

Taxing the Brave New World:
A Comment on Professor Tessa Davis's Article
*Freezing the Future: Elective Egg Freezing and the Future of the Medical
Expense Deduction*

Jennifer Bird-Pollan¹

One standard line of reasoning in the world of tax law scholarship claims that the tax law is objective, treating all taxpayers in the same way and ignoring the particularities that make taxpayers distinct from one another. Taxpayers are measured only by their income! Since all individuals are treated exactly the same, regardless of any distinguishing characteristics, nothing could be more objective than the tax law. Economic position is the only thing that matters! For decades, this model of objectivity has been held up as the standard in tax policy debates. However, in recent years, scholars have started to realize that assuming all taxpayers are (or should be) alike in the eyes of the tax law forces all taxpayers to conform to a norm.² That norm is, in almost all cases, white, straight, and male. The line of thinkers who have begun to point out these assumptions in the world of tax law scholarship are loosely known as Critical Tax Scholars.³ The areas of tax law that critical tax scholarship reaches are expanding, and the medical expense deduction is ripe with possibility for critical tax analyses. In that vein, Professor Tessa Davis's excellent article, *Freezing the Future: Elective Egg Freezing and the Future of the Medical Expense Deduction*, asks us to think through the implications of the future of technology and medical developments through the lens of the United States federal income tax – specifically, the deduction allowed for medical expenses.⁴ This is not Professor Davis's first foray into the murky waters of the medical expense deduction. Her earlier article, *Reproducing Value: How Tax Law Differentially Values Fertility, Sexuality, & Marriage*, explored the deductibility of fertility costs for same-sex couples.⁵ In each of these pieces, Davis looks at questions of the federal income tax through a critical lens, asking us to question assumptions and think through the consequences of treating the “normal” taxpayer as a straight white man.⁶ Using this

¹ Robert G. Lawson Professor of Law, University of Kentucky College of Law.

² Michael A. Livingston, *Radical Scholars, Conservative Field: Putting "Critical Tax Scholarship" in Perspective*, 76 N.C. L. REV. 1791 (1998).

³ For an excellent explanation of the movement known as Critical Tax Theory, see BRIDGET CRAWFORD & ANTHONY INFANTI, *CRITICAL TAX THEORY, AN INTRODUCTION* (2009).

⁴ Tessa Davis, *Freezing the Future: Elective Egg Freezing and the Limits of the Medical Expense Deduction*, 107 KY. L. J. 3 (2019) [hereinafter *Freezing the Future*].

⁵ Tessa Davis, *Reproducing Value: How Tax Law Differentially Values Fertility, Sexuality & Marriage*, 19 CARDOZO J. L. & GENDER 1 (2012) [hereinafter *Reproducing Value*].

⁶ See *Freezing the Future*, supra note 4; *Reproducing Value*, supra note 5.

critical lens allows Davis to uncover elements of the tax code that otherwise remain obscured from view.

In *Freezing the Future*, Professor Davis assesses the likelihood that the costs associated with elective egg freezing, a tool used to extend fertility among young women, will be considered medical expenses and therefore deductible under §213 of the Internal Revenue Code.⁷ This new piece continues Davis's original and insightful scholarship thinking critically about tax law, including about areas of the law that have long been considered "settled".⁸ In this piece, Davis carefully unpacks IRS rulings and recent court decisions to determine what the likely outcome would be, should a taxpayer attempt to take a medical expense deduction for the costs associated with elective egg freezing.⁹ Davis's excellent legal analysis involves close reading of the relevant cases, as well as the statute itself and the regulations and IRS rulings interpreting that statute.¹⁰ Because we do not have guidance from the government regarding how these cases will be decided, Davis takes what we do have and extends the analysis to this new area.

Part of what makes *Freezing the Future* such an excellent example of legal scholarship is Davis's ability to see connections in new and different ways. Again, because there is no federal guidance yet on the deductibility of the costs of freezing one's eggs, Davis must construct a rule by extracting from existing law. Davis takes recent case law addressing the ability of gay men to deduct the costs of reproductive assistance as medical expenses as the starting point for her analysis.¹¹ This allows Davis to take a deep dive into the assumptions that underlie those decisions and apply those to her analysis of what would likely come from a decision regarding elective egg freezing.¹² This work of unpacking preconceived notions and built-in assumptions is Davis at her best. Her critical tax approach to disrupting what tax scholars and practitioners have taken for granted for decades breathes new life into the enterprise and exposes the problems in the analyses that come out of courts and the IRS.¹³

The determination of deductibility/non-deductibility is made difficult in the medical expense context, partly because of the definition of what makes something a taxpayer "choice."¹⁴ Throughout its evolution, the medical expense deduction has been held to be available to taxpayers primarily for non-elective expenses.¹⁵ Indeed, the entire rationale for the existence of the medical expense deduction comes from the idea that taxpayers who incur significant medical costs in a tax year have less income available to them and thereby are appropriately considered less well-off than

⁷ *Freezing the Future*, *supra* note 4.

⁸ *Freezing the Future*, *supra* note 4 at 51.

⁹ *Id.*

¹⁰ *See generally id.*

¹¹ *Id.* at 32–33.

¹² *Id.* at 35.

¹³ *Id.* at 39–40.

¹⁴ *Id.* at 37–38.

¹⁵ *Id.* at 19.

their counterparts who have not incurred such expenses.¹⁶ Medical expenses are inherently personal, but the general rule is that personal expenses are non-deductible.¹⁷ Medical expenses are the exception.¹⁸ Unlike other personal expenses, including housing, food, and clothing, medical expenses are generally held to be non-elective, which justifies their deductibility.¹⁹ The question, and the issue that has remained the main point of contention for taxpayers claiming the medical expense deduction, is what constitutes a “choice.”²⁰ Why is the decision to undergo and pay for medical treatment a choice, when the decision to eat or seek shelter is not (at least not for tax purposes)?

This question of choice is at the heart of Professor Davis’s article, and at the heart of the evaluation of whether or not the costs associated with freezing one’s eggs should be deductible. But acting as though the question of “choice” is something that can be evaluated in the abstract is, to some extent, to fail to understand the evolving nature of medical care.²¹ As Professor Davis points out, the possibility of anticipatorily freezing one’s eggs to extend one’s period of fertility is a relatively new medical development.²² It has historically been the case that a woman’s reproductive possibilities tapered off as she approached middle age. However, the evolution of fertility treatments in the past thirty years has dramatically extended that period for many women and has made pregnancy and childbirth a possibility for those who did not have that option in the past.²³ The IRS and courts have regularly held that the expenses for such fertility treatments, when incurred by women who have been diagnosed with infertility, are eligible to be deducted as medical expenses.²⁴ So why are the costs associated with freezing one’s eggs in order to *avoid* that future struggle with infertility held not to be deductible?

Indeed, the issues around potential infertility and choice are only a part of what makes this discussion difficult. In fact, *all* decisions to have children involve choice. The reality of parenthood in the Twenty-First Century is that most adults have made a choice, either to have children or to take positive steps to avoid having

¹⁶ One of the most complete analyses of the role of personal deductions, including medical expense deductions, can be found in William D. Andrews’ article, *Personal Deductions in an Ideal Income Tax*. William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972).

¹⁷ “Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.” 26 U.S.C. § 262(a) (2012).

¹⁸ See 26 U.S.C. § 213 (2012).

¹⁹ *Freezing the Future*, *supra* note 4, at 19 (“[A]n individual does not choose to develop lung cancer while he does choose to travel to the Bahamas. Thus, income spent to treat cancer is different from other nondeductible consumption.”).

²⁰ See *id.* at 6 (The [IRS’s] definition of preventative care...appeals to the idea that the presence of personal choice disqualifies much preventative care, while ignoring or understating the role of personal choice in a wide swath of qualifying medical care.”).

²¹ *Id.* at 23.

²² *Id.* at 7.

²³ See Kate Brian, *The Amazing Story of IVF: 35 Years and Five Million Babies Later*, THE GUARDIAN (July 12, 2013, 12:34 AM), <https://www.theguardian.com/society/2013/jul/12/story-ivf-five-million-babies> (highlighting how IVF has evolved over the past thirty-five years and there are now “hundreds of centres offering treatment.”).

²⁴ See *Freezing the Future*, *supra* note 4, at 31 (highlighting that the IRS advocates a restrictive view of deductibility for assistive reproductive technologies without a diagnosis of infertility).

children. So, to suggest that those taxpayers who incur significant medical expenses in order to have children are making a “choice” that might make their costs non-deductible, as though that distinguishes those taxpayers from all other taxpayers, seems to fundamentally misunderstand contemporary parenthood. Certainly, this highlights the way in which an emphasis on choice raises the wrong questions altogether. Aren’t all medical treatments at some level “chosen” by the individual receiving those treatments? Some cancer patients seek out every available treatment, however aggressive and expensive. Others elect not to undergo any medical treatment at all, even when given the advice that it would likely be effective. Does the fact that those patients seeking treatment have made a “choice” indicate that their costs should not be deductible? The IRS has never yet attempted to make such a claim, nor do I think they would. Such an argument would be fundamentally inconsistent with the notion of deductibility of medical expenses. But pointing out the absurdity of such a distinction may help to highlight what is so precarious about the line drawing the government attempts in such situations.

At bottom, the fundamental issue with freezing one’s eggs is that it is a *preventative* activity. Rather than treating any diagnosed problem, a person who elects to freeze her eggs is acting anticipatorily to prevent the consequences of a possible future diagnosis of infertility. In this way, freezing one’s eggs is like banking cord blood in anticipation of a future cancer diagnosis.²⁵ Both of these activities are like exercising, keeping one’s weight down, and taking daily vitamins. All of these activities are preventative, meaning they anticipate future medical problems, and attempt to avoid them through action taken before any medical diagnosis occurs. Almost all medical professionals agree that preventative medicine is extremely important.²⁶ Keeping oneself healthy can keep many medical issues at bay, and further, even if one does develop medical problems, taking these preventative steps can lower the treatment costs at the time the problems arise. One could imagine the same would be true of an individual who had anticipatorily frozen her eggs as a young woman. A woman who develops infertility may lower the costs and difficulties associated with treating that infertility if she froze her eggs earlier in her lifetime.

Despite the medical community’s receptiveness to preventative treatments, the IRS has been extremely resistant to allowing the costs associated with those treatments to qualify as medical expenses eligible for a deduction. Why is that? The government’s position has been that, because these costs are incurred before a taxpayer has a diagnosis of an illness or other medical problem, the incurrence of these expenses is a choice.²⁷ These costs are not compelled by the existence of a

²⁵ Many hospitals and other health organizations offer cord blood banking services now, in an attempt to offer additional options to families wishing to preserve this valuable tissue in anticipation of needing it for future medical crises. See, e.g., *Cord Blood Banking*, THE AM. C. OF OBSTETRICIANS AND GYNECOLOGISTS (Feb. 2016), <https://www.acog.org/Patients/FAQs/Cord-Blood-Banking>.

²⁶ See *Health Promotion and Preventative Care*, AM. MED. ASS’N, <https://www.ama-assn.org/delivering-care/health-promotion-and-preventive-care> (last visited Feb. 15, 2019) (“Physicians have a professional commitment to prevent disease....”).

²⁷ *Reproducing Value*, *supra* note 5, at 20.

medical necessity. In that way, the government has made the argument that these costs are merely personal expenses and therefore non-deductible.

While the government claims to have drawn a clear line here, Professor Davis's intuition, which is one I share, is that the line is not so clear.²⁸ Rather than finding an easy way to distinguish between costs that are necessary and those that are elective (and therefore personal and non-deductible), the government has hung too much of its argument on the existence or non-existence of a diagnosis. The point is, *all* women will one day be infertile. Why require a diagnosis of infertility before allowing a taxpayer to deduct the costs associated with taking steps to address that? Indeed, one might ask whether there is some point at which the costs associated with, say, In Vitro Fertilization, which the IRS has regularly held to be deductible,²⁹ should be considered elective? If a woman is 65 years old and elects to undergo IVF in order to get pregnant, should those costs be deductible? If yes, then where should the line be drawn?

One argument for allowing certain costs to be deducted but not others is that providing a deduction serves as an incentive tool, encouraging taxpayers to incur a certain cost, by lowering the economic burden of incurring that cost. While this is not typically the rationale discussed for the medical expense deduction, applying that thinking to medical costs leads to the conclusion that preventative costs should be deductible as well. Part of what Professor Davis has made clear in *Freezing the Future* is that the government has great difficulty in doing rational line-drawing around the medical expense deduction.³⁰ Rather than drawing these lines, perhaps it is time for the government to lift its historic prohibition on the deductibility of the costs of preventive medical treatment. Since the medical community seems in general agreement that preventative medicine lowers overall medical costs and can reduce pain and suffering, as well as medical expenses, in the future, the government should be in the business of encouraging preventive medicine. One way to do this would be to allow the costs associated with preventive medicine, including elective egg freezing, to be deducted.

Turning back to the specific issues of reproductive medicine, elective egg freezing, and fertility treatments more generally, one of the questions raised by Davis's critical examination of the topic is why the government has been so skeptical regarding the tax treatment of the expenses associated with these medical procedures.³¹ The IRS's language in the published rulings around these matters, and the language in judicial opinions when these matters have made it to court, always remains neutral and objective. The discussions always focus on the matter of choice and medical necessity, rather than on any particulars of the case at hand. But the particulars of these cases matter, and they often touch on some of the most politically charged issues in contemporary politics. For instance, in *Magdalin v. Commissioner*,

²⁸ *Freezing the Future*, *supra* note 4, at 26–28.

²⁹ INTERNAL REVENUE SERV., U.S. DEP'T OF STATE, PUB. NO. 502, MEDICAL AND DENTAL EXPENSES 8 (2017).

³⁰ *Freezing the Future*, *supra* note 4, at 21–28.

³¹ *Id.* at 3.

a gay man sought to deduct as medical expenses the costs associated with IVF and surrogacy, so that he could have a child who would be biologically related to him.³² In *Freezing the Future*, Professor Davis addresses scenarios where young women elect to have their eggs frozen so that they can later use them in IVF procedures, which involve fertilizing the eggs in laboratory settings and then inserting the fertilized egg back into the woman's uterus.³³ Each of these examples raise the specter of abortion and the question of when life begins. The *Magdalin v. Commissioner* case also raises the question of gay families and the rights of same sex parents (although Magdalin himself was a single parent).³⁴ Might it be the case that the courts' and the IRS's attempts to talk about these cases in a way that elides the facts is an attempt to avoid talking about these complex matters? Framing the issue as a matter of whether the taxpayer had a "choice" about whether or not to incur the cost allows the arbiters in these cases to avoid making potentially controversial determinations about these complicated matters.

Professor Davis's article *Freezing the Future* helps us to think about the particular set of issues raised by this newly popular medical development, but also starts to think through some of the larger questions around what makes something a "choice" for purposes of the medical expense deduction.³⁵ It is likely that these questions will come up again and again as new and different technologies develop. When the government and the courts address these new questions in their different forms, they will be well-served to follow Davis's lead, dig beyond the "objective" analysis of the "neutral" taxpayer, and use a critical lens as they make their determinations.³⁶

³² *Magdalin v. Commissioner*, 96 T.C.M. (CCH) 491 (2008).

³³ *Freezing the Future*, *supra* note 4, at 8.

³⁴ *Magdalin*, 96 T.C.M. (CCH) at 491.

³⁵ *Freezing the Future*, *supra* note 4, at 18–28.

³⁶ *Id.*