CHAPTER 1. FOUNDATIONS OF CRITICAL TAX THEORY

Grace Blumberg is the original critical tax theorist. Many scholars and commentators before Blumberg critiqued U.S. tax law and policy, but Blumberg was the first to offer a systemic analysis of the tax law's negative impact on a disempowered group – in this case, women. Writing in 1971, Blumberg called the tax disincentives against women's paid labor "an instrument of social control." Blumberg pointed at the Code as inappropriately influencing women's career choices: "If the right to work is understood as a fundamental individual right, every individual should be afforded a neutral context in which to make a decision about work." Blumberg's scholarship is especially remarkable when placed in its historical context.

In the year that Blumberg's article was published, sex equality gained its first jurisprudential foothold when the U.S. Supreme Court decided *Reed v. Reed*,[1] the first important gender discrimination case. In *Reed*, the Court invalidated a state statutory preference for a male administrator of an intestate estate. Two years later, in *Frontiero v. Richardson*,[2] the Court held that it was unconstitutional to require a female member of the military to prove dependency of her spouse in order to obtain certain benefits, when a male member of the military was not required to do so. Finally in *Craig v. Boren*,[3] the Supreme Court articulated its "intermediate" scrutiny standard to be applied in gender discrimination cases, when it invalidated state liquor laws that treated women as a class differently from men as a class. Blumberg's cogent critique of the tax laws was ahead of its time.

In the 1970s, at the same time that feminist lawyers and their allies brought constitutional challenges to laws that discriminated on the basis of sex, young people were protesting in record numbers against the war in Vietnam and in favor of civil rights. As some of those young activists moved into the legal academy, legal scholarship experienced the first rumblings of the intellectual revolution that came to be known as the critical legal studies (CLS) movement. The "crits," as they were called, asserted the indeterminacy of legal rights and drew attention to the ways people in power use the legal system to reinforce the power they already have.

[1] 404 U.S. 71 (1971).
[2] 411 U.S. 677 (1973).
[3] 429 U.S. 190, 197 (1976).

What scholars now call critical race theory, feminist legal theory, and queer theory represents the second generation of critical scholarship. In response to perceived gaps in CLS analysis, different clusters of scholars began to use race, gender, and sexual orientation as lenses through which they could complicate the CLS analysis and explore the law's limitations. For example, "intersectional" scholars apply insights grounded in the perspective of those who are multiply disadvantaged (e.g., along lines of race *and* gender or race *and* sexual orientation).

As so many of the contributors to this volume acknowledge in their work, critical tax scholarship owes intellectual debts to all of these movements as well as to the specific scholarship of Grace Blumberg. Her article was the first to show how ripe the Code is for critical analysis.

Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers

GRACE BLUMBERG[1]

Close scrutiny of the Code reveals a strong pattern of work disincentive for married women and inequitable treatment of the two-earner family. The observation that American working wives are predominantly secondary family earners is not intended to express a social ideal. It merely reflects a contemporary social reality. Women workers generally earn substantially less than their male counterparts. Working wives earn less than their employed husbands. The American wife's working career is likely to be broken by child bearing and -rearing. Unless prompted by economic necessity, her return to work is generally considered discretionary. Even when she is earning a substantial salary, her husband is unlikely to view his employment as discretionary. Thus, the American working wife should properly be understood as a secondary family earner for the purpose of determining the work disincentive effect of various Code provisions.

UNITED STATES TAXATION OF WORKING WIVES AND MOTHERS

Prior to 1948, taxation was individual. Joint returns were authorized but seldom used because the aggregate family income was taxed as though it were the income of a single taxpayer. Since each individual taxpayer was taxed at progressive rates, a tax benefit would result from shifting earned and unearned income among family members. (Earned income is the fruit of personal effort and labor, e.g., salary; unearned income arises from the ownership of property, e.g., rent and dividends.) Thus, a husband with taxable earned income of $8,000 would secure a tax advantage by shifting $4,000 to his wife. Because of the progressive nature of income tax rates, each would pay less than one-half of the tax that the husband would have paid on the entire amount. The Supreme Court initially disapproved such shifting of earned income, but later created a serious problem when it allowed shifting in community property states where each spouse has a vested right in all property and income acquired during the marriage. In *Poe v. Seaborn*,[2] the Court construed the Code provision levying income tax on "the net income of every individual"[3] to allow each

[1] Reprinted by permission from 21 *Buffalo Law Review* 49 (1971).
[2] 282 U.S. 101 (1930).
[3] I.R.C. § 1(a) (1954).

spouse to file a separate return and pay tax on one-half of all community income. Since spouses in common law states do not have a vested interest in all property acquired by the other during marriage, they were denied the benefit of income splitting of earned income.

While *Seaborn* was clearly an improvident decision which could have been remedied by a legislative enactment requiring that earned income be taxable to the earner, all countries employing individual rather than aggregate taxation have had to contend with the persistent problem of unearned income shifting. A husband who owns two properties yielding $8,000 annual income can always transfer one of them to his wife; each spouse is then taxable on $4,000. Pre-1948 law, therefore, tended to impose higher taxes on earned family income in common law states than in community property states and to generally tax earned family income more heavily than unearned family income when the family receiving unearned income distributed the income-producing property among its members.

In 1948, Congress faced the choice of legislatively repealing the community property–common law distinction created by *Seaborn* or enacting the benefit of *Seaborn* for residents of common law states. It chose the latter course and in so doing created a serious disincentive for married women who wish to work as well as a disproportionately high tax liability for single people.

The new system was based on two separable elements, aggregation and income splitting. Under present law spouses may file a joint return in which they aggregate income, exemptions, and deductions. Total taxable income is split in half; from 1948 to 1970, the half figure was taxed at the individual rate and then multiplied by two. If a husband was the sole family earner with $20,000 taxable income, his income was taxed as though he were two individuals each earning $10,000. A couple in which each spouse earned $10,000 thus received the same tax treatment as a couple in which the sole family earner made $20,000 and theoretically (but not effectively) received the same tax treatment as two unrelated individuals each earning $10,000.

Aggregation

Aggregation of spousal income, as opposed to individual taxation of each spouse's income, is based on the indisputable economic unity of the family. Since resources are generally pooled by spouses, their ability to pay taxes is best measured in terms of family rather than individual income. Aggregation creates, however, a strong work disincentive for potential or actual secondary family earners. The secondary earner's first dollar of income is effectively taxed at the primary earner's highest or "marginal" rate. Assume that a husband earns $12,000 taxable income. At 1970 rates, he is taxed 14% of his first thousand dollars of taxable income, 15% of the second thousand, 16% of the third thousand, and so forth. His final or twelfth thousand is taxed at 22%. Any dollar that he earns in excess of $12,000 will be taxed at 25%, his marginal rate. If his wife decides to work, her very first dollar will be taxed at her husband's marginal rate. As the husband's income increases, so will his marginal rate and the wife's work disincentive. Filing separate returns is not an economically practical solution. While the wife's effective rate would be lower, the

family would pay a larger total tax unless both spouses have equivalent individual incomes, in which case filing separate returns would yield no benefit or loss.

Employee's Cost of Earning Income and Earned Income Allowances

Congress has the "power to lay and collect taxes on income, from whatever source derived."[4] In relation to income taxation, the least contested definition of income is "the money value of the net accretion to one's economic power between two points of time."[5] Taxable income is, thus, generally understood as net rather than gross income. Allowance for the cost of earning income may even be constitutionally required. Although the Code presently contains some provision for an employee's cost of earning income and the special expenses incurred by working women, the deductions are narrowly drawn and of little general applicability.

The Code draws a sharp distinction between businessmen and employees. A businessman deducts all his "ordinary and necessary business expenses" from gross receipts in order to determine his adjusted gross income; he then deducts personal exemptions and the optional standard deduction (or itemized deductions) to reach his taxable income. An employee, on the other hand, can deduct only four types of expenses from gross income: expenses reimbursed by his employer, expenses for business travel away from home, transportation expenses incurred in the course of employment, and expenses incurred as an outside salesman. With regard to other deductible employment expenses, the employee must choose between itemizing them or taking the optional standard deduction.

The optional standard deduction should not be understood as a substitute for an earned income allowance: it is available to all taxpayers regardless of whether they have earned income; it is effectively taken away from a working woman when she marries even though she continues to work; and it is available to a businessman after he has deducted all his deductible costs of earning income.

Deductible employee expenses are relatively few: limited child-care deductions, educational expenses necessary to maintain present employment, employment agency fees, labor union dues, employee's short-life tools, and uniforms so long as they are not suitable for general wear. Nondeductible items include commuting expenses, the cost of an employee's lunches, clothing necessary for work but suitable for general wear, and all housekeeping and most child-care costs incurred by working wives. An employee who does not incur large deductible expenses which are strictly personal in nature, that is, unrelated to the fact of his employment, is likely to be better off with the optional standard deduction which can, thus, best be understood as a compensatory exemption for taxpayers who do not incur certain personal expenses (the deductibility of which is open to serious question).

Since the ability to pay taxes is a primary factor in distribution of the tax burden, it would seem that an employee's cost of earning income should be excluded from his taxable income in order to put him on a par with recipients of unearned income. Other nations have come to this conclusion and allow an earned income credit or

[4] U.S. Const. amend. XVI.
[5] Edwin R.A. Seligman, *Income Tax*, *in* 7 Encyclopedia of the Social Sciences 628 (1932).

deduction for wage earners. There is [a] fourfold argument in favor of an earned income allowance for working wives and mothers. First, since most families have at least one earner, failure to provide an earned income allowance for the first family earner distributes a burden, albeit inequitable, equally among families. Since, however, most families do not have two earners, such families bear an extra burden. Secondly, the working wife is likely to incur more employment-related expenses than the primary earner. In addition to normal commuting, clothing, and lunch costs, she is also likely to incur housekeeping and child-care expenses. Thirdly, since the wife's first dollar is effectively taxed at her husband's marginal rate, she has less disposable income with which to defray her cost of earning income. Finally, providing the wife with an earned income allowance would tend to mitigate the work disincentive of income aggregation. Thus, if the revenue cost of an earned income allowance for all workers is judged to be excessive, consideration should still be given to earned income allowances for working wives and mothers.

Deduction of Child-Care Expenses

In 1954, the House Ways and Means Committee recommended that a deduction be allowed to widows and widowers with young children for child-care expenses incurred for the purpose of enabling the parent to pursue gainful employment. The Senate Finance Committee liberalized the bill to include expenses paid by working women and widowers for the care of any dependent physically or mentally incapable of caring for himself.

As passed, the Act allowed gainfully employed widows, widowers, and women to deduct up to $600 for expenses actually incurred for the care of children under the age of twelve and other dependents incapable of caring for themselves. The Act contained no general maximum income limitation beyond which the deduction could not be claimed. But married women with husbands capable of self-support were subject to a special provision allowing a deduction only if the couple filed a joint return and if the total adjusted gross family income did not exceed $5,100.

[In 1971,] § 214 allows a deduction for expenses paid during the taxable year for the care of certain dependents (a son, stepson, daughter, or stepdaughter of a taxpayer under the age of thirteen and any dependent not physically or mentally capable of caring for himself) while the taxpayer is gainfully employed or seeking gainful employment.

Deduction for the care of one child may not exceed $600; deduction for the care of two or more children may not exceed $900. Persons eligible to claim the deduction are all women, widowers, divorced or legally separated husbands, and husbands with incapacitated or institutionalized wives. Single men are not eligible.

In the case of working wives, and husbands with incapacitated wives, the spouses must file a joint return and the amount of deductible expense is reduced by the amount that adjusted gross income exceeds $6,000. This limitation does not apply to a working wife whose husband is incapable of self-support because of a mental or physical defect or to a working husband with an incapacitated wife who has been institutionalized for ninety days or more. A woman is not married, that is, not subject to the income limitation, if she is legally separated or divorced, or has

been deserted by her husband and has secured a judicial support order against him.

While the provision was not intended to cover all costs of maintaining a child (e.g., food, clothing, education), when those costs are an inseparable part of child care, they are deductible. Therefore, the full amount paid to a nursery school is deductible even though the fee effectively covers lunch, education, and recreation as well as care, that is, babysitting. There is no requirement that care be the least expensive available. When a maid is hired to perform housework as well as child care, a reasonable allocation should be made.

The Conceptual Basis for § 214 and the Family Income Limitation for Working Mothers

The House Ways and Means Committee initially reported:

> Your committee has added this deduction to the code because it recognizes that a widow or widower [not yet liberalized by the Senate to include working wives] with young children must incur these expenses in order to earn a livelihood and that they, therefore, are comparable to an employee's business expenses.[6]

The Committee's explanation leads to two different conclusions depending on the meaning one gives to "livelihood." If it is understood to signify the pursuit of income through gainful employment, all persons who necessarily incur such expenses ought to be allowed this deduction as a cost of earning income. If, on the other hand, "livelihood" is intended to mean the pursuit of income for the purpose of basic family subsistence, then it is arguable that a family in which one parent can earn and the other parent can stay home to care for children should not be eligible for the deduction unless the earned income of both is absolutely necessary for family survival. The latter interpretation would seem to be the operative one in view of the Senate's subsequent expansion of coverage to low-income, two-earner couples.

> It is recognized that in many low-income families, the earnings of the mother are essential for the maintenance of minimum living standards, even where the father is also employed, and that in such situations the requirement of providing child care may be just as pressing as in the case of a widowed or divorced mother.[7]

Such a reading is not, however, consonant with the economic policy expressed in other Code provisions or the American spirit of wealth acquisition. The Code does not require that a businessman show that he is economically constrained to pursue his business as a prerequisite for deduction of business expenses. Our society does not encourage individuals or families to view mere subsistence as an ultimate economic goal. While the low-income, two-earner provision might be understood as an exercise of congressional grace for the benefit of low-income families, the entire section does not lend support to such a reading. There is no income limitation on single-parent earners. Thus, the widowed business executive

[6] H.R. Rep. No. 83-1337 (1954), *as reprinted in* 1954 U.S.C.C.A.N. 4019, 4055.
[7] S. Rep. No. 83-1622 (1954), *as reprinted in* 1954 U.S.C.C.A.N. 4621, 4666.

with $10,000 unearned income from securities and $25,000 earned income from employment is eligible for the deduction as is the divorcée with $10,000 in alimony and $10,000 in salary. The deduction is, therefore, granted not because they need it but because it is expected that they will work and because child care is effectively a "business expense."

The basis for the distinction between single parents and couples thus emerges: a single parent will or should work; a married mother with a husband capable of support will not or should not work unless her income is absolutely necessary to provide for basic family needs. While this consideration was not articulated in the congressional reports, it is frequently mentioned by tax policy writers.

Whether § 214(a) is understood to confer a benefit on certain taxpayers or to register congressional recognition of child care as a "business expense," the equal protection guarantee requires that it be made available to all gainfully employed persons who incur child-care expenses unless a rational distinction related to the furtherance of legitimate legislative concerns can be made between the benefited group, sole household heads, and the denied group, working couples. Since there is no income limitation on single heads, the distinction is not based on ability to pay taxes. Nor is it based on the taxpayer's demonstrated need to seek employment. The distinction appears to be merely a reflection of congressional feeling that mothers should generally stay at home. Since infringement of the right to work is not a legitimate legislative goal, there would appear to be no constitutionally valid basis for the distinction between sole heads and married women.

DOES UNFAVORABLE TAXATION OF WORKING WIVES ACTUALLY CREATE A WORK DISINCENTIVE?

The argument that unfavorable taxation of working wives is likely to create a work disincentive is not equivalent to the assertion that taxation does, in fact, deter wives from seeking gainful employment. Commentators often conclude that taxation of working wives, while inequitable, does not deter them from working. Reference to the increased proportion of married women in the labor force would seem to support their position. The statistics do not show, however, what the rate of increase might have been in a more neutral tax context.

Commentators gather further support from British and American research which indicates that factors other than money play the most important role in work motivation. Studies involving the work motivation of male professionals and executives are frequently cited. Such research should probably not be used to measure the effect of tax disincentive on wives.

Firstly, male executives are likely to work for different reasons or, more precisely, to feel comfortable articulating certain nonmonetary motivations. A male executive or professional says that he likes the power, prestige, or sense of identity that he obtains from work. While the same factors may motivate a wife to work, she generally does not feel comfortable expressing them. A desire for power and prestige is unfeminine. She is supposed to find her identity at home and she is expected to enjoy staying at home. She says, therefore, that she works primarily to supplement family income. If she is not substantially adding to family income, she

ought not, by her own articulated criterion, be working. Any wife contemplating work or actually working will compare her disposable income (after taxation without exemptions at her husband's marginal rate) with the additional expenses incurred because of her daily departure from the home. If the difference is not great (and under our present system of taxation and prevalent pattern of wage discrimination, it is not likely to be), the wife may well stop working regardless of the unarticulated nonmonetary benefits that she and her family derive from her work.

Secondly, the male executive is the primary family earner. He and his family expect him to be employed. Even if he can choose between early retirement and continued employment, he is likely to opt for a continuation of his life pattern. Unlike the wife, he has no reentry problem. Between his first job and his final retirement, it is unlikely that a male will ever consider the possibility of not working. His wife's initial employment is likely, however, to have been terminated by marriage or child bearing. Her reentry into the labor market is generally the result of a considered and often discretionary choice.

Thirdly, the studies involved general tax increases. The larger resultant tax burden did not imply any societal judgments regarding the desirability of the taxpayer's gainful employment. But the disincentive provisions not only reflect national policy; they also express it normatively. The married woman who is instructed to claim "0" exemptions, informed that child-care expenses are disallowed because her family is not poor, and taxed at her husband's marginal rate is effectively told that her proper place is the home.

If the right to work is understood as a fundamental individual right, every individual should be afforded a neutral context in which to make a decision about work. The pattern of work disincentive embodied in the Code is entirely inconsistent with the principle of sexual equality enunciated in title VII and further expanded by the federal and state judiciaries. The aggregation of spousal income should be abandoned in favor of individual taxation for all wage earners; the § 214 income limitation for working couples should be abolished; and an earned income allowance for secondary family earners should be enacted.

CHAPTER 2. HISTORICAL PERSPECTIVES ON TAXATION

When studying the evolution of tax law and policy, students and scholars typically study official records – decisions by judges, rulings and publications by administrative agencies, statements by elected officials, and legislative histories. These are the traditional tools for uncovering the "history" of taxation, and yet the story these official records tell is incomplete. The contributors to this chapter seek to fill the gaps in our understanding of the social and political meaning of taxation in everyday life. Historical perspectives on the Code yield multiple implications for our understanding of the tax system.

In her article *Dollars and Selves: Women's Tax Criticism and Resistance in the 1870s*, Carolyn Jones examines nineteenth-century news articles to explain how proponents of woman suffrage linked their claims to the right of women to vote with the unfairness of the tax system. As Jones explains, suffrage advocates used tax protests to draw attention to women's lack of power in the public sphere. Through these tax protests, women made claims both about their economic rights and their right to participate in public life. The very meaning of taxation, Jones reminds us, is historically contingent.

In her second contribution, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, Jones again looks beyond court cases and policy statements to reveal a rich history of an "official" tax story. Jones carefully studies newspaper articles, advertisements, and letters written by citizens to their elected representatives to understand the tremendous role that war, gender, and property rights played in the development in 1948 of the joint income tax return. She urges the reader to analyze the relationship between tax law and everyday "culture."

In *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, Marjorie Kornhauser focuses on a distinct break with the past – the sustained attack in recent decades on the idea of a progressive income tax. Kornhauser critically examines the seemingly rational and semiscientific terms that scholars use to make the case against progressivity. Through her article's provocative title, Kornhauser draws the reader's attention to the role of rhetoric in any written or verbal communication, including descriptions of tax policy and, more particularly, the case against progressivity. Lawyers and economists make broad claims about