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Feminism And The Tax Code

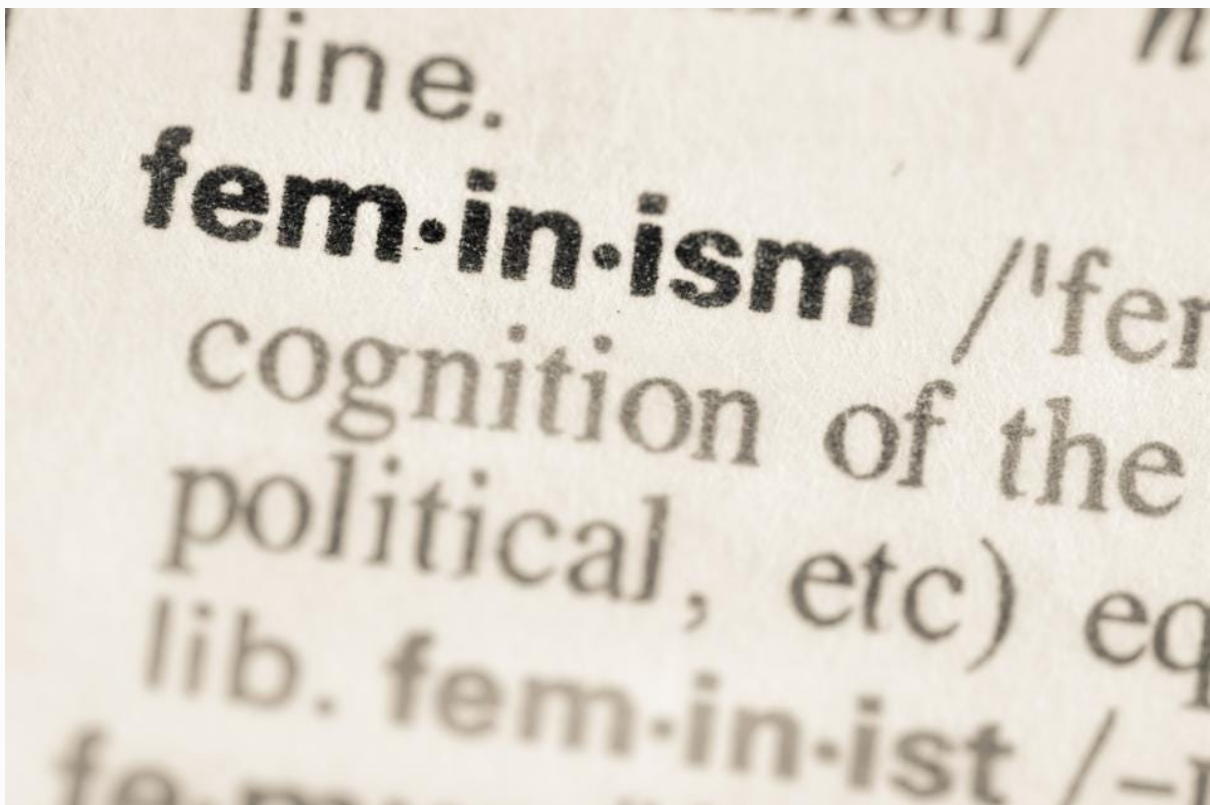
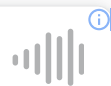
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Definition of word feminism in dictionary GETTY

Professors Bridget J. Crawford of the Pace University School of Law and Anthony C. Infanti of the University of Pittsburgh School of Law discuss viewing the U.S. tax code through a feminist lens.

This transcript has been edited for length and clarity.



Feminism and the Tax Code

September 24, 2021

[More Tax Notes Talk](#)

David D. Stewart: Welcome to the podcast. I'm David Stewart, editor in chief of *Tax Notes Today International*. This week: feminism and taxation.

Here in the U.S., while one of our founding documents recognizes certain unalienable rights, the authors and following generations seem to have had trouble grasping who all that should apply to.

This week's episode is part of a series we've done examining how tax rules affect marginalized groups. We'll include links to our previous episodes on the [intersection of tax](#) and [racial inequality](#), [LGBTQ rights](#), and [diversity in international tax policy](#).

But now, more than 100 years after the women's suffrage movement set the scene for modern-day feminism, the rise of social media and events like the Women's March and the #MeToo movement have elevated the discussion around feminism's impact on all aspects of life, including taxation.

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Joining me now to talk more about this is *Tax Notes* reporter Carolina Vargas. Carolina, welcome back to the podcast.

Carolina Vargas: Thanks, Dave. Glad to be here.

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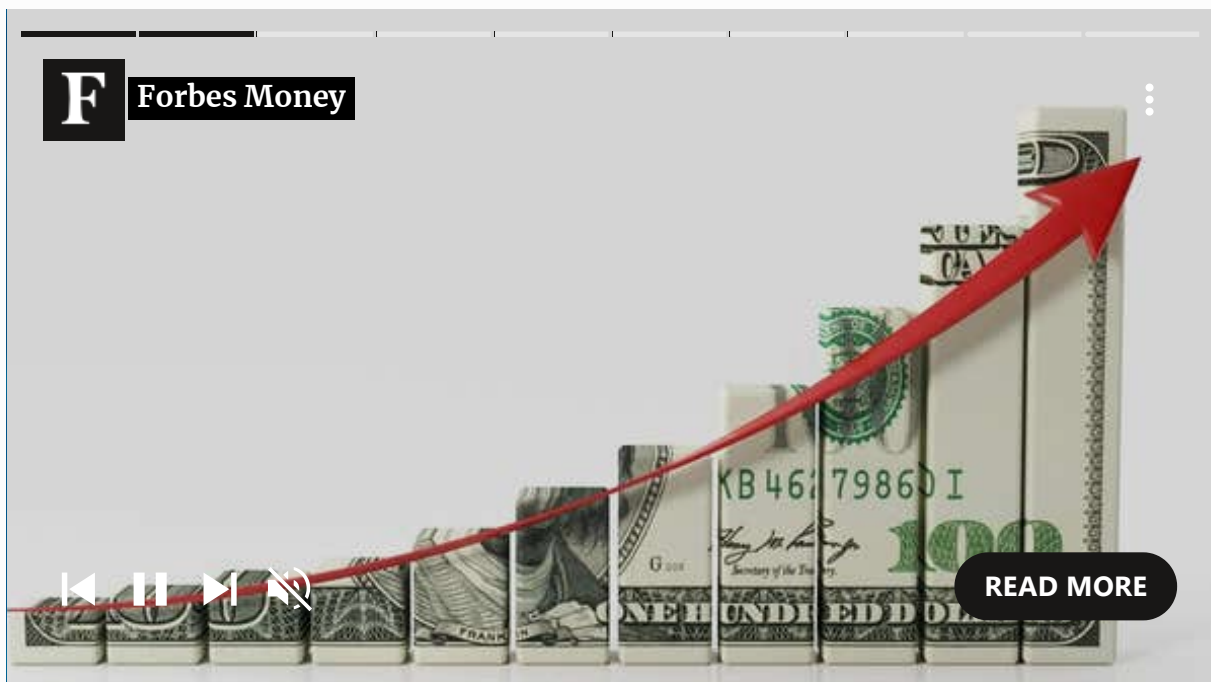
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David D. Stewart: Now, I understand you recently spoke with two professors about this issue. Could you tell me about your guests?

Carolina Vargas: I spoke with Bridget Crawford and Anthony C. Infanti. Bridget is a professor of law at the Elizabeth Haub School of Law at Pace University, where she teaches taxation and feminist legal theory.



Anthony, professor of law at the University of Pittsburgh's School of Law, teaches courses in tax with a focus on the impact of tax laws on marginalized groups.

David D. Stewart: Could you give us an overview of what you discussed?

Carolina Vargas: We discussed the intersectionality of feminism and tax and how it has impacted tax law throughout history and continues to do so today. We also talked about how we can work to reform the tax system with that feminist viewpoint in mind.

David D. Stewart: Let's go to that interview.

Carolina Vargas: Hi, Bridget and Tony. Thank you so much for joining me today.

Anthony C. Infanti: Thank you for having us.

Bridget J. Crawford: Thank you.

Carolina Vargas: My first question for you both is how is taxation a feminist issue? What does it mean to use a feminist scope?

Bridget J. Crawford: I think we should start first by defining what we mean by feminism. Tony and I, and many others, take a broad approach to what that term means. Obviously, feminism as we understand it in the 21st century has its roots in the 19th-century women's rights movement, carried over into the 1970s. It's a movement with political origins that specifically focused on advancing women's equality.



But as Tony and I approach it, we understand it as a broad social justice movement that's concerned with equality for all people and many different issues that have been historically marginalized. In terms of what it means to take a feminist perspective on taxation, certainly that perspective has a particular interest in women's equality, but equality for all sorts of other groups as well, including racial minorities, LGBTQ people, and disabled individuals. It also encompasses broad perspectives on the environment and other issues.

I think our approach to feminism is that it is a very, very broad tent with a particular historic background.

Anthony C. Infanti: Bridget has it exactly right. One of the things that you can't ignore is that there are intersections among all of these groups. There are women in racial minority groups. There are women in the LGBTQ community. Gender surfaces in all sorts of different ways in all of these different groups.

When we're thinking about looking at tax and law from a feminist perspective, especially when you take such a broad and capacious view of what feminism means, it's important to remember that tax law is a reflection of our society and who we are and what we value. Bringing social justice viewpoints into that is really important, especially as we come to a time where we see more and more being run through the tax system.

We have all sorts of social programs now being run through the tax system. The new changes to the child tax credit they did for this year. Things like that that would normally in other countries probably be run through direct programs are being run through the tax system.

It's really important to think about the social justice implications of all of these different programs as well as the basic structure of the code, because the basic structure of the code also implicates social justice questions.

Carolina Vargas: Bridget, you said that this had been an issue for a long time. Could you give me some example of cases in the past of why it was important to look at this through a feminist perspective?

Bridget J. Crawford: There we go back to the first-wave feminists and the Declaration of Sentiments in 1848, where Elizabeth Cady Stanton and others articulated women's exclusion from voting as a form of taxation without representation, borrowing that historic language from American history to bring those issues to the fore.

But the contemporary focus on feminism and tax really started with an article written in 1971 by Grace Ganz Blumberg, now a professor emerita at UCLA Law School. She wrote an article in the Buffalo Law Review called "Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers," looking at the way that women's participation in the marketplace for labor historically has been disadvantaged and the disincentives for women work.

There's a longer trajectory of tax rhetoric that is super important, and then we would mark formally the focus on gender issues and taxation with that important article by Professor Blumberg in 1971.



(Original Caption) Portrait of Elizabeth Stanton (1815-1902). American woman suffrage leader. ... [+] BETTMANN ARCHIVE

Carolina Vargas: How has this impacted the tax law as we know it today?

Anthony C. Infanti: The thing with critical tax theory — which is the broad umbrella that we think of covering feminist perspectives on tax, critical race perspectives on tax, queer theory perspectives on tax — hasn't had as much of an impact on the direct tax code as any of us I think would like. It's just now really starting to kind of seep more into the conversation.

We're starting to see more folks outside of academia focusing on these issues. This great podcast series that we have here is focusing on this. We're seeing more think tanks focusing on it. We're seeing folks in Congress focusing on it. We've had hearings on kind of racial impacts of taxation last year.

We're starting to see some more movement. We haven't seen enough of a direct impact on the shape of the tax laws as any of us would like yet, but hopefully more will be coming.

Carolina Vargas: Speaking of changes that need to be made, what are some of the necessary changes to the tax code or the tax viewpoint that could be beneficial for understanding feminism in taxes?

Bridget J. Crawford: Obviously there's no one feminist viewpoint about anything. But one issue that feminist scholars have debated for a very long time is the joint filing system for income tax returns. Whether it is reasonable to see spouses as one economic unit, and the way that disadvantages spouses who are the lower-income earner or does not participate in market labor at all. That's one salient issue.

Anthony C. Infanti: As Bridget said, there's definitely different perspectives on what a feminist viewpoint would dictate in terms of the actual solutions that are adopted.

I think when we talk about joint filing versus individual filing, that's one that hopefully should cross the lines. The way that our joint filing unit is set up, historically there have typically been marriage penalties for women. It's the secondary earner, but historically the woman has been the secondary earner in different-sex married couples, for participating in the labor force because their wages would be stacked on top of their husband's, in essence. They would be taxed at the highest marginal rates of the couple. That creates a disincentive for them to go out to work.

That was tamped down somewhat by the Tax Cuts and Jobs Act. But married with those tax disincentives has always been tax bonuses for married couples that just had a single breadwinner, which is historically that 1950s Ozzie and Harriet view of the married couple, where the husband goes out to work and the wife stays at home.





1951: Promotional portrait of married American actors Ozzie and Harriet Nelson posing with their ... [+] GETTY IMAGES

I think we would probably all agree that we don't need to be spending money to encourage a certain kind of family, particularly one that's tied to kind of a nostalgic 1950s view of what a married couple should look like. We should be acting in ways that allow people to choose whatever kind of family arrangement that they would like rather than privileging one arrangement over all others.

There are lots of other aspects of this as well. You can go from the very rhetorical to the things that have real financial impacts on people. One thing that's kind of rhetorical, but still important, is the fact that we do not use gender-neutral language in the Internal Revenue Code.

Lots of countries have moved to gender-neutral statutory drafting. We have not. The taxpayer in the code is "he, him, his." Always. It's very rare to see "she," but when you do see "she," it's always as the wife of the "him" in the code and you see that mirrored in the regulations as well.

A lot of the regulations are older, and they tend to trade in what you would consider gender stereotypes about what married couples look like. There's regs with examples of, "If you make a gift to a wife, like a business gift, that really is a

business gift to the husband unless you can prove that the wife has her own independent relationship." It's those kinds of stereotypes.

There's stereotypes about when you can deduct travel expenses. If the husband is the one that's out traveling for business and the wife comes along, you have to prove why the wife is there and that she's doing something business-related. The regs are written in that kind of language.

After the *Windsor* decision, when the Supreme Court said that same-sex marriage had to be recognized for federal tax purposes and other purposes of federal law, the IRS went in and changed the regulations, but rejected suggestions that the regulation specifically referenced same-sex marriage.



Demonstrators in favor of LGBT rights rally outside the US Supreme Court in Washington, DC, October ...

[+] AFP VIA GETTY IMAGES

Instead, what they decided to do was say that every time they use the words "husband" and "wife" in the code, they mean anyone who's married to anyone else. Because according to the IRS, if you had to mention same-sex couples that would go against their attempt to try to eliminate the gendered aspects of the code.

It's like, this is crazy. How can you possibly say that you are working towards eliminating the gendered aspects of the code when you're defining the words

"husband" and "wife," which are gender terms? You're basically erasing same-sex couples when you're supposed to actually be recognizing same-sex couples.

You see that in the very rhetorical aspects of things. You also see it in every day money kind of things. For example, when you think about how we deal with childcare, which is an important issue for women when they go out to work. We have now changes just for one year with the pandemic to the child tax credit and to the dependent care assistance credit. They both could have been expanded of who gets covered and how much you get, but still those are only temporary.

When you think about the dependent care assistance credit and the exclusion for benefits under dependent care assistance plans in the code, one of the big things they missed in thinking about those those is how they actually work and how people actually get them. Because you think about what's happening, you have a credit.

When you're talking about dependent care assistance credit, that's basically help for people who are going out to work and need childcare. This is the code's way of helping to defray that because we don't have a national program to pay for childcare. What happens is you get a choice between a credit and an exclusion.

Generally speaking, the way that these things work is that lower-income people will prefer the credit and higher-income people generally prefer the exclusion. I was talking to my own classes when we cover this stuff in taxation of the family about how tax design is important, and thinking about how this actually gets delivered to people. Not just we're trying to give benefits, but are we actually getting the benefits to the people when they need them?

You think about the dependent care assistance credit, the one that generally is preferred by lower-income people. That's a credit. There's no way of getting that in advance. Now they've changed the child tax credit, so it's paid in advance every month. They did not do the same thing for the dependent care assistance credit. You're paying for your childcare all year long. When do you get your help from the government? The following April 15, when you file your tax returns. You've already had to pay for your childcare all year long and then you're getting it.

But when you think about the exclusion, which generally higher-income people take advantage of, that's usually done through flexible spending arrangements. That's how I took advantage of it when my daughter was young and we were using childcare. With that, they take money out of my paycheck every month. As soon as it was taken out, I could put in for reimbursement for the amounts that I paid for childcare.

I'm getting real-time money through that flexible spending arrangement to help cover the cost of childcare. Well, who really needs the real-time help? Privileged folks like me who teach at university, or folks who are living paycheck to paycheck and really should be using a dependent care credit? That's a tax design issue that seems to have escaped Congress. They don't seem to focus on that and the fact that that's a real issue for working women and that we should be thinking about that.

There's lots of aspects of this. I could go on like all day long. I'll just stop there with all the different ways in which kind of gender intersects with the code and how we could make it better.

Carolina Vargas: You also talked a little bit about how caretaking is a very big gendered issue in the tax code. Could one of you talk to me about the *Moritz* case?

Bridget J. Crawford: This is a fantastic case. Many of us think of this as Ruth Bader Ginsburg's first equality jurisprudence case.



In 1968, there was an unmarried Colorado man named Charles Moritz. He took a deduction on his income tax return for expenses paid and caretaking for his elderly mother who lived with him. At that particular time, the applicable provision of the IRC allowed taxpayers to take deductions for dependent care expenses.

But that was available only, very interestingly, to a woman or a widower or a husband whose wife is incapacitated or institutionalized. Not for a single man like Mr. Moritz.

So, the Tax Court upheld the denial of that deduction. Luckily for Mr. Moritz, the great tax lawyer Martin Ginsburg happened to be reading this tax advance sheet and presented it to his wife, who, according to a speech that Martin Ginsburg made years later, said, "Oh, I don't read tax cases. Get out of here."

But she read the case and rapidly agreed that the two of them would represent Mr. Moritz on a pro bono basis. They appealed the case to the Tenth Circuit and the Tenth Circuit reversed the Tax Court finding that this was discrimination on the basis of sex.

As it turns out, the Supreme Court decision in *Reed* was running alongside that case at the same time. Although the Ginsburgs started their work on *Moritz* first, the *Reed* decision came out first. In fact, the Tenth Circuit relied on Ruth Bader Ginsburg's work in the *Reed* case.

Moritz to me is one of those foundational underappreciated cases that really made it clear that the tax code had gender discrimination baked right into it. Thanks to Ruth Bader Ginsburg and her brilliant tax attorney husband, Martin Ginsburg, that is no longer the law.

Anthony C. Infanti: It just goes to show you once again how the way that we draft our tax laws sends messages about who and what we value. It's really saying when you look at that, who could get that deduction at that time. They're giving you a sense of who they think it is that is needing help with taking care of other people.

The people who are supposed to be taking care of people are number one, women. That's what it's sending out. Men should only be taking care of other people if the woman in their life has either passed away and can't take care of them, or is incapacitated and can't take care of them. Men have no business taking care of anybody. Which that definitely sends messages to society about what we value, what we expect, what we think is appropriate or right. To my mind, completely wrong messages, but it's sending messages.

That's part of what we need to think about. It's not just a matter of discrimination against a certain person. It's about what are we saying? What are we saying as a society about who should be doing what? What do we value? What are different people's roles in society?



Male caretaker assisting senior woman in using walker at park GETTY

People don't think of tax usually in that respect. People usually think of tax as a very economic issue. It's just, how much do I owe the government? How can I minimize that amount as much as possible? They're not thinking about tax in the way of, "OK, who are we giving money to? Who are we supporting? And who are we not supporting?" Because those decisions send clear messages about what we value as a society.

We should be questioning that. We should be aware of it and questioning our congressmen, the IRS, and whoever about why it is that this is the case.

Bridget J. Crawford: We should also be questioning why the tax code cannot even bring itself to talk about same-sex couples. That I think is an embarrassment to the government. That it won't even take the basic step of moving to gender neutrality. Hiding behind this very old fashioned argument that "he" means it could be a person of either gender.

It's time to move the tax code to the 21st century and recognize the glorious diversity of human affectional relationships.

Anthony C. Infanti: The thing that's crazy about that is that they rely on the Dictionary Act. There's actually an act called the Dictionary Act that says that throughout federal law, "he" includes "she," and "him" includes "her." It doesn't go in the other direction. It doesn't say "she" includes "him." It only goes in one direction. That needs to be fixed.

But what's even kind of more appalling to my mind is the fact that the Dictionary Act doesn't prevent the IRS from fixing its publications to refer to just spouses or even to change its examples and switch them up a little bit once in a while so that everyone's not heterosexual. But they don't.

When you go through the publications, you'll see where they're referring to married folks. Sometimes it's kind of just married folks in general. But when they're talking about specific people, it's always different-sex couples. Always.

You don't see that acknowledgment that the other exists. There's nothing that prevents the IRS from changing that. Absolutely nothing, except for them getting out of their own way to do it.

Carolina Vargas: Some of the articles I was reading discussed how even terms that were gender neutral usually favored men or were directed for men. Could you talk to me a little bit about that?

Bridget J. Crawford: Oh, this is so important. Wendy Gerzog, who is one of the most brilliant estate and gift tax scholars we have, wrote an article in 1995 talking

about the estate and gift tax marital deduction and what's known as the QTIP trust, the qualified terminable interest property.

To make a long story short — this is oversimplifying — the transferor can get a full marital deduction for transfers in trust that the transferor still controls a lot of the strings over. In other words, typically the man would transfer assets to a trust, and as long as the wife is getting income, at least annually from that trust, even if she has no right to direct the disposition of the property on her death, the husband still gets a marital deduction for that. Just as if it were an outright transfer.

Now, it doesn't say husband and wife in the code. That's gender neutral. But the fact of the matter is the majority of wealth in different-sex relationships is held by men. At the time this provision was written, most certainly that was even more true than it is today.

So, who benefits? Who benefits from those provisions? It's the wealthier spouse. The wealthier spouse is more likely to be the man and statistically speaking, the men are more likely to die first compared to their wives, if in different-sex relationships.

It's really a way for men to continue to control the disposition of property at their wives' subsequent death, even though the code is written in a gender neutral way.

Anthony C. Infanti: Right. I think that Wendy did a fabulous job of also minding the legislative history and stuff to show that that's kind of what was in mind. That it was men who would be controlling the property.

It just goes to show how the tax code is built on top of all of the assumptions that people have from living in society. It doesn't live on its own off in some rarefied atmosphere. Just because it doesn't mention something doesn't mean that that's not what it's targeting.

As we talked about earlier with the married couple as the filing unit, and you're thinking about the joint return and the incentives that it creates, it's generally not thought that it's creating an incentive for the husband to stay at home because that's historically not what has happened. The wife has borne a disproportionate burden in terms of that work in the household and taking care of children and things like that.

When you have that kind of an atmosphere, it's not hard to fill in the blank sometimes. The marriage penalty historically has not just been about the tax rates that apply. There's other provisions in the code that also feed into the marriage penalty. There's lots of provisions in the code where the only way to get, say a deduction, is if you file a joint return. If you're a married couple.

But then they don't go and double the deduction. Think about educational loan interest. You can deduct the limited amount of educational loan interest. To my students, whenever I talk to them about it, if you're married, you have to file jointly to get that. But if you get it, you can only get the same deduction that a single person can get.

Then you start thinking about if you have a married couple and you're only giving them the same allowance as a single individual, you're not encouraging married folks to both go get an education. Which one are you encouraging to get an education? It doesn't take a lot of imagination to think about whom when we're thinking about a code that's structured in a way that's encouraging men to go out to work and women to stay at home when they're married.

Bridget J. Crawford: Let's also add to this the state tax systems as well. We've focused mostly in our conversation on federal law. That's a lot of the mainstay of law school classes.

But look at state sales taxes, for example, and the fact that in over half the states, there's still a sales tax on menstrual products. Now that's gender neutral on its face. It doesn't say women pay a tax on these products. But there's a sales tax imposed on menstrual products in the majority of states.

Whereas the majority of states do not tax things like Viagra or condoms. They don't tax tattoos, newspaper ink, jet fuel, or cowboy boots in some jurisdictions, but menstrual products are taxed.

Of course, both men and women buy menstrual products, either for themselves or for folks in their household. But these are products that are used for a function that is so closely associated with what has historically been called female biology that I think there is a very, very strong case that that in and of itself is a form of

gender discrimination. That's an article I've written with my Pace colleague Emily Waldman.



Packages of Tampax brand tampons on a drugstore shelf in New York on Wednesday, February 10, 2016. A ...

[+] CORBIS VIA GETTY IMAGES

We have to look not just at the income tax and deductions and things like childcare, but these taxes we've paid our entire lives. We don't necessarily notice them.

But what kind of message are we sending when we tax products that are so closely associated with so-called female biology? On any given purchase it may not be very much, but it adds up over a lifetime. In fact, several states have said they don't want to repeal the tax because it's an important source of revenue. Well, then you're balancing state budgets on the literal bodies of those who menstruate and that is wrong.

Carolina Vargas: My last question for you both is how can people start to look at the tax law with this viewpoint in mind?

Anthony C. Infanti: How people can start to look at the tax law with this viewpoint in mind is constantly questioning. Actually start reading some of the work that critical tax folks have done. Bridget and I both do this work, but we are not by any stretch of the imagination alone, nor have we been.

Tax law can be arcane. Sometimes this stuff will be kind of right on the surface of things, like that dependent care deduction that was in the *Moritz* case. That will happen occasionally. But a lot of times, you don't really understand what's going on until you dig a little deeper. That's where getting the benefit of the expertise of folks who spend their time studying the tax laws and looking at the tax laws from this perspective can help you to see what's going on and how this is working.

Think about how you're interacting with the tax code yourself every day. People don't realize things happen every day that are triggering taxes. You may not file your taxes until next year, but I know for myself, I have a little file. I'm constantly putting stuff in it so that way I have all my records that I need for when I fill out my tax return come February or March.

Just to give you an example, this summer I had an 11 year old. My partner got laid off during the pandemic. Last year he had some wages and stuff leftover, but this year he's been unemployed the whole year.

I sent my daughter to camp some over the summer, just basically childcare. Can I qualify for the dependent care assistance credit for that? Because that was childcare for her while I'm still working and my partner is unemployed.

The dependent care assistance credit is limited by earned income. If you don't have earned income, then you can't take it. Well, what qualifies as earned income? What doesn't qualify as earned income is unemployment. Unemployment compensation.

Especially with the pandemic going on, how many people have been unemployed and getting unemployment compensation? That may be all the earned income that they have. If you're out looking for a job, you need childcare too, right? I doubt you're going to be wanting to drag your child to all your job interviews and all the other stuff that you're doing.

It's important to think about how that works and the implication that has, especially in the current atmosphere that we have. It doesn't take a lot of imagination. You just have to start thinking, "How is this going to impact me? How does it work?"

How is it going to affect a lot of other people that are in the same situation? Especially how's it going to be affecting different groups that have traditionally been marginalized in society? How is it affecting women? How is it affecting racial minorities? How is it affecting the LGBTQ community? How is it affecting people who are immigrants? Down the line, all these different groups.

Just starting to question and think. It's opening your eyes is kind of the most important thing.

Bridget J. Crawford: I think Tony really is ending where we began, which is a feminist perspective on the tax law is linked to every other issue. Scratch the surface, and you will find that tax justice is an integral part of whatever one's concern is, whether it's fair housing, workers' rights, education, prisoners' rights, environmental issues, disability rights, LGBTQ issues, international trade, elder law, poverty law, racial justice, family-owned business, immigrants.

Scratch the surface and tax lurks not far below. There's a burgeoning community of folks who are interested in making these connections. In the end, that's what feminism to me means. Making the connection between all of these issues so that we can build the society that we want and deserve to live in and have a tax code that reflects our highest and best values.

Carolina Vargas: Thank you both so much for talking to me today.

Anthony C. Infanti: Thank you.

Bridget J. Crawford: Thank you.

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