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Anthony C. Infanti

University of Pittsburgh School of Law, infanti@pitt.edu

Bridget J. Crawford

Pace University School of Law, bcrawford@law.pace.edu

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Critical Tax Theory: Insights From the US and Opportunities for All

Anthony C Infanti and Bridget J Crawford*

At a moment when Australia – and the world – finds itself at a “critical juncture” as it reckons with a global pandemic as well as the inequalities that COVID-19 has laid bare, voicing – and listening to – critical tax perspectives has become more vital than ever. The economic impact of COVID-19 has precipitated talk of tax reform as nations consider how to pay for aid distributed during the pandemic and how to restart their economies. But more than just a time of crisis, the pandemic can be seen as an unexpected opportunity to break with a past plagued by social and economic inequalities, to rethink our relationships with each other, and to begin the work of building better and more just societies. If this opportunity is to be meaningfully seized, then tax law and policy rightfully belong at the heart of the discussion.

I. INTRODUCTION

For some 50 years now, critical perspectives have been challenging the prevailing economic approach to thinking about tax law and policy.¹ Influenced by, and building on, the work of the critical legal studies movement as well as critical race theory, feminist legal theory, and queer theory, critical tax scholars recognise that tax law is not a dry matter of economics but a vibrant and inherently political subject.² More recently, a growing international body of critical tax scholarship has emerged, with important contributions coming from the United States, Canada, the United Kingdom, Sweden, and other countries. What these critical tax scholars all share in common is an approach that treats taxpayers as more than the sum of their economic transactions – these scholars examine how tax law impacts individuals and groups along a variety of identity axes (eg, race, gender, and sexual orientation).

At a moment when Australia – and, indeed, the world – finds itself at a “critical juncture”³ as it reckons with a global pandemic as well as the inequalities that COVID-19 has achingly laid bare, voicing – and listening to – critical tax perspectives has become more vital than ever. The economic impact of COVID-19 has precipitated talk of tax reform – sometimes far reaching and fundamental – as nations consider how to pay for aid distributed during the pandemic and how to restart their economies.⁴ But more than just a time of crisis, the pandemic can be seen as an unexpected source of opportunity – that is to say, an inflection point when it might be possible to break with a past plagued by social and economic inequalities, to rethink our relationships with each other, and to begin the work of building better and

* Anthony C Infanti: Christopher C Walthour, Sr. Professor of Law, University of Pittsburgh School of Law. Bridget J Crawford: Distinguished University Professor and Professor of Law, Elisabeth Haub School of Law at Pace University.

¹ See Grace Blumberg, “Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers” (1971) 21(1) *Buffalo Law Review* 49.

² Anthony C Infanti and Bridget J Crawford, “Introduction” in Anthony C Infanti and Bridget J Crawford (eds), *Critical Tax Theory: An Introduction* (CUP, 2009) xxi.

³ Monash University, *Critical Junctures/Critical Perspectives: A Call for New Voices in Tax Reform* <<https://www.monash.edu/law/research/excellence/clars/news-events/critical-juncturescritical-perspectives-a-call-for-new-voices-in-tax-reform>>.

⁴ For example, in the United States under the administration of President Joseph Biden: Jim Tankersley and Alan Rappaport, “Biden Tax Plan Aims to Curtail Use of Havens”, *The New York Times*, 8 April 2021, A1; Jim Tankersley, “Biden to Seek Tax on Richest to Aid Families”, *The New York Times*, 23 April 2021, A1; Paul Wiseman, “Biden’s Corporate Tax Plan Takes Aim at Income Inequality”, *The Washington Post*, 30 April 2021 <https://www.washingtonpost.com/politics/bidens-corporate-tax-plan-takes-aim-at-income-inequality/2021/04/30/a374186a-a9c4-11eb-a8a7-5f45ddcdf364_story.html>.



more just societies.⁵ If this opportunity is to be meaningfully seized, then tax law and policy rightfully belong at the heart of the discussion. More than merely raising revenue, tax law aims “to ensure a fair distribution of the burden of funding ... government and defraying common expenses – that is, of creating and sustaining our life together”.⁶ With this in mind, the relevance of critical perspectives to tax reform debates becomes quickly apparent. After all, “[s]houldn’t the burdens that some already suffer due to marginalization or discrimination be accounted for when deciding how much of the burden of funding ... government and defraying common expenses they should be asked to shoulder as well?”⁷

As COVID-induced tax reform debates proceed, taking account of the impact and operation of tax law on marginalised and subordinated groups will be especially important in places such as Australia where critical tax perspectives remain underexplored. To aid in kick-starting these explorations and discussions, this essay aims to provide a general introduction to the critical tax movement’s principal concerns and methodologies with examples drawn from the United States (US) literature. The essay then assesses the accomplishments of critical tax theory in exposing the complex operation of injustice, while also acknowledging that critical tax theory has thus far had a limited impact on mainstream tax policy discourse. The essay concludes by turning again to the current moment, because pandemic-era discussions about the interrelationship of social justice and economic structures present a distinct opportunity for change. Critical tax theory has an important contribution to make to these discussions, as it offers frameworks and methods that scholars can adapt to reenvision tax systems to serve goals of equality, dignity, human rights, and sustainability.

II. THE CRITICAL TAX LENS

Though ostensibly concerned only with the distribution of burdens and benefits, tax law actually serves a broader, more expressive function: “The construction of a tax system ... involves political, social, and cultural questions that different countries answer differently – and in ways that send messages about how those societies see themselves, what and whom they value, and how they wish to be seen in the future.”⁸ With tax law acting as a mirror of society in this way, it should be unsurprising that it provides a portrait of society that reflects lines of dominance and privilege as well as of marginalisation, discrimination, and subordination.⁹ For those interested in viewing taxation through a critical lens, the first step is thus to identify the relevant axes of discrimination and subordination in society – which can vary from country to country depending on the specific political, social, and cultural contexts – and then to begin interrogating how the tax laws impact individuals in these marginalised groups as compared to those in dominant groups.

Some have criticised this approach on the ground that critical tax scholars “do not approach the tax laws in a detached and disinterested frame of mind. ... Within the critical tax movement, there is a reward for examining a tax provision and finding it guilty of hidden discrimination; there is no reward for discovering a provision is innocent”.¹⁰ Yet “mainstream” tax scholarship can hardly be said to be detached and

⁵ See, eg, Caroline Lucas, “Here’s How We Can Help the Covid-19 Recovery, Tackle the Climate Crisis and Fight Disillusionment with Our Democracy”, *The Independent*, 27 June 2020 <<https://www.independent.co.uk/voices/coronavirus-climate-crisis-uk-economy-government-parliament-a9588856.html>>; “‘Non à un retour à la normale’: De Robert De Niro à Juliette Binoche, l’appel de 200 artistes et scientifiques”, *Le Monde*, 6 May 2020 <https://www.lemonde.fr/idees/article/2020/05/06/non-a-un-retour-a-la-normale-de-robert-de-niro-a-juliette-binoche-de-joaquin-phenix-a-angele-l-appel-de-200-artistes-et-scientifiques_6038775_32-32.html>; Lee Stevens, “How COVID Has Challenged Our Theories About Poverty”, *Calgary Herald*, 25 June 2020 <<https://calgaryherald.com/opinion/columnists/opinion-how-covid-has-challenged-our-theories-about-poverty>>; Ekemini Uwan, “There’s No Going Back to ‘Normal’”, *The Atlantic*, 13 June 2020 <<https://www.theatlantic.com/family/archive/2020/06/radical-acceptance-path-change/613015/>>; Muhammad Yunus, “La crise du coronavirus nous ouvre des horizons illimités pour tout reprendre à zéro”, *Le Monde*, 5 May 2020 <https://www.lemonde.fr/idees/article/2020/05/05/muhammad-yunus-la-crise-du-coronavirus-nous-ouvre-des-horizons-illimites-pour-tout-reprendre-a-zero_6038665_3232.html>.

⁶ Anthony C Infanti, *Our Selfish Tax Laws: Toward Tax Reform That Mirrors Our Better Selves* (The MIT Press, 2018) 136.

⁷ Infanti, n 6, 137.

⁸ Infanti, n 6, 108.

⁹ See, eg, Infanti, n 6, 109–133.

¹⁰ Lawrence Zelenak, “Taking Critical Tax Theory Seriously” (1998) 76(5) *North Carolina Law Review* 1521, 1578.

disinterested when it is deliberately blinkered by the choice to focus attention narrowly on the economic dimension of individuals – to the exclusion of all other facets of complex, multidimensional human beings – and to ignore all but the most blatant forms of discrimination.¹¹ The real question, then, is not what academic inquiries get rewarded, but whether discrimination is rendered any less real or tangible by simply being ignored. Fortunately, critical tax scholars in the United States have been deterred neither by such criticism nor by the hostile reception they have received from some corners of tax academia; instead, they have forged ahead with the important work of raising awareness of the relationship between tax law and society, and the role that tax law plays in entrenching power and privilege and furthering dominance and subordination.¹²

Here, the United States will be used as an example to show how critical tax analysis can uncover the ways in which current tax law perpetuates social and economic inequality while concomitantly identifying opportunities for tax reform that would contribute to the creation of a more just society. In the United States, among the most salient lines of difference and discrimination are race, ethnicity, gender, sexual orientation, socioeconomic class, disability, and immigration status. As briefly (and nonexhaustively) catalogued here, US critical tax scholarship shows how these axes of subordination have been replicated in the tax system.

At present, the most prominent lines of difference and discrimination in US society are those drawn around race. Among the general public, new levels of awareness of the persistence of racism are due in no small part to the multiple public demonstrations that occurred in June 2020. In the United States and around the world, millions of people took to the streets to protest police brutality against minorities, galvanised by horrific video footage of the murder of George Floyd as a policeman kneeled on his neck and choked Mr. Floyd to death.¹³ Similarly, as the United States continues to struggle with the coronavirus pandemic, violent hate crimes against Asian Americans have become increasingly common.¹⁴ In response to these incidents, in May 2021, President Joseph Biden signed into law the COVID-19 Hate Crimes Act, the very name of which implicitly rebukes former President Donald Trump and others for using anti-Asian language in stoking public fears about the coronavirus.¹⁵ Even as the need for racial justice and reform receives new levels of attention in the United States and elsewhere, critical tax scholars continue their work exposing the tax law's disparate impacts on the basis of race and the role that tax laws play in reinforcing racialised economic inequality.¹⁶

A foundational article from the 1990s showed how White taxpayers reap greater benefits than African American taxpayers from the tax provisions that protect wealth (eg, the postponement of gain recognition until a sale or disposition, the preferential rates for capital gains, and the exclusion for gifts and inheritances), both because Whites have more wealth and because they own the “right” types of assets (eg, stocks and bonds that tend to appreciate in value rather than cars and trucks that tend to lose

¹¹ See Anthony C Infanti, “Tax” (2008) 55(4) *Buffalo Law Review* 1191. At times, mainstream scholarship questions the existence of even the most patent discrimination: Steve R Johnson, “Targets Missed and Targets Hit: Critical Tax Studies and Effective Tax Reform” (1998) 76(5) *North Carolina Law Review* 1771, 1772–1779.

¹² See Anthony C Infanti and Bridget J Crawford, “A Taxing Feminism” in Deborah L Brake, Martha Chamallas and Verna Williams (eds), *The Oxford Handbook of Feminism and Law in the United States* (OUP, 2021).

¹³ See, eg, Evan Hill et al, “How George Floyd Was Killed in Police Custody”, *The New York Times*, 31 May 2020 <<https://www.nytimes.com/2020/05/31/us/george-floyd-investigationnotehtml?smid=url-share>>; Larry Buchanan, Quoctrung Bui and Jugal K Patel, “Black Lives Matter May Be the Largest Movement in U.S. History”, *The New York Times*, 3 July 2020 <<https://nyti.ms/2ZqRyOU>>.

¹⁴ See Nicole Hong and Jonah E Bromwich, “Asian-Americans Are Being Attacked”, *The New York Times*, 18 March 2021 <<https://www.nytimes.com/2021/03/18/nyregion/asian-hate-crimes.html?smid=url-share>>.

¹⁵ See COVID-19 Hate Crimes Act, S 937, 117th Congress (2021) (signed into law by President Biden on 19 May 2021); Libby Cathey, “Biden Signs Anti-Asian Hate Crime Bill Marking ‘Significant Break’ in Partisanship”, *ABC News*, 20 May 2021 <<https://abcnews.go.com/Politics/biden-sign-anti-asian-hate-crime-bill-law/story?id=77801857>>; Barbara Sprint, “Congress Passes Bill to Counter the Rise in Anti-Asian Hate Crimes” (National Public Radio, 18 May 2021) <<https://www.npr.org/2021/05/18/997847571/congress-passes-bill-to-counter-the-rise-in-anti-asian-hate-crimes>> (quoting Donald Trump as calling COVID-19 the “kung flu”).

¹⁶ See, eg, Dorothy A Brown, *The Whiteness of Wealth: How the Tax System Impoverishes Black Americans and How We Can Fix It* (Crown, 2021).

value).¹⁷ This differential pattern of benefits is thought to stem from the fact that, in the United States, “the typical black and the typical white lead different lives, largely as a result of the American history of racial subordination.”¹⁸ Later work has explored how the tax provisions that benefit homeownership (eg, the home mortgage interest deduction, property tax deduction, and exclusion for gain on the sale of a principal residence) likewise redound to the greater benefit of Whites, both because White homeownership rates are higher than those of African Americans and because the value of housing dips significantly in neighborhoods where more than 10% of the neighborhood is African American.¹⁹ Important scholarly contributions have also considered the role that race plays in the tax incentives for retirement plans,²⁰ the “marriage penalty” on dual-earning married couples,²¹ the Earned Income Tax Credit (EITC) aimed at helping the working poor,²² and tax benefits for families.²³ This work has since been extended to examine the disparate treatment of Latinx and Asian American taxpayers in many of these same areas, with the disparities in treatment varying based on the specific situation of these communities (although to date, there is not as much critical tax scholarship focused on these groups as on African American taxpayers).²⁴

More recently, in the wake of the passage of President Donald Trump’s signature economic legislation, the 2017 Tax Cuts and Jobs Act, some academic work has focused on how the act’s changes might exacerbate the disparate tax impacts along racial and ethnic lines that have been identified by critical tax scholars.²⁵ Other academics have taken a constructive turn to consider the role that tax law might play in providing reparations for the history of slavery and segregation in the United States.²⁶ Still others, including scholars writing from within and outside the critical tax tradition, are developing proposals for US federal job-guarantee programs and a universal basic income (UBI).²⁷ These proposals draw on the jobs program *Plan Jefes y Jefas de Hogares* in Argentina during the period 2002–2004 and UBI pilot programs in Stockton, California, and Finland, among other places.²⁸ But even with all of these (and

¹⁷ Beverly I Moran and William Whitford, “A Black Critique of the Internal Revenue Code” [1996] (4) *Wisconsin Law Review* 751.

¹⁸ Moran and Whitford, n 17, 757.

¹⁹ Dorothy A Brown, “Shades of the American Dream” (2009) 87(2) *Washington University Law Review* 329.

²⁰ Dorothy A Brown, “Pensions and Risk Aversion: The Influence of Race, Ethnicity, and Class on Investor Behavior” (2007) 11(2) *Lewis & Clark Law Review* 385; Dorothy A Brown, “Pensions, Risk, and Race” (2004) 61(4) *Washington & Lee Law Review* 1501.

²¹ Dorothy A Brown, “The Marriage Bonus/Penalty in Black and White” (1997) 65(3) *University of Cincinnati Law Review* 787.

²² Dorothy A Brown, “Race and Class Matters in Tax Policy” (2007) 107(3) *Columbia Law Review* 790.

²³ Dorothy A Brown, “The Tax Treatment of Children: Separate but Unequal” (2005) 54(2) *Emory Law Journal* 755.

²⁴ Leo P. Martinez, “Latinos and the Internal Revenue Code: A Tax Policy Primer for the New Administration” (2017) 20 *Harvard Latinx Law Review* 101; Leo P. Martinez and Jennifer M. Martinez, “The Internal Revenue Code and Latino Realities: A Critical Perspective” (2011) 22(3) *University of Florida Journal of Law and Public Policy* 377; Mylinh Uy, “Tax and Race: The Impact on Asian Americans” (2004) 11(1) *Asian Law Journal* 117.

²⁵ See, eg, Victoria J. Haneman, “Contemplating Homeownership Tax Subsidies and Structural Racism” (2019) 54(2) *Wake Forest Law Review* 363; Palma Joy Strand and Nicholas A. Mirkey, “Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation” (2020) 15(3) *Northwestern Journal of Law and Social Policy* 265.

²⁶ See, eg, Andre Smith and Carlton Waterhouse, “No Reparation without Taxation: Applying the Internal Revenue Code to the Concept of Reparations for Slavery and Segregation” (2010) 7(2) *Pittsburgh Tax Review* 159; Bobby L. Dexter, “The Hate Exclusion: Moral Tax Equity for Damages Received on Account of Race, Sex, or Sexual Orientation Discrimination” (2016) 13(2) *Pittsburgh Tax Review* 197.

²⁷ See, eg, Lynn D. Lu, “From Stigma to Dignity? Transforming Workfare with Universal Basic Income and a Federal Job Guarantee” (2021) 72(3) *South Carolina Law Review* 703; Miranda Perry Fleischer and Daniel Hemel, “The Architecture of a Basic Income” (2020) 87(3) *University of Chicago Law Review* 625, 633–641.

²⁸ See Lu, n 27; Fleischer and Hemel, n 27, 627; Pavlina R. Tcherneva, “Beyond Full Employment: What Argentina’s *Plan Jefes* Can Teach Us About the Employer of Last Resort” in Michael J. Murray and Matthew Forstater (eds), *Employment Guarantee Schemes: Job Creation and Policy in Developing Countries and Emerging Markets* (Palgrave Macmillan, 2013); Pavlina R. Tcherneva, “The Job Guarantee: Design, Jobs, and Implementation” (Working Paper No. 902, Levy Economic Institute of Bard College, April 2018) 2; Leonid Bershidsky, *In Finland, Money Can Buy You Happiness* (9 February 2019) Bloomberg <<https://www.bloomberg.com/opinion/articles/2019-02-09/universal-basic-income-in-finland-money-can-buy-you-happiness>> (noting the limited impact of Finland’s UBI pilot program on job-seeking behavior).

other) scholarly contributions, there is still work to be done. To give just one example of a notable gap, there has not yet been a comprehensive critical study of the impact of US federal tax law on Indigenous Americans.²⁹

Before moving on, it is worth noting that the intersection of tax with race is not confined to the sphere of domestic taxation. It has been observed that “[i]nternational tax law may seem an unlikely place for the dog-whistle politics of race and discriminatory exclusion, yet its preoccupation with preserving the market from perceived threats lends itself to fears of lower class or racially charged lawlessness”.³⁰ Indeed, the Biden administration has been called out for its naming and shaming of majority-Black countries as “tax havens” while failing to mention their majority-White counterparts.³¹ This mention of the international dimensions of critical tax discourse also acts as a helpful bridge to exploring other lines of difference and discrimination that surface in tax law. After all, critical tax scholars have likewise focused on the international tax dimensions of gender (in the context of household work performed by immigrant women in the United States) and sexual orientation (in the context of the broader battle for marriage equality).³² Mention of the international tax dimensions of these additional lines of difference and discrimination serves as a natural segue to next considering how these and other lines of difference and discrimination surface in the US domestic tax sphere as well.

The intersection of tax law and gender has proved to be a fertile area of inquiry, which has been explored by a number of scholars and defies summary in this short space. An important strand of this work has focused on the replication of the public/private divide in US federal tax law. A constellation of US federal income tax provisions – including, most visibly, the joint filing of income tax returns by married couples – has operated to impose tax penalties on married couples in which both spouses work (with the largest penalties historically visited upon equal-earner couples) and to provide tax bonuses (ie, subsidies) to married couples in which only one spouse (historically, the husband) works in the paid labor market while the other spouse (historically, the wife) works in the home.³³ Given its unique visibility in a tax system that perpetuates outdated notions of what an American family ought to look like, the joint return has come in for particular criticism (and calls from some quarters for its abolition) because it was adopted to afford the tax savings associated with income splitting to husbands – without the need to actually split their income with their wives – based on the fiction that husbands and wives are one person for federal tax purposes.³⁴

The erasure of women’s agency and identity in marriage can similarly be seen in the US federal wealth transfer tax exemption for transfers between spouses. The exemption of transfers to so-called qualified terminable interest property (QTIP) trusts has been criticised because the husband is able to obtain an

²⁹ There is at least one article examining the tax implications of a recent major decision of the United States Supreme Court: Stacy L Leeds and Lonnie R Beard, “A Wealth of Sovereign Choices: Tax Implications of *McGirt v. Oklahoma* and the Promise of Tribal Economic Development” (2021) 56(3) *Tulsa Law Review* 417 (discussing implications of a judicial decision that much of present-day Oklahoma lies within the reservation boundaries of the Muscogee (Creek) Nation).

³⁰ Steven A Dean and Attiya Waris, “Ten Truths about Tax Havens: Inclusion and the ‘Liberia’ Problem” (2021) 70(7) *Emory Law Journal* 1659, 1662.

³¹ Steven Dean, “A Plea to President Biden to Stop Perpetuating Racist Tax Policy”, *The Nation* (13 April 2021) <<https://www.thenation.com/article/economy/biden-tax-policy/>>. For discussion of broader problems in the US approach to international taxation as applied to the nations of sub-Saharan Africa, see Karen B Brown, “Missing Africa: Should US International Tax Rules Accommodate Investment in Developing Countries?” (2002) 23(1) *University of Pennsylvania Journal of International Economic Law* 45.

³² Taunya Lovell Banks, “Toward a Global Critical Feminist Vision: Domestic Work and the Nanny Tax Debate” (1999) 3(1) *Journal of Gender, Race, and Justice* 1; Anthony C Infanti, “Prying Open the Closet Door: The Defense of Marriage Act and Tax Treaties” (2004) 105 *Tax Notes* 563.

³³ See, eg, Edward J McCaffery, *Taxing Women: How the Marriage Penalty Affects Your Taxes* (The University of Chicago Press, 1997).

³⁴ See, eg, Marjorie E Kornhauser, “Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return” (1997) 45(1) *Hastings Law Journal* 63; Amy C Christian, “Joint and Several Liability and the Joint Return: Its Implications for Women” (1998) 66(2) *University of Cincinnati Law Review* 535, 537; Lily Kahng, “Innocent Spouses: A Critique of the New Tax Laws Governing Joint and Several Liability” (2004) 49(2) *Villanova Law Review* 261; Martha T McCluskey, “Taxing the Family Work: Aid for Affluent Husband Care” (2011) 21(1) *Columbia Journal of Gender and the Law* 109.

exemption for a nominal transfer to his wife even though she lacks control over the property – control that he maintains even after death.³⁵ Like the fiction of marital unity that underpins the joint return, the exemption for QTIP transfers is “based on the fallacy that decisions by the husband are decisions of the marital unit”.³⁶

As with race and ethnicity, the changes made by the recent Tax Cuts and Jobs Act have come under scrutiny for their potentially adverse gender-based impacts.³⁷ At the same time, state-level consumption taxes have become the focus of new critical tax analysis, with scholars examining the application and operation of taxes imposed on menstrual products as “luxury” items – as opposed to products for men such as erectile dysfunction drugs that are classified as “necessities” – and having some success in raising public awareness that has led to efforts to repeal these taxes.³⁸ Another area of success has been in obtaining a federal income tax deduction for transgender taxpayers’ medical expenses when undergoing gender-confirmation surgery; however, the battle for that deduction was hard fought and the transgender taxpayer at the center of the battle was forced to endure open hostility and anti-trans bias from more than one branch of the Federal Government.³⁹

Critical tax scholars fought a long battle in one notable area in which tax discrimination by the Federal Government went from being tacit to blatant: the refusal to recognise same-sex relationships. As part of the decades-long battle for marriage equality in the United States, critical tax scholars examined the impacts of the Federal Government’s refusal to recognise same-sex relationships, even after those relationships were legally recognised by some states.⁴⁰ After the battle was won at the federal level – in a tax case concerning the application of the wealth transfer tax marital deduction to a surviving same-sex spouse⁴¹ – scholars continue to explore the vestiges of discrimination based on sexual orientation that lurk in federal tax law that has been (and continues to be) constructed with an explicitly heteronormative mindset.⁴²

In the areas of socioeconomic class and disability, scholars have explored how even well-intentioned provisions can be problematic. For instance, in addressing poverty, the Federal Government has increasingly turned to the Internal Revenue Code rather than direct spending measures to provide assistance.⁴³ Unfortunately, these antipoverty measures are a morass of complex tax provisions that is difficult, if not impossible, for the poor to successfully navigate.⁴⁴ Similarly, the tax provisions aimed

³⁵ Wendy C Gerzog, “The Marital Deduction QTIP Provisions: Illogical and Degrading to Women” (1995) 5(2) *UCLA Women’s Law Journal* 301.

³⁶ Gerzog, n 35, 310.

³⁷ Anne Bryson Bauer, “We Can Do It? How the Tax Cuts and Jobs Act Perpetuates Implicit Gender Bias in the Code” (2020) 43(1) *Harvard Journal of Law and Gender* 1.

³⁸ See, eg, Bridget J Crawford and Carla Spivack, “Tampon Taxes, Discrimination, and Human Rights” [2017] (3) *Wisconsin Law Review* 491; Bridget J Crawford and Emily Gold Waldman, “The Unconstitutional Tampon Tax” (2019) 53(2) *University of Richmond Law Review* 439.

³⁹ See, eg, Anthony C Infanti, “LGBT Taxpayers: A Collision of ‘Others’” (2012) 13(1) *Georgetown Journal of Gender and the Law* 1; Katherine Pratt, “The Tax Definition of ‘Medical Care.’ A Critique of the Startling IRS Arguments in *O’Donnabhain v. Commissioner*” (2016) 23(2) *Michigan Journal of Gender & Law* 313.

⁴⁰ See, eg, Patricia A. Cain, “Same-Sex Couples and the Federal Tax Laws” (1991) 1 *Law & Sexuality: A Review of Lesbian and Gay Legal Issues* 97; Patricia A Cain, “Taxing Lesbians” (1997) 6(2) *Southern California Review of Law and Women’s Studies* 471; Patricia A Cain, “Death Taxes: A Critique from the Margin” (2000) 48(4) *Cleveland State Law Review* 677; Anthony C Infanti, “The Internal Revenue Code as Sodomy Statute” (2004) 44(3) *Santa Clara Law Review* 763; Anthony C Infanti, “Tax Protest, ‘A Homosexual’, and Frivolity: A Deconstructionist Meditation” (2005) 24(1) *Saint Louis University Public Law Review* 21; Nancy J Knauer, “Heteronormativity and Federal Tax Policy” (1998) 101(1) *West Virginia Law Review* 129.

⁴¹ *United States v Windsor*, 570 US 744 (2013).

⁴² See, eg, Anthony C Infanti, “The House of *Windsor*: Accentuating the Heteronormativity in the Tax Incentives for Procreation” (2014) 89(4) *Washington Law Review* 1185; Anthony C Infanti, “Hegemonic Marriage: The Collision of ‘Transformative’ Same-Sex Marriage with Reactionary Tax Law” (2021) 74(3) *The Tax Lawyer* 411; Lily Kahng, “The Not-So-Merry Wives of *Windsor*: The Taxation of Women in Same-Sex Marriages” (2016) 101(2) *Cornell Law Review* 325.

⁴³ See Susannah Camic Tahk, “The Tax War on Poverty” (2014) 56(3) *Arizona Law Review* 791.

⁴⁴ See, eg, Francine J Lipman, “The Working Poor Are Paying for Government Benefits: Fixing the Hole in the Anti-Poverty Purse” [2003] (3) *Wisconsin Law Review* 461; Francine J Lipman and Dawn Davis, “Heal the Suffering Children: Fifty Years after the Declaration of War on Poverty” (2014) 34(2) *Boston College Journal of Law and Social Justice* 311.

at individuals with disabilities have been criticised for their incoherence and paternalism.⁴⁵ When it comes to immigration status, however, the reverse is true: rather than encountering (presumably) good intentions, one encounters contempt heaped on top of opprobrium. As one scholar has remarked, “Despite the shibboleth that undocumented immigrants are not subject to and do not pay income taxes, the truth is that they are and often at a higher effective tax rate than similarly situated U.S. citizens and documented immigrants.”⁴⁶

It is worth noting that in the tax arena, just as in society at large, these axes of discrimination do not run in parallel; they often overlap and intersect. A notable example lies in the conscious decision to tax damages received on account of employment discrimination. While Congress chose to tax workers who suffer discrimination based on race, ethnicity, gender, sexual orientation, or other protected characteristics, it continued to allow the employers who perpetrate such discrimination to deduct the damages that they pay and thus reduce the burden of those payments.⁴⁷ Adding insult to injury, Congress used the revenue raised on the backs of workers to fund additional tax benefits for businesses in that very same piece of legislation.⁴⁸

It is further worth observing that critical tax scholarship has focused not only on the substance of tax law but also on its procedural aspects. As critical tax scholars have shown, deep-seated biases are just as likely to influence the procedural workings of the tax laws as they are their normative structure. For instance, scholars have explored the biases that have informed how and when family relationships must be documented for tax purposes as well as the interaction between state and federal income tax filing obligations for couples whose relationships are recognised by one level of government but not the other.⁴⁹

Critical tax scholars use a variety of methods and approaches to ferret out all of the ways that the tax laws replicate and exacerbate social and economic inequalities. As we explained in *Critical Tax Theory: An Introduction*, critical tax scholars “use historical material, contemporary case studies, and personal or fictional narratives to illustrate the practical impact of the tax laws on individuals and groups; interpret social science and economic data to show how the tax laws impact groups differently; and explore the interconnectedness of tax laws with economic forces such as the labor market (especially as it impacts women) and international financial and political development”.⁵⁰

III. THE IMPACT AND LIMITATIONS OF CRITICAL TAX PERSPECTIVES

Critical tax scholarship generally received a chilly – and, at times, downright hostile – reception in the United States that long limited its ability to effect change. As Nancy Knauer explained:

The efforts of critical tax scholars to bring an outsider perspective to tax policy and question the base premise of taxpayer neutrality have often been met with stiff and sustained resistance from mainstream tax scholars who write primarily from an economics or public welfare perspective. As a result, critical tax theory has remained essentially a critique – a view from the margin that can both inform and

⁴⁵ See, eg, Francine J.- Lipman, “Enabling Work for People with Disabilities: A Post-integrationist Revision of Underutilized Tax Incentives” (2003) 53(2) *American University Law Review* 393; Theodore P Seto and Sande L Buhai, “Tax and Disability: Ability to Pay and the Taxation of Difference” (2006) 154(5) *University of Pennsylvania Law Review* 1053.

⁴⁶ Francine J Lipman, “The ‘ILLEGAL’ Tax” (2011) 11(1) *Connecticut Public Interest Law Journal* 93, 100.

⁴⁷ A minor – and, unfortunately, quite poorly drafted and problematical – exception to deductibility was enacted in 2017 for cases where sexual harassment settlements are subject to nondisclosure agreements: *Internal Revenue Code of 1986*, 26 USC § 162(q) (2021). See Margaret Ryznar, “#MeToo & Tax” (2018) 75 *Washington and Lee Law Review Online* 53; Anthony C Infanti, “Why Are Republicans Punishing Sexual Harassment Victims in the Tax Bill?”, *The Hill*, 19 December 2017 <<http://thehill.com/opinion/finance/365592-why-are-republicans-punishing-sexual-harassment-victims-in-the-tax-bill>>.

⁴⁸ See Karen B Brown, “Not Color- or Gender-Neutral: New Tax Treatment of Employment Discrimination Damages” (1998) 7(2) *Southern California Review of Law and Women’s Studies* 223.

⁴⁹ See, eg, Anthony C Infanti, “Inequitable Administration: Documenting Family for Tax Purposes” (2011) 22(2) *Columbia Journal of Gender and Law* 329; Carlton Smith and Edward Stein, “Dealing with DOMA: Federal Non-recognition Complicates State Income Taxation of Same-Sex Relationships” (2012) 24(1) *Columbia Journal of Gender and Law* 29.

⁵⁰ Infanti and Crawford, n 2, xxi–xxii.

illuminate – but it has failed to find a wide audience among tax scholars or application for its insights within tax policy.⁵¹

Nonetheless, as discussed next, the patient work of critical tax scholars in laying the foundation for a tectonic shift in how Americans see and interact with their tax system finally seems to be paying dividends.

Prior to the COVID-19 pandemic, there was evidence that policymakers were beginning to integrate insights from gender-based critical tax scholarship. For example, in 2017, Caroline Bruckner of the Tax Policy Center at American University's Kogod School of Business authored a report identifying “a billion dollar blind spot” on the part of Congress and other stakeholders regarding the availability of tax expenditures to women-owned businesses.⁵² She testified before Congress about the report in 2017 and 2018.⁵³ In 2019, after Bruckner testified before the Budget Committee of the US House of Representatives, the official hearing report summarised portions of her testimony, helping it reach a broader audience.⁵⁴ Bruckner's report and work like it – including the National Women's Law Center's 2019 reports on *The Faulty Foundations of the Code*,⁵⁵ *Reckoning with the Hidden Rules of Gender in the Tax Code*,⁵⁶ and *A Tax Code for the Rest of Us*⁵⁷ – helped critical tax insights reach policymakers, legislators, and scholars working in related areas.

Worldwide, the COVID-19 pandemic revealed gender fault lines that have always existed but that have become more visible at a time of stay-at-home orders, school and business closures, and the “new normal” of blended work and family life.⁵⁸ In the United States, the Biden administration has explicitly acknowledged the ways that the pandemic “disproportionately affected women and girls and significantly deepened existing gender inequalities around the world”.⁵⁹ Women have suffered higher rates of job losses and shouldered greater caretaking and household responsibilities than men.⁶⁰ Indeed, childcare issues, exacerbated by school closures, are cited as the main factor contributing to women's leaving the paid workforce in the United States.⁶¹

⁵¹ Nancy J Knauer, “Critical Tax Policy: A Pathway to Reform?” (2012) 9(2) *Northwestern Journal of Law and Social Policy* 206, 226–227.

⁵² Caroline Bruckner, *Billion Dollar Blind Spot: How the U.S. Tax Code's Small Business Expenditures Impact Women Business Owners* (Report, Kogod School of Business Tax Policy Center, June 2017) 7.

⁵³ Caroline Bruckner, Testimony on “Expanding Opportunities for Small Businesses Through the Tax Code”, Hearing Before the US Senate Committee on Small Business and Entrepreneurship, 115th Congress, 26–36 (2018); Caroline Bruckner, Testimony on “Small Business Tax Reform: Modernizing the Code for the Nation's Job Creators”, Hearing Before the US House Committee on Small Business, 115th Congress, 10–12, 13–14, 36–43 (2017).

⁵⁴ US House Committee on Budget, *Real-World Effects Prove the GOP Tax Law Was the Wrong Policy at the Wrong Time* (6 March 2019).

⁵⁵ Ariel Jurow Kleiman, Amy Matsui and Estelle Mitchell, “The Faulty Foundations of the Code: Gender and Racial Bias in Our Tax Laws” (Report, National Women's Law Center, 2019).

⁵⁶ Katy Milani et al, “Reckoning with the Hidden Rules of Gender in the Tax Code: How Low Taxes on Corporations and the Wealthy Impact Women's Economic Opportunity and Security” (Report, National Women's Law Center, 2019).

⁵⁷ Melissa Boteach et al, “A Tax Code for the Rest of Us: A Framework & Recommendations for Advancing Gender & Racial Equality Through Tax Credits” (Report, National Women's Law Center, 2019).

⁵⁸ Yvette Lind and Åsa Gunnarsson, “Gender Equality, Taxation, and the COVID-19 Recovery: A Study of Sweden and Denmark” (2021) 101(5) *Tax Notes International* 581, 581.

⁵⁹ President Joseph P Biden Jr, “National Strategy for the COVID-19 Response and Pandemic Preparedness” (2021) 107.

⁶⁰ See, eg, Pallavi Gogoi, “Stuck-At-Home Moms: The Pandemic's Devastating Toll on Women” in *Special Series: How the Pandemic Is Breaking Women* (National Public Radio, 28 October 2020) (citing rates of September 2020 job losses by women as four times the rate of men's and further commenting that “the uncomfortable truth is that in their homes, women are still fitting into stereotypical roles of doing the bulk of cooking, cleaning and parenting”); Kweilin Ellingrud and Liz Hilton Segel, “COVID-19 Has Driven Millions of Women Out of the Workforce”, *Fortune*, 13 February 2021 <<https://fortune.com/2021/02/13/covid-19-women-workforce-unemployment-gender-gap-recovery>> (“Recent projections ... estimate that employment for women may not recover to pre-pandemic levels until 2024 – two full years after a recovery for men”).

⁶¹ See, eg, Lauren Bauer, “Mothers Are Being Left behind in the Economic Recovery from COVID-19” (Brookings, 6 May 2021) <<https://www.brookings.edu/blog/up-front/2021/05/06/mothers-are-being-left-behind-in-the-economic-recovery-from-covid-19>>.

Gender fault lines were not, however, the only ones revealed by the pandemic. With the passage of the *Coronavirus Aid, Relief, and Economic Security Act* in 2020, each US taxpayer below specified income levels became eligible for a cash payment of US\$1,200 (approximately A\$1,545).⁶² Because the economic impact payments were administered through the tax system, those who had not filed tax returns (eg, because they fell below the income threshold for filing) and those experiencing homelessness missed out on their payments. To put this in perspective, consider that an estimated 11.8% of people live in poverty in the United States,⁶³ with Blacks twice as likely to be poor than Whites;⁶⁴ children and older adults more likely to be poor than those of working age;⁶⁵ women more likely to be poor than men;⁶⁶ disabled individuals more likely to be poor than the nondisabled (with disabled women more likely to be poor than disabled men); and lesbian cisgender women, bisexual cisgender women, and transgender people more likely to experience poverty than their straight or cisgender counterparts.⁶⁷ Because people below the poverty line often do not file tax returns, many of those most in need initially did not receive economic impact payments. Later, the program was expanded to deliver benefits directly to those enrolled in certain other federal programs, such as Social Security or veterans benefits; separately, provisions were made for “nonfilers” to register with the Internal Revenue Service, yet it still took several months for some of the most economically vulnerable to receive payments.⁶⁸

The US Government has since issued two additional rounds of payments, with slightly different eligibility criteria.⁶⁹ Even so, in fall 2020, researchers estimated that only one-fifth of pandemic aid had by then been allocated to direct payments to individuals as opposed to businesses – including not only small business but also large, publicly traded, profitable companies.⁷⁰ Concerns relating to the differential impact of the pandemic along lines of race, ethnicity, gender, age, disability, sexual orientation, and gender identity seemed entirely out of mind in designing this relief, which was often channeled through the tax system.

⁶² *Coronavirus Aid, Relief, and Economic Security Act*, Pub L No 116-136, 137 Stat 281 (2020); IRC § 6428(a)–(c).

⁶³ Using a different measure, the Organisation for Economic Co-operation and Development puts the US poverty rate at 17.8%, as compared to 12.4% in Australia. OECD, *Poverty Rate* <<https://data.oecd.org/inequality/poverty-rate.htm>>.

⁶⁴ See Alexandre Tanzi and Catarina Saraiva, *U.S. Suffers Sharpest Rise in Poverty Rate in More than 50 Years* (Bloomberg, 25 January 2021, 3:53 PM) <<https://www.bloomberg.com/news/articles/2021-01-25/u-s-suffers-sharpest-rise-in-poverty-rate-in-more-than-50-years>>.

⁶⁵ See Laura Ginnarellia, Laura Wheaton and Katie Shantz, “2021 Poverty Projections” (Brief, Urban Institute, 2021) <<https://www.urban.org/sites/default/files/publication/103656/2021-poverty-projections.pdf>> (“We project an overall 2021 poverty rate of 13.7 percent, meaning that about one in seven Americans may have annual family resources below the poverty threshold”).

⁶⁶ See Robin Bleiwies, Diana Boesch and Alexandra Cawthorne Gaines, “The Basic Facts About Women in Poverty” (Report, Center for American Progress, 3 August 2020) <<https://www.americanprogress.org/issues/women/reports/2020/08/03/488536/basic-facts-women-poverty>>.

⁶⁷ Bleiwies, Boesch and Gaines, n 66 (“A 2019 survey by UCLA Law School’s Williams Institute found that 17.9 percent of lesbian cisgender women, 29.4 percent of bisexual cisgender women, and 29.4 percent of transgender people lived in poverty, compared with 17.8 percent of straight cisgender women and 13.4 percent of straight cisgender men. They also found a similarly high poverty rate among gender-nonconforming people”. (internal citations omitted)).

⁶⁸ See, eg, Alison DeNisco Rayome and Shelby Brown, “How Nonfilers Can Get Stimulus Checks (Including Those Experiencing Homelessness)” (CNET Personal Finance, 16 April 2021) <<https://www.cnet.com/personal-finance/how-nonfilers-can-get-stimulus-checks-including-those-experiencing-homelessness>>. Furthermore, although incarcerated individuals were entitled under the law to receive the stimulus payments, the IRS inexplicably (and improperly) stopped making these payments. See Leslie Book, “Tax Administration and Racial Justice: The Illegal Denial of Tax Based Pandemic Relief to the Nation’s Incarcerated” (2021) 72(3) *South Carolina Law Review* 667. Only under an injunctive order from a federal district court did the IRS resume making the payments as required by law. *Scholl v Mnuchin*, 494 F Supp 3d 661 (ND Cal, 2020), appeal dismissed, *Scholl v Mnuchin*, 2020 WL 9073361 (9th Cir, 2020).

⁶⁹ See Internal Revenue Service, *Third Economic Impact Payment* <<https://www.irs.gov/coronavirus/third-economic-impact-payment>>.

⁷⁰ See Peter Whoriskey, Douglas MacMillan and Jonathan O’Connell, “‘Doomed to Fail’: Why a \$4 Trillion Bailout Couldn’t Revive the American Economy”, *The Washington Post*, 5 October 2020 <<https://www.washingtonpost.com/graphics/2020/business/coronavirus-bailout-spending>>; Victor Reklaitis, *Here Are the Public Companies That Got Coronavirus Aid Meant for Small Businesses* (25 April 2020) MarketWatch <<https://www.marketwatch.com/story/here-are-the-public-companies-that-got-coronavirus-aid-meant-for-small-businesses-2020-04-22>>.

One piece of COVID-relief legislation, the American Rescue Plan Act, did attempt to ease childcare burdens and provide additional relief to the working poor. The legislation temporarily increased the amount of the partially refundable child tax credit; converted the child and dependent care credit from a nonrefundable to a refundable tax credit and expanded the credit's size; broadened eligibility for the EITC; and expanded eligibility for the health insurance premium tax credit.⁷¹ While welcome and financially meaningful in many cases, these types of smaller-scale reforms suggest that critical tax scholarship does not yet impact tax policy and design except at the margins. Even though President Biden's National Strategy for the COVID-19 Response and Pandemic Preparedness acknowledges that the pandemic "has exposed and exacerbated severe and pervasive health inequities among communities defined by race, ethnicity, geography, disability, sexual orientation, gender identity, and other factors", the government's response has not yet taken these multiple (and often overlapping) considerations into account.⁷²

To be fair, President Biden has announced what he calls a "once-in-a-generation investment in America" in the form of a US\$2 trillion (approximately A\$2.6 trillion) infrastructure plan.⁷³ The plan calls for financing these initiatives – which President Biden says are "investments we have to make ... we can't afford not to"⁷⁴ – with a return to pre-Trump level corporate tax rates of 28% and the imposition of a minimum tax on US multinational corporations.⁷⁵ Furthermore, the Biden administration is expected in the future to propose several tax changes that do, in fact, respond directly to concerns of critical tax scholars. These anticipated changes include a lowering of the wealth transfer tax exemption,⁷⁶ the elimination of capital gains preferences,⁷⁷ and a realisation-upon-death rule for built-in gains.⁷⁸ While these changes would eliminate some of the ways that US tax laws have disparate impact on the basis of race, class, and other lines of difference and discrimination – and thus would represent "success"

⁷¹ See, eg, Rocky Mengle, *More Monthly Child Credit Payments, Higher Child Care Credit, and Other Tax Breaks in Biden's Latest Plan* (29 April 2021) Kiplinger <<https://www.kiplinger.com/taxes/602707/more-monthly-child-credit-payments-higher-child-care-credit-and-other-tax-breaks-in-biden-plan>> (providing an overview of the impact on these tax provisions of the *American Rescue Plan Act of 2021*, Pub L No 117-2, 135 Stat 4 (2021)). These changes would be made permanent under the Biden administration's American Families Plan. See White House, *Fact Sheet: The American Families Plan* (Information Sheet, 28 April 2021) <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan>>.

⁷² Biden, n 59, 9.

⁷³ See, eg, Ben Gittleson, Justine Gomez and Benjamin Siegel, "Biden Unveils Sweeping Infrastructure Plan, Calling It a 'Once-in-a-Generation Investment in America'", *ABCNews*, 31 March 2021 <<https://abcnews.go.com/Politics/bidens-big-push-massive-infrastructure-plan-proposed-tax/story?id=76770525>> (quoting President Biden and describing infrastructure plan); Javier Zarracina, Joey Garrison and George Petras, "Joe Biden Wants to Spend \$2 Trillion on Infrastructure and Jobs", *USA Today*, 1 April 2021 <<https://www.usatoday.com/in-depth/news/politics/2021/04/01/2-trillion-infrastructure-bill-charts-detail-bidens-plan/4820227001>>. The plan calls for repairing and improving roads, bridges, water pipes, and water systems; rebuilding schools and hospitals; and expanding public transit, the electric vehicle industry and other clean-energy initiatives, affordable care for the elderly, and broadband access across the country. See Zarracina Garrison and Petras above.

⁷⁴ Zarracina, Garrison and Petras, n 73 (quoting President Biden).

⁷⁵ Compare Zarracina, Garrison and Petras, n 73 (describing the proposed financing of the new infrastructure plan, including Biden's initial proposal for a 21% global minimum tax on US multinational corporations), with Allan Rappeport, "US Backs 15% Global Minimum Tax to Curb Profit Shifting Overseas", *The New York Times*, 20 May 2021 <<https://www.nytimes.com/2021/05/20/business/economy/global-minimum-tax-corporations.html?smid=url-share>> (describing the modified presidential proposal as including a 15% global minimum tax on US multinational corporations).

⁷⁶ See, eg, Greg Iacuri, *Wealth Tax, Estate Tax, Capital Gains: Here's How Democrats Want to Tax the Super Rich* (23 March 2021) CNBC <<https://www.cnbc.com/2021/03/23/heres-how-democrats-want-to-raise-taxes-on-the-rich.html>> (describing proposal to reduce the wealth transfer tax exemption from its current level of more than US\$11 million to Obama-era levels of US\$3.5 million for death-time transfers and US\$1 million for lifetime transfers); Bridget J Crawford and Wendy C Gerzog, "Tax Benefits, Higher Education and Race: A Gift Tax Proposal for Direct Tuition Payments" (2021) 72(3) *South Carolina Law Review* 783, 809 (explaining that "[u]nder any system where more than 99.5% of all decedents pay no wealth transfer tax at all, the wealth transfer exemption should be understood as a primary feature of a system that allows one generation to pass economic privilege to the next" and calling for lower wealth transfer tax exemption amounts in service of the tax law's goal of breaking up concentrations of wealth).

⁷⁷ Iacuri, n 76; Moran and Whitford, n 17, 779–780.

⁷⁸ Iacuri, n 76; Moran and Whitford, n 17, 779.

from a critical perspective – they do not go far enough.⁷⁹ To give just one example of further necessary reform, the joint federal income tax return and multiple (and often conflicting) definitions of family in US tax law continue to perpetuate “traditional” marriage as a fiscally favoured status, notwithstanding the reality that family relationships take many other forms that are equally deserving of legal recognition and protection, including by the tax laws.⁸⁰

Looking forward to these future battles to advance tax and social justice, the flurry of executive orders that President Biden issued in the days following his inauguration hold out the promise of an opportunity to be leveraged. One of these executive orders stated: “It is ... the policy of my Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all”, specifically defining *equity* as:

the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.⁸¹

To this end, President Biden created a new Interagency Working Group on Equitable Data designed to promote better gathering and sharing of data among agencies along identity axes including “race, ethnicity, gender, disability, income, veteran status, or other key demographic variables”, recognising that in the absence of data, there is no way to measure equity – and to hold the government accountable.⁸²

For many countries and nongovernmental organisations, a certain level of fiscal transparency is the norm, at least with respect to tracking gender in budgeting and spending.⁸³ But in the United States, tax data is not usually tracked or reported by race, gender, or any other identity axis.⁸⁴ Critical tax scholars have thus had to use nontax data (eg, the Current Population Survey, the Survey of Income and Program Participation, and the National Survey of Families and Households) to triangulate evidence of tax law’s disparate impacts.⁸⁵ Depending on how President Biden’s executive order is interpreted and applied, and the extent to which data are made available, we may be poised at the threshold of an entirely different, data-rich terrain that will bolster and improve US critical tax scholarship. For audiences who are receptive to claims that tax law has disparate impacts on certain groups of people – whether because of their race, gender, sexual orientation, socioeconomic class, disability, immigration status, or a combination of these – reference to official government data will make critical tax scholarship even more convincing. But for others, data from the government will remain inherently and always untrustworthy.⁸⁶

⁷⁹ The same can be said for the attention that Congress has finally begun to pay to inequities in US federal tax law – attention that has been both halting and unnecessarily narrow in scope. See, eg, William Hoffman, “Race and Class Split Finance Committee on Tax Code Disparities” (2021) 171 *Tax Notes Federal* 635.

⁸⁰ See, eg, Bridget J Crawford, “The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law” (2005) 3(1) *Pittsburgh Tax Review* 1, 42–48; Infanti, “The House of Windsor”, n 42; Infanti, “Hegemonic Marriage”, n 42; Kahng, n 42.

⁸¹ Executive Order No 13,985, 86 *Federal Register* 7,009 (24 January 2021) (entitled “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government”).

⁸² Executive Order, n 81.

⁸³ See generally Lisa Phillips and Miranda Stewart, “Fiscal Transparency: Global Norms, Domestic Laws, and the Politics of Budgets” (2009) 34(3) *Brooklyn Journal of International Law* 797, 843 (describing gender budgeting); United Nations Development Fund for Women, *Gender Responsive Budgeting and Aid Effectiveness* (Report, 2009) <<https://www.unwomen.org/-/media/headquarters/media/publications/unifem/introduction.pdf?la=en&vs=1013>>.

⁸⁴ See, eg, Jeremy Bearer-Friend, “Does the IRS Know Your Race? The Challenge of Colorblind Tax Data” (2019) 73(1) *Tax Law Review* 1, 2 (documenting “a century of colorblindness in the federal administration of tax data”); Crawford and Gerzog, n 76, 786–787 (describing limited availability of taxpayer data based on gender, age, or disability status).

⁸⁵ See, eg, Bearer-Friend, n 84, 39–41 (citing multiple studies that have drawn on nontax sources in order to reach supported conclusions about the racialised impacts of tax laws).

⁸⁶ See Pew Research Center, *Public Trust in Government: 1958–2021* (17 May 2021) <<https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021>> (“Currently, 36% of Democrats and Democratic-leaning independents say they can trust government, compared with 9% of Republicans and Republican-leaning.”); Lydia Saad, “Americans’ Concern

IV. CONCLUSION

At the current moment – a time of global pandemic, climate change, political tumult, and upheaval in the United States and elsewhere – there is a distinct need for critical tax scholarship. As we explained in *Critical Tax Theory: An Introduction*, one of the goals of this work is “to educate nontax scholars and lawyers about the interconnectedness of taxation, social justice, and progressive political movements”.⁸⁷ We now formally amend that goal to extend to the education of the general public too.⁸⁸ By offering frameworks and methods that global scholars can adapt, critical tax theory is a means for redesigning tax law and fiscal policies to serve goals of equity, broadly defined. Critical tax theory further invites into the academic and policy discourse concepts of dignity, human rights, and sustainability. Here, we use “sustainability” in the most expansive sense, so that it includes addressing both for current and future generations the ability to live long, healthy, and fulfilling lives as well as safeguarding the earth and its natural resources.⁸⁹ In order to enhance human flourishing now and in the future, all of these considerations must be brought to bear on tax law and economic policies.

To work towards a more equitable and just society, there must be adequate gathering and reporting of data about government spending and tax collection. To identify the places that fiscal unfairness and injustices persist, it is thus imperative to know how tax and other government benefits and burdens are allocated based on the lines of discrimination and disadvantage that divide a particular society. Unfortunately, the need for this type of data is not universally recognised. At least in the United States, it is common to encounter reluctance – on the part of individuals, private industry, and even the government – to acknowledging the multiple ways that identity categories matter, both in terms of one’s individual experience and the experience of any group or groups of which one is part. After all, the Declaration of Independence famously begins, “We hold these truths to be self-evident, that all men are created equal.”⁹⁰ Despite having been written at a time when all people in America were *not* treated equally – given the enslavement and legal subjugation of Indigenous people⁹¹ and Africans⁹² as well as the denial of multiple legal rights to White women⁹³ – that statement in the Declaration of Independence nonetheless retains a unique stronghold over the American psyche. For some people, to acknowledge difference is a denial of equality. For others, like US Supreme Court Justice Harry Blackmun, acknowledging difference is necessary: “In order to get beyond racism, we must first take account of race. There is no other way.”⁹⁴ To our minds, in order to fully remedy inequalities, one must know where they exist. In taxation and fiscal policy, that requires data collection on the basis of multiple identity axes.

Grows about Government, National Discord” (Gallup News, 25 January 2021) <<https://news.gallup.com/poll/328754/americans-concern-grows-government-national-discord.aspx>> (“The 12% of Americans citing national division and lack of unity as the top problem is the highest in Gallup’s seven decades of asking this question, dating back to 1939”).

⁸⁷ Infanti and Crawford, n 2, xxi.

⁸⁸ See Infanti, n 6, 1–2 (earlier taking steps in that direction).

⁸⁹ See President’s Council on Sustainable Development, *Sustainable America: A New Consensus for Prosperity, Opportunity, and A Healthy Environment for the Future* (1996) iv (“A sustainable United States will have a growing economy that provides equitable opportunities for satisfying livelihoods and a safe, healthy, high quality of life for current and future generations. Our nation will protect its environment, its natural resource base, and the functions and viability of natural systems on which all life depends”.); United Nations Development Programme, *Human Development Report 2011: Sustainability and Equity: A Better Future for All* (Report, 2011) 1 (“Human development, which is about expanding people’s choices, builds on shared natural resources. Promoting human development requires addressing sustainability – locally, nationally and globally – and this can and should be done in ways that are equitable and empowering. We seek to ensure that poor people’s aspirations for better lives are fully taken into account in moving towards greater environmental sustainability. And we point to pathways that enable people, communities, countries and the international community to promote sustainability and equity so that they are mutually reinforcing”).

⁹⁰ *The Declaration of Independence* (paragraph 2) (US 1776).

⁹¹ See eg, Alan Gally (ed), *Indian Slavery in Colonial America* (Nebraska Press, 2009).

⁹² See eg, A Leon Higginbotham, Jr, *In the Matter of Color: Race and the American Legal Process: The Colonial Period* (OUP, 1978); Wendy Warren, *New England Bound: Slavery and Colonization in Early America* (WW Norton & Company, 2016).

⁹³ See Modern History Sourcebook, *The Declaration of Sentiments, Seneca Falls Conference, 1848* <<https://sourcebooks.fordham.edu/mod/senecafalls.asp>>.

⁹⁴ *Regents of the University of California v Bakke*, 438 US 265, 407 (1978) (Blackmun, J, concurring in part and dissenting in part).

To be sure, there will be no universal agreement on how the law generally, or tax law in particular, should respond to disparate impacts on the basis of race, gender, sexuality, or any other identity category (or intersecting categories). Driven by different histories, philosophies, and intellectual and political traditions, countries take radically different approaches to matters of taxation. On fundamental design questions, such as the appropriate taxpaying unit or the scope of the tax base (eg, whether broad with few exceptions or narrower with many carve-outs), there is no single “correct” answer.⁹⁵ What the pandemic has made clear, however, is that the tax system is deeply implicated in the ways that people interact with their governments and with each other.

If we are to use this opportunity to rethink our relationships with each other and the world, then tax and fiscal policies must explicitly consider those who have been historically disadvantaged and those who are vulnerable. In seeking to identify and eradicate inequities in the tax system, critical tax scholars infuse new meaning into an old Irish proverb: “It is in the shelter of each other that the people live.”⁹⁶ Despite national borders and the multiple actual and metaphoric ways that people continue to be divided from each other, we can achieve greater mutual well-being through future tax policies that are guided by principles of equity, dignity, human rights, and sustainability.

In the shelter of each other, we can flourish.

⁹⁵ See n 8 and accompanying text.

⁹⁶ See, eg, “The Shelter of Each Other”, *Something Understood*, (BBC Radio 4, 25 May 2014) (quoting Irish poet Pádraig Ó Tuama’s translation of the Irish phrase *ar scáth a chéile a mhaireann na daoine* as “It is in the shelter of each other that the people live”); Mary Robinson, “What Makes Us Human: In Each Other’s Shadow”, *New Statesman*, 14 June 2013 (“To me, what makes us human is best summed up in the African concept of *Ubuntu*, which Desmond Tutu explains as: ‘I am because you are.’ Another way of saying it is the old Irish proverb: ‘*Is ar scáth a chéile a mhaireann na daoine.*’ This translates as: ‘It is in each other’s shadow that we flourish.’”)



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