Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 50 | Issue 2 Article 3

Winter 1975

Household Services and Child Care in the Income Tax and Social Security Laws

William D. Popkin
Indiana University Maurer School of Law, popkin@indiana.edu

Household Services and Child Care in the Income Tax and Social Security Laws

WILLIAM D. POPKIN*

INTRODUCTION

Recent changes in the income tax liberalized the deduction of payments for household and child care services but retained a number of restrictions on the deduction.[1] Both the liberalization and the restrictions were apparently based on the theory that such expenses should be deductible when incurred for business rather than personal reasons. In a seemingly contradictory spirit, there is also considerable congressional sympathy for recognizing the performance of household and child care services as productive work which enhances a family's standard of living for purposes of determining social security benefits.[2] The resolution of these and other issues raised by the income tax and social security treatment of housework is of current social significance in the context of the women's movement because women are the major producers of housework, and is of broader concern because it requires consideration of fundamental concepts of equity and neutrality in the tax and welfare structure. The criteria for resolving these issues are the subject of this article.

This article argues that housework performed at home by a family member significantly adds to the family's standard of living and that the paramount objective of the income tax and social security structure should be neutrality between housework and wage work, even at the

*A.B. 1958, LL.B. 1961, Harvard University; Professor of Law, Indiana University, Bloomington.

[1] Revenue Act of 1971, Pub. L. No. 92-178, § 210(a), 85 Stat. 518, *amending* INT. REV. CODE OF 1954, § 214 (codified at INT. REV. CODE OF 1954, § 214) [hereinafter the *1954 Code* will be cited by section number without further identification]. Although the text refers to "child care," the statute also allows a deduction when an incapacitated member of the family is being cared for. Sections 214(b)(1)(B), (C).

See generally Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers,* 21 BUFF. L. REV. 49 (1971); Feld, *Deductibility of Expenses for Child Care and Household Services: New Section 214,* 27 TAX L. REV. 415 (1972); Hjorth, *A Tax Subsidy for Child Care: Section 210 of the Revenue Act of 1971,* 50 TAXES 133 (1972); Klein, *Tax Deduction for Family Care Expenses,* 14 B.C. IND. & COM. L. REV. 917 (1973).

[2] *See, e.g.,* H.R. 16030, 92d Cong., 2d Sess. (1972) (value of household services performed by individuals is considered in determining social security benefits); *cf.* H.R. 996, 92d Cong., 1st Sess. (1971) (houseworker allowed to set up her own pension plan with tax advantages).

cost of introducing some inequities into the tax system. Such an approach would result in a further liberalization of the income tax deduction for household and child care, a reduction in the amount of wages currently subject to social security tax, an increase in the wages used as the basis for computing social security benefits, and recognition of a separate social security benefit for the wife independent of her husband.

The proper treatment of housework will be illustrated by three typical families whose circumstances and tax treatment are set forth in Table I. In Family W (FW), the husband earns $100 wages and the wife, Wage-earner (Ww), earns $30 wages, $20 of which are paid to a housekeeper to care for the house and children.[3] In Family H (FH), the husband also earns $100 wages and the wife, Housekeeper (WH), also works but earns no money; she takes care of the house and children. In Family L (FL), the husband earns $130 wages, but the wife, Leisure (WL), does not work; she pays a housekeeper $20 to care for the house and children. Since the major point of this article is the desirability of neutrality between the wage-worker and the houseworker, FW and FH should be thought of as two potential styles of life which a family could adopt. FL should be considered an actual family whose treatment in relation to FW and FH may raise problems of equity.

TABLE I

	Family W	Family H	Family L
Cash Wages: Husband	$100	$100	$130
Cash Wages: Wife	30	none–houseworker	none–leisure
Household and Child Care Expenses	20	none	20
Wages Taxed: Income Tax	110	100	130
Wages Taxed: Social Security Tax	130	100	130

[3] A 30 percent ratio of the wife's earnings to the husband's earnings is used because the median earnings in 1972 of families where the wife worked was about 30 percent higher than in families where the wife had no earnings. *See* Waldman & Grover, *Marital and Family Characteristics of the Labor Force*, 95 MONTHLY LAB. REV., April 1972, at 4, 8 ($11,940 compared to $9,175). Earlier statistics indicate a similar ratio. *See* CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES 70 (1968) ($8,597 compared to $6,592) [hereinafter cited as TASK FORCE].

Social Security Benefit Base	100	100	130
Social Security Benefit for Wife (Derivative)	50% of husband's benefit	50% of husband's benefit	50% of husband's benefit

Currently the income tax law determines that each family has the following income tax base: FW with the working wife (Ww)—$110;[4] FH with the housewife (W_H)—$100; and FL in which the wife does not work (W_L)—$130. FH is not taxed on the value of the housework produced by W_H, but FW can deduct the cost of purchasing similar services. In each case, the family is the taxable unit and the final tax reflects adjustments for children in the form of a deduction for personal exemptions[5] and adjustments for the extra costs of supporting two people in the form of lower tax rates than are applicable to an unmarried individual with the same income as the family unit.[6]

The social security tax is levied on the gross wages of these families computed as follows: FW—$130; FH—$100; FL—$130. Although the value of housework produced for FH by W_H is not subject to the social security tax, the household and child care expenses incurred by FW are not deductible. No adjustment is made for the size of the family; a single person with $130 of earnings pays the same social security tax as FW and FL.

Social security uses gross wages not only as a tax base, but also to determine the measure of benefits, *i.e.*, as a "benefit base."[7] The social security benefit base for our three families is as follows: FW—$100; FH—$100; FL—$130. FW's benefit base is lower than its social security tax base because the husband's and wife's earnings are not added together to determine benefits. However, the wife in all three families is entitled as a worker's spouse to an extra benefit equal to 50 percent of the husband's benefit.[8] The wife, therefore, receives a "derivative" benefit based on her husband's earnings whether or not she has earnings of her own. If her own cash earnings entitle her to

[4] This assumes that section 214 allows the deduction in full. See text accompanying notes 26–31 for limitations on the deduction.

[5] Sections 151(e), 152(a)(1).

[6] *Compare* section 1(a) *with* section 1(c).

[7] The "average monthly wage" with adjustments is the benefit base. 42 U.S.C. §§ 415(a), (b) (1970).

[8] *Id.* § 402(b).

benefits which exceed her derivative benefits, she is entitled to the excess.[9]

INCOME TAX

Imputed Income Aspects of Housework

Consideration of the proper tax treatment of housework must begin with a discussion of the broader issue of "imputed income." Imputed income is the value of goods and services derived from the use of property and the performance of services for oneself, the most common examples of which are the rental value of owner-occupied residences[10] and household and child care services performed by a member of the family.[11] The public finance literature generally recognizes such income as a valuable addition to a family's standard of living, but judicial elaboration of the definition of "income" for income tax purposes has usually excluded imputed income.[12] Administrative problems are often cited as the major reason for exclusion,[13] but they are only part of

[9] If the wife has any social security benefits based on her own earnings, they are treated as her own rather than as a derivative benefit. Her derivative benefit is, however, reduced by her own benefit. *Id.* §§ 402(b)(1)(E), (K); 20 C.F.R. § 404.407(a) (1974). The fact that it is her own benefit is important because her husband's earnings can reduce her derivative benefit, but not benefits based on her own earnings. 42 U.S.C. § 403(b) (1970). Her own work also entitles her to disability benefits, and her survivors can receive a derivative benefit based on her earnings. TASK FORCE at 71.

The wife's own benefit is not likely to be close to her derivative benefit for a number of reasons. First, most families do not have two workers; in 1966, couples with working wives represented about one third of all couples. This figure has undoubtedly risen. Second, the wife's own benefits are based on her "average monthly wage." Although she can omit the five lowest years of earnings in determining her average monthly wage, she may not be working consistently enough during her lifetime for her own benfits to exceed her derivative benefit. Third, recent figures indicate that the wife's contribution to median family income is only 37 percent of the husband's income. *See* Waldman & Grover, *supra* note 3, at 8:

$$\frac{\$9{,}175}{\$11{,}940 + \$9{,}175} = 37\%$$

[10] W. VICKREY, AGENDA FOR PROGRESSIVE TAXATION 18 (1947); Marsh, *The Taxation of Imputed Income*, 58 POL. SCI. Q. 514, 517 (1943).

[11] W. VICKREY, *supra* note 10, at 44–45; Marsh, *supra* note 10, at 515, 517.

[12] *See* Helvering v. Independent Life Ins. Co., 292 U.S. 371 (1934) (imputed rental value not "income"). The reluctance to tax imputed income has affected the court's willingness to attribute income under section 482; *see* Kahler Corp. v. Commissioner, 58 T.C. 496 (1972). *But cf.* Kerry Investment Co. v. Commissioner, 58 T.C. 479 (1972) (income imputed when borrower had gross income).

But see Commissioner v. Minzer, 279 F.2d 338 (5th Cir. 1960) (insurance agent taxed on commissions received on insurance purchased on own life); *cf.* Hatch v. Employment Security Agency, 79 Idaho 246, 313 P.2d 1067 (1957) (carpenter not "unemployed" while building his own house).

[13] W. VICKREY, *supra* note 10, at 22; Marsh, *supra* note 10, at 520. *See also* PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON SOCIAL

the problem. The popular view that imputed income is not really income has a sounder theoretical base in the case of services performed for oneself than is commonly supposed, for reasons to be elaborated shortly. Concern for neutral tax treatment between housework and wage work makes the determination of whether housework is imputed income crucial. For if housework were not income, *i.e.*, if it produced no significant increase in a family's standard of living, then preferential treatment for untaxed housework in contrast with taxed wages would be a minor problem; it is only when housework is a significant item of value, which is untaxed, that there will be an incentive to shun wage work, which *is* taxed.

The first objection to treating services for oneself as income is that, in a society in which labor is very specialized, many self-produced services do not approach the value of the same services purchased on the market. Second, there is often a drastic loss of leisure in performing many services for oneself which the income tax law should consider. The argument for not taxing the fruits of one's own labor because of loss of leisure rests on one of two theories. The first is that leisure is enjoyment and should therefore be taxed, but since leisure is too hard to tax, equity between workers and nonworkers is preserved only by reducing the tax on those who work and give up leisure. The difficulty with this approach is that the general tax concept of income[14] includes only that enjoyment which is obtained by an expenditure of a claim on society's resources. Leisure, though enjoyable, does not involve an expenditure of resources, and its omission from the tax base does not therefore create an inequity.

The second theory rests on the more persuasive argument that exempting leisure from taxation destroys the neutrality between work and leisure and therefore discourages work. This concern leads to the same result as the first theory; because taxing leisure is impractical,

---

INSURANCE AND TAXES 37 (1963). For example, the rental value of property and the value of services performed in the house are very difficult to measure. The information necessary to determine value is not normally acquired in administering the income tax law and, in the case of household and child care services, is known only to a few people.

[14] The definition of income in terms of consumption is itself a debatable point but one which I accept. W. POPKIN, THE DEDUCTION FOR BUSINESS EXPENSES AND LOSSES 16 (1973). *See also* Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 320–27 (1972).

A further question is whether consumption should refer to enjoyment generally, enjoyment obtained by exercising claims on society's resources (*i.e.*, making expenditures), or enjoyment obtained only by private consumption, not public goods such as charity. Professor Andrews would adopt the last definition. *Id.* at 356. I reject the first definition but am still not convinced that the second definition is unacceptable.

In any event, the enjoyment of leisure would be income only under the first criterion.

neutrality between leisure and work may be preserved only by reducing the tax on work.

Neither argument for reducing the tax on workers because leisure is exempt has had much appeal in the United States, although the tax on earnings has been reduced during two earlier periods.[15] But the problem of discouraging work by exempting leisure may be especially serious in the cases of services performed for oneself. Many services for oneself are especially burdensome, occurring after normal working hours or on weekends when the private market place usually recognizes the extra burden of overtime work by paying at least time and a half for it. In order to avoid discouraging this type of work, therefore, its fruits should not be taxed in full. Considering the disincentive effect of taxing work performed for oneself and the questionable value of the product of that work, the omission of this type of imputed income from the tax base is probably justified.

These reasons for not taxing imputed income are frequently inapplicable, however, when a wife performs household and child care services. Tradition has dictated that the wife learn how to keep house and care for children. The value of her services, unlike the value of many services produced by a family member, is therefore likely to be comparable to the market value of similar services.[16] Furthermore, since the work is often performed during normal working hours, a discount of the value produced because of the loss of leisure seems inappropriate as long as wages are fully taxed. Housework is therefore imputed income of considerable value whose exclusion from the income tax can only be justified on administrative grounds.

History of the Child Care Deduction

The original income tax treatment of household and child care expenses recognized that these expenses contribute to a family's standard of living. It therefore disallowed a deduction as a personal expense when their value was purchased,[17] while at the same time despairing of taxing such services when produced for oneself. The fact that such expenses were necessary to allow a person to work was considered irrelevant. Household and child care expenses were relegated to the

[15] Earned income was eligible for tax benefits from 1924 to 1931 and from 1934 to 1943. J. PECHMAN, FEDERAL TAX POLICY 92 (1971).

[16] In both *Minzer* and *Hatch,* in which the values of a person's own services were treated as analogous to his earning cash income, the individual was doing for himself what he was normally paid to do.

[17] Smith v. Commissioner, 40 B.T.A. 1038 (1939), *aff'd,* 113 F.2d 114 (2d Cir. 1940).

personal sphere of activity along with other nondeductible expenses such as clothing and medical care, which were also necessary to enable the individual to work.[18]

In 1954, however, a deduction for expenses to care for a child was allowed under narrowly defined circumstances.[19] Working women were allowed to deduct such expenses as long as they did not elect the standard deduction;[20] married women were subject to the further condition that, if their husbands were not incapacitated, they were eligible for the deduction only if family income did not exceed a certain level.[21] A working man was also entitled to the deduction if he was a widower.[22] The amount deductible was subject to a ceiling of $600 per year.[23] Since child care expenses were considered similar to business expenses, these rules were intended to identify those individuals who incurred the expenses for the purpose of enabling them to work.[24] It was thought that if individuals worked in order to satisfy a personal desire to pay someone else for child care, rather than paying for the services so that they could work, or if they would have incurred the expenses in any event for personal reasons whether or not they worked, then the expenses were nondeductible personal expenses. Thus, the income ceiling on eligibility for the deduction when the wife's husband was not incapacitated guaranteed that the expenses were incurred because the family needed the income and that the wife was not simply indulging a personal preference for work outside the home rather than housework.[25] The income ceiling also effectively denied the deduction to families who would have purchased the child care for personal reasons even if the wife did not work. The ceiling on the deduction itself also distinguished expenses necessary to enable the individual to work from those which indulged the worker's personal tastes.

---

[18] *See generally* Halperin, *Business Deduction for Personal Living Expenses: A Uniform Approach to an Unsolved Problem,* 122 U. PA. L. REV. 859 (1974).

[19] Int. Rev. Code of 1954, ch. 736, § 214(a), 68A Stat. 70.

[20] Sections 62(2), 63(b).

[21] Int. Rev. Code of 1954, ch. 736, § 214(b)(2), 68A Stat. 70. By 1964, the income ceiling was $6,000. Revenue Act of 1964, Pub. L. No. 88-272, § 212(b)(2)(B), 78 Stat. 49.

[22] Int. Rev. Code of 1954, ch. 736, § 214(a), 68A Stat. 70. In 1964, husbands with incapacitated wives became eligible for the deduction. Revenue Act of 1964, Pub. L. No. 88-272, § 212(b)(2), 78 Stat. 49.

[23] Int. Rev. Code of 1954, ch. 736, § 214(b)(1)(A), 68A Stat. 70. The amount was raised to $900 in 1964 if there were two or more children. Revenue Act of 1964, Pub. L. No. 88-272, § 212(b)(1)(B), 78 Stat. 49.

[24] *See* H.R. REP. No. 1337, 83d Cong., 2d Sess. 30 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 36 (1954).

[25] *Id.*

In 1971, the income and deduction ceilings were raised considerably. A family can now earn $18,000 before the deduction is reduced[26] and the ceiling on the deduction is now $400 per month.[27] These ceilings are applied uniformly to all individuals eligible for the deduction. Child care purchased outside of the home, however, is subject to a special ceiling of $200 for the first child, $300 for two children and $400 for three children.[28] The deduction is now available to all men[29] and payments to an individual to care for the household are deductible if a child is also being cared for.[30] This liberalization of the deduction occurred not because the "business expense" theory was abandoned, but because the factual setting in which it was realistic to expect expenses to be incurred to enable an individual to work had simply expanded.[31]

Although the congressional history indicates that these expenses were viewed as business expenses, it is difficult to justify their deduction on that ground. Even if the taxpayer incurs the expenses in order to work, the decision to have children is a personal one. The situation is analogous to commuting expenses, which must be incurred in order for the individual to earn wages.[32] They are presumed to arise from the individual's personal decision to live beyond walking distance and are, therefore, personal expenses. Expenses for household and child care are similarly grounded in a personal decision.

Justifications for the Deduction

A plausible argument can be made that caring for the household and children is a personal obligation which should be recognized in the tax law by a reduced tax burden. This argument leads, however, to a reduction in the tax burden for all individuals who pay to discharge these obligations without regard to their work experience or their reasons for working.[33] Families FW and FL, for example, would both be entitled to deductions. It would not matter that WL does not

[26] Section 214(d). Each dollar of income over $18,000 reduces the deduction by 50 cents.

[27] Section 214(c)(1).

[28] Section 214(c)(2)(B).

[29] Sections 214(a), (b)(1). Previously, only widowers and husbands with incapacitated wives were eligible. *See* note 22 *supra.*

[30] Sections 214(b)(1), (2)(A).

[31] *See* S. REP. No. 437, 92d Cong., 1st Sess. 59–61 (1971).

[32] Commissioner v. Flowers, 326 U.S. 465 (1964). *Cf.* United States v. Gilmore, 372 U.S. 39 (1963).

[33] Care of a child by a single individual may now entitle the taxpayer to head-of-household rates. Section 1(b). *See* sections 151(e), 152 (a)(2) (deduction for dependent children).

work, or that Ww might be working to earn money to pay for child care rather than incurring costs to enable her to work.

A deduction for household and child care expenses incurred by a wage-earner is entirely appropriate, however, as a technique for equalizing the tax bases of wives who work at home to produce household and child care services of significant value (W_H) and wives who earn wages (Ww).[34] The deduction establishes neutrality between the two types of work available to the individual, housework and wage work. These arguments favoring the child care deduction can be illustrated by reference to FW and FH. The wife in FH (W_H) produced tax-free income of considerable value. If she wishes to become a Ww, the payments she makes for services will probably purchase value equal to that which she previously produced. Thus while her $30 of earnings increased her standard of living by only $10, without a deduction, her tax base would be $30 greater.

Because of the difficulty of taxing W_H's imputed income,[35] the most practical method for the income tax to avoid the bias in favor of the wife who produces tax-free income at home is to allow Ww to deduct household and child care expenses. A deduction for Ww, however, produces imperfections of its own. The reduction of FW's tax base to $110 makes FW better off than FL, which is taxed on $130 of income, even though both families have $130 of income.[36] The inequity of treating equals (FW and FL) differently is the price paid for eliminating the bias in favor of household work.[37]

The "neutrality" rationale for allowing the deduction of household and child care expenses yields results different from those produced by the business expense theory embodied in the current statute.[38] First, a family in which the wife earns wages because she prefers to purchase these services rather than to perform them herself should be entitled to a deduction. According to the business expense analysis, expenses

[34] The discussion deals with wives because they are most likely to perform household and child care services. Men are also eligible for a deduction in those circumstances where they are likely to be called upon to provide such services. *See* note 29 *supra*. Men may, therefore, be able to deduct more for purchased service than the value of services they would have produced at home. The importance of symbolic equality between the sexes, however, may require that men and women be treated similarly in the statute.

[35] *See* note 13 *supra*.

[36] FL might be considered better off because of L's leisure. The advantage of leisure over remunerative work is not normally considered in the income tax. *But see* text accompanying note 15 *supra*.

[37] *See* Lipsey & Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUDIES 11 (1956).

[38] *See* text accompanying notes 19–25 *supra*.

should not be deducted in this situation because they are not incurred to enable the wife to work. Deductions were, therefore, limited to those cases in which the total income of the family was low enough ($18,000) to indicate that the expenses were incurred for that purpose. An income tax concerned primarily with the neutral treatment of FW and FH would not distinguish between those situations in which Ww earns wages because she prefers wage labor to housework and those in which she needs the money to supplement the family income and therefore pays for the services so she can work. Indeed, the former situation, in which the wife is primarily moved by her desire to get out of the house, presents at least as sympathetic a case for neutral treatment as the situation in which the wife pays for services in order to earn wages. An income ceiling higher than $18,000 is therefore appropriate. The only concern would be to disallow the deduction if the family would have incurred the expenses whether or not the wife worked. For example, if WL becomes Ww and earns wages, no deduction is necessary to prevent discrimination in favor of a wife who earns imputed income by performing household and child care services. WL did not produce such income before she worked and her wages, therefore, contribute in full to an increased standard of living for FL.[39]

Second, the cost of household services should be deductible whether or not a child is being cared for.[40] If there is concern that expenses incurred for household services will exceed the value of similar services produced by the wife if she had stayed at home, the imposition of a dollar ceiling on deductible household expenses would prevent any excess value from being deducted.[41] The disallowance of the deduction in the current law probably results from the assumption, relevant to a business expense theory, that individuals without children are more likely to work to pay for household services than to incur such expenses in order to work. However, a focus on equal treatment of Ww and WH would not make the wife's deduction depend upon her motive for earning wages.

[39] For example, if L earns $50, FL now has $180 income, not the $130 it previously enjoyed. Only when L is a working housewife does earning $50 wages fail to increase the family's standard of living by $50. Of course, L might not be $50 better off because of loss of leisure. *See* note 36 *supra*.

[40] Sections 214(a), (b)(1).

[41] For example, a lower ceiling than $400 per month might be imposed when there is no dependent to be cared for. The present limitation on the deduction for child care provided outside the home in § 214(c)(2)(B) can similarly be justified on the theory that a greater expense will purchase services which could not have been provided in the home. Educational services, which are often provided with expensive child care outside the home, are not likely to be a service provided by the wife.

Third, the current requirement that the wife be employed full-time[42] is not justified in the case of child care, if the purpose of the deduction is to equalize the tax burden on the housewife and wage-earning wife. If Ww works only half a day, the expenses for child care still replace the work she would otherwise have performed at home.

Fourth, it is inappropriate to disallow the deduction if the standard deduction is elected. The standard deduction replaces the deduction of small business expenses to simplify tax administration. The effect on business decisions of eliminating deductions for actual expenses is usually slight because the replaced expenses are small. Indeed, where expenses are large, as in the case of moving expenses and travelling expenses away from home, both the standard deduction and actual expenses are deductible. By characterizing the household and child care deduction as a business expense, Congress has unwittingly lumped this together with small business expenses for which the loss of deductibility is unlikely to have an adverse impact on an individual's decisions. If the deduction had been conceived as a technique for equalizing tax burdens on wage work and housework, disallowance of the deduction when the standard deduction was elected might not have been so easily accepted. The disallowance reintroduces WH's advantage by allowing FH both the standard deduction and exclusion of the value of the wife's services, whereas FW can take only the standard deduction.

Social Security

There are two problems in the design of the social security benefit and tax structure which concern the working wife: (1) neutrality between families in which the wife works at home (FH with WH) and those in which the wife earns wages (FW with Ww); and (2) the wife's entitlement to a benefit separate from her husband's benefit. In considering these problems we will first analyze the benefit structure without regard to taxes and then consider the effect of taxes on the proper solution.

To understand the following discussion, a brief outline of the social security benefit and tax structure is essential. An individual's benefit base is related to past wages on the theory that wages are a good indication of the individual's prior standard of living which should be the measure of retirement income. In order to help the poor, however, benefits are a larger percentage of the benefit base as wages decline. The benefit base for a family is not the family's total wages, but is tied to the income of the primary worker. Both FW and FH, for example, have

$100 benefit bases; FL's benefit base is $130. Ww's wages are not part of FW's benefit base.

Taxes are imposed on all gross wages and collected by employer withholding. Although wages must be taxed to be included in the the benefit base, the converse is not true for a husband and wife. While both pay taxes on wages, the wife's wages are not included in the family's benefit base. Thus, FW pays taxes on $130, a tax base equal to FL's, even though its benefit base is only $100, a benefit base equal to FH's.

The benefit structure for a family, however, is a function not only of its benefit base but also of the number of members in the family. Without regard to the taxed wages or untaxed household work of the spouse, the spouse is entitled to a benefit equal to 50 percent of the benefit received by the primary worker, who in most families is the husband. Thus, the wife in all three families, even WL in FL, is entitled to a derivative benefit intended primarily as a welfare measure to meet the greater needs of a two-person household. Although Ww's wages entitle her to her own benefits, she can collect an amount over her derivative benefit only in the unlikely event that her own benefit exceeds the derivative benfit.[43]

Neutrality Between Families

The failure to combine the wages of working family members to compute their benefit base has been severely criticized because combined earnings are the best measure of a family's standard of living.[44] FW's benefit base is lower than FL's even though they both had $130 of earnings which, disregarding WL's leisure,[45] indicates a similar standard of living.

A closer examination of the comparative situations of FW and FH, the two families with working wives, suggests, however, that there are problems with treating FW and FL equally, problems similar to those encountered in assigning equal income tax bases to FW and FL. If FW's benefit base were $130, it would exceed FH's benefit base by $30 even though FW's standard of living exceeded FH's by only $10. Those who would eliminate pressures on women to assume the traditional housekeeping role might disregard this inequity because, unlike

[42] Section 214(e)(2)(A).

[43] *See* note 9 *supra.*

[44] *See, e.g.,* J. PECHMAN, H. AARON & M. TAUSSIG, SOCIAL SECURITY, PERSPECTIVES FOR REFORM 81 (1968) [hereinafter cited as PERSPECTIVES]; TASK FORCE at 71–72.

[45] *See* note 36 *supra* and text accompanying.

the full inclusion of working women's wages in the income tax base, its bias is in favor of wage work rather than housework. However, the objective of reducing the income tax base for wage-earners was neutrality between wage work and housework, not favoritism for wage work. Neutrality in choice of work, not bias for a particular type of work, should be the objective of both the income tax and social security structures. FW's benefit base should therefore exceed FH's by only $10.

One way to limit FW's advantage over FH would be to include the value of WH's housework in FH's benefit base.[46] This solution, however, presents insuperable difficulties because the social security benefit base is tied to the tax base. Even if the value of WH's services could be accurately estimated, the payment of a tax by a worker without wages, especially a WH with low income, would be both burdensome for the wage-worker and difficult to enforce in the absence of employer withholding. The proper solution, therefore, is to provide that FW's benefit base exceed FH's by only $10. Although this creates an inequity between FW and FL, both of whom have standards of living equal to $130, this is the result of neutrality between FW and FH, just as the difference in income tax base between FW and FL is the price paid for neutralizing the effect of the income tax on WH and Ww. Of course, since reducing FW's income tax base helped Ww, FW would be pleased by the proposed change in the income tax, whereas reduction of the social security benefit base below the sum of the combined family earnings might not be received with equal enthusiasm.

The mechanics of including FW's wages in the benefit base but reducing them by the price paid for housework is not as simple as allowing a deduction, which was the technique the income tax used to achieve neutrality between WH and Ww. The social security system is wedded to the use of gross wages as its tax base by its reliance on reports from employers; a deduction by Ww of her actual expenses is therefore not administratively feasible. There is no administrative obstacle, however, to including some predetermined percentage of Ww's wages in her benefit base which roughly accounts for the amount by which her wages exceed the value of housework. The only administrative changes required would be to record the combined wages of husband and wife but increase FW's benefit base by only a predetermined percentage of the wife's earnings.[47]

[46] *See* H.R. 16030, 92d Cong., 2d Sess. (1972).

[47] The discussion refers to the wife because she is the family member most likely to

The more difficult problem is to determine the appropriate percentage. Two figures are needed to compute the percentage—Ww's hypothetical wages and the presumed value of her housework. The following data justifies use of the percentage employed so far in this article—one-third of Ww's wages—but the important point is that *some* process of estimating the relationship of Ww's wages to the value of her housework must be adopted.

For Ww's wages we used the amount which a working wife added to the income of a *male-headed* household, which was $3,109 in 1971.[48] There were two choices for the value of housework: $849, which was the 1971 median income of all private household workers,[49] or $1,900, which was 50 weeks of wages at the weekly wage in 1971 for full time private household workers;[50] we adopted the figure $1,900. According to these figures, Ww earned about one-third more than the value of her housework.

The analysis so far has considered only the benefit structure; we must now analyze the effect of social security taxes on the respective treatment of FW and FH. We will first consider the tax solely as a revenue measure and then evaluate the combined tax-benefit structure, analogizing the tax to an insurance premium.

The social security tax on Ww's $30 wages, analyzed apart from benefits, is not defensible as a general revenue measure for two reasons. First, the imposition of a tax on the $20 of wages which equals the tax-free imputed income earned by WH favors housework which is tax-exempt, and is objectionable for the same reasons as is the disallowance of a deduction for Ww in the income tax. Second, the remaining $10 of wages earned by Ww, which provided FW with a higher standard of living than FH, does not represent the actual amount by which FW's tax capacity exceeds FH's. The federal government normally uses a progressive income tax to reach the differing tax

perform productive housework. If statutory equality between husband and wife is desired, the statute should reduce the taxes of the "secondary earner" in the family. This neutrality between men and women may not be constitutionally required. Gruenwald v. Gardner, 390 F.2d 591 (2d Cir. 1968). *Contra*, Moritz v. Commissioner, CCH 1972 STAND. FED. TAX REP., U.S. TAX CAS. (72-2, at 85,908) ¶ 9759 (10th Cir). But it is becoming a statutory practice. 42 U.S.C. § 414(a)(1) (Supp. III, 1973) equalizes the retirement age for men and women for computing the social security benefit base, and 42 U.S.C. § 402(f) (Supp. III, 1973) gives widows and widowers equal rights to take actuarially reduced benefits.

[48] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971, at 331. The data were reported only for working wives, not "secondary workers" of both sexes.

[49] *Id.* at 334.

[50] *Id.* at 234.

capacities of different families. There is no reason to accept a proportionally higher tax on FW, therefore, as a technique for reaching the amount by which FW's tax capacity exceeds FH's.

Since the tax on Ww's wages cannot be justified as a general revenue measure, it must instead be justified as the purchase price of her social security benefits analagous to an insurance premium. From this perspective, the benefit structure is defective because it fails to provide Ww with a return for her taxes. Both FW and FL have a tax base of $130, but FW receives lower benefits than FL; instead FW's benefits equal FH's even though FH pays a tax on only $100.[51]

There is, of course, nothing inherently wrong with treating FH and FW the same, as a welfare measure, even though FH's taxes are lower than FW's. Indeed, the basic benefit structure for single workers uses the surplus produced by the social security tax to raise the benefits of workers with low incomes[52] and general revenues finance a Supplementary Security Income program[53] which often gives individuals who paid no taxes a benefit equal to the social security benefit.[54] The point is that the equality of FH and FW in the social security system does not result from a decision that FW, with a $130 tax base, should receive a certain benefit and FH, as a matter of welfare policy, should be provided benefits at the same level. If such a welfare policy existed, it would be similarly reflected in the basic benefit structure for single insured workers with tax bases of $130 and $100. However, the benefit levels of single workers earning these amounts are different, a difference which mysteriously disappears in the case of FW and FH. Apparently, FW's benefits have simply been allowed to remain at FH's benefit level without regard to the fact that Ww's tax payments raised FW's tax burden to the level borne by a family with a single worker earning $130.

The argument for giving Ww a fair return for her tax premiums does not depend on a belief that the insurance premium analogy for social security taxes is an accurate description of the tax-benefit structure.[55]

---

[51] 42 U.S.C. § 415(a) (1970).

[52] *Id.*

[53] *Id.* §§ 1381–83c.

[54] *Id.* § 1382(b)(2).

[55] Critics of the analogy point to the fact that private insurance benefits are a legal obligation backed up by reserves, whereas social security benefits are funded on a pay-as-you-go basis out of the current taxes of workers and are, therefore, subject to political, economic, and demographic exigencies. W. COHEN & M. FRIEDMAN, SOCIAL SECURITY: UNIVERSAL OR SELECTIVE? 23–26 (1972).

In response, it is pointed out that social and private insurance may not be significantly different. The political process seems to have produced social insurance benefits which are a reasonable return in relation to prior taxes, PERSPECTIVES at 167–71, and the legal rights in private insurance are subject to economic risks and may even be illusory if an

It is sufficient that, in the public's view, the taxes purchase benefits similar to insurance. There is no justification for a tax-benefit structure which purports to provide insurance for all purchasers except Ww. Even if the insurance analogy were a fraud on the public, Ww is entitled to the same value for her taxes as any other taxpayer.

The unfairness of taxing Ww without providing corresponding benefits could be remedied by exempting Ww from taxation[56] rather than by increasing her family's benefit base. An exemption from tax has the unfortunate effect, however, of treating Ww very differently from other wage-workers whose work entitles them to compulsory social insurance benefits. Different treatment of Ww and other wage-workers does not promote the overriding objective of achieving fair treatment for working women. As long as Ww works and workers generally are forced to buy insurance, Ww's $30 tax payment should entitle FW to the same benefits as any other family earning $130.

It is not clear, however, that Ww should be forced to buy insurance by paying tax on all $30 of her wages. The discussion of Ww's tax-benefit situation has so far focused on the inequity between FW and FL. We must also compare Ww with WH in this context before we too readily give FW a $130 tax and benefit base. As noted earlier, the public views the social security tax-benefit structure as an insurance program which benefits its participants. If the primary concern is neutrality between Ww in FW and WH in FH, rather than equity between FW and FL, Ww's participation in the insurance program should be limited to the amount by which her wages give her a higher standard of living than WH. The result is exactly the same whether we consider the benefit structure alone or consider the tax-benefit relationship. In both situations, there is a benefit dispensed by the government and in both situations wage-workers should receive no greater advantage over houseworkers than is accounted for by the improved standard of living which has resulted from working for wages. The price of such

employee's assumptions about vesting are too optimistic. The close relationship between current taxes and future benefits, which justifies use of the insurance premium analogy, is not undermined by the fact that current taxes are used to finance a benefit structure which provides lower income earners who survive to enjoy their benefits with a much better insurance benefit than their taxes might warrant. As long as reserves are not maintained and the system is on a pay-as-you-go basis, the surplus produced by an expanding economy and favorable young:elderly population ratio can be used either to lower social security taxes, help the poor, or for any other purpose. If future benefits for middle income wage earners will be adequate in relation to current taxes, a reduction of tax premiums would result in a windfall for these taxpayers, and the use of the surplus for workers with low incomes is not unreasonable.

[56] The appropriate mechanism might be a credit against income taxes. Workers presently get a credit if social security taxes are overwithheld. Sections 31(b), 6413(c).

neutrality may be inequity between FW and FL, both of whom earn $130, but that inequity also resulted when we allowed Ww to deduct household and child care for income tax purposes.

As a consequence of this analysis, Ww's participation in the insurance program should be limited to the $10 in wages which represent the actual amount by which FW's standard of living was improved over FH's because of Ww's wage-work. Only one-third of Ww's wages would therefore be subject to taxation and, as in the situation where the benefits were considered apart from taxes, only one-third of her wages should be added to FW's benefit base.

We have shown that the administrative problem of increasing FW's benefit base by one-third of Ww's wages can be solved by adjusting the benefit bases of married couples by the specified percentage of Ww's wages. The adjustment of her tax payment is more difficult. In order to retain the simplicity of employer withholding on gross wages, Ww's employer should continue to treat her as owing taxes on $30. Ww would, however, be entitled to a refund at the end of the year for two-thirds of her taxes, just as a worker whose social security taxes exceed the maximum because he has worked for two employers is now entitled to a refund.[57]

Separate Benefits for the Wife

The resolution of the comparative tax-benefit treatment of FH to FW and FL according to the "neutrality" principle does not determine whether the wife's contribution to the family ought to be recognized by awarding her a benefit "separate" from her husband's benefit. Whatever benefit structure is chosen to equalize treatment of the family with a working wife, the question of her entitlement to a separate benefit still arises.

The broadest conception of a "separate" benefit for the wife is a partnership approach to the family's earnings. This approach would recognize the wife's productive work by allocating to her a percentage, perhaps half, of the family's benefit base as it is earned during the family's productive years. Splitting family income in order to compute benefit bases would, however, create irrational disparities between benefits for families and single individuals with similar income. At present, a family consisting of a husband and wife receives 50 percent more than a single individual with the same benefit base in recognition of the family's greater need. The welfare objectives behind aiding a family

[57] *Id.*

would be poorly served, however, by splitting the family's benefit base between husband and wife. The problem arises because benefits represent a larger percentage of the benefit base as income declines.[58] If the total earnings of a family were split between husband and wife during their working lives, a family would receive an advantage over a single individual beyond that currently provided under the 50 percent supplement. Furthermore, the added advantage over the single individual derived by the family from splitting its income would not be a uniform additional percentage of the benefits provided to single individuals with the same earnings, as it now is; instead it would vary depending upon how the benefit structure for individuals helps those with declining incomes. A change in the relative benefits provided to families and those provided to single individuals may, of course, be desirable.[59] Income splitting, however, is a poor way to accomplish these welfare objectives.

Even if the partnership approach for computing the wife's benefit base is rejected, the wife's contribution to the household might still be recognized by assigning her a separate benefit. Thus, even if her benefit base is not computed by allocating to her a share of the family's earnings during their productive years, a share of the family's benefits could be hers, free from dependence upon whether or not the husband works.[60] At present, the wife's benefits depend on her husband's work status unless her benefits are based on her own remunerative work in the labor force. Her 50 percent derivative benefit is not only mathematically derived from her husband's benefit but is reduced if her husband has earnings.[61] Her separate contribution to the household might be better

---

[58] *See* note 51 *supra.*

[59] PERSPECTIVES at 84–86.

[60] A recent proposal would have allowed the wife a separate benefit if both husband and wife had worked 20 years. H.R. 1, 92d Cong., 1st Sess. § 110 (1971). It permitted the husband and wife to (1) add their earnings together to determine the benefit base, (2) add 50 percent to the benefit derived from that base, and (3) split those benefits between them. The main point of the proposal, however, was to treat families equally regardless of which members of the family earned the income, *i.e.*, equalize FW and FL. A separate benefit for each spouse was an incidental feature of the proposal.

[61] 42 U.S.C. § 403(b) (1970). When the husband's earnings reduce but do not eliminate the family's benefits payable in a particular month, the amount payable to each beneficiary is apportioned in accordance with each beneficiary's original entitlement without adjustment for the family maximum and then reduced, if necessary, to reflect the family maximum provisions. For example, assume that the benefits payable to a family in which no one works are $100 for the husband, $50 for the wife and $50 for the child. If the family maximum is $150, the benefits are reduced so that the husband (assuming he is the insured worker) receives $100 and each dependent receives $25. *Id.* § 403(a). If the husband works and his earnings reduce the $150 benefits by $70 (leaving $80 for distribution among the family members), the $80 is allocated in a 2:1:1 ratio among the family; *i.e.*, $40 for the husband and $20 for each dependent. Since that is less than the ceiling resulting from the family maximum, no further reduction is necessary. *See* So-

reflected by allocating to her a portion of the family's total benefits and making her share independent of her husband's work, just as it would be if she had her own benefits based on her own wages.

If the wife is entitled to a separate benefit, what percentage is appropriate? A useful analogy for determining the wife's share of family earnings, which would support her claim to an equal share, is the approach taken by those states which recognize "community property."[62] Wages earned by remunerative work in the market place are not used as the measure of each individual's contribution to the family's welfare.

The wife's separate benefit has so far been discussed on the assumption that an undivided family unit was receiving benefits. The partnership approach, allocating benefit bases to husband and wife, was found deficient because it produced unjustified inequities between benefits for a single individual and those for a family unit. The partnership approach may be justified, however, when deciding how to recognize the wife's individual productive contributions to a family which has been separated because of divorce or death. Once the family unit separates, it is inappropriate to compare the benefits to be received by its former members with the benefits to be received by a single individual having the same income as the family. For example, if WH in FH is divorced from her husband at age 50, she might be allowed to carry with her one-half of the family's benefit base ($50) rather than, as under the present system, no benefit base resulting from her prior contribution to the household.[63] It is true that WH and her husband, if they each continue to earn one-half of the family's benefit base ($50 each, for example), will together receive more benefits than a single person earning FH's benefit base ($100). However, there is no reason to deny WH and her husband these benefits, which are inherent in a benefit structure designed to aid poorer workers, if each member is entitled to be viewed as a separate working unit once the family disintegrates. They are no different from single individuals, each with a $50 benefit base, whose total benefits exceed those of a single worker with a $100 benefit base. If there is concern that a family unit might purposely split by

CIAL SECURITY AD., U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, SOCIAL SECURITY HANDBOOK §§ 733, 734, 1809, 1810 (1974).

[62] 4A R. POWELL, THE LAW OF REAL PROPERTY ¶ 625, at 713–14 (1973). Community property is any property acquired during the marriage other than by gift, descent, or devise. It is divided equally between the spouses because they are presumed to have made equal contributions to the family's wellbeing. *Id.*

[63] Although she has no benefit base resulting from her role as housewife, she may be entitled to derivative benefits based on her husband's earnings. *See* 42 U.S.C. §§ 402(b)(1); (d)(1), (2); (e)(1) (1970).

divorce just before benefits were to begin so that its members will receive higher benefits, WH might be entitled to less than 50 percent of the family's benefit base if they were divorced within some period before benefits begin.[64]

Ww's tax payment may appear to strengthen her claim for a benefit separate from her husband's. However, reliance on Ww's tax payment to establish the wife's rights would be unfortunate. Tax payments are relevant in determining the family's benefit base but are not relevant to the wife's share of that base. Her share depends upon her contribution to the household, not upon the market value attached to her services by the society at large. Emphasis on Ww's tax payment might imply that WH, who pays no tax, is less entitled to a separate benefit than Ww and that the basis for allocating benefits to Ww is the market value of her services on which taxes are paid. The wife's contribution to the household should be a sufficient basis for providing her with separate benefits on an equal basis with her husband whether or not she has paid a tax and regardless of the price which the market place puts on her services.

CONCLUSION

Congressional acceptance of the arguments in this article would lead to the following changes in the income tax: 1) increase of the present $18,000 income ceiling for deducting the full amount of household and child care expenses; 2) allowance of the deduction for household expenses, subject to a dollar ceiling, whether or not a child is being cared for; 3) repeal of the requirement that the spouse work full time in order to be eligible for the deduction; and 4) allowance of the deduction for household and child care expenses whether or not the taxpayer elects the standard deduction.

The following changes would be made in the social security tax and benefit systems: 1) reduction of the secondary worker's social security tax base by two-thirds of that worker's wages; 2) increase of the family's social security benefit base by one-third of the secondary worker's wages; 3) creation of the spouse's right to a "derivative benefit" that is independent of the primary worker's continued participation in the labor force; and 4) creation of a provision enabling a divorced spouse to carry with her one-half of the family's benefit base.

[64] Allocation of 50 percent of the family's benefit base to each family member when the family splits may not be fair to the husband. As a single worker with $100 of wages, he would have a $100 benefit base. Upon his divorce, should his benefit base for the years of his marriage be only $50? A workable compromise might give the husband 75 percent of the family's benefit base while H carries $50 with her.