

Conclusion

Allocation of net income tax liability on business income among multiple jurisdictions is a messy and uncertain affair. It is akin to “slicing a shadow”²⁰ whether the slicing is done under an arm’s-length approach or under formula apportionment. Neither approach reaches precisely the “correct” result, and neither is particularly easy to administer.

Under these circumstances, it may be a sufficient argument against change simply to state that formula apportionment is not so clearly superior to current law that we should incur the costs of transition and the exposure to the law of unanticipated consequences. However, we believe that the arm’s length approach would be the clearly superior choice even if we were writing on a clean slate.

The U.S. government should have a strong preference for the arm’s-length approach, because of the promise that it offers for countries to allocate taxing jurisdiction consistently among themselves. The arm’s length standard provides a basis for consistent allocations through application of principles that do not affect the tax and economic policies of the taxing jurisdictions. Furthermore, it is an essential premise of the arm’s-length standard that income should be taxed precisely once, so that a double or multiple tax result by definition violates the standard. Formula apportionment has none of these virtues. Multiple taxation is completely consistent with formula apportionment, and the approach provides no policy-neutral basis on which to resolve particular cases of multiple taxation. Furthermore, formula apportionment would entangle the U.S. government, in its role as tax collector, in administrative difficulties significantly exceeding those of the current system.

The arm’s length method may have its difficulties. However, it also has certain virtues that formula apportionment lacks: the arm’s-length method is a neutral standard that aspires to achieve single taxation; it is internationally accepted; and it does not require knowledge of transactions with no U.S. nexus. These are virtues that U.S. tax policy-makers should care about and fight to retain.

²⁰*Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 192 (1982), *rehearing denied*, 464 U.S. 909 (1983).

Mamas Don’t Let Your Babies Grow Up to Be Tax Lawyers

By Paul L. Caron

In 2012 *Tax Notes* will celebrate the 40th anniversary of its inaugural issue, published on September 18, 1972. In recognition of that milestone and to show its appreciation for your continued readership, *Tax Notes* will be republishing select archived articles from each of the past 40 years. *Tax Notes* hopes that readers will enjoy these valuable contributions from prominent members of the tax community on issues that were and are of central importance to the field. Readers are invited to submit their own recommendations for our retrospective to taxnotes@tax.org, along with a short explanation for why the article has been recommended.

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This article, originally published July 18, 1994, was excerpted from Caron’s report, “Tax Myopia, or Mamas Don’t Let Your Babies Grow Up to Be Tax Lawyers,” which was published in 13 *Va. Tax Rev.* 517 (1994). The article discussed two related myths that have a strong currency among law students, lawyers, and the public.

The first myth is that tax lawyers are somehow different from other lawyers. Part I of the article chronicled the disparagement of tax lawyers in a light-hearted fashion and set the stage for the discussion of the second myth that tax law is somehow different from other areas of the law.

As suggested by the abstract reference to “tax myopia” in the title, the article contended that tax law too often is mistakenly viewed as a self-contained body of law. Part II explained how that misperception has impaired the development of tax law by shielding it from other areas of law that should inform the tax debate. It also explained how other areas of law have been impoverished by the failure to consider how tax law can enrich their development. The article advocated a synergistic relationship between tax and nontax law through which each benefits from the insights of the other.

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The myth that tax lawyers are different from other lawyers is perpetuated in various (often humorous¹) ways in law schools, the legal profession, and the popular culture.²

Law Schools

Although a few law schools include the basic federal income tax course either in the first-year curriculum³ or as a required second- or third-year course,⁴ most schools offer it as an elective. In

¹I am treading on unconventional territory here — most people do not associate humor with either law reviews or tax law. See generally John Iekel, "Tax Humor: Oxymoron or Apt Description?" *Tax Notes*, Nov. 12, 1992, p. 963. ("The term 'tax humor' is no doubt an oxymoron to many people; to the more cynical, it is an apt description of the entire tax code."); J.T. McKnight, Comment, "Humor and the Law," 1993 *Wis. L. Rev.* 879, 879 (bemoaning "dearth of humor" in law reviews). But see "Symposium on Humor and the Law," 1992 *B.Y.U. L. Rev.* 313; "Symposium on Humor in the Law," 17 *Nova L. Rev.* 661 (1993); Martin D. Ginsburg, "Teaching Tax Law After Tax Reform," 65 *Wash. L. Rev.* 595, 595 (1990) ("Basic tax, as everyone knows, is the only genuinely funny subject in law school").

²Willie Nelson fans will recognize the title as a variation of his song "Mamas Don't Let Your Babies Grow Up To Be Cowboys," on *Greatest Hits (And Some That Will Be)* (Columbia Records 1981). In fact, Mr. Nelson placed lawyers above cowboys in the food chain:

Mamas don't let your babies grow up to be cowboys.
Don't let them pick guitars and drive them old trucks. Let them be doctors and lawyers and such.

Mamas don't let your babies grow up to be cowboys
cause they'll never stay home and they're always alone
even with someone they love.

Recent reports suggest that Mr. Nelson could have used a good tax lawyer. As a result of investments in various tax shelters that subsequently were disallowed by the Internal Revenue Service (the Service), he was faced with a \$16.7 million tax liability. With the sale of his seized property unable to make a significant dent, Mr. Nelson sought other ways to satisfy his tax obligations: he instituted a RICO suit against his former accountants and marketed a new album, *Who'll Buy My Memories? (The IRS Tapes)* (Sony Records 1992) for \$19.95, of which he received \$6: \$3 for the back tax liability, \$2 for taxes on the album's profits and \$1 to fund the lawsuit against the accountants. See Alison Leigh Cowan, "Willie Nelson Hopes for a Hit; So Does the I.R.S.," *N.Y. Times*, Sept. 2, 1991, at 1; Robert Draper, "Poor Willie," *Tex. Monthly*, May 1991, at 100; Geoffrey Himes, "Willie Nelson's Taxing Career," *Wash. Post*, Aug. 2, 1991, at N15; see also Lee A. Sheppard, "Individual Bankruptcy: The Tax Shelter of the '90s," *Tax Notes*, Oct. 12, 1992, p. 166 (noting that Mr. Nelson could have escaped tax liability through well-timed bankruptcy petition, but refused to do so). Mr. Nelson settled with the Service for less than 50 cents on the dollar, signaling "a much less punitive IRS policy toward all tax delinquents." Lee Berton, "Willie's in Stardust and a Punitive IRS Exists in Memories," *Wall St. J.*, Feb. 2, 1993, at A3.

³E.g., St. Louis University School of Law. *St. Louis University School of Law Bulletin* 19 (1992); cf. James D. Gordon III, "Humor in Legal Education and Scholarship," 1992 *B.Y.U. L. Rev.* 313, 314 n.4 ("You want to meet strange people? Go to St. Louis.") (quoting James D. Gordon II).

⁴During the 1984-86 period, 54 (31 percent) of the 175 ABA-approved law schools required students to take a federal

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choosing their courses, second- and third-year students follow the conventional wisdom that there are only two types of law school courses: tax and everything else. Tax courses are perceived to be reserved for what in my day used to be called "tax geeks"⁵ — accountant-types⁶ who carry calculators and plastic pocket-protectors for their multi-color array of pens.⁷ Nevertheless, most law students end up taking the basic income tax course, either because they follow the advice (not entirely disinterested) of their tax professors that all lawyers should have a basic familiarity with the tax principles that underlie most of the transactions and disputes they will confront in their professional lives,⁸ or (more

tax course prior to graduation. William P. Powers, *A Study of Contemporary Law School Curricula* 12 (1987).

⁵After I became one, I preferred the less pejorative term "tax jocks." I am unsure, however, whether the term caught on among anyone other than my fellow tax geeks. Cf. Joel S. Newman, "On Section 107's Worst Feature: The Teacher-Precursor," *Tax Notes*, Dec. 20, 1993, p. 1505. ("We tax jocks. . .").

⁶Tax courses apparently have long been perceived by law students to be reserved for accountants. See, e.g., "Interview with Erwin N. Griswold," 11 *ABA Sec. Tax'n NewsL.* 56, 57 (1992). ("Federal taxation was widely regarded [at Harvard Law School in the 1920s] as a field for accountants rather than for lawyers.")

⁷There is a strong tradition of jokes and insults by and about tax lawyers and accountants. For example, Professor Gordon has observed that "[a] tax lawyer is a person who is good with numbers but who does not have enough personality to be an accountant." James D. Gordon III, "A Dialogue About the Doctrine of Consideration," 75 *Cornell L. Rev.* 987, 1001 n.98 (1990); see also James D. Gordon III, "How Not to Succeed in Law School," 100 *Yale L.J.* 1679, 1697 (1991) (same); Erik M. Jensen, "The Heroic Nature of Tax Lawyers," 140 *U. Pa. L. Rev.* 367, 367-68 & nn.4-9 (1991) (collecting various references to tax lawyers and accountants in movies, television, newspapers, and law reviews); cf. Louis Auchincloss, *Powers of Attorney* 167 (1963) [hereinafter Auchincloss, *Powers of Attorney*] ("[Law has] become a mere jumble of tax regulations, to be practiced with a slide rule").

⁸See *Dobson v. Commissioner*, 320 U.S. 489, 494-95 (1943) ("No other branch of the law touches human activities at so many points."); Jeffrey H. Birnbaum & Alan S. Murray, *Showdown at Gucci Gulch: Lawmakers, Lobbyists, and the Unlikely Triumph of Tax Reform* 289 (1987) ("Taxation . . . is . . . life. If you know the position a person takes on taxes, you can tell their whole philosophy. The tax code, once you get to know it, embodies the essence of life: greed, politics, power, goodness, charity."); Martin J. McMahon Jr. & Lawrence Zelenak, *Bittker & McMahon's Federal Income Taxation of Individuals: Study Problems* iv (1990) ("It is the lawyers' duty to recognize and solve their clients' tax problems that lurk in [various types of transactions]. All lawyers must — if they are to practice competently — be proficient in basic federal income tax law."); see also Louis Auchincloss, *The Partners* 30 (1974) [hereinafter Auchincloss, *The Partners*]. ("Everything today is taxes. . . . What better seat on the grandstand of life can I offer you than that of tax counsel. . . . Who is the figure behind every great man, the individual who knows his ultimate secrets? A father confessor? Hell no, the tax expert.")

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likely) because tax is on the bar exam of the state in which they intend to practice.⁹

The students quickly confront the mind-numbing complexity of the Internal Revenue Code (the Code). A few students react by becoming so enamored with the subject that they decide to become tax lawyers or take other tax courses during their law school careers. Most, however, have their initial distaste for tax confirmed and go on to become corporate lawyers, litigators, etc., avoiding all other professional contact with tax during (and after) law school.

Several tax legends recently have bemoaned the difficulty of teaching the subject. What hope can the beginning tax professor¹⁰ have when Dean Gris-

wold calls the current tax law “bewildering,”¹¹ and Professor Eustice complains that the subject is “virtually unteachable?”¹² I believe Professor Ginsburg is closer to the truth when he refers to the “awesome complexity” of tax law in the same sentence as “the pleasure and challenge of teaching a basic [tax] course.”¹³

The students’ initial hostility toward tax and the complexity of the code often inure to the benefit of the professor. Most students approach tax with trepidation, and are relieved when the course is not as bad as they had feared.¹⁴ The students generally appreciate the tax professor who helps them through the complexity thicket. In the rare case where the tax course is every bit as bad as they had feared,¹⁵ the students tend to blame the subject

At the University of Cincinnati College of Law, the tax professors include with student registration materials an explanation of why even those students planning nontax careers should take two tax courses in law school. For a more extreme view, see Marjorie Kornhauser, “From the Editor,” 8-1 *AALS Sec. Tax’n Newsl.* 8 (1991) (“Tax is clearly the quintessential course and the whole law school curriculum should revolve around it.”); cf. William D. Popkin, *Introduction to Federal Income Taxation* vii (1987) (“The Tax Code is the Chaucer and Shakespeare of the law school curriculum.”); Charles Adams, *For Good and Evil: The Impact of Taxes on the Course of Civilization* (1992).

⁹At least 20 states include federal income tax as one of the topics on their bar exam (Alabama, Connecticut, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Minnesota, Montana, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oregon, Pennsylvania, Vermont, Virginia, and Wisconsin); a few states include other federal tax subjects such as estate and gift tax (e.g., Connecticut, Iowa, Maine, Oklahoma, and Utah). See generally *Martindale-Hubbell Law Digest, U.S. Law Digests* (1993) (under topic Attorneys and Counsellors: Examination); *BAR/BRI Digest* (1993); see also Katherine A. Davis Roome, *The Letter of the Law* 4 (1979) (describing “dread terror of the almighty bar exam” as motivation for law students).

¹⁰After serving on the University of Cincinnati College of Law’s faculty appointments committee last year (and reviewing all 1,000 resumes from prospective faculty candidates in the AALS’s Faculty Appointments Register), I can attest to the hostility many feel at the prospect of teaching tax. The AALS form requests the candidate to list the subjects she is willing to teach, and the conventional wisdom recommends that the candidate display maximum flexibility and rule out little. Don Zillman, et al., “Uncloaking Law School Hiring: A Recruit’s Guide to the AALS Faculty Recruitment Conference,” 38 *J. Legal Educ.* 345, 348 (1988). However, one of the most common responses last year on the list of desirable subjects was “anything but tax.” Cf. Walter I. Blum, “Anthropological Notes on Federal Tax Man,” 68 *Taxes* 499, 505 (1968) (new professors strenuously avoid being forced into teaching tax courses); Jon W. Bruce & Michael Swygert, “The Law Faculty Hiring Process,” 22 *Hous. L. Rev.* 215, 253 (1981) (tax draws fewer teaching candidates than other areas); James D. Gordon III, “An Insider’s Guide to the Faculty Recruitment Conference,” 43 *J. Legal Educ.* 301, 302 (1993) (Faculty candidate should narrow list of subjects “without foreclosing any meaningful options. You could write ‘Any subject but tax,’ but this is too modest a sacrifice. Try to narrow the subjects a little more, so that you don’t appear too protean.”); Deborah J. Merritt & Barbara F. Reskin, “The Double Minority: Empirical Evidence of a Double Standard of Law

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School Hiring of Minority Women,” 65 *S. Cal. L. Rev.* 2299, 2351 (1992) (law schools often have difficulty staffing tax courses); Carol A. Roehrenbeck & Gail L. Richmond, “Three Researchers in Search of an Alcove: A Play in Six Acts,” 84 *Law Libr. J.* 13, 23 (1992) (After tax professor dies, fictional law school faculty must hire new professor because “[a]ll of us fall into the anything-but-tax group. We need a tax-only type.”).

¹¹Interview with Erwin N. Griswold, *supra* note 6, at 68 (“What advice would I give to a beginning tax professor? I think it would be that the professor should think of teaching some other subject.”). Dean Griswold claims that his lifetime involvement with tax law came about by accident after graduating from law school when he accepted a position with the Solicitor General’s Office. Erwin N. Griswold, *Ould Fields, New Corne: The Personal Memoirs of a Twentieth Century Lawyer* 79-81 (1992). However, Dean Griswold’s role in writing the original Bluebook as a second-year law student suggests a predisposition toward a tax career. See James W. Paulsen, “An Uninformed System of Citation,” 105 *Harv. L. Rev.* 1780, 1782 (1992).

¹²Interview with James S. Eustice,” 11 *ABA Sec. Tax’n Newsl.* 38, 42 (1992).

¹³Ginsburg, *supra* note 1, at 596; see also “Interview with Martin D. Ginsburg,” 12 *ABA Sect. Tax’n Newsl.* 6, 6 (1992) (“Teaching basic tax is, I think, the most fun because it is an enormous challenge.”).

¹⁴See, e.g., Roome, *supra* note 9, at 103 (fictional account of Cornell Law School) (“I remarked how unexpectedly interesting I found Income Tax. . .”).

¹⁵See Chris Goodrich, *Anarchy and Elegance: Confessions of a Journalist at Yale Law School* 14 (1991) (asking “[h]ow could anyone inject life into . . . Taxation?”); Richard D. Kahlenberg, *Broken Contract: A Memoir of Harvard Law School* 126 (1992) (recalling “gigantic class, uninterested students, [and] mundane subtopics”); Michael Levin, *The Socratic Method* 148 (1987) (fictional account of Columbia Law School) (tax professor “spent three class hours every semester examining in painful detail an elaborate, but long-dead, provision of the Internal Revenue Code relating to the amortization of coal, because he once spent two years as counsel to a mining company”); Gail L. Richmond & Carol A. Roehrenbeck, “From Tedious to Trendy: A Tax Teacher’s Triumph,” 17 *Nova L. Rev.* 739, 739-40 (1993) (at fictional Avon Law School, tax course received poor student evaluations and was picketed by students); Daniel Wise, “‘The Firm’ Lets Lawyer-Author Quit Practice for Fiction-Writing,” *N.Y. L.J.*, Apr. 18, 1991, at 1, 2 (discussing author who “thought he would become a tax lawyer until he took a tax course at Ole Miss”).

more than the professor.¹⁶ From the professor's perspective, the complexity demands vigilance in guarding against oversimplification while at the same time making the students appreciate the policies implemented in the specific statutory or regulatory scheme.¹⁷

Of course, the tax professor's professional survival and advancement may depend more on scholarship than teaching.¹⁸ Current trends in legal scholarship favoring "abstract theory" at the expense of more traditional, "practical" work,¹⁹ may

¹⁶A tax professor recently has argued that tax courses are doomed to fail because of their overreliance on "linear" analysis through casebooks. C. Garrison Lepow, "Deconstructing Los Angeles or a Secret Fax from Magritte Regarding Postliterate Legal Reasoning: A Critique of Legal Education," 26 *U. Mich. J.L. Ref.* 69 (1992) [hereinafter Lepow, *Deconstructing Los Angeles*]. Although obscured by the ponderous title, her thesis is that professors should incorporate videos to more effectively teach tax. Coincidentally, Professor Lepow has produced a movie for classroom use: *Nobody Gets Married For the First Time Anymore, Part 1: How Divorce Became the Last Tax Shelter in America* (Thirsty Productions 1990). For the impact of videos on the nontax curriculum, see Christine Alice Corcos, "Columbo Goes to Law School: Or, Some Thoughts on the Uses of Television in the Teaching of Law," 13 *Loy. L.A. Ent. L. Rev.* 499, 501 (1993) ("The number of professors who use film and television clips to refer to cinematic characters to illustrate the law at work in society is rapidly increasing.") (footnote omitted).

¹⁷Professor Eustice describes this process as follows:

Obviously, we teach something, but we basically teach a vocabulary, and get people out there so they can learn it on their own. . . . But it's better to know what you don't know than it is to think you know something. If nothing else, I think it's a useful service to scare people. That we easily do. . . . There's an enormous tension between trying to be right, in other words not convey misleading information, and your ability to communicate. Sure, I can simplify it to the point where its comprehensible, but it's also wrong.

Interview with James A. Eustice, *supra* note 12, at 42; see also "Interview with Boris I. Bittker," 12 *ABA Sec. Tax'n Newsl.* 6, 10 (1993) ("Tax teachers who say, 'The field is so complicated that I can't make any headway,' are overlooking the fact that there is much that can be done with basic structures, and that students can be brought to understand the persistent problems that the current intricacies seek to resolve.")

¹⁸See, e.g., "Report of the AALS Special Committee on Tenure and the Tenuring Process," 42 *J. Legal Educ.* 477, 484, 487-89 (1992); Kenneth Lasson, "Scholarship Amok: Excesses in the Pursuit of Truth and Tenure," 103 *Harv. L. Rev.* 926, 927-28, 949 (1990); Marin Roger Scordato, "The Dualist Model of Teaching and Scholarship," 40 *Am. U. L. Rev.* 367, 373 (1990); Richmond & Roehrenbeck, *supra* note 15, at 739 (faculty committee voted to reappoint fictional tax professor who had published five articles in his first year of teaching despite horrendous student evaluations; after professor revamped course as "Tax Styles of the Rich and Famous," his popularity surged and he was awarded tenure).

¹⁹Harry T. Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession," 91 *Mich. L. Rev.* 34, 34 (1992). For 17 responses to Judge Edwards, and his reply, see Symposium, "Legal Education," 91 *Mich. L. Rev.* 1921 (1993).

place tax professors at a competitive disadvantage with their nontax peers.²⁰

Legal Profession

The perceived differences separating tax law and tax lawyers from their nontax counterparts are reinforced by the legal profession. I received my first hint of this attitude my first day as a summer associate at a Wall Street firm. At a presentation by senior partners of the firm's various departments, the tax partner extolled the virtues of his department by emphasizing that because of the intellectual rigor of the field,²¹ tax associates were encouraged to go home at 5:30 every day; tax practice was simply too complex to be done when an associate was tired.²² (Only later when I spoke

²⁰Cf. Richard B. Cappalli, "The 1990 Rose Awards: The Good, The Bad, and The Ugly — Titles for Law Review Articles," 41 *J. Legal Educ.* 485, 487 (1991) (tax article won "I Can't Wait to Curl Up With this Award"). *But cf.* John J. Osborne Jr., *The Associates* 156-59, 246-51 (1979) (first-year associate is fired from Wall Street firm for citing only philosophers such as Austin, Cicero, Gierke, and St. Augustine in his tax memoranda; associate joins Yale faculty and writes lead article in *Yale Law Journal* that is hailed as most brilliant tax article in years because it analyzes code in light of these philosophers).

²¹Cf. John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* 103 (1982) (tax practice received highest "intellectual challenge score" of 30 legal specialties in survey of 19 Northwestern Law School professors and American Bar Foundation research specialists); Angela P. Harris & Marjorie M. Shultz, "'A(n)other Critique of Pure Reason': Toward Civic Virtue in Legal Education," 45 *Stan. L. Rev.* 1773, 1777 n.14 (1993) (citing tax as example of how "highest-paying and most prestigious jobs in the legal profession are those having the least to do with handling people and emotions and the most to do with pure intellect"); Paul J. Sax, "The More Things Change the More They Stay the Same," 46 *Tax Law.* 690, 695 (1993) ("[T]here is a great deal of prestige still associated with the practice of . . . tax law.")

²²Unlike, he said, the corporate drones who could mindlessly bill hours at the printer, or the junior litigators who could do the same in a variety of mundane tasks. *But cf.* John Grisham, *The Firm* 86 (1991) [hereinafter Grisham, *The Firm*] (tax partner describing billing practices to first-year tax associate: "Every time you look at the file, charge it for an hour. . . . [I]f the [client's] name . . . crosses your mind while you're driving to work, stick it for an hour."); see also *id.* at 58 ("Most good lawyers can work eight or nine hours a day and bill twelve."). Of course, Mr. Grisham's description of tax practice is often inaccurate. See *id.* at 28, 50, 66-69 (describing bar review course run by tax partners for firm's new associate); *id.* at 306-13 (describing how tax partners and associates spent countless hours before April 15 preparing tax returns for individual clients). Mr. Grisham's later work also suffers from factual inaccuracies. See John Grisham, *The Pelican Brief* 63 (1992) (tenured professor at Tulane Law School sleeps late, works five hours per day, and earns a \$70,000 salary). As the Society of American Law Teachers' annual salary survey shows, Mr. Grisham significantly understated the salary. See 1991-92 *SALT Salary Survey* 9 (reporting \$96,500 median salary for full professor at Tulane Law School).

with some of the permanent tax associates did I learn that he was referring to 5:30 a.m.)

Of course, this self-indulgent air of intellectual superiority invites a less flattering view from non-tax lawyers. For example, at most firms, tax lawyers typically are not sent to law schools to interview students. Perhaps one fear is that tax lawyers would not be able to “sell” the firm because their work would not sound exciting to the average student. A more likely explanation is that the hiring partner (usually a nontax lawyer) or recruitment coordinator simply believes that tax lawyers are not as presentable as their fellow lawyers from other departments.²³ Under this view, tax lawyers simply lack the panache of the litigators or corporate lawyers sent to woo law students.²⁴

The perception that tax law is less interesting or important than other areas of law pervades even the Supreme Court. For example, one proffered explanation for Justice Marshall’s productivity in the tax field²⁵ is that the conservative chief justices under whom he served refused to assign him more important cases: “Justice Marshall was forced to write on federal income tax because he was given nothing better to do.”²⁶ Other members of the Court apparently share this view of tax law. For example, when asked why he sings along with the chief justice at the Court’s annual Christmas party, Justice Souter replied, “I have to. Otherwise I get all the tax cases.”²⁷ Although similar remarks have been attributed to other justices,²⁸ the most recent Supreme

Court appointee may help change this view of tax law. Justice Ginsburg’s husband is one of the “tax legends” referred to earlier,²⁹ and the gender discrimination case that launched her career was a tax case.³⁰

As increasing numbers of women enter the legal profession, tax practice has become more isolated from other areas of law by remaining primarily a men’s club. The tax bar is commonly referred to as a “special priesthood,”³¹ and it is only slightly more tolerant than the Catholic Church in ordaining women tax priests.³² For example, in 1991, women comprised 23 percent of the members of the ABA³³ but only 15 percent of the members of the ABA Tax Section.³⁴ Similarly, in 1992-93, women comprised

cases “‘you wish the Chief Justice had assigned to some other Justice.’ A deadly dull case, ‘a tax case, for example.’”); Stuart Taylor Jr., “Reading the Tea Leaves of a New Term,” *N.Y. Times*, Dec. 22, 1986, at B14 (quoting Justice Blackmun) (“If one’s in the doghouse with the Chief [Justice], he gets the crud. He gets the tax cases. . . .”).

²⁹See *supra* notes 1, 13 and accompanying text.

³⁰*All Things Considered: A Look at Judge Ruth Bader Ginsburg’s Life and Career* (National Public Radio broadcast July 6, 1993). See *Moritz v. Commissioner*, 469 F.2d 466 (10th Cir. 1972) (Ruth Bader Ginsburg and Martin D. Ginsburg, counsel for Appellant) (holding unconstitutional former section 214, which permitted dependency deduction for expenses of single women but not single men), *cert. denied*, 412 U.S. 906 (1973). Professor Ginsburg noted in the NPR interview that the government’s *certiorari* petition in *Moritz* listed hundreds of federal statutes called into question by the Tenth Circuit’s decision, and that his wife made her mark over the next decade trying to overturn those statutes in litigation.

³¹See, e.g., David Bradford, *Untangling the Income Tax* 266 (1986), quoted in Charles E. McLure, Jr., “The Budget Process and Tax Simplification/Complication,” 45 *Tax L. Rev.* 25, 27 (1989); Bradford L. Ferguson, et al., “Response: Adapting to the Evolving Legislative Process,” 68 *Taxes* 448, 449 (1990); James B. Lewis, “Viewpoint: The Nature and Role of Tax Legislative History,” 68 *Taxes* 442, 443 (1990); John A. Miller, “Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation,” 68 *Wash. L. Rev.* 1, 72 (1993); Lee A. Sheppard, “Book Review,” *Tax Notes*, Oct. 28, 1991, p. 499 (reviewing David J. Shakow, *The Taxation of Corporations and their Shareholders* (1991)).

³²See, e.g., Haye van der Meer, *Women Priests in the Catholic Church?* (1973); Vincent P. Miceli, *Women Priests and Other Fantasies* (1984).

³³Section, Division, and Forum Committee Demographics, in *ABA, Section Membership Development 1991-1992* [hereinafter *ABA Demographics*]. Although approximately one-half of the lawyers in this country are not members of the ABA, the percentage of women members of the ABA closely tracks the 22 percent of women lawyers generally reported for the 1990-91 period. *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, ABA Section of Legal Education and Admission to the Bar, *Legal Education and Professional Development — An Educational Continuum* 20 (1992).

³⁴*ABA Demographics*, *supra* note 33; see also Harris & Shultz, *supra* note 21, at 1777 n.14 (women predominantly fill “jobs involving caring for persons and managing emotions” like family law rather than jobs involving “pure intellect” like tax

²³Cf. Osborne, *supra* note 20, at 69 (“[T]ax makes you bald, round and shrinks you. It’s the truth. Tax makes you bald and round. . . .”). For more on hirsuteness and tax lawyers, see *infra* notes 41-42, 47 and accompanying text.

²⁴But cf. Heinz & Laumann, *supra* note 21, at 91 (tax received second highest “prestige score” of 30 legal specialties in survey of 224 Chicago lawyers); Grisham, *The Firm*, *supra* note 22, at 1-10, 15-32 (describing tax lawyers’ upscale wooing of third-year student to join firm).

²⁵See Deborah Geier, “Commentary: Textualism and Tax Cases,” 66 *Temple L. Rev.* 445, 465 n.75 (1993) (Justices Marshall and Blackmun most frequent authors of tax opinions in recent years).

²⁶Stephen B. Cohen, “Thurgood Marshall: Tax Lawyer,” 80 *Geo. L.J.* 2011, 2039 (1992); see also Dick Lehr, “Associates, Scholars Hail Contributions,” *Boston Globe*, Jan. 25, 1993, at 1, 6 (“[I]n the middle of a lofty legal discussion about a boring tax case, [Justice] Marshall leaned over to [Justice] Powell and said ‘You can have my vote on this for a future draft pick.’”).

²⁷Paul M. Barrett, “Independent Justice,” *Wall St. J.*, Feb. 2, 1993, at A1; cf. *United States v. Hill*, 113 S. Ct. 941 (1993) (defining oil depletion allowance for alternative minimum tax purposes) (Souter, J.).

²⁸See Bob Woodward & Scott Armstrong, *The Brethren* 362 (1980) (describing Justice Brennan’s normal reaction to a *certiorari* request in a tax case as: “‘This is a tax case. Deny.’”); Stuart Taylor Jr., “Powell on his Approach Doing Justice Case by Case,” *N.Y. Times*, July 12, 1987, at 1 (Justice Powell describing

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20 percent of law school faculty but only 16 percent of those who taught federal tax courses.³⁵ This male dominance is reflected in various ways in the literature,³⁶ which includes some unflattering references to female tax lawyers.³⁷

In any event, the life of the tax lawyer — whether male or female — is not for everyone. Indeed, in a recent article chronicling the general unhappiness of young lawyers, one wag suggests that tax lawyers are to blame for their lot in life: “[S]ome young lawyers put themselves into situations that bring about loneliness. ‘A lawyer selects his own type of work. If you pick tax work, you’re already picking a job that is going to isolate you. A trial lawyer or corporate lawyer has more access to people and the more access you have, the more likely you’re not going to feel isolated or depressed.’”³⁸

law); Claudia MacLachlan, “Making an Accounting of Top Tax Attorneys,” *Nat’l L.J.*, Feb. 15, 1993, at 34 (listing of most prominent tax lawyers in country included only 6 percent women).

³⁵Telephone Interview with Richard A. White, Research Associate, Association of American Law Schools (Mar. 8, 1993).

³⁶For example, the references to tax lawyers as “tax men,” and to the Service as the “tax man,” are legion. See, e.g., Boris I. Bittker, “Tax Shelters for the Poor,” 51 *Taxes* 68, 68 (1973); George W. Dent, Jr., “Toward Unifying Ownership and Control in the Public Corporation,” 1989 *Wis. L. Rev.* 881, 886; Philip P. Houle, “Maine’s Proposed Sales Tax on Services: The Tax Man Meets the Constitution,” 10 *U. Bridgeport L. Rev.* 83 (1989); Justin Sweet, “The American Institute of Architects: Dominant Actor in the Construction Documents Market,” 1991 *Wis. L. Rev.* 317, 343; Gary Taylor, “The Tax Man Loses,” *Nat’l L.J.*, Dec. 27, 1993, at 2; Paulette Thomas, “New Tax Means All Free Parking Won’t Be Free,” *Wall St. J.*, Jan. 10, 1994, at B1.

For a British perspective on the male-dominated tax profession, see generally The Beatles, “Taxman,” on *Revolver* (Capitol Records 1966). The Beatles were unusually prescient in anticipating the Clinton administration’s proposed Btu tax (Department of the Treasury, *Summary of the Administration’s Revenue Proposals* 64 (1993)):

If you drive a car I’ll tax the street.

If you try to sit I’ll tax your seat.

If you get too cold I’ll tax the heat.

If you take a walk I’ll tax your feet.

³⁷See *infra* note 45 and accompanying text. For a discussion of how the tax law discriminates against women generally, see Edward J. McCaffrey, “Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code,” 40 *UCLA L. Rev.* 983 (1993).

³⁸Dan Hurley, “Why are Young Lawyers the Loneliest People in the Profession?” *Barrister*, Summer 1987, at 9, 10; see also Larry Richard, “The Lawyer Types: How Your Personality Affects Your Practice,” *A.B.A. J.*, July 1993, at 74, 75 (“tax work seem[s] to draw introverts”); Project, “Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates,” 40 *Stan. L. Rev.* 1209, 1211 (1988) (law firms “tended to direct women toward certain areas of practice where their client contact was limited, such as tax”); cf. Laura Mannerus, “Why Women Are Leaving the Law,” *Working Woman*, Apr. 1993, at 64 (reporting on woman tax lawyer’s unhappiness with practice); Matt Siegel, “Where’s Bob?” *Am. Law.*, Oct. 1993,

(Footnote continued in next column.)

Popular Culture

Tax lawyers long have been portrayed in the popular culture as something other than normal.³⁹ Although this portrayal has potential advantages when the popular perception of lawyers in general is at an all-time low,⁴⁰ in practice the difference has resulted in an unflattering portrait of the tax lawyer.

The tax lawyer typically is depicted as a balding, white, bespectacled male in varying stages of emotional discord.⁴¹ For example, Louis Auchincloss, perhaps the most prolific novelist of the legal profession, has given us many memorable tax lawyer characters. In *Powers of Attorney*, we meet a junior tax associate with a “balding dome over which the sparse long hairs were so carefully pasted back,”⁴² and a senior tax partner, “an aloof, superior person,

at 70 (account of 40-year-old tax partner who quit \$1-million-per-year position at Wachtell, Lipton, Rosen & Katz to live on beach in Costa Rica). For a more upbeat portrayal of the life of tax lawyers, see “Tax Lawyering: A Changing Profession; A Modest Collection of Short Essays,” 46 *Tax Law.* 665 (1993).

³⁹For a discussion of the general portrayal of lawyers in the popular culture, see Anthony Chase, “Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys,” 1986 *Am. B. Found. Res. J.* 281; Anthony Chase, “Toward a Legal Theory of Popular Culture,” 1986 *Wis. L. Rev.* 527; Lawrence M. Freidman, “Law, Lawyers, and Popular Culture,” 98 *Yale L.J.* 1579 (1989); David A. Harris, “The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System,” 35 *Ariz. L. Rev.* 785 (1993); John Katzman, “The Lawyer in Popular Culture: Perception v. Reality,” 55 *Tex. B.J.* 116 (1992); Stewart Macaulay, “Images of Law in Everyday Life: The Lessons of School, Entertainment and Spectator Sports,” 21 *Law & Soc’y L. Rev.* 185 (1987); Robert C. Post, “On the Popular Image of the Lawyer: Reflections in a Dark Glass,” 75 *Cal. L. Rev.* 379 (1987); Thom Weidlich, “A Cynical Age Sees Few Heroes In Its Lawyers,” *Nat’l L.J.*, Nov. 29, 1993, at S26.

⁴⁰See, e.g., Leslie McAneny, “Pharmacists Again Top ‘Honesty and Ethics’ Poll; Ratings for Congress Hit New Low,” *The Gallup Poll Monthly*, July 1992, at 2 (1992 poll placed lawyers 14th out of 25 professions for honesty and ethics, above car salesmen, insurance salesmen, politicians, and labor union leaders, but below doctors, the media, funeral directors, and building contractors; 1992 results reflect approximately 25-percent decline in public’s perception of lawyers’ honesty and ethics since 1976); Randall Samborn, “Anti-Lawyer Attitude Up,” *Nat’l L.J.*, Aug. 9, 1993, at 1, 20 (31 percent of respondents in 1993 poll claimed lawyers were less honest than most people, compared with 17 percent in 1986 poll).

⁴¹For depictions of foreign tax officials, see Herbert E. Bates, *The Darling Buds of May* (1958) (British tax collector); Peter Carey, *The Tax Inspector* (1991) (Australian tax collector); *A Taxing Woman* (Itami Productions 1987) (Japanese tax collector).

⁴²Auchincloss, *Powers of Attorney*, *supra* note 7, at 30; see also D. Robert White, *The Official Lawyer’s Handbook* 148-49 (1987) (depicting tax lawyer as only 1 of 12 lawyers with less than full head of hair in photographic “Guide to Legal Personalities”). But cf. Louis Auchincloss, *Diary of a Yuppie* 44 (1986) (describing tax partner as “a handsome, youthful-looking man still on the sunny side of fifty”).

too exalted on his peak of tax brilliance,"⁴³ with a "neurotic fear of women."⁴⁴ The few women tax lawyers we meet in Auchincloss's legal world generally are more unstable than their male counterparts, including the only female tax partner at a fictional Wall Street firm in *The Partners*:

[A] well-preserved quinquagenarian, the blond-grey curls, the dry skin, the staring eyes, the sticklike figure, the brusque movements, all suggested a being totally desexed, or at least one deprived of those chemicals designed to attract a mate. [She] was not a masculine woman, but she had the will (if not the physique) of an Amazon determined to subsist alone. [The junior tax associate] doubted that she had the smallest interest in the liberation of her sex. She seemed, indeed, to see no function in the sexual organs beyond their power to create six-hundred dollar tax deductions.⁴⁵

There are other similar, more mainstream characterizations of the tax lawyer. For example, the opening scene of NBC's *L.A. Law*⁴⁶ showed the senior tax partner at McKenzie, Brackman, Chaney & Kuzak dead in his office on a Monday morning.⁴⁷ The humor in the scene involved the difficulty of physically removing the body, rigor-mortis having set in over the weekend, with a pincer-like grip on

his CCH tax service. Michael Tucker portrays the only remaining tax lawyer, Stuart Markowitz, as a short, balding, nerdy character with a low sperm count. After playing mainly a background role on the show, he gained more visibility only by abandoning tax to join the other high-profile lawyers in litigation.⁴⁸ Although tax lawyers generally have escaped ridicule in other television shows,⁴⁹ they have been lampooned in television commercials⁵⁰ and in movies.⁵¹

John Grisham's best-selling 1991 novel, *The Firm*,⁵² has thrust tax lawyers into the public eye as never before. Professor Jensen has predicted that, despite its many inaccuracies,⁵³ the book's depiction of a tax lawyer as a swashbuckling hero ultimately may improve the image of tax lawyers in the public mind.⁵⁴ In today's video age, it is unlikely that the book (or indeed, any book) could

⁴⁸See generally Michael Orey, "Sex! Money! Glitz! In-House at L.A. Law," *Am. Law.*, Dec. 1988, at 32.

⁴⁹For an extreme illustration of what can happen when law professors watch too much television, see Paul Joseph & Sharon Carton, "The Law of the Federation: Images of Law, Lawyers, and the Legal System in 'Star Trek: The Next Generation,'" 24 *U. Tol. L. Rev.* 43 (1992). Unfortunately, Professors Joseph and Carton do not discuss the role of tax lawyers in the United Federation of Planets. Cf. Lepow, *Deconstructing Los Angeles*, *supra* note 16, at 70 n.4 (tax professor cites television shows *Santa Barbara* and *Murphy Brown* in article); Richmond & Roehrenbeck, *supra* note 15, at 742 (listing fictional tax professor's favorite television shows as *C-SPAN*, *CNN*, *Sixty Minutes*, *Nightline*, and *Jeopardy*).

⁵⁰In a recent commercial, when two friends argue over whether to watch calf roping or a show about "big shot lawyers," Miller Lite combines the two elements in "The Big Lawyer Roundup" in which cowboys rope lawyers. The second lawyer out of the chute is an overweight tax lawyer who is quickly hog-tied. See Richard B. Schmitt, "Lawyers Plan to Accentuate the Positive," *Wall St. J.*, June 22, 1993, at B1; Ira Teinowitz, "Reviving Miller Lite: Can New Ads Do This?" *Advertising Age*, June 14, 1993, at 3.

⁵¹See, e.g., *Ghostbusters II* (Columbia 1989) (featuring Rick Moranis as nerdy tax lawyer); *Ordinary People* (Universal 1980) (starring Donald Sutherland as tax lawyer-father of emotionally dysfunctional family).

⁵²Grisham, *The Firm*, *supra* note 22.

⁵³See *supra* note 22.

⁵⁴Professor Jensen advises the public (or at least those who subscribe to the *University of Pennsylvania Law Review*) that the book is "a good yarn, with a lot of rock 'em, sock 'em prose and goings-on that cannot be described in an academic law review. . . . Read it for thrills and to gain new respect and admiration for the valiant tax lawyers living in your neighborhood." Jensen, *supra* note 7, at 375, 376. Other commentators combine favorable reviews of the book with potshots at tax lawyers. See, e.g., Corabel Alexander, "'The Firm' is Legal Thriller," *Louisville Courier-J.*, June 10, 1991, at 14 ("Any writer, like John Grisham, who converts tax law into a successful thriller, earns his credit."); Tony Mauro, "Lawyer Takes Novel Step Toward Legal Thrillers," *N.J. L.J.*, Apr. 4, 1991, at 11 ("It is a tribute to Grisham that he has made the world of a firm specializing in tax law seem enthralling.").

⁴³Auchincloss, *Powers of Attorney*, *supra* note 7, at 174. But cf. Louis Auchincloss, *Skinny Island: More Tales of Manhattan* 207 (1987) (senior partner, who had not read recently enacted generation-skipping tax, nevertheless explained statute to client; junior associate had more "plebeian" job of understanding and applying statute in drafting client's will).

⁴⁴Auchincloss, *Powers of Attorney*, *supra* note 7, at 113; see also Louis Auchincloss, *Fellow Passengers* 149 (1989) ("Had I been a man, I should have liked to be a lawyer.").

⁴⁵Auchincloss, *The Partners*, *supra* note 8, at 31-32. Contrast this "desexed" view of the female tax lawyer with one of the first literary references to a woman in the tax context. According to Eleventh Century legend, when Lady Godiva asked her husband, Earl Leofric of Mercia, to relieve Coventry of certain burdensome taxes, he replied that he would do so only if she rode naked through the marketplace at midday. She did, covered only by her long hair, and out of respect for her all the townspeople stayed indoors without looking out their windows, except for a tailor, thereafter known as the "Peeping Tom." See *The Poems of Tennyson* 731-35 (Christopher Ricks ed., 1969).

⁴⁶For more on the impact of *L.A. Law* on the legal profession, see Stephen Gillers, "Taking L.A. Law More Seriously," 98 *Yale L.J.* 1607 (1989); Robert E. Rosen, "Ethical Soap: L.A. Law and the Privileging of Character," 43 *U. Miami L. Rev.* 1229 (1989); Charles B. Rosenberg, "Popular Legal Culture: An L.A. Lawyer Replies," 98 *Yale L.J.* 1625 (1989); "Lawyers and the Media: Is It Time to Pull the Plug on 'L.A. Law'?" *A.B.A. J.*, Jan. 1994, at 34.

⁴⁷Cf. Lawrence K. Altman, "A Bald Spot on Top May Predict Heart Risk," *N.Y. Times*, Feb. 24, 1993, at A1; Glenn Ruffenach, "Bald Men, Objects of Jokes and Pity, Face Cardiac Risk," *Wall St. J.*, Feb. 24, 1993, at B4.

reverse the cumulative weight of unflattering portrayals of tax lawyers. The movie version of the book, however, holds far greater potential.⁵⁵ If Tom Cruise has the same effect on the tax bar as his portrayal of a fighter pilot in *Top Gun*⁵⁶ had on the armed forces,⁵⁷ tax lawyers may finally take their rightful place in the cultural pantheon.

Conclusion

Tax lawyers and professors have only ourselves to blame for the popular perception that Michael Tucker, and not Tom Cruise, is the prototypical tax lawyer. Until we start opening up the tax law to the light of nontax insights, we cannot expect the public to treat us like our nontax counterparts.

⁵⁵*The Firm* (Paramount 1993). Several commentators have worked jibes at tax lawyers into their movie review. See, e.g., Joe Brown, "Lawyers, Guns and Money," *Wash. Post*, July 2, 1993, at N31 (comparing *The Firm* to *Jurassic Park* (Paramount 1993): "'Jurassic' has all the visceral thrills, but for grown-ups, the more cerebral 'The Firm' is far scarier — what could be more terrifying than a pack of hungry tax lawyers?"); Nancy Pate, "'The Firm' Waltzes to the Top," *Orlando Sentinel Trib.*, Mar. 31, 1993, at F1 ("Let's face it. Compared to trial attorneys, tax lawyers come off sounding a bit, well, dull. . . . [W]e don't generally think of tax lawyers as being as sexy as their courtroom counterparts."); Debbie Urbanski, "'Firm' Makes Tax Law Exciting," *Chi. Trib.*, July 30, 1993, at M ("How do you make a firm specializing in tax law interesting enough to sustain a 180-minute film? . . . Now perhaps the idea of mail fraud and bald men don't excite you. But never have men wearing business suits been so frightening.").

⁵⁶(Paramount 1986).

⁵⁷See, e.g., Gene Siskel, "'Top Gun' Shoots for Box-Office Gold, But May Reap Navy Recruiting Bonanza," *Chi. Trib.*, May, 25, 1986, at 10 (predicting that *Top Gun* would aid Navy's recruitment of pilots); James Coates, "New Wave of Patriotism Lifts Military Academies," *Chi. Trib.*, Feb. 22, 1987, at 1 (confirming accuracy of Siskel's prediction).

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