up the revenue losses from tax expenditures, see *id.* at 2; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 225, at 19–21.

program) actually exceeded direct discretionary spending.[227] Indeed, the Government Accountability Office observed that, in 2004, the outlay equivalent for the home mortgage interest deduction (which is classified as a tax expenditure) was $61.5 billion, "compared to $45 billion in outlays for the Department of Housing and Urban Development, which is responsible for, among other things, mortgage credit and housing assistance programs."[228]

As one commentator has (however ahistorically) noted, "[t]he current tax reform debate is unique in one respect: It seems to be almost completely focused on tax expenditures."[229] Examples of this rhetorical focus abound and can be easily found in the sources drawn upon in the discussion in Part II.A above. For example, President Bush's tax reform panel counted tax expenditures among "the worst features of our current income tax system."[230] Professor Graetz, in advocating a move away from an income tax toward a consumption tax, described our reliance on tax expenditures as being "about as successful a solution to our national needs as handing out more gunpowder at the Alamo."[231] More recently, House Speaker John Boehner said that "'[t]ax reform should deal with the whole tax code, both the personal side and the corporate side, and it should result in a code that is simpler and fairer to everyone' . . . . He added that it would be necessary to eliminate 'deductions, credits, and special carveouts [sic] in our tax code' to accomplish that goal."[232] Furthermore, Senator Carl Levin has made several proposals that he has argued would move toward "ending unfair tax expenditures and loopholes that disadvantage average taxpayers."[233] These views are echoed and amplified by the general public, as evidenced by the number of letters sent to the editors of newspapers in 2011 calling for the elimination of tax loopholes, as talk of tax reform intensified.[234]

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[227] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 225, at 35–36.

[228] *Id.* at 40.

[229] Buckley, *supra* note 188, at 257.

[230] PRESIDENT'S ADVISORY PANEL ON FED. TAX REFORM, *supra* note 4, at 156.

[231] GRAETZ, *supra* note 36, at 13.

[232] Gleeson & Pierson, *supra* note 47, at 1204.

[233] *Id.* (quoting *Sen. Levin Sends 7 Tax Proposals to Joint Select Committee*, 2011 TNT 180-47 (Sept. 15, 2011)).

[234] *E.g.*, Jim Craig, Letter to the Editor, *Squeezed by Uncle Sam*, ST. LOUIS POST-DISPATCH, Apr. 19, 2011, at A12 ("First, we need to eliminate the tax loopholes that millionaires and big corporations use to avoid paying taxes. Second, we need to stop using the tax code to give away money. If you get back more than what you pay in taxes, that's not a tax refund, that's public assistance. I have no problem with helping the poor, but let's stop using the tax code to do it."); L. Pharris Knight, Letter to the

B. Calling a Truce

As Boris Bittker suggested,[235] the perennial focus on tax expenditures is not, in itself, a problem; rather, the problem lies in the purpose of focusing on them.[236] In tax reform debates, the purpose of focusing on tax expenditures is to eliminate them. This and the next section explain why, instead of aiming to eliminate most or all tax expenditures, we should accept that tax expenditures are an ineluctable part of our tax system. This explanation draws upon the human development approach's combination of theory with pragmatism as well as its eschewal of blinkered vision in favor of taking a holistic view of an issue. Once we accept that tax expenditures have a natural place in our tax system, we can begin to consider how to rehabilitate and reform tax expenditures so that they coordinate well with nontax efforts to advance human development.

1. Tax Exceptionalism

To paraphrase Antony in Shakespeare's *Julius Caesar*, contributors to tax reform debates generally come to bury tax expenditures, not to praise them.[237] As the discussion in the previous section illustrates, the movement to eliminate tax expenditures is

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Editor, *It's Time to Stand Ground*, ARK. DEMOCRAT-GAZETTE, July 30, 2011, at 21 ("It is also time to eliminate the tax loopholes for the rich like corporatejet [sic] deductions, country-club memberships, car allowances and other perks. That is an insult to me and every hardworking American out there."); Glenn Lock, Letter to the Editor, *Don't Discriminate, Tax it All*, PATRIOT NEWS (Harrisburg, Pa.), Dec. 6, 2011, at A14 ("Tax it all. Eliminate tax loopholes."); John Kujanek, Letter to the Editor, *Make Corporations Act in Our Interest*, S.F. CHRON., Dec. 10, 2011, at A11 ("Congress must eliminate tax loopholes"); L. Dean Murphy, Letter to the Editor, *Debt-Reduction Tax and Other Ideas to Save the U.S.*, ORLANDO SENTINEL, Aug. 7, 2011, at A19 ("Enact a corporate flat tax to eliminate tax loopholes."); Gary Poduska, Letter to the Editor, *Eliminate Tax Loopholes*, THE RECORD (Bergen County, N.J.), Nov. 28, 2011, at A13 ("Rather than declaring class warfare, President Obama and Congress should overhaul the 25,000-page tax code and eliminate all loopholes to ensure that all Americans pay their 'fair share' of taxes."); Pat Johns, Letter to the Editor, *Fairness Demands Federal Tax Reform*, ROANOKE TIMES, Aug. 10, 2011, at A16 ("Congress needs to eliminate tax loopholes that the rich enjoy").

[235] *See supra* text accompanying note 216.

[236] After all, as Amartya Sen has said, "[t]o ask how things are going and whether they can be improved is a constant and inescapable part of the pursuit of justice." SEN, *supra* note 118, at 86.

[237] WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2 ("I come to bury Caesar, not to praise him.").

motivated — explicitly or implicitly and to a greater or lesser extent — by the notion that the income tax can be made fairer, more efficient, and more administrable by adopting "a 'neutral, scientific [i.e., economic] definition of . . . income.'"[238] Naturally, academic commentators are the ones who tend to rely explicitly upon an economic or "scientific" definition of income as their baseline in critiquing tax expenditures.[239] Lay commentators (whether politicians or members of the general public) do so only implicitly, as they advocate for the elimination of tax "loopholes" — a pejorative term that evokes a gap in, or departure from, the theoretically appropriate tax base.[240] Moreover, the call to eliminate tax expenditures in order to move toward a more neutral, scientific vision of the tax base is often selectively made, targeting some tax preferences but leaving others untouched.[241] In some cases, the reason for this selectivity is unexplained;[242] in others, it is seemingly a matter of self-interest;[243] and, in yet others, it is more principled (e.g., calling for the repeal only of tax expenditures whose costs outweigh their benefits).[244]

The basic problem with this view is that it is founded upon tax "exceptionalism" — the notion that tax law is unique and different from other areas of U.S. law.[245] David Weisbach and Jacob Nussim

[238] Abreu & Greenstein, *supra* note 3, at 321 (quoting Bittker, *supra* note 212, at 925); *see also* STAFF OF JOINT COMM. ON TAXATION, 110TH CONG., PUB. NO. JCX-37-08, A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS 18 (Joint Comm. Print 2008) ("Surrey further believed that an examination of tax expenditures as if they were spending requests would demonstrate that many of these provisions are inconsistent with the goal of an equitable, efficient and simple income tax system.").

[239] *See supra* note 215.

[240] *See supra* note 234.

[241] *See supra* text accompanying notes 218–221.

[242] *See supra* text accompanying notes 218–219.

[243] *See, e.g.*, Herman Campos, Letter to the Editor, *Uphold Benefits for Veterans*, MONTEREY COUNTY HERALD, Nov. 11, 2011 ("All of this while refusing to eliminate tax loopholes for big oil . . . ."); William Schreffler, Letter to the Editor, *Remove Loopholes, Shelters for Large Corporations,* PATRIOT NEWS (Harrisburg, Pa.), Oct. 14, 2011, at A10 ("Instead of raising the tax rate, eliminate the tax loopholes, shelters, credits and subsidies available to large corporations.").

[244] *E.g.*, OECD, *supra* note 3, at 85–86; Fleming & Peroni, *supra* note 190, at 525–28. For a listing of the relevant factors to take into account in performing this cost/benefit analysis, see Fleming & Peroni, *supra* note 222, at 138–39.

[245] For a number of examples showing the pervasiveness of the notion of tax exceptionalism, see Anthony C. Infanti, *LGBT Taxpayers: A Collision of Others*, 13 GEO. J. GENDER & L. (forthcoming 2012). Fleming and Peroni disagree with this characterization. Fleming & Peroni, *supra* note 222, at 175. *But see infra* text accompanying note 250.

have pointed out that "the only way one can make the arguments made by CTB advocates is to treat the tax system as separate from the rest of the government."[246] The Joint Committee on Taxation (JCT) has embraced this view, asserting that:

> There . . . is merit to the argument that tax expenditure analysis reflects tax "exceptionalism" — the belief that the tax system ordinarily ought not to be burdened with the sort of *ad hoc* political compromises reflected on the face of much spending legislation. In the view of the JCT Staff, however, that "exceptionalism" is largely justified.[247]

From this perspective, the path to achieving a just tax system lies in setting tax apart from all other areas of law — rendering it neutral and apolitical — and then hewing as closely as possible to a theoretically perfect tax base.[248] Thus, the tax laws should be burdened with the task of achieving nontax ends — if at all — only on the rare occasion when the tax laws can be shown to be the best vehicle for accomplishing the task.[249] Even in its mildest iterations, this view privileges structural (i.e., "tax") over nonstructural (i.e., "nontax") provisions in the tax laws, imposing burdens on nonstructural provisions from which structural provisions are wholly exempt.

2. A More Realistic Starting Point

To my mind, however, it is a serious mistake to start from the premise that tax law is exceptional. Instead, the starting premise should be a more holistic — and realistic — one that recognizes that tax is not set *apart* from other areas of the law, from the spending side of the fiscal system, or from social systems more generally; rather, it is merely *a part* of this much larger sociolegal picture. A more holistic starting premise is also more realistic for two primary reasons: (1) the longevity of tax expenditures and (2) the expressive function of the tax laws.

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[246] David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 968 (2004).

[247] STAFF OF JOINT COMM. ON TAXATION, *supra* note 238, at 37.

[248] *Cf.* SEN, *supra* note 118 (criticizing theories of justice that concentrate on the creation of ideal institutions or sets of rules rather than on realized justice based on comprehensive accounts of how institutions, rules, and choices will actually operate).

[249] OECD, *supra* note 3, at 86–87; Fleming & Peroni, *supra* note 190, at 480.

a. Longevity

Tax expenditures have been with us since the earliest days of the modern U.S. federal income tax and have been the target of reformers since at least the time when the income tax moved from being a "class" tax to a "mass" tax. For example, the deduction for personal interest — and, more particularly, home mortgage interest — dates back to the inception of the modern federal income tax in 1913.[250]

Furthermore, as described in the previous section, the battle to eliminate tax expenditures has been going on for nearly seventy years and, despite the increasing salience of tax expenditures, there is no end in sight. After all, it has been nearly forty years since Congress mandated the compilation of a tax expenditure budget as part of the annual budgeting process in an effort to make tax expenditures more salient to lawmakers.[251] As mentioned above, in the first thirty years of this heightened salience, the absolute number of tax expenditures was not reduced but actually doubled.[252]

b. Expressive Function

This leads us into a discussion of the expressive function of the tax laws. Interestingly, Boris Bittker dated CTB advocates' alarm about the erosion of the tax base and attacks against tax loopholes to the days following World War II. This coincides with the shift in the role of the income tax from a "class tax" on the wealthy to a "mass tax" that applied to the population more broadly.[253] Prior to World War II, the income tax only applied to the wealthiest Americans and "was justified as a means of combating an 'unjust concentration of wealth and economic power.'"[254] As Carolyn Jones has explained, the message conveyed by the income tax had a "punitive cast," especially "when it was enforced, at least for a time, by publicity of certain

[250] *See* PAMELA J. JACKSON, CONG. RESEARCH SERV., RL 33025, FUNDAMENTAL TAX REFORM: OPTIONS FOR THE MORTGAGE INTEREST DEDUCTION 3–5 (2005) (describing the history of the home mortgage interest deduction and dating the deductibility of home mortgage interest to 1913); Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1351–52 (2000); Ventry, *supra* note 189, at 240–41.

[251] *See supra* note 192 and accompanying text.

[252] *See supra* note 225 and accompanying text.

[253] *See generally* Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 BUFF. L. REV. 685 (1989).

[254] *Id.* at 733.

information from taxpayers' returns and when the tax affairs of the nation's wealthiest citizens were paraded before Congressional hearings."[255]

(1) "Functional Necessity"

During World War II, the expressive function of the income tax changed as it was converted from a form of punishment against "'economic royalists'" into the people's chosen means for funding the costs of war.[256] As mentioned above, there had been tax "preferences" before World War II; however:

> Millions of new taxpayers joined the system, and they demanded millions — well, thousands — of new preferences. Most were reserved for the rich and famous, but others had a more plebian quality. The mortgage interest deduction was a principal concession — a feature of the tax system since 1913, it took on new importance as homeownership soared in the postwar era. Similarly, the tax-free treatment of health insurance benefits found a broad constituency once unions made employer-provided insurance a fixture of the modern labor market.[257]

Thus, in the early days of the income tax as a "mass tax," tax preferences were viewed as a "functional necessity" to make income taxation palatable to a population that had previously viewed this tax as a "rich man's burden."[258]

The "functional necessity" of tax preferences has not waned with time. For example, the home mortgage interest deduction has been called "the 'most sacred tax break in the code,' the 'third rail of tax reform,' a member of the 'Holy Trinity of U.S. social programs,' and 'an American birthright' so 'sacrosanct' that the 'mere thought of tampering with it was unpatriotic.'"[259] Similarly, it has been said that the deduction for charitable contributions is "politically unassailable"[260] and "almost a third rail in tax policymaking . . . .

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[255] *Id.*

[256] *Id.* at 699, 733–36.

[257] Joseph J. Thorndike, *Two Cheers for Loopholes*, 111 TAX NOTES 371, 371 (Apr. 17, 2006).

[258] *Id.*

[259] Ventry, *supra* note 189, at 234–35 (quoting a variety of sources).

[260] Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155,

[though] not quite as untouchable as the mortgage interest deduction . . . ."[261] Despite their erosion of the theoretically perfect tax base, these tax expenditures have come to be seen as a politically unassailable necessity.

(2) Mirroring Society

Tax preferences have thus been with us since the earliest days of the income tax and took on the important role of a necessary palliative following World War II — a role that is still relevant today. But tax preferences were — and are — more than just a functional necessity, they are a reflection of our society. Comparative law scholars generally view law as a mirror of society.[262] Naturally, there is controversy regarding how closely law mirrors society; however, areas of public law, such as tax law, are thought to be particularly closely tied to the societies of which they are a product.[263] Notwithstanding the general bias toward viewing tax law as technical and apolitical,[264]

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[261] Jeremy Scott, *Transfer Pricing Rules Cost Both Jobs and Revenue*, 128 TAX NOTES 453, 454 (Aug. 2, 2010).

[262] Anthony C. Infanti, *The Ethics of Tax Cloning*, 6 FLA. TAX REV. 251, 319 (2003).

[263] *Id.* at 320–36 (describing the divergent views on legal "transplants" (or what I have termed legal "cloning") of Otto Kahn-Freund and Alan Watson as well as the common ground that they share — in particular, Kahn-Freund's belief that areas of public law are particularly resistant to transplantation, Watson's restriction of his views regarding the ease of legal transplantation to areas of private law, and their shared belief that a successful legal transplant requires knowledge of the recipient legal environment).

[264] Jinyan Li, *Tax Transplants and Local Culture: A Comparative Study of the Chinese and Canadian GAAR*, 11 THEORETICAL INQUIRIES L. 655, 683–84 (2010); *see also id.* at 670 ("The application of a tax rule, including the GAAR, is dependent on the general legal environment in which tax laws are made and interpreted. There are some fundamental differences between the general legal systems in Canada and China that affect how the GAAR operates in reality."); Assaf Likhovski, *Is Tax Law Culturally Specific? Lessons from the History of Income Tax Law in Mandatory Palestine*, 11 THEORETICAL INQUIRIES L. 725, 730 (2010) ("Tax law occupies an ambiguous position between the more easily transferable areas of law and those areas which are culturally specific, between the universal and the particular. On the one hand, tax law, like other areas of commercial law, is often perceived as technical and, therefore, less culturally specific than other areas. It should therefore prove to be easily transferable. On the other hand, tax law is ultimately based on definitions and notions which are culturally specific."); Michael A. Livingston, *Law, Culture, and Anthropology: On the Hopes and Limits of Comparative Tax*, 18 CAN. J.L. & JURISPRUDENCE 119, 121 (2005) ("Along these lines, 'tax culture' may be defined as

even comparative tax scholars have come to embrace the notion that tax law is culturally specific:

> The level of sensitivity of tax rules to the local tax culture differs based on the nature of the tax rule. One can imagine that the 'universal' or 'scientific' rules, such as those based on accounting or market exchanges, are less sensitive than those 'indigenous' rules that reflect political or social values, such as progressivity, or tax expenditures for social programs.[265]

The ties between tax law and American society can be seen in a number of areas. For instance, the tax laws contain a number of preferences that privilege homeowners over renters, including the implicit exclusion of imputed rental income from gross income, the allowance of a deduction for home mortgage interest, the allowance of a deduction for real property taxes, and the exclusion from gross income of a specified amount of gain on the sale of a principal residence.[266] These tax benefits for homeownership are often viewed as a means of helping individuals realize the "American dream." Indeed, two years prior to the Tax Reform Act of 1986, President Ronald Reagan "explicitly instructed the Treasury Department to 'preserve that part of the American dream which the home mortgage interest deduction symbolizes.'"[267] When President Reagan released

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the body of beliefs and practices that are shared by tax practitioners and policy-makers in a given society and that provide the background or context in which tax decisions are made, i.e., the noneconomic or at least nonquantifiable side of taxation, which varies between societies even though the underlying economic principles are largely the same. Tax culture is thus distinct from the general culture or even the legal culture of a given society, although there is of course no clear line between them: for example, the American frontier tradition, with its emphasis on independence and its fascination with real or imagined risk-taking, plainly affects the public's attitudes toward taxation and as such exercises considerable influence on tax policy-makers. But the two remain conceptually and practically distinct from one another.").

[265] *See, e.g.,* Likhovski, *supra* note 264, at 761 ("[I]n fact law is both autonomous *and* related to society . . . .").

[266] I.R.C. §§ 121, 163(h), 164(a)(1); STAFF OF JOINT COMM. ON TAXATION, 112TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2011–2015, at 36 (Comm. Print 2012); *see, e.g.*, Jackson, *supra* note 250, at 1–2 (enumerating the tax benefits of homeownership); Ventry, *supra* note 189, at 236 ("At the same time, however, the 1913 income tax law violated this principle by excluding from gross income imputed rent from owner-occupied housing, while also allowing offsets for interest and property taxes on that nontaxable form of income.").

[267] Ventry, *supra* note 189, at 271–72 (quoting Lou Cannon, *Reagan to Keep Home Mortgage Tax Deduction*, WASH. POST, May 11, 1984, at F1).

his tax plan the next year, he proposed reforms to some of the then-existing housing tax subsidies, but "immunized the [mortgage interest deduction], calling it 'central to American values' and representative of 'America's unequivocal commitment to private home-ownership.'"[268] Some twenty years later, President George W. Bush echoed these sentiments:

> [I]n the executive order that established the President's Advisory Panel on Federal Tax Reform, one of the very few restrictions was a request that the panel 'recognize the importance of homeownership and charity in American society.' Some analysts have concluded that the Administration's statement indicate[d] its support for preserving the mortgage interest deduction along with all of the other homeownership tax incentives.[269]

In addition, the tax laws reflect "the extraordinary — probably unique — centrality of the nonprofit sector in American social and economic life."[270] In terms of tax preferences, the importance of nonprofit organizations in American life is reflected in the income, estate, and gift tax deductions for charitable contributions.[271] The perceived importance of charity in American society is not only reflected in the quotation above from President Bush's executive order establishing his tax reform panel, but also in the tax reform plan that President Reagan proposed some twenty years earlier. In his 1985 plan, President Reagan immunized the deduction for charitable contributions from reform efforts on the ground that, like the mortgage interest deduction, it too is "central to American values" —

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[268] *Id.* at 274 (quoting PRESIDENT RONALD REAGAN, THE PRESIDENT'S TAX PROPOSALS TO THE CONGRESS FOR FAIRNESS, GROWTH, AND SIMPLICITY 4 (1985)).

[269] Jackson, *supra* note 250, at 1 (quoting Exec. Order No. 13,369, 70 Fed. Reg. 2323 (2005)).

[270] John Simon, Harvey Dale & Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 267, 267 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2011).

[271] I.R.C. §§ 170, 2055, 2522; STAFF OF JOINT COMM. ON TAXATION, *supra* note 266, at 40, 42. *But cf.* William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 344–75 (1972) (arguing that, in many cases, the deduction for charitable contributions is a refinement of an ideal income tax base rather than a departure from it); Simon, Dale & Chisolm, *supra* note 270, at 273–74 (discussing the work of others who view the exemption from tax for charitable organizations and the deductibility of charitable contributions as serving a tax-base-defining function, but recognizing that the "tax-base-defining rationales have not been widely embraced.").

in this case because of "America's longstanding commitment to charity and voluntarism."[272]

Perhaps less obviously to some, the tax laws reflect not only American dreams but also some unpleasant American realities. Given a long history of de jure and de facto discrimination on the basis of race, it is no wonder that "[a]n air of discomfort has always permeated discussions about race"[273] in the United States. The same air of discomfort surrounds discussions of — or, in some cases, the absence of discussion of — sexual harassment.[274] Naturally, the air of discomfort surrounding discussions of both race and gender discrimination can be detected in the tax laws.

Strong and repeated legal condemnations of discrimination on the basis of race and gender would seem to have made it abundantly clear that invidious discrimination in employment is neither an ordinary nor a necessary business practice.[275] Yet, employees who recover damages

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[272] PRESIDENT RONALD REAGAN, *supra* note 268, at 4.

[273] Leo P. Martinez & Jennifer M. Martinez, *The Internal Revenue Code and Latino Realities: A Critical Perspective*, 22 U. FLA. J.L. & PUB. POL'Y 377, 378 (2011); *see* Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 457–59 (2006) (describing the media's discomfort with discussing the impact of Hurricane Katrina along lines of race and class).

[274] *See* Justine E. Tinkler, *Resisting the Enforcement of Sexual Harassment Law*, 37 LAW & SOC. INQUIRY 1, 1 (2012) (using a small-scale empirical study to explore the "familiar paradox about perceptions of sexual harassment: at the same time that sexual harassment is widely perceived as wrong, the enforcement of policies and the use of litigation as a strategy for redressing sexual harassment are often met with resistance."); Deborah Zalesne, *Sexual Harassment Law in the United States and South Africa: Facilitating the Transition from Legal Standards to Social Norms*, 25 HARV. WOMEN'S L.J. 143, 176–79 (2002) (describing a backlash against a series of U.S. Supreme Court decisions regarding sexual harassment). The absence of discussion of sexual harassment is evident in those workplaces, such as my own, in which the required training is accomplished online, with absolutely no interaction with another human being or discussion of these issues. *University Training Resources*, U. OF PITTSBURGH, http://www.hr.pitt.edu/training-development/general-courses-training-resources (last visited Aug. 9, 2012).

[275] *See, e.g.*, 29 U.S.C. § 206(d) (2011) (prohibiting sex discrimination in the setting of wages); 42 U.S.C. § 2000e-2(b) (prohibiting employment discrimination on the basis of race and sex); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2(1), 123 Stat. 5, 5 (statutorily overruling the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), on the ground that it "significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades"); Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983) (upholding the Internal Revenue Service's revocation of the tax exemption of a university with a

for discrimination on the basis of race or gender are required to pay tax on those damages while their employers are permitted to deduct those same damage payments as ordinary and necessary business expenses.[276] Drawing on tax expenditure analysis, Karen Brown has argued that taxing the employee on these damages constitutes a tax penalty (i.e., the employee is overtaxed because she is denied a deduction for the costs associated with producing income in a discriminatory workplace) while permitting an employer "a deduction for expenses connected to discriminatory conduct seems a reward."[277] When prohibitions against discrimination are juxtaposed with these tax preferences and penalties, we can clearly see how the law mirrors societal discomfort regarding racial and gender discrimination by sending "mixed messages."[278]

Likewise (and perhaps more obviously), the privileging of the different-sex married couple and the so-called traditional family in American society — as well as the closely associated culture war over same-sex marriage — are all reflected in the pervasive importance of marital status in the tax laws.[279] Marital status (and sexual orientation) impact not only such structural provisions as the determination of the taxable unit,[280] but also the meting out of tax preferences such as the

racially discriminatory admissions policy on the ground that it was not "charitable" and, in support of that decision, noting that, "[o]ver the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education").

[276] I.R.C. § 104(a)(2) (limiting the exclusion for damages based on personal injury to those received on account of "physical injuries or physical sickness"); Treas. Reg. § 1.162-1(a) (as amended in 1993) (indicating that a deduction "otherwise . . . allowable under section 162 shall not be denied on the grounds that allowance of such deduction would frustrate a sharply defined public policy"); Rev. Rul. 74-323, 1974-2 C.B. 40 (advertising expenses deductible by an employment agency even though the advertising in question arguably violated the Civil Rights Act of 1964).

[277] Karen B. Brown, *Not Color- or Gender-Neutral: New Tax Treatment of Employment Discrimination Damages*, 7 S. CAL. REV. L. & WOMEN'S STUD. 223, 261–67 (1998).

[278] *See* William D. Araiza et al., *The Jurisprudence of Yogi Berra*, 46 EMORY L.J. 697, 752 (1997) (describing the "mixed messages" sent when "federal law prohibits employment discrimination on the basis of gender, but the tax code provides numerous incentives for a secondary wage earner (the spouse with lower earnings, typically the wife) to work for no pay in the home instead of working in a paying job outside the home, especially if the couple has children") (footnotes omitted).

[279] *See* ANTHONY C. INFANTI, EVERYDAY LAW FOR GAYS AND LESBIANS (AND THOSE WHO CARE ABOUT THEM) 136–66 (2007).

[280] I.R.C. § 6013(a) (permitting "[a] husband and wife" to file a joint federal

exclusion for employee fringe benefits,[281] the exclusion for employer-provided health insurance,[282] and the exclusion for gain on the sale of a principal residence.[283] In each of these areas, taxpayers are treated differently based on their marital status and sexual orientation — with married different-sex couples being treated better than all others.[284]

The longstanding presence and important expressive function of tax expenditures together betray the quixotic nature of the battle to achieve a more just tax system by closing tax loopholes in an effort to approach ever closer to an ideal tax base. To achieve justice, we must be concerned not only with theory but also with the operation of the law in practice.[285] In practice, tax law is both salient in the public

income tax return); *Treasury Clarifies Filing Status of Individuals in Illinois Opposite-Sex Civil Unions*, 2011 TNT 215-62 (Aug. 30, 2011) (indicating that an Illinois civil union between a man and woman would be treated as a marriage for federal tax purposes). In contrast, the federal Defense of Marriage Act (DOMA) currently prohibits same-sex couples who are either married or parties to a civil union or domestic partnership that is intended to be legally equivalent to marriage from being similarly treated as a taxable unit. Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) (codifed at 1 U.S.C. § 7 (2012)). For the sake of simplicity, in the text below, I will refer to couples who are legally married or who have entered into a civil union or domestic partnership that is intended to be legally equivalent to marriage as "married" and those who have not entered into any such relationship as "unmarried."

[281] I.R.C. § 132(a)(1), (2), (b), (c), (h)(2); STAFF OF JOINT COMM. ON TAXATION, *supra* note 266, at 41.

[282] I.R.C. § 106(a); Treas. Reg. § 1.106-1 (1960); Prop. Treas. Reg. § 1.106-1, 72 Fed. Reg. 46,421 (Aug. 20, 2007); STAFF OF JOINT COMM. ON TAXATION, *supra* note 266, at 42.

[283] I.R.C. § 121(b)(2)(A)(i); STAFF OF JOINT COMM. ON TAXATION, *supra* note 266, at 36; *see* Anthony C. Infanti, *Bringing Sexual Orientation and Gender Identity into the Tax Classroom*, 59 J. LEGAL EDUC. 3, 14–15 (2009) (explaining how these rules apply differently to same-sex and different-sex couples).

[284] The constitutionality of section three of DOMA, which currently underpins these differences in treatment, has been cast in doubt by a series of recent judicial decisions. As of this writing, the parties in several of the cases have sought review of these decisions in the U.S. Supreme Court. For a discussion of these cases and of the possible worsening of the legal landscape after "equality" is achieved by striking down section three of DOMA, see generally Anthony C. Infanti, The Moonscape of Tax Equality (Sept. 8, 2012) (unpublished manuscript) (on file with author).

[285] *See* SEN, *supra* note 71, at 69 ("In general, the institutions have to be chosen not only in line with the nature of the society in question, but also co-dependently on the actual behaviour patterns that can be expected even if — and even after — a political conception of justice is accepted by all."). Sen critiqued Rawls's approach to justice on the same grounds:

> In the Rawlsian system, the choice of the two principles of justice is meant

imagination and highly politically charged, notwithstanding academic assumptions and protestations that it is (or, at the very least, ought to be) technical, neutral, and apolitical.[286] Because tax law touches so many areas of so many people's lives, it has come to serve an important expressive function. We use tax preferences and penalties as a means of (consciously or unconsciously) expressing who we are — and, in some cases, a view of how we would like to develop and whom we would like to become. Thus, as illustrated above, whether in arguments about the role of marriage in American society or as a symbol of the American dream, tax law often plays an important cultural role. Given this reality, the goal of tax reform should not be to eradicate tax expenditures from the Internal Revenue Code but to rethink and rehabilitate them so that they better reflect who we are and how we would like to develop as a society.

C. "Reforming" Tax Expenditures

1. Beginning a Public Discussion

With a starting point more grounded in reality, we can shift our focus away from eliminating tax expenditures (in an effort to approximate a theoretically perfect tax base) and toward reforming our tax system as it actually operates (in an effort to reduce manifest injustice and advance human development).[287] A key first step toward this end is to undertake a truly public discussion of what types of lives we value and why we have reason to value them.[288] In other words,

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> to ensure both the right choice of institutions as well as the emergence of appropriate actual behaviour on the part of everyone, making individual and social psychology thoroughly dependent on a kind of political ethics. Rawls's approach, developed with admirable consistency and skill, does involve a formulaic and drastic simplification of a huge and multi-faceted task — that of combining the operation of the principles of justice with the actual behaviour of people — which is central to practical reasoning about social justice. This is unfortunate since it can be argued that the relationship between social institutions and actual — as opposed to ideal — individual behaviour cannot but be critically important for any theory of justice that is aimed at guiding social choice towards social justice.

Id.

[286] Infanti, *supra* note 245.

[287] *Cf.* SEN, *supra* note 71, at 20–22.

[288] *See* Paul Krugman, Op-Ed., *Oligarchy, American Style*, N.Y. TIMES, Nov. 4, 2011, at A31 (reacting to the Congressional Budget Office report discussed in Part I, *see* CONG. BUDGET OFFICE, *supra* note 18, and stating "that extreme concentration of income is incompatible with real democracy. Can anyone seriously deny that our

focusing on the importance of agency and democratic participation to the human development approach,[289] we need to work together to set our own agenda for advancing our development. An important part of this discussion will involve addressing the equitable distribution and sustainability of our extant and future development. That is, we must particularly focus our attention on (1) how the disadvantaged in our society are now faring and (2) how our decisions today will impact future generations.

In keeping with the holistic view of the human development approach, there must necessarily be a broad discussion that can, in turn, form the basis for assessing the legal and nonlegal, tax and nontax steps that can be taken to achieve these goals and advance our development. The tax system will likely not be the sole means for achieving these goals, but it certainly will have a role to play in advancing our development.[290] Accordingly, we should consider how the tax system might be used to further our development as well as how the role of the tax system coordinates with and either supports or enhances other legal and nonlegal measures to be taken to advance our development.

Tax and nontax legal coordination is not as foreign a concept as one might think. In fact, in the wake of the passage of the Patient Protection and Affordable Care Act (Affordable Care Act),[291] the Department of Treasury worked together with the Department of Labor and the Department of Health and Human Services "to develop regulations and other administrative guidance that will respond to questions and assist stakeholders with implementation" of the health care reform legislation.[292] In developing certain standards, the Affordable Care Act even explicitly required consultation with "a working group composed of representatives of health insurance-related consumer advocacy organizations, health insurance issuers,

political system is being warped by the influence of big money, and that the warping is getting worse as the wealth of a few grows ever larger?").

[289] *See, e.g.*, *supra* text accompanying notes 99, 112, and 115–118.

[290] As should by now be clear, the purpose here is not to advocate achieving social justice through the tax system rather than through direct expenditures or other means. Instead, the purpose is to work with the tax system as it already exists and to reform and improve upon it. The tax law clearly has a role to play in discussions of human development and social justice. I am merely recognizing that role and embracing it.

[291] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[292] I.R.S. Notice 2011-36, 2011-21 I.R.B. 792, 792.

health care professionals, patient advocates including those representing individuals with limited English proficiency, and other qualified individuals."[293] Moreover, all three Departments "entered into a memorandum of understanding that, among other things, established a mechanism for coordinating enforcement and avoiding duplication of effort for shared jurisdiction."[294] Therefore, cooperation and coordination among federal agencies (as well as between federal agencies and nongovernmental stakeholders) as part of a broader effort to advance human development is not a lofty aspiration; it is already happening.

2. An Example of an Area Ripe for Discussion

Without in any way preempting the necessary public discussion and further recognizing that my purpose here is no more than to shift the focus of tax reform discourse, I would simply like to provide one example of an area that appears ripe for inclusion in this discussion. I will also offer a few thoughts on proposals that we might entertain when considering the role that the tax system (and, more particularly, provisions that could be classified as tax expenditures) might play in advancing human development in this area.

The area that I have in mind is housing. It comes to mind because, as mentioned above, in 2004 the outlay equivalent for the home mortgage interest deduction, which is just one of the tax provisions encouraging homeownership,[295] far exceeded the outlays of the Department of Housing and Urban Development.[296] This large component of federal housing policy (or lack thereof)[297] has come under fire for failing to actually encourage homeownership and for being regressive by disproportionately aiding those who least need help;[298] for disproportionately benefiting white taxpayers over African Americans and Latino/as;[299] for having "a close connection to

[293] Patient Protection and Affordable Care Act § 1001, 124 Stat. at 130, 132; *see* I.R.S. REG-140038-10, 2011-42 I.R.B. 537, 539 (proposed Aug. 22, 2011) (to be codified at 26 C.F.R. §§ 54, 602) (mentioning these consultative efforts).

[294] I.R.S. REG-140038-10, *supra* note 293, at 548 (footnote omitted).

[295] *See supra* text accompanying note 266.

[296] *See supra* text accompanying note 228.

[297] *See* Mann, *supra* note 250, at 1393–94.

[298] *Id.* at 1359–68.

[299] Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 774–76.

proliferating [urban] sprawl";[300] and, in its home equity indebtedness provision, for "amount[ing] to 'a house-sized credit card' for 'consumer-type purchases, the very evil that the interest provisions of the 1986 tax act were designed to eliminate.'"[301]

If we were to put people — and particularly those among us who are disadvantaged — at the center of discussions about housing, we might not so narrowly focus on homeownership. For example, rates of homeownership for African Americans and Latino/as are significantly below those of whites,[302] and a recent study found that homeownership rates for transgender individuals in California were far below the state average.[303] Not everyone will either wish to or have the means to purchase their own home. Perhaps a broader focus would lead us to conclude that what we value is not just homeownership, but access to safe, affordable, accessible, sustainable, and stable housing.

Certainly, we could implement a coordinated set of programs that would aid individuals — and particularly the disadvantaged — in gaining access to safe, affordable, accessible, sustainable, and stable housing. The tax system could play a role in achieving this goal, especially as it relates to affordability. Among the reforms of existing tax preferences and proposals for new tax preferences that one could imagine being offered for consideration (either separately or in combination) as a means of achieving this goal are:

1. Recognizing that one of the biggest hurdles to homeownership is the inability to cover the up-front costs of

[300] Mann, *supra* note 250, at 1384.

[301] Ventry, *supra* note 189, at 275 (quoting Robert J. Wells, *It's Time to Revisit the Interest Deduction Rules*, 60 TAX NOTES 649, 652 (Aug. 2, 1993)).

[302] Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 348 (2009) (indicating that the rate of homeownership among whites was 76% while the rate of homeownership among Asian Americans was 61% and among African Americans and Latino/as was below 50%); *see also* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 109 tbl.5.4 (1995) (showing a twenty-two percentage point spread between white and black homeownership rates; that is, an overall 63.8% homeownership rate for whites and an overall 41.6% homeownership rate for blacks); Kenya Covington & Rodney Harrell, *From Renting to Homeownership: Using Tax Incentives to Encourage Homeownership Among Renters*, 44 HARV. J. ON LEGIS. 97, 101 fig.1 (2007) (charting homeownership rates among whites and blacks from 1994 to 2005).

[303] *The State of Transgender California Report: Results from the 2008 California Transgender Economic Health Survey*, TRANSGENDER LAW CTR. 7 (2009), http://www.transgenderlawcenter.org/archives/860.

homeownership (i.e., the down payment and closing costs),[304] we might consider reinstating some form of the first-time homebuyer credit that expired in 2010 and/or instituting a tax-deferred savings account for first-time homebuyers the proceeds of which must be used to purchase a home.[305]

2. Recognizing that not all individuals will (or even wish to) become homeowners along with the existing discrimination in favor of homeowners and against renters in our tax laws,[306] we might consider adopting a refundable renter's credit based on the models employed by some states (e.g., Minnesota's renter's property tax refund program or New Jersey's property tax deduction/credit), which attempt to distribute property tax relief more equitably to both homeowners and renters.[307]

3. Recognizing that the lower rates of minority homeownership are due to a long and continuing history of discriminatory housing-related practices (e.g., redlining and reverse redlining),[308] we might choose not to eliminate the

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[304] Mann, *supra* note 250, at 1367–68.

[305] I.R.C. § 36; *see* Covington & Harrell, *supra* note 302, at 113–16 (proposing a rather limited first-time homebuyer credit); Mann, *supra* note 250, at 1396 (suggesting the possibility that a proposed shelter credit could be fashioned as a savings vehicle for renters who wish to become homeowners).

[306] For example, both homeowners and renters pay real property taxes (homeowners directly and renters indirectly), but only homeowners are permitted to deduct those taxes from their gross income for federal income tax purposes. I.R.C. § 164; Treas. Reg. § 1.164-1(a) (as amended in 1978) ("In general, taxes are deductible only by the person upon whom they are imposed."); Covington & Harrell, *supra* note 302, at 107.

[307] MINN. STAT. § 290A.04 (2012); N.J. STAT. ANN. § 54A:3A-18 (West 2012). For a description of these programs, see *Renter's Property Tax Refund*, MINN. REVENUE, http://www.revenue.state.mn.us/individuals/prop_tax_refund/Pages/Renters_Property_Tax_Refund.aspx (last updated August 16, 2012); *NJ Income Tax–Property Tax Deduction/Credit*, N.J. DEP'T OF TREASURY, http://www.nj.gov/treasury/taxation/njit35.shtml (last updated Dec. 12, 2011). *But see Renters' Credit Maintained in 2011, Cut in 2012*, MINN. BUDGET PROJECT (August 2011), http://www.mnbudgetproject.org/research-analysis/minnesota-taxes/credits/011-renters-credit.pdf.

[308] Hanson & Hanson, *supra* note 273, at 448–49 ("But the opportunity of home ownership was illusory for minorities, due in part to the 'statistically-justified' discriminatory policies of lending agencies. Indeed, of the $120 billion in home loans issued between 1932 and 1962, more than 98% went to white families. Redlining and restrictive covenants reinforced neighborhood racial boundaries. Because blacks were effectively barred from new suburban developments, even newly settled areas

home mortgage interest deduction but instead to convert it into a refundable credit (to make it available to all taxpayers, including many lower- and middle-income taxpayers who do not itemize)[309] and limit its application to areas that have been redlined or reverse redlined, while building limits into the credit to provide safeguards against predatory lending practices.

4. Recognizing the history of discrimination described immediately above as well as the fact that homeowners in areas with more than ten percent African American homeownership experience market discrimination (i.e., a drop in housing values once this tipping point is reached),[310] we might consider Dorothy Brown's proposal for a time-limited refundable credit that would replace both the home mortgage interest deduction and the deduction for property taxes in areas with more than ten percent African American

reflected stark segregation." (footnotes omitted)); *see generally* Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617 (1999) (describing the historical origins and continued practice of redlining); Barbara Ehrenreich & Dedrick Muhammad, Op-Ed., *The Recession's Racial Divide*, N.Y. TIMES, Sept. 13, 2009, at WK17 (describing "reverse redlining" as "intensive marketing aimed at black neighborhoods in the name of extending home ownership to the historically excluded" and explaining its connection with the subprime mortgage crisis); Andrew Martin, *Judge Allows Redlining Suits to Proceed*, N.Y. TIMES, May 6, 2011, at B9 (describing rulings from two courts that permitted lawsuits to proceed against Wells Fargo that accused the bank of "deliberately steer[ing] African-American borrowers who qualified for prime mortgages into subprime loans" and of "approv[ing] mortgage refinancing or home equity loans for African-American borrowers even though it knew or should have known that the borrowers couldn't afford the payments").

[309] For taxable year 2009, the Internal Revenue Service estimated that only 32.5% of all tax returns elected to itemize deductions. INTERNAL REVENUE SERV., PUB. 1304, INDIVIDUAL INCOME TAX RETURNS 2009, at 36 tbl.1.2 (2011). Tax returns reflecting an adjusted gross income of $50,000 or more comprised only about one-third of all tax returns filed for 2009. *Id.* Nonetheless, of the returns electing to itemize deductions, the Internal Revenue Service estimated that some 70% fell into this group of returns. *Id.* Moreover, nearly 75% of the returns claiming the home mortgage interest deduction came from this group. *Id.* at 82 tbl.2.1. In contrast, the two-thirds of all returns that reflected an adjusted gross income of less than $50,000 only comprised about 30% of the returns electing to itemize deductions and just slightly more than 25% of the returns claiming the home mortgage interest deduction. *Id.* at 36 tbl.1.2, 82 tbl.2.1.

[310] Brown, *supra* note 302, at 354–60.

homeownership — a proposal that would both redress this history of discrimination and encourage more racially diverse neighborhoods.[311]

5. Recognizing the importance of the sustainability of development, we might consider Roberta Mann's proposal to replace the home mortgage interest deduction (and perhaps extend that proposal to replacing the deduction for property taxes as well) with a refundable shelter credit that would be comprised of (i) a base amount tied to median home prices and (ii) a "location efficiency premium" for homes located close to public transportation, both of which would tend to discourage urban sprawl.[312]

Naturally, which of these (or other) proposals are ultimately adopted would depend on the course of the initial public discussion and the subsequent tailoring of any tax proposals both to meet the chosen goals for our development and to coordinate with any nontax proposals for meeting those goals. As a result, full elaboration of these tax proposals is both premature and beyond the scope of this article.

It is worth underscoring that housing is only one area where the tax system might play a role in advancing human development.[313] Other tax preferences might be reformed or created for the purpose of advancing human development in other areas (e.g., a refundable tax credit to ease the financial burden on those who take unpaid leave under the Family and Medical Leave Act in order to care for a loved one or new child).[314] Moreover, once we recognize that our tax laws mirror the society that created them, there is no reason to limit our horizons to examining only those provisions that can be classified as tax preferences.[315] After all, the local culture can express itself both

[311] *Id.* at 371–74.

[312] Mann, *supra* note 250, at 1393–96.

[313] Though a full discussion of this point is beyond the scope of this article, taking a people-centered approach to tax reform might provide reason for abandoning the artificial political constraint that seems to have accompanied talk of tax reform since 1986 — revenue neutrality. Shaviro, *supra* note 220, at 817–19. For instance, a focus on sustainable development might require tax reform to raise additional revenue so that development today does not come at the expense of the development of future generations. *See supra* text accompanying notes 134–138.

[314] 29 U.S.C. § 2612 (2011).

[315] Indeed, one of the peripheral benefits of adopting a people-centered approach to tax reform is that we can completely bypass unproductive debates regarding the line between structural and nonstructural tax provisions, which have proven to be the

through structural provisions *and* tax preferences and penalties.[316] To draw again upon an earlier example,[317] the influence of culture on structural provisions can be seen in the choice of the different-sex married couple as a taxable unit (as well as in the occasional expansion of that taxable unit to the boundaries of the so-called traditional family through the inclusion of the couple's children).[318] We can — and should — consider ways that the tax laws as a whole — both the structural provisions and any putative departures from the chosen baseline[319] — can advance human development.

V. CONCLUSION

The need to focus on people as people, and not as numbers, is, as Mahbub ul Haq and Amartya Sen have both noted, far from a new idea. In a sense, it represents a return to seeing the world through the innocent eyes of a child. Thus, in closing, I would like to end with a quote from my favorite book to read to my daughter before she goes to bed at night, *Le Petit Prince* (translation below):

> *Si je vous ai raconté ces détails sur l'astéroïde B 612 et si je vous ai confié son numéro, c'est à cause des grandes personnes. Les grandes personnes aiment les chiffres. Quand vous leur parlez d'un nouvel ami, elles ne vous questionnent jamais sur l'essentiel. Elles ne vous disent jamais: « Quel est le son de sa voix? Quels sont les jeux qu'il préfère? Est-ce qu'il collectionne les papillons? » Elle vous demandent: « Quel âge a-t-il? Combien a-t-il de frères? Combien pèse-t-il? Combien gagne son père? » Alors seulement elles croient le connaître. Si vous dites aux grandes personnes: « J'ai vu une belle maison en briques roses, avec des géraniums aux fenêtres et des colombes sur le toit. . . » elles ne parviennent pas à s'imaginer cette maison. Il faut leur dire: « J'ai vu une maison de cent mille*

Achilles heel of tax expenditure analysis. *See supra* text accompanying note 224. No group of tax provisions should be spared scrutiny because they are "structural" or part of some "normative" tax baseline.

316 *See* Livingston, *supra* note 264, at 124 ("[T]ax culture may express itself broadly, in the values and goals that the tax system tries to achieve, or more narrowly, in the design of particular institutions and structures.").

317 *See supra* text accompanying note 280.

318 *See* I.R.C. §§ 1(g), 6013.

319 Bittker, *supra* note 212, at 985 ("[T]he income tax structure cannot be discovered, but must be constructed; it is the final result of a multitude of debatable judgments.").

francs. » Alors elles s'écrient: « Comme c'est joli! »[320]

[320] ANTOINE DE SAINT-EXUPERY, LE PETIT PRINCE 19–20 (1946). Here is my own translation: "If I have told you these details about asteroid B612 and if I have confided in you its number, it's because of the grown ups. Grown ups love numbers. When you talk to them about a new friend, they never ask you about the important things. They never ask you: 'What does his voice sound like? What are his favorite games? Does he collect butterflies?' They ask you: 'How old is he? How many brothers does he have? How much does he weigh? How much does his father make?' Only in that way do they think they know him. If you tell grown ups, 'I saw a beautiful pink brick house with geraniums in the windows and doves on the roof . . .' they cannot manage to picture that house. It's necessary to tell them: 'I saw a 100,000 franc house.' Then they will cry, 'It's so pretty!'"