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TILL DEATH DO WE SPLIT: MARRIED COUPLES AND SINGLE PERSONS UNDER THE INDIVIDUAL INCOME TAX

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TABLE OF CONTENTS

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I. HISTORY OF APPROACHES TO THE TAXABLE UNIT

Policy choices are implicit in the income tax rules for attributing income to individuals. Unfortunately, the history of the individual income tax in the United States reveals a general lack of scholarly concern with these underlying policies. Consequently, administrative practice and court decrees have evolved without coordination with the other elements of the tax system. "[M]uch of the apparent illogic of the present pattern of adjusting tax burdens for family circumstances can be best understood as the fruit of ad hoc changes in the tax base or the taxable unit rules in order to correct for unfairness caused by defects in the attribution rules."[1]

A. *Pre-1948 Treatment*

The problem of attribution of income within the family was left to the Commissioner and the courts until 1948. Prior to

1. McIntyre and Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573, 1574-75 (1977) [hereinafter cited as McIntyre and Oldman].

1930, the original concept of the individual as the taxable unit, with earned income attributed to the earner and property income attributed to the title holder, was unquestioned. The United States Supreme Court decided two cases that year which raised questions about the original concept, however. In *Poe v. Seaborn*,[2] the Court held that under the law of community property states, in which income earned by one spouse became property of the marital community, each spouse would be attributed with one-half of the income earned by the other. Yet the Court had earlier held, in *Lucas v. Earl*,[3] that a similar division pursuant to a husband-wife contract would not control attribution of earned income for federal tax purposes.

Given progressive tax rates, the differentiation among taxpayers that resulted from *Seaborn* and *Earl* caused consternation among taxpayers in common-law states and consideration among congressmen of statutory remedies for the perceived unfairness. These remedies included (1) mandatory joint returns (*i.e.* aggregation of incomes of both spouses) for all couples, (2) taxation of community income to the spouse exercising management and control of the income in community property states, and (3) mandatory joint returns with a special allowance for the earned income of either spouse.[4] Perhaps because relatively few individuals were subject to tax[5] and overall tax rates were relatively low, Congress felt insufficient need to adopt any of these plans—they were defeated in 1941.[6] With the onset of World

2. 282 U.S. 101 (1930).

3. 281 U.S. 111 (1930).

4. JOINT COMMITTEE ON TAXATION, 96TH CONG., 2D SESS., THE INCOME TAX TREATMENT OF MARRIED COUPLES AND SINGLE PERSONS 21 (Comm. Print 1980)[hereinafter cited as COMMITTEE REPORT].

5. The portion of the civilian labor force in 1935 was 8.9 percent; in 1940, 26.4 percent. *Id.* at 22.

6.

Year	Percentage of Population Covered	Tax as Percentage of Personal Income
1913	less than 1.0	0.1
1918	7.7	1.8
1926	4.2	0.9
1939	5.0	1.2
1945	74.2	10.0
1950	58.9	8.1
1960	73.1	9.8
1970	80.8	10.4

War II and the corresponding increase in tax rates, however, the differences in taxpayer treatment became "conspicuous and intolerable,"[7] and several of the common-law states made statutory efforts to change to the community property system.[8] Because constitutional doubt had been cast on mandatory joint returns in *Hoeper v. Tax Commission of Wisconsin,*[9] and because other proposals for raising the effective tax on community property couples were defeated, the avoidance of a tax increase to community property was an unspoken premise of the legislative debate leading to the adoption of income splitting for married couples by Congress in the Revenue Act of 1948.[10]

B. Post-1948 Treatment

The Senate Finance Committee Report underscores the political nature of the adoption of the Revenue Act of 1948: "Adoption of these income-splitting provisions will produce substantial geographical equalization in the impact of the tax on individual incomes. The impetuous enactment of community property legislation by States that have long used the common law will be forestalled."[11] The measure had the undoubted political appeal of reducing taxes for the middle and upper-middle income classes without disturbing the tax rates or causing any absolute increase in the taxes of other groups. In retrospect, it is doubtful that Congress "ever intended to alter the distribution of the tax burden in the manner that ex-post analysis reveals."[12] Even in 1948, a foresighted observer cautioned, "[t]he Revenue Act of 1948 appears to have been born under an ill-omened

The underlying personal income estimate for 1913 is the average for 1912-1916; that for 1918 is the average for 1917-1921. *See* R. GOODE, THE INDIVIDUAL INCOME TAX, 4 (rev. ed. 1976).

7. H. GROVES, TAX TREATMENT OF THE FAMILY, 31 (1963) [hereinafter cited as GROVES].

8. Oklahoma, Oregon, Michigan, Nebraska, and Pennsylvania.

9. 284 U.S. 206, 213-14 (1930). There were also fears that the higher tax which would result from such aggregation would encourage divorce for tax purposes, although it was observed that such a phenomenon had not occurred under the aggregation method employed in the United Kingdom. S. REP. No.. 673, 77th Cong., 1st Sess. 9, 36 (1941).

10. Bittker, *Federal Income Taxation and the Family,* 27 STAN. L. REV. 1389, 1416 (1975).

11. S. REP. No. 1013, 80th Cong., 2d Sess. 25 (1948).

12. GROVES, *supra* note 7, at 50.

star."[13]

Thus, in ostensibly seeking to restore the equality of tax treatment of married couples lost as a result of *Poe v. Seaborn*, Congress failed to realize that the advantage enjoyed by married couples in community property states was over all other taxpayers—single and married—and not just over married couples in common-law states.[14] The perceived need for haste led to a politically expedient solution inadequate to forestall future claims of tax discrimination by single taxpayers.[15]

Under the income splitting provision, a married couple pays the same tax per person as a single person with one-half the total taxable income. In 1948, eighty percent of married households had only one earner.[16] Thus, income splitting permitted the vast majority of married earners to enjoy a lower tax bill than their single counterparts at the same income level. For example, at tax rates in effect between 1965 and 1970, a single-earner married couple with taxable income of $32,000 would pay $8,660 in federal income tax using income splitting and filing a joint return. The unmarried earner of the same income would pay $12,210—a difference of forty-one percent.[17]

Supporters of the 1948 Act justified the unequal treatment of unmarried taxpayers by focusing on the greater financial responsibilities of married couples. Despite this justification, it is doubtful that Congress intended the pattern of unequal treatment, increasing in value as income increases, as a correction of the previous inequalities among married couples caused by *Poe v. Seaborn*.[18] In any event, the greater financial responsibility justification raised the question of whether single heads of households should be similarly recognized under the tax code. In 1951, Congress responded to this question by establishing a sep-

13. Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097 (1948)[hereinafter cited as Surrey].

14. Neither the Senate Committee report, *supra* note 11, nor the House Committee report, H.R. REP. No. 1274, 80th Cong., 2d Sess. (1948), takes into account the disadvantage suffered by taxpayers other than married couples in common-law states.

15. Note, *Federal Income Tax Discrimination Between Married and Single Taxpayers*, 7 U. MICH. J. L. REF. 667, 676 (1973).

16. Seitel, *Judge: It Doesn't Pay to Wed and Work*, N.Y.L.J., July 26, 1978, at 1, col. 1 (citing figures compiled by A. Munell)[hereinafter cited as Seitel].

17. 1965 U.S. MASTER TAX GUIDE (CCH) ¶¶ 2, 4 (1964). Tax surcharges are ignored in the calculation.

18. GROVES, *supra* note 7, at 61.

arate tax rate schedule for single heads of households.

The 1951 legislation, however, further complicated the tax system and created its own set of anomalies. For example, the combination of the personal exemption and first dependent's exemption meant a larger overall tax reduction for the single head of household than for the married couple with the same taxable income. This created a "divorce bonus" if each parent kept one child and used the new tax rate.[19] Furthermore, the definition of "dependent" for single heads of households is different from that used in the ordinary dependent's deduction, and the concept of "maintaining a household" is not clearly defined.[20]

Single persons without children increasingly perceived the unfairness in their treatment under the federal tax system. Congress did not respond until 1969, perhaps because average income levels did not grow to the point where the difference was felt acutely enough to cause significant complaint until after the 1950's.[21] At some income levels, a single person's tax liability was as much as 42.1 percent higher than that of a one-earner married couple with the same taxable income.[22] The solution offered in the 1969 Tax Reform Act balanced the two extremes of maintaining the existing status quo and offering the benefits of splitting to single persons: a new lower rate schedule for singles insured that the difference in tax liability between a single person and a married couple with equal taxable income would not exceed twenty percent. The continuing differential was justified by the idea that the tax system should acknowledge additional living expenses incurred by a married couple.[23]

However, the limited relief granted to single persons carried

19. COMMITTEE REPORT, *supra* note 4, at 37.

20. *Id.* at 38. In 1954, Congress unsuccessfully attempted to accord single heads of households the full benefits of income splitting. H.R. REP. No. 1337, 83d Cong., 2d Sess. (1954). The provision which passed extended dependent status to parents of single heads of households, even if living separately, and allowed widows and widowers full income splitting benefits for a period of two years following the death of the spouse. I.R.C. § 2(b)(1)(B)(dependent parents); § 1(a)(2)(surviving spouse) (CCH 1954). Most critics would probably find the rationale behind this classification tenuous. GROVES, *supra* note 7, at 42.

21. As of 1958, 66.5 percent of all returns either did not qualify for the benefits of splitting or received only small dollar benefits; only 17 percent received benefits significantly greater than $40. COMMITTEE REPORT, *supra* note 4, at 72-73 (citing unpublished dissertation of D. Thorson).

22. *See supra* note 17 and accompanying text.

23. COMMITTEE REPORT, *supra* note 4, at 23.

with it a "marriage penalty" affecting two-earner couples, who under the 1969 Act were no longer permitted to use the tax tables for singles. The 1969 Act technically abolished income splitting by carrying forward the pre-1969 rate schedule for married couples filing jointly and severing the connection with the rates applicable to single persons. Thus, the phenomenon of two equal earners suffering a net tax increase by marrying became a part of the tax system. Furthermore, the Act provided the same standard deductions for single and joint returns, thereby creating another disadvantage to married couples. The Tax Reduction Act of 1975, however, mitigated this problem by providing for somewhat higher standard deductions on joint returns.

C. *Present Treatment*

The present scheme of four separate progressive tax rate schedules resulted from the piecemeal congressional treatment of the problems associated with choosing a fundamental unit of taxation. More specifically, contradictory positions throughout the tax code reveal consistent congressional indecision on the proper treatment of married couples versus single persons.[24] The combination of these inconsistent provisions gives rise to what is popularly known as the marriage penalty, the situation in which a two-earner married couple pays more in tax under the joint rates than they would if each were assessed separately under the

24. Some provisions treat each spouse separately, even on a joint return: Keogh plans and Individual Retirement Accounts, the child care credit, the dividend exclusion (with the exception of 1981 and 1982), and the Social Security payroll tax. Other provisions give twice the single person's benefits to married couples filing jointly irrespective of the interspousal distribution of the underlying economic factor: the personal exemption, the political contributions credit, first-year depreciation, loss on small business stock, and (in 1981 and 1982) the dividend exclusion. Another set of provisions treats single persons the same as married couples ("per return" provisions): the capital loss deduction, the earned income credit, the investment tax credit, the addon minimum tax, the disability income exclusion, the one-time capital gain exclusion for principal residence, the limitation on investment indebtedness, the casualty loss deduction, the medical insurance deduction, the moving expense deduction, the insulation credit, and the deduction for removal of architectural barriers. Yet another group of provisions allows married couples more benefits than single persons but less than twice as much: the elderly credit, the zero bracket amount, and the "base amount" affecting inclusion of unemployment compensation in taxable income. COMMITTEE REPORT, *supra* note 4, at 10-15. Even the definition of marriage for tax purposes is not consistent throughout the tax code. *Id.* at 18.

single persons rate. The tax rate schedules and the zero bracket amount are more important, because a marriage penalty generally exists whenever income is split more evenly than eighty to twenty percent. The severity of the marriage penalty increases the more evenly the taxable income is divided between the spouses.[25]

The modern trend toward two-earner families has heightened the importance of the marriage penalty. In 1948, eighty percent of American families were one-earner families. By 1970, that figure had decreased to 36.6 percent, and by 1979 it fell further to 29.7 percent.[26] Conversely, the percentage of families in which both husband and wife earned income rose from a figure of 45.7 percent in 1970 to 50.9 percent in 1979.[27]

D. *Proposals to Relieve the Marriage Penalty*

The growing awareness of the magnitude and extent of the

25. *Id.* at 28. JOINT COMM. ON TAXATION, 97TH CONG., 1ST SESS., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, 33 (Comm. Print 1981)[hereinafter cited as GENERAL EXPLANATION]. The size of the marriage penalty (or bonus) derived from operation of the tax schedules and the zero bracket amount is shown below for couples at various income levels and income splits between spouses under the 1979 tax law.

EFFECT OF MARRIAGE ON TAX LIABILITY AT SELECTED INCOME LEVELS AND EARNINGS SPLITS BETWEEN HUSBAND AND WIFE

	Share of lesser-earning spouse										
	0	5	10	15	20	25	30	35	40	45	50
Total family income	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
$5,000	—250	—210	—170	—133	—98	—63	—28	0	0	0	0
$7,000	—378	—315	—252	—189	—126	—66	—10	46	98	147	168
$10,000	—474	—370	—275	—180	—85	10	100	162	182	200	202
$15,000	—710	—515	—328	—148	32	132	183	220	236	243	251
$20,000	—1,692	—760	—460	—160	42	150	238	300	355	381	391
$25,000	—1,505	—1,055	—630	—268	—30	160	310	447	535	594	611
$30,000	—1,920	—1,334	—749	—334	—26	214	439	644	785	875	903
$40,000	—2,801	—1,821	—939	—338	177	667	1,031	1,329	1,564	1,644	1,692
$50,000	—3,344	—2,094	—1,094	—286	454	1,133	1,731	2,121	2,439	2,574	2,674
$100,000	—3,464	—1,214	359	1,691	2,699	3,474	4,014	4,314	4,369	4,394	4,394

The table assumes that taxpayers have no dependants and do not itemize deductions. Marriage penalties would be smaller, and marriage bonuses larger, for itemizers. Marriage penalties are positive in the table; marriage bonuses are negative.

26. COMMITTEE REPORT, *supra* note 4, at 65.

27. *Id.* Table 2 shows a classification of two-earner families by contributions of the wife's earnings for the year 1977.

greater tax burden imposed on two-earner couples led to congressional consideration of methods to alleviate the effect of the marriage penalty. This concern resulted in the adoption of the "second-earner deduction" as part of the Economic Recovery Tax Act of 1981.[28] Under the new provision, two-earner married couples filing joint returns are entitled to a deduction of ten percent (five percent for 1982) of the "qualified earned income" of the lesser-earning spouse, up to a maximum deduction of $3,000. Reasons given for the choice of the second-earner deduction over other possible schemes included the belief that the greater tax burden imposed on some two-earner families "undermined respect for the family . . . and for the tax system itself" and the feeling that the new provision would eliminate the work disincentive resulting from the taxation of the second earner's income at higher effective marginal rates.[29]

In adopting the second-earner deduction, Congress rejected several other proposals designed to reduce the marriage penalty.

NUMBER OF FAMILIES CLASSIFIED BY CONTRIBUTION OF WIFE'S EARNINGS TO FAMILY INCOME IN 1977

[Number of families in thousands]

Family income	Total	Percent earned by wife: Less than 5	5 to 9.9	10 to 19.9	20 to 29.9	30 to 39.9	40 to 49.9	50 to 74.9	75 or more	Median percent
Total	24,839	3,203	2,285	4,223	4,456	4,406	3,330	2,361	574	26.1
Under $3,000	166	46	4	11	18	15	12	22	37	31.9
$3,000 to $4,999	303	37	36	48	37	26	27	44	47	28.1
$5,000 to $6,999	718	117	89	133	82	70	60	86	81	22.5
$7,000 to $9,999	1,678	247	194	245	236	202	192	257	104	26.5
$10,000 to $12,999	2,435	363	253	416	362	299	305	319	117	25.1
$13,000 to $14,999	1,842	241	204	290	313	269	226	235	63	25.9
$15,000 to $19,999	5,241	734	455	912	878	889	715	576	82	25.9
$20,000 to $24,999	4,654	548	363	712	897	975	754	389	18	27.9
$25,000 to $34,999	5,088	510	382	836	1,081	1,167	773	322	16	27.5
$35,000 to $49,999	2,040	218	201	456	441	405	230	89	1	23.3
$50,000 and over	673	141	105	164	110	89	36	22	8	15.6
Median family income (dollars)	20,039	18,741	18,986	20,399	21,674	22,216	20,848	16,887	10,478	

Source: Bureau of Labor Statistics.

Combining data from Tables 1 and 2 (noting that the result combines demographic data from 1977 with tax computations under the 1979 tax law), one can see that approximately sixty-five percent of two-earner families suffered from the marriage penalty (by authors' calculations).

28. I.R.C. § 221 (1981).

29. GENERAL EXPLANATION, *supra* note 25, at 33-34.

A second-earner credit, although more progressive than the deduction which was adopted, was considered insufficient to reduce the work disincentive at high marginal rates, as well as being more expensive in terms of revenue loss.[30] Mandatory separate filing, which would have returned the tax system roughly to the method in effect until 1948, required overriding community-property laws vis-a-vis attribution of earned income and attributing investment income to the spouse owning the property, (or alternatively, allocating investment income arbitrarily in proportion to earned income, entirely to the higher earning spouse, or equally between spouses). Problems identified with mandatory separate filing included difficulties in allocating deductions betwen spouses and the possibility that allocation rules for investment income could create new marriage penalties or bonuses. Moreover, mandatory separate filing would necessitate writing new rules to prevent low-income earners with high-income spouses from receiving benefits currently designed to reach low-income singles, heads of households, or joint filers.[31] Optional separate filing posed many of the same technical difficulties as well as additional complexity for taxpayers in computing tax liability.[32] Additionally, optional separate filing presumably would result in substantial revenue loss.[33]

II. INCONSISTENCIES AND INEQUITIES

A. *Mutually Inconsistent Goals*

Even when the government's intention is to use the tax system purely to raise revenue and not to regulate social or economic behavior, the goal of a neutral tax system is elusive, if not unattainable. This elusiveness results from three desirable but inconsistent considerations:[34]

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30. COMMITTEE REPORT, *supra* note 4, at 59.

31. GENERAL EXPLANATION, *supra* note 25, at 34; *see also* COMMITTEE REPORT, *supra* note 24, at 47.

32. GENERAL EXPLANATION, *supra* note 25, at 34.

33. COMMITTEE REPORT, *supra* note 4, at 51. Revenue loss and offsetting general tax increase were calculated at $7.0 billion and 3.4 percent if property income and deductions were allocated proportionately to earned income and at $8.7 billion and 4.3 percent if property income and deductions were allocated equally. *Id.*

34. McIntyre and Oldman, *supra* note 1, at 1590. The Meade Report in its 1978 examination of the tax system of the United Kingdom listed six further considerations:

Progressive rate structure. Whether based on the ability-to-pay theory or the equal-sacrifice concept, the idea that the average tax rate should rise as income increases has long been a settled principle of the federal tax system.

Equal taxation of couples with equal incomes. Two couples sharing the same joint income should pay the same amount of tax irrespective of which spouse earned the income or owns the property producing the income. This concept was introduced into the tax system in 1948 with the adoption of income splitting.

Marriage neutrality. There should be no penalty for marriage; a married couple should pay no more tax jointly than each spouse would pay if taxed as a single person. Nor should a

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1. The incentive for a member of the family to earn should not be blunted by tax considerations which depend on the economic position of other members of the family.
2. Economic and financial arrangements within the family (*e.g.*, with respect to ownership of property) should not be dominated by sophisticated tax considerations.
3. The tax system should be fair between families who rely on earnings and families enjoying investment income.
4. Two persons living together and sharing household expenditures can live more cheaply and therefore have a greater taxable capacity than two single persons living separately.
5. The choice of tax units should not be excessively costly to the public fisc.
6. Taxing arrangements should be reasonably simple for taxpayers to understand and for the taxing authorities to administer.

Lister, *Taxation, Women, and the Family*, TAXATION AND SOCIAL POLICY 141 (C. Sandford ed. 1980)[hereinafter cited as Lister].

The Meade Committee's findings were further examined in a Green Paper entitled *The Taxation of Husband and Wife*, CMD. 8093 (1980)[hereinafter cited as Green Paper]. The Green Paper identified the four criteria of fairness—simplicity, sex equality, and privacy—as most important in the British tax system. *Id.* at 1. The concern for privacy seems surprisingly strong in the British tax writings, stressing the need for husbands and wives to be able to keep details of their incomes and taxes confidential from each other. The Green Paper specifically addresses discrimination within the family, noting in addition to the question of privacy the practice of attributing the wife's income to the husband and crediting him with her earned income allowance. *Id.* at 12. One can speculate that there is less concern in the United States with privacy between husband and wife for two reasons: (1) filing jointly does not attribute the income of one spouse to the other; rather, the income is considered as belonging to both spouses; and (2) American couples are given the choice of filing separately. Although the British system has allowed separate assessment since 1914, privacy is not assured, since the couple pays the same aggregate tax and the husband intent on discovering his wife's "secret" earnings can figure the amount by calculating backwards from the amount of tax paid. *Id.* at 7. It is interesting to note, however, that, given the choice between privacy (married filing separately) and lower taxes (married filing jointly), only 1.3 percent of American couples currently opt for privacy. COMMITTEE REPORT, *supra* note 4, at 48.

penalty exist for being single; a single person should pay no more taxes than a person of equal income who is married to a spouse with no income. Concern for marriage neutrality in the tax system motivated the movements culminating in the reduction of tax rates for singles in 1969 and the deduction for second earners in 1981.

To illustrate the inconsistency among the three objectives, consider a single person with a $30,000 income. Under the principle of marriage neutrality, he should pay the same tax as a single-earner married couple with a $30,000 income. Comparing the single-earner married couple with another married couple where each spouse earns $15,000, the principle of equal taxation of couples with equal incomes also suggests that the same tax be paid. The principle of marriage neutrality further mandates that this two-earner married couple should pay the same tax as two single people each of whom earns $15,000. But when this last pair of single persons, each earning $15,000, is compared with the single person earning $30,000, the principle of progressivity holds that the tax should be unequal—that the $30,000 earner should pay more than the two $15,000 earners should pay combined.

Until the adoption of the second-earner deduction in 1981, the federal tax system generally observed the principles that income should be taxed progressively and that equal-income couples should be taxed equally. Thus, the principle of marriage neutrality has necessarily been abandoned, with the burden of inequity shifting somewhat from single persons to two-earner married couples.[35] The remainder of this section will consider the three competing goals and the balance of equities involved therein. It is assumed that the progressive rate structure will be retained.

B. Horizontal Equity: Single Persons Versus Married Couples

The adoption of income splitting for married couples in

35. McIntyre and Oldman suggest that the continuing dissatisfaction with the treatment of single persons versus married couples after the 1969 Act stemmed from the fact that the balance struck represented simply an ad hoc compromise without support in any theory of an ideal income tax. McIntyre and Oldman, *supra* note 1 at 1595.

1948 created a "tax on remaining single," in that a single person, forbidden from splitting income, paid more tax than an equal-income counterpart who split income with a no-income spouse. The single person was better off, in terms of tax liability, by finding someone with no income to marry. This phenomenon becomes more significant than the marriage penalty for two-earner couples at lower income levels and presumably affects more people.[36] Despite the lowering of the tax rate for single taxpayers in 1969, the penalty for being single persists; the 1969 Act simply lowered the maximum differential from more than forty percent to around twenty percent. Perhaps because in 1948 some eighty percent of married couples had only one earner,[37] attention was drawn to the comparison between single persons and married couples for tax purposes.

1. *Family Financial Responsibility Theory*

After its enactment in 1948, the income splitting provision came to be justified as an allowance for the expense of family responsibilities.[38] As a recognition of greater living expenses for married couples, however, income splitting provides too great a benefit. Intuitively, the spouse of a $100,000 single earner would require little if any more than the spouse of a $20,000 single earner in terms of support. Whatever greater expense is necessitated by higher socio-economic class considerations should be viewed as a discretionary, taxable expenditure. The added expense of child rearing is similarly insufficient as a partial justification for income splitting in light of the lower tax benefit accorded to single heads of households. Moreover, income splitting does not differentiate between couples with children and couples without children.[39] Thus, it is not surprising that considerable comment has been made about the "astonishingly large bonus to marriage for high-income couples when most of the income accrued to one partner."[40]

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36. *Id.* at 1588.
37. Seitel, *supra* note 16, at 1, col. 1.
38. Bittker, *supra* note 10, at 1417.
39. J. PECHMAN, FEDERAL TAX POLICY 95 (3d ed. 1977) [hereinafter cited as PECHMAN].
40. Barr, *The Taxation of Married Women's Incomes—I*, 12 BRIT. TAX REV. 398, 406 (1980)[hereinafter cited as Barr].

One commentator has argued that the decision to get married, given its personal nature, would justify granting the working spouse an additional exemption but no further rebate merely because he or she prefers to spend money on a wife or husband rather than it in other ways.[41] However, the persuasiveness of this argument is unclear. Marriage, albeit voluntary, has social consequences which are more nearly fundamental than ordinary consumption expenses. Moreover, if the rearing of children is seen as at least partially imbued with a state interest, then income splitting might be justified as advancing that state interest.

It has been observed that a married couple actually has a greater capacity to pay than do two single people with the same combined income because of the presumed economies of scale enjoyed by a married couple. Many economies of scale, however, accrue to any set of people sharing expenses, whether married or not, and whether living together or not. Census data reveal that there were 1.3 million households in the United States shared by two unrelated adults of the opposite sex in 1979, an increase of 157 percent since 1970.[42] While this figure represents only three percent among all couples, no figures are available on the number of households shared by unrelated adults of the same sex.[43] The number of shared-expense living units is therefore likely to be much higher, with one estimate finding that 62.5 percent of single people share a home with another person.[44] Given these data, it would be inconsistent to argue for the greater ability of married couples to pay without applying the same reasoning to single persons who share expenses. There are counter-arguments, however, that a qualitative difference exists in the economic behavior of the two categories—the greater prevalence of "pooling" of income by married couples and the greater likeli-

41. Pechman, *Income Splitting*, 1 TAX REVISION COMPENDIUM 473, 479 (1959).

42. COMMITTEE REPORT, *supra* note 4, at 27. The Bureau of the Census refers to these people as "POSSLQ's" (person of the opposite sex sharing living quarters), thus filling a void in the English language experienced by many Americans when making introductions.

43. *Id.* at 28.

44. *Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working: Hearings Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. 149 (1972)(statement of Oscar S. Gray (citing figures compiled by Edwin S. Cohen)).

hood that singles share out of a choice to economize, which should not be penalized.[45] In any event, measuring the extent of economies of scale would be difficult and grossly intrusive. The benefits of such a system would not likely outweigh the costs of administration.[46] Further, the tax system should not decide whether people are arranging their lives efficiently or not.[47] Most commentators writing after 1971 reject economies of scale comparisons between married couples and single people on two grounds: (1) assumptions behind the concept of economies of scale vary too frequently from actual experience to justify inclusion in the tax rate schedule, and (2) comparative arguments based on economies of scale operate best at lower income levels and are less reliable as income level increases.[48] For purposes of evaluating the appropriateness of income splitting, then, the economies of scale theory should probably be ignored.

Finally, income splitting does not account for the imputed income of the one-earner married couple—the value of the home services performed by the non-working spouse, such as cooking, caring for children, performing household chores, and entertaining.[49] At the very least, a single-earner married couple, with one spouse free to perform household tasks, plausibly has more real income than the single person who leaves no one at home to do housework, and may pay for services similar to those of the non-working spouse. Arguably this benefit offsets any added burden of support which the married single earner must carry.

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45. Klein, *Familial Relationships and Economic Well-Being: Family Unit Rules for a Negative Income Tax,* 8 HARV. J. ON LEGIS. 361, 386 (1971).

46. *Id.* at 387.

47. *Legislative Proposals Relating to the Comparative Income Tax Treatment of Married Couples, Single Persons, and Heads of Households: Hearings Before the House Committee on Ways and Means*, 96th Cong., 2d Sess. 170 (1980)[hereinafter cited as *Hearings*](statement of Robert S. McIntyre, Director, Public Citizen's Tax Reform Research Group).

48. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 29 (1980)[hereinafter cited as Gann].

49. *See infra* notes 117-23 and accompanying text for discussion of the problematic character of imputed income and possible methods for its taxation.

2. *Pooling Theory*

a. *Benefit Analysis*

Because the family financial responsibility justification for income splitting has not been successful, another theory supporting preferential treatment of married couples vis-a-vis single persons has been suggested. The "benefit" theory recognizes that most taxpayers are married and the majority of marital partnerships are real partnerships in which spouses share economic benefits without much regard for the sources of the family revenue.[50] The thesis behind the theory is that income should be attributed to the person who uses or benefits from the income.[51] Using the Haig-Simons definition of personal income—the market value of consumption enjoyed during the taxable period plus net change in savings—the rule is that each family member should be taxed on the items he actually consumes or accumulates, regardless of source.[52] Thus, the focus is upon who in the family benefits, and the tax is on the uses to which income is put.[53]

Under the benefit theory, the issue is the extent to which sharing marital income justifies differential tax treatment. The immediate question is how much benefit such spouse derives from the income.[54] The degree of precision required by tax legislation demands that the tax system ignore any possibility that each individual may have different capacities to enjoy things that income makes available.[55] Income splitting assumes a fifty-fifty split between husband and wife, and the benefit theory posits that a single-earner couple is economically quite different from a single taxpayer with the same income. The single-earner couple should therefore pay less tax according to the benefit theory under the rationale that "[t]he wife as tax shelter argument . . . is faulty because it misapprehends the relationship between

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50. McIntyre, *Marriage Penalty: Problems with Individual Filing*, 12 TAX NOTES 741, 742 (1981).

51. McIntyre and Oldman, *supra* note 1, at 1575.

52. *Id.* at 1575-76.

53. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 317 (1972).

54. McIntyre and Oldman, *supra* note 1, at 1592-93.

55. GROVES, *supra* note 7, at 18.

the joint filing rule and the progressive rate structure. Under joint filing with income splitting, married persons are assumed to be sharing their incomes, one-half for the benefit of the wife."[56]

While the benefit theory as applied to income splitting may be plausible at lower income brackets, where income is almost entirely for the consumption by family members, a fifty percent consumption by the spouse at high income brackets is dubious.[57] Spouses do not equally share in savings accrued during marriage.[58] Nor do couples equally share important holdings such as business assets, retirement funds, or pension rights.[59] In fact, some upper-income couples maintain completely separate fortunes.[60] Because one justification of progressive taxation is to reduce the economic power of those individuals at very high income levels,[61] the benefit theory cannot adequately justify income splitting. One commentator acknowledges that complete pooling of income probably occurs only at the low and middle income brackets.[62] At minimum, the flaws in the benefit theory allow the greatest tax benefit to the highest income taxpayers who split income via the joint return.

Taken to its logical conclusions, the benefit rule would extend income splitting to all sets of individuals who pool income. Given the increasing number of unmarried couples who may be pooling income,[63] a temptation exists to substitute "social reali-

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56. McIntyre, *Individual Filing in the Personal Income Tax: Prolegomena to Future Discussion*, 58 N.C. L. REV. 469, 482 (1980)[hereinafter cited as McIntyre, *Individual Filing*].

57. PECHMAN, *supra* note 39, at 94.

58. *Taxation of the Family: A Panel Discussion*, 1 CANADIAN TAXATION 16, 17 (1979)[hereinafter cited as *Panel Discussion*](statement of Faye Woodman). Woodman suggests income splitting in the low brackets and income aggregation at higher levels.

59. Dulude, *Taxation of the Family: Joint Taxation of Spouses—A Feminist View*, 1 CANADIAN TAXATION 8, 9 (1979).

60. GROVES, *supra* note 7, at 43 (citing unpublished dissertation of D. Thorson).

61. *See* PECHMAN, *supra* note 39, at 94.

62. McIntyre, *Taxation of the Family: Economic Mutality and the Need for Joint Filing*, 1 CANADIAN TAXATION 13, 14 (1979)[hereinafter cited as McIntyre, *Taxation of the Family*]. Alone among the commentators in the panel discussion, *supra* note 63, McIntyre holds to the idea that substantial real splitting of beneficial enjoyment occurs at upper income levels. "It is only when you make assumptions of 100-0, 75-25, or 80-20 splitting that you produce radical differences in burdens of singles as against marrieds. I could accept 60-40 splitting as a reasonable guess of reality, but I would find a guess of 100-0 or 80-20 splitting as fanciful." *Id.* at 15.

63. *See supra* notes 42-46 and accompanying text.

ties" for the traditional lines of distinction based on legal characteristics such as marital status, support obligations, and rights to property.[64] One commentator has stated that the benefit rule should extend income splitting to children, relatives, or anyone who cohabits.[65]

Splitting would presumably alleviate a problem currently faced by unmarried couples who desire to pool their incomes. Depending on the structure of the pooling agreement, a transfer of earnings may be considered taxable income to the recipient under current law. While a bare pooling agreement may be characterized as a gift,[66] taxable income would arise if it were seen as a "purchase of companionship"[67] or transfer of wealth in exchange for domestic services.[68] Applying marketplace notions to quasifamilial transactions may seem inappropriate, however, and recognition of actual pooling with a corresponding benefit of splitting is arguably better suited to these less-than-arm's-length agreements.[69]

Immense difficulties arise, however, in deciding which pooling situations will be recognized for tax purposes. For example, a "domestic partnership" could require a minimum period of cohabitation.[70] A definition of domestic partnership would be difficult to reach politically and would pose problems in administration. Nonetheless, such a definition is necessary if splitting by unmarried persons is to be permitted at all. Unless such situations are identified and made mandatory, unmarried couples could choose whether to split income and have the best of both worlds. Married taxpayers would not have this option.[71] McIntyre and Oldman acknowledge the difficulty of allowing unmar-

64. Bittker, *supra* note 10, at 1398.

65. Gann, *supra* note 48, at 25.

66. *But cf.* Jones v. Comm'r, 36 T.C.M. (CCH) 1323 (1977)(taxable income arose from "gifts" to female taxpayer by male friend; decision influenced by taxpayer's testimony that friend was "getting his money's worth"); Angstadt v. Comm'r, 27 T.C.M. (CCH) 693 (1968)(male taxpayer denied dependency exemption for support of unmarried female cohabitant on grounds that the woman received "compensation for services rendered rather than support").

67. Wolk, *Federal Tax Consequences of Wealth Transfers Between Unmarried Cohabitants*, 27 U.C.L.A. L. REV. 1240, 1245 (1980)[hereinafter cited as Wolk].

68. *See* 26 CFR § 1.61-2(d)(1981).

69. Wolk, *supra* note 67, at 1245.

70. *Id.* at 1301. Wolk suggests three years.

71. Indeed, if most unmarried couples have dual incomes, joint treatment would not often be preferred.

ried persons to split pooled income under the benefit theory. They suggest that a fiscal definition of marriage might be foreseeable,[72] but the administrative tasks involved in developing and enforcing the tests for "fiscal marriage" would be formidable.

Finally, extension of splitting to unmarried persons via the benefit rule may have the effect of encouraging people to enter into marriage-like relationships without the legal status of matrimony. The possibility of exploitation of one party without legal rights may be sufficient in terms of social policy to keep the tax system from adopting the benefit theory.[73] Administratively and socially, then, income splitting should be considered only within the bonds of matrimony, for better or worse.

b. Aggregation Analysis

The same notions of pooling of income and the family unit that support income splitting under the benefit theory apply equally well to the theory of aggregation of family income. Aggregation involves combining total family income and taxing it at the single persons rate. Under the aggregation approach, the family is seen as a unit of economic mutuality within which the individual members are sufficiently intermeshed economically to be considered a unit for taxpaying purposes.[74] As opposed to the benefit theory, the aggregation concept is that the economic well-being of the entire household should govern the relative size of its contribution to the public fisc.[75] If it is true that husbands and wives typically pool income, then using the individual income of each is a poor index of a couple's economic situation.[76] Many government agencies, particularly those concerned with public assistance, use the family budget as the fundamental

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72. McIntyre and Oldman, *supra* note 1, at 1597.

73. *Panel Discussion, supra* note 58, at 19 (statement of Michael J. McIntyre). But some legal rights as to property may be upheld if one nonmarital partner can prove either an express or implied contract. *See* Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

74. London, *Taxation of the Family: The Family as the Basic Tax Unit*, 1 CANADIAN TAXATION 4, 5 (1979).

75. Brazer, *Comment*, COMPREHENSIVE INCOME TAXATION, 237 (J. Pechman ed. 1977)[hereinafter cited as Brazer].

76. McIntyre and Oldman, *supra* note 1, at 1579.

unit.[77] The Carter Commission, studying the Canadian tax system in the mid-sixties, concluded "[t]axation of the individual in . . . disregard of his inevitably close financial and economic ties with the other members of the basic social unit of which he is ordinarily a member, the family, is in our view [a] striking example of [a] lack of a comprehensive and rational pattern in [the] tax system."[78]

Under the Canadian view, use of the family unit and the aggregation theory is justified in three ways:[79] (1) The family reflects the "basic economic and financial entity" in society. Since resources are pooled within the unit, intrafamily transfers should not be taxed. While in reality the family unit may extend beyond parents and children, considerations of administrative convenience and the problems of tax free transfers between generations militate against recognizing any extended family unit. (2) Horizontal equity among married couples is achieved because aggregation eliminates problems of unequal spousal distribution of income and problems associated with income splitting. Vertical equity considerations are served in that because the family unit gives a clearer picture of discretionary income, the family units should be equitably compared. (3) Since under the aggregation theory intrafamily transfers and splitting arrangements need no longer be policed, administration of the tax system is simpler.

As with the theory of progressive tax rates, ability to pay is a central concept in aggregation. As long as the concept of income aggregation comports with the actual practice of consumption within particular families, the variations in the allocation of consumption within particular families have no bearing on the ability of the family unit to pay taxes.[80]

Under the pure theory of income aggregation, the income of minor children is included with that of the parents.[81] While it is

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77. *See* GROVES, *supra* note 7, at 43.

78. REPORT OF THE ROYAL COMM'N ON TAX'N 122 (1966).

79. *Id.* at 124.

80. McMahon, *Expanding the Taxable Unit: The Aggregation of the Income of Children and Parents*, 56 N.Y.U. L. REV. 60, 89 (1981)[hereinafter cited as McMahon].

81. The benefit theory in its pure form would consolidate children's income with that of the parents if the income were in fact pooled. To avoid administrative problems in this determination, since such consolidation would presumably result in a higher family tax bill, McIntyre and Oldman propose a rule that consolidation be mandatory if a

argued that children's income, at least in families above the subsistence level, is not pooled with parents' income for general family use, actual pooling of the child's income is not required to justify aggregation if such income indirectly benefits the family by freeing part of the parents' income. The use of the child's income to meet his own consumption needs enhances the family's economic power.[82]

Aggregation of children's income is attacked on the ground that it would create disincentives to children's work, given the higher marginal rate that would apply. If the earnings of children are generally small, however, it would seem that a dollar-amount exemption for a child's earnings would solve the problem. Whatever benefits derive from the educational value of work to the child would not be diminished by higher marginal taxation, since the educational value is imputed income and not taxed. In any event, any loss of "educational effect" would not outweigh the positive horizontal and vertical equity considerations of aggregation.[83] Even if most children do not pool their income with the rest of the family but save it for specific personal consumption, no work disincentive results because likely children are relatively tax-inelastic and would work more in order to achieve whatever goal was set.[84] Assuming arguendo a work disincentive, the question becomes whether the disincentive is significant in light of the relatively small contribution made by children to the average family income and, collectively, to the national income.[85]

Separate arguments support the aggregation of children's income from property, even if it is accepted that earnings should be separately taxed to the child. At minimum, income from property transferred to a child by the parents should be aggregated with family income, since transfers are usually seen as tax avoidance devices despite other motives recognized in judicial opinions.[86] Substantial gifts of property to children occur mainly

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dependent's exemption be claimed for the child. McIntyre and Oldman, *supra* note 1, at 1604.

82. McMahon, *supra* note 80, at 85.

83. *Id.* at 93.

84. *Id.*

85. *Id.*

86. *Id.* at 108; GROVES, *supra* note 7, at 98. The Canadian system taxes income from property transferred to or for the benefit of a minor to the transferor, whether related or

in the upper income brackets,[87] where the principle of progressivity suggests that tax avoidance is an important motivation. There is an argument that income from gifts of property to minor children by third parties should also be taxed to the parents, who benefit by being relieved of likely future support.[88] Aggregation of such third-party donated property as income to a child's parents may discourage gifts to children by third parties, and is accepted as a necessary implication of the theory.[89]

The most serious criticism of the aggregation theory is that it would greatly increase the marriage penalty. Under progressive rates, two earners who married would face a higher tax bill than the combination of their taxes as single persons. The institution of aggregation seems politically unfeasible. In fact, a 1941 proposal to tax marital income by aggregation was defeated partially on grounds that the measure would encourage divorce for tax reasons.[90] The United Kingdom employs the principle of aggregation in its tax system, and despite generous mitigating factors such as the Married Man's Allowance and the Wife's Earned Income Allowance, a substantial movement has occurred in favor of a system of individual taxation.[91] While aggregation was the prevalent pattern in Europe historically,[92] international trends within the past decade have been in the direction of individual taxation.[93] In Canada, the Carter Commission's compre-

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not. In the United Kingdom, investment income from property given to children by parents is taxed to the parents, a change from the former rule taxing all children's investment income from whatever source to the parents. McMahon, *supra* note 80, at 109.

87. McMahon, *supra* note 80, at 106.

88. *Id.*.

89. *See* Comment, *Tax Treatment of the Family: The Canadian Royal Commission on Taxation and the Internal Revenue Code*, 117 U. PA. L. REV. 98, 122 (1968). Whether such discouragement is a distortion of rational economic behavior or whether the status quo is the distortion are separate questions.

90. HOUSE WAYS AND MEANS COMMITTEE, REVENUE REVISIONS OF 1941, 1422 (1941), cited in GROVES, *supra* note 7, at 35. It was observed, however, that the British divorce rate in 1941 was not as high as that of the United States despite the use of the aggregation method, although a rather generous "married man's allowance" mitigated the effect of the higher nominal tax.

91. Green Paper, *supra* note 34, at 73.

92. McIntyre, *Taxation of the Family*, *supra* note 62, at 15.

93. Currently Austria, the Federal Republic of Germany, and Italy tax income from all sources to individuals; Belgium, Denmark, the Netherlands, Norway, Sweden, and Finland tax earned income individually but aggregate investment income; France, Luxembourg, Spain, and Switzerland aggregate income in a family tax. Judge, *Ireland: Changes in Personal Taxation*, 20 EUR. TAX'N 76, 80 (1980).

hensive recommendations for the establishment of aggregation-based taxation have been ignored in favor of the status quo of individual taxation.[94] The consensus seems to be that whatever justification there may be for the principle of aggregation, it is not "tax logic" but the political perception of social realities.[95]

3. *Source Theory*

Although income splitting is best explained under the benefit theory, and by implication, the concept of income pooling, it is a tenuous justification. It seems reasonable, then, to reexamine the original theory upon which the income tax was based, that of taxation according to source. Under the source theory, which taxes income on the basis of legal title, the only explanation for income splitting would be as recognition of the imputed income from the care of home and children.[96] Such an idea is unsatisfactory because the value of imputed income would rise progressively with income.[97]

Because no theory has yet provided convincing support for income splitting, it should be abandoned. Although real economic differences may exist between married couples and single

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France is a special case. The family is treated as an economic community, with all income taxed to the head of the household but income split according to a quotient system under which the divisor is the sum of husband and wife at one each, plus children at one-half each. The effect is similar to income splitting in the United States except that the tax benefit increases not only with income but also with family size. The tax system reflects a public policy of encouraging childbearing. M. NORR, WORLD TAX SERIES: TAXATION IN FRANCE 862, 866 (1966).

The Supreme Court of Ireland, interestingly, has recently rejected aggregation as being repugnant to Ireland's constitutional pledge to "guard with special care the institution of Marriage on which the Family is founded and to protect it against attack." *Francis Murphy and Mary Murphy v. The Attorney General*, Judgment of the Supreme Court of Ireland, delivered Jan. 25, 1980. The Court, while acknowledging that the State confers many revenue, social, and other advantages and privileges on married couples and their children, nevertheless held that "the nature and potentially progressive extent of the burden created by aggregation as required under the Income Tax Act . . . is such that . . . it is a breach of the pledge by the State . . . , not compensated for or justified by such advantages and privileges." After the Court's decision, the Minister of Finance decided to allow full income splitting, effective April 1980. Judge, *supra*, at 76.

94. Goodwin, *Provincial Marital Property Laws Recently Enacted or Proposed*, 29 CANADIAN TAX FOUND. 215, 232 (1977).

95. Bittker, *supra* note 10, at 1397.

96. *See* Groves, *Taxing the Family Unit: The Carter Commission's proposals and U.S. Practice*, 22 NAT'L TAX J. 109, 111 (1969).

97. *See supra* note 38 and accompanying text.

persons, perhaps traceable to social and legal consequences of marriage more fundamental than ordinary consumption expenses,[98] such differences can be remedied by exclusions, deductions, or credits.

C. Horizontal Equity: One-Earner Versus Two-Earner Couples

1. Constitutionality of the Marriage Penalty

In addition to favoring one-earner married couples over single persons at the same income level, income splitting, combined with the separate tax rate table for single persons, creates a marriage penalty on two-earner couples when the lesser earner contributes at least 20 percent to the combined income of the two spouses.[99] After the single person rate table became effective in 1971, married taxpayers became increasingly aware of the tax disparity from which they suffered. As a result, several constitutional challenges were brought.[100]

In the most recent case, *Mapes v. United States*,[101] taxpayers argued that the marriage penalty burdened the fundamental right to marry recognized by the Supreme Court in *Zablocki v. Redhail*[102] and thus called for strict judicial scrutiny. The Court of Claims declined the exercise of strict scrutiny, reasoning from *Califano v. Jobst*[103] that such a test is appropriate only when the

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98. Bittker, *supra* note 10, at 1421.

99. *See supra* note 64 and accompanying text.

100. The constitutionality of the single persons penalty was also challenged. In Kellems v. Comm'r, 58 T.C. 556 (1972), taxpayer's assertion that the amount of tax paid by her in excess of that which would be payable if joint return rates were applied to her income was not an income tax but a penalty for remaining single was rejected by the court as being without merit, since no evidence was submitted showing the intent of Congress was to regulate or restrict or penalize persons who are not married. The court also upheld the tax rate system as having a rational basis for the distinction drawn between married and single persons, namely that it was reasonable for Congress to attempt to achieve geographic equality between commonlaw and community-property states and that the degree of recognition given by Congress to the problem of greater financial burdens on the part of married taxpayers was within the discretion of Congress.

101. 576 F.2d 896 (Ct. Cl. 1978).

102. 434 U.S. 374 (1978).

103. 434 U.S. 47 (1977). *Jobst* challenged as interfering with the right to marry the provisions of the Social Security Act that benefits to a dependent child terminate upon the parent's marriage to an individual not eligible for Social Security benefits.

obstacle to marriage is direct, entirely precluding marriage for a certain class of people. The court noted that, although the elevated tax burden might dissuade some couples from marrying, others may be encouraged, stating "[the burden] is suffered not for marrying but for marrying one in a particular income group."[104] The taxpayers also argued for heightened scrutiny on grounds of discrimination against women, claiming that the tax code implicitly treats wives as secondary earners and taxes the wife's income at high marginal rates, thus interfering with the wife's constitutional right to pursue a career. The Court of Claims rejected this argument as well, observing that the tax code is sex neutral and does not treat either spouse's income as primary or secondary. Furthermore, even if the rates were founded upon discriminatory stereotypes, the income splitting system did not work to the detriment of all women.[105] The court thus examined the taxpayers' claims under the reasonableness standard.

The taxpayers argued that treating equal-income married couples equally irrespective of division of contribution conflicts with the fundamental principle of progression, citing the proposition that extra expenses make a two-earner couple worse off than a single-earner couple.[106] The court rejected this argument, holding that although the taxpayers had demonstrated imperfections in the tax system, the imperfections were insufficient to mandate invalidation of the income splitting provisions. The court then concluded that, given the inevitability of such disparities, the judiciary would not interfere with legislative determination of the balance of inequities.[107]

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104. *Mapes*, 576 F.2d at 901.

105. A third constitutional challenge, that the marriage penalty interfered with a taxpayer's freedom of religious practice, was similarly rejected in Johnson v. United States, 422 F. Supp. 958 (N.D. Ind. 1976), *aff'd sub nom.* Barter v. United States, 550 F.2d 1239 (7th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978).

106. Bittker, *supra* note 10; G. Break and J. Pechman, Federal Tax Reform, The Impossible Dream (1975).

107. As a remedy, the court suggested that "the tax-minded young man and woman, whose relative incomes place them in the disfavored group, will seriously consider cohabitation without marriage," given that, otherwise, "our Internal Revenue Code provides an opportunity to the young to demonstrate the depth of their unselfishness" through higher contributions to the federal fisc. *Mapes*, 576 F.2d at 898. *But cf. Francis Murphy and Mary Murphy v. The Attorney General, supra* note 93, declaring a greater tax burden on married people void as against the Irish constitution's protection of the family.

Another possible constitutional challenge to income splitting, based on the tenth amendment by way of *National League of Cities v. Usery*,[108] argues that Congress, through the tax laws, is effectively regulating marriage, a province of state law.[109] However, the tax code appears to base itself upon the local family law and not vice versa. Even assuming that some state interest is infringed, "[c]ongress need not be circumscribed by whatever lines are drawn by local law."[110]

2. *Tax Divorces*

The constitutionality of the marriage penalty having been upheld, other taxpayers sought to avoid the effects of income splitting through more ingenious devices. In *Boyter v. Commissioner*,[111] a married couple were divorced in December of 1975 and 1976 in Haiti and the Dominican Republic, respectively, and remarried in January of the year following each divorce. They filed tax returns as singles for those tax years on the basis of Internal Revenue Code sections 143(a) and 6013(d)(1)(A).[112] The Tax Court upheld the Commissioner's assessment of a deficiency on the grounds that the foreign divorces would not be recognized as valid in the couple's home state since the foreign courts did not have subject matter jurisdiction over the proceedings. Although the court did not reach the Commissioner's argument based on Revenue Ruling 76-255,[113] which provides that, even if the divorces were valid under the law of the home state, they should be disregarded for tax purposes because a year-end divorce in which the parties intend to and do remarry early in the next year is a sham transaction, such treatment of tax divorces likely would also be sustained. In any event, tax divorces are not likely to become a popular means of avoiding the effects of the marriage penalty for the majority of two-earner couples.[114]

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108. 426 U.S. 833 (1976).

109. Note, *Federal Income Tax Discrimination Between Married and Single Taxpayers*, 7 U. MICH. J. L. REF. 667, 682 (1973).

110. Fernandez v. Wiener, 326 U.S. 340 (1945).

111. 74 T.C. 989 (1980).

112. These sections provide that marital status for tax purposes is determined as of the end of the taxable year.

113. 1976-2 C.B. 40.

114. Interestingly, the Boyters divorced for the third time in 1977 and have been living together ever since, thus legitimately availing themselves of I.R.C. §§ 143(a) and

3. *Distinctions Between One-Earner and Two-Earner Couples*

Practically, the marriage penalty may not often influence decisions as to marriage status, although statistical evidence of increased cohabitation among unmarried adults of the opposite sex shows a prima facie correlation.[115] Even if no clear cause-and-effect relationship is demonstrated, the increasing incidence of the marriage penalty[116] demands that serious consideration be given to the goal of marriage neutrality within the tax system. The first step in this analysis is an examination of the relative equities of those who benefit from the marriage "bonus" of income splitting and those who suffer from its penalty. Three distinctions can be made with respect to oneearner and two-earner married couples: (1) the imputed income of the non-earning spouse, (2) the work disincentive effect of the marriage penalty on the second-earner spouse, and (3) the additional work expenses of the second-earner spouse.

a. *Imputed Income*

One commentator has stated that a household in which one adult earns the income while the other stays at home has greater real income and a higher real standard of living than a two-earner household with the same money income.[117] The reason for the supposed larger real income of one-earner family is the value of the services performed in the home by the non-earner spouse, alleviating the need to purchase those services in the marketplace. This concept is known as imputed income. By considering only monetary income, some argue, the tax system yields a poor measure of ability to pay under equity criteria.[118] The non-earner spouse is free to spend his time producing imputed income that is not taxable under the present system. By contrast, the two-earner family does not have as much time available to produce imputed income, because both spouses are

6013(d)(1)(A) for subsequent tax years. *Hearings, supra* note 47, at 164 (statement of Angela M. Boyter).

115. *See supra* notes 42-45 and accompanying text.

116. *See supra* notes 65-67 and accompanying text.

117. Andrews, *Comment*, COMPREHENSIVE INCOME TAX'N 235 (J. Pechman ed. 1977).

118. Gann, *supra* note 48, at 32.

employed, pay tax on their earned income, and either hire others to perform the household services or perform the services themselves as best they can.

Assuming that imputed income does give one-earner couples greater real income and thus greater ability to pay, a problem arises as to how imputed income should be taken into account for tax purposes. Given the enormous variety in the nature and quality of services performed and the difficulty in placing dollar values on them, it would be near impossible to tax imputed income directly. What adjustments would be made for the fact that some spouses are better housekeepers than others, or that some care for five children while others have only one?[119] Furthermore, once imputed income is deemed taxable, linedrawing questions arise. Should the value of home cooking be computed with regard to the cost of eating at a fast-food chain or dining at an haute cuisine restaurant? Should imputed income arise from mowing one's own lawn or shoveling the snow from one's own driveway?

Perhaps a reasonable approach would be to consider only those services which most one-earner families perform and most two-earner families purchase. Several difficulties surface with this method, however. Many two-earner couples perform the same household services usually associated with a non-earning spouse, especially in the case of child care. Yet, in order to perform these services and work as well, two-earner couples must sacrifice leisure time, raising the more general question of whether leisure time itself should be taxed, irrespective of the uses to which it is put. Under this approach, two-earner couples collectively would have less taxable leisure time than would one-earner couples.[120] It can be argued that the leisure of the non-earning spouse—or its alternative characterization as imputed income—constitutes an option to earn, a potential to contribute monetary rather than imputed income to the family budget. This option to earn, like most options, has its own intrinsic

119. *Cf.* McIntyre and Oldman, *supra* note 1, at 1615.

120. *Id.* at 1614-1617. McIntyre and Oldman question the value of a policy which would assign an increased share of the tax burden to the unemployed, children, retirees, and students—those with the greatest amounts of leisure time. *Id.* at 1617. The only kind of leisure in question, however, is the relatively greater leisure time available to one-earner couples than to two-earner couples.

value. The concept finds an alternative expression in the greater security enjoyed by a one-earner family, which has a spouse "in reserve" in case of the incapacity of the breadwinner.[121]

Inconsistencies arise in an imputed income analysis. While as a general rule a one-earner couple may be better off in terms of real income than a two-earner couple, a couple receiving all of its income from property would appear to have as much or more imputed income as the one-earner couple. Similarly, if both spouses work only half-time, each would have imputed income, which, when combined, might equal that of a one-earner couple having equal money income. Inequities would result in an imputed income analysis because the concept is limited in its application to aiding the understanding of the equities between one and two-earner couples.

Considering the relative equities among two-earner couples with both partners working full-time, allocation of income according to source results in tax treatment which varies according to the relative contribution of the partners. Because income is taxed to each partner on an individual basis at progressive tax rates and splitting is not allowed, two partners each contributing fifty percent of the joint income pay less tax combined than do two partners earning equal income but with a relative contribution ratio of seventy-five percent to twenty-five percent. Similarly, the 75:25 percent couple pays less combined tax than a couple with a 95:5 ratio. Income splitting would also treat these couples differently, but in inverse order, with the tax decreasing as the disparity in relative contribution increased.[122]

Under income splitting, the marriage penalty occurs whenever the relative contribution is more nearly equal than an eighty percent to twenty percent ratio.[123] Conversely, under separate taxation, those couples in which the second earner contributes less than twenty percent of the joint income pay more taxes

121. GROVES, *supra* note 7, at 58.

122. Using figures from Table 1, *supra* note 25, under income splitting, partners contributing $15,000 each to a family income of $30,000 pay $903 more in taxes than they would if taxed on their separate contributions. The 75:25 couple, contributing $22,500 and $7,500 respectively, would pay $214 more in taxes. The couple with the greatest disparity in their relative contribution, the 95:5 couple, contributing $28,500 and $1,500 respectively, would save $1,334 in taxes under an income splitting system. At the extreme of the spectrum, a one-earner couple would save $1,929 in taxes.

123. COMMITTEE REPORT, *supra* note 4, at 28.

than they would under income splitting. Assuming the lesser-earning spouse earns the $3.35 per hour minimum wage, yearly earnings would be $6,700, based on a forty-hour work week for fifty weeks. Using this figure as the lowest possible yearly income for a full-time wage earner, and figuring it in as twenty percent of a couple's joint income, the couple would earn $33,500. A two-earner couple with joint income above the $33,500 level would be adversely affected by a switch from income splitting to separate taxation, since the minimum wage second earner would be contributing less than twenty percent of the couple's joint income. Below the $33,500 level, the minimum wage second earner would be contributing more than twenty percent, and this "working poor" couple would benefit from separate taxation.

A final, albeit tentative, argument justifying differential treatment of two-earner couples is that, as the relative contributions of the two spouses grow more unbalanced, the greater earning spouse moves into a higher socio-economic class, with increasing job status. The lesser-earning spouse tends to be carried along, generating imputed income which mitigates the effect of separate taxation on such taxpayers.

b. Work Disincentives

Another factor in the balance of equities between one-earner and two-earner couples is the disincentive to work allegedly suffered by the second earner as a result of income splitting. Statistical studies show that married women are much more sensitive to tax considerations in work decisions than are married men or single persons.[124] Assuming that wives are more likely than husbands to be second earners, income splitting arguably operates to discourage wives from working, since it subjects the income of the second earner to tax at the first earner's marginal rate. The higher rate of taxation on the second earner, viewed in light of the assumption that most second earners are wives and the fact that work at home is not taxed, permits the inference that the tax system—perhaps unintentionally—embodies a policy of encouraging married women to re-

124. *See, e.g.*, Rosen, *Taxes in a Labor Supply Model with Joint Wage-Hours Determinations*, 44 ECONOMETRICA 485, 507 (1976).

main in the home.[125] This subliminal policy was challenged as being unconstitutional in *Mapes v. United States*.[126] Although the Court rejected the discrimination argument on the ground that the tax code is facially sex-neutral, the equitable argument that real-life discrimination exists is nonetheless valid for policy consideration, in which intent is not as important as effect. The effect of the tax system indeed reinforces other factors such as job discrimination and societal pressures, which make it difficult for women to achieve equality in the labor market.[127] The counter argument—that the tax system is not at fault if a married women, because of stereotyped views of marriage, considers herself a marginal worker—ignores the real-life effect of the tax system.[128]

The work disincentive effect has also been found to create behavioral change, resulting in misallocation of resources and economic inefficiency.[129] Efficiency theorists have concluded that taxpayer behavior responds to how the tax system treats second earner income. The price of home goods and services is artificially lowered as a consequence of omitting unpaid work at home from the tax base, resulting in higher production of home goods and services, yielding a misallocation of resources.[130]

One commentator has cast doubt on both the equity and the efficiency arguments, asserting that alleged second earner tax elasticity is relatively unimportant because it measures only the economic response of second earners already in the labor force, not the effect of the tax system on the initial decision to enter the labor market. This commentator contends that the higher marginal tax rate on second earners actually leads to an increase in the labor supply,[131] and that no real discentive exists.

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125. Gerzog, *The Marriage Penalty: The Working Couple's Dilemma*, 47 FORDHAM L. REV. 27, 36 (1978). Gerzog observes that this policy is reinforced by the FICA system, under which a two-earner couple makes twice the contribution of a single-earner couple yet draws only one and one-third the benefit. *Id.* at 37; *see* 42 U.S.C. §§ 402(a)-(b), 402(k)(3)(A) (1976).

126. 576 F.2d 896 (Ct. Cl. 1978).

127. *Hearings, supra* note 47, at 136 (statement of June O'Neill, economist).

128. McIntyre, *Individual Filing, supra* note 56, at 484.

129. Bittker, *Equity, Efficiency, and Income Tax Theory: Do Misallocations Drive Out Inequities?* 16 SAN DIEGO L. REV. 735, 738 (1979) [hereinafter cited as Bittker, *Equity*].

130. *Hearings, supra* note 47, at 136 (statement of June O'Neill, economist).

131. McIntyre, *Individual Filing, supra* note 56, at 486.

People who must work will work; those who do not need to work, will not. However, the increase in number and percentage of working spouses [132] does not negate the existence of the disincentive, but merely indicates that the disincentive has been overcome, in many instances, by family economic need for a second income and the non-economic sociological changes in the attitudes of women toward work outside the home.[133] The disincentive still exists for those spouses who have not entered the labor market; and for those spouses the entire economy suffers a loss of efficiency measured by the difference between foregone salary and the imputed income from staying at home.[134]

c. *Additional Work Expenses*

The final factor creating an imbalance in the equities between one-earner and two-earner couples is the greater work-related expense incurred when both spouses are employed. The problem arises because many work-related expenses—commuting expenses, business clothes, perhaps a second automobile—are not usually deductible as business expenses and thus are treated under the tax code and regulations as personal expenses which the worker must absorb. Because the two-earner couple would have to pay, in effect, twice the work-related expenses of a one-earner couple with equal income, these expenses can be seen as another equitable imbalance from which the two-earner couple suffers.

Section 44A of the tax code provides relief for employment-related expenses for two-earner couples and working single persons who have a child or children under age fifteen and/or a physically or mentally incapacitated dependent or spouse. A taxpayer in these situations can take a credit against tax owed for certain dependent-care and household expenses "if incurred to enable the taxpayer to be gainfully employed."[135] However, prior to the enacting of the predecessor of Section 44A, the Tax Court held, in *Smith v. Commissioner*,[136] that child care and related

132. *See supra* notes 26-27 and accompanying text.
133. Gann, *supra* note 48, at 43.
134. COMMITTEE REPORT, *supra* note 4, at 36.
135. I.R.C. § 44A(c)(2)(A).
136. 40 B.T.A. 1038 (1939), *aff'd mem.*, 113 F.2d 114 (2d Cir. 1940).

expenses were personal and not deductible. The first child care provision, enacted in 1954, gave a very limited benefit by allowing an itemized deduction in hardship cases.[137] In 1964 the limits were raised, but only slightly.[138] A deduction for household expenses was incorporated within the child care provision in 1971, and the maximum income limit was raised from $6,000 to $18,000 with a phase-out up to $27,000. The benefit was extended to married couples with both spouses working full-time that year as well.[139] In 1976 the itemized deduction was changed to a credit of twenty percent of these expenses, up to a maximum credit of $400 for one dependent's expense and $800 for the expenses of two or more dependants, with no limit on the taxpayer's income. However, the 1976 changes replaced the requirement that both spouses work full-time with a limit on allowable expenses, stating that expenses could not exceed the earned income of the lesser-earning spouse.[140] Finally, in 1981 the credit was increased to thirty percent of expenses, with a maximum of $2,400 for one dependant and $4,800 for two. The allowable percentage decreased over a sliding scale from thirty percent at an income of $10,000, to twenty percent at $28,000 and above.[141]

Three rationales for the child care expenses allowance have been put forward: alleviation of hardship, removal of work disincentive, and business expense. While the original intent seems to have been to create a subsidy for the lower income brackets, the 1971 changes expanded the ambit of the provision to cover working people with moderate incomes as well, providing an opportunity for both spouses to work outside the home.[142] However, the idea of removing the work disincentive was not followed consistently, because the income limitation resulted in no removal of the joint return effect at higher marginal rates, where the work disincentive presumably is greatest. The 1976 removal of the income limitation was only a hesitating step toward consistency, because Congress also changed the measure from a de-

137. I.R.C. § 214 (1954).
138. Revenue Act of 1964 § 214.
139. Revenue Act of 1971 § 214.
140. Tax Reform Act of 1976 § 44A.
141. Economic Recovery Tax Act of 1981 § 44A.
142. Schreiber and Yoran, *Child Care Expenses: A Proposal for a More Equitable and Efficient Tax Treatment*, 54 TAXES 345, 348 (1976).

duction to a tax credit, thus making the benefit more valuable at lower income levels and less valuable as income increased. Indeed, the legislative history of the 1981 change, which left in place the basic framework of capped tax credit with no income level limit, speaks both in terms of work disincentive and targeting toward low to middle-income taxpayers: "Congress believed that the child care credit provides a substantial work incentive for families with children . . . . The increases in the credit percentage are directed toward low and middle-income taxpayers because the Congress believed that these taxpayers are in greatest need of relief."[143] However, the work disincentive rationale seems unsatisfactory in light of the fact that the relief accorded under the child care provision does nothing to eliminate similar work disincentives suffered by childless couples.[144] Thus the child care deduction is not an effective way of neutralizing the disincentive effect created by joint filing.[145]

Attempts to characterize the child care expense provision as a simple business deduction initially were rejected. In *Nammack v. Commissioner*,[146] it was argued that the deduction in effect for the year 1965 was a recognition of the additional business expenses of affected taxpayers and, accordingly, there should be no income limit as to its applicability. The Tax Court held, however, that the deduction was a matter of legislative grace and that congressional treatment of child care as a limited business expense by establishing ceilings on income level and allowable deduction was not arbitrary.[147] The language of the 1971 extension of the household expense deduction—"if incurred to enable the taxpayer to be gainfully employed"[148]—indicated a business expense justification for the deduction. In 1976, Congress further implied a business expense justification by removing the income limit, extending the benefit—changed from a deduction to a credit—to all otherwise qualified taxpayers. In the words of the

143. JOINT COMMITTEE ON TAXATION, 97TH CONG., 1ST SESS., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, 53 (Comm. Print 1981).

144. Harmelink and Shurtz, *Child Care Expenses: Current Status and Alternatives*, 53 TAXES 479, 481 (1975).

145. Arnold, *The Deduction for Child Care Expenses in the United States and Canada: A Comparative Analysis*, 12 W. ONTARIO L. REV. 1, 35 (1973).

146. 56 T.C. 1379 (1971).

147. *Id.* at 1383.

148. *See supra* note 135.

1975 House Committee report, "such expenses should be viewed as a cost of earning income for which all working taxpayers may make a claim."[149] However, the use of a credit instead of a deduction tends to undercut the business expense rationale. Because credits are worth more at lower marginal rates, the measure appears to provide more relief to lower income taxpayers.[150] Furthermore, as observed in the work disincentive rationale, relief is accorded only to taxpayers with children.[151]

Part of the conceptual difficulty inheres in the dual nature of child care expenses dealt with in the provision. For example, when the employment of the second earner is not due to financial need, the allowance more likely serves personal rather than economic ends.[152] Certainly expenses for household services, included within the provision since 1971, seem more personal than business in nature and should be treated the same as commuting expenses. True child care expenses, by contrast, share attributes with travel and entertainment expenses in that, strictly speaking, only the incremental cost of the activity over the expense normally incurred at home is a business expense; yet with travel and entertainment, the full expense is deductible. Child care expenses also differ from household expenses in that household chores can be left undone, yet a child cannot be left unattended.[153] Questions arise under the child care expenses allowance as to whether the government should use taxation to support the decision to bear children, whether the rearing of children is a personal decision,[154] and whether the state has responsibility to the next generation to help families with children achieve the same standard of living as the childless.[155] In any event, the child care expense provision of the tax code does not satisfactorily account for the increased work expenses of the two-earner couple.

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149. H.R. REP. No. 658 94th Cong., 1st Sess. 147 (1975). The Senate committee report contained nearly identical language. S. REP. No. 938, 94th Cong., 2d Sess. (1976).

150. McIntyre, *Evaluating the New Tax Credit for Child Care and Maid Service*, 5 TAX NOTES 7, 8 (1977).

151. *See supra* notes 124-34 and accompanying text.

152. Keane, *Federal Income Tax Treatment of Child Care Expenses*, 10 HARV. J. ON LEGIS. 1, 10 (1973).

153. Schaffer and Berman, *Dissents and Concurrances*, 28 TAX L. REV. 535, 544-45 (1973).

154. *E.g.*, GROVES, *supra* note 7, at 22; Brazer, *supra* note 75, at 240.

155. Lister, *supra* note 34, at 147.

D. *Mutually Inconsistent Goals Revisited*

The conclusion to be drawn from examining the balance of equities between one and two-earner couples is that two-earner couples are substantially disfavored under the current tax system. The political origin of income splitting should no longer be a factor in the present tax treatment of married couples. Indeed, the paradigm of the single-earner couple is no longer valid. Recent cases, departing from settled rules, recognize sociological and demographic change. In *Daly v. Commissioner*,[156] the tax home rule was abandoned to allow a husband to deduct long distance commuting expenses while the wife was employed in the couple's home town. In *Nye v. United States*,[157] a two-earner couple was treated as two separate economic entities for purposes of an installment sale from one spouse to the other, followed by sale to a third party.[158]

With the emergence of a new socio-economic norm, the goal of marriage neutrality assumes greater importance in the tax system. While a state interest arguably exists in discouraging one spouse from working to prevent a glut in the labor market[159] or to encourage the performance of services in the home, these policies, if desirable, should be endorsed outright through the political process. Until these conscious policy decisions are made, the tax system should be neutral as to these choices. The marriage penalty no longer is justifiable in tax policy. Accordingly, since the three goals which introduced this section are acknowledged to be mutually inconsistent, where conflicts exist, the goal of marriage neutrality should override that of treating couples with equal money income equally.

III. Proposals for a Coherent Tax System

The discussions of historical political pressures in part I of this Article and the inconsistencies and inequities in part II reveal that no system of taxation will be ideal; some inconsisten-

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156. 631 F.2d 351 (4th Cir. 1980), *rev'g* 72 T.C. 190 (1979).

157. 407 F. Supp. 1345 (M.D.N.C. 1975).

158. 1973-1 C.B. 213 (rejecting Revenue Ruling 73-157).

159. Mess, *For Richer, For Poorer: Federal Taxation and Marriage*, 28 Cath. U. L. Rev. 87, 98 (1978).

cies and inequities will remain no matter which system is chosen. Consequently, political pressures will continue to test the choice. Nevertheless, some systems are better than others. In an effort to determine whether the most satisfactory—or merely the most politically expedient—balance was struck between the competing forces, examinations of the specific proposals most recently rejected by Congress as well as the second-earner deduction provision adopted as part of the Economic Recovery tax Act of 1981 are appropriate.

A. *Optional Separate Filing as Single Persons*

Allowing married couples the option of filing separately using the rate for single taxpayers poses many of the same technical difficulties of dividing marital income as would a system of mandatory separate filing[160] and adds complexity to the system. It would also result in substantial revenue loss.[161] Optional separate filing reduces the marriage penalty and offers the advantage of a slight departure from the current system.[162] Perhaps the greatest shortcoming of this proposal, however, is that it does not conclusively resolve the question of what is the proper tax unit. Optional separate filing would retain the availability of income splitting, a feature of the tax system which has been seriously questioned. Furthermore, the introduction of the option would seem to obscure the rationale of the tax code as it pertains to the relative taxation of single persons and married couples.[163]

B. *Aggregation*

The concept of aggregation of marital income based on ability to pay and income pooling was discussed earlier.[164] A fundamental difficulty with aggregation is that the extent to which income pooling represents actual economic practice in family units is far from clear. Furthermore—perhaps explaining why Con-

160. *See infra* notes 182-229 and accompanying text.
161. COMMITTEE REPORT, *supra* note 4, at 51.
162. *See* Gann, *supra* note 48, at 68.
163. Cook, *The Frustrations of the Marriage Tax*, 13 TAX NOTES 265, 267 (1981)[hereinafter cited as Cook].
164. *See supra* notes 74-95.

gress did not consider aggregation in its most recent reexamination of the income tax—aggregation would greatly increase the penalty suffered when two earners marry, since, given progressive rates, the married couple's tax bill would be greater than the sum of their tax liabilities as single persons. If the balance of equities indicated the desirability of a more nearly marriage neutral tax system, aggregation must be rejected.

C. *Quotient-Based Splitting*

An alternative also not introduced in Congress is the quotient system, currently used in France. This method is an enhancement of income splitting, dividing family income for tax purposes among spouses and children, thus giving the greatest benefit to the single-earner family with the greatest number of children. Adoption of this system in the United States would exacerbate the inequities now resulting from income splitting and therefore is not recommended absent a conscious policy choice favoring large families and a preference for the tax system over, for example, the social security system as the means for accomplishing the policy goal.

D. *Second-Earner Credit*

A credit for two-earner couples is similar to the second-earner deduction adopted as a part of the Economic Recovery Tax Act of 1981 in that a portion of the earnings of the lesser earning spouse is not taxed. Equally as simple and more progressive than a deduction, the credit is less effective per dollar of revenue loss in reducing the work disincentive at the higher marginal rates where, presumably, the disincentive effect is greatest. Although the credit escapes the criticism of the "upside-down subsidy" effect of a deduction, credits are inappropriate as an allowance intended to reflect income. Thus, if the purpose of the second-earner allowance is to account for the greater work expenses of a two-earner couple, the second-earner credit is not as accurate as the second-earner deduction.[165] If part of the purpose of the allowance is relief for lower income two-

165. *Cf.*, Due, *Personal Deductions*, COMPREHENSIVE INCOME TAXATION (J. Pechman ed. 1977).

earner couples, however, a credit would be preferable to a deduction.

A fundamental problem created by the second-earner credit is that, by adding new inconsistencies and inequities atop those already within the multiple rates and income splitting, the credit makes an already incoherent tax system more complex.

E. Second-Earner Deduction

The 1980 Joint Committee Report called the proposal for a second-earner deduction, later adopted as part of the Economic Recovery Tax Act of 1981, "the simplest way of reducing the marriage penalty and marginal tax rates on second earners."[166] This is because the deduction is applied without disturbing the rest of the tax system. The second-earner deduction, however, is not without difficulties. Because the provision applies only to "qualified earned income,"[167] a technical problem exists in distinguishing between earned and unearned income,[168] and in determining what constitutes employment.[169]

Even as a solution to the problem of mitigating the effects of the marriage penalty on second-earner couples, the provision is flawed. Since the deduction is not limited to those second earners who contribute at least twenty percent of family income-those who would suffer from the marriage penalty—the deduction allows some couples to enjoy both the marriage bonus provided by income splitting and the relief extended by the second-earner deduction. Although a limitation of the availability of the deduction to taxpayers actually subject to the marriage penalty would create a tax trap at the cutoff point,[170] a phase-out provision could minimize the effect of such a trap. In any event, the deduction seems preferable to a double benefit, which exacerbates both the one-earner-versus-two-earner and single-versus-married inequities.[171] The provision is also flawed if its purpose is to remedy the plight of two-earner couples who have no im-

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166. COMMITTEE REPORT, *supra* note 4, at 51.

167. I.R.C. § 221 (1981).

168. Thomas, *Marriage Tax "Reform": An Analysis of the Reagan Proposal,* 13 TAX NOTES 259, 263 (1981).

169. GROVES, *supra* note 7, at 81 n.33.

170. COMMITTEE REPORT, *supra* note 4, at 53.

171. *Hearings, supra* note 47.

puted income and are therefore worse off in real terms than their single-earner counterparts. Because the deduction has no requirement linking it to full-time work only, it is not sufficiently precise, and benefits those second earners with high paying part-time jobs.[172]

The legislative history shows that, in addition to the marriage penalty, Congress was concerned with the following other issues: the effect the penalty had on respect for the family; the work disincentive effect of high effective marginal tax rates on the second earner's income; the greater work-related expenses incurred by two-earner couples vis-a-vis single-earner couples; and the lesser amount of free time available to two-earner couples.[173] The second-earner deduction is too narrow insofar as the latter two issues are concerned, because it does not allow for similar differences between single persons and one-earner couples vis-a-vis those taxpayers who receive all of their income from property.[174] A general earned income credit would provide a reflection of the difference in the use of time and energy, however imprecise in monetary terms, for all earners.[175] However, such an allowance to a substantial part of the population would have to be small or it would result in a massive shift of the tax burden to property income.[176] Of course, the foregoing observation would not apply if the second-earner deduction was motivated fundamentally by political concern for the special plight of the working wife and was intended to be taken as a symbol of Congressional approval of the employment of married women outside the home.[177]

The most serious criticism of the second-earner deduction is that it does not satisfactorily resolve the problem of multiple tax rates based on marital status. A quandary exists in separating tax allowances from the structural features of a "normal" in-

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172. *See* McIntyre and Oldman, *supra* note 1, at 1622.

173. *Joint Committee on Taxation, 97th Cong., 1st Sess., General Explanation of the Economic Recovery Tax Act of 1981* 33, 34 (Comm. Print 1981).

174. Gann, *supra* note 48, at 36.

175. *Cf.* Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 377 (1972) ("That difference in use of time and energy, while not easy to value precisely in monetary terms, is arguably better reflected even crudely than left out of account altogether.").

176. McIntyre and Oldman, *supra* note 1, at 1622.

177. Bittker, *supra* note 10, at 1437.

come tax.[178] Furthermore, the second-earner deduction ignores the basic question of what the appropriate tax unit should be, and constitutes an acceptance of income splitting as the norm.

Revenue effects of the second-earner deduction were estimated at a loss of $3.6 billion to $3.7 billion.[179] The deduction will increase the relative burden on single persons and one-earner married couples correspondingly. Apart from a system of mandatory separate filing, however, the second-earner deduction represents the cheapest provision, in terms of revenue loss, for relief of the marriage penalty,[180] making it all the more attractive politically.[181]

F. Mandatory Separate Filing

Mandatory separate filing for married taxpayers provides the best comprehensive approach to the problems discussed in this Article. Under mandatory separate filing, all individuals subject to income tax are assessed as individuals and pay tax according to a single rate scale. Instead of accounting for dependents through application of a different tax scale, deductions or credits are allowed. Because mandatory separate filing compromises the goal of equal taxation of couples with equal income, it would require acceptance of a shift in the balance of equities between different groups of taxpayers. It also poses certain technical problems. Most of the technical problems can be solved, however, and ample justification exists for the shift in the balance of equities.

1. Advantages

Mandatory separate filing provides four basic advantages. First, it eliminates the work disincentive for the second-earner spouse, because it does not begin taxation of the second earner's income at the marginal rate of the first earner, thus minimizing

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178. *Cf.* Bittker, *Equity, supra* note 129, at 747. ("[A]re statutory provisions which reduce the tax on income from personal services . . . commendable features which mitigate a misallocation that is otherwise inherent in the tax itself, or are they sources of affirmative misallocation?").

179. *See* COMMITTEE REPORT, *supra* note 4, at 51.

180. *Id.* at 48, 51, 59, 62.

181. Gann, *supra* note 48, at 37.

distortion in the second earner's decision to work outside the home.[182] Second, mandatory separate filing simplifies the tax system and ends the obfuscation of policy choices and effects caused by multiple tax rate scales. Third, mandatory separate filing ends the need to apologize for the effects of income splitting by removing income splitting from the tax system. Finally, the new scheme renders the tax system generally marriage neutral, thus insulating an individual from "capricious changes in tax burdens when marriage occurs."[183] The failure adequately to account for and tax imputed income of a non-earner spouse or other non-earning individuals yet remains a problem, however.[184]

2. *Technical Problems*

a. *Exemptions*

Income splitting, originally justified as an attempt to recognize the expense of supporting a non-earning spouse,[185] is rejected under mandatory separate filing. Other techniques must thus be employed adequately to account for such support obligations. Greater use of exemptions can accomplish this task.

Four views of dependants exist, affecting the choice of method for recognizing support obligations through tax relief.[186] First, dependents may be viewed as a consumption choice, in which case no tax allowance would be indicated. An exception would be an allowance for only those dependents to whom the taxpayer owes legal obligation for support. Second, dependents may be viewed as a future source of support for the taxpayer, and expenses would be seen as investment. No tax recognition would accrue.[187] Third, the decision to have children, representing an irretrievable choice by the taxpayer, would require support of the dependants, in turn diminishing taxpaying capacity. A tax allowance would be appropriate, particularly if the taxpayer's support of dependants represents a state interest. Fi-

182. Barr, *supra* note 40, at 403, 478, 488.
183. Rosen, *Is It Time to Abandon Joint Filing?* 30 NAT'L TAX J. 423, 427 (1977).
184. Barr, *supra* note 40, at 488.
185. *See supra* notes 38-49 and accompanying text.
186. Bittker, *supra* note 10 at 1445.
187. It is generally agreed that this concept of the dependent is archaic.

nally, the state may wish to reflect a population policy through the tax system. Allowance for dependants may then vary with the number and type of dependants.

Arguably, allowances for dependents should be limited to the lowest income brackets.[188] However, it seems generally accepted that the tax system should acknowledge at least the minimum expenses necessary to satisfy legal obligations of support. If such recognition takes the form of a deduction from gross income, progressive rates render the deduction more valuable to those in higher tax brackets. This feature of a deduction seems to be too great a benefit to higher bracket taxpayers because actual expenses for support of dependents probably do not rise as fast as the value of the deduction.[189] Furthermore, the increased expenses of support at higher income levels probably exceed the minimum level of support and should therefore be regarded as discretionary. The effect of progression on the value of a deduction indeed tends to contradict one of the theories of progression itself: that the application of progressive rates, at least in the upper brackets, is a matter of controlling economic power.[190]

For political, equitable, and administrative reasons, however, restricting allowances for dependents to lower income taxpayers may not be advisable. A credit, calculated on the basis of the tax which would be owed on an income just sufficient to meet basic support expenses, seems more equitable. Extended to all taxpayers, such a credit would contribute to a perception of fairness in the tax system without giving higher bracket taxpayers a disproportionate benefit.

The next question is whether the credit should be uniform or vary according to the type of dependent and, if varied, what the relative size of the credit should be. Budget studies show that the expense of supporting a child is less than that for an adult dependent; that the cost per child decreases as family size increases; and that the cost of support for a married couple is

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188. *E.g.*, GROVES, *supra* note 7, at 22. The argument in a nutshell is that acquisition of a spouse and/or children is a voluntary choice and therefore the expenses are personal; such expenses should be borne by the government, if at all, only when the taxpayer lacks the means to bear them himself. *See also* Brannon and Morss, *The Tax Allowance for Dependents: Deductions Versus Credits*, 26 NAT'L TAX J. 599, 605 (1973).

189. Comment, *Tax Treatment of the Family: The Canadian Royal Commission on Taxation and the Internal Revenue Code*, 117 U. PA. L. REV. 98, 105 (1968).

190. H. GROVES, TAX PHILOSOPHERS 71 (1974).

less than that for two single persons.[191] The relative incomes that would provide roughly equivalent standards of living for single persons, married couples, and dependents appear to be in the ratio of 80:100:25.[192] These figures suggest the appropriate variations which should be instituted in the tax credits.[193]

In the case of a dependent spouse with no income, a credit equal to that of the taxpayer should be allowed. Despite arguments that expenses for support of a spouse are mere consumption expenses, differences exist in terms of legal obligations and general social interest in such support. Because the one-earner couple would suffer most under a mandatory separate filing system, allowing two full credits may be justified despite the likelihood that the couple's minimal support requirements are less than the combined expenses of two single persons. Furthermore, fairness requires that the one-earner couple receive the same personal credits as the two-earner couple, who would presumably receive one full credit for each spouse. By the same token, second-earner spouses earning income too small to qualify for the full personal credit should be allowed to transfer the unused

191. GROVES, *supra* note 7, at 85.

192. J. PECHMAN, FEDERAL TAX POLICY, 75 (3d ed. 1977) [hereinafter cited as PECHMAN, FEDERAL TAX].

193. Indeed, the history of the tax code's treatment of personal and dependent exemptions as shown in Table 3 reveals considerable variation in the relative size of the allowance depending on the type of dependent.

Year	Single Person	Married Persons		Children	
		Dollars	Percentage of single person's exemption	Dollars	Percentage of single person's exemption
1913	$3,000	$4,000	133	$ 0	0
1917	1,000	2,000	200	200	20
1921	1,000	2,500	250	400	40
1925	1,500	3,500	233	400	27
1932	1,000	2,500	150	400	40
1940	800	2,000	250	400	50
1941	750	1,500	200	400	53
1942	500	1,200	240	350	70
1944	500	1,000	200	500	100
1948	600	1,200	200	600	100

U.S. Department of the Treasury, Individual Income Tax Exemptions (1947).

portion to the higher earning spouse.[194] Requiring married taxpayers, taxed separately under this proposal, to file on the same tax return form would minimize administrative problems.

Allowances for children and the treatment of children's income pose special problems. The fact that the expense of supporting a child is considered to be less than that for an adult suggests that a full credit for each child is too generous, especially at lower income levels.[195] A half credit for each child therefore is recommended. The idea of a sliding scale for each additional child must be rejected in favor of simplicity. Since the allowance is in the form of a credit and not a deduction, the credit can be allocated to whichever parent provides support, or to either if both provide support. Unless they marry at an earlier age, children would not be permitted a credit against their own income until they reach age eighteen. Upon reaching age eighteen, the child would be entitled to a full personal credit, and the half-credit to the parent would cease. If, however, the eighteen-year-old did not have enough income to qualify for the full credit, parents would be allowed the full credit as long as the child remained a dependent as determined under current rules.[196] This measure is designed to eliminate the double deduction now available when children have income. While this treatment of children's income—taxing from the first dollar of income upwards—may seem harsh by comparison to the current system, it follows that because children are carried as credits to the parent's income tax liability, no personal allowance to the child himself is indicated.[197] Furthermore, lower tax rates financed by the revenue gain from the switch to mandatory separate filing would relieve the burden.[198] An earned income credit for children, if deemed desirable, would provide further relief. Arguably, this treatment of children's income would en-

194. This type of transferable allowance is based on the proposal of the Green Paper, *supra* note 34, at 22.

195. *See* GROVES, *supra* note 7, at 85. PECHMAN, FEDERAL TAX, *supra* note 192, at 75. *See also* McIntyre and Oldman, *supra* note 1, at 1607.

196. Allowing a full credit to parents of an eighteen-year-old with little or no income would be justified by the likelihood that the eighteen-year-old would be in college, and would therefore present an even greater expense to the parents.

197. For counter-arguments to the work disincentive and loss of educational effect, *see supra* note 83-85 and accompanying text.

198. *See* COMMITTEE REPORT, *supra* note 4, at 48.

courage early marriage, but such an effect likely would not be widespread.

Because no marriage penalty would exist and two-earner couples would be relatively better off than equal-income single-earner couples, the child care allowance is not necessary under mandatory separate filing. The possibility exists, however, of inequity between two-earner couples with children and those without children.

b. *Allocation of Deductions*

Under mandatory separate filing, the proper allocation of deductions not arising under the current system of filing must be addressed. Under the current system, marital income and deductions from that income are aggregated. Exact allocation of deductions to the appropriate spouse presents difficult administrative problems of tracing, often to the point of such minutiae as determining which spouse wrote a given check or the proper treatment of a payment made from a joint checking account. An arbitrary rule seems preferable, although admittedly such a rule "violate[s] the spirit of separate filing and create[s] [its] own marriage bonuses or penalties. . . ."[199] Since a fifty-fifty rule would pose difficulties of transferability in one-income families and those two-earner families in which the lesser-earning spouse had income insufficient to offset fully the half share of the total deductions available, deductions should be allocated according to the proportional share of family income of each spouse. This method has an analogy in Revenue Ruling 80-7,[200] which similarly allocated deductions in calculating a spouse's allocable share of joint income for purposes of determining that spouse's share of a refund.

c. *Effect of* Poe v. Seaborn

Taxation of income according to the system of mandatory separate filing, with earned income allocated to the earner, would necessitate overriding *Poe v. Seaborn*.[201] Ironically, al-

199. *Id.* at 44.
200. 1980-1 C.B. 296.
201. 282 U.S. 101 (1930).

though *Seaborn* gave rise to the movement for geographical equality of tax treatment which resulted in the adoption of income splitting in 1948, it seems generally agreed that a federal overriding of state property law for tax purposes would now survive constitutional challenge.[202] Indeed, like several other provisions of the Internal Revenue Code, the second-earner deduction adopted as part of the Economic Recovery Tax Act of 1981 provides for the determination of qualified earned income "without regard to any community property laws."[203]

d. Treatment of Income from Property

Property income raises the most complex problems under the proposed system of mandatory separate filing. Current law taxes such income to the owner of the asset as determined under state property law. Application of this ownership test as between spouses is usually an academic question under the current income splitting provisions, because allocation between husband and wife is not necessary. Taxation of this income to the spouse whose earned income was used to purchase a given investment causes tracing difficulties which, when compounded over time, prove too great to be overcome by any reasonably simple system of tax administration. Under the proposed system an arbitrary fiftyfifty split or allocation according to proportion of earned income seemingly would provide a new, and undue, form of marriage bonus or penalty. The one relatively simple case appears to be joint interests in property under state law, which could be allocated fifty-fifty.[204]

Since earned income is produced by human capital not eligible for depreciation allowance and, unlike unearned income, necessitates a loss of leisure, unearned income arguably should be taxed at a higher rate.[205] One means of so doing would be to aggregate a married couple's property income, while taxing earned income separately. However, such treatment of property income would amount to a marriage penalty, since the income from one spouse's investments would be stacked atop the

202. *E.g.*, Cook, *supra* note 163, at 271.
203. I.R.C. § 221(b) (1981).
204. *But see*, COMMITTEE REPORT, *supra* note 4, at 38.
205. Lister, *supra* note 34, at 159.

other's, resulting in a higher marginal rate of taxation than if the income were taxed to the spouse separately. Moreover, and more importantly, any differential treatment of income from property necessitates distinguishing between earned and unearned income, an often subtle task rife with potential for great administrative cost and litigation. Although in the past, provisions of the tax code, such as the maximum tax on earned income, have depended on this distinction, the wisest course is to eschew complexity and strive for simplicity. Income from property should therefore be taxed at the same rate as earned income, to the person holding legal title.

e. *Income Shifting*

Of course, by rejecting both splitting and aggregation of income from property, mandatory separate filing encourages shifting of property to the lesser-earning spouse. Attempts to reshuffle property interests, common before 1948, were eliminated by the income-splitting provisions.[206] Shifting interferes with the balance of equities both horizontally and vertically, since families can reduce their aggregate tax liability to the extent that income from investments can be shifted from one spouse to the other to achieve an even income split.

Many commentators point to the situation under Canada's separate filing system, in which serious income shifting problems have been identified.[207] The response of the Canadian taxing authority has been to attribute to the transferor income from certain kinds of property transferred between spouses, leading to tracing difficulties as well as problems in distinguishing the various kinds of property.[208] Because taxpayers frequently have been successful in showing non-tax reasons for the transfer, catch-all provisions in the similar tax codes of Australia and New Zealand, which void any such arrangements entered into for tax avoidance purposes, have been only moderately

206. McIntyre and Oldman, *supra* note 1, at 1590. Of course, adoption of income splitting between husband and wife did nothing to deter further splitting via transfers to children.

207. *E.g., id.* at 1590 n.65.

208. Aikman, *Income Splitting Among Family Members,* 19 CANADIAN TAX FOUND. 187, 188 (1977).

successful.[209]

Under mandatory separate filing, tax conscious individuals likely would reexamine many of the techniques that had been available fore 1948 for income shifting between husband and wife, such as direct gifts of income-producing property, joint ownership, family partnerships, and family trusts. In evaluating whether the new measure was necessary to put an end to ingenious private splitting devices, a contemporary critique of the income splitting provision adopted in 1948 observed that "[t]he courts are doing a respectable job in separating the wheat from the chaff in this field. Those tax advisers who . . . calmly weighed the pros and cons of Supreme Court precedent clearly recognized [in many cases] that the judicial gamble could not be won."[210] Insofar as family partnerships are concerned, in *Commissioner v. Culbertson*,[211] the Supreme Court laid down criteria for establishing a valid arrangement for tax purposes. Family corporations have been rendered less attractive as tax avoidance devices by the combination of the double tax on corporate income with the reduction of the maximum individual tax rate to fifty percent.

Trusts, widely used by taxpayers to shift income to children, pose special problems. Presumably, under the mandatory separate filing system, these trusts would serve as vehicles for shifting income to lesserearning spouses. Because the beneficiary of a trust is taxed on the income that is distributable or distributed to him, with the balance taxed to the trust as a separate entity, a favorable income split will result when the tax brackets of trust and beneficiary are lower than those of the grantor. When accumulated income, taxed to the trust, later is distributed, it is taxed to the beneficiary under I.R.C. sections 665 through 668. Income can thus be diverted from a high bracket taxpayer to a lower bracket taxpayer without giving the beneficiary a present right to the income.

Although the Clifford regulations[212] control some egregious taxpayer abuse of the trust device, there are complaints that trusts still provide too great a benefit to high income individu-

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209. McMahon, *supra* note 80, at 78.
210. Surrey, *supra* note 13, at 1111.
211. 337 U.S. 733 (1949).
212. 26 CFR §§ 1.661-.665 (1982).

als.[213] Many commentators recommend that trusts no longer be recognized as separate tax entities.[214] The American Law Institute is currently considering more fundamental changes in the tax treatment of trusts, which would reduce the potential advantage taxpayers could otherwise take under the mandatory separate filing system.[215] General rules proposed include taxation of trust income not currently distributable (or even if currently distributable if the donee is the grantor or the grantor's spouse) to the grantor if alive, or to the trust at highest individual tax rates if the grantor is not alive.[216] This proposal, if adopted, would virtually eliminate the use of trusts as a means of shifting income to a spouse, whether or not income is currently distributable, and to a child, unless the income is currently distributable.

Nothing in the proposed system of mandatory separate filing would present income shifting to a lower bracket spouse or child through outright transfer of legal title to property. However, such title transfer maintains a modicum of self-discipline. Several commentators have noted that the present system of income splitting has in practice allowed the husband legally to retain the title in property while, for tax purposes, give up half the legal title to his wife.[217] Granting a married couple the benefit of income splitting without regard to legal ownership of property provides no incentive for the actual sharing of legal ownership of property during marriage, however.[218] The more nearly equal sharing of property ownership among married couples can be seen as a good in itself.[219] Apart from whatever intrinsic value

213. *Cf.* Note, *Tax Consequences of an Intrafamily Transfer of a Business Property into Trust for Dependents with a Leaseback by the Grantor's Business*, 73 COLUM. L. REV. 1420, 1448 (1973). ("The apparent policies underlying a progressive income tax system are turned upside down. To those who already have, more is given. Machiavellian justification could be that the poor are appeased by the appearance of an income levelling system while the wealthy are in reality permitted to keep more of their income . . . .").

214. *E.g.*, McIntyre and Oldman, *supra* note 1, at 1597; McMahon, *supra* note 80, at 124.

215. Federal Income Tax Project (Tent. Draft No. 9, 1982).

216. *Id.* at 21.

217. *E.g.*, *Hearings*, *supra* note 47, at 196 (Report of the Action Group on the Marriage Tax Penalty to the Tax Subcommittee of the Interdepartmental Task Force on Women).

218. Gann, *supra* note 48, at 27.

219. Green Paper, *supra* note 34, at 2.

comes from greater sharing, it may reduce the likelihood of conflict—or at least simplify adjudication of rights—upon death and divorce.[220] Arguably, such a reform of property law practice would be unseemly in the tax system. However, tax treatment of property would simply be made more realistic—if one spouse is willing to part with legal title to investment holdings, let the favorable tax consequences follow. Finally, the concept of legal title has force in and of itself, and is emphasized by the current trend toward greater recognition of the property rights of married women.

Another, more direct possible check on property transfers within the family is a capital transfer or gift tax, perhaps imposed on transfers among the same persons listed for attribution purposes in I.R.C. section 318. A moderate tax on such transfers would not unduly restrict alienation of property, yet would prevent the shifting of property back and forth among family members according to yearly fluctuations in income.

With respect to income shifting, mandatory separate filing is admittedly imperfect. Those high income taxpayers with transferable property will be in a better position to benefit from lower tax through manipulation of the system than either lower income taxpayers or those with predominantly earned income. The availability of Individual Retirement Accounts to provide tax relief on earned income, however, mitigates to an extent the disproportionate burden of those who have predominantly or exclusively earned income.[221] Furthermore, the current system, arguably is even more beneficial to high income taxpayers. Nonetheless, the possibility of greater transaction costs and potential litigation exists, although the laissez-faire approach suggested herein indicates that less of a problem would develop than is currently experienced in Canada.

With the understanding that some shifting will occur, the choice has been made in favor of attempting to simplify the system wherever possible. It is assumed that rules such as the family partnership regulations, the Clifford rules, and the ALI trusts

220. *Hearings, supra* note 47, at 143 (statement of Pamela B. Gann).

221. Professor Surrey, writing in 1948, noted that the introduction of income splitting was such a boon to executives and professionals that it obviated the needed for any Individual Retirement Account-type proposals to shelter earned income for them. Surrey, *supra* note 13, at 1113.

proposal will be applied. These provisions, along with use of a transfer tax and the nature of a transfer of legal title in and of itself, will serve as a deterrent to capricious shifting. In light of the elimination of income splitting and the greater progressivity effected by use of personal exemption credits instead of deductions, the advantages should outweigh the problems of income shifting under the proposed system.

3. *Revenue Costs and Shifts in Tax Burden*

Separate taxation of married couples as individuals would decrease the aggregate tax liability for a substantial majority of two-earner married couples and increase the liability of one-earner couples and two-earner couples with substantially disproportionate incomes.[222] The treatment of single people would remain unchanged. Because of abandonment of multiple rate schedules, single heads of households would pay a slightly higher tax. The removal of the work disincentive effect on second earners should expand the work force, generating revenue which could finance tax cuts. While an across-the-board tax cut would not change the relative contributions of each category of taxpayers, it would mitigate the effect of the greater burden upon the one-earner couples and actually lessen the tax load on singles.

Concededly, one-earner couples would bear a larger share of the tax bill under mandatory separate filing than they paid under income splitting, but in the latter case one-earner couples paid less than their share. The proposed system seems to reflect more nearly the appropriate balance of contribution, as well as the appropriate balance of equities. Finally, if demographic trends continue, the percentage of married couples in which both spouses work, already greater than fifty percent, will increase.

4. *Other Policy Justifications*

Two other related reasons exist for incorporating mandatory separate filing into the tax system: the right of an individual to be taxed as an individual, and the recognition of the changing status of women.

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222. *See supra* notes 25-33 and accompanying text.

Although the current system technically allows a married couple to file separately, satisfying a possible due process claim,[223] individual treatment is effectively not given, because in the majority of cases the tax rate is higher than that applicable to married couples filing jointly and splitting income.

In rejecting a joint tax return, the words of the Taxation Review Committee of Australia are instructive:

> The adoption of a compulsory family unit basis must be rejected on grounds of general social principle. The right to be taxed as an individual has always been accorded in Australia. A time when women are playing an ever greater role in the economic and other affairs of society, the withdrawal of this right would certainly be regarded as a retrograde step. . . . [M]en too might take exception to a universal and compulsory commingling of their tax affairs with those of their wives. This would, in the Committee's view, make a change in this direction politically unacceptable. . . . Social attitudes to the separate status of the sexes, rather than purely economic considerations, are involved here.[224]

Although acknowledging conflicting considerations, there may be a general lack of understanding or an underestimation of the degree to which the choice of a tax unit is bound up in ideological and personal considerations of the social roles of men and women.[225] It is important to address these ideological questions explicitly.

International trends in the last decade toward separate taxation of spouses as individuals[226] reflect the growing importance attached to the status and role of women in society.[227] The social roles of women and men have changed. In 1948, when income splitting was introduced, one commentator wrote that "[i]n the general family picture, it is the husband who is the earner of wages, salary, or business profits, thereby providing both the dollars of income and the accumulation of capital producing ad-

223. *See* Hoeper v. Tax Comm'n of Wisconsin, 284 U.S. 206 (1931).

224. Taxation Review Committee, Full Report 134 (Australia, 1975).

225. Lister, *supra* note 34, at 141.

226. Green Paper, *supra* note 34, at 23.

227. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, COMM. ON FISCAL AFFAIRS, THE TREATMENT OF FAMILY UNITS IN OECD MEMBER COUNTRIES UNDER TAX AND TRANSFER SYSTEMS 8 (1977).

ditional dollars of income."[228] The fact that over half of married couples today are two-earner couples demonstrates one aspect of the change in the norm. To those who argue that the tax system, for the good of society, should not encourage the wife to leave home to work, the response is that of Simone de Beauvoir:

> [W]oman's inferiority originated in her being at first limited to repeating life, whereas man invented reasons for living more essential, in his eyes, than the not-willed routine of mere existence; to restrict woman to maternity would be to perpetuate this situation. She demands today to have a part in that mode of activity in which humanity tries continually to find justification through transcendence, through movement toward new goals and accomplishments; she cannot consent to bring forth life unless life has meaning; she cannot be a mother without endeavoring to play a role in the economic, political and social life of the times. . . . [T]he woman who works—farmer, chemist, or writer—is the one who undergoes pregnancy most easily because she is not absorbed in her own person; the woman who enjoys the richest individual life will have the most to give her children and will demand the least from them; she who acquires in effort and struggle a sense of true human values will be best able to bring them up properly.[229]

The system of separate filing does not prefer one role over the other. It simply neutrally provides each spouse with a choice.

IV. CONCLUSION

In fairness, there can be no normative response to the question of the taxable unit and the family unit. In one commentator's words, "the expert must give way to the citizen, whose judgments in the end can rest on nothing more precise or permanent than collective social preferences."[230] Or, as the same observation was made in 1946, "these are technical observations whereas the subject matter involved belongs to the public. So we must leave our conclusions to the test of the afternoon club

228. Surrey, *supra* note 13, at 980.

229. S. DE BEAUVOIR, THE SECOND SEX 495 (H. Parshley transl. & ed. 1949), quoted in Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFFALO L. REV. 49, 95 (1971).

230. Bittker, *supra* note 10, at 1463.

meeting, the locker room, and the bridge table."[231] If in the end, subjective and political judgments are inescapable, we must search for the simplest, most equitable and acceptable solution. For, unless the tax system is generally recognized as fair, the fundamental purpose of the tax will be lost; when the people feel the tax system is unfair, the social and political system under which it operates is in danger of collapse.

231. Surrey, *supra* note 13