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## The Marriage Penalty: The Working Couple's Dilemma

### Cover Page Footnote

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# THE MARRIAGE PENALTY: THE WORKING COUPLE'S DILEMMA

WENDY C. GERZOG\*

## INTRODUCTION

IT has recently been observed that the "Internal Revenue Code provides an opportunity to the young to demonstrate the depth of their unselfishness . . . ."<sup>1</sup> The source of this "opportunity" is the marriage penalty—a curious feature of the tax system whereby the tax liability of a married couple may exceed that of a cohabiting unmarried couple.<sup>2</sup>

The term "marriage penalty" is actually a misnomer. Marriage does not always give rise to a tax penalty; in some cases it results in a tax savings. For example, the tax liability of a single person with an income of \$20,000 is \$3,999.<sup>3</sup> If such a person marries someone with no income and the couple files a joint return, the couple's tax liability is only \$2,899. In this case, marriage produces a tax savings of \$1,100. On the other hand, if both spouses have incomes, a tax penalty results. For instance, if each of two single persons has an income of \$10,000 their combined tax liability amounts to \$2,432. If these persons marry and file a joint return, they must pay a total of \$2,899 in taxes.<sup>4</sup> In this case, marriage results in a tax penalty of \$467. The marriage penalty, therefore, is incurred by the marriage of two income-producing individuals.

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1. *Mapes v. United States*, 576 F.2d 896, 898 (Ct. Cl. 1978). This commentary proceeds as follows: "Formerly society frowned upon cohabitation without marriage, assessing various punitive sanctions by law and custom against the partners themselves, and their innocent offspring. Most of these have now been eliminated in our more 'enlightened' society. Cohabitation without marriage, and illegitimacy, or whatever it is now called, are said to be rapidly increasing. Certainly the tax-minded young man and woman, whose relative incomes place them in the disfavored group, will seriously consider cohabitation without marriage. Thereby they can enjoy the blessings of love while minimizing their forced contribution to the federal fisc. They can synthesize the forces of love and selfishness." *Id.*

2. *See It Doesn't Pay To Wed and Work*, N.Y.L.J., July 26, 1978, at 1, col. 1 [hereinafter cited as *It Doesn't Pay*]. This disparity is a product of the current tax schedules which provide different tax rates for single individuals, married couples filing jointly, married couples filing separately, and heads of household. The rates for married persons filing separate returns are considerably higher than those for single taxpayers. *Mapes v. United States*, 576 F.2d 896, 898-99 (Ct. Cl. 1978); *see* I.R.C. § 1(a)-(d).

3. The figures used in this Article have been derived from the rate schedules in effect for the 1977 tax year.

4. If the spouses file separate returns, their tax liability amounts to \$3,002. Exercise of that option, therefore, generally yields an even greater tax penalty.

Generally, the marriage penalty arises when each spouse contributes at least 20% of the couple's total income. There is, however, no marriage penalty for a couple whose income is \$5,200 or less, even if each spouse provides 50% of the total income. The penalty is greatest when the incomes of the two spouses are equal, and the most burdensome penalty exists when each spouse contributes \$50,000. In the latter instance, the spouses must pay roughly \$6,000 more than two single taxpayers—an additional 6% of their total income—simply because they choose to maintain their incomes after marriage.

The marriage penalty is aggravated by the fact that a couple filing separate returns receives only one-half the zero bracket amount of a couple filing jointly.<sup>5</sup> (The zero bracket amount replaces the maximum standard deduction allowed under prior law.<sup>6</sup>) By statute, the zero bracket amount is \$2,200 for a single individual and \$3,200 for a married couple filing a joint return. A married person filing separately, however, is permitted only \$1,600 as his zero bracket amount and, thus, is taxed on \$600 more than his single counterpart.<sup>7</sup>

In light of the increasing numbers of working wives, the marriage penalty has sparked considerable controversy.<sup>8</sup> Despite vehement protest and extreme measures of avoidance on the part of affected couples,<sup>9</sup> however, the courts have generally been unsympathetic to those subject to the penalty.<sup>10</sup> Furthermore, legislative attempts to alleviate the burden have been thwarted by deference to traditional policies of taxation and fear of revenue losses.<sup>11</sup>

This Article will examine the perplexing policy questions raised by the marriage penalty. Part I will trace the origins of the penalty. Part II will examine the deceptively complex nature of the penalty, its potential effects on taxpayer attitudes toward work and marriage, and its constitutionality. Part III will analyze possible solutions to the marriage penalty and recommend one that, albeit imperfect, is preferable to the status quo.

5. See I.R.C. § 63(d).

6. See Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 102(d), 91 Stat. 126 (codified at I.R.C. § 63(d)). Before this revision, married persons filing separate returns were similarly disadvantaged with respect to the maximum standard deduction and low income allowance. See Congressional Research Service, *Marital Status as a Factor in the Federal Tax Treatment of Individuals 13-14* (1974) [hereinafter cited as *Marital Status*]; Richards, *Discrimination Against Married Couples Under the Present Income Tax Laws*, 49 *Taxes* 526, 527 (1971) [hereinafter cited as *Discrimination*]; Rothblum, *Tax Equity for Marrieds and Singles: A Permanent Dilemma?*, 4 *Tax Notes* 3, 4 (Aug. 23, 1976) [hereinafter cited as *Tax Equity I*].

7. See I.R.C. § 63(d).

8. *It Doesn't Pay*, *supra* note 2, at 1, col. 2. Statistics show that between 1940 and 1977, the number of working women almost doubled and the number of working wives more than tripled. *Id.* at 3, col. 2.

9. See notes 65-66 *infra* and accompanying text.

10. See *United States v. Johnson*, 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*, 98 S. Ct. 725 (1978); *Mapes v. United States*, 576 F.2d 896 (Ct. Cl. 1978).

11. See *It Doesn't Pay*, *supra* note 2, at 3, col. 2; pt. III(A) *infra*.

## I. HISTORICAL BACKGROUND

The marriage penalty has its origin in the relatively recent decision to use the family as the proper unit of taxation.<sup>12</sup> Until 1948, the federal income tax system used the individual as the taxable unit.<sup>13</sup> Each individual, whether married or single, reported all income that he in fact received, and he was taxed without regard to marital status.

Despite the neutral nature of the tax, however, married persons had an inherent advantage. They could reduce their tax liability by shifting their income via interspousal gifts. In addition, married persons in community property law states could effectively split their income.<sup>14</sup> This condition pressured common-law property states to adopt community property laws in order to reduce the tax burden on their residents. To avoid an upheaval of established common-law property concepts, Congress permitted nationwide income splitting.<sup>15</sup> Pursuant to the Revenue Act of 1948,<sup>16</sup> every married couple was permitted to aggregate the incomes and deductions of the spouses, file a joint return, and pay twice the amount of a single individual's tax on one-half of its total income.<sup>17</sup>

The wisdom of Congress' response in 1948 is questionable. Income splitting has resulted in a tremendous loss of revenue.<sup>18</sup> Moreover, favorable tax treatment for married couples in community property law states may not be unwarranted. Community property laws create distinct property interests that are derived from each spouse's legal ownership of one-half of the couple's community property.<sup>19</sup> True geographical neutrality might better have been achieved by a state-by-state conversion to community property principles. Nevertheless, Congress did not wish to activate a hasty and solely tax-motivated overhaul of the traditional property law concepts prevailing in a great number of states. Therefore, it permitted nationwide income splitting

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12. A discussion of the penalty, therefore, necessitates a reevaluation of that decision. See Bittker, *Federal Income Taxation and the Family*, 27 Stan. L. Rev. 1389, 1393-94 (1975); Rothblum, *Tax Equity Between the Married and Single: Solutions Causes Problems*, 4 Tax Notes 12, 16 (Sept. 6, 1976) [hereinafter cited as *Tax Equity II*].

13. Marital Status, *supra* note 6, at 5; *Tax Equity I*, *supra* note 6, at 4.

14. Income splitting provides a 50-50 division of income and yields the lowest possible tax in a progressive rate system. *Tax Equity I*, *supra* note 6, at 4.

15. See Marital Status, *supra* note 6, at 6; B. Okner, *Income Distribution and the Federal Income Tax* 69 (1966); J. Pechman, *Federal Tax Policy* 92 (3d ed. 1977).

16. Revenue Act of 1948, ch. 168, 62 Stat. 110 (current version in scattered sections of I.R.C.).

17. *Id.* § 301 (current version at I.R.C. § 6013); Bittker, *supra* note 12, at 1412-13.

18. H. Groves, *Federal Tax Treatment of the Family* 74 (1963). It has been suggested that the government has been paying in excess of \$5.6 billion annually for its gesture in 1948. B. Okner, *supra* note 15, at 70.

19. Underlying community property law is a tacit acknowledgement of the value of one spouse's (traditionally the woman's) services in the home. Hall, *The Working Woman and the Federal Income Tax*, 61 A.B.A. J. 716, 716 (1975).

and, in so doing, substituted the family for the individual as the unit of taxation.

Congressional rejection of the individual as the taxable unit did more than alleviate the problems of geographical inconsistency and income shifting through interspousal gifts. Prior to 1948, in common-law property states, couples with individual incomes of \$6,000 and \$4,000 were taxed differently from couples with individual incomes of \$7,000 and \$3,000. The 1948 reforms provided for equal tax treatment of such couples, and thus a form of horizontal equity among married couples was instituted.<sup>20</sup>

Interspousal income splitting, however, subjected single taxpayers to a greater tax liability than that of married couples with the same income. Single taxpayers, of course, opposed this disparity, which in some cases amounted to 41%.<sup>21</sup> They claimed that the decision to marry and to support another person was a personal one which was already compensated through the tax system by a greater exemption given a married couple than that afforded a single individual.<sup>22</sup> The President of Single Persons Tax Reform called for the extension of head of household rates<sup>23</sup> to all singles who run their own households and the allowance of two exemptions for single householders over the age of thirty-five.<sup>24</sup> She dubbed all single women over the age of thirty-five "war single women" because they had been robbed of potential husbands through losses in the male population due to war. She maintained that such women should not be stigmatized further by a tax system which favors married persons.<sup>25</sup>

The severity of the tax burden imposed upon single persons impressed many legislators, and in the Tax Reform Act of 1969, Congress responded to the complaints by extending to all single taxpayers the benefits of partial income splitting.<sup>26</sup> The rates were lowered so as to subject the single taxpayer to no more than a 20% differential

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20. Bittker, *supra* note 12, at 1439. For a discussion of horizontal equity principles, see pt. II(A)(1) *infra*.

21. See S. Rep. No. 552, 91st Cong., 1st Sess. 260 (1969), reprinted in Internal Revenue Acts: Text and Legislative History 1966-1970, at 1909 (1971).

22. Bittker, *supra* note 12, at 1421; *Tax Equity I. supra* note 6, at 8.

23. Between 1948 and 1969, the major steps toward tax reduction consisted of the adoption and extension of head of household status. Head of household rates were accorded to single persons with certain qualified dependent relatives and reflected a tax burden that fell somewhere between the rates for married couples and those for single individuals. Marital Status, *supra* note 6, at 7.

24. *Tax Reform, 1969: Hearings Before the House Comm. on Ways and Means*, 91st Cong., 1st Sess. 1976-77 (1969) (statement of Dorothy Shinder).

25. *Id.* Of course, in light of the recent advances in the area of women's rights, this argument would hardly find favor today.

26. See Tax Reform Act of 1969, Pub. L. No. 91-172, § 803, 83 Stat. 487 (codified at I.R.C. § 1(c)); *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. 84 (1972) [hereinafter cited as 1972 Hearings] (statement of Edwin S. Cohen).

between his tax liability and that of a married couple with the same taxable income.<sup>27</sup>

Essentially, the Tax Reform Act of 1969 constituted an unsatisfactory compromise. Many single persons resented the fact that they continued to be taxed more severely than one-earner married couples who reported the same amounts of income but who were able to benefit fully, and not merely partially, from the provisions of income splitting.<sup>28</sup> Moreover, a new class of dissident taxpayers arose: the two-earner married couple.<sup>29</sup> This group of taxpayers was unable to use the lower rate schedules provided for single individuals when each spouse filed a separate return. Thus, the marriage penalty came into being: two income-producing persons sharing the same household increased their tax burden by marrying and continuing to work.<sup>30</sup>

## II. ANALYSIS OF THE MARRIAGE PENALTY

### A. Attempts To Rationalize the Penalty

Several reasons have been advanced for retaining the marriage penalty. The first is that the penalty affects only a minority of married couples.<sup>31</sup> This argument, however, is hardly convincing. The penalty is an inequitable tax burden that should be rectified if at all possible. Those opposed to eliminating the marriage penalty, however, also offer a second and more analytically complex rationale. They claim that the penalty is the inescapable result of a progressive tax system that adheres to the principles of (1) horizontal equity among married couples with the same income and (2) ability to pay. This argument merits closer analysis.

#### 1. Horizontal Equity

According to the principle of horizontal equity, persons who are equally situated should be equally taxed.<sup>32</sup> The correlative of this rule

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27. 1972 Hearings, *supra* note 26, at 75; Marital Status, *supra* note 6, at 8; *Tax Equity I*, *supra* note 6, at 5.

28. See *Statements of Members of Congress on General Subjects: Tax Reform Hearings Before the House Comm. on Ways and Means*, 94th Cong., 1st Sess. 3 (1975) [hereinafter cited as *1975 Hearings*] (statement of Rep. Charles E. Bennett); Hall, *supra* note 19, at 717; Richards, *Single v. Married Income Tax Returns Under the Tax Reform Act of 1969*, 48 *Taxes* 301, 303 (1970) [hereinafter cited as *Single v. Married*].

29. 1975 Hearings, *supra* note 28, at 3 (statement of Rep. Charles E. Bennett); Hall, *supra* note 19, at 717.

30. 1972 Hearings, *supra* note 26, at 73 (statement of Edwin S. Cohen); Marital Status, *supra* note 6, at 13.

31. Only about 20% of the married couples who pay taxes are subject to the marriage penalty and, for those couples, the extra liability is less than 10% of the aggregate tax the spouses would pay if they were single and producing the same income. 1972 Hearings, *supra* note 26, at 75 (statement of Edwin S. Cohen). Furthermore, the very poor do not pay a penalty regardless of contribution of each spouse to the couple's total income. *Id.* at 76.

32. See W. Klein, *Policy Analysis of the Federal Income Tax 7* (1976) [hereinafter cited as *Policy Analysis*].

is that people who have equal incomes should pay equal taxes. The tax liability of a married couple, therefore, should not differ with respect to the proportion of income contributed by each spouse.<sup>33</sup> For example, a couple in which one spouse has an income of \$4,000 and the other an income of \$6,000 should not be taxed differently from a couple whose individual incomes are \$3,000 and \$7,000. Yet, because of the progressive rate structure of the tax system, these couples would be taxed differently from one another unless the spouses could aggregate their incomes and file a joint return.

As demonstrated by the testimony of former Assistant Tax Secretary Edwin Cohen at the 1972 House Hearings on this subject, within the framework of a progressive rate tax system it is impossible to construct a set of rates which will not in some circumstances discomfit singles and at other times penalize marrieds. According to Mr. Cohen, if there is to be no penalty on single individuals, single person *A* with an income of \$20,000 should be taxed the same as one-earner married couple *AA* whose income is also \$20,000. Likewise, if there is to be no marriage penalty, single persons *B*<sub>1</sub> and *B*<sub>2</sub>, each of whom has an income of \$10,000, should be taxed the same as the spouses in two-earner couple *BB*, who have individual incomes of \$10,000. Lastly, if there is to be horizontal equity among married couples, one-earner couple *AA* should be taxed the same as two-earner couple *BB*.<sup>34</sup>

Clearly, all of these propositions could be accomplished if the tax system followed a proportional rate schedule. If everyone were taxed at a 10% rate, for example, single person *A* would be taxed \$2,000, as would one-earner couple *AA*; single persons *B*<sub>1</sub> and *B*<sub>2</sub> would each be taxed \$1,000, with a combined tax liability of \$2,000—the same as that of two-earner couple *BB*; and one-earner couple *AA* would pay the same \$2,000 in taxes as two-earner couple *BB*.

Under a progressive rate system such as the present one, however, there is no formula that will accommodate both a marriage-neutral tax and horizontal equity among married couples. For instance, assume that the individuals in the example above are subject to a progressive rate system which taxes incomes of \$10,000 at 5% and incomes of \$20,000 at 15%. Single person *A* and one-earner couple *AA* would both be taxed \$3,000. Single persons *B*<sub>1</sub> and *B*<sub>2</sub> would be taxed \$500 each and \$1,000 in total—the same as two-earner couple *BB*. Thus, the tax would be marriage-neutral: no marriage penalty and no singles' penalty. The tax, however, would not result in horizontal equity among married couples. One-earner couple *AA* and two-earner couple *BB*,

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33. 1972 Hearings, *supra* note 26, at 78 (statement of Edwin S. Cohen); 3 Report of the Royal Commission on Taxation 143 (1966) [hereinafter cited as Carter Comm'n Report].

34. 1972 Hearings, *supra* note 26, at 78 (statement of Edwin S. Cohen).



both of whom would report the same total income of \$20,000, would be taxed \$3,000 and \$1,000, respectively.

Horizontal equity, however, may not actually be achieved by taxing one-earner couple *AA* equally with two-earner couple *BB*.<sup>35</sup> Horizontal equity requires that persons similarly situated be equally taxed. But are couples *AA* and *BB* truly similarly situated? Before proceeding with this question, it is important to note that at the root of this discussion is the assumption, or the recognition, that there is a difference between a dollar earned and a dollar acquired through investment or the earnings of another.<sup>36</sup> If the income of one spouse in couple *BB* were derived from investments, leaving the spouse free to stay at home, there would be little difference between the two married couples and few complaints from taxpayers and tax analysts if the couples were taxed similarly.<sup>37</sup> Arguable differences between couple *AA* and couple *BB* would exist, however, if both spouses in couple *BB* were wage earners.<sup>38</sup> In that event, couple *BB* (1) would incur greater work-related expenses associated with the second wage earner,<sup>39</sup> (2) would not enjoy the imputed income of the spouse in couple *AA* who remains at home,<sup>40</sup> and (3) would not share in the intangible benefits of greater leisure time and greater prestige that couple *AA* arguably enjoys.<sup>41</sup>

The primary benefit enjoyed by the one-earner couple under the present tax system is that it is not taxed on the imputed income of the

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35. See 1972 Hearings, *supra* note 26, at 150, 153 (statement of Oscar S. Gray); J. Pechman, *supra* note 15, at 95; *Discrimination*, *supra* note 6, at 530; Comment, *Federal Income Tax Discrimination Between Married and Single Taxpayers*, 7 U. Mich. J.L. Ref. 667, 679 (1974) [hereinafter cited as Betz].

36. Bittker, *supra* note 12, at 1431 n.118.

37. H. Groves, *supra* note 18, at 80.

38. Congress has acceded to this differentiation to the extent that it adopted, in its 1969 legislation, a 50% maximum marginal rate on earned income. J. Pechman, *supra* note 15, at 100; Hall, *supra* note 19, at 718. This reform, however, can hardly be viewed as more than an inconsequential victory for proponents of the Protestant ethic who wish to see a greater representation of their views in the tax system. As one tax authority notes, there is little evidence that the maximum marginal rate on earned income has served as a work incentive; essentially, it has cost the government \$500 million and has provided a subsidy for those who enjoy the very highest income. J. Pechman, *supra* note 15, at 101.

39. That there are extra expenses associated with supporting a second wage earner is undeniable; yet, this argument may be countered by the fact that all wage earners incur such expenses and none are compensated by the present system for this cost. See H. Groves, *supra* note 18, at 80; *Tax Equity I*, *supra* note 6, at 7.

40. This imputed income would consist chiefly of the household services performed by the nonworking spouse. See Policy Analysis, *supra* note 32, at 588.

41. J. Pechman, *supra* note 15, at 99. Although certain psychological benefits might inure to one-earner couple *AA*, other psychological benefits may be identified with couple *BB*'s situation. Intentionally or not, the recent feminist advances have belittled the role of the homemaker, who is generally identified as the nonworking spouse. In addition, depression may often beset the spouse who does not earn a living and who, consequently, feels little self worth.

spouse who performs the duties of housework and, if there are dependent children, of child care. In that respect, the one-earner couple has a greater income than the two-earner couple with comparable earnings and should be taxed accordingly if true horizontal equity is to be achieved. Although imputed income in general has traditionally been excluded from the tax base because of the difficulty in evaluating such income, the imputed income of housework could feasibly be calculated with reference to a standard adjustment.<sup>42</sup> The fact that imputed income is not generally included in the tax base is not a sufficient justification for according equal tax treatment to what remain two unequally situated married couples.

This analysis reveals that the ostensible goal of preserving horizontal equity is a feeble justification for the marriage penalty. It is apparent that the principles of horizontal equity could better be served by considering the distinct circumstances of various taxpayers, rather than by taxing distinguishable married couples identically. Although true horizontal equity may not be attained by eliminating the marriage penalty, that goal is no more closely approximated by retaining the penalty.

## 2. Ability To Pay

Congress and the Treasury Department view income splitting together with the present rate schedules as intrinsic elements of a tax system committed to ability-to-pay principles.<sup>43</sup> Similarly, various tax authorities consider the marriage penalty to be an inevitable and inextricable result of a tax policy which is formulated on the concept of ability to pay.<sup>44</sup>

The marital status of an individual reflects his ability to pay in several ways. First, economies of scale are produced by the marriage of two individuals who previously maintained separate households; necessary living expenses are thereby reduced.<sup>45</sup> Clearly, the maintenance costs for a single household—one rent or house payment and one

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42. This possibility was considered and rejected in one study because it seemed inequitable to incorporate the imputed income of housework while other imputed income, which might pose more extreme computation problems, is consistently ignored in figuring a tax base. See Carter Comm'n Report, *supra* note 33, at 118-19.

43. Marital Status, *supra* note 6, at 1; S. Surrey, Pathways to Tax Reform 12-13 (1973). See generally Carter Comm'n Report, *supra* note 33, at 14-15.

44. 1972 Hearings, *supra* note 26, at 78-79 (statements of Edwin S. Cohen); *id.* at 252 (statement of Kenneth J. White); U.S. Dep't of the Treasury, Blueprints for Basic Tax Reform 102 (1977) [hereinafter cited as Blueprints]; Bittker, *supra* note 12, at 1395; *Tax Equity I*, *supra* note 6, at 7. This concept generally implies adherence to a progressive rate structure and serves as the goal of horizontal equity.

45. Bittker, *supra* note 12, at 1422-25; *Tax Equity I*, *supra* note 6, at 7. See generally Klein, *Familial Relationships and Economic Well-being: Family Unit Rules for a Negative Income Tax*, 8 Harv. J. Legis. 361, 372 (1971) [hereinafter cited as *Family Unit Rules*].

set of utility bills, for example—are less than those for two separate homes. Incidental expenses are lower as well, since one microwave oven and one newspaper generally suffice for one household.<sup>46</sup> Because of the savings inherent in most marriages, it may logically be argued that a married couple should, in fact, pay more in taxes than two single persons with individual incomes one-half that of the couple,<sup>47</sup> and that the marriage penalty serves to equalize the respective abilities to pay.

This analysis, however, is subject to criticism on the ground that any two working persons who share living arrangements have the same ability to pay, whatever their marital status,<sup>48</sup> and, conversely, that the ability to pay of married persons who live apart can be equated with that of single persons who maintain their own households.<sup>49</sup> Although a majority of married couples do live together, a 62.5% majority of single persons also share their homes with another.<sup>50</sup> Therefore, although the present rate schedules correctly adjust for the household economies which a significant minority of single persons lack, they do not accurately reflect prevalent living conditions or actual tax payment ability.<sup>51</sup>

Another rationalization posited for the marriage penalty is that married persons generally pool their incomes and, therefore, have a greater proportion of their total income available for discretionary use than do single individuals.<sup>52</sup> Despite the fact that a majority of the single persons in this country reside with others and thus may partake of the benefits of economies of scale, presumably very few singles aggregate their discretionary income with that of another. Accordingly, a married couple can more easily purchase such luxury items as jewelry, boats, and securities than can two individual taxpayers with the same total income.<sup>53</sup> It must be recognized, however, that while

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46. Bittker, *supra* note 12, at 1422; *Tax Equity I*, *supra* note 6, at 7.

47. Bittker, *supra* note 12, at 1423.

48. See 1972 *Hearings*, *supra* note 26, at 151 (statement of Oscar S. Gray); *Discrimination*, *supra* note 6, at 533.

49. See 1972 *Hearings*, *supra* note 26, at 151 (statement of Oscar S. Gray). See also Bittker, *supra* note 12, at 1423.

50. 1972 *Hearings*, *supra* note 26, at 149 (statement of Oscar S. Gray (citing figures quoted by Edwin S. Cohen)).

51. The Treasury Department has not been unaware of these discrepancies, but it has regarded them as unavoidable anomalies. "There can be no question that the present system does not provide perfect results in every instance, but the inequities generally arise from what seem to be atypical living conditions, for example where two single people live together or because of a particular division of income between husband and wife." *Id.* at 78 (statement of Edwin S. Cohen).

52. Carter Comm'n Report, *supra* note 33, at 15.

53. The availability of money for discretionary use is, of course, a luxury peculiar to the middle and upper level income groups. The marriage penalty, however, only affects those income strata and is most severe at the upper income levels.

this rationale is generally valid, it is not consistently supportable. Many discretionary expenses are incurred purely on an individual basis. For example, one must still purchase the same ticket for a theater performance regardless of one's marital status or combined resources.

Therefore, while economies of scale and available funds for discretionary uses are proffered as justifications for the existence of the marriage penalty, they are not compelling. The chief reason for its retention in our tax structure is that given the family as the chosen unit of taxation, the progressivity of the rate system, and the goal of preserving equity among married couples with the same aggregate income, the marriage penalty is mathematically inevitable.<sup>54</sup> Elimination of the penalty, therefore, necessarily entails the abandonment of one or more of the above characteristics of the present tax system.

### B. *The Penalty as a Disincentive*

For some, the message of the Tax Reform Act of 1969 is clear: "If you must work, don't marry; if you must marry, don't work; violators will be persecuted."<sup>55</sup> Although studies are inconclusive that the marriage penalty has had in fact more than a minimal impact on decisions to marry and to continue to produce income,<sup>56</sup> the penalty clearly has been perceived as a disincentive.<sup>57</sup> The penalty may, for instance, serve as a contributing factor in the rise of cohabitation without marriage.<sup>58</sup> With respect to work, it is true that the marriage penalty substantially disadvantages only those married couples in relatively high income tax brackets and that its impact should hardly deter such presumably self-motivated persons from pursuing their careers. Yet, the fact remains that when two wage-earning individuals marry and continue to work, their tax burden is likely to increase.

This fact raises an inference that the United States, perhaps unintentionally, has adopted a policy of encouraging married women to remain in the home.<sup>59</sup> The inference is buttressed by the fact that the marriage penalty is not the only federal statutory provision that

54. See 1972 Hearings, *supra* note 26, at 78-79 (statement of Edwin S. Cohen).

55. *Single v. Married*, *supra* note 28, at 304.

56. See Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 Buffalo L. Rev. 49, 88-89 (1971); *It Doesn't Pay*, *supra* note 2, at 3, col. 2.

57. "For the tax-minded young man or woman, with a substantial income, the Code adds to the attractiveness of a prospective spouse without taxable income, and detracts from one with it." *Mapes v. United States*, 576 F.2d 896, 898 (Ct. Cl. 1978). "[T]he elevated tax burden might in fact dissuade some couples from entering into matrimony . . ." *Id.* at 901.

58. *It Doesn't Pay*, *supra* note 2, at 3, col. 2. Between 1970 and 1977, the number of households shared by unrelated members of the opposite sex more than doubled. *Id.*

59. The penalty is viewed as a disincentive to women, who are generally the secondary wage earners in this country. *Discrimination*, *supra* note 6, at 532.

disadvantages the working wife. Consider the present social security laws as an example. If each spouse of a two-earner couple contributes the maximum amount of social security taxes each year, thereby paying twice as much as a one-earner couple, the two-earner couple qualifies for only one and one-third, rather than twice, the amount of benefits payable to a one-earner couple.<sup>60</sup> It is apparent, therefore, that various statutes in force discourage women from entering the labor force.<sup>61</sup>

Taxpayers subject to the marriage penalty have resorted to extreme and novel avoidance devices. Conscious that marital status, for purposes of income taxation, is determined at the end of December,<sup>62</sup> some couples who would ordinarily incur the penalty have travelled to an accommodating jurisdiction to obtain a divorce at the end of one year, only to remarry at the beginning of the next. For those couples subject to the full impact of the marriage penalty, the expenses of such a "divorce trip" amount to less than their tax savings.<sup>63</sup> In response to this increasingly prevalent merry-go-round of divorce and remarriage, the Internal Revenue Service rendered a ruling which denies these "sham divorces" any tax effect, that is, the couple is treated as a married couple for the taxable year.<sup>64</sup> This revenue ruling has been criticized on the ground that there are substantial nontax consequences associated with the divorce which could warrant its being treated as other than a contrivance.<sup>65</sup> Furthermore, the ruling does not necessarily remedy the tax incentive for a divorce. Couples may still divorce in order to avoid the marriage penalty, although they may continue to live together. They are more likely to remain divorced, however, in order to obtain a continuing tax advantage. Rather than nullify the effect of tax-motivated divorces, the revenue ruling may simply encourage permanent divorce.

### C. Constitutionality

The constitutionality of the marriage penalty was challenged for the first time in *Johnson v. United States*.<sup>66</sup> The plaintiffs in that case contended that the marriage penalty violated their fifth amendment

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60. See 42 U.S.C. §§ 402(a)-(b), 402 (k)(3)(A) (1976); *Economic Problems of Women: Hearings Before the Joint Economic Comm.*, 93d Cong., 1st Sess. 414 (1973) (statement of Martha W. Griffiths).

61. Betz, *supra* note 35, at 679-80.

62. See I.R.C. § 143(a)(1).

63. Feld, *Divorce Tax Style*, 54 Taxes 608, 609 (1976).

64. Rev. Rul. 76-255, 1976-2 I.R.B. 40.

65. Such consequences include the lapse of insurance coverage, as well as the termination of joint ownership of property and intestacy interests when one spouse dies during the interval. Feld, *supra* note 63, at 610-11.

66. 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*, 98 S. Ct. 725 (1978).

due process and equal protection guarantees,<sup>67</sup> as well as their fundamental right to marry.<sup>68</sup> The basis of the plaintiffs' due process argument was that the income of a married couple's secondary wage earner, which is compounded with that of the primary wage earner, is taxed at a higher rate than that of a single individual.<sup>69</sup> They premised this argument on *Hoeper v. Tax Commission*,<sup>70</sup> in which the Supreme Court struck down, as violative of due process, a state statute that required consolidation of a husband's and wife's separate incomes for tax purposes.<sup>71</sup> The court, however, distinguished *Hoeper* in that there is no federal requirement to aggregate a couple's income because the individual spouses have the option to file separate returns.<sup>72</sup> Yet the court failed to recognize that, although this option exists, the tax system does not permit married persons filing separately to use the lower rates provided for single individuals and that, therefore, the option may not be a meaningful alternative.

The plaintiffs further argued that they were denied equal protection because the marriage penalty creates a gender-based discrimination by which married female workers—who are generally the secondary wage earners—are taxed more severely than married male workers.<sup>73</sup> Rejecting this allegation, the court held that the tax laws did not incorporate any invalid gender-based assumptions about the sexes' earning power.<sup>74</sup>

Finally, the court rejected the plaintiffs' allegation that the marriage penalty impinged on their fundamental right to marry. Although it accepted the premise that marriage is a fundamental right protected by the Constitution and, therefore, found the strict scrutiny test appropriate to determine the law's constitutionality,<sup>75</sup> the court effectively retreated from applying that standard. Instead, it reasoned that previous violations of the fundamental right to marry had been found only when the challenged statutes essentially proscribed that right,<sup>76</sup> and held that the marriage penalty does not create such a severe marriage disincentive that it amounts to a prohibition.<sup>77</sup> Throughout its deci-

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67. *Id.* at 962-63, 968.

68. The plaintiffs claimed that their right to marry was protected by the first, fourth, fifth, ninth and tenth amendments. *Id.* at 963.

69. *Id.* at 966.

70. 284 U.S. 206 (1931).

71. *Id.* at 218.

72. 422 F. Supp. at 967-68.

73. *Id.* at 968.

74. *Id.* at 968-69. The court also pointed out that, unlike other statutes that had been invalidated on the basis of sex discrimination, the tax laws do not discriminate against *all* women. *Id.* at 969; *cf.* *Mapes v. United States*, 576 F.2d 896, 902 (Ct. Cl. 1978) (marriage penalty not invidiously discriminatory).

75. 422 F. Supp. at 969-71.

76. *See, e.g.*, *United States v. Kras*, 409 U.S. 434, 444 (1973); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

77. 422 F. Supp. at 970. The plaintiffs also claimed that the tax laws violated their freedom

sion, the court deferred to the federal government's expertise in the complex matter of taxation and accepted the Government's contention that no reasonable alternative to the penalty exists.<sup>78</sup>

The sentiments of the *Johnson* court were recently echoed by the Court of Claims in *Mapes v. United States*.<sup>79</sup> The *Mapes* court admitted that marriage is a fundamental right; however, it asserted that strict scrutiny of the marriage penalty was unnecessary because the penalty merely discourages, rather than proscribes, marriage.<sup>80</sup> Instead, the court held that the appropriate test was one of "minimum rationality."<sup>81</sup> Applying that standard, the court found that the marriage penalty satisfied constitutional requisites.<sup>82</sup> In addition, the court found no evidence of sex-based discrimination in the marriage penalty. Although the penalty may affect women most severely in its application, the court stated that the relevant statute is "facially gender neutral" and, therefore, is not discriminatory against women as such.<sup>83</sup> The court further found that legislative attempts to equalize the taxes of couples with equal incomes and to tax household economies of married persons were not unreasonable.<sup>84</sup> In short, the Court of Claims left to Congress the task of dealing with the plight and the complaints of the two-earner married couple.<sup>85</sup>

The *Johnson* and *Mapes* decisions are not unexpected; they are reminiscent of *Kellems v. Commissioner*,<sup>86</sup> in which the constitutionality of the singles' penalty was upheld. In *Kellems*, the Tax Court accepted the Government's argument that the existent tax schedule was necessary to insure geographic uniformity and that married per-

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of religion by discouraging marriage. The court, however, did not credit this allegation, because it found that marriage was not proscribed by the marriage penalty. *Id.* at 975.

It has been suggested by one commentator that a successful challenge to the penalty might be based on the argument that, under the tenth amendment, the federal government may not undermine the state's policy of encouraging the institution of marriage in an attempt to raise revenue. See Betz, *supra* note 35, at 681, 684-86. The plaintiffs in *Johnson*, however, did not forcefully promote this claim. If the state of Indiana had been a party in the case, this claim might have been advanced more strongly. Of course, the court did not find the marriage penalty to be an appreciable disincentive to marriage, and thus it is unlikely that this argument would have elicited a different result.

78. 422 F. Supp. at 973-74.

79. 576 F.2d 896 (Ct. Cl. 1978).

80. *Id.* at 901. In the words of the court, the marriage penalty "does not present an insuperable barrier to marriage." *Id.*

81. *Id.* at 904.

82. *Id.*

83. *Id.* at 901-02.

84. *Id.* at 904.

85. *Id.*

86. 58 T.C. 556 (1972), *aff'd per curiam*, 474 F.2d 1399 (2d Cir.), *cert. denied*, 414 U.S. 831 (1973). It should be noted that the tax year in question in this case was 1965, *i.e.*, prior to the enactment of the Tax Reform Act of 1969, which substantially alleviated the singles' penalty. See notes 26-27 *supra* and accompanying text.

sons have greater financial burdens than do single individuals with the same income.<sup>87</sup> Essentially, the courts have not required that the tax laws reflect a system of mathematically perfect justice. As long as a class of individuals is not uniformly disadvantaged, and as long as the Government can show that legitimate objectives are being sought, the courts, acknowledging their own lack of expertise, will sustain the validity of these laws. Therefore, it is clear that if the marriage penalty is to be reduced or eliminated, it is Congress, and not the courts, which must do so.

### III. ELIMINATING THE PENALTY

#### A. Legislative Efforts

Certainly, Congress never intended to create the marriage penalty when it lessened the tax burden of the single taxpayer in 1969.<sup>88</sup> Since that time, numerous bills have been introduced in Congress in response to the complaints generated by the penalty.<sup>89</sup> The prototype of these bills<sup>90</sup> would have extended income splitting benefits to everyone by adopting a new one-rate schedule.<sup>91</sup> A married person filing separately would have been limited to reporting only the portion of the couple's income that he actually earned, in order to insure uniform treatment of couples in community and common-law property states.<sup>92</sup> Inferentially, a one-earner couple in a community property law state would have been required to file a joint return; otherwise, the working spouse would have been taxed on the one-half of his income that is actually owned by the other spouse. The proposed legislation, how-

87. 58 T.C. at 559.

88. Betz, *supra* note 35, at 690.

89. See, e.g., H.R. 4353, 95th Cong., 1st Sess., 123 Cong. Rec. H1661 (daily ed. Mar. 2, 1977); H.R. 2454, 95th Cong., 1st Sess., 123 Cong. Rec. H573 (daily ed. Jan. 26, 1977); H.R. 2452, 95th Cong., 1st Sess., 123 Cong. Rec. H573 (daily ed. Jan. 26, 1977); H.R. 2451, 95th Cong., 1st Sess., 123 Cong. Rec. H573 (daily ed. Jan. 26, 1977); H.R. 207, 95th Cong., 1st Sess., 123 Cong. Rec. H187 (daily ed. Jan. 6, 1977); H.R. 178, 95th Cong., 1st Sess., 123 Cong. Rec. H186 (daily ed. Jan. 6, 1977); H.R. 10995, 94th Cong., 1st Sess., 121 Cong. Rec. H11923 (daily ed. Dec. 4, 1975); H.R. 5797, 94th Cong., 1st Sess., 121 Cong. Rec. 9551 (1975); H.R. 5584, 94th Cong., 1st Sess., 121 Cong. Rec. 8998 (1975); H.R. 5407, 94th Cong., 1st Sess., 121 Cong. Rec. 8456 (1975); H.R. 4698, 94th Cong., 1st Sess., 121 Cong. Rec. 6371 (1975); H.R. 3610, 94th Cong., 1st Sess., 121 Cong. Rec. 4035 (1975); H.R. 3254, 94th Cong., 1st Sess., 121 Cong. Rec. 3664 (1975); H.R. 2683, 94th Cong., 1st Sess., 121 Cong. Rec. 2256 (1975); H.R. 2586, 94th Cong., 1st Sess., 121 Cong. Rec. 2150 (1975); H.R. 1177, 94th Cong., 1st Sess., 121 Cong. Rec. 509 (1975); H.R. 850, 94th Cong., 1st Sess., 121 Cong. Rec. 500 (1975); H.R. 431, 94th Cong., 1st Sess., 121 Cong. Rec. 490 (1975); H.R. 273, 94th Cong., 1st Sess., 121 Cong. Rec. 191 (1975).

90. H.R. 715, 93d Cong., 1st Sess., 119 Cong. Rec. 55 (1973).

91. *Id.* The provisions of this bill essentially represent a return to pre-1948 conditions, except for the maintenance of present geographic neutrality.

92. See 1972 Hearings, *supra* note 26, at 100 (statement of Rep. Fred Schwengel). This accommodation to geographical uniformity may pose constitutional problems. See Bittker, *supra* note 12, at 1405-08 (discussing the implications of *Poe v. Seaborn*, 282 U.S. 101 (1930)).



ever, was effectively smothered at the committee stage because it was anticipated that its implementation would effect considerable revenue losses.<sup>93</sup>

President Carter, reportedly, had considered incorporating into his 1978 tax reform package a provision which would lessen some of the unintended but inevitable effects of the marriage penalty.<sup>94</sup> Apparently, the President had contemplated proposing a deduction or a credit which would remove part of the sting associated with this additional tax liability, without simultaneously rejecting the principle of horizontal equity among married couples with the same total income.<sup>95</sup> President Carter, however, decided to eliminate this proposal from his tax reform package.<sup>96</sup>

The recent decision in *Mapes v. United States*<sup>97</sup> has kindled renewed interest in relieving the two-earner couple of its excess tax burden.<sup>98</sup> Nevertheless, the delay in legislative action to remedy the inequities of the marriage penalty, despite numerous proposals for reform, indicates that developing an acceptable solution to the problem is a troublesome task. Much of the difficulty stems from the fact that abolition of the marriage penalty may entail a dissipation of federal revenue<sup>99</sup> and a departure from concepts upon which the current tax system is premised.<sup>100</sup> The following analysis of various proposals to eliminate or to reduce the penalty reveals the problems involved in formulating a workable alternative to the present system.

### B. A Comparison of Possible Solutions

It is apparent from the discussion thus far that any one of the following measures would effectively eliminate the marriage penalty: reestablishment of the individual as the unit of taxation; adoption of a proportional rate schedule; or taxation of married persons filing sepa-

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93. See *It Doesn't Pay*, *supra* note 2, at 3, col. 2.

94. Wash. Post, Dec. 1, 1977, at A10, col. 6.

95. The President's plan was aimed at reducing, rather than eliminating, the penalty. This indicates that he intended no overriding change in either the present taxable unit or the established principle of income splitting for married couples.

96. President Carter's tax package did not include a marriage penalty reduction. See generally Message from the President of the United States Transmitting Proposals for Tax Reductions and Reform, H.R. Doc. No. 95-283, 95th Cong., 2d Sess., reprinted in [1978] U.S. Code Cong. & Ad. News 113.

97. 576 F.2d 896 (Ct. Cl. 1978), discussed at notes 79-85 *supra* and accompanying text.

98. Senator Javits and Senator Mathias have reintroduced legislation which would eliminate the marriage penalty by reducing the tax on two-earner married couples. See *It Doesn't Pay*, *supra* note 2, at 3, col. 2. In addition, the House Ways and Means Committee is considering a general tax reduction for taxpayers in the \$20,000-\$50,000 income range which would incidentally effect a corresponding reduction of the marriage penalty. See Wash. Post, July 29, 1978, at A6, col. 1.

99. See note 102 *infra* and accompanying text.

100. See note 54 *supra* and accompanying text.

rate returns at rates applicable to single individuals.<sup>101</sup> Less ideally, the penalty could be reduced by instituting a deduction or a credit for the two-earner married couple or by extending an earned income allowance to all members of the labor force. Concededly, none of the foregoing proposals are flawless. For instance, all entail potential losses of federal revenue<sup>102</sup>—a feature which invites political opposition, but which should not sustain an inequitable taxation policy. Therefore, a solution to the marriage penalty must rest on the least objectionable alternative to the status quo.

### 1. The Individual as the Tax Unit

Substitution of the individual for the family as the taxable unit would remove the factor of marriage from tax computations,<sup>103</sup> eliminate the inequity of taxing single persons at a higher rate than married couples with the same total income,<sup>104</sup> recognize the economic disparities between one- and two-earner couples,<sup>105</sup> and underscore some

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101. The fact that the present tax system does not address itself to household sharing realities has spawned an additional proposal. Our present tax policy attributes to the marital state certain economies which actually are derived from the sharing of household expenses by more than one person—whether they be related by affinity, consanguinity, or not at all. *1972 Hearings, supra* note 26, at 251-52 (statement of Kenneth J. White); *Single v. Married, supra* note 28, at 304. In light of this attitude, it has been suggested: (1) that a one-rate schedule be adopted and a limited deduction for housing expenses be allowed, *Discrimination, supra* note 6, at 536; or (2) that the present rates be continued, but that those singles who actually maintain their own households be permitted to claim head of household status. Marital Status, *supra* note 6, at 17. Although theoretically more consistent with ability-to-pay concepts than the current tax system, these proposals have been criticized as impractical and possibly unconstitutional in their invasion of privacy. *1972 Hearings, supra* note 26, at 77 (statement of Edwin S. Cohen); *Family Unit Rules, supra* note 45, at 388 n.36. It would be difficult, indeed, to verify who lives with whom, and it would be nearly impossible to set a particular date on which to determine the status of an individual's living accommodations. Concededly, a proportion of days, or months, during which a taxpayer lived singly or with others could be ascertained in order to assess tax liability. Yet, roommates frequently change residences during the course of a year, and the number of household-sharing individuals could vary constantly so that calculations of a person's living expense deductions could be exceedingly complex. Basically, this system would create a nightmare for the Internal Revenue Service.

102. See *1972 Hearings, supra* note 26, at 90-91 (statement of Edwin S. Cohen) (marrieds taxed at singles' rates would result in an estimated loss of \$3.7 billion); Policy Analysis, *supra* note 32, at 10 (proportional tax); J. Pechman, *supra* note 15, at 97 (deduction or credit); *id.* at 100 (earned income allowance). Admittedly, replacement of the family with the individual as the taxable unit could result in either a revenue loss or gain, depending upon which alternative plan is implemented. See note 107 *infra* and accompanying text. On the one hand, if income splitting were extended to all individuals, a loss in revenue would result. Hall, *supra* note 19, at 717. On the other hand, if all income splitting were eliminated, there would be a revenue gain. See *1972 Hearings, supra* note 26, at 90 (statement of Edwin S. Cohen).

103. *1972 Hearings, supra* note 26, at 30 (statement of Rep. Robert K. Gray); *id.* at 252 (statement of Kenneth J. White); Blueprints, *supra* note 44, at 103.

104. *1975 Hearings, supra* note 28, at 3-4 (statement of Charles E. Bennett).

105. *1972 Hearings, supra* note 26, at 153 (statement of Oscar S. Gray).

feminist goals, particularly that of preserving a woman's individual identity.<sup>106</sup> In practice, use of the individual as the taxable unit would entail either the extension of income splitting to all individuals or the elimination of income splitting entirely.<sup>107</sup> Presumably, each individual—regardless of marital status or manner of filing—would be entitled to the same zero bracket amount.<sup>108</sup>

There is, however, no overwhelming support for this change in the tax unit.<sup>109</sup> Undoubtedly, an attempt to eliminate income splitting would raise a vigorous dissent from the one-earner married couple, for whom the present system provides a distinct tax advantage. Adoption of the individual as the tax base would also revive several problems which existed prior to 1948.<sup>110</sup> For instance, the concept of ability to pay could be weakened,<sup>111</sup> and income shifting through interspousal gifts could become unmanageable. Although property transfers primarily motivated by tax avoidance might be disallowed, distinguishing bona fide transactions from tax manipulations could present difficulties.<sup>112</sup> Also, the allocation of deductions between two spouses would pose renewed problems.<sup>113</sup>

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106. See Menzies, *The Uncounted Hours: The Perception of Women in Policy Formation*, 21 McGill L.J. 615, 623 (1975).

107. J. Pechman, *supra* note 15, at 95. Either plan would conceivably require only one rate schedule. See 1972 Hearings, *supra* note 26, at 228 (statement of Louise H. Jones); *Single v. Married*, *supra* note 28, at 304; Betz, *supra* note 35, at 688. Alternatively, a two-rate schedule with a table for marrieds filing separately containing bracket widths one-half as large as those used for individual returns could be employed. See H. Groves, *supra* note 18, at 57, 83 (including an explanation of the Pechman Plan). Additionally, the demise of income splitting would simplify the identification of taxpayers. Blueprints, *supra* note 44, at 103.

108. Cf. Nussbaum, *The Tax Structure and Discrimination Against Working Wives*, 25 Nat'l Tax J. 183, 191 (1972) (stating that, under prior law, each taxpayer would receive the same low income allowance or maximum standard deduction). For a discussion of zero bracket amounts, see notes 5-6 *supra* and accompanying text.

109. Even some advocates of the proposal agree that its adoption is unlikely. Hall, *supra* note 19, at 717; Betz, *supra* note 35, at 688.

110. It has been suggested that pre-1948 geographical disparities could be avoided by mandating the use of joint returns by married couples or by requiring that married persons filing separately report only the amount of income they themselves actually earned during the taxable year. See 1972 Hearings, *supra* note 26, at 148 (statement of Oscar S. Gray); Hall, *supra* note 19, at 717 (disallow all joint returns and limit each spouse to reporting only the income he actually earned); *Discrimination*, *supra* note 6, at 536. In addition, it may be possible to maintain some of the differentiation in tax burden based on family size through the allowance of personal exemptions. 1972 Hearings, *supra* note 26, at 174 (statement of Seymour Halpern); J. Pechman, *supra* note 15, at 95; 1 S. Surrey, W. Warren, P. McDaniel & H. Ault, *Federal Income Taxation 1280-83* (1972); Betz, *supra* note 35, at 691. Other pre-1948 problems, however, would necessarily reemerge.

111. See Carter Comm'n Report, *supra* note 33, at 122; Bittker, *supra* note 12, at 1419; *Tax Equity I*, *supra* note 6, at 7.

112. Carter Comm'n Report, *supra* note 33, at 120-21.

113. It has been suggested that this problem could be resolved by according to each spouse his proportionate deductible share. Such calculations, however, necessitate taking marriage into

Most importantly, however, after almost thirty years of income splitting, the family holds a secure position as the accepted unit of taxation.<sup>114</sup> It is unrealistic to anticipate legislative rejection of a prevalent social theory—that the family unit best represents society's economic relationships<sup>115</sup>—merely because adherence to that theory occasions the marriage penalty.

## 2. A Proportional Tax System

The adoption of a proportional tax system would eliminate a basic element of present tax policy—progressivity. Although conversion from a progressive to a proportional tax would quiet complaints of discrimination based on marital status,<sup>116</sup> so fundamental a change in policy would constitute a rather visionary cure for the marriage penalty, which affects a relatively small percentage of taxpayers.<sup>117</sup> Moreover, a change to a proportional rate schedule would probably occasion a general tax increment which would be especially unpopular with middle and lower income taxpayers who would reap little or no benefit from the conversion.<sup>118</sup>

## 3. The Use of Singles' Schedules by Married Persons Filing Separately

Perhaps the easiest means of eliminating the marriage penalty would be to grant married persons filing separately the privilege of using singles' schedules.<sup>119</sup> Two basic plans have been offered to implement such a system. One proposal would allow a couple to continue to compute its taxes under the present system and then to deduct the difference between the amount that it would owe under the current tax laws and the amount that the spouses would have to pay were they still single.<sup>120</sup> Alternatively, it has been suggested that married persons

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account. See *Tax Equity II*, *supra* note 12, at 13. More importantly, they would undermine the alleged simplicity inherent in a one-rate schedule.

114. Bittker, *supra* note 12, at 1428; Betz, *supra* note 35, at 688; see note 109 *supra* and accompanying text.

115. See Carter Comm'n Report, *supra* note 33, at 122.

116. 1972 Hearings, *supra* note 26, at 105 (statement of John C. Davidson); H. Groves, *supra* note 18, at 56; *The Tax Structure and Discrimination Against Working Wives: A Comment*, 26 Nat'l Tax J. 119, 121 (1973).

117. See note 31 *supra*.

118. See Policy Analysis, *supra* note 32, at 36.

119. See 1972 Hearings, *supra* note 26, at 228 (statement of Louise H. Jones); Haworth, *Tax Incentives for Getting or Staying Unmarried*, 4 Tax Adviser 128 (1973); *Single v. Married*, *supra* note 28, at 304. In order to avoid the pre-1948 advantages of living in community property law states, the option could be accorded only to those spouses who earn substantial amounts of income of their own. Married persons with less than the requisite earnings would continue to be permitted to file separately, but they would be limited to using the rate schedules presently in effect for marrieds filing separate returns.

120. 1972 Hearings, *supra* note 26, at 147-48, 152 (statement of Oscar S. Gray).

filing separately could simply use the rates presently applicable to single individuals.<sup>121</sup> To accord such an option to married taxpayers would equalize the secondary earner's work incentive with that of his single counterpart, eliminate the marriage disincentive associated with the penalty,<sup>122</sup> and recognize the economic differences between one- and two-earner couples.<sup>123</sup>

The principal drawback of this proposal is that it would necessitate an abandonment of the principle that all married couples with equal incomes should pay the same tax, regardless of each spouse's contribution to the couple's total income.<sup>124</sup> Although this factor would not entail as radical an alteration of present tax policies as either of the proposals discussed above,<sup>125</sup> implementation of such a plan may incite a protest from those who maintain that married couples with equal incomes are similarly situated and, therefore, should be taxed equally.

#### 4. Deduction or Credit for the Two-Earner Couple

Tax authorities who wish to retain the basic features of the present system suggest that the marriage penalty could be reduced, although not eliminated, by allowing a deduction or a credit for the couple with two wage-earning spouses.<sup>126</sup> Such a measure would compensate for the understatement of income by the one-earner married couple<sup>127</sup> and for the extra expenses associated with having a second worker in the family.<sup>128</sup>

121. *Id.* at 44 (statement of Florence B. Donohue), 147 (statement of Oscar S. Gray). One model bill submitted by the New York Women's Bar Association during the 1972 Hearings delineates this solution by limiting the application of singles' schedules to those spouses who earn at least 80% of their individual income or who derive at least 80% of their income from pensions associated with former employment, and by restricting claims of head of household status to one spouse who would then be able to deduct child care expenses. *Id.* at 44 (statement of Florence B. Donohue). Another provision of this bill would permit married wage earners who elect to file separately under singles' schedules to have the lesser amounts withheld from their paychecks in the following year. *Id.* at 45 (statement of Florence B. Donohue). The restrictions imposed under this plan would obviate inequitable taxation of the investment income of one-earner and two-earner families by limiting the applicability of singles' rates to earned income.

122. Bittker, *supra* note 12, at 1437-38.

123. 1972 Hearings, *supra* note 26, at 153 (statement of Oscar S. Gray).

124. See notes 34-35 *supra* and accompanying text.

125. See notes 109-17 *supra* and accompanying text.

126. Marital Status, *supra* note 6, at 16-17; H. Groves, *supra* note 18, at 17; Bittker, *supra* note 12, at 1434; Nussbaum, *supra* note 108, at 191; *Discrimination*, *supra* note 6, at 536; *Tax Equity II*, *supra* note 12, at 14.

127. J. Pechman, *supra* note 15, at 95; *Tax Equity II*, *supra* note 12, at 14.

128. Bittker, *supra* note 12, at 1431; *Tax Equity II*, *supra* note 12, at 14. Although all taxes are work disincentives and all workers incur nondeductible extra expenses, *id.* at 15, because even the first dollar of the secondary wage earner's income is taxed at the primary spouse's marginal rate, the secondary earner has less disposable income than an unmarried worker with which to defray such work-related costs. Blumberg, *supra* note 56, at 62.

Generally, proponents of this solution impose a specific upper limit for the deduction or credit so as to restrict its benefits to those families in the low and middle income levels.<sup>129</sup> One such plan, for instance, calls for the taxation of only 75% of the wage income of the secondary worker in a two-earner family.<sup>130</sup> This feature would be confined to secondary incomes of \$10,000 or less, that is, the maximum exclusion or deduction from gross income would be \$2,500 regardless of the amount of the secondary worker's earnings.<sup>131</sup> Under this proposal, the marriage penalty would be diminished, as compared with present law, for all married persons with incomes less than \$100,000; above that income stratum, however, the penalty would be aggravated.<sup>132</sup> Moreover, all higher income couples, including one-earner couples with incomes of \$30,000 or more, would be subject to the penalty. Therefore, implementation of this plan would diminish the value of income splitting—a benefit presently available to *all* one-earner couples.<sup>133</sup>

This plan has been criticized on the ground that it would address problems of employment rather than marriage,<sup>134</sup> yet fail to aid the single wage earner who also incurs work-related expenses,<sup>135</sup> even if he has a second job.<sup>136</sup> In addition, it has been suggested that such a plan may be politically unfeasible.<sup>137</sup>

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129. H. Groves, *supra* note 18, at 82.

130. See Blueprints, *supra* note 44, at 104-06.

131. *Id.*

132. *Id.* at 176.

133. See Hall, *supra* note 19, at 717-18. This plan, which was proposed by the Treasury Department under William A. Simon, is consistent with the goals espoused in Canada's Carter Comm'n Report, *supra* note 33. The Carter Commission recommended that there be no marriage penalty at the bottom of the income scale, since low income couples suffer from certain diseconomies associated with marriage and have less money available for discretionary use than their middle and upper income counterparts. *Id.* at 15-16. Although the Carter Commission suggested a tax credit—which is of greater benefit than a deduction to low income taxpayers—and would limit this credit to low income families, the Simon plan is substantially analogous to, and reflective of, the findings of that study. The Simon proposal would also lessen the marked differentiation between one- and two-earner married couples.

134. *Tax Equity II*, *supra* note 12, at 15.

135. H. Groves, *supra* note 18, at 80; *Tax Equity II*, *supra* note 12, at 15.

136. See generally *Tax Equity I*, *supra* note 6, at 7.

137. See Hall, *supra* note 19, at 717-18. A dependent care deduction or credit, on the other hand, is almost universally favored, see, e.g., Blueprints, *supra* note 44, at 105; H. Groves, *supra* note 18, at 17; Blumberg, *supra* note 56, at 95; Hall, *supra* note 19, at 718, although it has been criticized by those who view the expenses associated with child care as concomitant to the decision to have children. Klein, *Tax Deductions for Family Care Expenses*, 14 B.C. Indus. & Com. L. Rev. 917, 918, 938, 941 (1973). The present credit is particularly popular, as it is available for even those persons who do not itemize their deductions. See I.R.C. § 44A; 121 Cong. Rec. 7992 (1975) (remarks of Sen. Tunney); LaRue & Sapp, *The New Credit for Child and Dependent Care Expenses*, 55 Taxes 373 (1977). The legislative intent in enacting this credit, comparable to the arguments for reducing the marriage penalty, was to remove the severe work disincentive for working mothers. 121 Cong. Rec. 7992 (1975) (remarks of Sen. Tunney). A

### 5. A General Earned Income Allowance

Reduction of the marriage penalty could also be effected by extending an earned income allowance to all wage earners. Unlike the deduction or credit, the earned income allowance would promote relatively consistent tax treatment of single workers with one or more jobs and their married counterparts.<sup>138</sup> Nevertheless, such an allowance would foster many of the same problems presented by a deduction or credit<sup>139</sup> and would generate substantially greater revenue losses.<sup>140</sup> Since most income tax revenue is derived from earnings, it is probable that the rate schedules would have to be increased to such an extent that, ultimately, no wage earner would be in a better position than he was without the allowance.<sup>141</sup> Essentially, an earned income allowance would complicate the tax return<sup>142</sup> without achieving noticeable gains.

### C. *The Preferable Solution*

Among the several imperfect means of alleviating the marriage penalty, the least objectionable and most effective measure would be to permit married persons filing separate returns the option of using the rate schedules available to single taxpayers. This plan would not effect a total upheaval of the present tax structure, as would rejection of the family as the taxable unit or adoption of a proportional tax.<sup>143</sup> It would merely require a reevaluation of the assumption that married couples having the same total income should pay equal amounts in taxes. As demonstrated above, however, this assumption incorrectly ignores the actual economic distinctions between one-earner and two-earner couples with comparable incomes.<sup>144</sup> Therefore, it is not a cogent justification for maintaining an inequitable tax structure.

The proposal could easily be implemented; it would require no change in the present rate schedules and could be effected by means of a single statutory provision. Moreover, it would provide a complete, rather than a partial, remedy for the two-earner couple.

It should be noted that to permit some married taxpayers to take advantage of singles' rates would not have an adverse impact on other taxpayers. The tax liability of the one-earner couple—although it may

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dependent care deduction or credit, however, can only effect a partial remedy for the marriage penalty because not all married couples have dependent children or other qualifying relatives.

138. An earned income allowance has been justified on the ground that earned income differs from unearned income. An individual whose income is earned has less ability to pay than does a person whose income is derived from investments. The former must incur the expenses of earning a living, only a few of which are presently deductible. See I.R.C. § 262. Furthermore, he does not enjoy the luxury of the latter's leisure time. J. Pechman, *supra* note 15, at 99.

139. See notes 132-37 *supra* and accompanying text.

140. J. Pechman, *supra* note 15, at 100; Bittker, *supra* note 12, at 1442.

141. Bittker, *supra* note 12, at 1442.

142. J. Pechman, *supra* note 15, at 100.

143. See notes 109-17 *supra* and accompanying text.

144. See notes 35-42 *supra* and accompanying text.

exceed that of some two-earner couples under the proposed system—would be no greater than it is at present. Moreover, one-earner couples would continue to benefit from income splitting and to enjoy the untaxed imputed income of the spouse who remains at home, available for full time housework. Similarly, equalization of the tax rates of single individuals and secondary wage earners of two-earner couples would not place unmarried taxpayers in a less favorable position than they currently enjoy. Although the adoption of such a plan would create distinctions among two-earner couples whose spouses contribute in different proportions to the same total income, such couples could determine whether filing jointly or separately would benefit their particular circumstances and act accordingly. In any event, no taxpayer would be taxed more heavily than he is at present.

Under the proposed plan, the income tax laws would assume a neutral attitude toward the working wife. Although such a step might appear to disregard the economies of scale traditionally attributed to marriage, such economies are neither exclusively nor uniformly present in the marital relationship.<sup>145</sup> Moreover, even if this measure were viewed as an incentive to the married woman worker, such affirmative action is not reprehensible in light of the historic and current legislative penalties imposed for that status.<sup>146</sup>

#### CONCLUSION

The historical product of the Tax Reform Act of 1969,<sup>147</sup> the marriage penalty is an unavoidable result of a tax system based on precepts of ability to pay, rate progressivity, and horizontal equity among married couples with the same income.<sup>148</sup> Its elimination must rest upon a legislative reevaluation of these features, because any solution, despite its deceptive appearance of simplicity, will alter one or more of these fundamental policy decisions.

It is suggested that the simplest and most satisfying alternative to the present system is to afford married persons filing separately the opportunity to utilize the tax rates presently applicable to single individuals. This measure would effectively eliminate the penalty, but would not entail a corresponding alteration of fundamental tax principles and policies. It would simply reject the questionable assumption that all married couples with equal incomes are similarly situated and, therefore, should be equally taxed. This proposal represents a feasible and easily implemented alternative to the marriage penalty. As such, it merits serious and prompt consideration by legislators who seek to quell the legitimate complaints of the two-earner couple without adversely affecting the rights of other taxpayers.

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145. See notes 48-53 *supra* and accompanying text.

146. See notes 59-61 *supra* and accompanying text. Under this proposal, married women would be encouraged to take better paying and more prestigious jobs, since the marriage penalty would be eliminated even for the highest salaried employment.

147. See notes 26-30 *supra* and accompanying text.

148. See note 54 *supra* and accompanying text.