Critical Legal Studies and Regressive Taxation in the United States

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Of all the potential applications for the collective works of Duncan Kennedy, tax law stands out because of the *regressivity* of the current tax system.[1] Indeed, when all forms of taxation are taken into account in addition to Federal income taxation (e.g., sales tax, excise tax, wage tax, and so forth) the overall tax system in the United States is sharply regressive:[2]

Table 1. Summary of Effective Tax Rates of U.S. Persons

U.S. Persons by Income Level:	Lowest 20 percent	Second 20 percent	Third 20 percent	Fourth 20 percent	Highest 20 percent
Effective Tax Rate (incl. all forms of taxation)	27%	25%	24%	23%	9%

A proposal for change to the regressive framework of taxation yields what Kennedy referred to as distributional "changes in the ground rules so as to change the balance of power between the various groups in civil society."[3] However, prior applications of Critical Legal Studies to the tax law (hereafter "Critical Tax Studies") have often focused on disparate impacts of specific tax provisions rather than the structural design of the system itself.[4]

I take Kennedy´s general point to be that a regressive tax approach is a *systemic* problem. The inapposite methodology of Critical Tax Studies is often to identify the particular provisions of the Internal Revenue Code that are troublesome to a particular

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[1] Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD L. REV. 563 (1982).

[2] Bret N. Bogenschneider, *The Effective Tax Rate of U.S. Persons by Income Level*, 145 TAX NOTES 117 (2014); *see also*, Bret N. Bogenschneider, *Income Inequality & Regressive Taxation in the United States*, 4 INTERDISC. J. ECON. & BUS. L. no. 3, 2015, at 8.

[3] Kennedy, *supra* note 1, at 571–2.

[4] *See* Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. Rev. 1521 (1998) ("A third problem is selection bias, both in the aspects of the tax laws chosen for study, and in the analysis of those chose aspects. This is especially true of critical race theorists who focus on Tax Code provisions arguable disadvantageous to blacks, but pay no attention to Code provisions arguably favorable to blacks. The same problem also appears in the feminist literature"); *see also* James Bryce, *A Critical Evaluation of the Tax Crits*, 76 N.C. L. REV. 1687 (1998).

group.[5] One notable systemic problem is the Earned Income Tax Credit ("EITC"), where EITC recipients are subjected to approximately 461,000 IRS audits per year.[6] This represents a serious problem because the audited persons may then become what the IRS refers to as "tax delinquents."[7] But, the question not addressed so far is even if the EITC and all the other troubling provisions of the Internal Revenue Code were fixed, but the system remains regressive, would this be a favorable result? In other words, is the desired endgame for Critical Tax Studies, a more-"fair" yet regressive tax system?

Hence, the structural analysis of the Internal Revenue Code as proposed by Kennedy needs to be the starting point rather than the particular tax code provisions.[8] Of particular note, in Kennedy´s seminal discussion of decision making on the basis of: (i) distributional; (ii) paternalist; or (iii) efficiency grounds, corollaries within the field of taxation immediately come to mind.[9] For purposes of this short essay allow me to provide examples:

First, the classic "distributional" considerations within CLS arise in the allusion toward "progressive" income taxation. This claim predominates within the popular media discussion of tax policy. Of course, such an averment to tax "progressivity" is misleading as it refers only to Federal income taxation which then excludes by definition the taxes paid by the working poor.

Second, as to "paternalism" in taxation, the Federal excise tax on gasoline is illustrative. Such excise taxes on gasoline are often championed by progressives where the gasoline tax is viewed as combating potential environmental damage. However, this environmental concern often morphs into a discussion over the use of gasoline by the poor generally.[10] Such a "paternalist" discourse often queries whether the poor ought to simply take the bus.[11] Of course, we are asked to "never mind" that the oil companies are *exporting* roughly one-fifth of all petroleum refined in the United States *on a tax exempt basis* thus rendering higher gasoline prices to all gasoline consumers.[12] The export-based system for gasoline yields a roughly a $6 billion annual tax windfall to oil companies in addition to other tax incentives for oil production. As such, the tax

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[5] ANTHONY INFANTI & BRIDGET CRAWFORD, CRITICAL TAX THEORY: AN INTRODUCTION (2009); Anthony Infanti, *A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity*, 26 WHITTIER L. REV. 707 (2005).

[6] Internal Revenue Service, DATA BOOK 2014 at 3, 22.

[7] *See* Bret N. Bogenschneider, *8. Foucault and Tax Jurisprudence: On the Creation of a "Delinquent" Class of Taxpayer*, WASH. U. JURIS. REV. (forthcoming, 2015); Leslie Book, *EITC Noncompliance: What We Don´t Know Can Hurt Them*, 99 TAX NOTES 1821 (2003).

[8] *See e.g.* Nancy Knauer, *Critical Tax Policy: A Pathway to Reform*, 9 NW J. L. & SOC. POL´Y (2014).

[9] Kennedy, *supra* note 1, at 571.

[10] *See* N. Gregory Mankiw, *Smart Taxes: An Open Invitation to Join the Pigou Club*, 35 E. ECON. J. 14 (2009).

[11] *See* John Andrew Brunner-Brown, *Thirty Minutes or Less: The Inelasticity of Commuting*, 43 GOLDEN GATE U. L. REV. 355 (2013).

[12] Bret N. Bogenschneider, *On the Federal Excise Tax Exemption for U.S. Gasoline Exports*, 5:1 CONTEMP. TAX J. 8 (2015).

system itself is one underlying cause of ongoing hardship to the poor who ultimately must pay an inflated price for gasoline.

Third, as to the "efficiency" considerations in taxation, such an allusion is common within tax policy analysis. The classic example is the discourse over corporate tax "inversions" (i.e., the potential for large corporations to expatriate out of the United States if subjected to corporate level taxation). For example, Burger King at one point threatened to expatriate before being acquired by the Canadian donut company, Tim Hortons. We are to believe that corporate level taxes are economically *inefficient* because corporations, such as Burger King, might leave the United States and pay taxes elsewhere. Kennedy distinguished such "efficiency" motives from "paternalist" motives insofar as the decision maker is not trying to decide what is really best for the actor, here large corporations, but instead to determine what is efficient for society.[13] But, once again, a careful review shows that the *effective tax rate* of corporate taxation in the United States is less than or equal to that of the European Union.[14] The "inversion" policy arguments are generally meaningless because such are premised upon the s*tatutory* tax rate as opposed to the *effective* tax rate.[15]

In conclusion, the Libertarian moral theory of taxation for many years focused solely on the wrongfulness of the taxation only of property.[16] The wrongfulness was claimed to be particularly acute with regard to the taxation of property for purposes of "redistribution" to the poor, of course with heavy citation to John Locke and principles of "natural law".[17] But, eventually, Robert Nozick identified the parallel Lockean "freedom" to also engage in labor without excessive taxation.[18] Oddly, Nozick´s observation of Libertarian ideology may be an illustration of Critical Tax Studies that operates at a systemic level. And that is the point. Critical Tax Studies relates to a tax theory problem, not a tax code problem. In order to implement Kennedy´s vision the focus should be enhancing the epistemology of Critical Tax Studies as something more than raw subjectivism and storytelling. The salutary effect of Critical Tax Studies is enhanced by directly linking tax injustices to the underlying theory of taxation. The direct linkage to theory should include numbers where possible thus avoiding the label of subjectivism.[19] Finally, tax scholars ought not to reflexively concede fundamental aspects of tax policy such as the idea that only the taxation of property (as opposed to labor) is morally wrong, or that the overall tax system is not regressive.

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[13] Kennedy, *supra* note 1, at 573.

[14] *See generally* Reuven S. Avi-Yonah & Yaron Lahav, *The Effective Tax Rate of the Largest U.S. and EU Multinationals*, 65 TAX L. REV. 375 (2012); *see also* Bret N. Bogenschneider, *The Effective Tax Rates of U.S. Firms with Permanent Deferral*, 145 TAX NOTES 1391 (2014).

[15] Bret N. Bogenschneider, *Why Corporate Inversions are Irrelevant to U.S. Tax Policy*, 146 TAX NOTES 1267 (2015).

[16] *See* Daniel Attas, *Fragmenting Property*, 25 L. & PHIL. 119 (2006).

[17] Richard A. Epstein, *Taxation in a Lockean World*, 4:1 SOC. PHIL. & POL. 49 (1986).

[18] ROBERT NOZICK, ANARCHY, STATE & UTOPIA 246–50 (1968).

[19] *See, e.g.*, Beverly I. Moran & William C. Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751.