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## Toward Tax Reform That Mirrors Our Better Selves Book Review: Anthony C. Infanti, *Our Selfish Tax Laws* (2018)

Leo P. Martinez

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Toward Tax Reform That Mirrors  
Our Better Selves  
Book Review: Anthony C. Infanti,  
*Our Selfish Tax Laws* (2018).

by LEO P. MARTINEZ\*

Professor Anthony Infanti’s new book, *Our Selfish Tax Laws*, is a must-read for anyone affected by tax policy—by this I mean it is a must-read for everyone. To set the stage for this review, I begin with my only criticism of Professor Infanti’s book. The subtitle *Toward Tax Reform That Mirrors Our Better Selves* is more accurately descriptive of the book’s content than the main title *Our Selfish Tax Laws*. The more accurate description informs the content of this review.

In what seems another lifetime, in early November 2016, I submitted my edits to a piece that was to appear in the *Harvard Latinx Law Review* titled, “Latinos and the Internal Revenue Code: A Tax Policy Primer for the New Clinton Administration.” On November 9, 2016, the day after Election Day, as I uncurled myself from the fetal position, I realized that my article was going to require revision. The result, “Latinos and the Internal Revenue Code: A Tax Policy Primer for the New Administration,”<sup>1</sup> was painfully slow in coming. Thus, Professor Infanti’s introductory comment about coming to the same point in his work, “I could not help but feel that all of my work had been for naught,”<sup>2</sup> struck a particularly responsive chord. While my piece was a smaller contribution than his book, his observation that it is important now to move “the United States forward in a positive and

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\* Dean Emeritus & Albert Abramson Professor of Law Emeritus, University of California, Hastings College of the Law. Comments regarding this review can be directed to the author at [martinez@uchastings.edu](mailto:martinez@uchastings.edu). This review originated as a presentation at the May 2019 Law & Society Conference in Washington, D.C. I am grateful for the diligent and able research assistance of Kat Sundberg, Hastings Class of 2021.

1. Leo P. Martinez, *Latinos and the Internal Revenue Code: A Tax Policy Primer for the New Administration*, 20 HARV. LATINX L. REV. 101 (2017).

2. ANTHONY C. INFANTI, *OUR SELFISH TAX LAWS* ix (2018).

healing direction,”<sup>3</sup> takes on a more compelling urgency in light of recent history.

With this as background, my review of Professor Infanti’s book paints with a broad brush. I touch on the three aspects of his book that fit with his theme of moving us forward. These are (1) his framing of the issues, (2) his comparative law approach, and (3) his illustration of the issues. Thereafter, I explain why this matters and why Professor Infanti’s book arrives at the right time.

### I. Framing of the Issues.

I love how Professor Infanti has framed the big picture regarding tax as a portrait of the collective “American self.”<sup>4</sup> He follows well in the footsteps of Canadian philosopher Marshall McLuhan, who famously opined that “[t]he medium is the message.”<sup>5</sup> How we tax, according to Infanti, describes who we are. McLuhan would be proud.

A related point is that our often-unwitting approach to taxation is effectively a kind of inkblot test. Hermann Rorschach used inkblots to detect underlying thought disorders where patients were reluctant to transparently describe their thinking processes:<sup>6</sup> so it is with taxation. Despite a popular conception of taxation as a civic duty distributed not along demographic lines but on a neutral economic basis, the reality, according to the Rorschach inkblot test that is the Internal Revenue Code (“Code”), is that the burden of taxation disadvantages those who are characterized as Other.<sup>7</sup> This is a point that cannot be made often enough. Critical tax scholars are key in “seeing the selfishness” that Professor Infanti describes as crucial to effectively dealing with the disparate effects of our current Code.<sup>8</sup>

Infanti’s approach is not a naïve one. While he does not dwell on the point, he recognizes how those whom he describes as “mainstream scholars” have assailed his approach.<sup>9</sup> He rightfully counters that this is both a “short-

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3. *Id.* at x.

4. *Id.* at 1.

5. MARSHALL MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 7–13 (1964).

6. William Alexy, *The analyst’s Rorschach: gateway to opening the dialectical field*, 63 *JOURNAL OF ANALYTICAL PSYCHOLOGY* 1, 26–46 (2018).

7. INFANTI, *supra* note 2, at 2–3. The Other is a social construct that describes the rationalization by those in a privileged position to justify the less humane and less favorable treatment of outsiders or “others.” Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 *Santa Clara L. Rev.* 605, 614–15 (2009).

8. INFANTI, *supra* note 2, at 9.

9. *Id.* at 16. Infanti is actually kind in this regard. My own critique of the criticism of critical legal scholar is not as sparing. Leo P. Martinez, *A Critique of Critical Tax Policy Critiques (Or, You’ve Got to Speak Out Against the Madness)*, 28 *BERKELEY LA RAZA L.J.* 49 (2018).

sighted and misguided way of looking at critical tax [as an approach].”<sup>10</sup> These “mainstream scholars” tend to focus on the facial neutrality of the Code, and have failed to adequately challenge the well-documented evidence that at least some of the provisions create disparate impacts on minorities.<sup>11</sup> Instead, their critiques hone in on the rigor of the scholarship, accusing critical tax scholars of selectively choosing code provisions without providing substantive responses to the provisions themselves, as well as other, even more specious arguments.<sup>12</sup> Surely at some point this failure to respond to substance is a tacit endorsement of its accuracy, or at least of enough plausibility to shift the burden of proof. I am glad that Infanti has taken the time to “speak out against the madness.”<sup>13</sup>

## II. The Comparative Law Approach.

Professor Infanti does everyone a service by using comparative law principles to inform the tax policy debate. Too often, we as tax scholars operate in our own separate silos without taking the time to look at broader legal and social principles. The lack of discipline overlap—tax law and constitutional law come easily to mind—only worsens the scarcity of scholarship that examines the Code in nuanced and constructive ways. In his book, Tony Infanti uses comparative law principles to show how effective it can be to look at tax law in a different light.<sup>14</sup> This is a good thing. We should all aspire to do the same.

## III. Illustration of the Issues.

Professor Infanti has chosen two separate areas as his vehicles for comparative illustration and examination of the selfishness of tax law: (1)

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10. INFANTI, *supra* note 2, at 16.

11. Leo P. Martinez, *A Critique of Critical Tax Policy Critiques (Or, You've Got to Speak Out Against the Madness)*, 28 BERKELEY LA RAZA L.J. 49, 55–64 (2018).

12. *Id.* Other specious arguments include the fantasy that all taxpayers are treated alike, that the progressive rate structureNOTE “structure” instead of “struction?” and the Earned Income Tax Credit cure all, and that the Code is simply too complex to allow us to be fair. *Id.*

13. The reference, for those who are not aging rockers (or fans of folk-rock), is from Crosby, Stills & Nash’s album by the same name. DAVID CROSBY, *Long Time Gone*, on CROSBY, STILLS, & NASH (Atlantic Records 1969).

14. Professor Infanti is one of a few to advocate for the broad use of comparative law principles in tax law. A few others have, more narrowly, suggested a resort to comparative tax principles as an analytic tool. See Carlo Garbarino, *An Evolutionary Approach to Comparative Taxation: Methods and Agenda for Research*, 57 AM. J. COMP. L. 677 (2009) (generally outlining the case for using comparative methods in tax law); Michael A. Livingston, *Law, Culture, and Anthropology: On the Hopes and Limits of Comparative Tax*, 18 CAN. J.L. & JURIS. 119, 133 (2005) (describing benefits of comparative tax theory).

U.S. housing policy<sup>15</sup> and (2) the concept of the tax unit.<sup>16</sup> With this part of the book, he delves into each area and points out how they fail to serve those who are already underserved.<sup>17</sup> These areas are worthy of his insights because both are fundamental to the way the tax system affects taxpayers. All taxpayers are affected by housing policy and the definition of a tax unit goes to the very basis of taxation. Suffice it to say he uses his comparative approach to establish what he terms “an expressive function of tax law.”<sup>18</sup>

Professor Infanti takes this initially narrow inquiry and then turns to a general examination of how the Code, as a comprehensive body of law, is rife with indignities that are visited on those seen as Other.<sup>19</sup> This is a tour de force. Professor Infanti’s targets range from the Code’s creation (or exacerbation) of economic disparities<sup>20</sup> and its racial and ethnic bias<sup>21</sup> to its male-centric grammar<sup>22</sup> and its heterosexual tilt.<sup>23</sup> All of these combine to reveal the collective self of the American populace—the ultimate Rorschach inkblot test. I have always avoided the characterization of some of these problems as a war between good and evil. Professor Infanti has convinced me that my approach may have been too cautious. It is better perhaps to more directly confront those who defend the status quo as acceptable and to more directly challenge principles that have a demonstrably discriminatory effect. This is a lesson not to be missed or forgotten.

#### IV. Why This Matters.

There are widespread social harms associated with income inequality, and we tax scholars tend to ignore the issues Professor Infanti surfaces at our own peril. Plutarch is said to have stated that “[a]n imbalance between rich and poor is the oldest and most fatal ailment of all republics.”<sup>24</sup> Nearly 30 years ago, Kevin Phillips questioned whether the concentration of wealth in the Gilded Age was the cause of the 1929 crash and populist turbulence.<sup>25</sup>

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15. INFANTI, *supra* note 2, at 45.

16. *Id.* at 83.

17. This is reminiscent of Kevin Phillips’s observation that the wealth and income equality of the Reagan Era was “rough on people whose weakness was a matter of education, family status, sex, age or race.” KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR* 202 (1990).

18. INFANTI, *supra* note 2, at 108.

19. *Id.* at 109.

20. *Id.* at 124.

21. *Id.* at 127.

22. *Id.* at 110.

23. *Id.* at 115, 119.

24. A source attributing the quote to Plutarch could not be found, but as the quote is a particularly relevant one, I have left it in.

25. PHILLIPS, *supra* at note 17, at 11, 221.

Phillips fretted whether the concentration of wealth in the Reagan Era could bring about a similar result.

We have since seen a further increase in concentrated wealth. Professor Michael Simkovic has said that over the last 40 years, “[l]ike France’s *ancien regime*,” our federal tax revenue has increasingly come from payroll taxes of the poor and middle class, while corporate taxes have dropped substantially.<sup>26</sup> The National Bureau of Economic Research corroborates, calling income inequality a long-term trend that, in this iteration at least, started in the 1970s and has grown with renewed vigor since 2000.<sup>27</sup> Most analysts believe that increased job polarization has led to the shrinking of the middle class,<sup>28</sup> and this long-term global trend helps explain the widely observed rise of income inequality in the United States.<sup>29</sup> Those who self-identify as middle class are increasingly pessimistic about their own opportunities, and the opportunities of their children, to improve their lots in life,<sup>30</sup> and the data support those depressed expectations.<sup>31</sup>

A more recent gloss was provided by *The New York Times* that reported in late May 2019 the truly staggering sums being paid as salaries to the CEOs of America’s largest companies.<sup>32</sup> In 2018, executive compensation (measured by the 200 most highly compensated CEOs) increased at double the rate of that of the ordinary worker.<sup>33</sup> While this is a remarkable fact by itself, it has the effect of masking the differences in the relative absolute amounts of compensation. Thus, in 2018 the average worker saw gains of 3.2% or 84 cents per hour.<sup>34</sup> At the same time, median CEO compensation

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26. Michael Simkovic, *Billionaire Taxes*, LAW PROFESSOR BLOGS NETWORK (Feb. 1, 2019), [https://taxprof.typepad.com/taxprof\\_blog/2019/02/simkovic-billionaire-taxes.html](https://taxprof.typepad.com/taxprof_blog/2019/02/simkovic-billionaire-taxes.html).

27. Jonathan Heathcote et al., *Unequal We Stand: An Empirical Analysis of Economic Inequality in the United States*, NATIONAL BUREAU OF ECONOMIC RESEARCH (Nov. 2009), <https://www.nber.org/papers/w15483.pdf>.

28. Kirk J. Stark & Eric M. Zolt, *Tax Reform and the American Middle Class*, 40 PEPP. L. REV. 1209, 1213-14 (2013) (referring to “hollowing out” of middle-class employment opportunities while high-skill jobs and low-skill jobs account for more and more of the job market—Stark and Zolt attribute the rise of job polarization in part to the globalization of labor markets and the automation of routine work).

29. *Id.* at 1217.

30. *Id.* at 1214.

31. Kirk J. Stark, *Tax Policy and the (Dying) American Dream*, 70 TAX. L. REV. 409, 420-422 (2017) (an examination of the U.S. compared to Canada and other countries shows a strong correlation between increased income inequality and a decline in intergenerational earnings mobility).

32. Peter Eavis, *It’s Never Been Easier to Be a C.E.O. and the Pay Keeps Rising*, N.Y. TIMES (May 24, 2019), <https://www.nytimes.com/2019/05/24/business/highest-paid-ceos-2018.html>.

33. *Id.*

34. *Id.*

was slightly less than \$18.6 million.<sup>35</sup> A bit of back of-the-envelope-math reveals that the average CEO must have seen an absolute amount of compensation increase on the order of \$1.2 million annually whereas the average worker saw an increase of about \$1680 annually, assuming a 2,000-hour work year.

Income inequality is the key driver of the rapid increase of wealth at the richest echelons of society,<sup>36</sup> and the reality is that the upsurge in top incomes of the 1% and 0.1% have driven income and wealth inequality to the highest levels we have seen since 1929.<sup>37</sup> Professor Infanti touches on this and notes that even with its striking issues, income from earnings is still taxed at a much higher rate than income from investments, and that Warren Buffett, one of the world's richest investors, has repeatedly said that he pays a lower tax rate than his secretary due to these preferential rates.<sup>38</sup> Moreover, federal gift and estate taxes are at historically low rates.<sup>39</sup> These wealth taxes, which are designed to break up concentrations of extreme wealth, now apply to only 0.2% of decedents compared with 6% in the 1970s.<sup>40</sup> When groups advocate for changes that challenge existing tax privileges, it triggers a reaction designed to quash the civil unrest while ceding as little ground as possible.<sup>41</sup> Infanti makes a call to action to break the cycle of using the tax system to further entrench the wealthy at the expense of the disadvantaged, and instead move toward a system that intentionally focuses on accomplishing the hopes that we have for American society.<sup>42</sup>

Even *Forbes Magazine*, a self-styled capitalist tool, has recently recognized the problem of income inequality and the very real problem it

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35. *Id.* The top five CEOs had total compensation exceeding \$100 million. *Id.* Elon Musk, the CEO of Tesla, topped the chart with \$2.28 billion in total compensation. *Id.*

36. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States since 1913: Evidence from Capitalized Income Tax Data*, 131 THE QUARTERLY JOURNAL OF ECONOMICS, 519, 523 (Feb. 16, 2016), <https://doi.org/10.1093/qje/qjw004> (open PDF for accurate pagination).

37. *Id.*

38. INFANTI, *supra* note 2, at 124.

39. Goldburn P. Maynard Jr., *Addressing Wealth Disparities: Reimagining Wealth Taxation as a Tool for Building Wealth*, 92 DENV. U. L. REV. 145, 160–61 (2014) (providing a brief history of the decline in estate tax rates to 2014); Samuel D. Brunson, *Afterlife of the Death Tax*, 94 IND. L.J. 355, 361 (2019) (observing decrease in the estate tax after 2016).

40. *Id.* at 125.

41. *Id.* at 149. One is reminded of the canard that “[T]he art of taxation consists in so plucking the goose as to procure the greatest quantity of feathers with the least possible amount of hissing.” The quote is attributed to Jean-Baptiste Colbert, French Minister of Finances to Louis XIV. Herbert Samuel, *The Taxation of the Various Classes of the People*, 82 JOURNAL OF THE ROYAL STATISTICAL SOCIETY, 143, 181 (1919), [www.jstor.org/stable/2340674](http://www.jstor.org/stable/2340674).

42. INFANTI, *supra* note 2, at 149-150.

represents.<sup>43</sup> According to Forbes, it is “utter insanity” to deny the “major problem” of income inequality and instead try to “turn the wealthy into victims.”<sup>44</sup> It does not help that the Code seems to have a role in this ever-increasing income gap between rich and poor.<sup>45</sup> Because of this, Professor Infanti’s book comes at the right time.

### Conclusion.

My friend Professor Emerita Margaret Montoya, has observed “budgets are moral documents; budgets, including tax expenditures, expose and reveal our lawmakers’ values and commitments.”<sup>46</sup> While she is undoubtedly correct and unquestionably eloquent in her observation, Professor Infanti’s book reveals that she was too narrow in her formulation. The Code exposes not only lawmakers’ values and commitments but our own. As Professor Infanti would agree, we can do better.

The exhortation that we can do better is the starting point of Professor Infanti’s message. It recognizes that if we do nothing or if what we do is ineffectual, improvement will never arrive. The second part of his message, although more subtle, is unmistakable. It recognizes that our duty as citizens to is understand the intricacies of our constitutional democracy even if they are arcane, like our system of taxation. Understanding the disparate effects of a seemingly neutral system is an indispensable ingredient to reform.

In his penultimate chapter, Professor Infanti urges us to recognize that the Code may very well actually reflect the values of a small, privileged group and he prods us to understand that we should not be fooled by the “economic veneer of ‘neutrality’ and ‘objectivity.’”<sup>47</sup> He concludes that we

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43. Erik Sherman, *The Not So Secret Reason The Wealthiest Pay The Most In Income Taxes*, FORBES (May 26, 2019, 12:00 AM), <https://www.forbes.com/sites/eriksherman/2019/05/26/the-not-so-secret-reason-the-wealthiest-pay-the-most-in-income-taxes/#7294ab8d153a>.

44. Erik Sherman, *The Not So Secret Reason The Wealthiest Pay The Most In Income Taxes*, FORBES (May 26, 2019, 12:00AM), <https://www.forbes.com/sites/eriksherman/2019/05/26/the-not-so-secret-reason-the-wealthiest-pay-the-most-in-income-taxes/#7294ab8d153a>. See also Patricia Cohen, *A Message From the Billionaire’s Club: Tax Us*, N.Y. TIMES (June 24, 2019), <https://www.nytimes.com/2019/06/24/business/economy/wealth-tax-letter.html>. (Eighteen Billionaires addressed a letter to candidates in the 2020 presidential campaign that asks for an increase in the wealth tax.)

45. David Wessel, *How Much does the tax code reduce inequality?*, TAX POL’Y CTR. (Apr. 10, 2015), <http://www.taxpolicycenter.org/taxvox/how-much-does-tax-code-reduce-inequality>.

46. Margaret Montoya, *Threats Demand Our Action*, ALBUQUERQUE J., (Mar. 24, 2017, 12:02 AM), <https://www.abqjournal.com/975110/threats-demand-our-action.html>, archived at <https://perma.cc/FQX9-96E9>.

47. INFANTI, *supra* note 2, at 142–143. See also Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. (forthcoming) (manuscript at 3-48) (arguing with compelling documentation that our failure to include race and ethnicity in the

should all shed our blinders and engage in the robust debate that results in a tax system that reflects our better selves. This alone makes Professor Infanti's timely book required reading.

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collection and analysis of tax data conceals, and prevents the remedy of, racial inequality in our tax policies).