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# A CRITICAL EVALUATION OF THE TAX CRITS

JAMES D. BRYCE*

## I. INTRODUCTION AND GENERAL OBSERVATIONS

Recent years have seen the spread of legal academia's favorite obsession—sex and race as the origin of all of society's ills—to the tax law.[1] In my view, this is not a helpful development. This Article will focus on just a few of the recent writings to illustrate how little useful analysis there is in this body of writing.

The first general observation is that it is odd to see blacks and women, who view themselves as disadvantaged, attacking the income tax. Throughout its history in the United States, the income tax has been an instrument for redistributing income. It was conceived that way by its advocates, the Progressives, at the turn of the century.[2] It has always incorporated a progressive rate structure.[3] Thus, the economically disadvantaged receive the benefits of general governmental benefits such as national defense and federal courts

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1. *See, e.g.*, EDWARD J. MCCAFFERY, TAXING WOMEN (1997); Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971); Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, *in* TAXING AMERICA 45 (Karen B. Brown & Mary Louise Fellows eds., 1996); Amy C. Christian, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law*, 13 J.L. & POL. 241 (1997); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1 (1980); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Return*, 45 HASTINGS L.J. 63 (1993); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751; Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994); Laura Ann Davis, Note, *A Feminist Justification for the Adoption of an Individual Filing System*, 62 S. CAL. L. REV. 197 (1988). Some of the writers in this area treat the claims of the proponents of critical tax analysis with healthy skepticism. *See, e.g.*, Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001 (1996).

2. *See* JOHN F. WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX 70-79 (1985).

3. *See id.* at 258 fig.12.1, 263 fig.12.2.

while paying only a small part of the cost of these benefits. In addition, a substantial part of the income tax revenue is used for explicitly redistributive measures, for example, AFDC, Medicaid, and food stamps, which truly take from the rich and give to the poor. Would the critical tax writers be happier if the revenue to provide these services were raised by a consumption tax rather than by an imperfect income tax?

The second general observation is that most of this literature starts with the premise that either women or blacks are oppressed. Starting with the premise that something is wrong, it is not surprising that things are found about which to complain. This is all expressed in the voguish terms of struggle: "patriarchy," "racial subordination," "subordination of women," and "social injustice."[4] The solutions to the critical tax theorists' grievances, however, are stated in such general terms that it is impossible to subject them to rigorous analysis.[5]

A third observation is that many of these articles have a heavy overlay of nonlegal technical material—particularly statistics and economics.[6] There is, however, very little *legal* analysis; in fact, the authors pay little attention to the details of the income tax as the law has developed.[7]

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4. MCCAFFERY, *supra* note 1, at 4; Christian, *supra* note 1, at 246; Moran & Whitford, *supra* note 1, at 751, 756.

5. *See, e.g.*, Christian, *supra* note 1, at 376 (arguing that more study is required in order to determine whether tax policy should encourage women to enter the paid work force).

6. *See* MCCAFFERY, *supra* note 1, at 168-80 (elaborating on optimal tax theory); Moran & Whitford, *supra* note 1, app. at 804 (explaining when logistic regressions are used and when least squares regressions are used).

7. A "sitting duck" example of this appears in the article by Professors Moran and Whitford. In their discussion of the marriage penalty, the breakpoint between the 15% and 28% brackets is incorrect; what they indicate to be the 1995 breakpoint is clearly the 1986 breakpoint before the proper indexing adjustments. *See* Moran & Whitford, *supra* note 1, at 792; *see also* I.R.C. § 1(f) (West Supp. 1998) (requiring indexing of brackets after 1987). Admittedly, the exact breakpoint between the 15% and 28% brackets is not important to their explanation of the marriage penalty, but such an obvious factual error shows their lack of concern for the details of the income tax.

In their discussion of employee benefits, Professors Moran and Whitford suggest that:

> the amount of annual employer pension contributions that receive tax deferred treatment might be capped. Here the goal is to allow the tax benefits of deferral to employer contributions sufficient to provide a middle, or even an upper middle, income lifestyle, without providing the same tax benefit for contributions to pensions that are principally a vehicle for investing accumulated wealth.

Moran & Whitford, *supra* note 1, at 790. In fact, there are many such rules: the limit on elective contributions, *see* I.R.C. § 402(g) (West Supp. 1998), the full funding limitation,

## II. RACE AND TAXES

### A. General

Professors Moran and Whitford argue that the Internal Revenue Code ("I.R.C." or "the Code") discriminates against blacks.[8] They base this argument on the fact that various provisions benefiting taxpayers are utilized by a smaller percentage of blacks than whites. The four broad categories of such rules are: (1) property rules, (2) tax benefits of home ownership, (3) employee benefits, and (4) the marriage penalty.[9]

Even if Professors Moran and Whitford are correct, they have discovered a few tiny truths at the cost of overlooking the giant truth: The Code discriminates against whites. The progressive rate structure results in whites paying most of the federal income tax. This discrimination has increased in recent years as Congress has added a complex tangle of phase-outs to the Code explicitly to deprive high-income taxpayers, who are predominantly white, of various benefits.[10]

More than one-half of the federal income tax is paid by the 10.5% of taxpayers with adjusted gross incomes of $75,000 or greater.[11] As would be expected, the Internal Revenue Service ("IRS") statistics do not break down taxpayers by race, so the racial makeup of this discriminated-against group must be deduced from other sources. The Census Bureau's *Current Population Studies*[12]

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*see id.* § 412, the maximum benefit rules, *see id.* § 415, the top-heavy rules, *see id.* § 416, and, at the time their article was written, a very burdensome tax on excess distributions from qualified plans, *see* I.R.C. § 4980A, *repealed by* Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1073(a), 1997 U.S.C.C.A.N. (111 Stat.) 788, 948.

8. *See* Moran & Whitford, *supra* note 1, at 751.

9. *See id.* at 755.

10. *See, e.g.*, I.R.C. § 68 (West Supp. 1998) (disallowing itemized deductions as adjusted gross income increases over $100,000 (joint return, indexed)); *id.* § 151(d) (phasing out personal exemptions as adjusted gross income increases over $150,000 (joint return, indexed)); *id.* § 24(b)(2) (phasing out child care credit as modified adjusted gross income increases over $110,000 (joint return, indexed)); *id.* § 25A(d)(2) (phasing out Hope Scholarship and Lifetime Learning credits as modified adjusted gross income increases over $80,000 (joint return, indexed)).

11. *See* Therese M. Cruciano, *Individual Income Tax Returns, Preliminary Data, 1994*, IRS STAT. INCOME BULL., Spring 1996, at 6, 24 tbl.1. Total individual income tax liability in 1994 was approximately $556 billion, of which $303 billion (54%) was paid by 9.27 million taxpayers with adjusted gross incomes over $75,000 out of a total 87.8 million taxpayers. *See id.*

12. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, CONSUMER INCOME, MONEY INCOME IN THE UNITED STATES: 1996 (1997) [hereinafter BUREAU OF THE CENSUS].

figures for total cash income are instructive in this regard, although they are not strictly comparable because they do not take into account the various deductions allowed in converting total income to adjusted gross income.[13] The Census Bureau's figures show that high income earners are disproportionately white. Nearly 15 million white families (out of a total 85 million white households) had incomes greater than $75,000, but only about 900,000 black households (out of a total 12 million) had such incomes.[14] Looking at family income rather than household income, in 1996 there were nearly 13 million white families and 750,000 black families in the over-$75,000 income groups.[15] In percentage terms, 21.7% of white householders had incomes over $75,000; only 7.4% of black householders had such incomes.[16] At the other end of the scale, few householders with incomes under $10,000 paid any significant income tax. Among white householders, about 10% fell into this category, and among blacks, 23%.[17]

In light of the burden of the progressive rates on whites, Professors Moran and Whitford miss the point by focusing on social science data showing how the relative incomes of black husbands and wives and white husbands and wives affect the relative marriage penalties of blacks and whites.[18] The same could be said for the different rates of utilizing the exclusion of gifts from the income of the donee, different amounts of benefit from home ownership, and different utilization of tax-free fringe benefits for employees.

Many of the provisions that are alleged by Professors Moran and Whitford to discriminate against blacks mitigate the effect of the

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13. Total cash income would be reduced by various deductions of business-related expense (and alimony) in arriving at adjusted gross income. *See* I.R.C. §§ 61, 62 (West Supp. 1998). On the other hand, total cash income does not include capital gains, which would be included in adjusted gross income. *See* BUREAU OF THE CENSUS, *supra* note 12, at xiv tbl.D.

14. *See* BUREAU OF THE CENSUS, *supra* note 12, at 5 tbl.2. The income measurement used here does not include capital gains, thus probably understating the number of whites in the over-$75,000 group. *See id.* at A-3.

15. *See id.* at 17 tbl.5. The term "families" refers to two or more related persons residing together; "households" refers to all of the persons who occupy a housing unit. Neither of these terms is the same as the filing units for income tax purposes. For example, children residing with the family might be separate taxpayers. A group of young people sharing an apartment would constitute a household but would include multiple taxpayers. Also, it appears that "families" excludes single-person households. *See id.* at A-1.

16. *See id.* at B-3 tbl.B-2. The term "householder" refers to the person maintaining the household, that is, the owner or lessee. *See id.* at A-1.

17. *See id.* at 5 tbl.2.

18. *See* Moran & Whitford, *supra* note 1, at 794-96.

graduated rates in order to implement various policies. For example, the tax-free step-up of basis at death[19] avoids the administrative problems of determining the decedent's basis in the property, and the deferral of gain on the sale of homes[20] enhanced both job and social mobility. Professors Moran and Whitford view these provisions as discriminating against blacks;[21] the provisions can just as well be viewed as reducing the discrimination against whites.

The position of Professors Moran and Whitford may be that it is appropriate for whites to pay most—perhaps all—of the income tax. It may be their position that the progressive rate structure is an essential part of the tax system and that the provisions they complain about, for example, capital gains rates and joint returns, are not essential parts of the tax system. If they really want to attack the Code, why do they not go straight to the point and argue that the existing rate structure is insufficiently progressive and that the Code discriminates against blacks (and other low-income groups) by not taking much more of the income of high-income (disproportionately white) taxpayers for redistribution?

Even if there were merit in the argument that the Code discriminates against blacks, where does the argument lead? Studies of income distribution show that the category "Asian and Pacific Islander" has the highest median household income, followed by whites, followed by blacks.[22] From Moran and Whitford's standpoint, then, the Code discriminates in favor of Asians and Pacific Islanders to the detriment of blacks. Would they contend that the tax law discriminates against whites vis-à-vis Asians and Pacific Islanders?

### B. *Property Transactions*

Many of the provisions complained of deal with property

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19. *See* I.R.C. § 1014 (West Supp. 1998).

20. The authors are dealing, of course, with § 1034 before its repeal. *See* I.R.C. § 1034, *repealed by* Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 312(b), 1997 U.S.C.C.A.N. (111 Stat.) 788, 839. To summarize briefly, § 1034 allowed a taxpayer to defer the gain on the sale of a principal residence to the extent the proceeds of selling the old home were reinvested in a new home.

21. *See* Moran & Whitford, *supra* note 1, at 755.

22. The median income in 1996 for Asians and Pacific Islanders was $43,276, for the category white-not-Hispanic, $38,787, for blacks, $23,482. *See* BUREAU OF THE CENSUS, *supra* note 12, at vii tbl.A; *see also* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 48-49 tbl.49, tbl.50 [hereinafter 1996 STATISTICAL ABSTRACT] (showing that 46.2% of Asians and Pacific Islanders, 39.4% of whites, and 21.2% of blacks were in the over-$50,000 income per household category (1995 figures)).

transactions.[23] To the extent that the income tax treatment of these property transactions falls short of the ideal treatment, it will benefit whites, who own much more property than blacks.[24] While this statement is true, Professors Moran and Whitford do not adequately develop it.

For some reason, Professors Moran and Whitford use *Commissioner v. Glenshaw Glass*[25] as the standard for the comprehensive income tax base.[26] This is very odd. *Glenshaw Glass* did not purport to define the comprehensive tax base. Rather, it interpreted the term "gross income," as used in present § 61 of the Code, to include "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."[27] Its historical importance was in eliminating the old *Eisner v. Macomber*[28] definition of income, " ' "the gain derived from capital, from labor, or from both combined," ' "[29] from the tax law. Its continued significance is merely as a test of whether ambiguous receipts should be included in gross income.[30]

If the authors seek to define a comprehensive tax base, why did they not use the Haig-Simons definition: "Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question."[31] Haig-Simons is the usual starting point for the discussion of a comprehensive tax base,[32] although Professor Brooks questions whether it should be.[33]

The authors could have strengthened their case greatly by using Haig-Simons as their starting point for the tax base. With a great

23. *See* Moran & Whitford, *supra* note 1, at 773-83.

24. *See* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH 86 tbl.4.4, 106 tbl.5.3 (1997) (showing statistics comparing the wealth and assets of blacks and whites).

25. 348 U.S. 426 (1955).

26. *See* Moran & Whitford, *supra* note 1, at 759.

27. *Glenshaw Glass*, 348 U.S. at 431.

28. 252 U.S. 189 (1920).

29. *Id.* at 207 (quoting Doyle v. Mitchell Bros. Co., 247 U.S. 179, 185 (1918) (quoting Stratton's Independence, Ltd. v. Howbert, 231 U.S. 399, 415 (1913))).

30. *See, e.g.*, Martin D. Ginsburg, *Taxing the Components of Income: A U.S. Perspective*, 86 GEO. L.J. 123, 126 & n.23 (1997).

31. HENRY C. SIMONS, PERSONAL INCOME TAXATION 50 (1938).

32. *See* WITTE, *supra* note 2, at 49.

33. *See* Jennifer J.S. Brooks, *Taxation and Human Capital, in* TAXING AMERICA, *supra* note 1, at 58, 59-60; Jennifer J.S. Brooks, *Taxation and Human Capital*, 13 AM. J. TAX POL'Y 189, 192-96 (1996). (These are two slightly different versions of the same article.)

fanfare of statistics, they show that whites enjoy most of the untaxed appreciation in homes, real estate, and stocks,[34] and recommend the taxation of unrealized appreciation in publicly traded stocks and nonresidential real estate.[35] This recommendation is not supported by their reliance on *Glenshaw Glass*, which explicitly requires realization, but would be supported by the Haig-Simons approach of measuring changes in net worth, whether or not realized.

### C. *What Do They Want?*

It is not clear what Professors Moran and Whitford are arguing. They disclaim any racial animus on the part of Congress, acknowledging that the Code is not deliberately structured to impose an extra burden on blacks.[36] On the other hand, they go to some length to eliminate the effect of socioeconomic factors other than race from their statistical studies and conclude that the Code does discriminate against blacks even after eliminating all other factors.[37] In a word, poor blacks are treated worse under the Code than are poor whites.

They appear to be arguing that there is a black lifestyle (as distinguished from a low-income lifestyle that happens to be the lifestyle of most blacks) and that the Code discriminates against taxpayers who live the black lifestyle.[38] It is surely inaccurate to stereotype blacks this way, just as it would be inaccurate to stereotype all whites as living lives of wealth and leisure. But even accepting the authors' stereotyping, they are again looking at the facts from the wrong perspective.

Viewing the income tax from the more sensible perspective of "who pays," the lifestyle against which the income tax discriminates is a lifestyle devoted to education, work, saving, and investing. This lifestyle often results in high incomes and accumulations of property. The income tax (and estate and gift taxes, which are not at issue in Moran and Whitford's article) discriminates against this lifestyle by taking large amounts of income and accumulated property.

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34. *See* Moran & Whitford, *supra* note 1, at 763-70.

35. *See id.* at 782.

36. *See id.* at 758, 801.

37. *See id.* at 770-71 (concluding that blacks are less likely to own financial assets that are tax-favored), 772 (concluding that blacks are less likely to enjoy tax benefits associated with gifts and inheritances), app. at 804-17 (reporting statistical results).

38. Professors Moran and Whitford discuss "lifestyle" throughout their article, *see, e.g.*, *id.* at 758, 802 n.176, but they never define the term. I presume it refers to such matters as marital status, spending patterns, and the value placed on education.

It is true that proportionately more whites than blacks live lifestyles devoted to education, work, saving, and investing, but it is also true that proportionately more Asians and Pacific Islanders than whites live this lifestyle.[39] Many blacks already enjoy this lifestyle and the proportion of blacks living this lifestyle is increasing faster than is the proportion of whites living this lifestyle.[40] As society evolves, the provisions about which Professors Moran and Whitford complain will benefit more and more blacks.

That Professors Moran and Whitford are ambivalent in their goals is shown in their discussion of the "Black Code," where they end up arguing *for* the exclusion of gifts from the income of the donee and *for* the deferral of gain on the sale of homes, reasoning that these rules will make it possible for blacks in the future to accumulate more wealth.[41] Of course! Will not all the provisions about which they complain do the same? As blacks buy more homes and more expensive homes, they too will begin to accumulate wealth that can be shielded from the income tax by home mortgage interest and property tax deductions. As they buy more stocks, they will benefit from the reduced capital gains rates and by the step-up in basis at death. Even with respect to the marriage penalty, which they oppose, Professors Moran and Whitford admit that a Black Congress might want to retain the present structure, which provides couples

39. As to education, Asians and Pacific Islanders have much higher educational attainments than whites, who in turn have much higher educational achievements than blacks. Based on 1990 data, the percentages of the different groups completing four years or more of college were: Asian and Pacific Islander, 39.9%; white, 22.0%; and black, 11.3%. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1997, at 159 tbl.243 [hereinafter 1997 STATISTICAL ABSTRACT].

As to income, the median household incomes of the different groups are (1995 figures): Asian and Pacific Islander, $46,356; white, $42,646; and black, $25,970. *See id.* at 469 tbl.724.

There are few data on savings and investment or the resulting wealth accumulations. *See* OLIVER & SHAPIRO, *supra* note 24, at 53-58. I rest my case on the high positive correlation of wealth with both educational achievement and income. *See* 1997 STATISTICAL ABSTRACT, *supra*, at 480 tbl.747 (showing that education and income are correlated with net worth); *id.* at 481 tbl.748 (showing that income is correlated with nonfinancial assets).

40. The percentage of blacks in the over-$75,000 household category increased from 2.6% to 9.0% between 1967 and 1996, a faster rate of increase than by whites (including those of Hispanic origin), of which the percentage in the over-$75,000 household category increased from 7.9% to 21.7%. *See* BUREAU OF THE CENSUS, *supra* note 12, at B-9 to B-10 tbl.B-4; *see also* 1996 STATISTICAL ABSTRACT, *supra* note 22, at 48 tbl.49 (showing a similar rapid increase in the percentage of blacks in the over-$50,000 group between 1980 and 1995).

41. *See* Moran & Whitford, *supra* note 1, at 783.

with a marriage bonus when the wife does not participate in the labor force, because "there are social gains from women working mostly in the home, such as better quality childcare."[42]

*D. A Counterargument: The Earned Income Tax Credit*

There is at least one provision in the Code that helps blacks disproportionately. The earned income tax credit is a refundable credit based on a percentage of the earned income of a taxpayer with dependent children—in essence a negative income tax for these taxpayers.[43] (There is a somewhat different rule that refunds some of the FICA tax to low-income taxpayers who do not have children.[44]) The earned income tax credit contains a phase-out so that it disappears as income rises.[45] The credit is granted to individual taxpayers, but there is a requirement that married individuals file joint returns.[46] The effect of these rules is an enormous marriage penalty on the working poor because the phase-out will often eliminate the earned income tax credit when both spouses' incomes are included on their joint return.

The structure of the earned income tax credit benefits not poor parents in general, but poor parents who are not married. That feature naturally favors those who live what Professors Moran and Whitford characterize as a black lifestyle.[47] Blacks are much more likely not only to be poor,[48] but also to be unmarried.[49] Because low-income whites are more likely to be married, their earned income tax credits are reduced or eliminated by the phase-out; low-income blacks are less likely to be married and less likely to be affected by

42. *Id.* at 798.

43. *See* I.R.C. § 32 (West Supp. 1998).

44. For individuals with no qualifying children, the earned income tax credit is computed at 7.65%, *see id.* § 32(b), which is exactly the same as the FICA tax imposed on the employee, *see* I.R.C. § 3101 (1994).

45. *See* I.R.C. § 32(a)(2), (b)(2) (West Supp. 1998).

46. *See id.* § 32(d).

47. *See* Moran & Whitford, *supra* note 1, at 797 n.163.

48. *See* 1997 STATISTICAL ABSTRACT, *supra* note 39, at 49 tbl.49 (showing that 30.3% of black families, compared to 11.6% of white families, had income under $15,000 (1996 figures)); *id.* at 475 tbl.736 (showing that 29.3% of black families, compared to 11.2% of white families, were below the poverty level (1995 figures)); *id.* at 475 tbl.737 (showing that 41.5% of black children, compared to 15.5% of white children, were living in families below the poverty level (1995 figures)).

49. *See id.* at 49 tbl.49 (showing that 46.1% of black households with children consist of married couples, compared to 81.3% of white households with children; and that 29.8% of black households with children consist of a female with no spouse present, compared to 8.5% of white households with children (1996 figures)).

the phase-out.[50] It is therefore not surprising that economists have estimated that about 24% of earned income tax credit recipients are black.[51] If anything, the earned income tax credit seems designed to reward the black lifestyle.

## III. MARRIAGE PENALTIES AND BONUSES

There is a long history of disputes about the effect of marriage and the income tax.[52] More recently, following academic trends, the complaints have changed to focus on the effect of the income tax on women, especially married women. As is well described in the writing on this subject, many married couples suffer a marriage penalty resulting from the effect of the progressive rates on their combined incomes.[53] Others approach the same fact from the standpoint of the wife, who finds that she has little of her earnings left after the (nondeductible) expenses of working and taxes (computed at the high marginal rates applicable to her income added to her husband's).[54] For various reasons, writers from the critical schools think that this is a problem. Mandatory individual filing is the usual prescription; some authors prescribe stronger medicine.[55]

This analysis will focus on the marriage penalty arising from the rate structure. Some of the other aspects of the marriage penalty, for example, the reduced standard deduction on a joint return, are not very interesting topics. Others are large topics in themselves, for example, the Social Security taxes (FICA and SECA).[56] It would be misleading to discuss FICA and SECA as taxes without discussing the benefit structure as well because, unlike the situation with the income tax, where there is no connection between the taxes paid and

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50. *See* Steve Rawlings & Arlene Saluter, *Household and Family Characteristics: March 1994*, *in* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS xvii fig.5 (1995) (showing that 75% of white families with children consist of two-parent groups, while only 35% of black families with children consist of two-parent groups).

51. *See* John Karl Scholz, *The Earned Income Tax Credit: Participation, Compliance, and Antipoverty Effectiveness*, 47 NAT'L TAX J. 63 app. at 86 tbl.1 (1994) (1990 figures).

52. The classic discussion of the issues is Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975).

53. *See id.* at 1429-32.

54. *See* MCCAFFERY, *supra* note 1, at 12-15; Alstott, *supra* note 1, at 2009; Blumberg, *supra* note 1, at 52-53; Gann, *supra* note 1, at 41-43; Kornhauser, *supra* note 1, at 109-10.

55. Professors Moran and Whitford would allow married couples to use the more advantageous of single or joint returns. *See* Moran & Whitford, *supra* note 1, at 798-99. Professor McCaffery would impose higher taxes on husbands in this situation. *See* MCCAFFERY, *supra* note 1, at 200-01.

56. *See* I.R.C. §§ 1401, 3101, 3111 (1994 & West Supp. 1998).

the benefits received, taxpayers receive benefits in return for their FICA and SECA contributions, and those benefits have a strong redistributive element.

### A. *Facts*

The Congressional Budget Office study *For Better or Worse*[57] shows that more couples enjoy a marriage bonus than suffer a marriage penalty.[58] The average size of the penalty is slightly larger than the average amount of the bonus,[59] but the differences are small. It is fair to say that the benefits and burdens are about equally split.

It is rarely noted in the commentary on this important study that if the effect of the earned income tax credit is removed, there is a large net bonus.[60] Thus, in the income tax proper, as distinguished from the income redistribution scheme administered through the earned income tax credit, more taxpayers benefit than suffer from the present rate structure.

### B. *The Marriage Penalty*

*A* and *B* marry. Each had taxable income of $25,000 before marriage. If no other factors change, *A* and *B* as a couple will pay more than twice the tax each paid while single. The critical tax theorists uniformly consider this effect to be a problem.

The marriage penalty in this situation arises because the joint return breakpoints between rate brackets are less than twice the single return breakpoints.[61] The joint return breakpoints are only

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57. CONGRESSIONAL BUDGET OFFICE, FOR BETTER OR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX (1997) [hereinafter CBO].

58. *See id.* at 30 tbl.4. This conclusion is based on the "basic measure" of penalty. *See id.* at 29 box 6 (describing five different ways to compute the marriage bonus/penalty, depending on the assumptions used to compute the alternative tax liabilities of joint filers if joint filing were not permitted). The basic measure, which prorates the deductions between the spouses, appears to be the most realistic baseline.

Other economists investigating the marriage penalty have concluded that penalties generally exceed bonuses but that the measures of penalty and bonus are highly dependent on the methodology used. *See, e.g.*, James Alm & Leslie A. Whittington, *The Rise and Fall and Rise . . . of the Marriage Tax*, 49 NAT'L TAX J. 571, 575 (1996).

59. *See* CBO, *supra* note 57, at 30 tbl.4.

60. *See id.* at 31. The "basic measure," which includes the effect of the earned income tax credit in determining the marriage bonus/penalty, shows 3.1 million more taxpayers with penalties and 2 million fewer with bonuses than when the marriage bonus/penalty is determined with reference to "basic measure less EITC." *See id.* at 30 tbl.4. For these taxpayers, changes in the earned income tax credit are a major factor in the marriage bonus/penalty.

61. *See* I.R.C. § 1(a), (c) (West Supp. 1998). Consider two taxpayers with taxable incomes in 1997 of $24,650, which is the maximum amount to which the 15% bracket

about 60% greater than the single return breakpoints in order to reduce the disparity between the taxes on married and single individuals at the same income level.[62]

Much is made of the desirability of the income tax being marriage-neutral even though marriage changes a whole array of legal relationships. (Would people marry if it did not?) Consider a brief illustrative list of areas of law that are not marriage-neutral: descent and distribution,[63] property,[64] bankruptcy,[65] federal tax liens,[66] evidence,[67] pension law,[68] tort,[69] and contract.[70]

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applies for single taxpayers. *See* Rev. Proc. 96-59, 1996-2 C.B. 392, 393 tbl.3. If they marry, they will have taxable income of $49,300 (ignoring the loss of some of their standard deduction). On the joint return, the maximum amount of income taxed at 15% is $41,200. *See id.* The remaining $8100 of their joint taxable income is taxed at 28%, giving rise to a marriage penalty of $1053 ($8100 x (28% - 15%)). If the joint return breakpoint were twice the single return breakpoint, all of their income would be taxed in the 15% bracket, and there would be no marriage penalty.

62. *See* I.R.C. § 1(a), (c) (West Supp. 1998). Consider two taxpayers, one single and one married, each having taxable income of $49,300 in 1997. The single taxpayer will pay tax on $24,650 at 15% and on another $24,650 at 28%. *See* Rev. Proc. 96-59, 1996-2 C.B. at 393 tbl.3 (setting $24,650 as the breakpoint between the 15% and 28% brackets). If the joint return breakpoint were twice the single return breakpoint, the married taxpayer would pay tax on the entire $49,300 at 15%. *See id.* The married taxpayer would enjoy a marriage bonus of $3205 (13% x $24,650). The breakpoint between the 15% and 28% brackets for married taxpayers is only $41,200, so that the married taxpayer faces a 28% rate on $8100, and thus enjoys a marriage bonus of only $2152.

63. Spouses are typically heirs of a person's property in intestacy and are allowed to elect against the will of the decedent. *See* UNIF. PROBATE CODE §§ 2-102, 2-201 to -207 (amended 1990), 8 U.L.A. 81, 101-18 (1998).

64. Under the community property regimes of eight states, spouses have equal interests in the community property even though the definition of what property falls to the community and what property remains separate differs widely among the states. *See* WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 56, at 96 (2d ed. 1971). Many common-law states have equitable distribution statutes that may deprive the husband of some of his property in the case of divorce. *See, e.g.*, N.Y. DOM. REL. LAW § 236(B)(5)(c) (McKinney 1986).

65. For example, the bankruptcy estate includes all interests of the debtor's spouse in community property; it does not include interests of other persons in other property, for example, tenancies in common. *See* 11 U.S.C. § 541(a)(2) (1994).

66. In states that recognize the tenancy by the entirety, the IRS cannot levy against property held as tenants by the entirety to satisfy the tax obligations of one of the spouses. *See* United States v. Gurley, 415 F.2d 144, 149 (5th Cir. 1969); Talbot v. United States, 850 F. Supp. 969, 975 (D. Wyo. 1994); *cf.* United States v. Rodgers, 461 U.S. 677, 719-20 (1983) (Blackmun, J., concurring in part and dissenting in part) (analogizing from tax liens on property held as tenants by the entirety to tax liens on property subject to a homestead exemption).

67. A married person can invoke the privilege of spousal immunity to prevent his spouse from testifying against him. *See* FED. R. EVID. 501.

68. An employee is required to receive his pension in the form of a joint and survivor pension unless he elects otherwise and his spouse joins in the election. *See* I.R.C. § 417 (West Supp. 1998).

The marriage penalty arising from the rate structure affects a minority of couples. Most are not affected because even their combined incomes do not reach the level at which the rate graduations begin. In 1996, the joint return taxed all taxable income up to $40,100 at the 15% rate.[71] The median household income in 1996 was $35,492.[72] A more precise figure from the IRS sews up the point: In 1994, roughly 67 million of the 93 million returns showing taxable income paid tax only at the 15% rate.[73] Thus, no couple in the lower 70% of the income spectrum is affected by the rate structure.[74]

The problem arises for couples earning incomes that are substantially higher than the median household income. Within that group, the problem is most serious for couples in which the spouses earn approximately the same incomes. Thus, it is not surprising that more than half the returns showing penalties reported adjusted gross incomes over $50,000, while more than half of the returns showing marriage bonuses reported adjusted gross incomes under $50,000.[75]

### C. *The Marriage Bonus*

The joint return favors families in which most or all the income is earned by one of the spouses. If *C* and *D* have taxable incomes of $50,000 and $0 respectively when they marry, *C* will pay substantially less tax when married than when single. *C* and *D* pay exactly the same tax as *A* and *B* who suffered a marriage penalty above, even though the contributions of the spouses differ. Many of the critical

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69. There are vestiges of the doctrine of interspousal immunity for torts in many jurisdictions. *See* RESTATEMENT (SECOND) OF TORTS § 895F (1965).

70. Standards for formation and enforcement of premarital agreements are much more stringent than for agreements between unrelated parties or between parents and adult children. *See* UNIF. PREMARITAL AGREEMENT ACT §§ 2-6, 9B U.L.A. 372-76 (1983).

71. *See* I.R.C. § 1(c) (1994); Rev. Proc. 95-53, 1995-2 C.B. 445, 446 tbl.1.

72. *See* BUREAU OF THE CENSUS, *supra* note 12, at vii tbl.A. Household income is a gross income figure that will exceed the same household's taxable income by a substantial amount.

73. *See* Therese Cruciano, *Individual Income Tax Rates and Tax Shares, 1994*, IRS STAT. INCOME BULL., Spring 1997, at 7, 25 tbl.1.

74. All couples are adversely affected by the loss of part of the standard deduction on the joint return. In 1996, *A* and *B* would have had standard deductions of $4150 each on single returns and only $6900 on a joint return. *See* I.R.C. § 63(c) (1994) (amended 1997). This effect operates purely as a tax penalty for marriage and is independent of the source of the couple's income, although it can produce a marriage bonus if the wife has no income.

75. *See* CBO, *supra* note 57, at 31 tbl.5.

tax theorists consider this to be a problem.[76]

The critical tax theorists have us compare two families: Family *A* in which the husband and wife each earn $25,000, and Family *C* in which the husband earns $50,000 and the wife does not work outside the home.[77] Clearly, they say, Family *C* is better off because the wife can perform a range of household services for which Family *A* must pay. Therefore, the argument goes, these two families are not comparable, and there is no reason why their taxes should be the same.

This argument fails for several reasons. First, it is not true in most situations that Family *A* will hire others to perform the necessary household services. In moderate-income families, the spouses still will cook, vacuum, and do laundry. These tasks may leave them with less time to relax, but the work will be done and for the most part without paying any outsider to do it. So Family *A* and Family *C* really differ in their amount of leisure time.

Second, this argument requires the taxation of imputed income from services. Even if Family *C* is better off, it is only because of the value of the services performed by the wife. Taxing Family *C* on the value of her services runs against the principle that taxpayers are not taxed on the value of the services they perform for themselves. It is true that people who repair their cars or cook gourmet meals for themselves are better off than those who must pay for such services, but the value of these services is hardly a feasible addition to the tax base.[78] A taxpayer should not be taxed on the value of an oil change when he performs that work on his own car.

Third, accepting again the argument that Family *A* is worse off because it will have to pay for household services, consider Family *E*, in which the husband earns $50,000 and the wife earns $0. The wife in Family *E* cannot or will not perform household services. Family *E* is forced to pay outsiders to perform these tasks. Family *E* is in the same position as Family *A*, which must also pay for the household

76. *See* MCCAFFERY, *supra* note 1, at 20; Christian, *supra* note 1, at 279; Moran & Whitford, *supra* note 1, at 800.

77. *See* MCCAFFERY, *supra* note 1, at 12-13; Blumberg, *supra* note 1, at 58-59, Gann, *supra* note 1, at 28; Davis, *supra* note 1, at 207.

78. Even the tax theorists who suggest taxing imputed income from the use of homes and consumer durables, for example, cars, throw up their hands at the thought of taxing homeowners for cutting their own grass. *See, e.g.*, WILLIAM A. KLEIN & JOSEPH BANKMAN, FEDERAL INCOME TAXATION 121-22 (11th ed. 1997). There also is a slippery slope problem with this approach: If Family *C* is taxed on the value of the wife's services, how about the grass-cutting services performed by the teenage son? Or the daughter's services babysitting her younger siblings?

services. Taxing Family *E* like Family *C* because the wife *could have* performed household services is even worse than taxing imputed income. It would be taxing *imputed* imputed income. A taxpayer should certainly not be taxed on the value of an oil change because he *could* change the oil in his car even though he does not.

These points fit together: Family *C* and Family *E* both differ from Family *A* in having more leisure time. The added tax liability, then, is a tax on sleeping, watching TV, playing with the children, knitting, or just loafing! There is, of course, the possibility that the wife in Family *E* cannot perform household services because of ill health, in which case the added tax on Family *E* would be a tax on Mrs. *E*'s misery.

### D. *Effect on Women's Work Outside the Home*

#### 1. Theory

Adding the wife's income to the husband's income results in its being taxed at the higher rates applicable to their combined incomes, which reduces the after-tax return on the wife's income and reduces her incentive to work.[79] (The same fact can be used to argue that the income tax discourages marriage, but there are few data on this point,[80] and most critical tax authors do not take this path.) This analysis is correct, but this is a problem only if we accept the premises that (1) women working outside the home should be a major social goal, and (2) marriage should be tax-neutral.

The discrimination against the second earner is a natural consequence of the progressive rate structure in which *any* additional income will be taxed at the marginal rate determined by the income already being earned. The same argument applies to a single taxpayer taking a second job or investing; the additional income will be taxed at the marginal rate determined by the taxpayer's primary employment. If we are serious about wanting the population to be fully employed—two jobs if the first does not occupy enough time or

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79. *See, e.g.*, MCCAFFERY, *supra* note 1, at 20.

80. *See* CBO, *supra* note 57, at 12-14. Economists have investigated this question. *See* David L. Sjoquist & Mary Beth Walker, *The Marriage Tax and Rate and Timing of Marriage*, 48 NAT'L TAX J. 547, 556 (1995) (arguing that the marriage tax does not affect the rate of marriage, but does affect the timing of marriage); *see also* James Alm & Leslie A. Whittington, *Does the Income Tax Affect Marital Decisions?*, 48 NAT'L TAX J. 565, 565-66 (1995) (commenting on methodological issues in Sjoquist and Walker's article and concluding that the overall effect of tax considerations on the marriage rate was to reduce it slightly).

produce enough income—and to invest for the future, then we should adopt a system of separate filing for each job and for each investment.

2. Empirical Research

Many economists focus on efficiency, which requires that taxes distort behavior as little as possible. They note that the combination of the high marginal rate of tax on the first dollar of the wife's compensation, the FICA tax, and the nondeductibility of expenses such as child care and work clothing, discourage paid work by wives. According to economic theory, this disincentive represents a loss to the economy.[81]

This economic theory has been put to empirical test. Feldstein and Feenberg showed that, assuming high elasticities for women's work, the combination of the first dollar being taxed at 28% (rather than 15%) and the FICA tax creates a very large deadweight loss to the economy.[82] They simulated the economic effect of various remedies, such as second-earner deductions, exemption of wives from the FICA tax, a lower rate on the second earner, and mandatory individual returns. All of these proposals resulted in substantial revenue losses. In all but one of the simulations, a revenue loss of one dollar reduced deadweight loss to the economy by less than one dollar. Of particular interest here, the simulations showed that a 15% rate on the second earner would reduce the deadweight loss by 61 to 69 cents per dollar of lost revenue; a 20% rate on the second earner would reduce the deadweight loss by 71 to 77 cents per dollar of lost revenue.[83] These trade-offs do not appear to be beneficial.

The only simulation that produced substantial reductions in the deadweight loss without a major revenue loss was mandatory individual returns with rate adjustments to maintain revenue neutrality. Revenue neutrality resulted from income taxes (at lower

81. This analysis, like most of the efficiency economics, depends on the assumption that people are better off if the money economy is larger. A non-economist might doubt this. According to this logic, we would be better off if all housewives were forced into the market economy: Mrs. *A* would now perform household services for pay in the *B*s' home while Mrs. *B* performed household services for pay in the *A*s' home. The fallacy, of course, is the underlying assumption that anyone or anything not earning a cash return is not contributing to the welfare of society. That assumption is true as to idle factories and probably true as to unemployed young men, but is clearly untrue as to housewives.

82. *See* Martin Feldstein & Daniel R. Feenberg, *The Taxation of Two-Earner Families*, *in* EMPIRICAL FOUNDATIONS OF HOUSEHOLD TAXATION 39, 40-43 (Martin Feldstein & James M. Poterba eds., 1996).

83. *See id.* at 68-69.

rates but on a larger base) and Social Security taxes on women who joined the workforce as a result of the tax changes and higher taxes on other workers, thereby offsetting the reduction in taxes on women already in the workforce.[84] In practice, this individual filing scheme would probably work out fairly equally for many couples. If both are now working, he would pay more tax, but she would pay less, and they would end up about where they are now. If she is not now working, the spouses would have additional income to the extent of the wife's earnings net of taxes, which in many cases would be only the FICA tax, offset by the additional taxes on the husband's income. It would presumably increase taxes on single taxpayers and married taxpayers where one spouse earned most or all the income.

## *E. Solutions to the Marriage Penalty*

### 1. Higher Tax Rates for Men

While Professors Moran and Whitford are ambivalent about whether to change the Code provisions that benefit traditional families because these same provisions may benefit blacks in the future,[85] Professor McCaffery has no doubts that any provision benefiting the traditional family should be eliminated. In his view, the traditional family perpetuates the burden of patriarchy that still burdens women.[86]

#### a. Theory

To solve these problems, Professor McCaffery proposes a higher rate of tax on the income of married men, which will discourage them from working and encourage them to stay home with the children, and a lower rate of tax on the income of married women, which will encourage them to enter the work force.[87] The idea of taxing married men at higher rates is founded in the theory of optimal taxation, which hypothesizes efficiency gains from taxing the least elastic goods at the highest rates.[88] Although taxes will change the relative

84. *See id.* at 62-63 tbl.2.3, 69-71. Although they were not able to deal precisely with the allocation of property income and deductions between the spouses' returns because of limitations of the data, Feldstein and Feenberg approximated the results by splitting these items between the two returns. *See id.* at 69.

85. *See* Moran & Whitford, *supra* note 1, at 782, 783, 798.

86. *See* MCCAFFERY, *supra* note 1, *passim.*

87. *See id.* at 5, 192-94.

88. *See, e.g.*, J.A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175, 207-08 (1971); F.P. Ramsey, *A Contribution to the Theory of Taxation*, 37 ECON. J. 47, 58-59 (1927).

production of goods from what it would have been in a no-tax world, the changes will be the smallest—and therefore the least inefficient—if the inelastic goods are taxed heavily and the highly elastic goods are taxed lightly. According to the data that Professor McCaffery cites, married men are almost completely inelastic with respect to employment.[89] Married women, on the other hand, are highly elastic with respect to employment.[90] Therefore, men should be taxed at higher rates, and women at lower rates.

b. A Small Problem

There are also unmarried men and women. Unmarried women do not face the tax problems that concern Professor McCaffery, so there is no reason to make them beneficiaries of the lower rates. Their elasticity as to work is probably lower than that of married women because they do not have husbands on whom to depend for support.[91] Applying the rationale of optimal taxation to complete the tax scheme stated above would lead to taxing single women at higher rates than married women, although not as high as those for married men.

More seriously, what about unmarried men? Their elasticity of employment is substantially higher than that of married men.[92] The

89. *See* MCCAFFERY, *supra* note 1, at 179-82.

90. *See* Nada Eissa, *Labor Supply and the Economic Recovery Tax Act of 1981, in* EMPIRICAL FOUNDATIONS OF HOUSEHOLD TAXATION, *supra* note 82, at 5, 6 (estimating elasticity of .79 for upper income women). This obviously overstates the elasticity for all women; low-income women presumably have low elasticity because they are forced to work.

91. I have not found any study measuring the elasticity of single women with respect to employment, but the propensity to work can be deduced from the actual employment figures. The rates of participation in the workforce for women by age and marital status are:

WOMEN'S PARTICIPATION IN THE WORKFORCE

| | | AGE | | | |
|---|---|---|---|---|---|
| | | 20-24 | 25-34 | 35-44 | 45-64 |
| MARITAL STATUS | Single | 72.9% | 80.2% | 79.5% | 67.3% |
| | Married | 64.7% | 72.0% | 75.7% | 62.7% |

*See* 1996 STATISTICAL ABSTRACT, *supra* note 22, at 399 tbl.624 (1995 figures).

92. I have not found any study that has measured the elasticity of unmarried men with respect to employment, but it is clear from their much lower rate of participation in the workforce that unmarried men do not feel the same compulsion to work that married men feel. *See* Howard V. Hayghe & Steven E. Haugen, *Profiles of Husbands in Today's Labor Market*, MONTHLY LAB. REV., Oct. 1987, at 12, 13. This lower rate of participation is shown in the following table:

optimal tax argument for taxing men more heavily fails when applied to unmarried men. A heavy tax where there is a high elasticity will produce substantial, and in this case, very serious, changes in behavior: Unmarried men will not work or will not work any more than necessary to survive.

The problems of unemployed men, especially unemployed young men, are serious, for themselves and for society. Deprived of work and its socializing benefits, young men can fall into lives of idleness and crime.[93] Of course, this problem can be easily solved by taxing unmarried men at lower rates in order to encourage them to work. Although unmarried men are more likely to participate in the workforce than are unmarried women, the social consequences of their not participating are much more serious, which justifies a rate of tax on their incomes lower than that on the incomes of unmarried women.

Consider the tax system that would emerge from all this theorizing:

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MEN'S PARTICIPATION IN THE WORKFORCE (1987)

| | AGE | | | | | |
|---|---|---|---|---|---|---|
| | | All Ages | 16-24 | 25-34 | 35-44 | 45-54 |
| MARITAL STATUS | Married | 78.5% | 95.3% | 97.1% | 96.2% | 93.7% |
| | Never Married | 71.7% | 65.2% | 88.0% | 83.7% | 71.7% |
| | Not Married | 67.9% | 87.6% | 92.9% | 91.1% | 86.1% |

*See id.* at 13 tbl.1. The more recent figures shown in the following table substantiate lower rates of labor force participation for single men.

MEN'S PARTICIPATION IN THE WORKFORCE (1995)

| | AGE | | | | |
|---|---|---|---|---|---|
| | | 20-24 | 25-34 | 35-44 | 45-64 |
| MARITAL STATUS | Single | 80.2% | 88.7% | 81.4% | 67.0% |
| | Married | 94.9% | 96.3% | 95.4% | 82.4% |

*See* 1996 STATISTICAL ABSTRACT, *supra* note 22, at 399 tbl.624 (1995 figures).

93. *See* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1996) (chronicling the social disintegration of a Southside Chicago neighborhood arising from the widespread unemployment of young men); *see also Tomorrow's Second Sex*, ECONOMIST, Sept. 28, 1996, at 23 (discussing the growing social problem of uneducated, unmarried, and unemployed men).

RATE STRUCTURE OF A TAX SYSTEM BASED ON ELASTICITY

| | *Unmarried* | *Married* |
|---|---|---|
| *Men* | Lowest Tax Rates | Highest Tax Rates |
| *Women* | Higher Tax Rates | Low Tax Rates |

It is hard to imagine beneficial social results arising from such a tax rate structure.[94]

### 2. The Earned Income Tax Credit

There is one area in which the marriage penalty is both severe and avoidable without fundamental damage to the tax system. Low-income couples face a drastic reduction in the earned income tax credit when they marry. This reduction occurs because they are required to file joint returns, the credit is phased out as adjusted gross income increases, and the phase-out is the same for single persons and married persons.[95] Thus, adding a spouse's income to the taxpayer's income is likely to cause the taxpayer to lose a large part of the earned income tax credit to the phase-out. This problem should be eliminated because the persons eligible for the earned income tax credit are in dire economic straits even with the credit and because marriage should be encouraged especially in this economic stratum.

Individual returns could solve this problem. There would be few problems of assigning property income or deductions among couples at this income level.[96] Individual returns, however, present a serious problem, which I will call the "surgeon's wife" problem. If a benefit is phased out for taxpayers with high incomes, the surgeon will

94. It is interesting to note that the above rate structure would reinforce the biological tendencies of the sexes: marriage for women, and bachelorhood for men. These tendencies result, biologists now believe, because women seek long-term commitment to aid them in their long-term commitment to their children, while men seek only to spread their seed as widely as possible. *See* James Q. Wilson, *On Gender*, PUB. INTEREST, Summer 1993, at 3, 5, 7. Given the widely accepted social benefits of marriage, it would be odd to see a tax system that would give men yet another incentive to avoid long-term commitment and that would add tax insult to psychic injury for single women.

95. *See* I.R.C. § 32(b), (d) (West Supp. 1998).

96. The only deductions likely to apply to these taxpayers would be the deductions allowed in arriving at adjusted gross income because the other deductions are not likely to exceed the standard deduction. Alimony and perhaps the moving expense deduction are the only deductions that come to mind for taxpayers in these income ranges. Moreover, the earned income tax credit is eliminated for taxpayers with more than $2200 of investment income during the year. *See id.* § 32(i).

obviously not receive the benefit. But his wife might if she earns a small salary and the benefit is determined with respect to her salary only. The surgeon's wife problem will arise if the taxpayer's eligibility for the earned income tax credit is completely independent from the income of her spouse.

There are better ways to solve the problem, the most straightforward of which would be to adjust the phase-out for married couples so that it starts much higher. Starting the phase-out at twice the current level would make the earned income tax credit marriage-neutral.[97] This solution would not be very costly.[98] It would perhaps stir resentment among other taxpayers who saw substantial earned income tax credits being given to people with adjusted gross incomes in excess of $40,000.[99]

To prevent the political backlash that might result from having such relatively high income taxpayers receiving the earned income tax credit, it would be better to increase the starting point of the phase-out on a joint return to something less than twice the starting point of the phase-out on a single return. This would also be justified by the idea that the needs of a married couple with children are greater than those of a single person with children, but not twice as great because of economies of scale in housing and food. In the § 1 rate schedules, the first two joint return brackets are 60% wider than the single return brackets.[100] There is nothing magic about that number, but it is not a bad trade-off among the competing interests.

## IV. MANDATORY INDIVIDUAL FILING

### A. *Not Theoretically Justified*

The usual recommendation to avoid the problems of the

97. *See id.* § 32(b)(2). If the phase-out amount were exactly twice the phase-out amount in effect now, two individuals receiving the maximum earned income tax credit with earned income (or adjusted gross income) exactly equal to the phase-out amount could marry and still not lose any of the earned income tax credit by reason of the phase-out.

98. *See* CBO, *supra* note 57, at xviii tbl.4 (showing that starting the earned income tax credit phase-out for married couples at twice the current level would result in revenue loss of $4 billion and reduce the total marriage penalty by 12%, and that 41% of the benefits from so raising the phase-out would inure to taxpayers with incomes below $20,000).

99. The completed phase-out amount applicable in 1998 is $30,095. *See* Rev. Proc. 97-57, 1997-52 I.R.B. 20, 22. If doubled phase-out amounts applied to married taxpayers, a couple with earned income of $60,000 would receive a credit—albeit a very small one.

100. *See* I.R.C. § 1(a), (c) (West Supp. 1998).

marriage penalty is mandatory individual filing.[101] This Part of this Section will argue that mandatory individual filing is no more justifiable on equity grounds than joint filing. The next Part of this Section will argue that mandatory single filing would add a major level of complexity to the tax system.

Changing to a system of mandatory individual filing would replace one disincentive with another. For example, husband and wife, both employed at salaries of $50,000 each, confront the husband's promotion to a new job at a salary of $100,000, which will require the couple to move. The move will cost the wife her job, and the time demands of the husband's new job will make it impractical for the wife to work. Under the present joint filing system, this is a tax-neutral decision for the couple. Under single filing, there would be a substantial tax penalty for accepting the promotion.

Individual filing would present other inequities. Consider *F* and *G*, both working in their first jobs at $25,000 each. *F* now marries *H*, who earns $100,000. *F* and *G* would still pay the same tax. Unless *F* unwisely has chosen a spouse who refuses to share his income with her, it is not plausible to argue that *F*'s ability to pay remains the same as *G*'s. Will *G* be satisfied when told that the individual filing system prevents *H* from obtaining a marriage bonus?

Consider *J*, single with $50,000 taxable income, vis-à-vis *K* and *L*, married to each other, each with $25,000 taxable income. Under the joint return system, *J* pays more than *K* and *L*. If *K* and *L* are allowed to file individual returns and thereby reduce their marriage penalty, *J* will pay much more than they do unless there is a major flattening of the rates in conjunction with the change to mandatory individual filing.

The problem with this whole subject is that inequity can be found in any system depending on what perspective is used. The table below shows in brief form how various single persons (*S1*, *S2*, and *S3*) and married couples (*H1* and *W1*, *H2* and *W2*, and *H3* and *W3*) fare under joint returns and individual returns. The table assumes that there are no differences in standard deductions or personal exemptions depending on marital status. The table shows that there would be many opportunities to complain about unfair tax burdens under individual filing.

101. *See* MCCAFFERY, *supra* note 1, at 278; Moran & Whitford, *supra* note 1, at 798.

COMPARISON OF TAX BURDENS OF JOINT RETURNS AND INDIVIDUAL RETURNS

| | *1* | 2 | *3* |
|---|---|---|---|
| *H* | $50,000 | $25,000 | $25,000 |
| *W* | $0 | $25,000 | $25,000 |
| *S* | $50,000 | $50,000 | $25,000 |

| Joint | Individual |
|---|---|
| *H1W1 = H2W2* | *H1 + W1 > H2 + W2* |
| *S1 > H1W1* | *S1 = H1 + W1* |
| *S2 > H2W2* | *S2 >> H2 + W2* |
| *H3* > S3* | *S3 = H3 = W3* |

= means "pays same tax as"

> means "pays more tax than"

>> means "pays much more tax than"

* Assumes that *H3* is liable for one-half the combined tax liability. This illustrates the marriage penalty: *H* and *W* pay more tax after marriage than before.

## B. *Implementing Mandatory Individual Returns*

The topic of mandatory individual returns deserves detailed treatment because it is regarded as a panacea by so many writers criticizing the tax law as unfair to some taxpayers on account of their race or their sex.[102] Most of these writers simply state that the problem of discrimination against women can be solved by a mandatory individual return system and do not consider the practical problems of individual returns for married persons.[103] The discussion

102. *See* MCCAFFERY, *supra* note 1, at 278; Blumberg, *supra* note 1, at 54-55; Moran & Whitford, *supra* note 1, at 795; Davis, *supra* note 1, at 218-19, 236-38.

103. *See* Blumberg, *supra* note 1, at 95 (noting that the aggregation of spousal income should be abandoned in favor of individual taxation for all wage earners without addressing the problems of such a system); Brown, *supra* note 1, at 54 (concluding that the marriage penalty should be eliminated without analysis of how to do so); Christian, *supra* note 1, at 355-63 (discussing second-earner credit, higher tax rates for married men, and mandatory individual filing); Gann, *supra* note 1, at 32, 51-52 (stating that the elimination of marital status should be abandoned in favor of individual taxation for all wage earners without addressing the problems of such a system); Davis, *supra* note 1, at 238-48 (acknowledging problems of allocating unearned income, especially when the wife does not actually share in benefits of unearned income, but lacking discussion of deductions not related to property). *But see* Alstott, *supra* note 1, at 2031-32 (pointing

here focuses on the joint return and does not consider the broader issue of true marriage neutrality.

Professor Zelenak, who has made a serious effort at working out the practical problems of an individual return system, admits that the simplicity of the joint return system is one of the strongest arguments for retaining it.[104] He believes, however, that workable solutions can be developed for the problems presented by an individual return system. He identifies two categories of problems: (1) assigning the itemized (or standard) deductions, personal credits, and personal exemptions to one of the spouses; and (2) assigning the income from property to one of the spouses.[105]

1. Personal Deductions, Credits, and Exemptions

Professor Zelenak concludes that there are two equally satisfactory ways of dealing with the deductions: (1) assigning all the personal deductions to the spouse with the higher income until the spouses' incomes are equal and then splitting the deductions equally; or (2) prorating the personal deductions between the spouses in proportion to their incomes.[106]

Professor Zelenak's proposal would work well for the simple deductions, for example, the home mortgage interest deduction on the family home. Either proration or allocation to the higher-earning spouse would be simple and produce rough justice. Despite his thoughtful efforts, problems remain because not all of the itemized deductions are simple deductions.[107] Many of the itemized deductions and credits are subject to various limits and restrictions that make it less clear to whom the deduction should be assigned.[108]

There are three categories of limits and restrictions: (1) thresholds, (2) phase-outs, and (3) deductions that appear to call for assignment by rules other than those proposed by Professor Zelenak. Thresholds allow a deduction only to the extent it exceeds a

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out that individual filing would likely enhance women's market work but would be detrimental to women as caregivers).

104. *See* Zelenak, *supra* note 1, at 381.

105. *See id.*

106. *See id.* at 393.

107. If I thought that the adoption of individual filing might lead to simplification of the itemized deductions, I might be more favorably inclined toward it.

108. At the time Professor Zelenak was writing, the main problem was the itemized deductions. After the enactment of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 1997 U.S.C.C.A.N. (111 Stat.) 788, the issue of personal credits is important. *See, e.g.*, I.R.C. § 24 (West Supp. 1998) (child tax credit); *id.* § 25A (Hope Scholarship and Lifetime Learning Credits).

threshold. The rationale for thresholds is generally to screen out small items for administrative reasons and sometimes for revenue reasons.[109] Phase-outs reduce a credit or deduction as the taxpayer's income increases over some specified amount in order to deny the benefit to high income taxpayers. Finally, some deductions, for example, alimony, should not be apportioned.

a. Thresholds

The casualty loss deduction illustrates the operation of a threshold rule. Casualty losses are limited, first, to the excess of each loss over $100, and, second, to the excess of the aggregate remaining loss over 10% of the taxpayer's adjusted gross income.[110] The best way to assign this deduction is not clear. Consider *H* and *W*, earning $80,000 and $20,000, respectively. *W* suffers $6000 uninsured damage to her car. Assigning the whole deduction to the higher-earning spouse, *H*, seems wrongheaded; it was *W*'s car, and she might have paid for the car from her earnings. Assigning the whole deduction to *H* does not maximize the tax benefit; it deprives the spouses of any income tax benefit because the damage does not exceed 10% of *H*'s adjusted gross income. If the rule is proration in proportion to their incomes, the conceptual problem of *W*'s owning the car disappears because title is irrelevant in a proration system. The spouses, however, still do not receive any income tax benefit because the $1200 casualty loss prorated to *W* ($20,000/$100,000 x $6000) will not exceed 10% of her adjusted gross income, and the reduced casualty loss prorated to *H* will not exceed 10% of his adjusted gross income.

On the other hand, if the tax consequences follow the title to the car, then *W* may be entitled to some deduction because the loss exceeds 10% of her adjusted gross income. Following title seems most consistent with a marriage-neutral tax system; that is, it leaves *W* where she would have been if not married. This system would not present serious compliance or administrative problems because the spouses would have title documents proving the ownership of the kinds of major items (for example, cars, boats, homes) that can give rise to casualty losses large enough to pass the thresholds described above. Taxpayers would find it difficult to game the system by throwing all casualty losses onto the return of the lower-income

109. The threshold for the medical expense deduction was increased in the Tax Reform Act of 1986, Pub. L. No. 99-514, § 133, 100 Stat. 2085, 2116 (codified at I.R.C. § 213(a) (West Supp. 1998)). This was done to raise revenue. *See* H.R. REP. NO. 99-841, at 866 tbl.A.2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4075, 4954.

110. *See* I.R.C. § 165(h) (West Supp. 1998).

spouse unless they can predict accurately which items of property will be subject to casualty.

The medical expense deduction is another example of a deduction subject to a threshold. This deduction is limited to the excess over 7.5% of the taxpayer's adjusted gross income.[111] The medical expense deduction, unlike the other itemized deductions, is allowed to the taxpayer with respect to expenditures for the benefit of other persons if the other persons are dependents.[112] That means that a liability test would not be appropriate here, but a payment test would be consistent with current law. Either of Professor Zelenak's proposed rules often will deny the taxpayer the benefit of the deduction because the expense will not exceed 7.5% of adjusted gross income of the spouse to whom it is allocated or apportioned. Unlike the casualty loss deduction where taxpayers will have some difficulty in shifting the deduction to the lower-income spouse, a payment rule would allow taxpayers to shift the medical expense deduction to the lower-income spouse to get past the 7.5% of adjusted gross income threshold, or, in a few cases, to the higher-earning spouse to take advantage of the excess over 7.5% of adjusted gross income against higher tax rates.

b. Phase-Outs

Phase-outs abound in the Code, especially after the passage of the Taxpayer Relief Act of 1997. They exist primarily to deny benefits to high-income taxpayers. The phase-outs usually require taxpayers to file joint returns as a means of solving the surgeon's wife problem. Some of the critical tax theorists may believe that the surgeon's wife does not present a problem—after all, her work will liberate her from patriarchy and that will presumably justify the benefit.[113] But it is unlikely that Congress or the public at large will accept this.

To illustrate the issues, consider the child credit created by the 1997 Act.[114] A taxpayer is allowed a $500 credit ($400 in 1998) for each dependent child under the age of seventeen, but the credit is

111. *See id.* § 213(a).

112. The dependents need only be dependents as defined by the more-than-half-support and relationship tests. *See id.* § 152(a). It is not necessary that the taxpayer actually be allowed a dependency exemption for the person. *See id.* § 213(a) (referring to the definition of "dependent" in I.R.C. § 152, rather than to I.R.C. § 151, which allows the dependency exemption).

113. *See, e.g.*, MCCAFFERY, *supra* note 1, at 159.

114. *See* I.R.C. § 24 (West Supp. 1998) (added by Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 101(a), 1997 U.S.C.C.A.N. (111 Stat.) 788, 796-98).

reduced by $50 for each $1000 of the taxpayer's modified adjusted gross income in excess of $110,000.[115] Thus, a taxpayer with modified adjusted gross income of $120,000 (or more) would see his $500 credit reduced by 10 times $50, and therefore would be allowed no credit.

In an individual return system, the phase-out would affect the spouses differently depending on their relative incomes. If the $500 credit were divided between the spouses in proportion to their incomes, the result would favor couples with an exactly equal division of income, who are, interestingly, the very couples treated worst by the rate structure. Assuming that the starting point of the phase-out for single taxpayers now in the law ($75,000) would apply in an individual return system, *H* and *W* could each have $75,000 modified adjusted gross income and not suffer from the phase-out. The family would have $150,000 modified adjusted gross income and a $500 child credit for each child under age seventeen. As the incomes of the spouses diverge from equality, the amount of credit will be reduced, for example, if *H* has modified adjusted gross income of $85,000, and *W* of $65,000, he will be allowed no credit—the family will still have $150,000 modified adjusted gross income, but only *W* will have a credit. If the credit were prorated, it would be approximately $217 ($500 x 65/150) for each child under age seventeen.

It is not clear, however, that the credit should be prorated. Because a credit is a direct offset against the tax liability, the benefit of a credit does not depend on the taxpayer's marginal rate, which suggests that the credit should be divided equally between the taxpayers. In that case, *W* will have a credit of $250, but *H*, of course, will still be phased out. Equal division of the credit has two problems: (1) it is less advantageous than proration if the lower-earning spouse has tax liability less than $250 (unless the higher-earning spouse is fully phased out); and (2) the surgeon's wife problem re-emerges.

No matter how the $500 credit is divided between the spouses' individual returns, the above results are inconsistent with the demand of horizontal equity that similarly situated taxpayers be treated similarly. Many couples in which the higher-earning spouse is phased out would regard it as unfair that they receive less than the $500 credit available to another couple with the same income earned equally by the spouses.

Professor Zelenak's other proposed rule—assigning the credit to

115. *See id.* § 24(b)(1), (b)(2)(A).

the higher-earning spouse—would be disastrous to high-income taxpayers, as it would eliminate the credit whenever the higher-earning spouse had modified adjusted gross income of $85,000 or more.

The phase-outs on the Hope Scholarship Credit and Lifetime Learning Credit[116] would operate in much the same way, even though the phase-outs start at different levels. The rule defining the base of these credits, "qualified tuition and related expenses," would presumably be modified to include only expenses of the taxpayer and the taxpayer's dependents, deleting the expenses of the taxpayer's spouse from the base of the credit. If this change were not made, a wife could claim the Lifetime Learning Credit for the educational expenses incurred by her husband if his income made him ineligible for the credit.

The credit for a child's education expenses could be assigned using either of Professor Zelenak's proposed rules. For high-income taxpayers, the apportionment in accordance with income rule would be much more beneficial because assigning it to the higher-income spouse would almost always lead to a complete phase-out. A payor rule would be costly to the Treasury; the lower-income spouse would always pay the education expenses (at least up to the amounts taken into account for the credit) in cases where she was not completely phased out.

The rate of the child care credit is reduced from 30% to 20% as the taxpayer's adjusted gross income increases over $10,000.[117] Married couples are required to file joint returns in order to qualify for the credit.[118] If there were no joint returns, the credit reduction could depend on the wife's income, the husband's income, or on the payor's income. The rationale of the credit—to offset some of the additional expenses incurred by the second earner—suggests that the credit should be allowed to the second earner and based on her income. This again presents a variation of the surgeon's wife problem, which could be solved by some limit based on the income of the taxpayer's spouse.

The use of phase-outs is not limited to credits. Itemized deductions (except medical, casualty losses, and investment interest—all of which have their own serious limits) are phased out as

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116. *See id.* § 25A (added by Taxpayer Relief Act of 1997 § 201(a), 1997 U.S.C.C.A.N. (111 Stat.) at 788, 799-803).
117. *See id.* § 21(a)(2).
118. *See id.* § 21(e)(2).

the taxpayer's adjusted gross income increases over $100,000 (indexed).[119] If the $100,000 applicable amount remained in effect in a mandatory individual return system, many taxpayers who now suffer from the phase-out of itemized deductions would avoid or reduce the phase-out by shifting some income to their spouses' returns. There would be some revenue cost to this change, but any reduction in the complications introduced into the Code by § 68 would be welcome.[120]

c. Deductions Calling for Other Rules of Assignment

Presumably the alimony deduction would be allocated to the payor. It would be strange indeed to allow the second wife a part of the husband's deduction for alimony paid to his first wife.

Among the itemized deductions is the deduction for investment interest, which is deductible to the extent of the taxpayer's net investment income.[121] This deduction should surely be allocated in its entirety to the owner of the property—or to both spouses if the property is jointly owned—to avoid the anomaly of including the income from the investment property in the owner's income and not allowing him to deduct all the expense attributable to the property. It would also be difficult to determine the taxpayer's net investment income if this and other investment expenses were not allocated by ownership.

The moving expense deduction presents an interesting situation. This is not an itemized deduction, but is allowed in computing adjusted gross income.[122] There is no income limitation, but there are strict rules about distance of the new residence from the former job and the time the taxpayer must be employed at the new residence.[123] When *H* and *W* move to a new city, who should be allowed the deduction? While income-producing deductions would be allocated to the owner of the income, the moving expense deduction is not tied to any particular income. Rather, it is contingent on being employed at the new residence for specified periods.

It would be possible to allow the deduction to the payor of the

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119. *See id.* § 68.

120. *See* Calvin W. Johnson, *Simplification: Replacement of the Section 68 Limitation on Itemized Deductions*, 78 TAX NOTES 89, 89 (1998).

121. *See* I.R.C. § 163(d) (West Supp. 1998).

122. *See id.* § 62(a)(15). Because this deduction is a deduction from gross income and is not subject to any limits or thresholds, it will always benefit the taxpayer at his marginal rate.

123. *See id.* § 217(c).

expenses, to the spouse who satisfies the distance and work requirements (or divide it if both satisfy the work requirements), or to prorate it. Each of these possibilities presents problems. Allowing the deduction to the payor would put a premium on planning. If both spouses satisfy the work requirement, proration might be fairest, but proration would sometimes be inconsistent with the rationale of the deduction. For example, suppose *H* has $10,000 earned income and $90,000 investment income, *W* has $25,000 employment income, and they move to a new residence where she works and he does not. *H* will be apportioned 80% of the moving expense deduction even though he would not be allowed any moving expense deduction on his own. This is one situation in which allocating the entire deduction to the spouse with the most earned income would be most beneficial to the spouses when both qualify.

Taxpayers are allowed to deduct state and local income taxes and property taxes as itemized deductions.[124] Proration in proportion to income would be an appropriate way to assign the deduction for state and local income taxes between the spouses, because that would approximate the amounts each paid. Proration of the property tax deduction on the personal residence is more doubtful. It might be owned separately by one of the spouses, in which case proration is not appropriate. If it is owned jointly, the spouses' equal shares of the property tax liability will not be reflected in the deduction unless their incomes are equal.

If the itemized deduction for property taxes is prorated while the deduction for business property is assigned to the owner, mixed-use property will be subject to both rules. Consider the beach condo owned by the husband, used partly by the family and partly for rental purposes. The taxpayers would find that the property taxes assigned by I.R.C. § 280A to their personal use would be prorated between them, while the property taxes assigned by I.R.C. § 280A to the rental use of the property would be assigned entirely to the husband. This is not a technical tax problem, but it will be hard to explain to the taxpayers and is unlikely to raise their regard for the income tax as a sensible and fair method of raising revenue.

It might seem that the problems pointed out here are of no consequence because in many cases the thresholds and phase-outs will deny the deductions and credits to taxpayers on individual returns in situations in which they would not be allowed on joint

124. *See id.* § 164(a)(1)-(3).

returns.[125] That may be true, but if the goal of individual returns is to reflect accurately the individual taxpayer's ability to pay, then it is inconsistent to inject into the determination of the tax any factors relating to another taxpayer.[126] Further, there will be horizontal inequities as couples with similar combined incomes face different tax liabilities arising from the operation of the thresholds and phase-outs.

In general, allocating all the itemized deductions to the higher-earning spouse on the grounds that doing so maximizes the spouses' welfare will sometimes have the opposite result, depriving the taxpayers of a deduction or credit because the higher earner's income runs afoul of a threshold or phase-out. Prorating the deductions in proportion to the spouses' incomes works better in some cases, although it would not reflect the reality of their economic arrangements.

An academic response to the above might be that the various thresholds and phase-outs are not themselves justified by tax policy and that they should be eliminated in an income tax free of sex discrimination. This is not likely to happen. Congress seems ever more enamored of thresholds, phase-outs, and offsets.[127] If policy recommendations are to be taken seriously, they must cope with the realities of the present tax law.

The preceding examination of the various itemized (and other personal) deductions reveals that neither proration between the spouses nor allocation to the higher-earning spouse is completely satisfactory. It is obviously possible to fix the problems; we tax lawyers pride ourselves on our ability to draft a rule for any situation. The result, however, is not likely to be pretty. For example, the law could provide that the payor may deduct alimony, that the owner of

125. This discussion accepts Professor Zelenak's view that *Hoeper v. Tax Commission*, 284 U.S. 206 (1931), is not likely to be continued authority that basing one spouse's tax liability on factors related to the other is unconstitutional. *See* Zelenak, *supra* note 1, at 389-90. The assertion here is that it is inconsistent with the goals of individual filing.

126. *See* Christian, *supra* note 1, at 305-49 (decrying the fact that wives benefit less than husbands from filing joint returns and the difficulty that wives face in obtaining a fair share of the benefit).

127. In addition to the provisions in the recently enacted Taxpayer Relief Act of 1997 discussed above, *see supra* text accompanying notes 114-16, in that same Act, Congress added phase-outs to the deduction for interest on education loans, *see* I.R.C. § 221(b)(2) (West Supp. 1998), the Roth IRA, *see id.* § 408A(c)(3), and education IRAs, *see id.* § 530(c)(1). The purpose of this discussion of phase-outs is not to defend these congressional judgments, but rather to demonstrate that the personal income tax is permeated with such rules, all of which present problems for the designer of an individual return system.

the property may deduct investment interest, that the child credit is prorated, that the Lifetime Learning Credit is allocated to the spouse being educated, and so on. Taxpayers currently face a mass of—to them—arbitrary rules for determining what is deductible and to what extent and what (if any) credit is allowed. Under individual filing, married taxpayers would face a further set of arbitrary rules for determining which spouse could deduct the item or claim the credit.[128]

### 2. Property

Assigning the income, deductions, and credits from the ownership of property to the single returns of the spouses presents problems. Professor Zelenak suggests two suitable ways of doing so: (1) to follow ownership (his preference); or (2) to assign the income to the higher-earning spouse.[129] If taxability follows ownership of property, the IRS will find itself entangled in the vagaries of state law, particularly in the community property states, which differ substantially among themselves in the way they treat property that the spouses owned before marriage or receive by gift or inheritance during marriage, and the income from these kinds of property.[130] This will produce difficult administrative problems and differences in taxation from state to state. There will be endless conflicts-of-law problems about what kind of community property law should apply to property.[131]

It is suggested that husbands should be taxed on community property in most states because of the presumptive control of the property under state law.[132] If that became the rule, community property laws of each of the community property states would face scrutiny from the IRS, and ultimately the courts, which would try to determine whether the rights of the wife under state law are sufficient to cause the income from the property to be taxed equally to the spouses or whether all of the income should be taxed to the

128. This problem would not affect only itemizers because some of the deductions—for example, for alimony and moving expenses—are allowable in computing adjusted gross income, and all of the credits are available without regard to whether the taxpayer itemizes.

129. *See* Zelenak, *supra* note 1, at 390-91.

130. *See* DE FUNIAK & VAUGHN, *supra* note 64, at 129-35, 301-04.

131. It is true that state courts can and do unscramble these matters, but they need to do so only in a small number of cases, usually when an issue arises from divorce or inheritance. If the income tax were based on ownership, these issues would have to be unscrambled in every case before the spouses could file their income tax returns.

132. *See* Davis, *supra* note 1, at 238-40.

husband. Of course, the Supreme Court might refuse to do so, having already considered the question during the 1920s and 1930s.[133]

In *Poe v. Seaborn*,[134] the Supreme Court held that community property laws would be given effect for federal income tax purposes so that spouses in community property states could split their incomes without regard to which spouse earned the income or owned the property.[135] Many of the critical tax theorists dismiss *Poe v. Seaborn* as wrongly decided and an obstacle to the correct taxation of married persons.[136] Congress should legislatively override it and move on. This prescription illustrates well the air of unreality that permeates much of this writing. Is it likely that Congress will abolish the rule of *Poe v. Seaborn* to the detriment of the voters of California (who elect fifty-two representatives, approximately 12% of the House of Representatives) and Texas (who elect another thirty, approximately 7% of the House)?[137] Whatever one may think of *Poe v. Seaborn*, it is a fact of life that should be accepted.

The representatives from the community property states will not be persuaded by their constituents to vote to overrule *Poe v. Seaborn* on the grounds advocated by the critical tax theorists: marriage neutrality, elimination of the marriage penalty, and reducing the disincentive for wives to work. If an individual filing system were enacted, without *Poe v. Seaborn* having been legislatively overruled, then residents of community property states would have the best of both worlds. Those concerned with marriage neutrality, the marriage penalty, and reducing the wife's disincentives would file individual returns. Those who now receive a marriage bonus would follow state property law and report their shares of the community income, thereby continuing to receive the benefits of income-splitting. In this situation, there would be, as there was before 1948, an income tax

133. The issue of apportionment of tax between spouses in community property states first came to the Supreme Court in *United States v. Robbins*, 269 U.S. 315 (1926), in which the Court held that California taxpayers were not entitled to split their income because the husband had too much control of the marital property. *See id.* at 327. After *Poe v. Seaborn*, 282 U.S. 101 (1930), the California legislature amended its laws to vest control of community property jointly in the spouses. This was held sufficient to allow income-splitting. *See* United States v. Malcolm, 282 U.S. 792, 794 (1930).

134. 282 U.S. 101 (1930).

135. *See id.* at 113.

136. *See* Kornhauser, *supra* note 1, at 104; Davis, *supra* note 1, at 238-39. *But see* Gann, *supra* note 1, at 52-64 (analyzing the constitutionality of repealing *Poe v. Seaborn* and some of the details of income attribution after its repeal).

137. *See* State Delegations, [105th Cong.] Cong. Index (CCH) 25,301, 25,301, 25,304 (Nov. 26, 1997) (listing 52 representatives to the House of Representatives from California and 30 from Texas).

advantage to residents of community property states, some of whom would continue to enjoy marriage bonuses.

### 3. Head-of-Household Filing Status

Head-of-household filing status is now justified as a midpoint between the single rate schedule and the joint return rate schedule for those who are not married but are supporting children in the home.[138] This is a widely used filing status; fifteen million taxpayers utilized this rate schedule in 1995.[139]

It is difficult to find a rationale for the head-of-household rates in an individual filing system. The premise of the head-of-household rates is that single persons supporting dependent children need a tax break delivered through the rate structure. In an individual filing system, the premise underlying the rate structure would be that everyone is single. If Congress wanted to provide single persons with additional tax relief for the expenses of dependent children, it would be more consistent with individual filing to provide an enhanced dependents exemption for children or a larger child credit.

If head-of-household status remained in effect in an individual filing system, many new questions would arise. If this status were limited to unmarried persons, as it is at present, two problems would exist: (1) the system would not be marriage-neutral; and (2) unmarried persons supporting children would face a more favorable rate structure than married persons supporting children, which is hard to justify as social policy.[140] If head-of-household status were made independent of marital status, then many married persons would take advantage of it. Depending on the details of this status, in some cases both spouses might be heads of households for income tax purposes,[141] with the result that many married couples would enjoy more favorable rate tables than single people, which is the starting point of this post-1969 cycle of the eternal battle over the taxation of married persons.

### 4. Final Thoughts on Mandatory Individual Returns

None of this discussion is intended to show that it is impossible

138. *See* I.R.C. § 1(b) (West Supp. 1998); *id.* § 2(b).

139. *See* Daryl E. Cronk & Maureen Keenan, *Individual Income Tax Returns: 1995, Early Tax Estimates*, IRS STAT. INCOME BULL., Fall 1996, at 8, 19 tbl.1 (showing 15 million of 109 million total returns filed as head of household).

140. This is, however, the effect of the earned income tax credit.

141. The Congressional Budget Office's study incorporates this assumption into its "basic measure" of the marriage penalty. *See* CBO, *supra* note 57, at 29 box 6.

to distribute the income and deductions of married couples in ways that are administrable.[142] Rather, it is intended to show that it is not easy to do so and that many very unsatisfactory compromises will be required. I believe it shows that the resulting system would not be any better overall than the system we have now; it would merely disadvantage different groups who have at least as good a claim to tax equity as those who are now disadvantaged.

## V. MARRIAGE NEUTRALITY

The joint return (and associated anomalies in the standard deduction) are only the most obvious ways in which the income tax treats married people differently than otherwise identical people who are not and never have been married. It is hard to tell whether the critical tax theorists recommending marriage neutrality would favor complete neutrality; their recommendations are stated so generally that there are no clues about implementing what they think is a simple solution to a complex problem.[143] In the event some might want complete marriage neutrality, this Section discusses some of the many interesting problems that would arise if there were an attempt to make the income tax truly marriage-neutral.

### *A. Attribution Rules*

In some cases, the tax law attributes one spouse's activity or ownership of property to the other. This may have the effect of treating the spouses as alter egos; for example, in various corporate transactions, the shares owned by the taxpayer's wife are treated as owned by him,[144] or the transaction may be disregarded as if the taxpayer had engaged in it with himself.[145] Complete marriage neutrality would require elimination of the attribution rules on the grounds that all rules providing special treatment for persons who are married should be eliminated. This would have consequences that sometimes help and sometimes hurt taxpayers.

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142. The United States successfully administered such a system from 1913 until 1948. *See id.* app. A. That was, however, a time when most property was concentrated in husbands' hands and when two-earner families were much less common. Most of the Organisation for Economic Cooperation and Development countries administer individual return systems today as a result of a shift from joint to individual filing during the 1970s. *See id.* To my knowledge, none of those countries has the problem of different systems of property law existing in sub-national jurisdictions.

143. *See* MCCAFFERY, *supra* note 1, at 277-79; Moran & Whitford, *supra* note 1, at 800-01.

144. *See* I.R.C. § 318(a)(1)(A)(i) (West Supp. 1998).

145. *See id.* § 267(a)(1).

Elimination of the stock attribution rules would make it possible for taxpayers to enjoy losses on transactions that do not change the economic status of the married couple.[146] Marriage neutrality would eliminate attribution of stock between spouses under I.R.C. § 318, opening up the possibilities of abuse, for example, redeeming the wife's stock in a closely held corporation while the husband retained a controlling block of stock.[147] Sections 267(a)(1) and 707(b) would not apply to spouses, and therefore taxpayers would be allowed to recognize losses on intra-family sales of property, for example, sales from husband to wife, or from wife to a partnership controlled by husband.

Elimination of stock attribution in § 544(a)(2) would allow taxpayers to avoid classification as a personal holding company more easily by spreading the stock among more shareholders while still retaining the stock within the family.[148] The same change would make it easier for taxpayers to avoid having their family-owned corporations classified as closely held C corporations subject to the at-risk and passive activity loss rules.[149]

The grantor trust rules treat a taxpayer who is the grantor of a trust as the owner of the trust if the income of the trust can be distributed to or accumulated for the benefit of the taxpayer or his spouse.[150] A marriage-neutral system would take the spouse out of this rule, so that a grantor could shift the income of the trust to his spouse by allowing her the right to the income or corpus in her discretion.[151] This would allow taxpayers with property to achieve much of the benefit of the joint return, but at the price of putting the property under the spouse's power.

The foregoing examples have shown how the elimination of attribution rules would help taxpayers. Other changes to make the Code marriage-neutral would hurt taxpayers. An employee is allowed to exclude from gross income a variety of fringe benefits, including some benefits provided to the employee's spouse or dependent children.[152] A marriage-neutral income tax would eliminate this rule, which is based on a view of the married couple as sharing. Section 117(d) allows the exclusion of certain tuition

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146. This assumes a community of interest between the spouses.
147. *See* I.R.C. § 302(b)(2), (b)(3) (1994).
148. *See* I.R.C. § 542(a)(2) (West Supp. 1998).
149. *See id.* §§ 465(a)(1)(B), 469(a)(2)(B).
150. *See* I.R.C. § 677(a) (1994).
151. *See id.* § 678.
152. *See* I.R.C. § 132(h)(2)(A) (West Supp. 1998).

waivers by educational institutions, including tuition waivers for spouses and dependent children of employees.[153] This rule too would be eliminated in a marriage-neutral system, at least as it applies to spouses.

Under the present rules, a taxpayer may take into account his spouse's participation in an activity in determining "material participation," which will avoid the application of the passive activity loss rule.[154] A marriage-neutral system would eliminate this rule, thereby making it harder for some taxpayers to avoid the passive activity loss rules.

*B. Divorce*

If marriage were truly tax-neutral, then divorce should also be tax-neutral.[155] Thus, alimony would be nondeductible; a taxpayer generally cannot deduct payments that are not for carrying on a trade or business or paid or incurred in income-producing activities,[156] and payments to an ex-spouse certainly do not fall under either of these categories. The rationale that the alimony deduction represents a continued sharing of the husband's income after the marriage ends[157] has no place in a marriage-neutral system. Under general tax principles, alimony received would probably be includible,[158] but the hardship entailed by taxation of alimony and the obvious absurdity (to all but tax lawyers) of double-taxing these payments would surely be solved legislatively.

Section 1041 provides that gain and loss are not recognized on the transfer of property between spouses or incident to their divorce.[159] In a marriage-neutral system, this rule would be eliminated so that gain and loss would be recognized on transfers of property between spouses just as between strangers. This would resurrect the complex and unsatisfactory state of the law under *Davis*

153. *See id.* § 117(d).

154. *See id.* § 469(h)(5). This rule applies even if the spouse owns no interest in the activity and even if the spouses do not file a joint return. *See* Treas. Reg. § 1.469-5T(f)(3) (as amended in 1996).

155. Currently, alimony payments are deductible to the payor. *See* I.R.C. § 215 (1994).

156. *See* I.R.C. § 162 (West Supp. 1998); I.R.C. § 212 (1994).

157. *See* S. REP. NO. 94-938, at 124-25 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3558-59 (stating that splitting of income should be achieved by deduction in arriving at adjusted gross income).

158. *See* Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

159. *See* I.R.C. § 1041 (West Supp. 1998).

*v. Commissioner*,[160] in which husbands in common-law states were deemed to have reportable gains on the transfer of appreciated property to their ex-wives.[161]

### C. *Do We Have to Go So Far?*

It is certainly possible to argue that the joint return rules create an order of marital non-neutrality different than that created by the rules described in this Section. Thus, the rules that can be characterized generally as anti-abuse rules, for example, § 267, might be left in place while the joint return was eliminated. This would be in keeping with the adoption of rules for implementing individual returns that are themselves inconsistent with marriage neutrality—such as either of Professor Zelenak's proposals (prorating itemized deductions and credits or assigning them to the higher earner), which will treat the spouses very differently than they would be treated in a system that ignored their marital status.

One might distinguish the joint return, which affects the taxpayer's liability by reason of being married to *someone*, from the attribution rules, which affect the taxpayer's liability by reason of being married to a *particular* someone. That distinction will not stand up to analysis. On the joint return, marriage usually has an effect on the taxpayer's liability, but that effect can be an increase or a decrease, depending on the characteristics—in particular, the income—of the spouse. It is hard to see how, for purposes of determining tax liability, the characteristic of the spouse's income is different from the characteristic of the spouse's ownership of shares in a closely held corporation.

It might also be argued that the attribution rules are based on classifications much broader than marriage, typically including at least some ancestors and descendants in addition to spouses.[162] This is true, but if the question is whether marriage may affect a taxpayer's liability, the fact that birth can also affect a taxpayer's tax liability is irrelevant. A spouse contemplating marriage should take into account the whole range of tax benefits and burdens arising from the marriage, including the benefits and burdens of the attribution rules as well as the benefits and burdens of the joint return.

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160. 370 U.S. 65 (1962).

161. *See id.* at 70-71.

162. *See* I.R.C. § 318(a)(1) (West Supp. 1998) (attribution from parents, children, and grandchildren); *id.* § 267(c)(4) (attribution from siblings, ancestors, and lineal descendants); I.R.C. § 544(a)(2) (1994) (attribution from siblings, ancestors, and lineal descendants).

If the decision were to require mandatory individual returns but not pursue other marriage-neutral goals, thus leaving the attribution and other rules discussed in the previous section in effect, § 1041 would present a quandary. The law before § 1041 was not satisfactory; it was confusing, inconsistent, and a trap for the unwary.[163] Repealing it, but leaving other rules in effect would present an odd mixture of results: A loss on a transfer of depreciable property from husband to wife would be disallowed (not marriage-neutral),[164] but a gain would be reportable (marriage-neutral),[165] and would be ordinary gain even if § 1245 or § 1250 recapture did not apply (not marriage-neutral).[166]

Section 1041 could be left in effect, but that would allow married couples who own property to achieve a quasi-joint return by self-help: The husband could transfer to his wife the property he wanted to sell, thereby shifting the gain to her return and achieving some of the advantages of the joint return. Section 1041 could be narrowed to apply only to divorcing spouses, which would solve the *Davis* problem without permitting the wholesale shuffling of the spouses' property for tax purposes.

## VI. CONCLUSION

The main point to be made in conclusion is that there is no conclusion to these topics. Virtually every argument made can be countered by another argument proceeding from different premises or even from the same premises. One person's marriage penalty is another's proper sharing of the tax burden. Wonderful-sounding solutions, for example, mandatory individual filing to eliminate the marriage penalty, turn out to be full of complexity and present their

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163. The problem in *Davis* arose from the fact that recently divorced husbands did not perceive a gain when they transferred property to their ex-wives. Accordingly, they usually did not report the gain. The wife, however, would usually use a fair market value at date of transfer basis for the property when she sold it. The Treasury thus lost the revenue that should have been reported on the appreciation of the property in the husband's hands. *See* H.R. REP. NO. 98-432, at 1491-92 (1983), *reprinted in* 1984 U.S.C.C.A.N. 697, 1134-36.

There was also a problem of geographic non-uniformity. In the community property states, spouses were allowed to split the community property asset by asset, for example, the husband would take the business, and the wife would take the home, without triggering gain. In a common-law state, this transaction would trigger gain to the husband with respect to his interest in the home and to the wife with respect to her interest in the business.

164. *See* I.R.C. § 267(a)(2) (West Supp. 1998).

165. *See id.* § 1001.

166. *See id.* § 1239.

own dilemmas.

My own conclusion, not widely shared in Washington or among academic writers, is that the existing system is not all bad. Rather, it is a quite defensible balancing of the various goals of the income tax. If changes must be made, however, let me propose a simple solution to address the problems: a flat-rate income tax. Modify the existing income tax to impose a flat rate (including no special rate for capital gains).[167] A rate of about 20% would suffice for the flat tax proposed here.[168]

In the system described, there would be minimal marriage penalties and bonuses and no income tax disincentives for wives to become second earners.[169] There would be less reason for employers to shift their compensation packages for highly compensated individuals toward tax-favored fringe benefits and deferred compensation arrangements, a change that would equalize the treatment of white men with that of blacks and women. Well-to-do taxpayers would have less incentive to avoid the high rates by engaging in property transactions that are not available to the poor, for example, gifts to low-bracket children.

This is a specific proposal for changes that would solve many of the problems about which the critical tax authors complain. Unlike many of their proposals, which are so lacking in detail that they can hardly be analyzed, all the details are in place. Unlike proposals to base tax rates on the taxpayer's sex, there is nothing obviously wrong with this proposal.

Unfortunately, I doubt that many of the writers would regard the

167. The proposal would not change the tax base; it would accept the existing definitions of gross income and deductions and allow the current hodgepodge of credits.

The proposed tax is not akin to the so-called flat taxes proposed in Congress, which have very large standard deductions and personal exemptions and are thus graduated, with 0% on the first $XX and some flat rate—17% is most widely promoted—above that. These proposals tax mainly wage income and disallow most or all the itemized deductions. *See, e.g.*, Freedom and Fairness Restoration Act of 1995, H.R. 2060, 104th Cong. (1995) (flat tax based on Hall-Rabushka model); USA Tax Act of 1995, S. 722, 104th Cong. (1995) (USA Tax, allowing deduction for savings and some existing deductions).

168. In 1994, individual taxpayers reported about $2.6 trillion of taxable income, that is, income after deductions and personal exemptions, and paid about $530 billion in personal income taxes. *See Selected Historical and Other Data*, IRS STAT. INCOME BULL., Summer 1997, at 133, 134-36 tbl.1. A more refined estimate of the necessary rate would take into account the recent changes in personal credits.

169. These results follow because all the couple's combined income would continue to be taxed at the same flat rate rather than pushing some of their combined income into higher brackets. There might be other disincentives, for example, employment taxes, but, as stated above, that is a different topic. *See supra* text accompanying note 56.

above proposal as an improvement over current law. They would be unwilling to give up the redistribution achieved by the progressive rates even though the progressive rates are the primary cause of the problems about which they complain. In other words, they would tinker with the system to solve little problems, with the inevitable consequence of creating other problems—some foreseeable, some not.

Even Professor Zelenak, who admits sympathy with the goals of these writers, finds most of the proposals seriously and obviously flawed.[170] Starting with little sympathy for these goals, I find little to recommend in any of this writing. It is unfortunate that some intelligent people have spent a lot of time writing and theorizing about problems that are insolvable when there are serious topics in the tax law that could profit from legal analysis.

170. *See* Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521 (1998).