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TAXING REPARATIONS

Katie Pratt, prattk@lls.edu

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The problem

Tax consequences of reparation remedies:

- Generally undermine the remedial goals of reparation remedies – continuing the injury the remedies were designed to redress – absent Treasury/IRS action or legislation;
- Are ad hoc and vary in similar situations; &
- Shift procedural burdens from payors to payees, which further injure payees.



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What are reparations?

Some combination of:

- Fact finding about grievous wrongdoing;
- Apology for the wrongdoing;
- Promise of nonrecurrence of the wrongdoing; &
- **Payment or distribution of property or benefits on account of the wrongdoing.**



Two models of reparation remedies

- Discrete injury model:
 - Tort/UE claims based on property rights;
- Continuing injury model:
 - Redress and stop the injuries;
 - Disempower wrongdoers; and
 - Empower injured, subordinated persons



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Framing of the paper

- Grievous wrongs to members of subordinated groups are innumerable.
- Paper thus focuses on:
 - Reparation remedy categories; and
 - Analysis of examples of each type.



Reparation examples of receipt of \$ or property:

- Holocaust
- Japanese internment
- Eugenic sterilization of incarcerated women
- Wrongful incarceration
- Wrongful taking (e.g., dispossession, theft or condemnation) of property
- USDA farm loan discrimination against Black farmers as a class



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Conclusions:

- Designers of reparation remedies must consider tax consequences *ex ante* as part of the reparation remedy design process.
- Tax law should advance – not undermine – the remedial goals of reparations:
 - Substantive law re exclusions and basis.
 - Procedural rules, e.g., info reporting.
 - Advance guidance from Treasury & IRS.



Current Tax Default: Inclusion of the Remedy

- For exclusion, affirmative action is required.
 - Treasury/IRS invoke General Welfare Doctrine, an administrative rule; or
 - Legislation: Standalone statute or IRC rule.
- Information reporting rules create excess burdens unless Treasury/IRS act.



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Examples of GWD + statutes **reinforcing** remedial goals of reparation remedies:

- Holocaust: GWD + statute
- Japanese American internment: statute
- Native American displacement: GWD + 139E



Examples where tax consequences undermined reparation remedies: No GWD, no statute, with 1099

- State payments:
 - Wrongful incarceration
 - Forced sterilization
- Property recovery:
 - *Bruce's Beach*
- *Pigford* settlement



Proposals:

1. Add a new “reparations” exclusion to IRC.
2. Add a debt discharge reparations exclusion to IRC.
3. Amend 1099 info reporting rules and forms.
4. Create an expedited administrative process to request advance guidance from Treasury & IRS about the tax consequences of proposed reparation remedies.
5. Codify the General Welfare Doctrine.



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Thank you!



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