

# AN EXPRESSIVE THEORY OF TAX

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*The tax code is full of ineffective, inefficient, inequitable, or otherwise problematic provisions that make little sense when evaluated through the lens of traditional tax policy analysis, yet remain popular with citizens and legislators alike. The tax literature is equally full of carefully-researched, technically precise, and theoretically sound proposals for reform that nonetheless fail to get traction in the public debate. Why?*

*What tax scholarship is missing is the importance of social meaning: what do our tax laws say about our society's values, and how is taxation being used to construct cultural ideals in contested spaces?*

*This Article applies expressive theory, well developed in the criminal and constitutional law literature, to a series of tax policy puzzles, demonstrating how attention to social meaning can help to explain otherwise inexplicable behavior by legislators and policymakers, and can allow scholars to engage more productively in the policy process. From the tax treatment of Nevada's legal brothels to tax preferences for retirement savings, social meaning matters, and frequently dominates traditional tax policy concerns. This observation has far-reaching implications for tax scholarship, policy design, and advocacy.*

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\* The author would like to thank the following people for their support and comments: David Arkush, Aviva Aron-Dine, Lily Batchelder, Donald Braman, David Fontana, Rachel Godsil, Ryan Goodman, Chye Ching Huang, David Kamin, Edward Richards, Erin Scharff, and Naomi Schoenbaum.

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“The distribution of the subsidies from income splitting simply cannot be explained on any rational policy ground.”

— Lawrence Zelenak<sup>1</sup>

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<sup>1</sup> Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX. L. R. 1, 32 (2000).

“But dollars are not all that matters; ideology is at stake in the drafting of changes in the income tax law.”

— Phyllis Schlafly<sup>2</sup>

“How should we tax? Who should we tax? What should we tax? What values does our tax system reflect?”

— Congresswoman Jennifer Dunn<sup>3</sup>

#### INTRODUCTION

Why do politicians keep getting tax policy so wrong? Why is the code littered with inefficient, ineffective incentives? Why do so many voters support tax policies that are not only poorly designed, but against their own self-interest? The legal literature is full of systematic explorations of the moral underpinnings and structural workings of taxation, often with strong policy prescriptions attached, yet these questions remain largely unanswered. Time and again, inefficient, ineffective tax policies withstand withering scholarly critiques, and calls for common sense reforms fall on deaf ears. Where tax law cannot be explained using the dominant modes of tax policy analysis, it is frequently chalked up to policymaker corruption, special interest capture, or, when all else fails, ignorance. This is a mistake.

In this Article I offer a diagnosis and a prescription. Tax scholarship is missing a crucial piece of the puzzle: social meaning. Like every other area of law, tax law offers policymakers a chance to give expression to the values of their constituents and themselves—and the values expressed by the tax code are at least as central to the tax policy preferences of citizens, lawmakers, and judges as economic efficiency and the distribution of income.

This Article develops an expressive theory of tax and demonstrates its utility to scholars and policymakers. Section I describes expressive theory as it has been applied in other fields of law, then discusses traditional tax policy analysis and its isolation from expressive theory. Section II demonstrates the utility of expressive theory to understanding and shaping tax policy outcomes by turning to a set of legislative and court actions that cannot be fully explained by traditional tax policy, but make perfect sense when viewed as at least partially (and in some cases primarily) motivated by expressive concerns.

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<sup>2</sup> Phyllis Schlafly, *The Hidden Meaning of Marriage Tax Repeal*, THE EAGLE FORUM (Mar. 7, 2001), <http://eagleforum.org/column/2001/mar01/01-03-07.shtml>.

<sup>3</sup> MICHAEL J. GRAETZ AND IAN SHAPIRO, *Death by a Thousand Cuts: the Fight Over Taxing Inherited Wealth* 43 (2005) (quoting Congresswoman Jennifer Dunn).

Why are lawmakers in Nevada dead set against taxing the state's legal brothel industry, while the "ranch" owners cry out to pay their fair share? Why, in the midst of implementing drastic austerity measures did the Tories make introducing a tax preference for married couples into the British tax code a central piece of their platform, even though David Cameron himself did not believe it would cause more people to marry? Why have Americans rallied around "marriage penalty relief" that is costly and poorly targeted, while better-targeted proposals with the power to correct a number of inefficiencies in the taxation of married couples get short shrift? Why have judges routinely, but inconsistently, disallowed otherwise clearly appropriate business deductions because they "frustrate public policy?"

All of these questions can be answered once one takes account of the social meaning of the taxes being debated, and the ways in which the various actors understand, value, and shape (or fail to shape) this social meaning. In some cases, expressive concerns are dominant (or even exclusive) drivers of the debate; in others the expressive component of the law is more difficult to separate from more traditional tax policy concerns, but no less relevant to the policy outcomes.

Section III shows that even debates premised on traditional tax policy analysis are often primarily arguments over the expressive power of taxation. It is relatively rare for expressive concerns to sit right at the surface—with politicians arguing over the "message" being sent by the tax code. Frequently expressive concerns are hidden under layers of rhetoric about efficiency and incentives—the language of incentive (or "reward," or "encourage") stands in for more culturally fraught arguments about morality and values, even as these expressive concerns dominate actual decisionmaking. This understanding of the "secret ambition of incentive" can explain a tax policy puzzle far removed from the obvious cultural flashpoints of sex, marriage, drug trafficking, and racial discrimination—the persistence in the federal income tax code (and persistent popularity) of a slate of expensive, inefficient, and poorly-targeted retirement savings incentives that are difficult to justify on traditional tax-policy grounds.

Section IV illustrates how attention to social meaning can strengthen tax policy design, both by informing policy analysis and advocacy (in this case, lending support to structural changes in the taxation of intergenerational wealth transfers) and by encouraging policymakers to express "correct" social meaning in the tax code in ways that minimize negative side effects.

## I. THE ISOLATION OF EXPRESSIVE THEORY AND TAX

### A. *Expressive Theory and Its Avoidance of Tax Law*

Expressive theories of law take notice of the social meaning of activities and behaviors, and locate law within the context of these social meanings.<sup>4</sup> Essentially, expressive theory argues that what the law *says*, about who and what our society values, matters. One limited version of expressive theory links this feature of the law directly to the law's role in shaping behavior—the law's expression of social values enunciates social norms that then shape behavior, independent of the official sanction tied to the law. On this account, the law's expressive value is simply an added mechanism by which law achieves the instrumental goals of punishing, deterring, or encouraging specific behavior.<sup>56</sup>

This Article fits into the broader conception of expressive theory prominent in the criminal and constitutional law literature.<sup>7</sup> Under this account, the law not only shapes behavior via penalties and rewards, it also serves to express societal values and approval of (possibly contested) social norms in a way that is valued by citizens and policymakers independent of the instrumental function of the law. An expressive theory in this mold can be a normative framework, but it is also a compel-

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<sup>4</sup> Lawrence Lessig defines “social meaning” as follows: “Any society or social context has what I call here social meanings—the semiotic content attached to various actions, or inactions, or statuses, within a particular context. If an action creates a stigma, that stigma is a social meaning. If a gesture is an insult, that insult is a social meaning.” Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951–952 (1995). He goes on to provide the example of buckling a seatbelt: in early 1990's Budapest, buckling your seatbelt in a taxi was seen as an insult to the driver. The insult is the social meaning of the act. The same act in contemporary America likely has a very different social meaning. Similarly, tipping a bellhop is a sign of respect, while tipping a doctor could be seen as demeaning, and tipping a police officer is deeply problematic. Wearing your seatbelt and tipping someone for good service are both acts that can have myriad social meanings attached depending on context.

<sup>5</sup> Two 1996 papers by Cass Sunstein illustrate well this conception of expressive law. In *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, Sunstein explores the use of law in norm management, arguing that, “at least for purposes of law, any support for ‘statements’ should be rooted not simply in the intrinsic value of the statement, but also in plausible judgments about its effect on social norms and hence in ‘on balance’ judgments about its consequences.” (at 2045). He furthers this argument in *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996), arguing that “norm management” can be a cost-effective mechanism through which government can incentivize socially valuable behaviors and deter socially costly behaviors.

<sup>6</sup> See also, Ted Sampsell-Jones, *Culture and Contempt: The Limitations of Expressive Criminal Law*, 27 SEATTLE UNIV. L. R. 133, 133–34 (2003) (“[C]riminal laws prevent crime not only by applying legal sanctions to disfavored actions, but also by facilitating the application of nonlegal sanctions, such as gossip, ostracism, and loss of employment.”); Mark Tushnet and Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Anti-Terrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997); Richard H. McAdams, *New and Critical Approaches to Law and Economics (Part II) Norms Theory: And Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000).

<sup>7</sup> See *infra* notes 8–18.

ling positive framework for understanding the values and desires that animate policy debates and legal opinions. This also makes it a powerful practical tool for developing policies that can withstand political and judicial processes that would seem irrational if expressive concerns were not taken into account.

In the constitutional law context, expressive theory has been used to explain the Supreme Court's analysis in a number of fields where the court has rejected legal rules that inflict "expressive harms" by conveying distasteful or inappropriate valuations of people or behavior. This type of consideration, expressive theorists have argued, has been paramount in the Supreme Court's equal protection and Establishment Clause jurisprudence.<sup>8</sup> In the equal protection sphere, they point to the post-*Brown v. Board* orders desegregating public spaces<sup>9</sup>, and the Court's exclusive focus "on the laws' history and meaning, not on their specific cultural or psychological effects,"<sup>10</sup> in striking down anti-miscegenation laws in *Loving v. Virginia*.<sup>11</sup> In the Establishment Clause context, the Court has ruled sectarian nativity scenes on public property unconstitutional on the grounds that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community' . . . Whether state action actually makes nonadherents feel like pariahs is irrelevant."<sup>12</sup> This is a strong example of expressive concerns driving the Court's doctrine well beyond the instrumental effect of the expression.

In the criminal law context, Dan Kahan has used expressive theory to explain the failure of attempts to substitute alternative sanctions, such as drug treatment, fines and community service, for costly, inhumane and ineffective regimes of imprisonment.<sup>13</sup> He argues persuasively that any

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<sup>8</sup> For a comprehensive analysis, see Elizabeth S. Anderson and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

<sup>9</sup> While the Court pointed to segregation's possible empirical effects on the self-esteem of black children in *Brown v. Board* (*Brown v. Board of Educ.*, 347 U.S. 483, 495 n.11 (1954)), no such appeal to real-world effect can be found in the cascade of decisions desegregating myriad other public spaces. Anderson and Pildes, *supra* note 8 at 1543. Instead, the court focuses on the bare expression of racial separation and status hierarchy as the harm of the law.

<sup>10</sup> Anderson and Pildes, *supra* note 8 at 1543.

<sup>11</sup> *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

<sup>12</sup> Anderson and Pildes, *supra* note 8 at 1547 (quoting *Lynch v. Donnelly*, 465 U.S. 668, at 687 (1984) (O'Connor, J., concurring)).

<sup>13</sup> Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 592 (1996). Under this account, the public does not reject the use of fines, for example, to punish many crimes because of a strong sense that they will be ineffective deterrents, nor because they fail to create sufficient hardship from a retributive point of view, but because they express to a wrongdoer: "you may do what you have done, but you must pay for the privilege." *Id.* at 593. Community service is not an acceptable alternative to incarceration because it does not unambiguously express condemnation—it involves offenders in "activities that conventionally

proposed reform that gives expression to offensive values is doomed to fail even if it is a superior deterrent or retributive option. Sanctions that convey inappropriate expressions of value are offensive *in themselves*, regardless of their deterrent effects or the material or dignitary harm they impose on wrongdoers.<sup>14</sup>

Expressive theory has been used to explain heated battles over many culturally-charged statutes, from sodomy laws,<sup>15</sup> to flag desecration statutes,<sup>16</sup> and to understand the contours of public reaction to court rulings that express inappropriate valuation of different people or groups.<sup>17</sup>

Despite the extensive use of expressive theory in the criminal and constitutional law scholarship through the early 2000s, scholars of expressive theory largely ignored tax law and policy. In fact, when tax law occasionally appeared in an expressive theorist's work, it was as an example of an area of law likely to be *immune* from expressive analysis.<sup>18</sup>

This omission is a serious oversight. As this Article will show, tax policy debates have provided some of the most compelling examples of expressive law at work over the last few decades.

entitle people to respect and admiration"—and because, to many, the use of community service as punishment in fact "devalues community service, denigrates the virtue of those who perform it, and shows contempt for the interests of those whom it is supposed to benefit." *Id.* at 627.

<sup>14</sup> "The political unacceptability of alternative sanctions . . . reflects their inadequacy along the expressive dimension of punishment. The public reflects the alternatives not because they perceive that these punishments won't work or aren't severe enough, but because they fail to express condemnation as dramatically and unequivocally as imprisonment." *Id.* at 592.

<sup>15</sup> Sodomy laws are rarely enforced, but their continued existence causes expressive harm, as they are seen to "proclaim the message that society hates homosexuals, whoever that category happens to encompass and whatever those people happen to do in bed." Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209, 233 (1992). See also Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics*, 89 CAL. L. REV. 643 (2001), for an examination of the way that sodomy laws shape social structure and individual behavior through their construction of social meaning.

<sup>16</sup> See generally ROBERT JUSTIN GOLDSTEIN, *BURNING THE FLAG: THE GREAT 1989–1990 AMERICAN FLAG DESECRATION CONTROVERSY* (1996).

<sup>17</sup> See e.g. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 421, nn. 21–24 and accompanying text (1999). To representatives of the National Organization for Women, the lenient sentencing of three young men convicted of sexually abusing their developmentally disabled classmate spoke volumes: "The clear message to women is the crime of rape is not a crime worthy of punishment. It's a blow to women today." Robert Hanley, *3 Are Sentenced to Youth Center Over Sex Abuse of Retarded Girl*, N.Y. TIMES, Apr. 24, 1993, at 1:1. Similarly, to gay rights groups, a Utah judge's lenient treatment of a defendant accused of murdering a gay man in a homophobic rage (allowing the defendant to plead to manslaughter, and imposing an unusually light sentence), expressed contempt for the lives of gay people: "What Judge Young has said is that it's O.K. to kill faggots . . . This is beyond insult." *Judge Draws Protests After Cutting Sentence of Gay Man's Killer*, N.Y. TIMES, Aug. 17, 1994, at A15.

<sup>18</sup> See Kahan, *supra* note 17, at 435–36 n.87 (1999): "There may be some forms of behavior—perhaps speeding or tax evasion—on which moral and cultural disagreement is minimal (if not nonexistent) and on which instrumental issues loom much larger."

### B. *Tax Scholarship's Isolation from Expressive Theory*

The three bedrocks of traditional tax policy analysis are generally described as “equity, efficiency, and administrability/simplicity.”<sup>19</sup> This is how most introductory tax students are taught to analyze tax policies, with each of these three criteria fleshed out and weighed against the others,<sup>20</sup> and these are the typical criteria used in the tax literature to evaluate different policy options. Yet the tax code consistently fails to conform to scholarly opinion on what optimal taxation would look like in any given scenario. Tax scholars frequently reference public choice theory to explain this failure.<sup>21</sup> Under this analysis, clearly superior tax policies (from a traditional equity/efficiency/simplicity point of view) are defeated by concentrated special interests with money and influence.

Tax scholars at times have recognized the “symbolic” purposes of legislative action,<sup>22</sup> as a supplement to public choice theory and traditional policy analysis. Under this account, legislators maximize their chances of reelection by engaging in the theater of legislating, thereby demonstrating to constituents that they are “doing something” about salient issues, and gain gratification and prestige by demonstrating their power.<sup>23</sup> This symbolic function of tax law, while certainly important, should not be confused with the expressive function of tax law, in which

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<sup>19</sup> See, e.g., Alex Raskolnikov, *Accepting the Limits of Tax Law and Economics*, 98 CORNELL L. REV. 417, 524 (citing Victor Fleischer, *A Theory of Taxing Sovereign Wealth*, 84 N.Y.U. L. REV. 440, 498 (2009)).

<sup>20</sup> See, e.g., MICHAEL J. GRAETZ AND DEBORAH SCHENK, *FEDERAL TAX INCOME: PRINCIPLES AND POLICIES* 28 (7th ed. 2013).

<sup>21</sup> See, e.g., Fleischer *supra* note 19, at 497–498 (noting that “proposals that are appealing in terms of the traditional tax policy goals of equity, efficiency, and administrability may not always survive the legislative process.”) (citing JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM* (1987)); S.S. SUTREY, *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145 (1957).

<sup>22</sup> The foundational work in this area is Daniel Shaviro’s *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PENN. LAW. REV. 1 (1990).

<sup>23</sup> “In many cases, Congress legislates because its members and others who influence it value and benefit from the activity of legislating. The reasons for such behavior can be divided into two categories. First, proposing and enacting legislation is a means of symbolic communication with members of the general public, of causing them to like a politician without the inconvenience (and possible political in consequence) of actually having to benefit them tangibly. Thus, without regard to its actual effects, legislation can promote reelection. Second, succeeding legislatively is a means of exercising and demonstrating one’s power. It is inherently gratifying (as when an emperor enjoys seeing statues of himself), and it increases one’s prestige and status in political circles. Thus, without regard to its actual effects, legislation can promote self-interested goals apart from reelection.” *Id.* at 8 (referencing MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964)); C. ELDER AND R. COBB, *THE POLITICAL USES OF SYMBOLS* (1983).



the expression of appropriate values in the code provides real benefits to favored groups and society.<sup>24</sup>

The tax literature does not, by and large, pay attention to expressive theory as either a positive framework for understanding legislative and judicial outcomes or public opinion, or as a contribution to the normative theory of what tax law should be.

When expressive theory does make an appearance in the tax literature, it is generally the narrow, norm-management form of expressive theory, in which expression of cultural values in the code is a means to more traditional instrumental ends. For example, in *Alternative Sanctions in the Federal Tax Code*, Michael S. Kirsh explores “public shaming and immigration law-banishment” sanctions for tax avoiders “from three perspectives: their instrumental effects, their expressive function in altering social norms, and their role as symbolic legislation.”<sup>25</sup> Professor Kirsh lays out probably the most extensive review of expressive theories of law found in the tax literature:

The use of alternative sanctions in the context of the federal tax law might also be justified based on their expressive effects. A considerable body of recent legal scholarship addresses the expressive function of legislation. As the term is used herein, a statute reflects expressive functions if it is intended to change its target’s conduct not by increasing the cost of engaging in undesirable behavior, but by altering social norms. This alter-

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<sup>24</sup> See Sara Sun Beale, 80 B.U. LAW REV. 1227 at 1254 (2000) (distinguishing the expressive function of criminal law from its symbolic function in the context of federal hate crimes legislation):

One of the most important arguments in support of the Kennedy proposal and the creation of the new federal hate crime has been the need to “send a message.” Many of the witnesses at the congressional hearings as well as the Senators who participated in the debates saw this as a central function of the Kennedy proposal. Proponents of this view have identified two key aspects of the message sent by the Kennedy proposal (and other hate crime legislation). First, it expresses strong social condemnation of bias crimes. Second, the condemnation of hate crimes implies a general affirmation of the societal value of the groups targeted by hate crimes and a recognition of their rightful place in society. Hate crimes legislation is seen as reinforcing the community’s commitment to equality among all citizens.

Analyzing these arguments under the rubric of symbolic politics assumes that symbolic action (like sending a message) is an empty form of reassurance. This section explores the possibility that law may play a valuable role in denouncing undesirable conduct and reinforcing desirable values. Using criminal law for these purposes finds support in classical work on the function of the criminal law as well as more recent scholarship on the expressive function of law and the role law can play in the shaping of norms and in the allocation of social capital.

<sup>25</sup> Michael S. Kirsh, *Alternative Sanctions and the Federal Tax Law: Symbols, Shaming and Social Norm Management as a Substitute for Effective Tax Policy*, 89 IOWA L. REV. 863, 913 (2004).

ation in social norms may affect the target's behavior by causing him to internalize the new norm, changing his preferences, or in some other way.<sup>26</sup>

The Article goes on to summarize the expressive literature as it relates to the law's power to *alter behavior through a norm-management mechanism*. But Professor Kirsh misses the independent value of cultural expression through the law, even where it is discussed in the cited literature.<sup>27</sup><sup>28</sup> This is the core mistake made by most of the small number of tax scholars who reference expressive theory in their work.<sup>29</sup>

Inattention to the expression of social meaning in the tax code causes tax scholars to misapprehend the nature of a number of important tax policy debates. It leaves us puzzled at legislative and judicial outcomes, unable to advance optimal policies, and deaf to the very real expressive benefits and harms that come along with different approaches to tax policy. I will argue that expressive theory is at the heart of many tax policy debates.

## II. EXPRESSIVE TAX

To demonstrate the importance of expressive theory to understanding tax policy it may help to start with an extreme case where legislative

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<sup>26</sup> *Id.* at 913, citing Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996). For critiques of the various theories of the expressive role of legislation, see generally Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000) and Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1613 n.22 (2000).

<sup>27</sup> For example, Professor Kirsh extensively quotes Dan Kahan's *What Do Alternative Sanctions Mean* (*supra* note 13) but misses the core argument: expressive theory *can* be used to bolster traditional analysis (in this case retributivism and deterrence in criminal law) but *is distinguishable*, and that clear expression of condemnation of wrongdoing has independent value to society from any resultant behavior modification (deterrence value), and that inattention to the *meaning* of alternative sanctions such as fines, community service, and drug treatment *is the reason* that they have not been adopted even in contexts where they are equivalent in their deterrence value to imprisonment. See *supra* note 14.

<sup>28</sup> To be fair, Professor Kirsh provides a disclaimer: "This Article does not purport to set out a complete summary and analysis of the competing theories on the expressive function of law. Rather, this Article briefly addresses several of the recent theories that envision the expressive function of law causing changes in an individual's behavior through the alteration of social norms and analyzes the extent to which those theories explain alternative sanctions in the context of tax-motivated expatriation." *Id.* at n.218. But this selective deployment of expressive theory pervades the literature, to its detriment. Also note that professor Kirsh extensively discusses the "symbolic" use of tax law as it pertains to alternative sanctions for noncompliance. *Id.* at 922.

<sup>29</sup> *But see, e.g.*, the works of Marjorie Kornhauser (*e.g. infra* note 63, at 650–53) on taxes and gender norms. Many writers have discussed the role of the tax code in constructing and reinforcing racial, gender, and class hierarchies, but this tax criticism is not primarily grounded in expressive theory.

action is obviously based on a desire to express values in a contested field—where what the tax code *says* is explicitly preferenced over what the code *does*, even as every traditional tax policy concern points in the opposite direction. Such a case exists, in the debate over the taxation of brothels in Nevada.

A. *The Wages of Sin: Nontaxation of Nevada's Legal Sex Trade*

Prostitution has been legal and regulated in Nevada since the state entered the Union in 1864, though a 1971 law excluded the sex trade from Reno and Las Vegas by prohibiting prostitution in counties with more than 200,000 residents (later increased to 400,000).<sup>30</sup> Legal prostitution is regulated at the local level, through city and county ordinances, and generally confined to locally-licensed brothels known as “ranches.” While precise revenue figures are closely guarded by brothel owners, the industry is thought to gross tens of millions of dollars a year.<sup>31</sup> Taxes on these receipts represent a substantial revenue source for many small counties, yet the brothels are not subject to state-level business taxes, and the sexual transactions occurring on the premises are not subject to state sales taxes.<sup>32</sup> Why the favorable tax treatment?

This is not a story of powerful business interests extracting tax breaks from state governments wary of losing valuable industries to other states. Quite the contrary; the most vocal advocate for state taxation of the Nevada brothel industry has been George Flint, a longtime lobbyist for the Nevada Brothel Owner's Association. The Brothel lobby has been begging to be taxed at the state level for at least twenty years, but while each cyclical downturn in state tax revenues leads to new hearings and renewed debate, the Brothel industry's cries have gone unheeded. The state legislature refuses to include prostitution in the state's tax base. A 1991 hearing appearance by Mustang Ranch owner Joe Conforte, in which he argued that it was the brothel industry's patriotic duty to pay more in taxes,<sup>33</sup> failed to convince lawmakers to accept his proposal for a “bedroom tax,” which would have levied a sales tax on brothel services. During the state budget crisis of 2003, the brothel lobby again urged lawmakers to levy state taxes on their businesses, this time arguing that prostitution services should be included in a pending “live entertainment

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<sup>30</sup> Daria Snadowsky, *The Best Little Whorehouse Is Not in Texas: How Nevada's Prostitution Laws Serve Public Policy, and How those Laws May Be Improved*, 6 NEV. L.J. 217, at 219, 222 (2005).

<sup>31</sup> Steven Freiss, *Brothels Ask to Be Taxed, But Official Sees a Catch*, N.Y. TIMES, Jan. 26, 2009, at A11.

<sup>32</sup> *Id.* Note that other transactions, such as liquor sales in brothel bars, or souvenir purchases, are subject to state sales tax (*e.g. infra* note 39).

<sup>33</sup> David McGrath-Schwartz, *Brothel Industry Says 'Tax Us;' State Says Thanks, but No Thanks*, LAS VEGAS SUN, Dec. 21, 2008.

tax.” They were again turned down. In 2005, the industry offered yet another new brothel tax proposal, projected to raise \$1 million in revenue through a special “entry fee” coupled with an excise tax on non-sexual purchases (liquor, souvenirs, etc). No dice. Even the recent unparalleled state budget crisis, in which Nevada struggled to close a total fiscal year 2011 budget shortfall equal to *half* of the state’s general fund,<sup>34</sup> did not soften state legislators’ attitudes.

Applying traditional tax policy analysis to this situation would lead one to a number of potential explanations. It is possible that Nevada legislators believe strongly that prostitution services, at least as provided in the small number of legally-sanctioned ranches, are socially or economically beneficial and thus should be subsidized by the tax code. Under this theory, non-taxation is a means to reduce the net cost and increase the supply of sexual services. Another plausible theory under traditional tax policy analysis is that lawmakers in Nevada are concerned about the distributional effects of taxing brothels. There is little data available on the income distribution among patrons of Nevada’s ranches, but if legislators believe that sexual services are generally disproportionately consumed by lower-income individuals, they could be concerned about increasing taxes on this population. Alternatively, if they believe that the brothel market is such that the incidence of the tax would fall on sex workers themselves, and that these workers are likely to be lower-income or otherwise disadvantaged, that concern could lead to favorable tax treatment for sexual services. Additionally, legislators could be concerned about horizontal inequities among similarly-situated taxpayers with different consumption mixes—though that would argue for harmonizing taxes across goods and services, not carving out exceptions for sexual services.

There is no evidence, however, that legislators feel that taxing brothels would be economically damaging, or reduce socially beneficial activities, or create horizontal or vertical inequities. In fact, just as the push for a brothel tax comes from an unlikely source, resistance to brothel taxes comes predominantly from critics of Nevada’s prostitution industry, even though the current tax regime treats spending on the sex trade favorably compared to other consumption.

In fact, the debate over the taxation of Nevada’s brothels is dominated by explicit concern with the purely expressive value of taxation—what does state-level taxation “say” about the value placed on the brothel industry by the state.

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<sup>34</sup> Phil Oliff, Chris Mai and Vincent Palacios, *States Continue to Feel Recession’s Impact*, CENTER ON BUDGET AND POLICY PRIORITIES (updated June 27, 2012), <http://www.cbpp.org/cms/index.cfm?fa=view&id=711>.

### 1. It's Bad Enough It's Legal: What Taxation Says About Prostitution

While they disagree about policy, all sides of the argument agree about what is at stake: it all comes down to “legitimacy.” The Reno Gazette-Journal editorial board registered their opposition to brothel taxes in 2009:

But, for the brothel industry, it's not about the money. Rather it's about the legitimacy that comes with being involved in a state-recognized taxpaying business. As much as the state needs the additional money, Nevada cannot afford to give the brothel industry the legitimacy it seeks. . . . Yes, Nevada may continue to tolerate prostitution, but the state should never profit from it.<sup>35</sup>

Shady Lady Ranch owner Bobbi Davis supports a brothel tax because “there's a price, sometimes, for legitimacy.”<sup>36</sup> Bunny Ranch owner Dennis Hof, on the other hand, opposes state taxation because “brothels pay their fair share and should not have to ‘pay for legitimacy.’”<sup>37</sup>

Then-governor Kenny Guinn shied away from the 2005 debate; his spokesman confirmed that the Governor felt “that he would be affirming the industry if he came out in support of the bill.”<sup>38</sup> Even the sponsor of the 2005 brothel tax bill, Assemblywoman Sheila Leslie (D-Reno), expressed concern that imposing a state tax on brothels would help legitimize the business.<sup>39</sup> State Senator Dina Titus (D-Las Vegas) supports brothel taxation, but is nonetheless disturbed by the expressive power of such a policy: “‘I would certainly vote for it. . . . But the reason they want to be taxed is it legitimizes them even more. We have totally abandoned the family atmosphere in Nevada.’”<sup>40</sup> Jim Gibbons, governor of Nevada during the financial crisis and subsequent recession, was so uncomfortable with the legal status of prostitution in his state that he opposed any move that would even acknowledge that the sex trade was already a legal enterprise. During budget deliberations in the spring of 2009, he stated

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<sup>35</sup> Reno Gazette-Journal Editorial Board, Editorial, *Nevada shouldn't benefit from prostitution business*, RENO GAZETTE-JOURNAL, Apr. 8, 2009.

<sup>36</sup> Kathleen Hennessey, *Nevada Brothels Lobby to Be Taxed; State Turns Down Unusual Strategy To Secure Future*, THE WASH. POST, May 15, 2005.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Ray Hagar, *Brothel Owners Offer Own Tax Proposal*, RENO GAZETTE-JOURNAL, Mar. 24, 2005, at A3.

<sup>40</sup> Ed Vogel, *Prostitution Lobbyist Faithful To Cause*, LAS VEGAS REV. J., Dec. 22, 2003, at 1B.

“I’m not a supporter of legalizing prostitution in Nevada. So by taxing it, there’s a recognition of the legality of it.”<sup>41</sup>

The debate over brothel taxes is a relatively straightforward battle over the expressive capital of taxation. While brothels are legal in Nevada, they are still widely regarded as an unsavory element of Nevada’s economy. To the participants in the tax debate, inclusion in the state tax base represents explicit inclusion in the state’s “respectable” economy, and contribution to the state’s fiscal stability is a laudable, even “patriotic” activity. This is the uncontested social meaning of taxation within this context. What *is* contested is who should be entitled to the valuable social capital conferred by taxation. The brothel industry is willing to pay dearly for the chance to participate positively in the public life of the state and receive the social status that attends such participation. Opponents of legal prostitution are willing to sacrifice scarce revenue, even in the face of debilitating budget cuts,<sup>42</sup> because they are unwilling to grant this type of social status to people and activities they find distasteful.

While cultural status is a valuable good in itself, it is not necessary to argue here that there is nothing at stake beyond pure social status. The brothel lobby undoubtedly believes that the legitimacy gained through inclusion in the tax base will be in some way profitable. Perhaps it will lead to reduced stigma and higher revenues, or make future attempts to criminalize prostitution statewide more difficult. Legislators are certainly also aware of these potential repercussions. But notice that even these economic effects are achieved through expressive means, not through the direct material effects of the tax code.

## 2. Dirty Money: What Taxing Prostitution Says About the State

In addition to what taxation says about the brothel industry, many participants in the debate are deeply concerned about what taxing brothels will say about the government of Nevada. Senator Titus’ concern about abandoning the “family atmosphere in Nevada,” was echoed by Melissa Farley, a psychologist who testified at the 2009 brothel tax hearings that the legislation was “an act of legislative pimping,” that would “damage the reputation of the state of Nevada.”<sup>43</sup> As Flint put it at the

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<sup>41</sup> Ashley Powers, *Tax Debate Has Many Squirming; Potential Brothels Levy Reopens Discussion Of Their Place In Nevada*, CHI. TRIB., Apr. 8, 2009.

<sup>42</sup> Many do not feel that this trade-off is worth it. *See e.g.* CJ Corley, Letter to the Editor, *What’s with legislators turning down taxes?*, RENO GAZETTE-JOURNAL, May 6, 2009 (“ . . . when an industry goes to our legislators and “offers” to be taxed, does it really make sense to say ‘no thanks?’ . . . How can Nevadans allow our legislators to turn down taxes that would be generated by legal businesses in this state, while threatening to lay off workers to help balance the budget?”).

<sup>43</sup> Ray Hagar, *Brothel Owners Reluctantly Support Sex Tax Legislation*, RENO GAZETTE-JOURNAL, Apr. 8, 2009, at A4.

beginning of the legislature's deliberation over the fiscal year 2010 budget, "Certain people almost get the hives when you bring us up. . . I was talking to the speaker of the Assembly the other day, and she told me, 'As bad as it is, we're not hurting so much we want to use that kind of money.'"<sup>44</sup> Apparent state acceptance of prostitution reflects positively on the brothel industry, but has a reciprocal negative effect on the status of Nevada in the eyes of prostitution's opponents. This expressive consequence can be particularly salient in the tax context, where the law involves transfer of money between the state and private actors. To those who find the brothels distasteful, or worthy of strong moral condemnation, acceptance of "tainted" tax revenues would be tantamount to state investment in the industry. As reported in the *Las Vegas Sun*, "some politicians have said, the brothel money would somehow *stain* the good, clean dollars used to pay for schools and safety net (from the wholesome casino and construction industries)."<sup>45</sup> This concern is typified by the *Reno Gazette-Journal's* editorial admonition that the state "should never profit" from prostitution. It underlies Dr. Farley's belief that taxation of prostitution would involve the state in "pimping," and "economic exploitation" of sex workers.

For Nevada legislators, neither the revenues that could be generated by including sex work in the state tax base nor the pro-prostitution incentive effects of non-taxation of sexual services are as important as the perceived expressive harms of "legitimizing" the sex trade by taxing it.

This example may represent the outer bounds of expressive taxation—it is rare that policymakers are so upfront about their expressive concerns, and even rarer that the expressive concerns run so obviously counter to more traditional concerns about revenue, incentives, and equity—but it is by no means unique.

Because the debate over taxing prostitution explicitly highlights expressive concerns, and because those expressive concerns clearly dominate traditional approaches to analyzing tax policy, it makes it a good starting point for our exploration. But once alert to expressive concerns, the attentive scholar will find them motivating decisionmaking in nearly every public debate over tax law.

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<sup>44</sup> McGrath-Schwartz, *supra* note 33.

<sup>45</sup> David McGrath-Schwartz, *Brothel Industry Falls Short in Desire to Pay State Taxes*, *LAS VEGAS SUN* (blog) (May 24, 2011), <http://www.lasvegassun.com/news/2011/may/24/brothel-industry-falls-short-goal-pay-state-taxes/> (emphasis mine, sarcasm original).

## B. *Marriage and the Tax Code*

### 1. “Recognizing” Marriage: It’s Not the Money, it’s the Message

In the United Kingdom, taxpayers file individually, and until recently there was only very limited formal recognition of marriage in the income tax code: a narrowly-targeted credit for certain elderly taxpayers called the “Married Couple’s Allowance,” the ability to transfer assets to your spouse tax-free (thus facilitating capital gains income-splitting), and inheritance tax exemptions for surviving spouses. As part of their platform for the 2010 parliamentary elections, the Tories proposed allowing low-and-moderate income taxpayers (those paying the 20 percent “basic rate”) to transfer up to £750 of their unused personal allowance to their spouse, resulting in up to a £150 tax break for married couples with a single major breadwinner. In a speech given at a Demos think-tank conference, prospective Prime Minister David Cameron touted the expressive value of such a policy: “I think it is essential to say loudly and proudly that commitment is a core value of a responsible society, and that’s why we will recognize marriage . . . in the tax system.”<sup>46</sup> When the effectiveness of a small tax benefit as a support for marriage was questioned in a pre-election debate, Mr. Cameron affirmed the expressive nature of the proposal, saying “it’s not the money, it’s the message.” In January 2011, after assuming the role of Prime Minister, Mr. Cameron continued to call for a tax break for married couples on purely expressive grounds: “I don’t think people are going to rush out and get married because there’s a certain amount of money on offer every week, I just think that we, as a country, should recognize the importance of committed relationships”<sup>47</sup>

While expressing support for marriage and family values is a part of the rhetoric of both major parties in the U.S., Mr. Cameron’s statements ignited a fiery debate in the U.K. over whether it is right for government to value one type of family over another at all. In a *Times of London* op-ed entitled “The Single Mother’s Manifesto: David Cameron says the ‘Nasty Party’ that Castigated People Like Me Has Changed. I’m Not Buying It,” *Harry Potter* author J.K. Rowling pointed to the tax proposal as a symptom of the Tories’ distaste for and discrimination against single parents, and a reflection of their lack of understanding of the problems facing lone parents:

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<sup>46</sup> Nicholas Watt, *Conservatives Commit To £150 Tax Break For Married Couples*, THE GUARDIAN, Apr. 9, 2010, at 10. This quote has been edited for brevity and flow and I would feel remiss if I didn’t point out that the omitted section of the quote is a call for marriage equality for gays and lesbians, to which Mr. Cameron has given his full-throated support.

<sup>47</sup> Matt Chorley, *Nick Clegg Ridicules Tax Break For Married Couples*, THE INDEPENDENT, Dec. 18, 2011.



Even Mr Cameron seems to admit that he is offering nothing more than a token gesture when he tells us “it’s not the money, it’s the message”. Nobody who has ever experienced the reality of poverty could say “it’s not the money, it’s the message”. . . If Mr Cameron’s only practical advice to women living in poverty, the sole carers of their children, is “get married, and we’ll give you Pounds 150”, he reveals himself to be completely ignorant of their true situation. . .<sup>48</sup>

To Rowling, a former single mother who relied on government assistance to feed her child, the Tory call for government to recognize and value marriage represented “renewed marginalization of the single, the divorced, and the widowed.”<sup>49</sup> The chief executive of Gingerbread, a U.K. organization dedicated to supporting lone parents and their children bridled at the degradation of single-parent families implicit in the Tory platform: “These are ordinary mums or dads who provide stable home environments for their families. They deserve equal treatment, not measures that treat them as second class.”<sup>50</sup>

These concerns were not limited to advocates for single parents. The issue of recognizing marriage in the tax code became a serious point of discord in the precarious Tory-Liberal Democrat coalition that emerged after the 2010 election. In fact, the coalition agreement negotiated between the parties had to make specific allowance for Liberal Democratic Members of Parliament to abstain from budget resolutions introducing the transferable-allowance without violating the terms of the agreement.<sup>51</sup> To Liberal Democratic leader Nick Clegg, the policy represents an unwarranted ideological intrusion into the private affairs of British citizens, and codifies retrograde attitudes about what the “right” kind of family looks like. In December of 2011, as Mr. Cameron ramped up his hearth-and-home rhetoric in time for the holiday season, Mr. Clegg took the opportunity to attack the married-couple tax break, stating bluntly, “The institutions of our society are constantly evolving . . . We should not take a particular version of the family institution, such as the 1950s model of suit-wearing, bread-winning dad and aproned, homemaking mother—and try and preserve it in aspic.”<sup>52</sup>

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<sup>48</sup> J.K. Rowling, *The Single Mother’s Manifesto*, THE TIMES of London, Apr. 14, 2010, at 20.

<sup>49</sup> *Id.*

<sup>50</sup> *Cameron Hints at Tax Break Amid Child Benefit Row*, BBC NEWS: UK POLITICS (Oct. 5, 2010), <http://www.bbc.co.uk/news/uk-politics-11478320>.

<sup>51</sup> Her Majesty’s Government: Cabinet Office, *The Coalition: Our Programme For Government*, § 29, [http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition\\_programme\\_for\\_government.pdf](http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf).

<sup>52</sup> Chorley, *supra* note 47.

Like the Nevada brothel tax debate, the debate in the U.K. over marriage and taxes has been couched in explicitly expressive terms. The argument has not been primarily over whether the proposal will effectively encourage family formation or formalization—not even its strongest supporters believe a £150 tax reduction will make a dent in Britain’s declining marriage rates. Instead, both proponents and opponents of the proposal are concerned with the message that it sends about what types of people and families are valued by British society and thus deserving of government support. Proponents seek to venerate married couples (and specifically single-breadwinner married couples), while opponents find the concomitant devaluation of single parents offensive, and neither side hides its expressive motivations.<sup>53</sup>

The marriage allowance was finally introduced in late 2013 (at a higher £220 maximum value), to become effective April 2015. Liberal Democratic Deputy Prime Minister Nick Clegg instructed his party’s Members of Parliament not to block the measure<sup>54</sup>, as part of a deal to provide free school meals to young children, but both Liberal Democrats and Labour quickly vowed to repeal the measure should they win power after the following election.<sup>55</sup>

Thus far, the allowance has been significantly less costly than expected, because only about two in five eligible couples is receiving the benefit.<sup>56</sup> In Britain, 90 percent of taxpayers pay through the Pay As You Earn exact withholding system, and 90 percent of these taxpayers do not need to file any type of return.<sup>57</sup> Thus, in order to claim the transferable marriage allowance, a couple must proactively register with the revenue authority.<sup>58</sup> As further evidence that marginal incentives to marry are not the main target of the policy, the government is attempting to increase uptake and payouts by allowing taxpayers to claim the allowance *retro-*

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<sup>53</sup> The opposition also emphasizes the fiscal cost of the program—even if the expressive harms to unmarried people aren’t substantial, the government should not expend resources expressing support for married families (e.g., Chorley, *supra* note 47).

<sup>54</sup> Christopher Hope, *Married couples to receive £1,000 tax break*, THE TELEGRAPH (Sept. 27, 2013), <http://www.telegraph.co.uk/news/politics/10340987/Married-couples-to-receive-1000-tax-break.html>.

<sup>55</sup> Peter Dominiczak, *Labour Would Scrap Tax Break for Married Couples, says Ed Balls*, THE TELEGRAPH (Mar. 13, 2014), <http://www.telegraph.co.uk/news/politics/10696553/Labour-would-scrap-tax-break-for-married-couples-says-Ed-Balls.html>.

<sup>56</sup> See Laura Suter, *Are you due £432 for the marriage tax allowance?*, THE TELEGRAPH (Mar. 7, 2017), <http://www.telegraph.co.uk/money/consumer-affairs/due-432-marriage-tax-allowance/>.

<sup>57</sup> Norton Francis, et al., *TPC Briefing Book; What other countries use return-free filing?*, TAX POLICY CENTER, <http://www.taxpolicycenter.org/briefing-book/what-other-countries-use-return-free-filing>.

<sup>58</sup> See Suter, *supra* note 56.

actively for up to four years,<sup>59</sup> with little expected effect on the *past* marital decisions of recipients.

## 2. The Family that Pays Together

The United Kingdom is fairly typical in levying income taxes at the individual level—in 2013, nineteen members of the Organization for Economic Co-operation and Development had individual-level income taxation for spouses, and eleven taxed spouses jointly in some way.<sup>60</sup>

The United States is among those latter countries, taxing married couples jointly under almost all circumstances.<sup>61</sup> While the U.S. Federal income tax was originally levied on individuals as well, joint filing was introduced in 1948 in response to the effect of varying state property laws on the ability of married couples to split their income.<sup>62</sup>

In *Wedded to the Joint Return: Culture and the Persistence of the Marital Unit in the American Income Tax*,<sup>63</sup> Marjorie Kornhauser argues that the persistence of joint filing in the U.S. is fundamentally expressive—motivated by cultural preferences for marriage and religion (which supports marriage) and the desire of Congress to express these values in the tax code. She begins with a historical analysis, outlining the unique, central role that marriage and religion have played in the civic life of America since its founding—countries with less cultural attachment to the institution of marriage (or where religious institutions occupy a less

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<sup>59</sup> Paul Hackett, *Why the married tax allowance has been an 'utter flop'*, THE WEEK (Feb. 18, 2016), <http://www.theweek.co.uk/69731/why-the-married-tax-allowance-has-been-an-utter-flop>,

<sup>60</sup> See PF1.4: Neutrality of tax-benefit systems, OECD Family Database, SOCIAL POLICY DIVISION—DIRECTORATE OF EMPLOYMENT, LABOUR AND SOCIAL AFFAIRS (updated 2016), [http://www.oecd.org/els/soc/PF1\\_4\\_Neutrality\\_of\\_tax\\_benefit\\_systems.pdf](http://www.oecd.org/els/soc/PF1_4_Neutrality_of_tax_benefit_systems.pdf).

<sup>61</sup> There is an option on the federal income tax return to file as “married filing separately” but it is a highly disfavored filing status that is almost never financially preferable to filing jointly but can serve an important purpose in cases where non-tax considerations weigh against spousal collaboration.

<sup>62</sup> For a complete discussion of the advent of joint filing and the historical evolution of the rate structure see Edward McCaffery, *TAXING WOMEN 79–81* (1997). The rise of community property laws in the 1920's and 1930's created a strange inequality in the tax system: under *Poe v. Seaborn*, 282 U.S. 101, 51 (1930), wealthy single-earner couples in community property states were allowed to attribute half the husband's income to the wife for the purposes of federal taxes (thus being taxed at a substantially lower rate, due to the progressivity of the rate structure), while similarly situated couples in non-community property jurisdictions were unable to engage in income-splitting. As more states adopted community property laws—partially in response to *Seaborn*, which drove a number of states to grant women the barest property rights necessary to allow their wealthy husbands favorable federal tax treatment—Congress (especially members from non-community property jurisdictions) became increasingly concerned about the inequality and loss of revenue created by this patchwork system. A move to joint filing in 1948 solved the problem, but created problems of its own, as we will see.

<sup>63</sup> Marjorie E. Kornhauser, *Wedded to the Joint Return: Culture and the Persistence of the Marital Unit in the American Income Tax*, 11 THEORILAW 631, 651 (2010).

contested space in the public discourse) will not find it necessary to express governmental support for marriage in the tax code—then turns to U.S. tax law. Speaking of the joint return, Kornhauser says, “As its name indicates, it strikes at the heart of marriage—its unity, its sharing. Congressional action in this area, therefore, is an effective means of showing symbolic support for marriage, families, and religion, which in turn supports marriage and families.”<sup>64</sup> By establishing married couples as the unit of taxation, the government supports the monetary, cultural and spiritual unity that marriage entails. The joint filing unit provides the kind of visible “recognition” of marriage that the Tories sought in the U.K. and, as discussed in the next section, provides a reward to the type of families most valued by American culture: the breadwinning husband married to a stay-at-home mother. This family benefits mightily from the lower tax rates garnered by splitting the husband’s sole income between the two spouses for tax purposes, and Kornhauser argues convincingly that this “traditional” family’s cultural importance has been a driving factor in the maintenance of joint filing in the U.S.<sup>65,66</sup>

Moving to joint filing does not end the debate over marriage and taxes—in fact, it creates a new set of difficult tax policy questions. Over the past three decades, the problem of so-called “marriage penalties” in the tax code has been a recurrent focus of debate in the United States.

### 3. Marriage Penalties and Second Earner Biases

When taxing married couples in a progressive system, there is a tension between neutrality across married couples with similar total incomes and neutrality with regard to marital state (individual, married couple, cohabiting couple, etc.). This is an unavoidable consequence of

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<sup>64</sup> *Id.* at 651.

<sup>65</sup> See also Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 *LAW & HIST. REV.* 259, 292–94 (1988). Jones additionally argues that legislators were motivated by explicit desire to curtail the state-level shift to community property (and thus the advance of women’s economic rights) by eliminating the tax benefit accorded to wealthy married men in community property states. *But see* Lawrence Zelenak, *Marriage and the Income Tax*, 67 *S. CAL. L. REV.* 339, 347 (1994) and Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 *N.C. L. REV.* 1521, 1574 (1998).

<sup>66</sup> There is a reasonable equity argument for joint filing—when judging ability to pay, some kind of income splitting can certainly be justifiable. The economic benefits and burdens of sharing expenses and providing for a spouse can certainly make a married household better or worse off than another household with similar income. *But see* Lily Kahng, *The Not So Merry Wives of Windsor*, 101 *CORNELL L. REV.* 325, 368–369 (2015) (critique of the “fiction” of marital unity (regardless of wives’ actual legal claim to “joint” income) especially in the historical era in which the joint return emerged) and Zelenak, *supra* note 1. I do not intend to argue that there is no explanation for joint filing outside of an expressive explanation; rather, that attention to social meaning can help us understand why the American system has developed differently than the British system, why this difference persists, and how to best attack some of the problems created by joint filing while still expressing appropriate reverence for ideals cherished by the American people.

progressive rates, and it creates an important set of choices that policy-makers must grapple with—choices that implicate different contested cultural values around family structure and gender roles in the home.<sup>67</sup>

Individual filing is marriage neutral. Each member of a couple pays tax on his or her own income, without regard to whether the couple is married, cohabiting, or just getting to know each other. Each member of the couple pays the same as he or she would as a single individual. Individual filing does not, however, tax all married couples with the same total income at the same rate.

Joint filing, on the other hand, can tax all couples with similar incomes at the same rate, but introduces marriage “penalties” or “bonuses,” into the system—couples will pay more or less after marriage than they would if they paid as individuals. In theory, this tax non-neutrality could affect decisions about when and whether to marry.

#### a. The Mechanics of “Marriage Penalties”

Individual filing is marriage neutral, with individual taxpayers taxed the same whether they are married or single. Imagine a simple, progressive income tax, in which all income up to \$20,000 is taxed at a 10 percent rate, and all income above \$20,000 is taxed at a 20 percent rate. An individual making \$40,000 will pay  $\$20,000 \times 10\% + \$20,000 \times 20\% = \$2,000 + \$4,000 = \$6,000$  in taxes, for an average effective rate of 15 percent. The combined tax on two individuals making \$40,000 each is \$12,000, and the average effective rate for the two together is 15 percent. In an individual filing system, this is true whether these two are married or perfect strangers. Individual filing is marriage-neutral. But because of this, it treats couples differently depending on the distribution of earnings between them.

Consider a single-breadwinner couple earning \$80,000 (the same total income as the egalitarian couple above). Under an individual-filing regime, the non-earning spouse will pay zero taxes on zero income. The breadwinner will pay  $\$20,000 \times 10\% + \$60,000 \times 20\% = \$14,000$  for an average effective tax rate of 17.5 percent. This couple has the same net income as our egalitarian couple, and the same number of people in the household sharing the income, yet they pay \$2,000 more in taxes (an extra 2.5 percent of income). A single-breadwinner couple is taxed more than a dual-earner couple because of the progressive rate structure—each individual member of the egalitarian couple is, in the eyes of the tax code, less well-off than the husband in the traditional family, and thus

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<sup>67</sup> For a detailed explanation of the policy puzzles surrounding taxation of married couples and the feminist implications of different approaches, see Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001 (1996); See also Zelenak, *supra* note 1.

taxed at a lower rate, even as both *couples* have the same combined market income.

By contrast, joint filing taxes couples with the same income at the same rate, without regard to who earns what within the marriage, but is not neutral across marital states. Imagine the same two couples, facing the same rate structure, but in a joint-filing regime. Under this system, an individual making \$40,000 per year will still pay \$6,000 (15 percent) in taxes, and two unmarried individuals each making \$40,000 per year will still pay a combined \$12,000 (15 percent) in taxes. But, if those two get married, they will have a combined income of \$80,000 and their tax bill will equal  $\$20,000 \times 10\% + \$60,000 \times 20\% = \$2,000 + \$12,000 = \$14,000$  (17.5%). This is a *marriage penalty*. The couple pays more after marriage than they would as individuals.

What about our single breadwinner couple, in which one spouse earns nothing and the other spouse earns \$80,000? They pay the same \$14,000 (17.5 percent) as the egalitarian married couple—joint filing is neutral as between married couples with the same income. They also pay the same as if they were not married—because the tax brackets are exactly the same for married couples and individuals, our breadwinner pays the same as half of a married couple as he would as an individual. Single breadwinner couples pay no marriage penalty in this scenario.

Now imagine a joint filing regime in which the income cutoff for the higher tax bracket is doubled for married couples, to reflect the fact that two individuals are contributing to and being supported by the pooled family income. Married couples now pay 10 percent on their first \$40,000 of combined income and 20 percent on the rest. Our individuals still pay \$6,000 each and \$12,000 combined (15 percent). And now both our egalitarian couple and our single-breadwinner couple also pay \$12,000 (15 percent).<sup>68</sup>

Marriage neutrality has been restored—but only for the egalitarian couple. The single breadwinner couple pays the same \$12,000 (15 percent) in taxes as the egalitarian couple, but this is less than the \$14,000 (17.5 percent) the single breadwinner would have paid as an unmarried individual. Now our single-breadwinner couple is receiving a *marriage bonus*. In fact, any couple with a disparity in income that puts them in different individual tax brackets gets this “marriage bonus” because some portion of the high-earning spouse’s income is taxed at a lower rate than it would be under the individual schedule.

These two rate schedules (one schedule for all or doubled for married couples) represent the poles—anything in between creates a mix of marriage penalties, bonuses and neutrality for different couples with dif-

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<sup>68</sup>  $\$40,000 \times 10\% + \$40,000 \times 15\%$ .

ferent individual earnings. This is an inherent tradeoff when thinking about taxing couples—it is impossible to choose a regime that is both marriage-neutral (treating individuals the same whether they are part of a married couple or not) and neutral as between married couples with the same income. Once you have decided to prioritize neutrality across married couples, your only choice is whether to subsidize marriage (and penalize single people), tax marriage, or a little bit of each. When originally enacted in 1948, the U.S. joint filing system went all-in on subsidizing marriage, eliminating all bracket-related marriage penalties and providing substantial marriage bonuses by doubling the single-individual brackets for married couples,<sup>69</sup> but in 1969 Congress adopted an intermediate approach, reintroducing marriage penalties for many couples and setting the stage for future battles over marriage and the tax code.

#### b. Another Hitch: Secondary-Earner Biases

Another crucial effect of joint filing is that it creates what is known as the secondary-earner bias. Consider our single-breadwinner family again, and imagine that the non-earning spouse wishes to enter the labor force. Under an individual filing regime, the first dollar of the new worker's salary will be taxed at the 10 percent rate. Under a joint-filing regime, the new worker's first dollar will be treated as dollar 80,001 for the tax unit, and taxed at the 20 percent rate. Thus, the secondary earner faces a higher effective marginal tax on his labor than he would under individual filing, even if on net his family receives a marriage bonus. While there is nothing about the tax code that dictates whose income is "taxed first" at the lower rate and whose income is "stacked on top" and taxed at the higher rate, most couples view the substantially lower-earning spouse's income as marginal, and thus treat it as though it is taxed fully at the highest rate.<sup>70</sup> This increased marginal tax rate can distort the labor-market decisions of the low-earning spouse, especially when the second earner already faces high costs to income production (childcare costs, for example, which may only exist if both spouses are working).

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<sup>69</sup> Recall that this approach protects all married couples from a marriage "penalty" but only provides a bonus for couples with unequal incomes, with the largest bonuses going to single-breadwinner couples.

<sup>70</sup> In dual-breadwinner heterosexual married couples in the U.S. the secondary earner is generally the wife, though this has been changing over time. See WENDY WANG, KIM PARKER AND PAUL TAYLOR, PEW RESEARCH CENTER, BREADWINNER MOMS, PEW RESEARCH CENTER (2013), <http://www.pewsocialtrends.org/2013/05/29/chapter-3-married-mothers-who-out-earn-their-husbands/>. ("Among married couples with children, the proportion in which the wife's income tops her husband's has increased from about 4% in 1960 to 23% in 2011. By contrast, the share of couples in which the husband makes more than his wife has fallen about 20 percentage points, from 95% in 1960 to 75% in 2011.")

This distortion is an obvious target for tax policy reform driven by efficiency concerns.<sup>71</sup>

These two distinct but intertwined side-effects of joint filing—marriage penalties/bonuses and the secondary earner bias—offer a chance to explore the expressive component of our society’s choices about how we tax families. They are both created by the same system, but marriage penalties and secondary-earner biases have vastly different cultural valences. Some legislative solutions (including abolition of joint filing) address both issues, some address only one, and each proposal has its own unique distributional effect as between couples with different divisions of earnings. Attention to the expressive value of each potential legislative choice can help us understand why certain paths and sets of arguments are favored over others.

### c. Puzzling Policy Choices

Beginning in the 1980s, relief from the marriage penalty became an important component of the Republican tax program, with rhetoric focused on the centrality of marriage, motherhood and homemaking to American culture. By the year 2000, it would be central to presidential candidate George W. Bush’s tax-cutting plan, and by 2001 Congress would enact targeted marriage penalty relief as part of the Economic Growth and Tax Relief Reconciliation Act. Before delving into the specific policy choices embodied in these Republican-led marriage penalty relief plans, it is worth discussing the empirical incidence of marriage penalties and bonuses at the time of the debate.

#### 1. *Who Pays the Price?*

In the 1990s, as marriage penalty relief was put front and center by the conservative Contract for America, the *majority*—51 percent—of married tax filing units received a marriage bonus, while 42 percent paid a marriage penalty and 6 percent were unaffected by their marital status. At \$1,400 per couple, average marriage bonuses were slightly higher than marriage penalties, which averaged \$1,300 per couple, resulting in a total net revenue loss to marriage bonuses of \$4 billion per year.<sup>72</sup> It is also worth noting that under 1996 law, higher-income married couples were more likely than lower-income couples to pay a marriage penalty,<sup>73</sup>

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<sup>71</sup> The larger disincentive is the nontaxation of imputed income from household production, but taxing women for providing childcare and cooking meals is a total non-starter. See Alstott, *supra* note 67 for a full discussion of conflicting feminist perspectives on the nontaxation of imputed income.

<sup>72</sup> Congressional Budget Office, *For Better or worse: Marriage and the Federal Income Tax*, 29–30 (1997), <https://www.cbo.gov/sites/default/files/105th-congress-1997-1998/reports/marriage.pdf>.

<sup>73</sup> *Id.* at 31, table 5.



though lower-middle-income couples paid the highest net penalty (due to filing status effects and the EITC) both in total tax dollars and as a share of income.<sup>74</sup>

Across the income spectrum, the largest marriage penalties were, of course, paid by couples with the most egalitarian division of earnings. Forty-four percent of joint-filing couples had only a single earner, and 89 percent of these single-breadwinner couples received a marriage bonus (the rest were unaffected, and none paid a marriage penalty). In 24 percent of couples each spouse contributed at least one third of the household's income, and among these families, 90 percent paid a marriage penalty, and only five percent received a marriage bonus. Most couples facing a marriage penalty fell into this most-egalitarian quarter of the married population.<sup>75</sup>

But these families were *not* the focus of marriage penalty relief. If they were, a return to individual filing or a second-earner credit that redressed the imbalance between egalitarian couples and "traditional" couples would have been the policy levers of choice, as they are well-targeted to couples who actually face a marriage penalty, and have the bonus effect of reducing or eliminating the second-earner bias. Instead, the marriage penalty relief called for in the Contract for America and eventually enacted into law under George W. Bush<sup>76</sup> took the form of a partial return to the doubled tax brackets of the original 1948 plan.

These bracket expansions are the most expensive version of marriage penalty relief (providing an enhanced marriage bonus to "traditional" couples), are poorly targeted from a distributional standpoint, and provide very little marginal relief from the second-earner bias.

All of this could still be consistent with traditional tax policy analysis if Congress wants to *incentivize* marriage as a matter of social policy and does not care about (or actively opposes) correcting disincentives to women's/mother's market work. Lawrence Zelenak reviews the evidence and puts a fine point on the problem with this theory:

. . .the proponents [of doubled brackets for married couples] do not adequately explain what the subsidy is supposed to accomplish. No one is so bold as to claim that the point is simply to throw billions of dollars at people whose lifestyle merits approval, but who would engage in the same behavior without the cash. The purpose, then, must be to change behavior, but in what way? If it is supposed to encourage couples to marry

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<sup>74</sup> *Id.* at 32, table 6.

<sup>75</sup> *Id.* at 33, table 7.

<sup>76</sup> GEORGE W. BUSH, A CHARGE TO KEEP, 238 (2001) ("I support reducing the marriage penalty because the tax code should not conflict with our core values.")

rather than cohabit, the problem is the evidence that tax rules have little effect on those decisions. The likely result is billions of dollars of revenue loss with almost no resulting change in marriage rates. The Center on Budget and Policy Priorities estimates that the additional marriages created by a return to 1948 would come at a revenue cost of about \$380,000 per couple.<sup>77</sup>

Zelenak spends several pages digging into the policy problems discussed above, and a host of other distributional, equity and efficiency problems with using doubled brackets for married couples as a subsidy for marriage, concluding that, “the distribution of the subsidies from income splitting simply cannot be explained on any rational policy ground.”<sup>78</sup>

d. Motives May Be Mixed, But Expressive Concerns Dominate

His policy analysis is extremely careful, but Zelenak makes one mistaken leap of logic. Because he does not recognize the importance of the expressive component of taxation, he is puzzled by the expenditure of vast sums of money on an incentive that does not appear to actually affect behavior. Let me be bold: the point of the policy *is* simply to throw billions of dollars at people whose lifestyle merits approval. That is the “true purpose,” and changing behavior is a beneficial, but not terribly important, side-effect.

Recall that in the debate over brothel taxes in Nevada expressive concerns are easy to separate from instrumental goals because the two are in direct conflict. The payment of taxes is seen as conferring “legitimacy,” and legislators are so concerned with this expressive effect that they are willing to forgo revenue and even provide tax preferences for the disfavored behavior to avoid sending what they see as the wrong message. In most other settings, however, expressive concerns overlap with other concerns, often in ways that have led tax scholars to miss the expressive dimension altogether. When it comes to marriage, and most other tax debates, tax preferences are seen as conveying cultural support and value. This complicates expressive analysis, as tax preferences serve both to express cultural value and to provide actual material incentives. The U.K. marriage tax debate has recently been marked by similar frankness—with direct appeals to the “message” sent by the “recognition” of marriage in the tax code. America’s debate over marriage penalties is somewhat harder to parse. We rarely hear such explicit admissions from politicians that they are *purely* interested in sending a message.

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<sup>77</sup> Zelenak, *supra* note 1, at 31.

<sup>78</sup> *Id.* at 32.

Nonetheless, given that there is very little evidence that compressing or expanding the size of the married-filing-jointly brackets has any effect on marriage rates, and given that there are less-costly and better-targeted ways to attack this marriage disincentive if it does exist, it seems clear that “rewarding marriage” means something more than simply creating an effective incentive. Yet again, it is not the money, it’s the message, and while American politicians are not quite as upfront about it as David Cameron, political rhetoric about family taxation is full of references to the importance of supporting marriage, from political actors who, if pressed, would admit that taxes are rarely the main driver of marital decisionmaking. Take, for example, the debate surrounding the 2001 tax bill. During House debate, a Democratic supporter of the bill, Representative James Barcia (D-Michigan) described marriage penalty relief in this way:

“[F]undamentally the marriage penalty is an issue of tax fairness. Married couples on average pay \$1,400 more in taxes simply because they are married. This is an unfair burden on our Nation’s married couples. Marriage is a sacred institution and our Tax Code should not discourage it by making married couples pay more. We need to change the Tax Code so it no longer discriminates against those who are wed. . . The legislation that is before us will fix the grave injustice of our current Tax Code that results in married couples paying higher taxes than they would if they remained singles. . . This bill strikes to the heart of middle-income tax relief. These are the people who are the backbone of our communities. These are the people who need tax relief the most.”<sup>79</sup>

To Rep. Barcia, marriage penalty relief was about “fairness,” and stopping “discrimination” against the “sacred institution” of marriage, and the “people who are the backbone of our communities” and thus “need tax relief the most.” In testimony he submitted to the House Committee on Ways and Means, he was even more explicitly expressive: “Congressman Weller once said that the only form someone can file to avoid the marriage tax penalty is the paperwork for divorce. That’s not the message that Congress should send to working families across our nation.”<sup>80</sup> Congressman Tom Cole (R-OK) echoed this sentiment in the 2004 debate over continued marriage penalty relief, stating in a press

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<sup>79</sup> 146 Cong. Rec. H4961 (daily ed. Mar. 23, 2001 to Apr. 23, 2001) (statement of Rep. Barcia).

<sup>80</sup> *Hearing on President’s Tax Relief Proposals that Affect Individuals Before the H. Comm. On Ways and Means*, 2001 (statement of Rep. Barcia), Mar. 21, 2001, <https://waysandmeans.house.gov/Legacy/fullcomm/107cong/3-21-01/3-21barc.htm>.

release: “Married couples should not suffer an unfair tax disadvantage simply because they are married. The government is sending the wrong message to families by making them pay more in taxes than [sic] they would if they were single.”<sup>81</sup> A recent paper on marriage penalties in the Earned Income Tax Credit (EITC) program by the conservative American Enterprise Institute argues that, “Although it is unclear how much the EITC factors into decisions about marriage, marriage penalties send the wrong message and might contribute to a culture that minimizes the importance of marriage.”<sup>82</sup>

Once we recognize that policymakers value the expressive content of a tax subsidy for marriage (and particularly for “traditional” marriages reflecting conservative gender roles and family values) independent of the subsidy’s instrumental effects on marriage rates, differing social meaning can explain policy choices that are inexplicable on traditional grounds.<sup>83</sup>

An individual filing regime would eliminate both the marriage penalty and the second-earner bias, but, for the reasons cited by Kornhauser<sup>84</sup> (and David Cameron), a shift to individual filing would have undesirable expressive consequences—destroying the tax code’s recognition of marriage as our culture’s primary organizational unit—and is thus unsatisfactory. It would make the tax code marriage-neutral, rather than “supportive” of marriage, which is not what the American public and its elected officials desire.

Similarly, credits for second earners or other policies targeted directly at dual-earner couples could simultaneously eliminate or reduce the marriage penalty (or even provide a marriage subsidy if that is the goal) and partially correct the disincentive to market work created by the current code. Yet secondary earner credits did not gain traction as “marriage penalty relief” became a rallying cry in election after election, and was then cemented as a core part of the popular “middle-class tax cuts” portion of George W. Bush’s 2001 and 2003 policies.

This seems odd from an efficiency standpoint, but makes perfect sense given the vastly different social meanings conveyed by, on the one hand, rewarding marriage and, on the other, supporting married women who work outside the home. In contemporary American society, mar-

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<sup>81</sup> Press Release, Congressman Tom Cole, Congressman Cole Votes for Marriage Penalty Tax Relief (Apr. 28, 2004), <https://cole.house.gov/press-release/congressman-cole-votes-marriage-penalty-tax-relief>.

<sup>82</sup> Angela Rachidi, *The earned income tax credit and marriage penalties: Does a childless worker expansion make them worse?* (Nov. 2015), <https://www.aei.org/wp-content/uploads/2015/10/The-earned-income-tax-credit-and-marriage-penalties.pdf>.

<sup>83</sup> For further discussion of the use of “incentive” language in expressive debates, see *Secret Ambition of Incentive*, *supra* note 17.

<sup>84</sup> Kornhauser, *supra* note 63.

riage is an ideal with broad support, while working motherhood is much more contested. According to a 2007 Pew Research Center survey, fully 41 percent of Americans view the trend toward mothers of young children working as “a bad thing for our society,” 32 percent view the trend neutrally, and only 20 percent view it as a positive trend for society<sup>85</sup>—this in spite of the fact that a large majority of women with young children now work outside the home.<sup>86</sup> By contrast, seven in ten respondents said that it was either very important (47 percent) or somewhat important (23 percent) to them that a man and a woman get legally married if they intend to spend the rest of their lives together.

In fact, during debate over the 2001 marriage penalty relief, in a column entitled *The Hidden Meaning of Marriage Tax Repeal*, influential, anti-feminist conservative activist Phyllis Schlafly<sup>87</sup> weighed in,<sup>88</sup> asking, “Is the purpose of cutting the marriage tax to accord long overdue socio-economic respect for marriage as an institution fundamental to our society and to the raising of children? Or is the purpose to enable government to engage in national economic planning by using tax policy to influence human behavior?”<sup>89</sup> As her tone implies, for Schlafly, the marriage penalty relief targeted at dual-earner couples offered in the President’s budget (a reintroduction of a “10 percent deduction for two-earner couples”<sup>90</sup>) was unacceptable, as this policy would “send the radical feminist message that the government sees no value in a homemaker’s work at home.”<sup>91</sup> Schlafly could not have been clearer: “Few people understand how the marriage tax functions or how it should be remedied except the green-eyeshade number-crunchers. But dollars are not all that matters; ideology is at stake in the drafting of changes in the income tax law.”<sup>92</sup>

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<sup>85</sup> Paul Taylor, Cary Funk and April Clark, *As Marriage and Parenthood Drift Apart, Public Is Concerned about Social Impact*, PEW SOCIAL TRENDS (July 1, 2007), <http://www.pewsocialtrends.org/files/2007/07/Pew-Marriage-report-6-28-for-web-display.pdf>.

<sup>86</sup> U.S. Census Bureau, *The Statistical Abstract of the United States: 2012* (131st Edition), at table 599, <http://www.census.gov/compendia/statab/>.

<sup>87</sup> Upon her death in 2016, Schlafly was described by the Washington Post as, “a conservative activist, lawyer and author who is credited with almost single-handedly stopping the passage of the Equal Rights Amendment in the 1970s and who helped move the Republican Party toward the right on family and religious issues” and “[a] champion of traditional, stay-at-home roles for women, [who] opposed the ERA because she believed it would open the door to same-sex marriage, abortion, the military draft for women, co-ed bathrooms and the end of labor laws that barred women from dangerous workplaces.” Patricia Sullivan, *Phyllis Schlafly, a conservative activist, has died at age 92*, THE WASH. POST, Sept. 5, 2016.

<sup>88</sup> Schlafly, *supra* note 2.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

The failure of bracket expansions to target working mothers and egalitarian couples is not a defect in the American milieu—it is a positive feature if one is concerned not only with efficiency, equity, or incentivizing marriage, but also with expressing cultural admiration of “traditional” families. And once we view this as the primary goal of marriage penalty relief, policies that explicitly express support for married women are less appealing than policies that simply “support marriage.” It is the broad-based expressive resonance of “rewarding marriage” that allows marriage penalty relief to take hold while efforts to explicitly help working women fall flat.

### C. *Deductions Denied*

#### 1. Tax Exempt, “Government Approved” Racial Discrimination

Legislators are not the only ones concerned about the expressive power of tax law. Judges have also placed explicit value on the expressive power of the code—and nowhere as clearly as at the intersection between the tax code and constitutional and statutory bars on racial discrimination.

In *McGlotten v. Connally*,<sup>93</sup> an African American plaintiff challenged the granting of various tax benefits to the Benevolent and Protective Order of the Elks. Mr. McGlotten alleged that he had been denied membership in the organization because of his race, and sued to enjoin the Treasury Secretary from granting any of the following benefits to organizations with racially discriminatory policies and practices: (1) tax-exempt status as nonprofit clubs under IRC § 501(c) (7); (2) tax-exempt status as fraternal orders under IRC § 501(c) (8); and (3) tax deductibility of contributions to the organization.

The suit challenged these tax benefits on three theories: (1) the granting of the benefits is unconstitutional under the Equal Protection Clause of the Fifth Amendment; (2) the perpetuation of racial discrimination by fraternal orders is an impermissible use of funds that violates the statutory requirement under IRC §§ 170(c) (4), 642(c), 2055, 2106(a), and 2522 that tax-deductible contributions be used “exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.,” and (3) that the granting of the enumerated tax benefits violates the Civil Rights Act of 1964’s bar on discrimination by any “program or activity receiving Federal financial assistance.”<sup>94</sup>

<sup>93</sup> 338 F. Supp. 448 (D.D.C. 1972).

<sup>94</sup> 42 U.S.C. § 2000d (1964) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

As it tackles each of these claims, the *McGlotten* court repeatedly finds itself appealing explicitly to the expressive function of exemption from taxation. But perhaps its clearest appeal to the expressive function of law resides in its analysis of the plaintiff's standing to sue.

a. Injurious Endorsements

To satisfy the injury-in-fact requirement for standing,<sup>95</sup> the plaintiff alleged two injuries: "First, that the funds generated by such tax benefits enable segregated fraternal orders to maintain their racist membership policies; and second, *that such benefits constitute an endorsement of blatantly discriminatory organizations by the Federal Government.*"<sup>96</sup> The court finds that *both* of these two alleged injuries<sup>97</sup>—*enabling* the maintenance of racist policies on the part of fraternal orders, and simply *endorsing* these discriminatory organizations—constitute injuries in fact for the purposes of standing.<sup>98</sup> The first alleged injury, that the tax benefits "enable" racism, can be seen as an instrumental harm, but the second injury is fundamentally expressive: by granting the challenged tax preferences, the federal government "endorses" discriminatory organizations, inappropriately expressing approval for discrimination, and this expression alone injures the victims of the governmentally-endorsed discrimination.

This analysis carries over into the court's treatment of the substantive claims raised by the plaintiff.

b. When the Code Speaks, the Government Acts

In ruling that the deductibility of contributions to discriminatory fraternal orders violates the Constitution, the court finds that, through the allowance of these deductions, "the Government has become sufficiently entwined with private parties to call forth a duty to ensure compliance

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<sup>95</sup> "The Supreme Court has recently clarified this troubled area, setting forth a two-part test for standing: 1) for purposes of the case or controversy requirement of Article III it must appear 'that the challenged action has caused injury in fact, economic or otherwise;' and 2) as a matter of judicial self-restraint, the court must determine 'whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *McGlotten*, 338 F. Supp. at 452 (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970)).

<sup>96</sup> *Id.* at 452 (emphasis added).

<sup>97</sup> "We find both these allegations of injury sufficient to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'" *Id.* (quoting *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. 150 (1970)) (citing *Flast v. Cohen*, 392 U.S. 83, 88 (1968)).

<sup>98</sup> Just as "[a] person or family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and Free Exercise Clause," so a black American has standing to challenge a system of federal support and encouragement of segregated fraternal organizations. *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153.

with the Fifth Amendment by the parties through whom it chooses to act,<sup>99</sup> distinguishing this deduction from the “general run” of ordinary deductions from income which do not transform private activity into state action.<sup>100</sup> It supports this finding in a number of ways—support for “charitable” activities represents a delegation of governmental functions to private actors,<sup>101</sup> the extensive regulation of exempt organizations under the code causes the government to retain substantial control over the organizations in question<sup>102</sup>—but each argument is suffused with appeals to the expressive power of the tax regime. By specifying which organizations can receive deductible contributions, and issuing letters of determination to qualifying organizations, “the government has marked certain organizations as ‘*Government Approved*’ with the result that such organizations may solicit funds from the general public on the basis of that approval.”<sup>103</sup> By granting the deduction, “the Government has ‘place[d] its power, property *and* prestige behind the admitted discrimination.’”<sup>104</sup> These deductions are distinguishable from others in part by “the aura of Government approval inherent in an exempt ruling by the Internal Revenue Service. . . .”<sup>105</sup> and the fact that they “allow such organizations to represent themselves as having the imprimatur of the Government.”<sup>106</sup> The contours of state action are in some part defined by the pure expression of approval conveyed by the deduction.

In the preceding section, expressive concerns were consistently coupled with more instrumental concerns, making it difficult to determine whether the court found pure expression of approval to be sufficient state action to implicate the Fifth Amendment—not so in the court’s analysis of tax exemption for the income of discriminatory nonprofit clubs and

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<sup>99</sup> *McGlotten*, 338 F. Supp. at 456–57.

<sup>100</sup> “Every deduction in the tax laws provides a benefit to the class who may take advantage of it. And the withdrawal of that benefit would often act as a substantial incentive to eliminate the behavior which caused the change in status. Yet the provision of an income tax deduction for mortgage interest paid has not been held sufficient to make the Federal Government a ‘joint participant’ in the bigotry practiced by a homeowner. . . .” *Id.* (citing *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)).

<sup>101</sup> “The rationale for allowing the deduction of charitable contributions has historically been that by doing so, the Government relieves itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the Government. ‘The Government is compensated for its loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from public funds.’” *Id.* (quoting H. Rep. No. 1860, 75th Cong., 3rd Sess. 19 (1938)).

<sup>102</sup> “The statute, regulations, and administrative rulings thereunder, define in extensive detail not only the purposes which will satisfy the statute, but the vehicles through which those purposes may be achieved as well.” *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (emphasis added).

<sup>105</sup> *Id.* at 457.

<sup>106</sup> *Id.*



fraternal orders. In fact, the Court appears to find the expressive content of the law's treatment of the two types of organizations critical.

First, the court determines that the non-taxation of "exempt function income"<sup>107</sup> earned by nonprofit clubs "does not operate to provide a grant of federal funds through the tax system. Rather, it is part and parcel of defining appropriate subjects of taxation."<sup>108</sup> While the distinction between the exemption here and the deductibility of contributions is debatable,<sup>109</sup> the court finds no "grant" of federal funds to create a state action, but then moves on to expressive analysis: "That the Government provides no monetary benefit does not, however, insulate its involvement from constitutional scrutiny . . . Encouragement of discrimination through the appearance of governmental approval may also be sufficient involvement to violate the Constitution."<sup>110</sup> The court then evaluates the expressive value of corporate income tax exemptions granted to nonprofit clubs and fraternal orders in turn, finding that, due to the different structures of the exemptions, "there is no mark of Government approval inherent in the designation of a [nonprofit club] as exempt"<sup>111</sup> under § 501(c) (7), and thus the exemption for discriminatory nonprofit clubs passes constitutional muster, whereas the exemption granted to fraternal orders organized under § 501(c) (8) fails because, "[b]y providing differential treatment to only selected organizations, the Government has *indicated approval of the organizations and hence their discriminatory practice*, and aided that discrimination by the provision of federal tax benefits."<sup>112</sup> One need not agree with the distinction drawn by the Court between the two types of exemption<sup>113</sup> to see the importance of the law's expressive content to the Court's rulings.

### c. When Approval Means Assistance

The court then addresses the plaintiff's claim that the targeted tax benefits represent "Federal financial assistance" for the purposes of the Civil Rights Act of 1964, which proscribes, among other things, racial

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<sup>107</sup> I.R.C. § 512(a)(3)(A) (1988).

<sup>108</sup> *McGlotten*, 338 F. Supp. at 458.

<sup>109</sup> See Boris I. Bittker and Kenneth M. Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 *YALE L.J.* 51 (1972) (For a critical treatment of the *McGlotten* Court's reasoning on this point and others.).

<sup>110</sup> *McGlotten*, 338 F. Supp. at 458.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 459 (emphasis added).

<sup>113</sup> See Bittker and Kaufman, *supra* note 109, at 68–74, for a persuasive argument that the distinction drawn by the court between the "particularized" allowance embodied in exemption for fraternal orders and the "across the board" allowance embodied by the exemption for nonprofit clubs is "ambiguous and unsatisfactory," and lacks the ability to distinguish many other allowances in the code from one another.

discrimination in “any program or activity receiving Federal financial assistance.”<sup>114</sup>

After finding that the “plain purpose of the statute” indicates that assistance provided through the tax code is “within the scope of Title VI of the 1964 Civil Rights Act,”<sup>115</sup> the court must articulate a limiting principal, lest every deduction or exemption—or other failure to tax—in the code be deemed “assistance.” The deductibility of contributions to discriminatory organizations is dealt with quickly, with reference to tax expenditure analysis, deeming the charitable deduction “a special tax provision not required by, and contrary to, widely accepted definitions of income applicable to the determination of the structure of an income tax.”<sup>116</sup>

As to the tax exemptions granted to the organizations themselves, the court simply recapitulates its state action analysis, repeating that the exemption for nonprofit clubs does not operate as a grant because of its “across-the-board” nature, explicable “as a matter of pure tax policy,”<sup>117</sup> whereas, “[s]ince it is available only to particular groups, [the exemption for fraternal organizations] operates in fact as a subsidy in favor of the particular activities these groups are pursuing.”<sup>118</sup>

## 2. Illicit Business and the Frustration of Public Policy

While the *McGlotten* decision is unusual in both its finding that tax exemption represents state action for the purposes of the Fifth Amendment, and its explicit appeals to the expressive content of the tax code, its reasoning may shed light on other disallowed deductions and exemptions that are otherwise confusing.

The courts established early on that the federal income tax was to apply equally to income derived from legal and illegal enterprises.<sup>119</sup> The courts also generally affirmed that the taxation of *net* income pre-

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<sup>114</sup> 42 U.S.C. § 2000d (1964).

<sup>115</sup> “In the absence of strong legislative history to the contrary, the plain purpose of the statute is controlling. Here that purpose is clearly to eliminate discrimination in programs or activities benefitting from federal financial assistance. Distinctions as to the method of distribution of federal funds or their equivalent seem beside the point, as the regulations issued by the various agencies make apparent.” *McGlotten*, 338 F. Supp. at 461.

<sup>116</sup> *Id.* at 462 (quoting S.S. Surrey, *Federal Income Tax Reforms: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352, 384 (1970)).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *See, e.g.*, *US v. Sullivan*, 274 U.S. 259, 263 (1927) (upholding the taxation of profits from bootlegging).

scribed by the code required that illegal enterprises be allowed to deduct ordinary and necessary business expenses like any other business.<sup>120</sup>

Yet the deduction of expenses incurred in illicit business caused judges significant discomfort over the years. Over the first 50 years of the tax code, courts routinely disallowed deductions for otherwise ordinary and necessary business expenses incurred in the process of obtaining illicit income, on the grounds that allowing such deductions would “frustrate public policy.”<sup>121</sup> These disallowed deductions included fines and penalties, lobbying and “propaganda” on behalf of German “enemy aliens” after the Second World War,<sup>122</sup> and bribes, among other things—and many of these disallowances were then codified by Congress.<sup>123</sup> While the courts in the above cases did not dispute the relationship of the claimed expenses to income-generating enterprises, they seemed to find it unfathomable that Congress could have intended to allow deductions for such activities. In a canonical case, *Tank Truck Rentals v. Commissioner*, the Supreme Court announced, “We will not presume that the Congress, in allowing deductions for income tax purposes, intended to encourage a business enterprise to violate the declared policy of a State,” and declared state fines paid by a trucking company for running overweight trucks through Pennsylvania non-deductible.<sup>124</sup>

But what does it mean for a tax deduction to “frustrate” public policy, or to “encourage” violation of state policy? In *Suitable for Framing: Business Deductions in a Net Income Tax System*, David I. Walker argues convincingly that the determination that allowing certain deductions would frustrate public policy (and their subsequent disallowance in the code) is frequently based in the (often erroneous) mental framing of a deduction as a *subsidy*, even when the deduction is necessary to define a business’s net income.<sup>125</sup>

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<sup>120</sup> See, e.g., *Comm’r v. Tellier*, 383 U.S. 687 (The Supreme Court noted that the issue had been clearly addressed at the time of the code’s initial enactment, when the Senate voted down several amendments that would have limited deductibility of business expenses to those expenses incurred in the operation of *lawful* businesses. The Tellier Court quoted the Senate floor manager of the bill: “The object of this bill is to tax a man’s net income; that is to say, what he has at the end of the year after deducting from his receipts his expenditures or losses. It is not to reform men’s moral characters; that is not the object of the bill at all.”).

<sup>121</sup> See *Comm’r v. Heininger*, 320 U.S. 467, 473 (1943) (discussing judicial disallowance).

<sup>122</sup> See *Textile Mills Sec. Corp. v. Comm’r*, 314 U.S. 326, 336 (1941).

<sup>123</sup> I.R.C. §§ 162(c), (e)–(f) (2014).

<sup>124</sup> 356 U.S. 30, 35 (1958).

<sup>125</sup> David I. Walker, *Suitable for Framing: Business Deductions in a Net Income Tax System*, 52 WM. & MARY L. REV. 1247, 1255, 1262–63, 1272 (2011) (“Despite the fact that our income tax is based on net, not gross income, I believe that in thinking about any particular business deduction observers tend to adopt a pre-deduction, gross income baseline. Given that baseline, these deductions appear to be pro-taxpayer deviations that we tend to conceptualize as subsidies. This is not surprising. Outside of the tax context, to “deduct” means to reduce, subtract, or discount from some baseline. The elimination of a deduction is a move back in the

According to Professor Walker, the implicit baseline adopted by a court, and whether a deduction is a deviation from that baseline—and thus a subsidy—or simply necessary to accurately measure net income, is often dispositive as to whether the deduction is found to frustrate public policy.<sup>126</sup>

He illustrates this point by comparing *Tank Truck*<sup>127</sup> to another well-known case handed down on the same day: *Commissioner v. Sullivan*.<sup>128</sup> When read together, these cases are extremely puzzling. Each assesses a business deduction related to illicit behavior and whether allowing such a deduction would frustrate public policy, but the rules outlined in the two cases are difficult to reconcile, especially once the particular facts of the cases are brought to bear.

In *Tank Truck*, the Court articulated a test for non-deductibility that began with the observation that “the frustration of state policy is most complete and direct when the expenditure for which deduction is sought is itself prohibited by statute.” This seems quite reasonable—yet in the *Sullivan* decision, the Court allowed the operator of an illegal bookmaking operation a deduction for rent paid, even though *payment of rent* by a bookmaking enterprise was itself directly prohibited by a state statute.<sup>129</sup> The Court held in *Tank Truck* that “Deduction of fines and penalties uniformly has been held to frustrate state policy in severe and direct fashion by reducing the ‘sting’ of the penalty prescribed by the state legislature,” yet found that the deduction at issue in *Sullivan* would not be “a device to avoid the consequence of violations of a law.”<sup>130</sup>

Professor Walker argues that the different outcomes in the two cases are the result of differential subsidy framing:

A striking difference between *Tank Truck* and *Sullivan* lies in the choice of baseline and the framing of the opinions, which are 180 degrees apart. In *Tank Truck*, Clark’s selection of a pre-deduction baseline causes deduction of fines to look like a subsidy for bad behavior,

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direction of the gross income baseline, so we tend to conceptualize that move as the elimination of a subsidy.”).

<sup>126</sup> “Mental and rhetorical framing of deduction as subsidy has several important consequences. A court’s choice of baseline may largely determine the outcome of a case. Explicit rhetorical framing of deduction as subsidy may yield sufficient votes to garner a majority on appeal or smooth reception. More concretely, subsidy framing may help explain judicial approval of the IRS’s disallowance of a number of business deductions on public policy grounds. Mental and rhetorical framing may also have contributed to the codification by Congress of these and other public policy disallowances.” *Id.* at 1271.

<sup>127</sup> *Tank Truck Rentals*, 356 U.S. at 30.

<sup>128</sup> 356 U.S. 27, 27 (1958).

<sup>129</sup> Bernard Wolfman, et al., *The Behavior of Justice Douglas in Federal Tax Cases*, 122 U. PA. L. REV. 235, 261 (1973) (citing ILL. REV. STAT. ch. 38, § 336 (1945)).

<sup>130</sup> *Comm’r v. Sullivan*, 356 U.S. at 29.

reducing the “sting” of the penalties. Douglas’s baseline in *Sullivan* is allowance of “the normal deductions of . . . rent and wages.” (footnote omitted) Douglas emphasizes that the disallowance in *Sullivan* “would come close to making this type of business taxable on the basis of its gross receipts, while all other businesses would be taxable on the basis of net income.”<sup>131</sup>

This approach is appealing, but it leaves unanswered a crucial question: *why* does the Court frame (either sincerely, or as a rhetorical device) one disallowed deduction as a subsidy and the other as necessary to determine net income?

In the Tax Reform Act of 1969,<sup>132</sup> Congress codified many of the traditional public policy disallowances, disallowing business expense deductions for bribes, kickbacks, and any payments that are illegal under state law,<sup>133</sup> as well as for fines and penalties assessed for the violation of state law.<sup>134</sup> The accompanying Senate report indicated that these additions to the code were to replace the common law public policy disallowances, and were to be seen as comprehensive.<sup>135</sup>

Yet the *Tank Truck/Sullivan* puzzle has reappeared in other contexts. For example, courts have struggled to determine the appropriate tax treatment of court-ordered disgorgement of previously-taxed profits from illegal activities: reasonable people could disagree as to whether these payments should be deductible from income as losses under §165, but it is difficult to come up with a policy rationale for treating court-ordered disgorgement of illegal profits differently depending on what illegal enterprise gave rise to the profits. Yet this is precisely what tax courts have done in treating the disgorgement of embezzlement proceeds differently from the forfeiture of profits from drug trafficking.<sup>136</sup>

In 1983, Glen Wood pled guilty to importing marijuana and conspiracy to import marijuana. His sentence included a four-year prison term and a \$30,000 fine. In 1985, Wood paid \$735,557 in back taxes, tax fraud penalties and interest resulting from his failure to report \$600,000 in drug trafficking income on his 1978 and 1979 tax returns. Wood then filed for a refund for tax year 1984 on the grounds that he had forfeited the \$600,000 to the government in that year, and was thus enti-

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<sup>131</sup> Walker, *supra* note 125 at 33.

<sup>132</sup> Pub. L. No. 91-172 § 902 (b), (c), 83 STAT. 487, 710 (1969).

<sup>133</sup> I.R.C. § 162(c). Note that this had the effect of overturning *Sullivan*.

<sup>134</sup> I.R.C. § 162(f).

<sup>135</sup> S. REP. NO. 91-552 at 274 (1969).

<sup>136</sup> See Andrew R. Shoemaker, *The Smuggler's Blues: Wood v. United States and the Resulting Horizontal Inequity Among Criminals in the Allowance of Federal Income Tax Deductions*, 11 VA. TAX REV. 660 (1992).

tled to a deduction for the forfeiture on his 1984 return.<sup>137</sup> In *Wood v. United States*, the Fifth Circuit ruled that the forfeiture was properly classified as a loss under §165, but that the loss was disallowed because “It is obvious, however, that the public policy embodied in this nation’s drug laws is not enhanced by allowing a tax deduction to offset a forfeiture.”<sup>138</sup> The court relied on *Holt v. Commissioner* (in which the value of forfeited marijuana and vehicles was held non-deductible):

Holt observed that ‘the primary purpose of such forfeitures is to cripple illegal drug trafficking and narcotics activities by depriving narcotics peddlers of the operating tools of their trade.’ (footnote omitted). The legislative history of 21 U.S.C. § 881 reveals that the forfeiture provision was designed to reach drug traffickers “where it hurts the most.”<sup>139</sup>

Quoting *Tank Truck*, the court ruled that “allowing a loss deduction would certainly ‘take the sting’ out of a penalty intended to deter drug dealing.”<sup>140</sup> Note that the court is unmoved by the fact that the taxpayer received four years in prison and a \$30,000 fine as punishment for his crimes before disgorging the \$600,000 in ill-gotten gains.

Contrast this with the treatment of repayment of embezzled funds.<sup>141</sup> The courts have sometimes held that deducting restitution payments would frustrate public policy if the payments were *direct substitutes* for punitive payments meted out by the criminal court, as part of a deal for a stayed sentence, for example,<sup>142</sup> but this finding has not been consistent. In *Spitz v. United States*,<sup>143</sup> the Court held that a \$5,000 restitution payment made as a condition of probation was deductible from income. In *Stephens v. Commissioner*, decided one year after *Wood*, the tax court ruled that the \$530,000 principal portion of \$1,000,000 in restitution (including interest) paid to a former employer in lieu of an additional prison term was non-deductible on public policy grounds similar to those cited in *Wood*, but the Second Circuit reversed this decision.<sup>144</sup> Much like the court in *Wood*, the Circuit court quoted extensively from *Tank Truck*, but to the opposite effect, finding that allowing the deduction would not “reduce the sting” of the penalties Stephens faced, but rather that “disallowing the deduction for repaying the funds would in

<sup>137</sup> *Wood v. United States*, 863 F.2d 417, 418 (1989).

<sup>138</sup> *Id.* at 421.

<sup>139</sup> *Id.* (quoting *Holt v. Comm’r*, 69 T.C. 75, 80 (1977)); H.R.REP. NO. 98-1030 (1984).

<sup>140</sup> *Id.* at 422.

<sup>141</sup> For full description of the following cases, see Shoemaker, *supra* note 136.

<sup>142</sup> See, e.g., *Bailey v. Comm’r*, 756 F.2d 44, 47 (6th Cir. 1985); *Waldman v. Comm’r*, 88 T.C. 1384, 1385 (1987), *aff’d*, 850 F.2d 611 (9th Cir. 1988).

<sup>143</sup> 432 F. Supp. 148, 149-50 (E.D. Wis. 1977).

<sup>144</sup> *Stephens v. Comm’r*, 905 F.2d 667, 674 (2nd Cir. 1990).

effect result in a ‘double sting.’ If the deduction were disallowed, Stephens would pay approximately \$30,000 in taxes on income he did not retain, in addition to the restitution payment.”<sup>145</sup> The court seemed particularly moved by the “stern sentence” Stephens had already received: 5 years in prison and \$16,000 in fines.

In all of the above cases, taxpayers were seeking deduction for money paid to the government on pain of imprisonment. In all cases the taxpayers were found to be deserving of deduction based on the statutory definition of losses. But in the drug cases, these losses were disallowed based on questionable deterrence rationales not applied in the embezzlement cases. Why is non-deductibility a “double sting” in one set of cases, but necessary to preserve existing criminal law deterrents in another? In both instances, the taxpayers were engaged in the violation of federal and state statutes evincing “sharply defined public policy” against their profit-making behaviors.

Traditional analysis cannot answer this question. Professor Walker’s implicit subsidy theory has some purchase—with the language of “double stings” and “taking the sting out” standing in for clearer reference to subsidy—but cannot explain the differential treatment.

Attention to social meaning can bring these threads together. When judges are operating in hotly contested cultural spaces, they are moved by the cultural values that the law (as they interpret it) expresses. Like the legislators in Nevada concerned about the tax code’s ability to place brothels within the ambit of “normal businesses,” one can imagine that a judge would struggle more with reading “ordinary and necessary” business expenses to encompass punitive fines than rent paid, even though the rent payments were actually illegal. Similarly, while the action of white-collar embezzlers is hardly praiseworthy, it does not (and certainly did not in the 1970s and 1980s) compare to the behavior of “narcotics peddlers,”<sup>146</sup> and thus courts may be less comfortable approving loss deductions for the forfeiture of their tools of the trade or ill-gotten gains.

Professor Walker notes that subsidy framing could be simply *ex-post* rhetoric, but I would argue that his theory that “subconscious framing of deduction as subsidy” influences the public policy disallowance decisions fits well with an expressive theory of tax. Just as legislators are not necessarily disingenuous when using “incentive” language rather than pure expressive appeals,<sup>147</sup> and advocates for and against the death penalty conform their assessments of its deterrence value to their expressive beliefs,<sup>148</sup> expressive concerns contribute to the justices’ determina-

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<sup>145</sup> *Id.* at 671.

<sup>146</sup> See *Holt*, 69 T.C. at 80.

<sup>147</sup> Walker, *supra* note 125.

<sup>148</sup> See Schlafly, *supra* note 87 and accompanying text.

tions in the *Tank Truck* and *Sullivan* decisions, as well as the many lower court and legislative public policy disallowances.

In fact, the *McGlotten* court's decision with respect to the interaction of the tax exemption for fraternal organizations with the Civil Rights Act of 1964 makes an often subconscious analytic move explicit. Recall that in order to find that a tax provision violates the Civil Rights Act, the court must find that the provision constitutes a *subsidy*.<sup>149</sup> In order to distinguish a tax *subsidy* from other tax provisions, the court does not look to tables of tax expenditures, or a coherent definition of income or theory of the appropriate taxation of nonprofits.

Instead, the court states of the tax exemption for fraternal orders (especially their passive investment income): "Since it is available only to particular groups, it operates in fact as a subsidy in favor of the particular activities these groups are pursuing."<sup>150</sup> Now, the availability of any given tax provision to some groups and not others (businesses not individuals, individuals with particular types of income, etc.) occurs frequently in any net income tax system, but the *McGlotten* court had already decided, in addressing the plaintiff's equal protection claims, that offering particular benefits to particular organizations had the effect of "indicating approval" of the organizations and *thus* "aiding" their discrimination through the provision of tax benefits. A code provision that draws distinctions among organizations indicates approval of those that receive benefits, and this approval itself constitutes aid and defines the provision as a subsidy in the minds of the justices. When the tax code expresses inappropriate values, judges are more likely to view the code as a deviation from the normal income tax baseline, and find that this deviation constitutes "frustration" of public policy.

### 3. Drugs are Different: From "Peddlers" to Entrepreneurs

The above drug trafficking cases did not involve deductions for ordinary and necessary business expenses—in 1982, Congress had enacted a prohibition on *all* business expense deductions (other than cost of goods sold) for drug traffickers, based explicitly in the pre-existing public policy doctrine. IRC §280E, inserted into the Tax Equity and Fiscal Responsibility Act of 1982<sup>151</sup> as an amendment by Senator William L. Armstrong of Colorado,<sup>152</sup> provides:

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<sup>149</sup> See *supra* Section C(1)(c). The court must find that the provision constitutes "federal financial assistance."

<sup>150</sup> *McGlotten*, 338 F. Supp. at 462.

<sup>151</sup> Tax Equity and Fiscal Responsibility Act of 1982, PUB. L. NO. 97-248, § 351, 96 STAT. 324, 640 (1982) (codified at I.R.C. § 280E).

<sup>152</sup> S. 2212, 97th Cong. (1982). A bill to amend the Internal Revenue Code of 1954 to disallow a deduction for expenses paid or incurred in connection with the illegal sale of drugs.



No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances.<sup>153</sup>

The provision was a direct response to a tax court ruling from a year earlier, *Edmondson v. Commissioner*, in which a retail drug dealer was allowed various business expense deductions against his drug-related income.<sup>154</sup> The Commissioner did not argue that the deductions should be denied as frustrating public policy, and the tax court did not address the issue, as Treasury considered the public policy disallowances codified in the 1969 tax reform act to be a complete replacement for the common law doctrine.<sup>155</sup>

The Senate report accompanying § 280E's enactment explained the provision thusly:

There is a sharply defined public policy against drug dealing. To allow drug dealers the benefit of business expense deductions at the same time that the U.S. and its citizens are losing billions of dollars per year to such persons is not compelled by the fact that such deductions are allowed to other, legal, enterprises. Such deductions must be disallowed on public policy grounds.<sup>156</sup>

It is unlikely that this code section has had much marginal deterrence effect on illegal drug sales or dramatically increased the sanctions apprehended drug traffickers face. But the introduction of the section certainly allowed legislators to ensure that the tax code, like other federal laws, expressed unequivocal condemnation of drug traffickers. It was thus passed uncontroversially.

But § 280E is no longer uncontroversial—it has become part of a heated conflict over the federal tax treatment of marijuana dispensaries that are now legal under state law in many states. In nearly half of the states, marijuana is legal for medicinal purposes, and eight states and the

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<sup>153</sup> I.R.C. § 280E (1982).

<sup>154</sup> *Edmondson v. Comm'r*, 42 T.C.M. 1533 (1981).

<sup>155</sup> See Nikola Vujcic, *Section 280E of the Internal Revenue Code and Medical Marijuana Dispensaries: an Interpretation Based On Statutory Purpose*, 84 GEO. WASH. L. REV. 249, 258–59 (2016). After the 1969 tax reform act codified the existing public policy disallowances, treasury had issued a regulation stating: “A deduction for an expense paid or incurred after December 30, 1969, which would otherwise be allowable under section 162 shall not be denied on the grounds that allowance of such deduction would frustrate a sharply defined public policy.” Treas. Reg. §1.162-1(a) (1975).

<sup>156</sup> S. REP. NO. 97-494, at 309 (1982).

District of Columbia<sup>157</sup> have legalized it for recreational use as well. There has been a substantial shift over the last two decades in public opinion regarding marijuana,<sup>158</sup> and in places where marijuana sales are blessed by the state, the social meaning of “trafficking” in marijuana has changed dramatically.

### III. THE SECRET AMBITION OF “INCENTIVE”

The preceding discussions have introduced an important theme in the expressive theory of tax: the use of “incentive” language as a replacement for explicit appeals to expressive values. Understanding the complicated meaning of such language can help scholars identify expressive battles even when they are being waged under the cover of more traditional tax policy discourse.

As Dan Kahan explains in *The Secret Ambition of Deterrence*,<sup>159</sup> when citizens and lawmakers debate controversial topics in criminal law, they frequently turn to deterrence arguments to justify their positions, as these arguments are more acceptable within liberal political discourse than explicit struggles for symbolic expression. But this “deterrence talk” does not necessarily reflect the true feelings and motivations of speakers.

Death penalty advocacy is a good example: research on public opinion about the death penalty indicates that people frequently speak in deterrence terms because they feel that these arguments are seen as more “scientific” or reasonable.<sup>160</sup> Members of Congress similarly feel that policy appeals based on a deterrence rationale seem more “rational” and thus “legitimate” than saying simply “the bastard deserved it.”<sup>161</sup> When pressed on their motivations, however, many citizens and lawmakers who support the death penalty talk about the importance of communicating society’s unequivocal condemnation of certain acts,<sup>162</sup> or of affirming the virtue and status of law-abiding citizens. Opponents of capital punishment frequently cite the devaluation of the lives of offend-

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<sup>157</sup> See *State Marijuana Laws in 2016 Map*, GOVERNING MAG. (Mar. 23, 2017), <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>.

<sup>158</sup> Today, 57 percent of U.S. adults say the use of marijuana should be made legal, while 37 percent say it should be illegal. A decade ago, opinion on legalizing marijuana was nearly the reverse—just 32 percent favored legalization, while 60 percent were opposed. Abigail Geiger, *Support for Marijuana Legalization Continues to Rise*, PEW RESEARCH CENTER (Oct. 12, 2016), <http://www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise/>.

<sup>159</sup> See generally Kahan, *supra* note 17 (arguing that “deterrence talk” serves an important function within liberal discourse, cooling overheated debates over cultural status).

<sup>160</sup> See Phoebe C. Ellsworth and Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116, 145–49 (1983).

<sup>161</sup> See Barbara Ann Stolz, *Congress and Capital Punishment: An Exercise in Symbolic Politics*, 5 LAW & POL’Y Q. 157, 176 (1983).

<sup>162</sup> *Id.* at 166.

ers or the “brutalization” of our society as primary harms associated with the death penalty. Though people on both sides of the debate marshal endless deterrence-based arguments in support of their positions, experiments show that few people are persuaded by empirical evidence contradicting their intuitions about deterrence,<sup>163</sup> and a large majority of survey respondents freely admit that they *would not change their position* on the death penalty even if they were shown *definitive evidence* contradicting their beliefs about its deterrent effects.<sup>164</sup>

Cheap deterrence talk is pervasive in debates about gun control as well: battles over gun control are freighted with cultural meaning, pitting rugged frontier individualism against liberal Eastern urbanism in a fight for societal recognition and cultural status. While both proponents and opponents of gun control bolster their arguments with appeals to the reduction of crime,<sup>165</sup> beliefs about crime effects of gun control are predicted by cultural attachment and do not appear to actually motivate policy preferences.<sup>166</sup> In fact, most people who claim that they support gun control because it would reduce crime admit in their response to follow-up questions that they don’t *actually believe that crime will go down* if gun control is enacted.<sup>167</sup>

These examples demonstrate how expressive concerns can at times be the dominant—or at least a very significant—motivation behind policy preferences or analytic decisions that are outwardly staged on other grounds. This phenomenon, I will argue, underwrites many of the most contentious arguments about the economic effects of particular tax policies, with dueling economic justifications frequently providing public cover for the expressive battles lurking just below the surface. Very few tax policy debates are as overtly expressive as the Nevada brothel tax debate or the fight between David Cameron and J.K. Rowling over “rec-

<sup>163</sup> JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 239, 242–43 (John Hagan ed., 1997).

<sup>164</sup> Ellsworth and Ross, *supra* note 1600 (noting that “[r]espondents were generally ignorant on factual issues related to the death penalty, and indicated that if their factual beliefs (in deterrence) were incorrect, their attitude would not be influenced”).

<sup>165</sup> Gun control proponents argue that stricter gun control will decrease violent crime, while opponents argue that an armed citizenry provides an effective deterrent to violent criminality. See Kahan *supra* note 159, at 451.

<sup>166</sup> See Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1321 (2003) (“While predictably failing to change anyone’s mind, empirical analyses do reinforce the conviction of those who already accept their conclusions that a rational and just assessment of the facts *must* support their position.”).

<sup>167</sup> Kahan, *supra* note 17, at 452 (citing GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 370 (Michael Useem & James D. Wright eds., 1991)); ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 121 (1995); DON B. KATES JR., PUBLIC OPINION: THE EFFECTS OF EXTREMIST DISCOURSE ON THE GUN DEBATE, IN THE GREAT AMERICAN GUN DEBATE 93, 95 (Don B. Kates Jr. & Gary Kleck eds., 1997).

ognition” of marriage at the expense of unmarried mothers, but we should not assume that debates framed in other terms are devoid of expressive motivation.

### A. *Cheap Incentive Talk*

Just as “deterrence talk” in criminal law frequently obscures the more fundamental cultural concerns that are the true drivers of legislative and public opinion on culturally charged issues like the death penalty and gun control, many fundamentally expressive battles in the tax realm are clothed in the language of incentives, efficiency, or distributional fairness. Talk of incentives, and especially “penalties” and “rewards,” can easily be understood as expressive as well as instrumental.

This is not to say that policymakers are not concerned about the true instrumental effects of tax policy legislation—only that we cannot take talk of incentives at face value, and we should not automatically construe ambiguous words like “reward” as synonymous with real economic incentive. Rewards and punishments in the tax code may be valuable for expressive reasons even if they are ineffective at changing behavior, just as prison may be valued over drug treatment for the moral condemnation it expresses, even if prison is markedly less effective than treatment at reducing drug offenses. Policymakers are willing to spend vast amounts of money to reward marriage whether or not marriage penalties affect marital decisions, because the “reward” they are concerned about is primarily expressive, not instrumental. They would *like* to increase marriage rates, but they are not overly concerned with the efficacy of their attempts, as long as those attempts express to the public that Congress values marriage and family. Recall also that individuals’ factual perceptions of the efficacy of incentives (whether the death penalty deters, for example) are generally contingent on their cultural attachments and highly resistant to contrary data.

Attention to the importance of expressive concerns does not demand that we view legislators as consciously valuing expressive goals over instrumental effects at every turn—in reality, we should expect that legislators both assign some independent value to expression *and* hold firm beliefs about incentive efficacy that conform to their cultural attachments. “Reward,” “penalize,” and “incentivize” are thus not necessarily strategic code words, though they certainly can be deployed disingenuously. Instead, they are frequently authentic representations of a poorly-defined mix of expressive and (culturally-informed) instrumental concerns.

This insight can help us solve a persistent puzzle in many tax policy debates: why are lawmakers frequently enamored of tax incentives that have been repeatedly demonstrated ineffective? Is it just stupidity, dis-

honesty, or corruption on the part of political actors? Or is there something that traditional analysis is missing?

B. “Rewarding” Savings, “Encouraging” Thrift, Changing Nothing

The Internal Revenue Code is replete with tax-preferences for retirement savings allegedly designed to increase savings on the part of workers. These tax expenditures are projected to amount to over \$165 billion this fiscal year alone,<sup>168</sup> or more than 10 percent of total income tax revenues for the year.<sup>169</sup> This incentive talk is anything but cheap.

Unfortunately, available empirical evidence indicates that these provisions do an extremely poor job as incentives.<sup>170</sup> Coverage and take-up are patchy, with about 55 percent of workers completely left out of all tax-preferred savings programs.<sup>171</sup> Among workers who are covered, it appears that tax-preferred savings accounts induce much shifting of savings into tax-preferred accounts from other vehicles, but fail to induce any *additional* saving by plan participants.<sup>172</sup> Furthermore, retirement savings incentives flow predominantly to high-income households who are already capital-rich and over-insured, providing tax windfalls to families in least need of increased retirement security.<sup>173</sup>

While economists have been questioning the efficacy and efficiency of retirement savings incentives for at least 20 years, the political appetite for these incentives is unabated. They were popular during the Clinton administration. Over the course of the George W. Bush

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<sup>168</sup> President’s Fiscal Year 2013 Budget, Analytical Perspectives, 252 at table 17.1. This figure includes the net exclusion for contributions and earnings for employer pension plans, 401(k)-type plans, Individual Retirement Accounts, and self-employed plans (Keogh plans), and the saver’s credit.

<sup>169</sup> *Id.* at 187 at table 15.1.

<sup>170</sup> Lily Batchelder, *Savings Incentives with Insurance Objectives: A Bankrupt Approach?* (work in progress).

<sup>171</sup> See Craig Copeland, *Retirement Plan Participation: Survey of Income and Program Participation (SIPP) Data, 2006*, 30:2 EBRI NOTES 2 (2009).

<sup>172</sup> See, e.g., William Gale and Benjamin Harris, *Savings And Retirement: How Does Tax-Favored Retirement Saving Affect National Saving?*, TAX POLICY CENTER BRIEFING BOOK (2007) (“The earliest research on both traditional defined-benefit pensions and defined-contribution plans appeared to demonstrate very strong effects on private wealth and saving. These efforts, however, were marred by a series of econometric and statistical problems. More recent research, using improved methods, has found significantly smaller impacts of tax-preferred saving vehicles on private saving and wealth, and in some cases has found no net effects on private wealth at all.”); See also Alan J. Auerbach, William G. Gale, and Peter R. Orszag, *The Fiscal Gap and Retirement Saving Revisited*, TAX NOTES, 431(2004); Eric M. Engen, William G. Gale, and John Karl Scholz, *The Illusory Effects of Saving Incentives on Saving*, J. ECON. PERSP. 113 (1996).

<sup>173</sup> See Batchelder, *supra* note 170; Eric J. Toder, Benjamin H. Harris and Katherine Lim, *Distributional Effects of Tax Expenditures*, TAX POL’Y CENTER (July 21, 2009), <http://www.taxpolicycenter.org/publications/url.cfm?ID=411922> (nearly 80 percent of the benefit of retirement savings accrues to the top quintile of earners).

Administration, existing incentives were expanded and new provisions added. President Obama proposed to expand the Saver's Credit to cover more low-income households and provide larger subsidies. While this is certainly an improvement from a distributional standpoint, a much more efficient way to change the distributional effects of savings incentives would be to eliminate them and invest the resulting revenue in expansions of progressive programs. Why are "incentives" that do so little to change private behavior and cost so much so beloved?

Because they say the right thing about the people they target. Saving for the future is a virtue deserving of recognition and reward, regardless of whether the system of rewards actually induces more people to save. By exempting savings from taxation, especially the savings of hard-working households socking away funds for a modest retirement, or a first home purchase, or an education (all of which may be paid for with tax-preferred savings), we ordain a social ideal. Given that the current slate of savings incentives is largely ineffective, but spends precious resources providing windfalls to people who save, one might expect support for them to dwindle as household savings rates decline and fewer households benefit monetarily. This has not been the case, and the expressive function of savings incentives provides an explanation: propounding a cultural ideal is an aspirational endeavor. Expressive concerns are often most salient and powerful when cherished values seem most besieged. It is thus unsurprising that during a time of ballooning debt, easy money and record-low saving, Americans would place even more value on legislative expression of the virtues and values they see slipping away.

Increasing national saving and retirement security are laudable goals, and new empirical work on program design could lead to increased participation and incentive effectiveness.<sup>174</sup> But it is notable that proposals to directly increase national savings and retirement security through, for example, a Social Security expansion and deficit reduction funded through increased taxes, are not central to the "savings incentive" debate. This approach would be much more efficient at achieving both instrumental goals of retirement savings incentives, but it would not express Congressional approval for individual thrift—in fact, it would relieve individuals of the need to be fiscally virtuous—and thus, is not expressively appealing. Again, there are many ideological and practical

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<sup>174</sup> See, e.g. Esther Duflo, William G. Gale, Jeffrey Liebman, Peter Orszag, and Emmanuel Saez, *Saving Incentives for Low- and Middle-Income Families: Evidence from a Field Experiment with H&R Block*, Q. J. ECON. 1311–46 (2006); Emmanuel Saez, *Details Matter: The Impact of Presentation and Information on the Take-up of Financial Incentives for Retirement Saving*, AM. ECON. J.: ECON. POL'Y 1, 204–28 (2009).

concerns motivating lawmakers, but expressive goals are frequently important, and can help to explain otherwise puzzling choices.

#### IV. IMPLICATIONS FOR POLICY DESIGN

Expressive theory provides a powerful positive framework for understanding tax policy, shedding light on otherwise puzzling debates and decisions. But expressive theory can have normative weight as well. It is easy to dismiss expressive concerns as being just so much rhetoric, or representing ignorance or irrationality on the part of policymakers and citizens, but that would be a mistake. Social meaning matters. People care deeply about their standing in society, and about what our criminal laws, our constitution, and our tax code say about it.<sup>175</sup> It may thus at times be right to choose policies with otherwise sub-optimal instrumental effects if they express the right thing about our society's values.

Expressive theory has a number of implications for policy design and advocacy. The easiest piece involves simply being smarter about rhetoric—if your opponents are arguing about values and virtues and you are tempted to refute them with a spreadsheet, rethink your approach. More interestingly, creative policy design can align expressive goals with instrumental goals.

##### A. *Example: How Expressive Taxation Could Bolster the Taxation of Intergenerational Wealth Transfers*

###### 1. The Death of the Death Tax

At the time of its delayed temporary repeal in the Economic Growth and Tax Relief Reconciliation Act of 2001,<sup>176</sup> the estate tax, in place for 85 years, affected less than 2 percent of the population, and was the most progressive element of the U.S. tax code.<sup>177</sup> Yet its repeal moved from a fringe issue, of concern primarily to a small number of extremely

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<sup>175</sup> Expressive value enters directly into their utility function.

<sup>176</sup> The recent legislative history of the estate tax is incredibly complicated. Most provisions of EGTRRA (including changes to income tax rates, “marriage penalty relief” and a number of other tax policy changes) phased in slowly over the 10-year budget window, then expired at the end of ten years. This structure was adopted to avoid triggering budget rules that would have required 60 votes in the Senate. In the case of the estate tax, the exemption was gradually increased and the rate gradually decreased over the 10 years until the tax was completely repealed in 2010. The tax was then scheduled to spring back in 2011 at its pre-2001 levels. Much to the chagrin of Congressional Democrats, repeal occurred as scheduled in 2010. Congress then passed another expiring measure to prevent the application in 2011 of the pre-2001 tax; estates in 2011 and 2012 benefitted from a substantially higher exemption and a substantially lower rate. Then in early 2013, the “fiscal cliff” deal (encompassing the so-called “Bush tax cuts” and the sequestration deal enacted during prior negotiations) permanently reinstated the estate tax with a higher exemption and lower rate than the lowest-revenue iteration (2009) of the EGGTRA repeal phase-in.

<sup>177</sup> Graetz and Shapiro, *supra* note 3, at 1.

wealthy families, to a central theme of George W. Bush's tax cutting rhetoric, and a point of bipartisan agreement in the Senate. This sea change cannot be chocked up to corruption or backroom deals with special interests—when polled, a majority of Americans supported repeal of the “death tax.”<sup>178</sup> What happened?

In their comprehensive, authoritative book *Death by a Thousand Cuts*, Michael J. Graetz and Ian Shapiro explore this puzzle from every angle. They chronicle the birth of a diverse repeal coalition, the creation by conservative think-tanks of the intellectual underpinnings of the repeal movement, the prosecution of an aggressive electoral and legislative strategy, and the flows of money that made it all possible. While all of these elements were important, Graetz and Shapiro also take very seriously the repeal movement's success at swaying public opinion with moral arguments about what social values the tax code ought to represent, and who should and should not be “punished” with a tax bill.

Graetz and Shapiro name Frank Luntz, a prominent Republican pollster, “the most important player in reshaping the rhetoric of estate tax politics.” Luntz encouraged the repeal coalition to personalize the estate tax by focusing on sympathetic families affected by the tax, and to fundamentally reframe it as a “tax on the American dream.” He made extensive use of focus groups to develop “four commonsense principles” that repeal advocates should use to make their case to the public and their lawmakers:

1. It is the wrong tax. It provides just one percent of the nation's revenues, and it costs more to collect than any other federal tax.
2. It comes at the wrong time. People shouldn't be burdened at the most difficult time of their lives.
3. It hurts the wrong people. If you saved for the future, put away money for your children, built a small business, ran a family farm, or achieved the American Dream in other ways, the Death Tax punishes you.
4. It helps the wrong people. The only people helped by the estate tax are the fancy lawyers and expensive tax accountants—and IRS agents.<sup>179</sup>

Of these four principles, only one includes any reference to revenue, and none appeals directly to ability-to-pay or other traditional distributional concerns. These are primarily arguments about how the tax code constructs the social meaning of family wealth and the American Dream. The estate tax is unfair because it punishes the virtues of hard work,

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<sup>178</sup> *Id.* at 122.

<sup>179</sup> *Id.* at 81–82.



thrift, entrepreneurship and generosity toward the next generation. By contrast, the tax rewards culturally disfavored actors—lawyers, “high-priced” accountants, and IRS bureaucrats—who gain by leeching off the virtuous behavior of others.<sup>180</sup>

And where were the opponents of repeal while Luntz was defining the terms of the expressive debate? They were stuck in traditional modes of analysis. As Graetz and Shapiro write,

[W]hile the repeal forces made a moral case on one side, their opponents left it unanswered. They argued about the math of who pays and how much, without joining the fight over questions of morality, fairness, and democratic values . . . The family farmers, the small business owners, the Chester Thigpens,<sup>181</sup> all embody the work ethic. They exemplify American virtue. The argument for repeal became an argument about how these virtuous Americans were being unjustly penalized by the death tax.<sup>182</sup>

Meanwhile, The Center on Budget and Policy Priorities,<sup>183</sup> probably the most important force in the anti-repeal movement, issued publication after publication explaining in detail the true incidence of the estate tax (e.g. “Eliminating the Estate Tax: A Costly Benefit for the Wealthiest Americans”),<sup>184</sup> while the Brookings Institution assembled countless papers “debunking” the driest economic claims of repealers and running the estate tax through traditional efficiency and equity analysis.<sup>185</sup> None of these actors were prepared to play the expressive game, and “but it’s only the top 2 percent!” could not compete with the values and virtues

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<sup>180</sup> Luntz is often cited, ruefully, by repeal opponents as the man who coined the great rhetorical bogeyman “death-tax”—viewed by many as an Orwellian turn-of-phrase so powerful that it completely changed the terms of the debate around estate taxation. *Id.* While the transformation of the estate tax into the “death tax” exemplifies Luntz’s every-word-counts approach to message discipline, placing outside focus on a single change in nomenclature trivializes the remarkable way in which he and the rest of the repeal coalition used rhetoric to claim the moral and expressive high ground. They did not just focus-group the phrase “death tax” and apply it broadly, they used every available microphone to define the phrase’s expressive content until “death tax” became shorthand for an entire narrative of unfair punishment of virtuous Americans. *Id.*

<sup>181</sup> An African American octogenarian tree farmer from Mississippi who, after testifying before the Ways and Means Committee in 1995, became a key figure in death tax folklore.

<sup>182</sup> Graetz and Shapiro, *supra* note 3, at 227.

<sup>183</sup> Disclosure: I have worked for CBPP in the past, including on estate tax issues, and think very highly of their staff and their work.

<sup>184</sup> Graetz and Shapiro, *supra* note 3, at 227.

<sup>185</sup> *Id.*

frames of the repeal movement. In fact, constant focus on how few people pay the estate tax may have backfired.<sup>186</sup>

One lesson of the estate tax debate is that policy advocates must pay attention to social meaning when choosing their rhetorical arguments. Expressive arguments for the estate tax would have explicitly contested the meaning of the tax with respect to the values espoused by repealers, or attempted to focus the discussion on a different set of values altogether. A family farmer is a powerful symbol, but so is Paris Hilton—by turning the focus away from thrifty, entrepreneurial parents and toward profligate, non-working heirs, estate tax proponents could have challenged the meaning of the estate tax with respect to the values of hard work and thrift. Americans believe that parents should be able to work to create a better life for their children, but they also believe strongly in an ideal of equality of opportunity.<sup>187</sup> These are conflicting values that point in different directions on the estate tax, and the social meaning of the tax in any given context will depend a great deal on which value is dominant in the discussion. The repeal coalition was successful in both setting the terms of the expressive debate and defining the meaning of estate taxation within that debate. Charts and graphs explaining the progressivity of the estate tax, or attempting to tie the tax's revenue to favored government programs did not address this social meaning.

But there is a deeper lesson for tax policy design: if there is a policy that is equivalent or superior to the estate tax from a traditional tax policy perspective, and also expresses appropriate social values, lawmakers should adopt that policy.

## 2. Social Meaning and Transition to an Inheritance Tax

Professor Lily Batchelder has laid out the case for a move away from estate taxation and toward inheritance taxation,<sup>188</sup> which would explicitly tax heirs rather than decedents.<sup>189</sup> While most of Professor

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<sup>186</sup> “[T]he anti-repeal forces actually helped the repeal movement claim the moral victory. The defenders of the estate tax sang a constant refrain, telling people ‘you won’t pay this tax, only other people will, so it is in your interest to keep it.’ This self-interest chorus allowed the repeal coalitions to tell their members that their cause was righteous not selfish.” *See id.*

<sup>187</sup> Eighty-six percent of polled Americans either “completely agree” or “mostly agree” that “Our society should do what is necessary to make sure that everyone has an equal opportunity to succeed.” PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS VALUES SURVEY, APR. 2012 (Apr. 2012), <http://www.people-press.org/question-search/?qid=1811658&pid=51&ccid=51#top>.

<sup>188</sup> Lily L. Batchelder, *What Should Society Expect From Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1 (2009).

<sup>189</sup> Under the current system, intergenerational transfers at death are not taxable as income to the heir—rather, the estate is taxed before it is distributed to heirs. An inheritance tax would eliminate the taxation of the estate and instead tax distributions as income to heirs, with special rules. *Id.* at 2–3.

Batchelder's argument for the shift is based on potential benefits with respect to traditional tax policy analysis—enhancing fairness<sup>190</sup> and efficiency,<sup>191</sup> and providing an opportunity to remove unnecessary complexity<sup>192</sup>—she additionally argues that the shift would improve “political transparency:”

The fact that the estate and gift taxes focus by design on the donor drives the public to believe that their economic burdens also fall on donors in practice. Because all other major sources of income are subject to the income tax, many also erroneously may believe that heirs are taxed on their inherited income under the income tax.

These understandable misconceptions have been exploited by advocates of estate tax repeal who have framed the estate tax as a double tax on the frugal, hard-working, generous donor who is confronted by the taxman at the moment of death. This portrayal is far from accurate. As explained, the estate tax in fact predominantly burdens heirs. And it is generally the only tax that applies to extraordinarily large inheritances.

Nevertheless, the public could probably better understand the estate tax system's effects if its form more transparently embodied its function. Doing so would enable the public to make a more informed decision about how much resources heirs should have to share with society relative to those who personally earn their wealth.<sup>193</sup>

Professor Batchelder focuses on the rhetorical significance of the choice of tax base here, and the “transparency” effect of matching the statutory incidence of the tax to the actual incidence of the tax. But it is also true that this shift in statutory incidence changes the expressive content of the code in a way that improves it directly, by ensuring that that the law expresses appropriate cultural values. A comprehensive inheritance tax could be simpler, more transparent, more efficient and more equitable than the estate tax, and *it would also* get the expressive content right by taxing ne'er-do-well heirs and heiresses instead of the accumulated savings of business owners and entrepreneurs.

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<sup>190</sup> Since the empirical literature indicates that the majority of the true incidence of estate taxes falls on heirs (in the form of reduced inheritances) not decedents, taxing heirs allows more accurate calculation of ability to pay and calibration of taxes to the payor's position on the income distribution. *Id.* at 17–19, 49.

<sup>191</sup> *Id.* 26–44.

<sup>192</sup> *Id.* at 56

<sup>193</sup> *Id.* at 58

To return to Congresswoman Dunn's quote from the beginning of this Article:

The policy choices we make surrounding the death tax go to the heart not just of our tax system but of who we are as a society. How should we tax? Who should we tax? What should we tax? What values does our tax system reflect? Naturally our tax system is not neutral to social values. Look at the values that are penalized when a government imposes a death tax: Thrift. Conservation. Entrepreneurship. Ingenuity. Family Businesses. Family Farms. Families.<sup>194</sup>

By taxing the unearned income of heirs rather than the "thrift," "conservation," and "entrepreneurship" of donors, and the family farms and businesses that resulted from these qualities, an inheritance tax reflects the right social values, and is thus expressively superior to an estate tax.

Here there are expressive *and* traditional tax policy factors supporting reform, but a move to a tax that achieved expressive goals could represent an improvement even if all incidental effects of the tax remained unchanged. For example, under certain circumstances, whether the government levels a payroll tax on workers or employers may not change who really pays but may change the cultural valence of the tax in important ways, by helping to frame an associated benefit as "earned," or by requiring employers to pay "their fair share" toward benefits for their employees, and these expressive concerns can be taken into account.

### B. *Even Cheap-er Incentive Talk*

Just as alignment with expressive concerns strengthens good policy, it can make bad policy less bad. Given the interest of the public and legislators in enacting expressive tax provisions, in many cases advocates for good tax policy will be more successful in mitigating damage if they pay attention to the social meaning of the desired tax provisions. If a policy is enacted for primarily expressive reasons, it should be structured to lose as little revenue and create as few inequities and bad incentives as possible.

This understanding could further bolster the push to convert many income tax deductions into limited refundable credits. While refundable credits provide the same value to all taxpayers regardless of income or other tax liability, when tax subsidies for socially desirable behavior are structured as deductions from taxable income, they have the effect of providing a higher *subsidy rate* to higher income taxpayers (without evidence that the positive externalities of the behavior increase with in-

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<sup>194</sup> Graetz and Shapiro, *supra* note 3, at 42.

come) and providing no subsidy (or none at the margin) for taxpayers with no tax liability. There is a strong efficiency argument for defaulting all such provisions to limited refundable credits to avoid this odd outcome.<sup>195</sup> This argument can be even stronger for deductions that serve primarily expressive ends—to the extent that policymakers and citizens attach value to the mere existence in the code of a tax preference for a particular activity or group, but care less about the structure and size of the preference, small refundable credits could maximize the expressive bang-for-the-buck by reducing revenue loss and improving the distributional effects of the inefficient provisions. In fact, this is implicit in the arguments made by proponents of conversion of, for example, the home mortgage interest deduction (MID), which many tax policy experts would likely eliminate altogether were it not for the “political impossibility” of such a move.<sup>196</sup>

Viewed from a perspective of pure self-interest, broad support for the MID is a bit puzzling—only 25 percent of tax filers claimed the MID in 2012.<sup>197</sup> This represents fewer than half of all *homeowners*.<sup>198</sup> And the vast majority of the benefits flow to high-income households, with 77 percent of the value of the MID accruing to households with incomes above \$100,000 in 2012.<sup>199</sup> Viewed from an efficiency standpoint the MID leaves much to be desired.<sup>200</sup> Viewed through an expressive lens,

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<sup>195</sup> See Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 53 (2006).

<sup>196</sup> See, e.g., Alan Viard, *Proposal 8: Replacing the Home Mortgage Interest Deduction*, THE HAMILTON PROJECT: INNOVATIVE APPROACHES TO TAX POL’Y (Feb. 2013), [https://www.brookings.edu/wp-content/uploads/2016/06/THP\\_15WaysFedBudget\\_Prop8.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/THP_15WaysFedBudget_Prop8.pdf).

“The economic merits of a homeownership preference depend on whether homeownership generates spillover benefits for society as a whole, perhaps by promoting social stability or by encouraging residents’ neighborhood involvement. Rather than wading into this contentious debate, however, this proposal accepts the political reality that complete removal of the tax preference, or even of the mortgage deduction, is impossible, and instead seeks to target the tax preference in a more rational manner. Opinion polls suggest that many Americans who are unwilling to eliminate the mortgage deduction are willing to restrict it.” (citing *U.S. Voters Trust Obama, Dems to Avoid Fiscal Cliff, Quinnipiac University National Poll Finds; Tax The Rich, But Don’t Touch Medicare, Voters Say*, QUINNIPIAC UNIV. (Dec. 6, 2012), <http://www.quinnipiac.edu/institutes-centers/pollinginstitute/national/release-detail/?ReleaseID=1821>).

<sup>197</sup> Mark P. Keightley, *An Analysis of the Geographic Distribution of the Mortgage Interest Deduction*, CONGRESSIONAL RESEARCH SERVICE at 4–5 (2014).

<sup>198</sup> See, e.g., Brian H. Jenn, *The Case for Tax Credits*, 61 TAX LAW 549, 585–87 (2008) (summarizing the arguments for subsidizing home ownership and the inappropriateness of the MID as the tool for these subsidies); *But see id.* at 587–588 (arguing that the MID may reduce investment distortions as between owner-occupied housing and other investment vehicles for homeowners with assets).

<sup>199</sup> Will Fischer and Chye-Ching Huang, *Mortgage Interest Deduction is Ripe for Reform*, CENTER ON BUDGET AND POL’Y PRIORITIES (2013), <http://www.cbpp.org/research/mortgage-interest-deduction-is-ripe-for-reform>.

<sup>200</sup> See, e.g., Stephen G. Cecchetti and Kermit L. Shoenholtz, *Why the mortgage interest tax deduction should disappear, but won’t*, MONEY & BANKING (June 8, 2015), <http://www>

however, support for the deduction makes more sense. To quote pollster Celinda Lake, when discussing a building-industry funded poll favorable to the MID, “Despite the current housing downturn, Americans still see homeownership as a *core value* and a *key building block of being in the middle class* and creating strong jobs in their communities. . . .”<sup>201</sup> If the key function of the MID is expressing American’s support for the “core value” of homeownership, that expressive goal can be achieved more cheaply and efficiently through a limited refundable credit, but cannot be achieved through repeal.<sup>202</sup>

### CONCLUSION

This Article suggests that tax scholars must begin to pay more careful attention to social meaning if they are to understand what is really driving tax policy debates and be effective in shaping those debates. They must be as attuned to what message a given tax provision is sending about who and what our society values as they are to the provision’s instrumental effects on behavior, revenue, and the distribution of income.

In some cases, the battle over social meaning is so heated that it dominates every other policy concern—Nevada’s anti-prostitution legislators are so loath to lend any gloss of legitimacy to the sex trade that they are willing to forgo revenue and actually provide tax preferences to prostitution (incentivizing purchase of sexual services at the margin and increasing the monetary well-being of brothel owners in the process) to avoid a formal recognition of the industry’s existence in the state tax code. In most cases the role of social meaning is more subtle, but no less crucial. Recurring fights over the estate tax and the tax treatment of married couples demonstrate that expressive concerns can dominate traditional analysis even in less obviously culturally-charged tax debates, whether those expressive motivations are explicit or hidden. The case of retirement savings incentives shows how greater attention to social meaning can help scholars explain even the driest tax policy debates.

The greater understanding provided by expressive theory can help tax scholars to be more effective advocates for sound policy, and also to

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.moneyandbanking.com/commentary/2015/6/3/why-the-mortgage-interest-tax-deduction-should-disappear-but-wont.

<sup>201</sup> *Voters Strongly Support Politicians Who Embrace Pro-Housing Policies, Mortgage Deduction, Poll Finds*, NEW YORK STATE BUILDER’S ASS’N (2011), <https://nysba.com/news-info/consumer-information/19-voters-strongly-support-politicians-who-embrace-pro-housing-policies-mortgage-deduction-poll-finds>.

<sup>202</sup> More radically, scholars could advocate for novel expressions of societal approval in the tax code, like prizes, raffles run by the IRS, or plaudits in the Congressional Record. As J. K. Rowling put it, “Half a billion pounds, to send a message—would it not be more cost-effective, more personal, to send all the lower-income married people flowers?” Rowling, *supra* note 48.

design policies that both satisfy traditional efficiency, equity, and simplicity norms and give expression to important cultural values. This endeavor requires scholars to engage more deeply with research into public opinion, social psychology, and political economy, but it will greatly enrich both tax scholarship and tax policymaking.

