

Taxation of the Spouses: A Comparison of Canadian, American, British, French and Swedish Law

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Abstract

In examining the treatment of families v. individual taxpayers under the tax systems of five different countries, Louise Dulude begins by tracing each system's political and historical evolution. She provides criteria for an ideal choice of tax unit against which the existing five systems are measured and reviews the political and philosophical rationales preventing adoption of this ideal.

TAXATION OF THE SPOUSES: A COMPARISON OF CANADIAN, AMERICAN, BRITISH, FRENCH AND SWEDISH LAW

BY LOUISE DULUDE*

In examining the treatment of families v. individual taxpayers under the tax systems of five different countries, Louise Dulude begins by tracing each system's political and historical evolution. She provides criteria for an ideal choice of tax unit against which the existing five systems are measured and reviews the political and philosophical rationales preventing adoption of this ideal.

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I. INTRODUCTION

If it is true that law is a social phenomenon which reflects a given culture,¹ then nowhere is the cultural diversity of occidental countries more apparent than in the legal provisions which regulate the tax treatment of the family. Indeed, one would be hard pressed to find any two Western nations, however close their original cultures, that presently tax family members in exactly the same manner. The five countries chosen for examination here — Canada, the United States, Great Britain, France and Sweden — have each developed a system of spousal and family taxation with unique features that distinguished it in important ways from the other four.

Canada assesses taxes separately for each individual on the basis of a single progressive rate schedule.² In the United States, most married couples are taxed as a unit; the spouses' incomes are added together and their taxes calculated according to a special rate schedule which is lower than that of single people. Britain also taxes couples jointly, but uses the same tax schedule for all tax units, distinguishing instead between singles and marrieds through special exemptions and deductions. A French husband, his wife and their children all file one combined tax return, but their total income is then divided by a num-

¹ Emanuelli, "Le droit comparé selon une perspective canadienne" (1980) 40(1) *Revue du Barreau* at 98.

² "Progressive" means that the percentage of tax increases as the person's income rises. All the systems studied here use progressive tax tables.

ber of "parts" (two parts for a couple, half a part for each of the first two children, and so on) and the individual income tax table is applied to the result. Sweden's system is a cross between that of Great Britain (for the treatment of unearned income) and that of Canada (for earnings from work).

The questions this article will ask are: 1) How did such differences develop in each of these five countries? 2) Are countries consistent in their treatment of the family under their tax and matrimonial property laws? 3) To what extent is the tax treatment of the family affected by non-legal factors such as societal values toward marriage, parenthood and the promotion of equal rights for women? 4) Are there general goals that all countries should strive to attain in their tax treatment of the family and if so, how close do each of the five countries studied come to reaching them?

Three means will be used to answer these questions. The first, in Part I, is a review of the historical development of the treatment of the family under the income tax systems of each of the five countries examined.³ Secondly, Part II will provide a summary and synthesis of the multitude of opinions and studies done in the last fifty years about the objectives which the optimal tax unit should seek to attain. Thirdly and finally, Part III will contain a comparative evaluation of the systems of the five countries in light of the objectives determined in Part II. This will reveal the strengths and weaknesses of each system, as well as the ways they reflect different community values. It will also give some indications of the directions in which these countries' tax units can be expected to develop.

II. HISTORICAL OVERVIEW

The one stable fact about taxation of the family is its constant state of flux. No sooner has one system of spousal tax assessment been established to please one group than another clan rises up to protest unfair treatment of its members and demand further reforms. Consequently, the five countries reviewed here have together used virtually all the possible ways of taxing family members at some time in their history. They are therefore an excellent source of information on the hopes and pitfalls attending each tax unit choice.

³ Although many authors have written more or less comprehensive histories of the tax unit of their own countries, and a few have done international comparisons of contemporary systems, none have ever done a parallel overview of the historical evolution of the tax treatment of the family in several different countries such as the one presented in this text. Matrimonial property laws will also be described inasmuch as they are relevant.

A. France

France's first general tax on incomes was introduced in 1914.⁴ The unit subjected to the new tax was the "home", which included the family's male head and everyone he supported. The husband/father was solely responsible for the filing of the tax return and the payment of the tax; his family responsibilities were recognized by means of exemptions and deductions.

Why was it decided to tax the whole family in the man's hands? For one thing, in 1914 the family was still an extremely cohesive social group.⁵ For another, the standard matrimonial regime, which applied to the vast majority of spouses, gave the husband absolute power over all the family's "common" assets as well as the right to administer the wife's "private" property and the income from any assets owned by his minor children. In the circumstances, taxing the husband alone for all of the family's income seemed only logical.⁶

The new income tax system did not remain simple very long. In 1917 it was supplemented by another type of income tax levied and calculated on a personal basis, though people with family responsibilities were entitled to some reductions. This meant that in 1930, for example, a female storekeeper married in separation of property (through a marriage contract) would file her own income tax form for her business profits, but would then have to inform her husband of these profits so he could include them along with his own income on their family's general income tax form, which he would alone sign and be responsible for.

In 1945 a new family tax system called the "quotient familial" was introduced, under which the total of the family's income was first divided into a number of equal "parts" that varied according to the number of people in the family (one part for a single-person household, two parts for a couple, an additional half part for each dependent child). Each "part" was assessed an amount of tax on the basis of the progressive tax schedule, then the taxes for all of the family's "parts" were added together to determine the total liability of the head of the family.

A dual system was maintained until 1959, with both income taxes operating on a family basis. They were then integrated into a single tax to which the "quotient familial" was applied. From 1980 on, the "quo-

⁴ Trotabas et Cotteret, *Droit fiscal* (1975) at 187s.

⁵ Souillac, "Le cumul des revenus du foyer familial au double point de vue de l'établissement et du recouvrement de l'impôt" (1970) 28 *Cahiers de droit fiscal international* at 105.

⁶ *Ibid.*

tient" was modified to give an additional half part to parents with three or more children.⁷

Many tax experts predict other changes because of the great dissatisfaction with the present system.⁸ Particularly criticized are:

1. The strong bias of the "quotient familial" in favour of high-income families. By splitting income among family members, it largely cancels out progressivity at high income levels.⁹ For example, the 1980 change for families with three or more children gave nothing to families earning less than \$8,000 (Cdn), while fathers earning \$130,000 and over enjoyed a tax saving of approximately \$2,000 a year.¹⁰

2. The ever-widening gap between women's position under France's matrimonial property laws and under its fiscal policies. As far back as 1914, some people found joint taxation unacceptable when the spouses were married under separation of property; they thought it absurd that husbands should be fully responsible for reporting their wives' incomes and paying the tax on it when the wives were under no obligation to inform their spouses about their personal financial affairs.¹¹ Conversely, women resent being jointly responsible (since 1938) for the whole of the family's tax.¹² They also protest the rule which entitles only the husband to the family's tax refunds, even if they relate to an overpayment by the wife.¹³

Recommendations for change include:

1. Replacing the "quotient familial" with a "spousal quotient" and exemptions for children and other dependants;¹⁴
2. Establishing a ceiling on the benefits any taxpayer can receive

⁷ France, Ministère du budget, (1981) *Précis de fiscalité* at 63-64.

⁸ Louis et de Marcillac, "Incohérent et injuste, le système des aides financières aux familles a besoin d'être totalement réformé" (1981) 1 *Droit fiscal* at 114-115.

"Rapport au Conseil Economique et Social sur les orientations de la réforme de l'impôt sur les revenus des personnes physiques" (1969) *Statistiques et études financières*, cited in Tixier et Gest, *Droit fiscal* (1976) at 158 and in Gastineau, "Rapport de la France sur le régime fiscal des unités familiales (revenus, fortunes, successions)" (1972) 57a *Cahiers de droit fiscal international* at II-141.

⁹ Trotabas, "De la dignité de l'individu et de la nécessité de la stabilité familiale à travers le droit fiscal français" (1962) *Problèmes contemporains de droit comparé* at 403, 404; Tixier & Gest, (1976) *Droit fiscal* at 159.

¹⁰ Louis & de Marcillac, *supra* note 8.

¹¹ Souillac, *supra* note 5 at 141; Gastineau, *supra* note 8 at II-132; Schmitt, "L'impôt responsable de la communauté universelle" (1977) *Comptes-rendus du 74e Congrès des notaires de France* at 187.

¹² Giroud, *Cent mesures pour les femmes* (1976) at 97.

¹³ Zoller, "Le statut fiscal de la femme mariée en France" in Roskamp & Forte, eds., *Réformes des systèmes fiscaux/Reforms of Tax Systems* (1981) at 357.

¹⁴ "Rapport au Conseil", *supra* note 8.

from the "quotient";¹⁵

3. Abandoning the "quotient" system altogether in favour of a system based only on exemptions and deductions;¹⁶

4. Introducing a separate taxation option for those who want it.¹⁷

B. *United States*¹⁸

From the Civil War until 1948, the main principle which dominated the tax treatment of the family in the United States was the coordination of its tax and matrimonial property laws. The family was taxed as a unit under the Civil War income tax "because common law property rights made the husband a substantial owner of his wife's and children's income."¹⁹ By 1913, when a federal income tax statute was adopted, married women in common law states had gained full control of their earnings and property. The few among them who had independent incomes were therefore expected to pay taxes as separate individuals.

The situation was more complicated in the states which had inherited community of property systems through their exposure to Spanish or French civil law (Texas, Louisiana, California, New Mexico, Arizona, Washington, Nevada and Idaho). In theory, their laws provided that marriage was a partnership vesting in each spouse a present interest in one half of the couple's total income. In practice, the husband had almost complete control over both spouses' property and earnings for the duration of the marriage.

This ambiguity, along with the important tax savings that could be obtained by splitting the family income in two for assessing its income tax (because of the progressive tax schedule), led to a flurry of court challenges culminating in 1930 in *Poe v. Seaborn*.²⁰ It held that the husband's powers over the community property were only those of an "agent" and that one half of the community income should therefore be attributed to each spouse for tax purposes. Many people²¹ had diffi-

¹⁵ *Ibid.* at 160; also in Schmitt, *supra* note 11 at 181.

¹⁶ *Rapport Documentation Français* (1975) at 59, cited in Tixier & Gest, *supra* note 8.

¹⁷ Bollé, "La femme mariée et l'impôt sur le revenu" (1976) 54 *Juris-Classeur Périodique*.

¹⁸ The main sources used in preparing this section are:

Bittker, "Federal Income Taxation and the Family" (1976) 27 *Stan. L. Rev.* at 1389-1463. Thorson, "An Analysis of the Sources of Continued Controversy Over the Tax Treatment of Family Income" (1965) 18(2) *Nat. Tax J.* at 113-132.

¹⁹ Thorson, *supra* note 18 at 115.

²⁰ 282 U.S. 101 (1930).

²¹ Boyd, "Disparity in Federal Income Tax Rates: Discrimination Against the Single Taxpayer" (1970-71) 4 *Indiana Legal Forum* at 386s.

culty reconciling this with the conclusions reached in *Lucas v. Earl*²² the same year. In that case, the spouses had a marriage contract specifying that each of them would have immediate equal rights of property and control over half of everything they acquired. The Court held that the wife should be taxed on the income from her half share on the spouses' savings, but that the husband was alone taxable on the earnings from his work.

These two decisions created widespread feelings of unfairness and almost twenty years of legislative chaos. Husbands from common law states felt disadvantaged compared to their counterparts from community property states who paid much lower taxes on the same income. Couples whose income was derived entirely from the husband's work resented the fact that spouses with savings and assets could artificially reduce their tax burden by rearranging the ownership of their properties between them. One common law state after another abandoned centuries of legal tradition to adopt community property systems to entitle their residents to the tax windfall this brought about.

Spurred by these criticisms and by the desire to substantially reduce taxes after World War II, Congress decided in 1948 to extend the benefit of full income splitting to all married couples. Although this new regime seemed perfect to some who thought the tax unit problem had been solved "for all time",²³ it didn't take long to spring a number of leaks. Widowed and divorced people with dependants resented having to pay much higher taxes than married people.²⁴ Single taxpayers protested against the sometimes enormous difference (as much as 42%) between their taxes and those of married couples with the same income.²⁵

These problems finally led to the 1969 changeover to a new system with four different tax rate schedules: one for married couples filing jointly, another (higher one) for married couples filing separately, one for singles and one for heads of households. The gap between singles and marrieds was reduced so that spouses no longer received the equivalent of full splitting. On the contrary, many couples with both spouses in the labour force now found that their tax burden *increased* when they married and protests against this new "marriage penalty" gathered wide support.²⁶

²² 281 U.S. 111 (1930).

²³ Pechman, "Income Splitting" (1959) *Tax Revision Compendium* at 473.

²⁴ Bittker, *supra* note 18 at 1417.

²⁵ *Ibid.* at 1419.

²⁶ Cook, "The Frustrations of the Marriage Tax" (1981) *Tax Notes* at 265; *H. Boyter v.*

At the same time, women's increased participation in the labour market in the 1960s and 70s made them more aware and critical of the disincentive effect they suffered because joint taxation taxed their first dollar of income at the highest rate applicable on their husbands' earnings.²⁷ This was buttressed by many American and British studies demonstrating that married women's labour force participation is much more easily discouraged than men's because of the additional house-keeping, child-care and other expenses the family incurs when both spouses work outside.²⁸ Feminists also challenged the joint taxation assumption that spouses pool and share all their income.²⁹

The first concession these critics obtained was a child-care expense deduction for mothers in the labour force, later broadened into a tax credit. This was judged insufficient, however, and political pressure intensified to the point where, in 1981 alone, the following were introduced in the House of Representatives:³⁰

- four bills proposing tax reductions to alleviate the marriage penalty;
- ten bills to give married persons the choice of filing under the single rate schedule;
- twelve bills introducing a system of separate taxation of the spouses.

The one concrete result of that year was President Reagan's marriage penalty reduction law.³¹ It provided a deduction of 5% of the first \$30,000 of earnings of the lower-income spouse for 1982 and 10% of the same maximum for 1983 and following years.

Commissioner & A. Boyter v. Commissioner (1980), 74 T.C. 72; and U.S. Congress, (1980) *Hearings on the Marriage Penalty Tax* at 182.

²⁷ Hon. Griffiths, "Opening Statement at the Hearings Before the U.S. Congress Joint Economic Committee" (1973) *Economic Problems of Women*. Also see Bittker, *supra* note 18 at 1431-3; Nussbaum, "The Tax Structure and Discrimination Against Working Wives" (1972) 25(2) *Nat. Tax J.* at 183-191; Quester, "The Effect of the Tax Structure on the Labor Market Behavior of Wives" (1977) 29(3) *J. of Econ. and Bus.* at 171-180; Musgrave, "Women and Taxation", in Roskamp & Forte, eds., *supra* note 13 at 341-354.

²⁸ Rosen, "Is It Time to Abandon Joint Filing?" (1977) 30(4) *Nat. Tax J.* at 426-7; Boskin, "Factor Supply and the Relationships Among the Choice of Tax Base, Tax Rates, and the Unit of Account in the Design of an Optimal Tax System" in Aaron & Boking eds., *The Economics of Taxation* (1980) at 154-5; Greenhalgh & Mayhew, "Labour Supply in Great Britain: Theory and Evidence" in Hornstein *et al.* eds., *The Economics of the Labour Market* (1980).

²⁹ Munnell, "The Couple Versus the Individual Under the Federal Personal Income Tax" in Aaron & Boskin, eds., *ibid.* at 266; Gann, "Abandoning Marital Status as a Factor in Allocating Income Tax Burdens" (1980) 59(1) *Tex. L. Rev.* at 25.

³⁰ Cited in Moerschbaecher, "The Marriage Penalty and the Divorce Bonus: A Comparative Examination of the Current Legislative Proposals" (1981) 5(2) *Rev. of Taxation of Individuals* at 133-146.

³¹ Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, reprinted in (1981) 3 *U.S. Code Cong. & Ad. News*.

But the critics are still not satisfied. . .

C. *Great Britain*³²

From the inception of the income tax in Great Britain during the Napoleonic wars in 1799 until the present day, the general rule has been that the income of the spouses is combined and taxed in the husband's hands using the same tax rate as for single people. The British Finance Act of 1842 stated that the "profits of any married woman living with her husband shall be deemed the profits of her husband."³³ That system, whose origin is attributed to married women's "servile" status and their lack of control over their own property until the Married Women's Property Act of 1882,³⁴ remained essentially unchanged until 1971.

Ever since British wives gained control of their property in the 1880s, they have made frequent and vigorous complaints about the tax treatment of their own incomes.³⁵ Concessions were first granted in 1894, with the institution of a separate exemption on the wife's earnings to recognize "that earning wives in tax units with moderate incomes incurred extra expenses as a result of working."³⁶ In 1914, the option of a *separate assessment* of the spouses' tax was introduced. This allowed wives to file a separate return, but as the tax was still calculated on the basis of the spouses' total income, this option had little more than symbolic significance.

After the War (1918), all married men were given a "wife allowance" whether or not their wives had jobs outside the home. The government also established a Royal Commission on the Income Tax, whose conclusions about the proper unit of taxation were that:

The incomes are aggregated because the law of taxable capacity is the supreme law in matters of taxation, and taxable capacity is, in fact, found to depend on the amount of the income that accrues to the married pair, and not upon the way in which that income happens fortuitously to be owned by the members of that

³² The main sources used in preparing this section are:

- U.K. Royal Commission of the Taxation of Profits and Income (1954) *Second Report* at 35-41.

- Marshall & Walsh, "Marital Status and Variations in Income Tax Burdens" (1970) 4 Br. Tax Rev. at 236-249.

- U.K. Chancellor of the Exchequer, *The Taxation of Husband and Wife* (1980).

³³ Cited in Barr, "The Taxation of Married Women's Incomes — Part II" (1980) 6 Br. Tax Rev. at 478.

³⁴ *Ibid.*

³⁵ Lloyd George called the question of the desirable size of the tax unit a "hardy perennial". (1909) 11 U.K. *House of Commons Debates, Official Report*, cited in Marshall & Walsh, *supra* note 29 at 58.

³⁶ Marshall & Walsh, *supra* note 32 at 237.

union. It is beyond question that in the immense majority of cases where the wife has separate means she contributes to the common purse, either by the actual merger of her income with her husband's, or by bearing expenses which in less fortunate households would fall upon the husband.³⁷

In the 1940s, inspired by the need for female labour, the government twice raised the exemption on wives' earnings, thus giving a married couple a much greater tax deduction than two single people with the same total income. This had the effect of "encouraging wives in the lower classes to work outside the home, reflecting the desire of the legislators to increase the labour force participation of married women in the factories."³⁸ When a Royal Commission on the Taxation of Profits and Income was set up in the early 1950s, it

. . . received such a volume of representations from different quarters to the effect that aggregation of the incomes of husband and wife ought to be abolished and the income of each assessed as that of a separate individual that we find it necessary to express an opinion. . .³⁹

That opinion was that joint taxation should be retained because otherwise "(t)here would be a natural tendency for husbands to try to arrange to transfer so much of their incomes to their wives as would produce an equal division",⁴⁰ which would minimize their taxes. The Commission also said it wasn't worried about the exceedingly high tax rates which high-income professional couples had to pay because of joint taxation, since this affected so few people and was unlikely to discourage anyone from getting married.⁴¹

In spite of this, well-off two-earner couples kept up their lobbying until 1971, when they finally obtained the *wife's earnings election*, under which a married woman could be taxed as a single person on the income from her own work. If this election was made — and it could only be made if the woman *and her husband* requested it in writing — the man could only claim a single person's exemption. As a result, only couples earning \$30,000 a year or more benefitted from this new option.⁴²

At least one commentator believed that this 1971 change spelled the end of the joint taxation controversy.⁴³ He was proved wrong in

³⁷ Cited in U.K. Chancellor of the Exchequer, *supra* note 32 at 58.

³⁸ Marshall & Walsh, *supra* note 32 at 242.

³⁹ U.K. Royal Commission on the Taxation of Profits and Income, *supra* note 32 at 36-7.

⁴⁰ *Ibid.* at 37.

⁴¹ *Ibid.* at 36.

⁴² Jeffrey-Cook, "Separate Taxation of Wife's Earnings" (1980) 6 Br. Tax Rev. at 439-441.

⁴³ Coombe, "The income, fortune and estate tax treatment of household units: Report of the United Kingdom" (1972) LVIIa Cahiers de droit fiscal international at II-263.

1978, when a booklet entitled *Income Tax and Sex Discrimination*⁴⁴ produced a deluge of more than 2,000 letters, 730 of which specifically demanded that the tax system treat married women as separate individuals.⁴⁵ The ensuing public debate led the government to commission a *Green Paper on the Taxation of Husband and Wife*, released in 1980.⁴⁶ Without taking a definite stand, the Green Paper delineated two main courses:

1. Allowing the spouses to choose between traditional joint taxation in the husband's hands, totally separate taxation or joint assessment with joint and equal liability; or
2. Changing to a new system of Canadian-style mandatory independent taxation of all individuals.

Most of the briefs presented to the British government in response to the Green Paper favoured the separate taxation route.⁴⁷ This did not lead to the implementation of such a system in Great Britain, though, partly because of disagreements between the supporters of independent taxation about the way such a system should work.⁴⁸ The main dispute concerned the exemptions to be assigned to single people, one-earner and two-earner couples. The principal contending options were:

1. Separate taxation with each spouse having a personal exemption that is fully transferable to the other spouse if one of them stays home. This is supported by the more conservative "pro-family" groups, but rejected by modern organizations which argue that: (a) spousal exemptions do not necessarily help families, since they are given regardless of the presence of children or other dependants; (b) transferable exemptions between spouses act as a barrier to women's participation in the labour force, since husbands' taxes would rise when their wives take paid jobs; and (c) exemptions give most help to high-income families, and little or nothing to those with low incomes who need it most.⁴⁹
2. Separate taxation with *non-transferable* personal exemptions, cash

⁴⁴ U.K. Equal Opportunities Commission (1977).

⁴⁵ Mentioned in *With All My Wordly Goods I Thee Endow . . . Except my Tax Allowances* (1979), which the U.K. Equal Opportunities Commission produced to describe the response to its 1977 booklet on taxation.

⁴⁶ U.K. Chancellor of the Exchequer, *supra* note 32.

⁴⁷ See items on the "Taxation of Husband and Wife" in *Taxation* Sept. 5 1981 at 620; Sept. 12 at 651-652; Sept. 26 at 705; Oct. 10 at 37; and Oct. 17 at 65. Also *The Economist* Dec. 19 1981 at 12-13.

⁴⁸ Letter to the author by Helen Lindars, Policy Unit, Equal Opportunities Commission (Oct. 27, 1983)

⁴⁹ Wilkinson, "The Discriminatory System of Personal Taxation: Some Proposals for Reform" (1982) II(3) *J. of Soc. Pol.* at 313.

payments for dependent children and, in some proposals, a tax reduction for older wives who spent most of their lives at home.⁵⁰

3. An intermediate approach with partially transferable deductions, where a one-earner couple would be entitled to a deduction more or less equal to the present Married Man's Allowance (about 160% of a single exemption).

The failure to reach a consensus has stalled the British movement toward family taxation reform. At the end of 1983, a representative of the Equal Opportunities Commission wrote to the author that "[t]he impetus which existed in the 1970s has been lost."⁵¹

D. Sweden⁵²

Income tax is a very old institution in Sweden, going back to the end of the sixteenth century, when taxes were occasionally levied on estimated incomes. The system crystallized in a 1710 statute which imposed a 20% tax on salaries, wages and pensions. Progressive tax rates were introduced in 1902 and became a permanent feature of the system in 1910.

Until 1874, the Swedish tax unit reflected the country's matrimonial property laws, under which "[t]he property of the husband and the property of the wife constituted a unit"⁵³ that was administered by the husband. As a result, the husband was alone responsible for reporting the family's income and paying its tax. From 1874 on, tax and family laws started to diverge: married women gained control over their work earnings, but husbands continued to be responsible for all the taxes. When the Code of 1920 granted full emancipation and complete control over their own property to women, the tax unit remained the family so the break between the two sets of laws became complete.

This was not immediately perceived to be a problem:

⁵⁰ U.K. Equal Opportunities Commission, *The Taxation of Husband and Wife: Response of the Equal Opportunities Commission to the Government Green Paper* (1981); also mentioned in Wilkinson, *supra* note 49 at 325; also Institute for Fiscal Studies, *The Structure and Reform of Direct Taxation* (1978) at 382-385.

⁵¹ *Supra* note 48.

⁵² The main sources used in preparing this section are:

- Sprague Barner, Director, *World Tax Series: Taxation in Sweden* (1959).
- Björklund, "Die Gemeinsame Veranlagung von Mitgliedern Desselben Haushalts und die Haftung der Haushaltsmitgliedern für die Entrichtung der Steuern in Schweden" (1955) 28 Cahiers de droit fiscal international at 30-45.
- Björne, "Sweden's Report on the Income, Fortune and Estate Tax Treatment of Household Units" (1972) 57a Cahier de droit fiscal international at II/275-II/291.
- Lindencrona, *Trends in Scandanavian Taxation* (1979).

⁵³ Schmidt, "The Prospective Law of Marriage", *Scandanavian Studies in Law* (1971) at 195.

Originally there was not much debate about joint taxation. This principle was supposed to be more or less self-evident. Marriages were stable, the husband was the only bread-winner and the ability to pay taxes was consequently measured by the income of the household instead of the income of each individual.⁵⁴

The main factor which changed the situation was the increasingly steep progressivity of the rate schedule. By the end of World War II, the exceedingly high tax burdens of parents and two-earner couples compared to those of unmarried taxpayers had become intolerable. The first reform came in 1947 with the abolition of the deductions for children and the introduction of family allowances. A number of studies followed, the most important originating from the Tax Committee of 1949,⁵⁵ which identified two main alternatives: (1) separate taxation of the spouses; and (2) full splitting of spousal incomes. It recommended a compromise solution: introducing an additional tax schedule for married couples that would combine full splitting at low income levels with gradually less splitting as the couples' incomes rose.

This compromise was implemented in 1952. The new system also distinguished between one and two-earner couples through an earned-income deduction for wives in the labour force. In 1960, the tax unit was extended to include unmarried cohabitants. This put an end to the increasingly widespread practice among upper-income couples of cohabiting without marriage or of getting a so-called "tax divorce", which meant that "a married couple divorced and then lived apart until their new status had been accepted by the tax authorities, after which they secretly moved back together."⁵⁶

The next move came from women's organizations. In the early 1960s, they made Sweden's joint taxation system the focus of a "vast debate" and criticized it for going against the trend toward making the sexes more equal.⁵⁷ Most objectionable was the "threshold effect" which discouraged housewives from taking paid jobs. This was acknowledged by experts:

It has been widely discussed in the Scandinavian countries if, and in that case to what extent, the willingness to work and make extra efforts is influenced by taxation. Opinions have been very different. As to joint taxation and the willingness of women to work outside the household the effect was, however, obvious to everyone. In a country with strongly progressive income tax rates the net effect of a woman's employment was very small if her husband was already gainfully

⁵⁴ Lindercrona, *supra* note 52 at 30.

⁵⁵ The report of the 1949 Tax Committee is described at length in Björklund, *supra* note 52 at 36-41.

⁵⁶ Sundberg, "Recent Changes in Swedish Family Law: Experiment Repeated" (1975) 23 *Am. Jour. of Comp. Law* at 39.

⁵⁷ Suède, *Le statut de la femme en Suède — Rapport aux Nations Unies* (1968) at 59-60.

employed.⁵⁸

Since feminist demands for change coincided with a labour shortage in Sweden, reforms were very swift. A separate filing option for spouses' *earnings* was introduced in 1965, followed in 1970 by the abolition of joint taxation of the earnings of married (and cohabiting) couples. This did not affect incomes from profits, properties and savings, which continued to be taxed jointly. Other remaining joint features included a few transferable "family" deductions as well as a marital credit for taxpayers whose spouses had little or no earnings. This credit was intended to be a transitional measure for families where the wife was "too old to receive training" or where the spouses were "living in a place where there are no job opportunities."⁵⁹

Feminists had hoped to gain the separate taxation of all types of incomes soon afterwards, but this did not happen. Their only victory in that area since 1970 has been the extension of individual taxation to the earnings of wives and husbands who work in the same business or farm (1976). These spouses had been obliged to file joint returns until then. The lack of further progress toward separate taxation was explained in 1979 as follows:

The last step, the introduction of complete separate taxation, has not been taken in any Scandinavian country. Unearned income and net wealth is still taxed jointly. The reason for this is to a large extent another important factor in Scandinavian taxation: the growing fear of tax avoidance. The legislator does not feel able to foresee the consequences of the complete abolition of joint taxation for unearned income and fears that tax avoidance could be facilitated. Another factor is that the introduction of completely separate taxation is not deemed necessary from a labour market point of view.⁶⁰

E. Canada⁶¹

Compared to most others, the history of Canada's tax treatment of the family is remarkably sedate and uneventful. Ever since 1917, when the federal Income War Tax Act was introduced, the Canadian unit of taxation has always been the individual. Only one tax schedule exists

⁵⁸ Lindencrona, *supra* note 52 at 31.

⁵⁹ Odhnoff, Minister for Youth and Family Affairs, Sweden, "The Family in a Changing Society: Problems and Responsibilities of Its Members: Sweden" (Paper presented to a United Nations Interregional Seminar, 1973) at 8.

⁶⁰ Lindencrona, *supra* note 52 at 31.

⁶¹ The main sources used in preparing this section are:

- Mockler, Smith and Frenette, *Taxation of the Family*, Study No. 10 of the Royal Commission on Taxation (1964).

- London, *Tax and the Family*, (1975).

- London, "Taxation of the Family United" 1974 Conference Report at 297-316.

and family responsibilities are recognized through exemptions for spouses and children.

As the original Canadian and American income tax systems were almost identical, it is particularly interesting to see why Canada has never swerved from its original path while the United States took a very different course. This is found in the radically different ways in which Canada dealt with the two main challenges that destroyed the American separate taxation system — the treatment of spouses married in community of property and the prevention of artificial income-splitting by couples with substantial unearned income.

The Canadian counterpart of the American community property states is the province of Quebec, whose family laws originated in France. Until recently, the standard matrimonial regime of Quebec was very similar to the old American community property regimes described earlier; theoretically the spouses were equal partners, but in fact the husband had almost unlimited control over all or most of their property. Possibly because upper-income Quebeckers routinely opted out of their province's community regime through pre-nuptial contracts, it was not until 1957 that the Canadian equivalent of *Poe v. Seaborn*⁶² reached the Supreme Court of Canada. In the Canadian *Sura* case,⁶³ the spouses were denied the right to each declare half of their total income for tax purposes because the wife did not "have the exercise of the plenitude of rights which ownership normally confers. . . . [T]he result is that the wife receives no income from community property."⁶⁴ The husband therefore had to pay tax on the whole amount.

This did not settle the community property issue for all time. On the contrary, the wording of *Sura* indicated that if a province changed its matrimonial regime to a California-style community system with joint control by the spouses, people married under such a regime would probably be entitled to full income splitting. However, more than twenty-five years have gone by without much pressure on the provinces to adopt such a regime, which tells something about the price — in higher taxes — husbands are willing to pay to maintain the upper hand over their families' finances. Stranger still, not a single Canadian case has been reported of spouses attempting to split their incomes on the basis of a marriage contract similar to that involved in the American

⁶² *Supra* note 20.

⁶³ *Frank Sura v. Minister of National Revenue* [1957] 62 D.T.C. 1005.

⁶⁴ *Ibid.* at 1008-9.

case of *Lucas v. Earl*.⁶⁵ Although several experts believe that such a manoeuvre would have little chance of success,⁶⁶ at least one thinks otherwise⁶⁷ and the technique has been found acceptable under the Quebec Income Tax Act.⁶⁸

To prevent well-off spouses from reducing their taxes by transferring assets to each other, Canada's first and subsequent income tax acts specified that income from property transferred by one spouse to the other, or by parents to their children, would be attributed back to the *transferor* for tax purposes. In practice, however, these so-called "attribution rules" have been called "illogical, arbitrary and often unfair"⁶⁹ because the loopholes various court decisions created in them were "wide enough to drive a truck through".⁷⁰ The most glaring of these holes are:

1. The definition of "property" as used in the attribution sections does not include "businesses";
2. Until the May 1985 budget,⁷¹ the term "transfer" did not include loans between family members, even demand loans without interest;
3. Although attribution rules apply to transfers by way of trusts, they do not cover transfers of property to corporations of which the transferee spouse or child is the shareholder.

Until 1980, the tax act also prevented employers from deducting as expenses the salaries they paid to their spouses in unincorporated businesses or farms. This prohibition was repealed following protests from women's groups.⁷²

⁶⁵ *Supra* note 22.

⁶⁶ Eng, "Tax Consequences of Provincial Family Law Reform Legislation" (1978) 26 Can. Tax J. at 562; McNair, "The Income Tax Implications of Matrimonial Property Law Reform — The Common Law Provinces" 1979 *Conference Report* at 268; Lareau, "Les implications fiscales des transferts de biens effectués sous la loi sur les biens matrimoniaux de Nouveau-Brunswick" (1981) 29 Can. Tax J. at 157; Ellis, "An Income Tax Perspective on British Columbia Marriage Agreements" (1981) 15(1) U.B.C. Law Rev. at 155.

⁶⁷ London, "Taxation of the Family United", *supra* note 61 at 109-110. London writes about s. 56(4), which prevents transfers of income other than property between family members for tax purposes, that: "[O]ne might question . . . whether a present assignment of future income is caught within its terms. One can read that section to say that it is only income in the year of the assignment itself which is included in the income of the assignor and not income earned in years subsequent to the assignment."

⁶⁸ Jolin, "Aspects fiscaux des régimes matrimoniaux au Québec" *Journées d'études fiscales 1979* at 86.

⁶⁹ MacGowan, "The Tax Consequences of Marriage" 1974 *Conference Report* at 278.

⁷⁰ London, "Taxation of the Family United", *supra* note 61 at 110; see also Aikman, "Income Splitting Among Family Members" 1977 *Conference Report* at 189.

⁷¹ Canada, Department of Finance, *Securing Economic Renewal: Budget Papers*, May 1985 at 63.

⁷² Canadian Advisory Council on the Status of Women, "Annotated Recommendations on Women and Taxation" (1978) at 4. Salaries paid to spouses are still not recognized for unemploy-

The extent and impact of income splitting between family members in Canada have never been documented, but it is clear from the above that even after the May 1985 changes, the possibilities for income splitting by people who own substantial assets are considerable. This was one of the main reasons why the Carter Commission recommended in 1966 that Canada abandon separate taxation in favour of a taxpaying unit which would include the spouses and their dependent children. The Commission's other reason for supporting family taxation was its belief that the family was "the basic economic unit in society".⁷³

When the federal government responded in 1969 to the Carter proposals, it rejected the taxation of the family as a unit because: (1) it would impose a "tax on marriage"; and (2) it would greatly increase the tax rates of wives.⁷⁴ Women's views seem to have played a significant role in this decision. An internal Finance Department document⁷⁵ warned that women would oppose joint taxation because they stood to lose much more under it than under the current system already under attack by women's groups. Robert Bryce, Canada's Deputy Minister of Finance from 1966 to 1970, also reported to the author that the government officials of the time were influenced by the fact that all their wives were opposed to joint family or spousal taxation.⁷⁶

The last official examination of Canada's tax unit was done in 1975-76 by a federal Interdepartmental Committee on the Taxation of Women.⁷⁷ On the issue of the tax unit, the committee was split down the middle. Half of its members, led by the Revenue Department, supported joint spousal taxation because they found it fairer and thought it would simplify the administration of the tax system. The other members were equally adamant that only separate taxation was fair because joint taxation would discriminate against employed women and create an undesirable tax on marriage. The conclusion of the second group was summarized by the federal Coordinator for the Status of Women:

Joint returns are an idea whose time has passed. During the 1950s and '60s when most wives worked in the home, it would perhaps have been a better tax system

ment insurance purposes.

⁷³ Canada, 3 *Report of the Royal Commission of Taxation* (1966) at 123.

⁷⁴ Hon. Benson, Minister of Finance, *Proposals for Tax Reform* (known as the "White Paper on Tax Reform") (1969) at 14-15.

⁷⁵ Canada, Department of Finance, "A Marital or Family Unit" (Unpub. paper 1969) at 8.

⁷⁶ This conversation took place on Jan. 9, 1982 in Ottawa, on the occasion of the Tax Reform Conference of the Canadian Centre for Policy Alternatives.

⁷⁷ Canada, "Report of the Interdepartmental Committee on the Taxation of Women" (Unpub. paper 1976).

than individual returns. In the 1970s, however, when the government is making such efforts to improve the status of women by recognizing them as individuals outside the family unit, it would seem a retrograde step. . . .⁷⁸

III. GOALS WHICH TAX UNITS SHOULD TRY TO ACHIEVE

As Part I demonstrated, the choice of the appropriate tax unit has not always been based on a careful and rational assessment of the alternatives. Often, short-term political considerations such as the desire to raise or lower taxes or to appease an annoyingly squeaky wheel have dominated instead. To compensate for this lack of forethought, academics, tax practitioners and other interested people have discussed the rationales and respective merits of the various tax unit options in relation to two main questions: 1. What is the best tax unit? and 2. What is the appropriate relationship between different categories of units or taxpayers?

A. *What is the Best Tax Unit?*

When discussing which tax unit is best, “neutrality toward the marriage decision” and “taxing families with the same income at the same rate” are common criteria. Then it is noted that these criteria cannot co-exist under a progressive rate structure, but “the treatment of the tax unit must inevitably be a matter of compromise between a number of conflicting considerations.”⁷⁹ With all due respect, this approach is neither logical nor helpful since “taxing families with the same incomes. . . .” is not a criterion at all, but merely one of the possible conclusions that may or may not be reached after analyzing the basic principles (the criteria) upon which everyone, or almost everyone, agrees.

After eliminating such “false” criteria from the analyses, the remaining three criteria are:

1. *Fairness* — This requires that the population be generally satisfied that the tax unit chosen is appropriate to assess people’s ability to pay. Secondly, this criterion requires that all types of income be taxed in the same manner unless there is a valid reason for doing otherwise.
2. *Neutrality* — The tax unit should affect life choices as little as possible, particularly decisions regarding marriage, taking a job

⁷⁸ Memo by Julie Loranger, then federal Coordinator for the Status of Women, to the Hon. Marc Lalonde, then Minister Responsible for the Status of Women (and Minister of National Health and Welfare) (Dec. 21, 1976)

⁷⁹ Meade, *supra* note 50 at 377.

outside the home and the transfer of property to spouses and children.

3. *Simplicity* — A good tax unit is one that is reasonably easy for the taxpayer to understand and for the tax authorities to administer.

1. Fairness

A 1960 article by American law professors Oldman and Temple greatly influenced the future of the U.S. tax unit as well as the deliberations of the Carter Commission.⁸⁰ After summarizing their international survey of tax systems of the late 1950s, Oldman and Temple concluded that:

The initial question countries have had to answer in approaching the allocation of tax burdens is whether or not the characteristics of the marriage relationship are such that all married couples with the same total incomes should pay approximately the same total tax.⁸¹

They thought that countries which aggregated spousal incomes saw the married couple as “a common pool of income or wealth” constituting “a spending or utilizing unit”; that “for the purposes of any reasonable policy of progressive taxation, the economic lives of a husband and wife are inseparable”;⁸² and that “taxation of the married couple as a unit is more reasonable, in terms of economic realities and administrative facility, than separate taxation of the spouses.”⁸³

No evidence is given that Oldman and Temple asked the countries using joint taxation why they did so; as well, the authors ignored the more than one-third of countries surveyed which were using separate taxation. This, and the fact that the OECD reports a steady move away from joint taxation among its member countries during the 1960s and '70s,⁸⁴ indicates that Oldman and Temple's large following in North America in the fifteen years after the publication of their article owed more to their eloquence than the scholarship of their views.

Returning to Oldman and Temple's starting point, the “initial question” countries asked themselves about the nature of the marriage relationship when choosing a tax unit, and comparing it with historical realities, we note that none of the five countries took such a philosophi-

⁸⁰ Oldman & Temple, “Comparative Analysis of the Taxation of Married Persons” (1960) 12 *Stan. L. Rev.* at 585-605.

⁸¹ *Ibid.* at 596.

⁸² *Ibid.* at 597.

⁸³ *Ibid.* at 603.

⁸⁴ Organisation for Economic Co-Operation and Development, Committee on Fiscal Affairs, *The Treatment of Family Units in OECD Member Countries Under Tax and Transfer Systems* (1977).

cal approach. On the contrary, the starting point in all five cases was the assumption that the tax unit should correspond to property rights under the civil law. Where matrimonial property rules treated the couple or the family as a unit under the control of the male head of the household (France, Great Britain, Sweden), tax law simply did the same. In the countries where wives had gained control of their property when the first permanent income tax provisions were introduced (Canada, the United States in 1913), it was taken for granted that the taxpayer would be the individual.

Typically, the philosophical arguments about the alleged special characteristics of the marital unit only arose when tax and property laws had drifted apart and the split between them was being challenged. This happened in Great Britain in the 1920s and in Sweden in the 1940s. By 1940, joint taxation had not yet gained much acceptance in the United States, as demonstrated by Shoup's conclusion that whether spouses should be treated as a tax unit or not depended largely upon the two following factors: "the treatment of imputed income under the tax law and the division of control, actual and potential, of the family's total income between the spouses."⁸⁵ As no information existed on "the actual degree of control each spouse exercises over his income", Shoup concluded the matter would "require special study before any particular technique can be recommended for a given time and place."⁸⁶

Stanley Surrey, architect of the 1948 U.S. changeover to full splitting for all spouses, was the first American to defend the view of spouses as an economic unit. He did not argue that spouses pooled all their income and assets, but that they are "the economic unit of consumption."⁸⁷ This justified taxing same-income couples at the same level, something he found desirable to reduce litigation on artificial splitting, to solve the community property anomaly, to answer "the insistent demand for a tax incentive for upper bracket executives"⁸⁸ and to reduce income taxes after World War II. Given all these perceived benefits as well as the fact that the *Poe v. Seaborn*⁸⁹ case had already rejected Shoup's criterion of "actual control" by granting full splitting to all community property spouses even though the wife usually con-

⁸⁵ Shoup, Columbia University, "Married Couples Compared With Single Persons Under the Income Tax" (1940) 25 Bulletin of the Nat. Tax Assoc. at 130.

⁸⁶ *Ibid.* at 135.

⁸⁷ Surrey, "Family Income and Federal Taxation" (1946) Taxes at 985.

⁸⁸ *Ibid.* at 986.

⁸⁹ *Supra* note 20.

trolled nothing at all, Surrey's proposals were irresistible.

The result was that from 1946 on, and for the next 25 years, almost all American tax experts unquestioningly accepted the spousal unit postulate.⁹⁰ In 1964, when the Carter Commission issued its background paper on taxation of the family, it buttressed its conclusion — that a married couple was an economic unit — by reproducing most of the Oldman and Temple article.⁹¹ After stating that “[v]irtually no information is available on the pooling of family resources in Canada”, the background paper went on to recommend that all spouses be jointly taxed. However, it rejected the inclusion of children in the tax unit because:

. . . this treatment depends entirely upon the validity of the premise that the income of minor children is pooled and shared with all the family. We have little or no statistics on this point.⁹²

As all the tax experts who supported joint spousal taxation agreed that “pooling and sharing” was the crucial assumption on which they based their view, it is remarkable that not a single survey was ever carried out in North America to verify its accuracy. When American professors McIntyre and Oldman wrote that “married couples should be assumed to share their income equally” because “common experience suggests that at least partial pooling of sources to finance community consumption is almost universal”,⁹³ the best support they could find for this assumption was a 1965 article based on unsupported statements of various sociologists in the 1950s and early ‘60s (the most up-to-date reference being a book entitled *Building a Successful Marriage*).⁹⁴ Generalized pooling and sharing is now a fundamental tenet of the American and British tax systems, but the foundation on which they are built is still a mystery.

Pahl, who made the only serious survey — in Great Britain — of the extent of sharing within marriage, concluded that “there is a considerable amount of evidence to suggest that such sharing of income cannot be taken for granted.”⁹⁵ She found four standard patterns of money management which were characteristic of different types of families:

⁹⁰ Bittker, *supra* note 18 at 1392.

⁹¹ Mockler, Smith & Frenette, *supra* note 61 at 63-72.

⁹² *Ibid.* at 80, 84.

⁹³ McIntyre & Oldman, “Taxation of the Family in a Comprehensive and Simplified Income Tax” (1977) 90 Harv. L. Rev. at 1578, 1594.

⁹⁴ Thorson, *supra* note 18 at 116.

⁹⁵ Pahl, University of Kent, “Patterns of Money Management Within Marriage” (1980) 9 J. of Soc. Pol. at 314.

1) *the whole wage system*, characteristic of olden days and of families living on social assistance or social security today. Under that system, the husband hands over his salary or benefit cheque to his wife who manages all their financial affairs. Pahl found that “[w]hen money is very short, . . . managing the budget becomes a chore rather than a source of power within the marriage.”⁹⁶

2) *the allowance system*, typical of working and middle-class families where the wife stays home and the husband gives her an “allowance” or “wage”, not so much related to the husband’s actual income as to some community norm of an appropriate sum. Sometimes, the husband keeps back as much as half of his income. Thus, writes Pahl, “more affluent households offer the possibility of greater inequality between husband and wife.”⁹⁷

3) *the pooling system*, mainly characteristic of newly married couples where both husband and wife are earning. This does not always give the wife more financial power, however, because her earnings are often used for household expenditures, while the man keeps more of his money for personal use. “The pooling system also seems to be more common among those who have received a longer than average education.”⁹⁸

4) *the individual control system*, which is still quite rare, gives both spouses who are very well off full control over their individual sources of earned or unearned income.

Applying this information to determine whether spouses generally pool and share all or most of their income and assets, the answer we get is yes and no. Yes, it appears that couples with very low incomes do share everything because they have no choice. At the other end of the scale the answer is no; spouses who each have substantial incomes and assets do not tend to share much at all. Among middle-income people, sharing seems most common when the spouses are young and have similar incomes and least frequent when the wife has no income and stays home. In fact, with the single exception of the very poor, the earnings and assets of couples are generally controlled and managed by the spouse who has legal title to them.

These findings negate the basic justification of joint taxation since control of the family’s income and assets by both spouses has always been one of its central elements.

. . .the extent to which members of the . . . units share in the making of deci-

⁹⁶ *Ibid.* at 330.

⁹⁷ *Ibid.* at 331.

⁹⁸ *Ibid.*

sions on the extent and form of expenditures and saving of pooled funds . . . has been an important factor in the determination of the existing social and economic units of society and therefore must be an important factor in the determination of the size and extent of the tax units.⁹⁹

The one exception to the belief that control is an important factor was presented in the 1977 McIntyre and Oldman article mentioned earlier. The authors rejected property interest rules and control criteria and concluded that "(t)axing the income to those who actually consume or accumulate it regardless of source seems *intuitively* more equitable and provides a basic principle to govern how the tax system should take domestic sharing arrangements into account." [emphasis added]¹⁰⁰ Basing themselves on the legal support and obligations and the traditional assumption of pooling, McIntyre and Oldman concluded that both spouses consumed and accumulated in equal shares, so each of them should be taxed on half the couple's total income.

McIntyre also wrote that:

For perhaps 90% of the population, consumption is going to be 90% of disposable income. . . . As a rough figure, we can assume that 40% of family income is spent on housing and utilities. This, . . . we can assume, is shared. . . . The next consumption item in order of importance is food. . . . Food takes something like 20 to 39% of disposable income. That income I assume is universally shared. . . .

Another big consumption item is clothing. It is not my experience that the husband typically has a much larger clothing budget than the wife. Therefore, on the three traditional essentials, which make up probably 60 to 70% of disposable income for the overwhelming majority of North American families, there is very little doubt . . . of a sharing of income.¹⁰¹

The first criticism of these views is that the facts and figures McIntyre cites above are pure invention. Statistics Canada figures show that the average Canadian family spends 44% of its after-tax income on the three basic items of food, shelter (including utilities) and clothing.¹⁰² If this is also true for the other Western countries, there is a great deal of room for individual decision and choice in the financial affairs of most middle and upper-income families in the industrialized world. Secondly, the idea that the person who should pay tax is the one who has "beneficial enjoyment" of the income was not very popular. It was accused of being a consumption tax which would not even be im-

⁹⁹ London, *Tax and the Family*, *supra* note 61 at 84.

¹⁰⁰ McIntyre and Oldman, *supra* note 93 at 1577.

¹⁰¹ McIntyre, *Taxation of the Family: Economic Mutuality and the Need for Joint Filing* (1979) 1 Can. Tax. at 14-15.

¹⁰² Calculated from Canada, Statistics Canada, *Income Distributions by Size in Canada, 1978* at 37 and *Family Expenditure in Canada, 1978* at 24.

posed on the true consumer.¹⁰³

Even more fundamental was the lack of realism of McIntyre and Oldman's belief that marriage still is, and will continue to be, a fundamentally stable and reliable support institution. This is contradicted by most family law experts, including Prof. Glendon, who foresees "the decline of marriage as a support institution and the decline of the family as a status determinant." She adds that:

The attenuation of family ties, and the ease with which family members can and do enter and leave the unit in the twentieth century, are both indicators and motors in a state of affairs in which family members are no longer so dependent on the unit for security and social position as they were in the past.¹⁰⁴

The result, she believes, will be the fulfilling of Sir Henry Maine's prophecy about the "emergence of the self-determining, separate individual from the network of family and group ties."¹⁰⁵

Because of changes such as women's mass entry into the labour force, the phenomenal rise in divorce rates and the growing tendency to equalize the legal treatment of married and unmarried couples, Glendon writes, this transformation will soon be complete. Employment and government programmes have largely replaced the family as people's main sources of status and financial support. This was echoed by the participants in a Brookings Institution conference who believed that "marital status or living arrangements are too fragile a thing on which to hang important consequences" and therefore favoured a system of mandatory separate taxation.¹⁰⁶

It therefore appears that the pooling hypothesis on which joint taxation systems are founded is made of quicksand. In a society where most spouses keep control over their own earnings and assets, and where close to 40% of marriages end in divorce,¹⁰⁷ it is impossible to argue with any conviction that husbands and wives have the same ability to pay. Instead, the best measure of any person's ability to pay is that individual's personal income and the fairest tax unit is the individual.

While this disposes of the first element of the fairness criterion, it

¹⁰³ Moerschbaeche, *supra* note 30 at 136-37.

¹⁰⁴ Glendon, "Modern Marriage and Its Underlying Assumptions: The New Marriage and the New Property" 8 *Fam. L. Quarterly* at 447, 455. See also Buchhofer & Ziegert, "Family Dynamics and Legal Change: Empirical Sociology in Search of a General Theory on the Effects of Law on Family Life" (1981) 12 *J. of Comp. Fam. Studies* at 397.

¹⁰⁵ Allen, *Introduction to Maine's Ancient Law* (1959 ed.) cited in Glendon, *supra* note 104 at 455.

¹⁰⁶ Sunley, Jr., *Summary of the Conference Discussion Comprehensive Income Taxation* (1977) at 272.

¹⁰⁷ McKie, Prentice & Reed, *Divorce: Law and the Family in Canada* (1983) at 64.

does not settle the second, which requires that all types of income be taxed in the same manner unless there is a good reason not to do so. This problem arose in the United States following *Lucas v. Earl*,¹⁰⁸ in which it was held that the spouses could split their incomes by giving each other assets, but were not allowed to do the same with respect to their earnings.

The only two ways of equalizing the treatment of earned and unearned income under an individual taxation system are:

- 1) Canadian-style attribution rules, which ignore the transfer of income and income-producing assets between the spouses and tax the products in the hands of the transferor-spouse. At present, these provisions are glaringly defective and could be much improved.
- 2) Permitting and recognizing, for tax purposes, the real and irrevocable transfers of earnings and income that take place between family members. In a case such as *Lucas v. Earl*, as well as under community of property regimes where the spouses have joint rights of ownership *and control*, the spouses would be entitled to split all their incomes between them for tax purposes. Technical "rights of ownership" without real control, such as existed under the old community property regimes analyzed in *Poe v. Seaborn*,¹⁰⁹ would not be recognized since they do not increase the current ability to pay of the poorer spouse.

Once again, these two approaches reflect different beliefs about the nature of the marital relationship. The first is based on the long-standing common law principle that the spouses are one, so transfers between them are never real and should be dismissed as mere "bed-chamber transactions" without practical significance. From that viewpoint, anything that would lower the tax burden of some spouses relative to that of single people or other couples should be rejected as meaningless and "artificial". Professor Boris Bittker commented on this attitude of the American courts:

For at least 50 years, a major theme in the taxation of income from property transferred within the family has been that bedchamber transactions are suspect because the allocation of legal rights within the family is a trivial matter.¹¹⁰

Bittker subtly pointed out that if income splitting had been accepted in cases such as *Lucas v. Earl*, it would have encouraged all couples to enter into sharing agreements and the result would have been equal taxes for same-income couples. He added:

¹⁰⁸ *Supra* note 22.

¹⁰⁹ *Supra* note 20.

¹¹⁰ Bittker, *supra* note 18 at 1394.

. . . it is far from self-evident that the property rights won by married women are inconsequential. . . . Taxpayers pass up many opportunities to reduce their taxes by intrafamily gifts, possibly from ignorance or inertia, but perhaps because they attach more significance to their legal rights than academicians assert. . . .

It may be, therefore, that tax theorists have excessively downgraded the importance of legal rights within the family, and that a swing of the pendulum is in the offing.¹¹¹

Tax professor Lynda Sands Moerschbaeher is part of that swing. On the one hand, she writes, "no valid tax policy or reason exists for allowing a *hypothetical* income split with a spouse, usually a wife, when no *real* split of income or control of assets has occurred."¹¹² On the other hand, she adds:

Ideally, the tax law would recognize the income splitting of community property and permit it where the state's community property laws bear economic substance and reality by granting actual ownership and control to both spouses (as does California law since 1975, and others). Thus, in states of *actual* joint ownership and control, the concept of taxing the income to the one who earns it or the income from the property to the one who owns it is not violated by the 50-50 community property split.¹¹³

Matrimonial property laws and agreements are very significant. If they weren't, why would women's battle for equal rights over family property have been so bitterly resisted for the last hundred years? Why is it that even today, with the exception of a few community property jurisdictions in the United States, none of the five countries studied has granted wives equal rights over their families' income and assets during the course of the marriage?¹¹⁴

Very specifically, why didn't Canadian men rush to pressure their provincial governments into adopting community of property regimes with joint control when the *Sura* decision made full income splitting possible? Why is it that, in spite of the ease with which Canadian spouses could circumvent their country's attribution rules, 44% of married men who earned more than \$40,000 in 1981 had wives with incomes so low (less than \$3,200) that the husbands were able to claim the marital exemption?¹¹⁵ If we exclude a further 45% of husbands in

¹¹¹ *Ibid.*

¹¹² Moerschbaeher, *supra* note 30 at 135.

¹¹³ *Ibid.* at 144.

¹¹⁴ For France: Robert, *Les rapports patrimoniaux* (1979) at 57; for Great Britain: Thomson, "English Law", *The Reform of Family Law in Europe* (1978) at 43; for the United States: Freed & Foster, "Family Law in the Fifty States: An Overview" (1983) XVI(4) *Fam. L. Quarterly*; for Sweden: Lögdberg, *The Reform of Family Law in the Scandinavian Countries* (1978) at 201; for Canada: Dulude, *Love, Marriage and Money* (1984).

¹¹⁵ Canada, Revenue Canada Taxation, *Taxation Statistics, 1983 Ed.* at 162-63.

that income group whose wives were in the labour force and therefore had personal incomes,¹¹⁶ we are left with at most 11% of husbands who were married to penniless wives to whom they transferred income-producing assets to reduce their tax.

This supports the conclusions that sharing is far from the norm between spouses and that legal rights are valid indicators of real control over income and property. This being so, it would be fair to recognize matrimonial regimes and marriage contracts for tax purposes as well as all other types of real and irrevocable transfers between the spouses.

2. Neutrality

Ostensibly, the neutrality criterion is straightforward. When tax experts write that “[t]he decision to marry or not to marry should not be affected by tax considerations”¹¹⁷ or that “[t]he incentive for a member of the family to earn should not be blunted by tax considerations which depend upon the economic position of other members of the family”,¹¹⁸ their meaning is quite clear.

In spite of this, the neutrality criterion is far less than absolute. Some non-neutral aspects of the tax system do not seem to bother anyone. For instance, while many suggest that a higher tax following marriage may discourage people from getting married, nobody has protested the other side of the equation — that favourable treatment of married couples might discourage people from seeking a divorce. Such selectivity in identifying the possible negative consequences of non-neutrality indicates that this criterion is closely tied to current social norms.

That the troublesome aspects of non-neutrality of the tax unit vary from time to time and from place to place confirms this. The disincentives to labour force participation by wives is the main example: while Sweden identified this problem in the early 1960s, it was not recognized until much later in Great Britain and the United States, and is still not seen as a major impediment in France.

Finally, some tax experts and policy makers have stated outright that neutrality is sometimes *not* desirable. For example, the French “quotient” system officially endorses pro-natalist values; some theorists believe that “tax-free transfers are desirable between spouses”¹¹⁹ or

¹¹⁶ Canada, Statistics Canada, *Income Distribution by Size in Canada, 1982* at 71.

¹¹⁷ Institute for Fiscal Studies, *supra* note 50 at 378.

¹¹⁸ *Ibid.*

¹¹⁹ London, *Tax and the Family*, *supra* note 61 at 92.

that the tax system should promote "the equalization of women in the society".¹²⁰ These comments indicate that neutrality should be set aside in pursuit of valid social goals.

None of the above means that the neutrality criterion is not important. On the contrary, as Jack London pointed out, to ignore it is to risk widespread "discontentment, frustration and anger. The result may be non-cooperation and increased tax evasion. . . ." ¹²¹ To avoid this, a tax system must follow criteria that "correspond as far as possible to current social attitudes, customs and practices."¹²² Neutrality criterion arguments have coalesced around three main situations: marriage, employment of wives and family transfers.

a) *Neutrality in the marriage decision*

The only way in which a tax system can be simultaneously progressive and neutral on the marriage decision is if married and unmarried people are taxed on exactly the same basis. Any special treatment of married couples, whether through French-style splitting, British-style aggregation with a single rate schedule, American-style multi-rate system or Canadian-style marital exemption, will tax some spouses more heavily or less heavily than had they remained single.

According to Bittker, the increasingly loud American call for a marriage-neutral system "stems sometimes from the conviction that the state should neither encourage nor discourage marriage by a tax incentive or penalty, and sometimes from a belief that ceremonial marriages in today's society are not sufficiently different from informal alliances to warrant a difference in tax liability."¹²³ Two other reasons can be added: first, marriage does not, in itself, make a woman a dependant; second, many traditionalists, especially in the United States, believe that the so-called "tax on marriage" reflects an anti-family attitude.¹²⁴

Nevertheless, some experts still believe that tax has little effect on the marriage decision. As late as 1975 and 1976, Jack London¹²⁵ and Richard Goode¹²⁶ were citing the 1954 U.K. Royal Commission on the

¹²⁰ *Ibid.*

¹²¹ *Ibid.* at 87.

¹²² *Ibid.*

¹²³ Bittker, *supra* note 18 at 1395.

¹²⁴ Carr, *Statement Before the Subcommittee on Taxation and Debt Management, Senate Finance Committee, on the Tax Treatment of Married and Single Taxpayers* (1980) at 153. At the three White House Conferences (on Families), no issue drew more support than the proposal to eliminate the marriage tax.

¹²⁵ London, *Tax and the Family*, *supra* note 61.

¹²⁶ Goode, *The Individual Income Tax* (1976) at 231.

Taxation of Profits and Income which was "sceptical of the suggestion that men and women are in fact dissuaded from marriage by any such nice calculation of the financial odds" and thought that "the reasons that impel men and women to prefer marriage to more casual associations are many and powerful."¹²⁷ This view is now hopelessly old-fashioned. In 1976, the Canadian Interdepartmental Committee on the Taxation of Women reported that if joint taxation was introduced in Canada and a tax on marriage ensued, many couples would not marry until the woman left the labour force to have a child and could take advantage of the system to minimize their taxes.¹²⁸

Common law unions have tremendously increased during the last two decades. About 16% of Swedish couples are now cohabiting without marriage¹²⁹ and 6% of Canadian couples described themselves as "common law partners" in the Census of 1981.¹³⁰ Margrit Eichler wrote that:

It is not impossible to imagine that if the taxation system were to start to seriously discriminate against married people, a substantial portion of cohabitants might be very reluctant to participate in a legal marriage, even after a very long period of cohabitation.¹³¹

Assuming that the tax treatment of married couples affects people's decision to marry or not, and further assuming that such an effect is undesirable, four main proposals have been made to avoid this: 1) mandatory separate taxation with no special provision for marital status; 2) joint taxation with optional filing as singles; 3) joint taxation with an earned income deduction or credit for the wife; and 4) taxing common law couples as if they were married.

(1) Mandatory separate taxation with no provision for marital status

When such a system was proposed in Canada¹³² and in Great Britain,¹³³ the criticisms were: i) a marital status deduction is necessary when the wife has no earnings to compensate the husband for supporting her; ii) the marital deduction recognizes the contribution of home-

¹²⁷ U.K. Royal Commission of the Taxation of Profits and Income, *supra* note 32 at 36.

¹²⁸ Canada, Interdepartmental Committee on the Taxation of Women (1976), *Report* at 19.

¹²⁹ Trost, "Cohabitation Without Marriage in Sweden" in Eekelaar & Katz, eds., *Marriage and Cohabitation in Contemporary Societies* (1980) at 16-22.

¹³⁰ Norland, *Common Law Unions in Canada, 1981: Selected Socio-Economic Characteristics* (1984).

¹³¹ Eichler, *Families in Canada Today* (1983) at 126.

¹³² *Supra* note 73 at 299.

¹³³ U.K. Equal Opportunities Commission, *The Taxation of Husband and Wife: Response of the Equal Opportunities Commission to the Government Green Paper* (1981).

makers to society; iii) the absence of such a deduction would — at least in Canada — result in taxing some one-earner couples on incomes far below the poverty line.

These criticisms were answered as follows:

a) *On the cost of supporting a non-earning wife* — It is incorrect to include a wife at home in the dependent class since “[i]n most cases the wife who works at home as a housekeeper, far from being a dependant, performs essential services worth at least as much to her husband as the cost of the food, shelter and clothing that he provides for her.”¹³⁴ As a result, tax exemptions or deductions that treat the wife as a financial burden are inappropriate.

b) *On recognizing the contribution of homemakers* — People who believe the marital status exemption is a type of recompense for the housewife’s work are mistaken since the exemption’s purpose does just the opposite. The way to achieve such recognition of homemakers’ work would be to tax one-earner families *more* than the others rather than less.¹³⁵

c) *Taxing families below the poverty level* — Unlike the others, this is a real problem. One proposed solution would have low-income families complete an additional tax schedule reporting their total income and exempting them from tax if the total is below the poverty line for a family of its size. Another possibility is a vanishing marital status exemption that would diminish and eventually disappear as the single earner’s income rises.

(2) Joint taxation with optional individual filing

This proposal has gathered considerable support in the U.S. Congress.¹³⁶ The British Green Paper of 1980 also favoured this option (as well as separate taxation).¹³⁷ Under a system of optional filing, taxpayers could choose whichever tax schedule produced the lower tax. In both the United States and Great Britain, this would abolish the tax penalty on some two-income couples while retaining the marriage bonus enjoyed by one-earner families. The main criticisms of this proposal are:

¹³⁴ *Supra* note 73 at 293-94.

¹³⁵ Hartle, *Taxation of the Incomes of Married Women*, Study No. 5 of the Royal Commission on the Status of Women in Canada (1971) at 41-43.

¹³⁶ Gilliam, “Marital Status and Individual Income Taxation: The Equitable Issues” (1981) 4 *Detroit College of L. Rev.* at 1095. In 1981, a bill to this effect presented by Congresswoman Millicent Fenwick had 209 sponsors.

¹³⁷ U.K. Chancellor of the Exchequer, *supra* note 32 at 15-16.

- i) The tax system would be strongly pro-marriage for one-earner couples.
- ii) It is a patchwork answer of dubious theoretical validity. It assumes that one-earner couples share everything while two-earner couples do not; this does not at all correspond to the evidence on pooling and sharing in families that was reviewed in the previous section.

Finally, some of the supporters of optional separate filing see it as a viable means of transition from a system of joint filing to one of individual taxation.¹³⁸ A precedent for this exists in Sweden, where optional filing for earned income served such a purpose between 1965 and 1970.

(3) Joint taxation with an earned-income reduction for wives

Great Britain took this approach in 1894, Sweden between 1952 and 1964 and the United States in 1981. According to U.S. Senate reports, there were three main policy considerations for adopting this measure:

- i) the desire to keep joint taxation despite its many critics;
- ii) the need to distinguish between one and two-earner couples to account for the added expense of earning two incomes; and
- iii) the reduction in the tax increase which results from stacking the incomes of the spouses.¹³⁹ The report added that "alleviation of the marriage penalty is now necessary because large tax penalties on marriage undermine respect for the family by affected individuals and for the tax system itself."¹⁴⁰

This provision has been criticized because it does not eliminate the whole of the tax penalty and because it reduces it in a very arbitrary manner. For example, Lynda Sands Moerschbaecher calculated that this new American provision eliminates from 14% to 40% of the tax on marriage depending on the spouses' incomes and the share earned by each of them.¹⁴¹ A similar proposed solution, a tax credit instead of a deduction, would also have given arbitrary results — from a 10% to a 246% correction of the tax on marriage, according to Moerschbaecher.¹⁴²

¹³⁸ Moerschbaecher, *supra* note 30 at 143.

¹³⁹ Cited in Gilliam, *supra* note 136 at 1094.

¹⁴⁰ *Ibid.* at 1087.

¹⁴¹ Moerschbaecher, *supra* note 30 at 140.

¹⁴² *Ibid.* at 141.

(4) Taxing common law couples as marrieds

If unmarried cohabiting couples paid the same taxes as married people, this would eliminate any incentive for couples to marry or avoid marriage to minimize their taxes. Such a system could still distinguish between taxpayers with a live-in mate and others, but the difference would be based on lifestyle rather than marital status. This has been the practice in Sweden since 1960. The United States also made a move in that direction when it ruled that "sham divorces" whose sole purpose was to reduce couples' taxes would not be recognized for tax purposes.

Outside Sweden and a few other countries (including Austria and Belgium),¹⁴³ however, the idea of taxing common law couples does not arouse much enthusiasm. The main argument is that it would constitute "an unacceptable and intolerable invasion of individual privacy".¹⁴⁴ Proposals to allow cohabiting couples to elect the status they want were also rejected because:

Unless an election is irrevocable for all time, taxpayers will always elect that status which produces the maximum annual financial advantage. . . . Furthermore, it would be extremely difficult to rationalize an irrevocable election when the parties have chosen to live in a relationship that because of its informal structure can be easily terminated.¹⁴⁵

On the other hand, after noting that many other laws now recognize "relationships equivalent to marriage", Jack London recommended that persons who cohabit for a year or more, and persons who cohabit and have a child together, be treated as married spouses for purposes of the tax system.¹⁴⁶ McIntyre and Oldman also wrote that "if income pooling among single persons becomes a common feature of our society, and there are signs that it is so becoming, . . . [w]e may have to develop a fiscal definition of marriage which includes *de facto*, informal marriage-type relationships existing for longer than, say, two years."¹⁴⁷

If cohabitation outside marriage continues to increase as expected, countries with tax systems that impose a larger burden on people who marry may soon have no choice but to impose the same treatment on common law partners. Otherwise, they will experience the same

¹⁴³ Reuterswård, "General Report on the Income, Fortune and Estate Tax Treatment of Household Units" (1972) 57 *Cahiers de droit fiscal international* at 1-5.

¹⁴⁴ Krishna, "Selectivity in Tax-Transfer Programs and the Tax Unit Problem" (1980) 2 *Can. Tax.* at 166.

¹⁴⁵ *Ibid.*

¹⁴⁶ London, *Tax and the Family*, *supra* note 61 at 132.

¹⁴⁷ McIntyre & Oldman, *supra* note 93 at 1597-98.

problems of widespread marriage avoidance and disrespect for the law that forced Sweden to act in 1960.

(5) Conclusion on neutrality in the marriage decision

There are only two effective ways of achieving a marriage-neutral tax system:

- 1) Mandatory individual taxation without provision for marital status, but with a mechanism to prevent very-low-income families from paying tax on incomes below the poverty line.
- 2) Taxing unmarried cohabitants in the same manner as legally married couples.

The other two methods proposed, joint taxation with optional filing as singles and joint taxation with an earned-income deduction or credit for wives, are not neutral toward the marriage decision. Optional filing might be desirable if the goal pursued were to promote marriage or to effect a transition from a joint to an individual system of taxation.

b) *Neutrality toward the employment decision of wives*

When complaints were first expressed in the 1950s about joint taxation unfairly increasing married women's taxes,¹⁴⁸ many tax experts denied that the system did any such thing. Oldman and Temple wrote that joint tax did not violate the notion of women's equality "since husband and wife are treated the same for the purpose of calculating the tax on the married couple as a unit."¹⁴⁹ A French tax expert echoed this view in 1981 when she wrote that it was incorrect to say that aggregation penalized wives who have paid jobs "since legally the wife's income is no more added to that of the husband than the husband's income is added to that of his wife".¹⁵⁰

By 1965, however, economists such as Thorson were impatient with such subtleties. He wrote that "inclusion of the wife's income is likely to result in higher marginal rates of tax for her than if she were single. . . . The individual tax unit is the only alternative in the treatment of single and married women that is neutral in this respect."¹⁵¹ Bittker agreed with this analysis, adding that:

In theory, of course, the burden arises whether the "secondary" wage earner is the husband or the wife, and hence falls on the couple jointly. In a society that

¹⁴⁸ See Ritz, "Notes: The Married Woman and the Federal Income Tax" (1958) 14 Tax L. Rev. at 437.

¹⁴⁹ Oldman & Temple, *supra* note 80 at 602.

¹⁵⁰ Zoller, *supra* note 13 at 363. (author's trans.)

¹⁵¹ Thorson, *supra* note 18 at 117.

takes the husband's job for granted and views the wife as the secondary wage earner, however, it is reasonable to describe the existing state of affairs as biased against women.¹⁵²

These remarks imply that joint taxation is unfair toward wives unless their marriage is an economic partnership in which both spouses have equal access to and control of their belongings; little evidence exists to support the sharing hypothesis. Also, taxing the income of the poorer spouse at a much higher rate than if that spouse were single may act as a disincentive to married women's participation in the labour force, particularly after a period spent at home with their young children. A woman may feel that the additional income she would bring into the family would not be worthwhile since the first dollar she earned would be taxed at the highest rate imposed on her husband's income.

The problem is further aggravated because taking a paid job entails new expenditures (for items such as clothes, food and transportation) and because, if the family is to maintain the same standard of living, a good chunk of the increase in income may have to be spent on the services (such as child care) that the wife provided before. As we saw in Part I, the need to compensate families of employed wives for additional expenses resulting from their absence from the home has long been recognized. The British introduced an exemption on wives' earnings in 1894; Sweden had an earned income deduction followed by a deduction for child care; Canada introduced a child-care expenses deduction in 1970; the United States has a child-care expenses credit as well as an earned income deduction to lighten the burden of two-earner couples.

These measures show that: (1) tax reductions for employed wives are necessary under all tax unit alternatives; and (2) the basic joint taxation principle of same-income couples paying the same tax is too simplistic.

Returning to the question of the disincentive effect of high tax rates on the labour force participation of married women, we find that until quite recently, there were important geographical differences in perception. In a 1972 international survey, continental European countries such as Belgium, Finland, Germany, Luxembourg and the Netherlands all reported that their joint taxation systems had a negative impact on married women's readiness to take up paid employment.¹⁵³ Belgium even said that by being unfavourable to married

¹⁵² Bittker, *supra* note 18 at 1433.

¹⁵³ Reuterswärd, *supra* note 143 at 1-12.

women, its tax system was encouraging the development of an underground female labour market.¹⁵⁴

The United States also reported a disincentive effect, but attributed it "not to the tax system as such but to a comparatively insignificant detail in it, namely the fact that the deductions for costs are inadequate."¹⁵⁵ American tax then experts believed that the "taxation of working wives, while inequitable, does not deter them from working."¹⁵⁶ Justification for that belief was found in British and American studies about the work motivation of male executives and professionals.¹⁵⁷

Grace Blumberg challenged this: "Such research should probably not be used to measure the effect of tax disincentive on wives,"¹⁵⁸ and argued that average wives are less likely than male executives to work for motives such as "power, prestige or sense of identity"; that a wife who is contemplating taking a paid job will mentally deduct from her prospective income not only the high taxes she would have to pay, but also the additional expenses the household would incur; that male motivation to be employed is stronger because everyone expects men to have paid jobs; that men do not have re-entry problems since they never drop out; and finally, that the studies involved general tax increases without societal judgments, while the tax treatment of wives under a joint taxation system sent every married woman a clear message that her proper place is the home.¹⁵⁹

Blumberg's views were vindicated soon afterwards. Economist Michael Boskin's 1973 study concluded that "the net effect of the tax system is clearly to drive female labor out of the market into the home and to reduce the (market-oriented) human capital accumulation of women relative to men."¹⁶⁰ By 1977, U.S. tax experts had accepted the validity of the disincentive argument. The Treasury Department's *Blueprints for Basic Tax Reform* of that year noted that:

¹⁵⁴ *Ibid.* at 1-14.

¹⁵⁵ *Ibid.* at 1-12.

¹⁵⁶ Blumberg, "Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers" (1972) 21 Buffalo L. Rev. at 88.

¹⁵⁷ Cited in Blumberg, *ibid.* at 89.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.* at 89-90.

¹⁶⁰ Boskin, "The Effects of Government Expenditures and Taxes on Female Labor" (1974) 64 Am. Econ. Rev. at 252. These results were confirmed by several other American and British economists, including Robert Hall, Harvey Rosen, Christine Greenhalgh, Aline Quester, Jane Leuthold and Janet Hunt. Only one study (Alice Nakamura and Masao Nakamura, in 1981) reached contradictory conclusions concerning women who are already employed, but even it agreed that taxes have an important influence on wives who are thinking of re-entering the labour force.

A system of joint family filing may cause an efficiency loss to the economy; namely, the discouragement of labor force participation by secondary workers in a family. If a partner not in the labor force is thinking of entering it, the tax rate that person faces is the marginal rate applying to the prospective total income. This rate may be much higher than for a single wage earner. This consequence of family filing is sometimes referred to as the "wife tax".¹⁶¹

Some see the increase in married women's labour force participation rates (McIntyre quoted a 90% participation rate — which includes women who held a paid job for one day in their entire lives)¹⁶² as proving that joint taxation is gender neutral. However, as Gann comments, it could be that the participation rate of American wives would have reached 60% or 70% by 1979, instead of 50%, had it not been hampered by the high tax rates that joint taxation imposed on their earnings.¹⁶³

Assuming that joint taxation does have a disincentive effect on wives' employment, then, and that this effect is bad for a variety of reasons including economic efficiency and the promotion of women's independence, let us turn to the main proposals that have been made to correct the situation. Leaving aside the question of child-care expenses, which will be analyzed later, these proposals are:

1) *Joint taxation with an earned-income deduction or credit for the second earner spouse*

This method is used in Great Britain and the United States. Its main disadvantage is that earned-income deductions and credits produce erratic results, overcompensating some wives while undercompensating others. In Great Britain, wives in professional positions continued to exert strong pressure on their government until, in 1971, they were finally allowed to file separate returns for their earned income.

2) *Lower tax rates for married women* This was proposed by economists, such as Boskin, who wished to maximize economic efficiency. He wrote that because the labour elasticity of wives is about six times greater than that of husbands, "it is clear that short-run efficiency requires much higher tax rates on husbands (more accurately, primary earners) than on wives (secondary earners)."¹⁶⁴ Most tax experts were appalled by the idea and felt that "if one follows this efficiency logic, one would end up with a highly differentiated tax

¹⁶¹ U.S. Department of the Treasury, *Blueprints for Basic Tax Reform* (1977).

¹⁶² McIntyre, "Prolegmoena to Future Arguments for Individual Filing in the Personal Income Tax" (1979) Tax Notes at 766-7.

¹⁶³ Gann, *supra* note 29 at 43.

¹⁶⁴ Boskin, "Factor Supply and the Relationships Among the Choice of Tax Base, Tax Rates, and the Unit of Account in the Design of an Optimal Tax System" in H. Aaron & M. Boskin eds., *The Economics of Taxation* (1980) 154-55.

system that would strike most people as unjust, unworkable, and having no obvious appeal."¹⁶⁵

3) *Separate taxation of earned income* It is generally agreed that taxing earned income on an individual basis solves the problem of tax disincentives for married women who are thinking of taking a paid job. This is certainly true if the separate taxation system adopted does not contain too many "threshold" barriers such as marital status exemptions and transferable deductions between spouses.

c) *Neutrality toward transfers of property within the family*

When tax experts worry about the tax unit's neutrality toward transfers of property between family members, what they mean is that "[e]conomic and financial arrangements within the family (e.g. as regards the ownership of property) should not be dominated by sophisticated tax considerations."¹⁶⁶ The two assumptions here are first, that the choice of one tax unit rather than another will encourage a significant degree of property rearrangement between family members and second, that the consequences of this rearrangement would be negative.

Both of these assumptions need re-evaluation. On the first, in Canada, where it was very easy for wealthy taxpayers to split their income and assets with their spouses, only a small proportion took advantage of it. (Tax practitioners deny such evidence by saying they have encountered many such cases,¹⁶⁷ but this is akin to doctors saying that the population must be very unhealthy because they meet so many sick people.) In fact, old assumptions that most spouses would seize all possible opportunities to split their incomes may well be obsolete now that "current levels of marital instability have probably made cavalier transfers of asset ownership quite risky."¹⁶⁸

The second assumption is that transfers between family members have neither positive value nor practical significance. As discussed earlier,¹⁶⁹ many feminists challenge this attitude. They argue that if tax laws recognized property transfers between spouses, the result would be more financial autonomy for women and an incentive to adopt matrimonial property regimes of true sharing between the spouses.

¹⁶⁵ Sunley, Jr., *supra* note 106 at 273.

¹⁶⁶ *Supra* note 50 at 377.

¹⁶⁷ London, "Taxation of the Family: The Family as the Basic Tax Unit" (1979) 1(4) *Can. Tax.* at 7.

¹⁶⁸ Quester, "Women's Behaviour and the Tax Code" (1979) 59 *Soc. Sc. Quarterly* at 676.

¹⁶⁹ Moerschbaeche, *supra* note 30 at 135.

3. Simplicity

A good tax system must not be too difficult for taxpayers to understand and must be relatively easy to administer.

a) *Easily understood by taxpayers*

The tax systems that are most easily understood are those based on one or at most two simple basic principles. Such is the French-style splitting or "quotient" system (the income is spread over the members of the family, with each child counting as half a person). The original British and Swedish pure aggregation systems (the head of the family declares its income and gets a deduction for each dependent) and the Canadian individual taxation system (each person pays tax on his or her income) also meet that requirement.

Conversely, the public has difficulty understanding tax systems whose basic components are more or less arbitrary. One example is multiple tax schedules based on dubious or unverified assumptions.¹⁷⁰ Another is complicated deductions or credits (such as earned-income deductions for second earners) whose amounts are determined by purely political considerations. If our self-assessment tax system requires "a gentle balancing of the revenue requirement and the relative contentment of the populace,"¹⁷¹ then having a straightforward system without fancy deductions and schedules is definitely preferable.

b) *Easily administered*

In 1976, Canadian tax administrators' description of the "ideal" tax system,¹⁷² is:

(1) The tax unit should be easy to identify

Revenue officials were strongly opposed to taxing common law married couples in the same manner as legally married ones because they felt they "would be faced with an almost impossible monitoring task."¹⁷³ When it was suggested that a couple might be allowed to elect to be treated as married or not for tax purposes, they

. . . quickly concluded that such a system would be open to too great abuse. This would be particularly the case in respect of taxpayers who own income producing property. Under an elective system, in year one a taxpayer with such property

¹⁷⁰ See Part IIB of text — the relationship between various taxpayers.

¹⁷¹ London, *Tax and the Family*, *supra* note 61 at 87.

¹⁷² *Supra* note 128.

¹⁷³ *Ibid.* at 8.

could elect to be treated as married and transfer income producing property to his dependent spouse with no capital gains tax exigible. In the next year the taxpayer could elect to be treated as unmarried so that the attribution rules would not apply.¹⁷⁴

Administrators expect the worst and assume that the minimization of taxes is the most important motive for people's actions. They do not realize that most people would be extremely hesitant to transfer substantial assets to someone who is not their spouse.

(2) Financial transactions between spouses should not be recognized

Although the Canadian tax system is based on the individual, its tax administrators assume that most couples make their financial decisions as a unit and would not hesitate to take steps to minimize their total tax burden. As a result, they felt that matrimonial property laws and agreements had no practical value and should be ignored, and that "a chance to permit an employer to deduct his spouse's wages could result in wide-scale illegal income splitting among businessmen and their spouses."¹⁷⁵ Politicians showed their disagreement with this view in 1979, when they repealed the Canadian provisions preventing the deduction of spousal salaries. Sweden made the same change in 1976.

Ensuring that the rules disallowing intra-family property transfers for tax purposes are observed is frustrating, since Canadian laws are helpless against large-scale income splitting schemes engineered by sophisticated lawyers, (though less so now than before the May 1985 budget), but ruthless toward average taxpayers who cannot afford professional tax planning advice. However, Canadian tax administrators did not complain about inadequacies or loopholes of the attribution rules; they simply proposed that the issue be made irrelevant by the adoption of spousal joint taxation.

On the same issue, the Australian Tax Review Committee of 1975, remarked:

The appeal of compulsory aggregation to many is that it is considered, despite its modern reliefs, allowances, options for separate assessment, etc., to be the "simple" way of combatting income-splitting. . . . In Australia in 1975 . . . any test of "simplicity" which produces discrimination against such a large and important section of the population as its husbands and wives should not be introduced into any legislation.¹⁷⁶

Assuming there was a country which had individual taxation, but

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.* at 13.

¹⁷⁶ Asprey, *Aggregation of Incomes of Husband and Wife in Family Unit Taxation* (1975) at 15.

no provisions to prevent the recognition of transfers of any kind between spouses, it would be almost impossible for tax administrators to manage the resulting situation. It is mind-boggling to imagine what would happen if they had to give effect to thousands or even millions of individually-tailored marriage contracts. A compromise would inevitably have to be developed on that count, probably at the expense of perfect fairness.

(3) The fewer returns, the better

Another attractive administrative feature of joint taxation is its significant reduction in the number of tax forms.

In addition to these three considerations, two other administrative or semi-administrative issues occasionally arise in connection with the tax unit. They are: 1) the question of which spouse should be liable for what portion of the tax and 2) the alleged necessity of joint taxation as a pre-condition to the introduction of a negative income tax.

c) *Liability for the tax*

The bitter and long-standing controversy concerning who should be legally responsible for the payment of the income tax in countries with joint taxation systems supports the belief that most spouses do not pool and share their income. The main bone of contention¹⁷⁷ is that a spouse can be required to pay tax on income over which she or he has no rights of property or control. A Carter Commission background paper expressed the problem succinctly when it said that "it might be difficult to persuade the fairer sex in Canada that her property ought to be subject to a lien for taxes on income earned by her husband."¹⁷⁸

In an attempt to solve the difficulty, London proposed:

In the event of joint filing each spouse would be required to sign the return and to attest to the accuracy of the information in that return affecting that person or emanating from that person. Liability for tax would fall on each member of the unit individually in the ratio of that portion of the tax that the net income of the

¹⁷⁷ U.K. Chancery of the Exchequer, *supra* note 32 at 11; Bollé, *supra* note 17; Savatier, "Le régime matrimonial et la contribution respective des époux aux impôts" (1979) 23 *Recueil Dalloz Sirey* at 147; Ritz, *supra* note 148 at 437-448; Bradley, "Community Property — Federal Income Tax Liability of Wife During Existence of Community" (1971) 46 *Tulane L. Rev.* at 329-335; Emory, "New Law Alleviates Innocent Spouse — Joint Return Problem on Omitted Income" (1971) *J. of Tax.* 154-157; Anthony, Jr., "Federal Tax Liability of the Wife for Community Income Earned by the Husband" (1972) 32 *Louis. L. Rev.* at 471-478; Quick & Du Canto, "Joint Tax Liability and the Innocent Spouse Doctrine in Common Law and Community Property Jurisdictions: A Review of Code Section 6013(e) and Its Progeny, Section 66" (1983) 17 *Fam. L. Quarterly* at 65-87.

¹⁷⁸ Mockler *et al.*, *supra* note 61 at 98.

individual member of the unit is of the entire income of the unit.¹⁷⁹

However, the Canadian Interdepartmental Committee on the Taxation of Women rejected that approach because "it would reintroduce the complexity which the joint return is supposed to significantly reduce."¹⁸⁰

d) *The tax unit and the negative income tax*

When proposals for a guaranteed income for everyone were first developed, one of the "purest" models designed was that of a negative income tax that would be grafted to present "positive" tax systems and be a mirror image of them. As a negative income tax for poor families had to be calculated on the basis of their total income, it was assumed that the "positive" tax system to which it would be connected would also have to use the family unit.

Although the political chances of such a "pure" model being implemented anywhere were never very good, the idea has lingered in the tax community that a negative income tax could not be implemented outside a joint taxation system. Woodman concluded that a system of joint taxation may be inevitable in the future because of

. . .the introduction of a guaranteed income in Canada. The introduction of a national scheme would be virtually impossible without its integration with the income tax system. Furthermore — and this is its significance — for reasons of cost alone, if not also of equity, a guaranteed income scheme would require the adoption of the marital unit.¹⁸¹

However, Canada has introduced two separate national negative income tax programmes without having to abandon the individual as its unit of taxation. These are the guaranteed income supplement for the aged (1967) and the refundable child tax credit (1979), which are both claimed by filing a separate form declaring the family's total income.

B. *What Differences Should Exist Between the Tax Burdens of People Living in Different Circumstances?*

This analysis ignores the previous discussion's conclusion regarding the superiority of individual over joint taxation, and examines the relationship between taxpayers under joint as well as separate tax systems. One reason for doing so is that joint taxation systems are unlikely to

¹⁷⁹ London, *Tax and the Family*, *supra* note 61 at 130.

¹⁸⁰ *Supra* note 128 at 18.

¹⁸¹ Woodman, "The Taxation Unit" in Hansen, Krishna & Rendall eds., *Essays on Canadian Taxation* (1978) at 103.

disappear very soon and will continue to affect millions of taxpayers for some time. Such a study may also shed more light on the choice of unit debate. Finally, it is also possible that such study will reveal principles that apply regardless of the unit chosen.

The three main circumstances analyzed in this section are marriage, parenthood and the employment status of the wife. The main focus is on relationships between single and married taxpayers, between people with and without children, and between two-earner couples and all other taxpayers.

1. Relationship between single and married people

a) *Under individual taxation*

The basic principle of individual taxation is that each person pays tax on his or her own income, with deductions or credits being used to recognize family responsibilities. Opinions are irremediably split, however, on whether a spouse with no personal income is or is not a dependant. Those who insist that a wife at home is a dependant point to the cost of the food, shelter and clothing, for which her husband pays. Those who say she is not a dependant argue that such costs are only partial payment for the services a homemaking wife provides:

The man whose wife works inside the home has a much higher standard of living than a bachelor with the same salary. The bachelor would have to pay a small fortune to provide himself with all the services a wife provides without charge to her husband and family.¹⁸²

The main difference is that the first group does not believe the tax system should take the value of homemakers' services into account, while the second group insists that it should. Since this dispute is also relevant to the debate over the treatment of one-earner compared to two-earner couples, we will pursue this discussion later in that context.

b) *Under joint taxation*

There are two main schools of thought in this area. The first, embodied in the French full-splitting system (and that of the United States between 1948 and 1969), is that couples should pay twice as much tax as two single people who each have half the couple's income. The second, first formulated by Oldman and Temple in 1960 and the favourite of American, British and Canadian tax theorists, includes two elements:

¹⁸² Dulude, *Background Study on Women and the Personal Income Tax System* (1976) at 12.

(1) One single person should pay the same or a greater tax than the married couple with one income, since the advantages of joint living are never so great that two can live more cheaply than one.

(2) The dual-income couple should, in turn, pay a greater total tax on its two incomes than would be paid by two single persons with corresponding incomes.¹⁸³

The Carter Commission incorporated these principles in its own proposed joint taxation system, but added two qualifications:

1) At the bottom of the income scale there are often diseconomies to marriage. . . . Consequently, . . . there should be a lower tax for low-income individuals, upon marriage, so that the total tax on the couple would in no case be greater than the sum of the taxes on the separate individuals. 2) At the very top of the income scale, marital status has relatively little effect on discretionary economic powers. . . . The increase in tax upon marriage for such people should consequently be relatively smaller than for individuals with less income who marry.¹⁸⁴

Neither Oldman and Temple nor the Carter Commission cited any studies of spending patterns that would support their assumptions. When critics protested that more solid data was required to justify a system which resulted in a much-resented tax on marriage,¹⁸⁵ Jack London answered that:

First, just as there is as yet little evidence of the net economies involved in cohabitation, there is no empirical evidence of diseconomies to the contrary. Hopefully, as time passes further and better evidence will become available. Secondly, one may in this area rely adequately on *intuition and generalization*. [emphasis added]¹⁸⁶

When some evidence did appear, it did not support the economies-of-scale argument. In 1978, Gerzog reported that 62.5% of single persons shared a home with someone else;¹⁸⁷ it was therefore incorrect to assume that most people's expenses went down as a result of cohabitation after marriage. McIntyre and Oldman agreed:

The great variety of living arrangements which now characterize our society undermines the economies of scale argument for persons above the subsistence level. Generalities about economies of scale are no longer useful.¹⁸⁸

As Oldman had been co-author of the original economies-of-scale theory, this dealt it a serious blow.

¹⁸³ Oldman & Temple, *supra* note 80 at 603-4.

¹⁸⁴ *Supra* note 73 at 15.

¹⁸⁵ Smith, *Rates, Allowances and Averaging* (1967) at 32.

¹⁸⁶ London, *Tax and the Family*, *supra* note 61 at 113.

¹⁸⁷ Gerzog, "The Marriage Penalty: The Working Couple's Dilemma" (1978) 47 *Fordham L. Rev.* at 35.

¹⁸⁸ McIntyre & Oldman, *supra* note 93 at 1595.

At the other end of the spectrum, unmarried Americans complained about the 20% tax differential in favour of one-earner couples which resulted from implementing these principles:

They point out that many singles have dependants and similar family responsibilities as married persons, but are forced to pay higher taxes. . . . (They) say that singles have the same standard of living as a one-job married couple with the same total income. The earner in each group incurs similar expenses for food, shelter and clothing. To expend money to support a spouse, singles argue, is a personal choice of consumption, and should not be a factor used in increasing a single's relative tax rate. Further, even if the cost of providing for an unemployed spouse results in higher spending for a married earner than a single person, the increased cost is reflected in the personal exemption allowed for each spouse and should not be further reflected in the rates. Single people also note that the imputed income of an unemployed spouse's housework, etc., should increase the one-job couple's taxpaying ability, not decrease it to less than a single person's computed ability to pay.¹⁸⁹

Upon reviewing all these criss-crossing arguments, Bittker concluded that "the tax rate differential between single and married persons rests — and must rest — on judgments as subjective and political as those that determine the degree of progression in the rate schedule itself."¹⁹⁰

2. Relationship between people with and without children

This section will deal only with the physical cost of raising a child, meaning the parents' expenditures for providing them with food, housing, clothing, *et cetera*. Child-care costs will be discussed in the context of the relationship between two-earner families and other taxpayers.

a) *Under individual taxation*

Discussions about the tax treatment of children are remarkable for their lack of objectivity. At one ideological extreme are people who maintain that spending money on children is "a form of pleasurable consumption, a characterization implying that these expenditures are no more entitled to a tax allowance than the cost of the taxpayer's food and clothing."¹⁹¹ At the other extreme are groups such as the Quebec Status of Women Council, which believe that parents fulfill a public service and should receive financial assistance amounting to the full cost of bringing up children.¹⁹²

¹⁸⁹ Rothblum, "Tax Equity for Marrieds and Singles: A Permanent Dilemma?" (1976) Tax Notes at 8.

¹⁹⁰ Bittker, *supra* note 18 at 1426.

¹⁹¹ *Ibid.* at 1445.

¹⁹² Québec, Conseil du statut de la femme, *Pour les Québécoises: égalité et indépendance*

i) *Flat-rate deductions* that reduce parents' taxable income. This has been criticized because its benefits rise with the taxpayers' incomes,¹⁹³ but its defenders maintain that such an effect is legitimate since wealthy parents spend more on their children than do poor ones.¹⁹⁴

ii) *Flat-rate credits* — Credits are deducted from the amount of tax payable and give equal benefits to all who owe enough tax to take advantage of them. Their critics point out that this does little or nothing for the neediest parents whose taxes are very low or nil.

iii) *Taxable or non-taxable cash transfers* — These are not tax benefits, but periodic transfer payments sent to all parents by social welfare authorities. Sweden opted for them when it eliminated all provisions for children from its tax system in 1947. Great Britain followed the same route in 1979.

iv) *Vanishing refundable tax credits* — These, which include the Canadian refundable child tax credit referred to earlier, are a form of negative income tax. They are paid out as a "refund" to parents who are below the tax threshold and diminish in value as incomes increase, eventually disappearing altogether.

None of the approaches described above is intrinsically "correct" or "incorrect"; most countries use a mix of tax and transfer benefits. This situation is changing, however, and the OECD reports that, since 1974, there has been a tendency among its members to move away from tax deductions in favour of tax credits and, to an even greater extent, toward systems of cash transfers. The OECD explains this as follows:

The fact that more countries have been moving over to the cash transfer system may not be unconnected with the move . . . from joint taxation to individual taxation as individual taxation tends to confer the greatest benefit on two-earner families at high income levels, and governments may feel that such families should not receive, as parents, the additional advantage of having their income tax liability reduced more than that of lower income parents.¹⁹⁵

b) *Under joint taxation*

Everything said above about the recognition of parenthood in the tax system also applies under systems of joint taxation. In addition, joint taxation countries must decide whether or not to include children

(1978) at 170 à 175.

¹⁹³ National Council of Welfare, *Family Allowances for All?* (1983).

¹⁹⁴ Salyzyn, *Canadian Income Tax Policy: An Economic Evaluation* (1976) at 87.

¹⁹⁵ *Supra* note 84 at 30.

in their basic tax unit.

The debate over the inclusion of children in the tax unit has evoked strong feelings. The standards applied are also much stricter than those used in the debate over the joint taxation of wives. The Carter Commission research team recommended taxing spouses jointly despite any concrete evidence of sharing, but rejected the inclusion of children because “[w]e have little or no statistics on . . . the validity of the premise that the income of minor children is pooled and shared with all the family.”¹⁹⁶ Bittker showed the same double standard when he accepted joint taxation of spouses but balked at proposals to include children’s income because “self-imposed or even legal restrictions on the use of such income are not uncommon.”¹⁹⁷

Salyzyn, who accepted the idea of spousal aggregation without question, thought that the inclusion of children would create “perverse incentives”:

One of these was that the high marginal tax rate applicable to the earnings of a child would have discouraged the taking of summer and part-time employment. The other would have encouraged children to leave home to establish their own taxpaying units (with new exemptions and lower marginal tax rates), or even worse, parents would be encouraged to ask their children to leave in order to reduce the overall tax bill. Clearly, such inequities would have been socially unacceptable.¹⁹⁸

On the other hand, the supporters of the inclusion of children’s income are those whose main goal is to avoid income splitting between family members. Sander explained the problem when he said that “[i]ndeed, since our unit does not encompass children, we still encounter that problem in all its colourful variations, ranging from the establishments of trusts for minor children to the creation of family partnerships with two-year-old children.”¹⁹⁹ McMahon argued that parents had much greater control over their children’s income than husbands had over the income of their wives:

The . . . premise that parents lack effective control over their children’s income is doubtful. First, effective control may be achieved by parents’ withdrawal of discretionary contributions to their children, thus forcing the children to use their income for purposes for which the parents previously supplied funds. Additionally, . . . (m)ost often the income from property of a minor child is under the control, directly or indirectly, or the parents of the child or his grandparents. . . . Parents are most frequently appointed the guardians of the property

¹⁹⁶ Mockler *et al.*, *supra* note 61 at 63, 72.

¹⁹⁷ Bittker, “Income Tax Reform in Canada: The Report of the Royal Commission on Taxation” (1968) 35 *Univ. of Chicago L. Rev.* at 647-649.

¹⁹⁸ Salyzyn, *supra* note 194 at 88.

¹⁹⁹ Sander, *Who is Taxed: The Tax Unit*, 1967 Conference Report of the Canadian Tax Foundation, on the Report of the Royal Commission on Taxation at 19.

of their children regardless of the source of the funds. . . .²⁰⁰

The case for the aggregation of children's incomes is much stronger than the case for the joint taxation of husbands and wives. As the first is difficult to achieve without the second, and as the aggregation of all categories of children's incomes is very unpopular (even France allows separate returns for children's earned income and unearned income from sources unconnected to their fathers), the best compromise might be partial aggregation through the use of Canadian-style attribution rules. These provide that whenever income-producing property is transferred to a child under 18, that income is aggregated with that of the transferor for tax purposes.

3. Relationship between two-earner couples and other taxpayers

a) *Description of the problem*

Earlier, it was mentioned that housewives thinking of taking paid employment mentally deduct two kinds of expenditures from their prospective earnings: the first includes the additional costs such as clothes and transportation required for work outside; the second is the cost to replace the child-care and housework services these women themselves provide when they are at home.

The problem of the first type of expense is relatively easy to solve. Since practically everyone who has a paid job incurs such additional expenditures, what is required is an employment expenses deduction or credit for all earners. Different rates of tax for earned and unearned incomes could also be used, but this makes the system much more complicated and appears less fair.

The second kind of expense is more difficult to handle. The problem²⁰¹ is the existence of the so-called "imputed income" of homemakers. The easiest way to understand this is to compare two different situations:

Household A is composed of a single man who earns \$30,000 a year and his full-time female housekeeper, whose salary amounts to \$8,000 (including some cash and the value of her in-kind benefits

²⁰⁰ McMahon, Jr., "Expanding the Taxable Unit: The Aggregation of the Income of Children and Parents" (1981) 56 N.Y. Univ. L. Rev. at 89-92.

²⁰¹ Shoup, *supra* note 85 at 134; D. Thorson, *supra* note 18 at 116; Pechman, "Statement Before the U.S. Congress Joint Economic Committee" in *Economic Problems of Women* (1973) at 253; Popkin, "Household Services and Child Care in the Income Tax and Social Security Laws" (1975) 50 Ind. L. Rev. at 241; Sheppard, "The Taxation of Imputed Income and the Rule in *Sharkey v. Wernher*" (1973) 51 Can. Bar Rev. at 637-638; Cuvillier, "L'épouse au foyer: une charge injustifiée pour la collectivité" (1977) 12 Droit social at 436; Barr, "The Taxation of Married Women's Incomes, Part I" (1980) 5 Br. Tax Rev. at 410.

such as free room and board). Both pay tax on their respective incomes. He cannot deduct his housekeeper's salary since it is a personal expense which is not necessary to earn his income.

Household B is composed of the same two people, but the man and his housekeeper have now married each other. She still produces \$8,000 worth of housekeeping services, but he no longer gives her a salary as such and she no longer pays tax. In addition, his own tax is diminished through the use of joint taxation or a marital status deduction or credit.

The question this example raises is whether the extremely advantageous tax treatment enjoyed by Household B is fair toward two-earner couples and other taxpayers who must either do without the services of a full-time housekeeper, or hire one without being able to deduct anything for these services. Most experts agree that such a state is unjust because "the taxable income of the one-earner couple is understated in that it does not include the value of services provided by the spouse who stays at home."²⁰²

McIntyre and Oldman express one of the rare exceptions to this view. They write that:

In examining the widely held perception that one-job couples have more imputed income from these (household) services than two-job couples have, we are unable to refer to existing empirical studies. In any case, empirical verification of this perception may be impossible.²⁰³

However, they are mistaken; dozens of American, Canadian and other time-budget studies have provided empirical confirmation that the value of the household services enjoyed by families diminishes radically when wives take outside jobs.²⁰⁴ Typical data show that "employed women devote about half as much time to household tasks as unemployed women."²⁰⁵ The other problem in our example is that it is not really Household B which receives an undue benefit, but *Husband B*, who gets all the advantages of the situation. He benefits from the same domestic services as before, but at a lesser cost, and in addition pays tax on a lower amount. For her part, his wife is much worse off than before. She is doing the same work, but has lost her claim to a regular income and is no longer protected by income security programmes such

²⁰² Break & Pechman, *Federal Tax Reform: The Impossible Dream?* (1975) at 35.

²⁰³ McIntyre & Oldman, *supra* note 93 at 1614.

²⁰⁴ Hawrylyshyn, "The Value of Household Services: A Survey of Empirical Estimates" (1976) 2 *Rev. of Income and Wealth* at 101-131; Szalai, "Women's Time: Women in the Light of Contemporary Time-Budget Research" (1975) 7 *Futures* at 385-399.

²⁰⁵ Vanek, "Time Spent in Housework" in *The Economics of Women and Work* (1980) at 86.

as unemployment insurance and a pension plan.

b) *Proposed solutions*

The five solutions proposed to come to grips with this are:

- 1) taxing the value of homemakers' services;
- 2) granting tax reductions to taxpayers who do not enjoy untaxed homemaker services; or
- 3) paying a salary to homemakers and taxing them on it.
- 4) abolishing the spousal exemption; and
- 5) transforming the spousal exemption into a refundable credit payable to wives at home.

(1) Taxing homemakers' services

Many tax economists and lawyers believe the best way to solve the problem of the untaxed value of homemaking services would be to tax the imputed income of homemakers.²⁰⁶ Having said this, most invariably add that this is "non-feasible".²⁰⁷ When Douglas Hartle designed such a system for the Canadian Royal Commission on the Status of Women²⁰⁸ it was rejected because of the administrative problems and because it was ". . . undesirable that a married woman who stays at home keeping house for her family and having no income of her own should be liable for a tax which her husband would have to pay."²⁰⁹

These objections miss the point. There is indeed something undesirable about taxing housewives on the full value of their services, but it is hidden by the misleading language used to define the question. Most obscuring is the erroneous use of the term "imputed income" to refer to homemakers' services. If this were corrected, the real issues would be clearer and a solution might emerge.

The Carter Commission defined "imputed income" as arising "when an individual who owns productive assets, or who supplies production services, uses them directly to produce goods and services that he consumes himself. . . ." ²¹⁰ This definition does not fit the work of housewives well at all. True, some part of homemakers' work is devoted to their own maintenance, but for the most part, housewives do not "consume themselves" the services they produce. It is their husbands

²⁰⁶ See references, *supra* note 201.

²⁰⁷ Musgrave, *supra* note 27 at 344.

²⁰⁸ Hartle, *supra* note 135 at 41.

²⁰⁹ Royal Commission on the Status of Women in Canada at 298.

²¹⁰ *Supra* note 73 at 47.

and children who do.

If most of the value produced by homemakers' work is not imputed income, then what is it? There are two different categories: first, to the extent that housewives' work is compensated by the value of the "free" food, shelter and clothing they receive from their husbands, they are in exactly the same position as any employee who receives *income in kind*; secondly, above the level of the in-kind wages they receive, what housewives do is *volunteer work* which benefits their husbands and their children. Inasmuch as raising children benefits all of society, housewives also do volunteer work for the state.

Given these facts, it is difficult to support the proposal that the value of housewives' work be taxed. Their income in kind is probably not worth more than the basic exemption (\$4,140 in Canada in 1985), and one can imagine the howls of protest if husbands were singled out from all the people who benefit from volunteer work and asked to pay tax on the services they receive from their wives.

(2) Offsetting benefits for non-homemaker households

If the value of homemakers' services cannot be taxed, many people have said the next best method is to give compensating tax reductions to those who don't have access to such untaxed services.²¹¹ Two-earner families and single parents could claim deductions or credits for their child-care costs or the lower-earning spouse could receive an earned-income deduction or credit.

Earned-income deductions and credits have been criticized for being too complicated and for producing erratic benefits. There are other controversial aspects of offsetting benefits: do tax reductions granted only to two-earner couples discriminate against other groups of taxpayers? Is the tax system the most appropriate avenue to compensate parents for child-care expenses and, if so, should these expenses be treated as business expenditures? To what extent are such offsetting benefits needed in individual taxation systems?

First, the example of Households A and B shows that the failure to tax homemaker services results in all other households being disadvantaged, so an offsetting benefit for only two-earner couples discriminates against all the other non-homemaker households. The only mitigating factor is that the work disincentive effect is much stronger in the case of married women. On the other hand, it makes sense to compen-

²¹¹ Thorson, *supra* note 18 at 116; J. Pechman, *supra* note 201 at 253; Cooper, "Working Wives and the Tax Law" (1970), 25 Rutgers L. Rev. at 70; Sheppard, *supra* note 201; Marshall, "Some Economic Aspects of Family Property Rights Reform" (1974) 1 Br. Tax Rev. at 35-36.

sate child-care costs only for non-homemaker households with young children (meaning two-earner parents and single parents in the labour force), since they have additional expenses that are not borne by childless people.

The second area of controversy concerns the proper treatment of child-care expenditures. The U.S. Citizens' Advisory Council on the Status of Women concluded in 1968 that tax deductions are "inadequate", "inequitable" and "ineffective" in helping to provide adequate care for the children of employed mothers, and that:

Liberalization of the deduction by extending it to higher income levels, raising the limits on the amount of the deduction and increasing the age limit for children will not improve its effectiveness. . . . Such changes would simply provide tax relief to those families able to make expenditures for the care of children and disabled dependents.²¹²

Instead, the Council recommended that the government intervene directly to "stimulate the development of facilities and services for provision of the needed care of children of working mothers" and "give substantial encouragement to community efforts to develop such organized facilities as day care centers. . . . Such services should be available to families at all income levels, with charges on the basis of the ability to pay. . . ." ²¹³ Although this position is supported by feminists worldwide, it is hampered by two sizeable political factors. One is the reluctance of governments to commit the large sums necessary to subsidize decent systems of child care services. The other is the self-interested support of professional women for the maintenance and even the extension of child-care deductions.

This has led to numerous debates on the question of whether the tax system should recognize child-care services through a deduction, which gives benefits that increase with a person's income, or through a credit, which gives the same benefit to all those who owe enough tax. The credit approach was adopted in the United States, but Canadian women's groups have so far not persuaded their government to follow suit. The position of the Canadian government and of high-income professional women has been defended as follows:

Child-care expenses, by their very nature, are *incurred for the purpose of earning income* (or, in the case of a student, for the purpose of earning future income). Just as a business woman who has a high overhead (expensive furniture and well-paid staff) may claim the full amount of these expenditures, so ought parents who pay for child care be entitled to claim the amount actually spent.

²¹² Citizen's Advisory Council on the Status of Women, *Report of Task Force on Social Insurance and Taxes* (1968) at 96-106.

²¹³ *Ibid.* at 104-105.

This in no way confers an "unfair advantage" on higher income families. To claim the deduction, one must first make the expenditure.²¹⁴

This argument has always been rejected by the courts, which held that:

Petitioners would have us apply the "but for" test. They propose that but for the nurses the wife could not leave her child; but for the freedom so secured she could not pursue her gainful labors; and but for them there would be no income and no tax. This thought evokes an array of interesting possibilities. The fees to the doctor, but for whose healing service the earner of the family income could not leave his sickbed; the cost of the labourer's raiment, for how can the world proceed about its business unclathed; the very home which gives us shelter and rest and food which provides energy might all by an extension of the same proposition be construed as necessary to the operation of business and to the creation of income. Yet these are the very essence of those "personal" expenses the deductibility of which is expressly denied.²¹⁵

This does not mean that the tax system should not take child care expenses into account, but that there is no necessary rationale for doing it through a deduction or for linking it to an actual expenditure. Arnold concludes that these costs should be taken into account, and recommends the implementation of a *credit* to help parents with their child-care costs because: 1) the case for treating them as business expenses is "rather tenuous"; 2) he believed that deductions would not be as effective in neutralizing the work disincentive of wives; 3) this recognized reduced ability to pay and 4) credits helped lower-income taxpayers whose relative ability to pay is most heavily affected.²¹⁶ Since the prospect of a universally available child-care system is still very remote, the author agrees with this analysis and supports its conclusions.

The final controversy is whether or not offsetting benefits are needed in a system of separate taxation. The previous discussion concluded that compensation for child-care expenditures was needed, but the same question arises about compensating for non-homemaker households for their additional housekeeping costs. No one in Canada has expressly addressed this question, but the Interdepartmental Committee on the Taxation of Women implicitly disagreed, finding that separate taxation already produces enough or even too much of a difference between the respective tax burdens of one and two-earner families.²¹⁷ Another argument against offsetting benefits for housekeeping

²¹⁴ Blain, *A Preliminary Review of the Income Tax Act, and its Implications for an Employment Strategy for Women* (1979) at 15.

²¹⁵ *Smith v. Commissioner* (1939) 40 B.T.A. 1038, aff'd *per curiam*, 113F. 2d 114 (2d Cir. 1940).

²¹⁶ Arnold, *The Deduction for Child Care Expenses in the United States and Canada: A Comparative Analysis* (1973) 12 Ont. L. Rev. at 26-27.

²¹⁷ *Supra* note 128 at 11.

services is that they would make Canada's tax system much more complicated and difficult to understand.

(3) Paying homemakers a salary

Some people have suggested that we should pay homemakers a salary which would be taxed.²¹⁸ Whatever the intrinsic merits of this proposal, it is difficult to see how it could solve the problem of the undervaluation of homemakers' work, since it would make one-earner families even better off in comparison to two-earner families.

(4) Abolishing the spousal exemption

The Canadian Royal Commission on the Status of Women concluded that:

In all justice the married status exemption should not be given when there is no dependent in the family. We believe that a woman does not become economically dependent by virtue of her marriage. If she is in fact dependent, it is the result of the couple's personal choice. A childless couple has the right to decide that the wife will devote all her time to homemaking but there is no reason why the State should attach an advantage to this choice by giving the husband a married status exemption.²¹⁹

The controversy that arose when Status of Women Minister Judy Erola expressed similar ideas in 1983 shows that public opinion is far from unanimous. The main obstacle is housewives who, deprived of any compensation for their work, do not see the marital exemption as a denial of their economic value, but as the only measure in the tax act that grants them some recognition.

(5) Transforming the spousal exemption into a credit for housewives

This proposal offers an unusual interpretation of the role of the spousal exemption.²²⁰ It sees all residents of Canada as entitled to a personal guaranteed income, either through benefits such as welfare, unemployment insurance, the old age pension or other direct payments, or indirectly through their personal tax exemption. The only exception to this universal entitlement is housewives: they are disentitled from direct income security benefits because of their husbands' incomes, and are also bereft of their own personal tax exemption because it is given to their husbands as the spousal exemption.

²¹⁸ See London, *Tax and the Family*, *supra* note 61 at 102-103 and Zoller, *supra* note 13 at 362.

²¹⁹ Canadian Royal Commission on the Status of Women, *supra* note 13 at 299.

²²⁰ RAIF — Revue d'information pour les femmes, no.77/78, June 1983.

The proposed method of redressing the situation is to abolish the spousal exemption and divide the sums thereby recovered between all homemaking spouses. This would give the same minimal guaranteed income to all wives at home and produce less regressive benefits than the present system. On the other hand, the assumption that homemaking wives presently receive nothing ignores the value of their untaxed in-kind benefits.

c) Summary of the Goals to be Reached

Countries should pursue the following goals when choosing a tax unit:

- 1) Each spouse should pay tax on the income that person owns and controls, since this best indicates his or her ability to pay.
- 2) Children should be taxed separately on their earned income, but their unearned income from assets transferred to them by adults should be aggregated with the income of the donors.
- 3) Marriage should have no effect on people's tax burden since it does not in itself change their ability to pay.
- 4) Marriage should not increase the effective tax burden of married women because this creates an unjustified and undesirable barrier to their participation in the labour force.
- 5) Transfers of property between spouses should be recognized and encouraged by the tax system because ownership and control reflect each spouse's ability to pay and because such transfers enhance the financial independence of women.
- 6) As much as possible, tax systems should avoid multiple rate schedules and complicated deductions because they are difficult for taxpayers to understand and lead to dissatisfaction and non-compliance.
- 7) The value of homemakers' services should be recognized through the provision of child-care expense credits to families where the single parent or both parents are employed or at school.

IV. EVALUATION OF THE SYSTEMS OF THE FIVE COUNTRIES IN LIGHT OF THE DESIRED GOALS

A. Goal One — Separate Taxation of the Spouses

Of the five countries studied, only France and the United States aggregate all the income of spouses for tax purposes. (The U.S. option to file separately is not considered a true one since it penalizes those who make that choice.) This is widely criticized in both these countries. Americans particularly resent the "tax on marriage" which results

from their multiple-schedule system; French people deplore the obsolete sexism of the male "head of the family" rule and consider it illogical that couples who specifically chose to be married under regimes of separation of property are deemed to form an economic unit for tax purposes.

The main difficulty facing reformists in both countries is that one-earner couples and spouses with widely divergent incomes are not willing to abandon the considerable advantages they derive from income splitting (full splitting in France and partial splitting in the United States). As a result, the proposals with the greatest chances of political success are those which reduce the unfairly high burden of two-earner families without affecting the unfairly low taxes of one-earner couples. The main example of this is the common recommendation that married couples be allowed to file as singles when they want. Although the result might be politically pleasing, it would be complicated, theoretically unsound and very unfair toward unmarried taxpayers.

Great Britain and Sweden now have mixed systems that tax spouses jointly on unearned income and separately on earnings. In Great Britain, most employed wives were already exempted from tax by generous deductions so it was a simple step to allow all female earnings to be taxed separately. In Sweden, the transition was made with ease and speed following strong pressure from feminist groups and the need for more married women in the labour force. Great Britain and Sweden have now abandoned their former belief in the economic unity of the couple. Their retention of joint taxation for unearned income is therefore not based on philosophical conviction, but on the fear of administrative complications and of a significant loss of revenue. As the group adversely affected by taxing unearned income jointly is relatively small, it may lack the political clout to surmount these obstacles.

Canada is the only country surveyed which taxes all spousal income separately. Its tax system nevertheless contains several joint taxation features such as a marital status exemption that decreases as the other spouse's income rises, attribution rules and a number of deductions that are transferable between husbands and wives. Most of these measures were introduced in the last fifteen years, indicating that the Carter Commission's belief in the family as an economic unit did have a modest impact after all.

B. Goal Two — Partial Aggregation of Children's Unearned Income

This objective calls for the separate taxation of children's earnings, but for the aggregation of their receipts from income-producing gifts with the incomes of the donors. The systems in Canada and France

come close to doing this, though the Canadian attribution rules are full of holes and France only mandates the aggregation of incomes from assets which originated from the children's own fathers.

None of the three other countries aggregate any part of children's incomes with those of their parents or of anyone else for purposes of the income tax. In Sweden, the only one of the five countries to impose a fortune tax, the children's wealth is aggregated with that of their parents in certain circumstances.

C. *Goal Three — Marriage Neutrality*

None of the five systems studied is marriage-neutral. A 1977 OECD study²²¹ showed the following:

- 1) In the case of childless one-earner couples where the earning spouse draws an average salary, the tax saving realized by getting married (or of being taxed as married, in the case of Swedes) amounts to 12% for Swedish and British couples, 21% for American ones, 24% for Canadians and a phenomenal 66% reduction for married couples in France.
- 2) In the case of a childless two-earner couple where both spouses earn an average salary, the tax difference from being married is a 2% increase in tax for couples from the United States, no change for Canadian, Swedish and French couples and a 6% reduction in Great Britain.

This demonstrates how erratic marriage penalties or rewards can be, depending on the spouses' incomes, the tax units, the tax schedules and the deductions or credits used. The 66% saving enjoyed by one-earner average-income couples who marry in France clearly shows why single people resent full splitting systems, especially when they do not reflect the respective abilities of the spouses to pay. If the French couple was married under a regime of separation of property, for example, the husband would pocket the entire 66% tax saving and the wife would have no right to it at all.

D. *Goal Four — Neutrality Toward Women's Employment*

This subject is much more difficult in practice than in theory because so many different elements are involved. Among the most important are the progressivity of each country's tax schedule(s) and the presence and amount of deductions to offset the earnings of lower-income spouses. Several aspects must also be considered, including:

²²¹ *Supra* note 84 at 39, 47.

1. The difference in tax between employed wives and single women with the same income

We saw this effect in the section concerning marriage neutrality. The second example demonstrated what happens when a single woman who earns an average wage gets married to a man who has the same salary: her taxes would increase in the United States, decrease in Great Britain and stay the same in the other three countries.

The increase in the United States, which results from a higher tax schedule for married people, would be smaller now than when the OECD study was done because of the introduction of an earned-income deduction for the lower-income spouses. The decrease in tax in Great Britain also results from generous earned-income reductions for employed wives. If the American and British wives' incomes were higher and surpassed the level of the deductions, however, they would be taxed at a much higher rate than their single counterparts. In that case, the American wife would have no recourse, but the British one could avoid the increase by choosing to file a separate return.

2. The effect of the wife's employment on the family's average tax rate

A wife who stays home for a while and then returns to paid employment will raise the family's tax rate. The only exception to this rule is in Great Britain, where the deductions applied to the wife's earned income will exempt lower-income married women from paying tax. In separate taxation countries, such as Canada and Sweden, the increase in tax which results from the wife taking a paid job is due to the loss of the marital status exemption. This has a smaller effect than the aggregation of a wife's income with that of her husband in countries with systems of joint taxation. Overall, the OECD's conclusion on this point was that:

. . .the choice of a tax unit is an influential, but not a decisive factor in determining the relative rate of income tax encountered by the family when a married woman enters the labour force. The tax unit does become important for the higher income groups, since the allowance structure, being based as a rule on absolute amounts, has less influence at these income levels, and the data confirm the expected result that individual taxation is more advantageous than compulsory joint taxation for two-earner families at higher income levels.²²²

²²² *Ibid.* at 59.

3. The effect on the tax rate of the wife

Looking at the wife's tax position alone, we see that the rate of tax on her income varies greatly depending mainly on the progressivity of her country's tax rates, but also on the tax unit used. A table prepared by the OECD to show the tax rates applying to wives earning 33%, 66% and 100% of an average salary (with the husband always earning a full average salary) gave the following approximate ranges of taxes on the women's incomes:

Sweden — the rate ranged from a low of 32% for wives earning one-third of an average wage to 40% for those earning an average salary.

United States — the range was from 22% for the lower-earning wives to 24% for those earning average salaries.

Great Britain — the range was from a rate of 8% to a rate of 24%

Canada — the range went from 17% for the lower earners to 23% for the average-income ones.

France — the range went from 9% for those earning one-third of an average wage to 12% for those earning an average one.

The OECD's conclusions were:²²³

1) Generally speaking, the countries with the most steeply progressive tax systems and with joint taxation take the largest proportion of the wife's gross earnings in tax.

2) Exceptions to this rule are found in countries with very high taxes, such as Denmark and Sweden, where high rates more than offset the impact of the use of individual taxation.

3) Joint taxation becomes more burdensome as the spouses' incomes increase.

4) Income splitting or "quotient" systems substantially offset the effects of aggregation at higher income levels.

E. Goal Five — Encouragement of Inter-Spousal Transfers

The five countries under study can be divided into three groups in that regard.

1. *Canada* — Because Canada's system of individual taxation can give substantial tax savings when the spouses transfer property to each other, so-called attribution rules were enacted to prevent the recognition of such transfers for tax purposes. These rules have been quite ineffective so far, with the result that upper-income people who could afford to hire tax consultants were encouraged to transfer income-producing assets to their spouses. To extend this advantage to

²²³ *Ibid.* at 55-56.

all Canadian taxpayers and meet the requirements of Goal Five, all Canada needs to do is repeal its spousal attribution rules except for cases where the donor has not relinquished effective control over the property transferred.

2. *Sweden, Great Britain and the United States* — All three of these make a distinction between earned and unearned income. The unearned income of the spouses is always taxed jointly in all three countries while earnings are or can be taxed separately in Sweden and Great Britain and give entitlement to a special deduction for lower-income spouses in the United States. Therefore, no incentive exists to transfer assets to equalize the spouses' incomes from properties, but some tax savings can be effected through manoeuvres that transform the investment income of the richer spouse into a salary paid out to the poorer one.

3. *France* — Since France aggregates all the income of the spouses for tax purposes, its system has no effect on transfers of property between them.

F. *Goal Six — Simplicity*

The simplest tax systems are those which are based on a few clear principles. France and Canada come closest to meeting that goal, with Sweden not far behind. The American and British systems, with their multiple and contradictory principles and patches, are much too complicated for ordinary taxpayers to understand.

Administratively, tax officials particularly resent features that require extensive monitoring and control, such as the Swedish treatment of common law spouses as if they were married and the Canadian attribution rules. In Canada, this could easily be cured by allowing the free flow of assets between the spouses for tax purposes.

G. *Goal Seven — Child-Care Expense Recognition*

The United States is the only country which recognizes the child-care expenditures of two-earner families and single parents with paid jobs through the use of tax credits. Sweden and Canada chose instead to use deductions, although the fact that Sweden has not increased the level of its deduction since 1971 may indicate a preference for direct government intervention in helping to set up adequate child-care facilities.

Great Britain does not have a special measure to recognize child-care costs, though British widowers and widows are entitled to a special flat-rate deduction to help pay for a live-in *female* housekeeper or

child-minder. In France, a child-care deduction was introduced in 1976 for the sole use of single parents in the labour force.

H. *Summary of the Evaluation*

None of the countries examined in this study meets all our objectives, although individual or semi-individual taxation countries such as Canada and Sweden come closest to respecting the most crucial ones. In spite of these seemingly disappointing findings, the overall picture is not at all depressing because the changes taking place in all the other countries show a strong trend toward individual taxation and the recognition of the separate economic existence of the spouses.

This was also the conclusion of the OECD, which found that “[i]n recent years, a trend away from compulsory joint or family taxation toward the choice of the individual as the tax unit for earned income or, at least, the provision of an option for individual taxation is discernible among OECD countries.”²²⁴ Between 1970 and 1976, six European countries switched from joint to individual taxation of the earned income of the spouses (not counting the new British separate tax option). The main reason for these changes, according to the OECD, is “the growing importance attached to the status and role of women in society.”²²⁵

V. CONCLUSION

This study set out to answer four questions about the tax treatment of the family in France, Great Britain, the United States, Sweden and Canada. These questions concerned the origins of the tax units used, their relationship with marital property laws, the influence of community values in the choice of a tax unit and the goals which all countries should strive to attain in taxing the family.

The first two questions were answered in the historical overview in Part I. It was found that each of the countries examined started by assuming that its tax and matrimonial laws should be synchronized, but that differences subsequently developed when married women acquired more rights (in Sweden, Great Britain and most recently in France) or when the courts interpreted marital property laws for tax purposes in ways that many taxpayers found unfair (in the United States). Whenever such a split occurred between tax and family laws, it eventually led to strong pressure to reunite the two. This is particu-

²²⁴ *Ibid.* at 15.

²²⁵ *Ibid.* at 18.

larly evident in the evolution of the Swedish and British systems, both of which went from joint to individual taxation of the earnings of the spouses. Canada is the only country studied whose tax and matrimonial property laws were always in accord.

The other questions were answered in Part II. Using the three criteria of fairness, neutrality and simplicity as the basis for this analysis, it was concluded that the tax treatment of the family should strive to reach the following seven goals:

1. Taxing the spouses separately on all their income, because that is the best way of adjusting their tax burdens to their capacity to pay.
2. Taxing children's unearned income jointly and their earnings separately.
3. Making the tax system neutral toward the decision to marry or not, since getting married does not, alone, affect people's ability to pay.
4. Promoting the participation of women in the labour force by eliminating tax barriers to it.
5. Encouraging transfers of property between spouses by recognizing them as valid for tax purposes.
6. Avoiding hard-to-understand tax systems which have multiple rate schedules and complicated deductions.
7. Providing child-care expense credits to recognize the additional expenses of families where neither parent stays home with the children.

When the systems studied were weighed against these standards, none won a perfect score, but there were very important differences. A country such as Canada, where all incomes are taxed separately, and countries like Sweden and Great Britain, where earnings from work are or can be taxed on an individual basis, meet many of these objectives and could be changed quite easily to conform to all. The same cannot be said of France and the United States, whose systems of aggregation of all spousal incomes with full or partial splitting could not be easily adapted to meet our objectives. Attempts at reforming these countries' systems — barely started in France but vigorous for close to twenty years in the United States — have met very serious obstacles.

These barriers can be traced to the main factors which influence the evolution of tax units. In our historical review, as well as in the discussions of the desired objectives, three crucial factors kept recurring. One is the importance of societal values such as the sanctity of marriage (especially in France) and the promotion of women's equality (particularly in Sweden). A second one is a country's employment situation and its perceived need for married women to join the labour force

(mainly in Great Britain and Sweden). A third factor is the great political difficulty, if not impossibility, of achieving reforms that would raise the tax burden of large numbers of people.

In France, reforms are hampered by a strong combination of traditional family values and political resistance from upper-income people who would stand to lose. In the United States, the battle is mainly between the advocates of women's rights and the huge number of undertaxed one-earner couples, with the political odds still heavily weighted in favour of the latter. Because of these deadlocks, Professor Bittker may be right in his belief that the American tax unit problem can never be solved; according to him, "there can be no peace in this area, only an uneasy truce."²²⁶

²²⁶ Bittker, *supra* note 18 at 1443.

