

# Boris Bittker the Scholar

William A. Klein†

A highlight of a semester that I recently spent as a visiting professor at Yale Law School was the opportunity to spend some time with Boris Bittker. On occasions when I went to him with problems that intrigued or puzzled me, he would turn from his work with a friendly word, listen, and respond with the kind of imagination, experience, and insight that people familiar with his work would expect. He was also the ideal companion for a morning coffee break: pleasant, genial, relaxed, witty, and full of interesting ideas and observations. He knows how to listen. His ego never interferes with his intellect. He makes no effort to dazzle people with his insights. He seems to believe that if others fail to follow his thoughts it is more likely to be his fault than theirs, and because of this peculiar trait, the occasions when one is confused by him or misses his point are rare. His writings reflect these personal characteristics. People who have not struggled with the problems he addresses might mistakenly conclude from reading his clear, terse, felicitously stated analyses that the problems he addresses are simple; people familiar with those problems know better. His clarity of expression reflects a remarkable depth of understanding. One often responds to his writing with the thought, "Oh yes, of course," and wonders why previous efforts had been so muddled and so prolix.

These qualities have probably been appreciated most widely by users of the treatise of which he is co-author, *Federal Income Taxation of Corporations and Shareholders*.<sup>1</sup> It began as a work for students, to help them gain a grasp of an exceedingly complex body of law. It quickly became an indispensable tool not only for students but for their teachers; in time, for practitioners; and ultimately for judges. I find it hard to imagine a treatise in any other area of law that has so thoroughly and so deservedly dominated the field.

Now we have a new treatise, *Federal Taxation of Income, Estates, and Gifts*,<sup>2</sup> that has the same qualities of remarkable clarity and insight and is quickly becoming as indispensable a tool to student, teacher, practitioner, and judge. The new treatise is useful as the starting point of one's exami-

---

† Professor, University of California School of Law, Los Angeles.

1. B. BITTKER & J. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* (4th ed. 1979).

2. B. BITTKER, *FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS* (1981).

nation of a tax problem. Often it is all that one needs. At the very least it makes the rest of one's search easier, not just by supplying references, but, more importantly, by providing an understanding of, or at least a framework for understanding, the issues. The quality and value of the treatise is reflected in this statement by a reviewer: "Now that this work has appeared, it is impossible to imagine engaging in a tax practice without it. Indeed, it is nearly possible to imagine engaging in tax practice with nothing else."<sup>3</sup>

Another major contribution of Bittker the scholar is his casebook, the first edition of which was published in 1955 and entitled *Federal Income, Estate, and Gift Taxation*.<sup>4</sup> Widely adopted, the casebook educated both students and teachers (including me). I used the book when I started teaching in 1961 and continue to recommend it to beginning teachers. One attractive feature of the book was its mastery of the law, a mastery that permitted thoroughness with economy of expression. Bittker has a fine sense not only of what to include but of what to leave out. The casebook also reflected his recognition that students must learn rules and concepts, but at the same time should persistently be called upon to ask not just what but why. Bittker challenged the students; he asked good questions, questions that focused on the right issues and were tough enough but not too tough. All the while, he demonstrated a respect for the students' intelligence and their right to form their own opinions.

While the treatises and the casebook are truly impressive achievements, it may be that Bittker's articles on tax policy even better display and are a greater tribute to his intellect and his character. In 1967 he published the article in which he coined the now-standard phrase "comprehensive tax base" (CTB) and began a debate that was the dominant topic of academic tax policy discussion for many years thereafter.<sup>5</sup> The article attacked the vagueness of the criteria used by tax reformers in assigning pejoratives such as "preference" or "erosion" to various provisions of the tax law that they found objectionable. A basic message was that "[t]he systematic elimination of 'preferences' in order to achieve a truly 'comprehensive' base would require many more fundamental changes in existing law than are

---

3. Isenbergh, *Musings on Form and Substance in Taxation* (Book Review), 49 U. CHI. L. REV. 859 (1982).

4. B. BITTKER, *FEDERAL INCOME, ESTATE, AND GIFT TAXATION* (1st ed. 1955). The original edition was published in 1955. The Fourth Edition (1972) was co-authored by Lawrence M. Stone, who assumed principal editorial responsibility for the Fifth Edition (1980), entitled *Federal Income Taxation*. I have become co-author for the Sixth Edition, to be published in 1984. My comments in the text are based primarily on my recollections of pure-Bittker editions that I used when I first began teaching.

5. Bittker, *A "Comprehensive Tax Base" As a Goal of Income Tax Reform*, 80 HARV. L. REV. 925 (1967).

usually acknowledged”<sup>6</sup> or than the proponents of the CTB would seriously propose. The article proved this point in a comprehensive and relentless manner. In doing so, it proved a more fundamental and damning proposition: Widely accepted and academically respectable tax reform proposals offered no observable, coherent theory that would permit an objective identification of which tax provisions deserve to be condemned. Implicit in this heresy, of course, was the idea that many people who, in their condemnation of particular provisions, purported to speak as impartial experts in fact reflected little more than their own unarticulated values, prejudices, or ideologies. But that is my language, not Bittker’s. His is softer, more gracious, more witty. Part of his message was that reformers fail to take account of the demands of practicality or to provide us with any formula for weighing practicality against equity. Reformers sometimes tell us that we should give heavy weight to equity, but fail to tell us what that means. Bittker’s charming and wonderfully effective response to one such suggestion was that “we cannot comply with [the] advice to ‘lean over backward’ to avoid ‘preferences’ because, in the absence of a generally acceptable or scientifically determinable vertical, we cannot know whether we are leaning forward or backward.”<sup>7</sup>

The attack on the weaknesses of the CTB concept was followed by attacks on other fundamental deficiencies in much of tax policy analysis. Bittker reminded us with characteristic persuasiveness that one must take account of behavioral adjustments to tax rules and that it is misleading, for example, to say that interest on state and local bonds is tax-free when in fact there is an implicit tax.<sup>8</sup> In the same vein, he pointed out how the possibility of behavioral adjustments undercuts much of the customary discussion of the unfairness of provisions that seem to favor particular groups of people.<sup>9</sup> This idea may seem obvious; after all, who can claim to be treated unfairly by a provision whose benefits are available to all? But

---

6. *Id.* at 980.

7. *Id.* at 985 (footnote omitted). Another nicely phrased version of this idea is found in B. BITTKER, C. GALVIN, R. MUSGRAVE & J. PECHMAN, *A COMPREHENSIVE INCOME TAX BASE?* (1967): I think that Galvin is right in likening the CTB concept to the first precept of Aquinas, “Do good and avoid evil.” Galvin cannot intend this comparison to be taken literally, since one cannot pair a definition with a principle of behavior; his point, I presume, is that the devotees of the CTB ideal mean to say: “Follow the Haig-Simons definition of income unless it produces adverse results.” If they find this bland principle comfortable, I would not want to rob them of it. For myself, I have never been able to extract from the Angelic Doctor’s first principle any guidance to such issues as therapeutic abortion, the gold standard, or student control over the university’s curriculum; and I find equally little help in the CTB formula as a guide to action when I approach questions of income tax policy.

*Id.* at 126–27.

8. See Bittker, *Equity, Efficiency, and Income Tax Theory: Do Misallocations Drive Out Inequities?*, 16 *SAN DIEGO L. REV.* 735 (1979).

9. See *id.* Bittker, *Income Tax “Loopholes” and Political Rhetoric*, 71 *MICH. L. REV.* 1099, 1121–23 (1973).

fairness arguments are beguiling; they sound good and make a teacher look good. So we often forget to add the note of skepticism or caution dictated by a decent respect for the reality of behavioral adjustments or of free availability. But Bittker does not forget. I learned this recently, to my embarrassment, from his comments on my revisions of his casebook, but his reminders to me were stated with his characteristic wit and gentleness, and in the long run I was more grateful than embarrassed.<sup>10</sup>

In Bittker's policy writings there is a message that is timeless yet of special contemporary significance. It seems to me that in recent years too many law teachers have become insensitive to the obligation of scholars and teachers to do their best to keep ideology out of their scholarly work and out of the classroom. On one side we find the devotees of economic analysis who steadfastly ignore the problem of the second best and its devastating effects on arguments based on allocational efficiency. On the other side we find the utopian socialists and attackers of the status quo who insist on comparing their ideal with our reality and refuse to address the vital question, "Compared with what?" Too many teachers seem able to recognize that we cannot totally remove the effects of our ideologies from the classroom but seem unable to recognize the importance of trying to do so, of doing one's best in an imperfect world. Bittker was unwilling to tolerate the confusion of ideology and expertise.

This was not because he lacked an opinion. Indeed, his sympathies generally were with those he attacked. He referred to himself as a member of a "generation of idealists in their sunset years, still inspired by the ethics of compassion adopted in their youth"<sup>11</sup> and added that his "chagrin, if my doubts about conventional equity analysis can be refuted, would be outweighed by the pleasure of having my faith resuscitated."<sup>12</sup> But he was able to put aside his sentiments and do his duty as a teacher and scholar. He was honest with himself and contributed greatly to keeping the rest of us honest. It is not surprising that he was excoriated for his blasphemy, accused, among other things, of being an enemy of rationality and order who would "turn the tax system over completely to those who thrive on disorder, for then their advantages are beyond judgment and control."<sup>13</sup>

---

10. It is worth noting that Bittker's policy analysis has not been limited to attacks on the errors of others. For examples of his superb synthesis and policy analysis, see Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975); Bittker & Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299 (1976).

11. Bittker, *supra* note 8, at 737.

12. *Id.* at 737 n.3. One should also consider Bittker's book, *THE CASE FOR BLACK REPARATIONS* (1973).

13. Surrey & Hellmuth, *The Tax Expenditure Budget—Response to Professor Bittker*, 22 NAT'L TAX J. 528, 537 (1969).

## Boris Bittker

Bittker's response to this particular attack sharply delineates his attitude about the proper role of the scholar and teacher:

There is no surer way to discredit scholarship than to claim that value judgments can be plucked out of a definition, or even out of an expert. To acknowledge candidly that expertise has its limits is not a counsel of despair, nor does it abdicate to the forces of darkness. Experts can point out problems, offer alternative solutions, illuminate the consequences of choosing one route rather than another, and support their own preferences with argument and rhetoric. At bottom, however, every tax structure, whether on the books or projected, is an assemblage of value judgments on scores of issues that could plausibly have been decided differently. To bestow the label "correct" on any of these human creations is to misuse the term.<sup>14</sup>

What we need in the academic world, today and always, is more of the intellect and the attitude expressed in that passage.

---

14. Bittker, *The Tax Expenditure Budget—A Reply to Professors Surrey and Hellmuth*, 22 NAT'L TAX J. 538, 542 (1969).