Michigan Journal of Gender & Law

Volume 3 | Issue 2

1996

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INNOCENT SPOUSES, REASONABLE WOMEN AND DIVORCE: THE GAP BETWEEN REALITY AND THE INTERNAL REVENUE CODE

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Thanks to Ruthann Robson for guidance on sources, to my research assistants, Stephanie Vullo and, especially, Michelle Koelle, for organizing the abundant case-law material on the innocent spouse statute, and to Jean Zorn, for her usual trenchant and constructive editing.

Thanks also to the staff of the *Michigan Journal of Gender & Law* for careful and extremely helpful editing and for patience.

JANET BLISS'S STORY[1]

Janet Bliss had a high school education and married in 1963 when she was twenty-one years old. Her total paid employment experience from that time until 1982 consisted of brief periods of clerical work and part-time babysitting. Janet stayed at home raising their three children. Her husband Hal, in contrast, earned a law degree in 1967, and practiced law continuously since that time.

Hal and Janet moved to the Phoenix, Arizona area in 1967, when he finished law school. In 1973, Hal moved out of the family home for several weeks, returning only when he became ill. Over the next few years, Hal established a pattern of moving out for weeks or months then returning for short periods only to move out again. By 1982, he was living with another woman and paying the expenses for their extra-marital household. During his repeated absences Hal would deposit money in his and Janet's joint checking account twice a month. By 1982 he was depositing approximately $2,400 per month.

Throughout the marriage, Hal handled the family finances. Typically, he gave Janet a small cash allowance to pay for household expenses, but insisted she ask his permission to write checks. Hal never discussed their finances with Janet; when she asked questions, his usual response was to get angry or tell her she was too stupid to understand.

Despite her husband's unfaithfulness, Janet continued to hope for a reconciliation. However, in 1982, Hal initiated divorce proceedings. The divorce decree granted on January 28, 1983 apparently was delayed from December 1982 in order to permit the parties to file a joint tax return for 1982.[2]

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1. The facts that follow are taken from the Tax Court opinion and the trial transcript of Bliss v. Commissioner, 66 T.C.M. (CCH) 522 (1993), *aff'd*, 59 F.3d 374 (2d Cir. 1995). The author acted as counsel to Janet Bliss, and the facts are recounted here with her permission.

2. Internal Revenue Code § 7703(a) provides:

> (1)the determination of whether an individual is married [for the purpose of filing a joint return] shall be made as of the close of his taxable year; except that if his spouse dies during the taxable year such determination shall be made as of the time of such death; and
> (2)an individual legally separated from his spouse under a decree of divorce or separate maintenance shall not be considered as married.

I.R.C. § 7703(a) (1994). Prior to 1986, substantially the same language was contained in then-I.R.C. § 143.

Tax preparation in this family was a male prerogative, as it had been in Janet's own fairly traditional family. She received the clear message while growing up that men were primarily responsible for work and financial matters. Typically, Hal would prepare, or have prepared, the tax return and bring it to Janet for signature. In some years, she signed blank returns. Until 1983, after her divorce, Janet had never prepared her own tax return. Even during the ten years from 1973 through the divorce, when Hal was more frequently away than at home, Janet had no overall knowledge of her husband's finances. She nonetheless routinely signed their joint returns.

Like many other women caught up in divorce proceedings, Janet Bliss hired a well-known divorce lawyer, and trusted him to "take care of everything" for her. In some respects, her divorce lawyer now substituted for her errant husband, becoming the man in her life who was responsible for taking care of financial matters. Janet herself never examined any of the documents produced during discovery for the divorce proceedings, other than the draft separation agreement itself.

The 1982 tax return, signed and filed after Janet and Hal were already divorced, neglected to report as gross income some $33,000 that Hal had received from his law firm. The return classified the $33,000 as a loan, rather than as income.[3] *Without the loan, Hal's reported gross income was approximately $72,000; if the loan had been included as income, his gross income would have been about $115,000, and the tax due more than $15,000 higher than the amount shown on the return that was filed. Janet's well-known divorce lawyer, on whom she relied, failed to detect the understatement of income. He testified that he had determined that Hal's actual income for 1982 was on the order of $72,000, because of a precipitous decline in Hal's billable hours from the previous year, when Hal had earned $114,000.*

The Internal Revenue Service ("IRS") eventually discovered the understatement of income, and issued a deficiency notice to both Janet and Hal. Janet, by this time having put her life back together following the divorce, had earned a college degree and was enrolled in law school. She petitioned

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3. Because the borrower's receipt of loan proceeds is contemporaneous with the assumption of an obligation to repay the loan principal, a loan normally results in no net accession to wealth and hence no gross income. *See* Commissioner v. Indianapolis Power & Light Co., 493 U.S. 203, 211–14 (1990) (holding that refundable customer deposits were loans and therefore not taxable as income to the utility company on receipt).

the Tax Court for relief under the innocent spouse statute, I.R.C. § 6013(e),[4] and a trial was held in December 1989. At the trial, Hal testified for the IRS. Some three and a half years later, in August 1993, the Tax Court finally handed down its decision in the case. It held for the IRS, on the grounds that, although Janet might not actually have known that Hal was understating his income, she had "reason to know" of the understatement of tax.[5] Two years later, in July 1995, the U.S. Court of Appeals for the Second Circuit affirmed.[6] During the entire time that the case was pending, the IRS apparently made no attempt to collect the deficiency from Hal, even though he was earning substantial income and accumulating assets, and even though his actions were the cause of the problem.[7]

INTRODUCTION

Janet Bliss is typical of the more than 435 people who have had their claims for innocent spouse relief determined by the courts since 1971, when such relief first became available.[8] Like 393 of the petitioners, or ninety percent, she is a woman. More than ninety percent of the

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4. I.R.C. § 6013(e) (1994). For a discussion of the specific requirements for relief under § 6013(e), see *infra* text accompanying notes 100–121.

5. Bliss v. Commissioner, 66 T.C.M. (CCH) 522 (1993), *aff'd*, 59 F.3d 374 (2d Cir. 1995). A case involving remarkably similar facts, including the husband's domination of business affairs and the wife's modest lifestyle, was recently decided in favor of the petitioning wife. Smith v. Commissioner, 67 T.C.M. (CCH) 2887 (1994). The *Smith* case, however, did not involve a divorce actually in progress at the time the tax return was signed (the couple had separated in 1986; tax returns at issue were for 1981, 1982 and 1984). It did, however, involve a wife who, unlike Janet Bliss, already had a master's degree and substantial experience in various kinds of employment. *Smith*, 67 T.C.M. (CCH) at 2888–89.

6. Bliss v. Commissioner, 59 F.3d 374 (2d Cir. 1995).

7. The failure to pursue collection action against Hal also conflicts with a stated IRS policy to defer collection action against a putative innocent spouse and to pursue it against a culpable spouse. *See* INTERNAL REVENUE MANUAL (Administration) (CCH) § 53(10)(11).22(2) (Jan. 14, 1991); *see also* Marjorie A. O'Connell, *Innocent Spouse Rules Can Avoid Unexpected Liability on Joint Returns with Former Spouse*, 17 TAX'N FOR LAW. 226, 228–29 (1989). The IRS's choice in Janet Bliss's case to pursue a relatively poor, largely "innocent" ex-wife, however, while not taking collection action against an ex-husband who can be found and who has current income, is not an isolated instance. *See* Richard C.E. Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed*, 43 VAND. L. REV. 317, 323–24 (1989).

8. The statistics in this paragraph derive from a review of all relevant cases available on Westlaw as of June 30, 1995. Spreadsheets containing the statistical analysis were prepared by my research assistant, Michelle Koelle, and are on file with the author.

cases are initially heard in Tax Court,[9] and at the trial level, petitioners win slightly less than twenty-five percent of the cases.[10] The most common explanation for denying relief is that the spouse asserting innocence "had reason to know" of the understatement of tax on the return.[11] "Reason to know" was the basis for failing to qualify for innocent spouse status in approximately fifty-five percent of all cases decided adversely to the petitioner, with no significant difference between male and female petitioners.

The innocent spouse statute purports to relieve one spouse of the otherwise applicable joint-return liability[12] for the other spouse's tax deficiencies, provided the spouse asserting innocence can establish, among other things, that she[13] did not know or have reason to know of the understatement of tax on the joint return.[14] The standard that the courts have generally applied in determining whether a spouse alleging

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9. Upon receipt of the statutory notice of deficiency, a taxpayer who wishes to contest the deficiency in court has two alternatives. The taxpayer may file a petition with the Tax Court within 90 days from the issuance of the deficiency notice for a "redetermination" of the asserted deficiency. Assessment and collection (but not the accumulation of interest and, if applicable, penalties) will be barred until the decision of the Tax Court becomes final. I.R.C. § 6213(a) (1994). Alternatively, the taxpayer may pay the deficiency as asserted by the IRS and then file a claim for a refund. If the refund claim is denied, the taxpayer must file suit for the refund in the appropriate U.S. District Court or in the Court of Federal Claims. I.R.C. § 7422 (1994). Note that the Tax Court may be the only viable option for taxpayers who cannot afford to pay the asserted deficiency up front. *See* JAMES W. QUIGGLE & LIPMAN REDMAN, PROCEDURE BEFORE THE INTERNAL REVENUE SERVICE 145–148 (6th ed. 1984).

10. At the trial court level, men were granted innocent spouse relief in 10 of 42 cases (23.8%), while women were granted relief in 92 of 393 cases (23.4%). On appeal, 16 women and no men were granted relief, and the trial court decisions in favor of women were reversed in two cases. Therefore, after appeal, 106 of 393 women (27.0%) were granted relief.

11. See *infra* text accompanying notes 127–177 for a discussion of the "reason to know" standard.

12. I.R.C. § 6013(d)(3) (1994) provides that "if a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several." For a discussion of the rationale for joint and several liability, see *infra* text accompanying notes 73–81.

13. As noted above, slightly more than 90% of all innocent spouse petitioners are women. Because relatively few men seem to be affected by the statute, and because many of the issues that are raised by the innocent spouse statute are gender-specific, this article refers to those claiming relief as "she."

14. I.R.C. § 6013(e)(1)(C) (1994). A similar, but more restrictive provision permits relief from liability in the case of separate returns filed by spouses in community-property states. I.R.C. § 66(c) (1994). *See infra* text accompanying notes 87–88.

her innocence had reason to know of an understatement of tax on the return is whether "a reasonably prudent taxpayer in her position at the time she signed the return could be expected to know that the return contained a substantial understatement."[15]

All too often, however, a judge's view of whether a particular woman had reason to know of her husband's tax dereliction has little or nothing to do with the realities of that woman's situation or of the situation of women in general. In particular, the standard of reasonable behavior that the courts usually apply in innocent spouse cases, and especially in those cases that involve traumatic events that might affect an ordinary woman's pattern of behavior,[16] seems woefully out of touch with everyday reality. There should be room in federal tax law, as there now is in other areas of the law, for a fuller, more textured view of real people's lives and motivations, which do not always mirror the rational abstractions of the law. As one prescient judge stated in an innocent spouse case, "[e]ven a tax collector should have some heart."[17]

In certain areas of the law, "the man in the Clapham omnibus,"[18] that staple of Anglo-American reasonableness and dispassion, is slowly being made to share legal prominence with newer actors—the reasonable person or even the reasonable woman. In tort law, the "reasonable man" has become, apparently in deference to increased sensitivity, the "reasonable person," even if the attributes of the legal construct making up such a paragon have not changed.[19] In some areas of law, however,

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15. Pietromonaco v. Commissioner, 3 F.3d 1342, 1345 (9th Cir. 1993) (citing Price v. Commissioner, 887 F.2d 959, 965 (9th Cir. 1989)); Sanders v. United States, 509 F.2d 162, 166–67 (5th Cir. 1975).

16. *See infra* text accompanying notes 300–324 (discussing typical responses to divorce).

17. Dakil v. United States, 496 F.2d 431, 433 (10th Cir. 1974).

18. Hall v. Brooklands Auto Racing Club, [1933] 1 K.B. 205, 224. The "man of ordinary prudence" was apparently first mentioned in Vaughan v. Menlove, 3 Bing. N.C. 468, 132 Eng. Rep. 490, 493 (1837), and the "prudent and reasonable man" seems first to have appeared in Blyth v. Birmingham Waterworks Co., 156 Eng. Rep. 1047, 1049 (Ex. Ch. 1856). On the history and content of the "reasonable man" standard, see generally Ronald K. L. Collins, *Language, History and the Legal Process: a Profile of the "Reasonable Man,"* 8 RUT.-CAM. L.J. 311 (1977); Edward Green, *The Reasonable Man: Legal Fiction or Psychosocial Reality?*, 2 LAW & SOC'Y REV. 241 (1968); Fleming James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1 (1951); Osborne Reynolds, *The Reasonable Man of Negligence Law: A Health Report on the "Odious Creature,"* 23 OKLA. L. REV. 410 (1970); Randy T. Austin, Note, *Better Off With the Reasonable Man Dead or The Reasonable Man Did the Darndest Things*, 1992 B.Y.U. L. REV. 479.

19. Although the name of the reasonable actor may have changed from "man" to "person," the accumulation of case-law situations and precedents that determine

the realization that there are gender-specific bearers of reason is gaining ground. The "reasonable woman" or the "reasonable victim"[20] seem to represent an emerging standard,[21] particularly in sexual harassment cases[22] and in cases involving women who kill or injure their battering or otherwise abusive mates.[23] In other areas of law, such as the law of fright and the infliction of emotional distress,[24] or the state-of-mind defense that reduces homicide from murder to manslaughter,[25] the outlines of a standard of reasonableness that takes greater cognizance of the specific attributes of the person involved are beginning to emerge.

These developments, while a welcome departure from the monolithic and male-dominated legal fiction of the past, raise their own questions. For example, is there only one "reasonable woman," or are differences of race, class, personal experience, family situation, etc., to

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whether a particular actor is to be viewed as having acted reasonably is still made up largely of factual settings in which the actors and the expected behaviors were overwhelmingly male. Wendy Parker, *The Reasonable Person: a Gendered Concept*, 23(2) VICTORIA U. WELLINGTON L. REV. 105, 108–10 (1993).

20. *See, e.g.*, Harris v. International Paper Co., 765 F. Supp. 1509, 1516 n.12 (D. Me. 1991) ("reasonable person from the protected group [race, not gender in this case] of which the alleged victim is a member").

21. *See infra* text accompanying notes 178–187.

22. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (adopting the reasonable woman standard). Similar positions have been taken by the U.S. Courts of Appeals for the Third Circuit, Andrews v. City of Phila., 895 F.2d 1469, 1482 (3d Cir. 1990), the Sixth Circuit, Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987), and the Eighth Circuit, Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 962 n.3 (8th Cir. 1993). The Supreme Court's most recent decision regarding sexual harassment does not explicitly invoke the "reasonable woman" standard but rather looks to whether a "reasonable person" would find a particular work environment hostile or abusive. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993). However, the first court of appeals decision relying on *Harris* appears to require consideration of the employee's gender. Saxton v. American Tel. & Tel. Co. 10 F.3d 526, 534 (7th Cir. 1993) ("[W]e consider . . . the effect the discriminatory conduct . . . likely would have had on a reasonable employee *in her position.*") (emphasis added).

23. *See, e.g.*, State v. Wanrow, 559 P.2d 548 (Wash. 1977); sources cited *infra* note 264.

24. *See infra* text accompanying notes 219–224.

25. MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962). The Model Penal Code defines manslaughter as "a homicide which would otherwise be murder . . . committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he [sic] believes them to be." MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962).

be taken into account?[26] And perhaps as important, who is to decide what the reasonable woman would do in a particular situation—the still male-dominated judiciary?[27] When one looks at any area of law where reasonableness is a concern, these questions must necessarily be faced.

This Article asks whether the "reasonable woman" should become the standard for women seeking relief from tax liabilities under the innocent spouse provision of the I.R.C. and whether an even more specific standard should be adopted for women who are also going through divorce or are in similar situations.

Part I of the Article discusses the legislative and judicial history of the innocent-spouse statute, examining some recent doctrinal splits among the courts of appeals and between those courts and the U.S. Tax Court, and focusing on the various aspects of "reasonableness" that the courts have emphasized in determining whether a woman had reason to know of a tax understatement. Part II considers the "reasonable woman" concept, particularly as it has evolved in the sexual harassment and battered women's self-defense cases, and discusses whether the standard is appropriate in the innocent spouse arena. Part III analyzes the particular pressures that apply to women in the midst of a divorce or separation proceeding and discusses the use of a sub-category of "reasonable women" standard for these women. The Article concludes, first, by suggesting three remedial steps that would reduce the injustice that is apparent in joint-return liability under the income-tax laws, as such liability is applied today: (1) a recognition of the reasonable woman and her sub-categories by the courts; (2) a liberalization of the innocent spouse statute by Congress; and (3) the abolition of joint-return liability. Second, the Article recognizes that much of such remedial action, with the possible exception of the abolition of joint-return liability, might amount to little more than rearranging the deck chairs on the Titanic. As one wise non-lawyer put it, " . . . *the master's tools will never dismantle the master's house.*"[28]

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26. For a discussion of conflicts that may arise with the adoption of a "reasonable woman" standard, see sources cited *infra* note 201.

27. On the general under-representation of women in the judiciary, see Miriam G. Cedarbaum, *Women on the Federal Bench*, 73 B.U. L. REV. 39 (1993); Sheldon Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 344 (1981); Sheldon Goldman & Matthew Saronson, *Clinton's Nontraditional Judges: Creating a More Representative Bench*, 78 JUDICATURE 68 (1994).

28. AUDRE LORDE, SISTER OUTSIDER 112 (1994).

I. The Innocent Spouse Statute[29]

At one extreme, petitioners in the reported innocent spouse cases are wives with little formal education, a cultural tradition of deferring to male authority, and no knowledge of either their husbands' business affairs or any significant aspects of the family finances. At the other, they are women of substantial wealth, education, and business achievement who took an active role in family financial decisions.

For example, in Pietromonaco v. Commissioner,[30] the petitioner Emilia Pietromonaco married her husband Erminio at age eighteen, soon after she graduated from high school. She remained married for fifty-two years, until Erminio's death.[31] She never worked outside the home, and never obtained any further education.[32] During their marriage, she stayed at home, raised the children, cooked the meals. She let Erminio handle the money, except for paying for groceries, utility bills, and the mortgage, which she paid with checks from their joint account.[33] As their daughter described the situation, Erminio "wanted to be in charge of everything and he really didn't want my mother to be involved financially or with the business, and I guess she was typical in being a housewife. She enjoyed that and was content doing that."[34]

Erminio ran a cash business, a hair salon located some forty miles from their home.[35] He apparently hid income, which he used to pay

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29. The innocent spouse statute has been the subject of considerable academic and practitioner comment. *See, e.g.*, Richard C.E. Beck, *supra* note 7; Jerome Borison, *Innocent Spouse Relief: a Call for Legislative and Judicial Liberalization*, 40 Tax Law. 819 (1987); James B. Lewis, *Innocent Spouse Cases: Comments Inspired by Professor Borison's Article*, 40 Tax Law. 865 (1987); William J. Minick III, *The Innocent Spouse Doctrine: The Need for Reform and Planning Alternatives in the State of Texas*, 66 Taxes 56 (1987); O'Connell, *supra* note 7; James E. Panny & Marc L. Faust, *The Innocent Spouse Provisions of the Internal Revenue Code: In Search of Equity*, 32 U. Miami L. Rev. 137 (1977); J. Timothy Philipps & L. Bradford Braford, *Even a Tax Collector Should Have Some Heart: Equitable Relief for the Innocent Spouse Under I.R.C. § 6013(e)*, 8 N. Ill. U. L. Rev. 33 (1987); Stephen A. Zorn, *Lost Innocence: the Tax Court and I.R.C. § 6013(e)*, 48 Tax Notes 1177 (1990); Lisa Bittan, Note, *The Innocent Spouse Rule: Recent Developments and Proposed Changes*, 14 Sw. U. L. Rev. 129; Donna Y. Chance, Note, *Tax Relief for an Innocent Spouse for Gross Income Omissions on Income Tax Returns*, 7 T. Marshall L. Rev. 300 (1982).

30. Pietromonaco v. Commissioner, 3 F.3d 1342 (9th Cir. 1993).

31. *Pietromonaco*, 3 F.3d at 1344.

32. *Pietromonaco*, 3 F.3d at 1344.

33. *Pietromonaco*, 3 F.3d at 1344.

34. *Pietromonaco*, 3 F.3d at 1344.

35. *Pietromonaco*, 3 F.3d at 1344.

gambling debts, from the Internal Revenue Service.[36] From what Emilia could tell, their lifestyle did not reflect any great changes in wealth.[37] The high points of that lifestyle were hiring a gardener, regular trips for Emilia to the beauty parlor, the bowling alley, and the cafeteria, and occasional two-day outings to Las Vegas.[38] By the time the IRS got around to issuing a deficiency notice with respect to the unreported income, Erminio had been stricken with Alzheimer's disease, and by the time of the trial in Tax Court, he was incompetent.[39] While the trial court found that Emilia was not an innocent spouse, because of the "extravagance" of having a part-time gardener and regular hair stylings, the Court of Appeals for the Ninth Circuit reversed, finding her to be exactly the sort of person for whom the innocent spouse statute was intended.[40]

In Ratana v. Commissioner,[41] the Court of Appeals for the Fourth Circuit demonstrated sympathy for a wife who came from a cultural background that was not part of the American mainstream. The woman was a Filipina married to a Thai man who worked for the Thai embassy in Washington, but whose major source of income appeared to be from drug trafficking. She argued that in Thai culture, "a wife submits to her husband and does not question his demeanor."[42] Despite the wife's tertiary education (she was qualified as a nurse) and her direct responsibility for paying the household bills, the court found she had no reason to know of the income her husband had omitted from their tax returns, except to the extent that such income was and could reasonably be identified as the specific source of the cash allowance he gave her.[43] Similarly, in Aina v. Commissioner,[44] a Nigerian wife moved to the United States with her Nigerian husband. She turned all her earnings over to her husband, leaving all spending decisions up to

36. *Pietromonaco*, 3 F.3d at 1348.
37. *Pietromonaco*, 3 F.3d at 1344.
38. *Pietromonaco*, 3 F.3d at 1346–47, 1348.
39. *Pietromonaco*, 3 F.3d at 1346–47, 1348.
40. *Pietromonaco*, 3 F.3d at 1347–48.
41. Ratana v. Commissioner, 662 F.2d 220 (4th Cir. 1981), *rev'g in part and aff'g in part* 40 T.C.M. (CCH) 1119 (1980).
42. *Ratana*, 662 F.2d at 222.
43. *Ratana*, 662 F.2d at 225.
44. Aina v. Commissioner, 53 T.C.M. (CCH) 88 (1987).

him.[45] The court granted innocent spouse relief even though the wife had post-secondary education and considerable experience working outside the home.[46]

The case law is not entirely consistent, however, even with respect to these archetypal dependent spouses. For example, in Estate of Jackson v. Commissioner,[47] a wife with only a sixth grade education was held to have had reason to know of the husband's omitted income, although her husband made all financial decisions for the family, paid all the bills, and physically abused her whenever she asked about money matters.[48] She was denied innocent spouse relief, apparently on the basis that she should have realized that her husband's large cash outlays were incompatible with the income reported on their joint returns.[49]

When a wife has more education or business experience, her chances of obtaining innocent spouse relief diminish significantly. For example, in Hayman v. Commissioner,[50] the petitioner wife had received a B.S. degree and was vice president and marketing director for a large clothing chain.[51] Her husband was a promoter of various tax shelter investments, in which the Haymans themselves invested.[52] The Court of Appeals for the Second Circuit, affirming the Tax Court, found that Mrs. Hayman had reason to know of understatements of tax on their joint return attributable to the tax shelter deals, in part at least because of her "education; her involvement in the family's financial affairs; [and] her business experience."[53] Although Jacqueline Hayman apparently spent no more time reviewing the tax return that her husband presented to her than did the less well educated Emilia Pietromonaco,[54] Mrs. Hayman was charged by the court with a stricter duty of inquiry than was Mrs. Pietromonaco. Such a distinction may well be justifiable because there may not be a single "reasonable

45. *Aina*, 53 T.C.M. (CCH) at 92.
46. *Aina*, 53 T.C.M. (CCH) at 89–92.
47. Jackson v. Commissioner, 72 T.C. 356 (1979).
48. *Jackson*, 72 T.C. at 359–60.
49. *Jackson*, 72 T.C. at 361–62.
50. Hayman v. Commissioner, 992 F.2d 1256 (2d Cir. 1993).
51. *Hayman*, 992 F.2d at 1258.
52. *Hayman*, 992 F.2d at 1258.
53. *Hayman*, 992 F.2d at 1262.
54. *See Hayman*, 942 F.2d at 1258 (husband presented tax returns and wife signed them without understanding them); Pietromonaco v. Commissioner, 3 F.3d at 1342, 1344 (9th Cir. 1993) (wife signed tax returns "without question").

woman" standard, but, rather, multiple standards;[55] nonetheless the cases do not articulate a rationale for making such distinctions.

In contrast, Anna Friedman was granted innocent spouse status by the same court that denied it to Hayman.[56] She was held not to have had reason to know of an understatement of tax on the Friedman's joint return attributable to her husband's real estate deals, even though prior to their marriage she had worked as a secretary in his office.[57] Friedman, unlike Jacqueline Hayman, had only a high school education, and was described by the court as "possessing only a rudimentary grasp of the simplest tax principles" and as falling far short of the "sophisticated financial insight necessary to assess the propriety of a complex individual tax shelter."[58]

In some cases, the mere fact of being well-off and having ready access to large sums of money appears to be a substitute for advanced education or business experience. For example, in Bokum v. Commissioner,[59] the wife had only a junior college education and no involvement in her husband's business affairs, other than occasionally giving him money from her trust fund for his investments.[60] Apparently, neither her husband nor his accountant knew that there had been a tax understatement.[61] The Tax Court nonetheless held that the wife had reason to know of the understatement because: (1) the tax preparer failed to sign his name at the bottom of the return, which, the Tax Court said, should have alerted her to a possible problem;[62] (2) there was an arithmetic error in Schedule A of the return;[63] and (3) the size of the Schedule A item at issue—approximately $2 million—should have alerted her to the need for more inquiry.[64] The facts of *Bokum* indicate that no amount of inquiry, short perhaps of hiring another, more competent accountant to review the entire return or hiring

55. *See infra* text accompanying notes 260–261.

56. Friedman v. Commissioner, 53 F.3d 523 (2d Cir. 1995).

57. *Friedman*, 53 F.3d at 526, 532.

58. *Friedman*, 53 F.3d at 530.

59. Bokum v. Commissioner, 94 T.C. 126 (1990), *aff'd*, 992 F.2d 1132 (11th Cir. 1993). The court of appeals did not address the reason to know issue, affirming solely on the basis that it would not be inequitable to hold Mrs. Bokum liable for the deficiency. Bokum v. Commissioner, 992 F.2d 1132, 1134 (11th Cir. 1993).

60. She had trust fund income of $120,000–150,000 annually. *Bokum*, 94 T.C. at 128.

61. *Bokum*, 94 T.C. at 132.

62. *Bokum*, 94 T.C. at 147.

63. *Bokum*, 94 T.C. at 148.

64. *Bokum*, 94 T.C. at 148.

investigators to delve into the other spouse's finances[65] would have caused Mrs. Bokum to have had actual knowledge of the understatement of tax.

If all women behaved the way Emilia Pietromonaco and other less-educated, less business-experienced petitioners did, then there would be few questions about whether they were innocent with respect to their husbands' tax cheating. But Emilia Pietromonaco is no longer, if she ever was, typical of most American women. Women work, they write checks, they pay the bills, and the determination of whether they should be held responsible for their husbands' tax derelictions has become more complex. The tendency of the courts, as in the *Hayman* and *Bokum* cases, has been to decline to find "innocence" where the wife is moderately well educated, professionally successful, or has even a moderate familiarity with family finances and her husband's business. But a substantial and legally very imprecise middle ground exists, where a spouse seeking relief under I.R.C. § 6013(e) has greater education and experience than the homemaker archetype of the *Pietromonaco* case, but less than the successful career woman in *Hayman*. A more carefully structured approach to defining the reasonableness of women's expectations with respect to the joint tax returns that they file with their husbands might eliminate some of this imprecision.

This section of the Article reviews the statutory provisions establishing joint and several liability and creating the innocent spouse exception, together with the rather limited legislative and judicial history that might aid in interpreting these statutes. The section then examines in some detail the various elements of an innocent spouse claim, in particular the question of whether a spouse seeking to be relieved of liability had reason to know of her husband's understatement of tax on the joint return.

A. The Overall Statutory Scheme

In general, husbands and wives who file joint federal income tax returns are jointly and severally liable for any tax due, including interest and penalties, even if all the tax liability is attributable to the economic

65. Judge Whalen advocated the latter procedure in Janet Bliss' case. Transcript of record at 293, Bliss v. Commissioner, 66 T.C.M. (CCH) 522 (1993), *aff'd*, 59 F.3d 374 (2d Cir. 1995).

activity of only one spouse.[66] Such joint and several liability has been incorporated in the Internal Revenue Code since 1938.[67] Although earlier legislation had authorized the filing of joint returns,[68] their effect remained unclear for some years.[69] As early as the 1920s, the IRS insisted that the tax liability deriving from a joint return be joint and several,[70] but this theory was rejected by the Court of Appeals for the Ninth Circuit in 1935 in *Cole v. Commissioner*.[71] Shortly thereafter, Congress reversed the effect of the *Cole* decision by enacting what is

66. I.R.C § 6013(d)(3) (1994).

67. Revenue Act of 1938, ch. 289, § 51(b), 52 Stat. 447, 476.

68. Revenue Act of 1918, ch. 18, § 223, 40 Stat. 1057, 1074. In 1921, Congress made it clear that the joint return should be used to calculate the overall tax due on the basis of the aggregate income of the spouses, but did not explicitly establish joint and several liability. Revenue Act of 1921, ch. 136, § 223(b)(2), 42 Stat. 227, 250. The joint return provided no special rate advantage until 1948, when Congress enacted income-splitting provisions. Revenue Act of 1948, ch. 168, § 301, 62 Stat. 110, 114. The current benefits of joint-return filings are reflected in I.R.C. § 1(a), setting out the rate schedule applicable to the aggregate taxable income of a husband and wife filing jointly. I.R.C. § 1(a) (1994).

69. Under the original provisions authorizing joint-return filing, the same rate schedule applied to the aggregate income reported on a return, whether that income was for one person or two. As a result, in most circumstances, the filing of a joint return would tend to increase the total tax due by moving the taxpayers to a higher marginal rate bracket. *See* Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1400 (1975). *See also* Beck, *supra* note 7, at 336 (noting that the aggregation of husband's and wife's income and deductions might either increase or reduce the tax due).

70. I.T. 1575, II-1 C.B. 144 (1923) (husband and wife are "individually liable for the full amount of tax shown to be due on [a joint] return"). This position was adopted by the Court of Appeals for the Fifth Circuit in Anderson v. United States, 48 F.2d 201 (5th Cir. 1931) (implicitly adopting joint and several liability once it is determined that a joint return has been filed) and by the court of claims in Moore v. United States, 37 F. Supp. 136, 140 (Ct. Cl. 1941). The Board of Tax Appeals, predecessor of the Tax Court, also applied a joint and several liability rule in cases where income could not be allocated between husband and wife. *See, e.g.*, Rogers v. Commissioner, 38 B.T.A. 16, 26 (1938); Seder v. Commissioner, 38 B.T.A. 874 (1938). For discussion of the IRS's early theories of joint and several liability, see Beck, *supra* note 7, at 335–40.

71. Cole v. Commissioner, 81 F.2d 485 (9th Cir. 1935), *rev'g* 29 B.T.A. 602 (1933). In *Cole*, the court rejected the Internal Revenue Service's contention that joint and several liability was inescapably required by the "privilege" of joint filing. *Cole*, 81 F.2d at 487 (citing Fawsett v. Commissioner, 31 B.T.A. 139, 141–42 (1934)). The court also rejected the IRS argument that joint and several liability was required by "administrative necessity." *Cole*, 81 F.2d at 488. *Accord*, Commissioner v. Rabenold, 108 F.2d 639, 641 (2d Cir. 1940); Crowe v. Commissioner, 86 F.2d 796, 798 (7th Cir. 1936).

now Code I.R.C. § 6013(d), explicitly establishing joint and several liability.[72] It is not clear from the language of the 1938 amendment whether the joint and several liability attached only to the tax reported as due on the joint return or also to any additional tax that might result from the omission of income or the claiming of improper deductions.

1. The Development of Joint and Several Liability

The rationale for joint and several liability involves two elements: first, a *quid pro quo* for the "privilege" of filing a joint return,[73] and, second, the IRS' claim that any other approach to liability would create excessive administrative difficulties.[74] In the 1990s many women work outside the home and the tax rates often impose a "marriage penalty"[75] on two-earner couples. It is no longer clear, if it ever was, that the joint return represents a "privilege." Nor is it clear how eliminating joint returns or joint and several liability would substantially burden the IRS. On the contrary, the burdens imposed by the courts on a woman attempting to establish her status as an innocent spouse[76] suggest that the administrative difficulty, if any, falls heavily on the petitioner.

The desirability of using joint returns, and, hence, the exposure of women to liability for their husbands' tax cheating, was significantly increased by the introduction of income splitting in the Revenue Act of

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72. Revenue Act of 1938, ch. 289, § 51(b), 52 Stat. 447, 476.

73. *See, e.g.*, Sonnenborn v. Commissioner, 57 T.C. 373, 380–81 (1971) (joint and several liability is exacted in exchange for the "highly valuable privilege" of filing a joint return and, generally, obtaining the lower tax burden associated with such a return). *See also* Pesch v. Commissioner, 78 T.C. 100, 129–30 (1982) (setting out the Tax Court's view of the history of joint and several liability).

74. As the court of appeals suggested in *Cole*, this burden could be reduced by the simple expedient of requiring the spouse seeking to avoid liability to prove the proper division of tax liability as between the spouses. *Cole*, 81 F.2d at 487–88. Administrative convenience has been cited by Congress, however, as a reason for the imposition of joint and several liability. *See* H.R. REP. No. 1734, 91st Cong., 2d Sess. 2 (1970); S. REP. No. 1537, 91st Cong., 2d Sess. 2 (1970). Neither report spells out the nature of this administrative necessity.

75. *See* Harvey S. Rosen, *The Marriage Tax Is Down But Not Out*, 40 NAT'L TAX J. 567 (1987) (estimating that, in 1988, some 40% of American married couples paid an average of $1100 more than they would have if they had filed as single, unmarried individuals, but that 53% of married couples—those in which one spouse did not work outside the home or had minimal income—received an average marriage subsidy of $600).

76. *See infra* text accompanying notes 100–121.

1948.[77] In the then-typical one-wage-earner family,[78] income splitting resulted in substantially lower tax liability for the family's sole wage-earner than if each spouse had filed separately.[79] By 1990, roughly ninety-nine percent of all married couples filed joint returns, with each spouse thus incurring personal liability for the taxes due on the other's

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77. Revenue Act of 1948, ch. 168, § 301, 62 Stat. 110, 114 (1948). Adoption of the income-splitting joint return appears to have been, in part, a reaction to the spread of community-property laws that followed the Supreme Court's decision in Poe v. Seaborn, 282 U.S. 101 (1930). The Supreme Court held that the division of marital community income mandated by community-property statutes was effective for federal income-tax purposes. *Poe*, 282 U.S. at 116. The *Poe* holding contrasts with that of Lucas v. Earl, 281 U.S. 111 (1930), in which the Court declined to give tax effect to a contractual arrangement entered into by husband and wife that purported irrevocably to assign half the husband's income to the wife, even though the contract was formed before there was any income tax to avoid.

In addition, the income-splitting provision of the 1948 Act was part of an overall Republican strategy of tax reduction, included in a bill that also increased personal exemptions and added an exemption for the blind and elderly. The chair of the House Ways and Means Committee, Republican Harold Knutson, justified the reductions as part of his party's effort to thwart "the short-haired women and long-haired men of alien minds in the administrative branch of government [who] were trying to wreck the American way of life and install a hybrid oligarchy at Washington through confiscatory taxation," *quoted in* Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259, 294 (1988).

78. In the immediate aftermath of World War II, more than two million American women left the labor force. While women made up 35.4% of the civilian labor force in 1944 (up from 27.6% in 1940), by 1947 that percentage had fallen back to 28.6%, essentially its prewar level. Jones, *supra* note 77, at 264. In addition to the economic pressure on women's jobs from returning (mostly male) soldiers, there was also a substantial cultural bias in favor of the mother-and-homemaker model of women's lives. The first edition of Dr. Benjamin Spock's *The Common Sense Book of Baby and Child Care*, advocating an approach to child-rearing that virtually demanded a full-time mother, was published in 1945. BENJAMIN SPOCK, M.D., THE COMMON SENSE BOOK OF BABY AND CHILD CARE (1945).

79. The marriage advantage was reduced, and for many two-earner families turned into a marriage penalty, by the enactment in 1969 of a separate rate schedule for single taxpayers, based on a Congressional policy determination that a single person should pay more tax than a married couple with the same aggregate income, but that this additional tax should not exceed 20% of the married couple's tax at any given income level. Tax Reform Act of 1969, Pub. L. No. 91-172, tit. VIII § 803, 83 Stat. 487, 678. The separate rate schedule for single taxpayers is contained in I.R.C. § 1(c) (1994). *See generally* Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573, 1584 (1977). For illustrations of the effect of the marriage penalty, see McIntyre, *supra* at 1586–87; Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 22–23 (1980).

income.[80] In this context, and with no specific relief provisions incorporated in the Code to shield wives from their husbands' tax derelictions, courts sometimes, though not always, relied on a variety of legal fictions to avoid the draconian effect of joint and several liability in the most egregious situations.[81]

2. Statutory Relief Mechanisms

The legal fictions, however, were not always adequate to provide relief even in the most dire cases,[82] and courts that were unable to imagine a usable legal fiction to avoid imposing liability on a clearly blameless wife were sometimes reduced to pleading with Congress to change the rules.[83] As a result, Congress in 1971 enacted a limited form of relief.[84]

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80. Beck, *supra* note 7, at 319. The mere convenience of a joint return, however, and not any particular economic advantage, may have been a factor in determining which kind of return to file. As of 1938 (the last year before joint and several liability became effective), 94% of married couples filed joint returns, even though such returns produced a tax saving only in the case where one spouse's allowable deductions exceeded his or her income. Beck, *supra* note 7, at 337 n.78 (citing H.R. REP. No. 1040, 77th Cong., 1st Sess. 16–17 (1941), *reprinted in* 1941-2 C.B. 413, 426–27).

81. *See, e.g.*, Payne v. United States, 247 F.2d 481 (8th Cir. 1957) (court found that no joint return had been intended, even though the wife actually signed the return); Brown v. Commissioner, 51 T.C. 116 (1968) (wife held to have signed the joint return under duress, hence no true joint return); Hickey v. Commissioner, 14 T.C.M. (CCH) 546 (1955) (same). *But see* Estate of Aylesworth v. Commissioner, 24 T.C. 134, 146 (1955) (wife held liable, even though husband procured her signature by threatening to "destroy" her father and to mutilate her face).

82. *See, e.g.*, Huelsman v. Commissioner, 27 T.C.M. (CCH) 436 (1968), *remanded*, 416 F.2d 477 (6th Cir. 1969) (husband embezzled funds, which were not reported on joint return, and from which wife received no benefit but wife still held liable for the deficiency). *But cf.* Scudder v. Commissioner, 48 T.C. 36 (1967), *rev'd*, 405 F.2d 222 (6th Cir. 1968), *cert. denied*, 396 U.S. 886 (1969) (husband embezzled from wife's business, and Tax Court held her liable for the deficiency resulting from failure to report the embezzled funds on the joint return; but the Court of Appeals for the Sixth Circuit remanded, on the theory that the husband's conduct amounted to the functional equivalent of fraud or duress).

83. *See, e.g.*, Scudder v. Commissioner, 48 T.C. 36, 41 (1967) ("[A]lthough we have much sympathy for the petitioner's unhappy situation and are appalled at the harshness of this result . . . the inflexible statute leaves no room for amelioration . . . . [O]nly remedial legislation can soften the impact of strict individual liability.").

84. Pub. L. No. 91-679, § 1, 84 Stat. 2063 (1971). For a discussion of the background to the 1971 legislation, see Bittan, *supra* note 29, at 129–30; Chance, *supra* note 29, at 303–04; Note, *Innocent Spouses' Liability for Fraudulent Understatement of Taxable Income on Joint Returns*, 56 VA. L. REV. 1268 (1970).

In its current form, as amended in 1984,[85] the innocent spouse statute provides for an exception to joint liability in the case of an "innocent spouse," who may be relieved of liability in certain circumstances. Code Section 6013(e)(1) provides:

> (1) In General.—Under regulations prescribed by the Secretary, if—
> (A) a joint return has been made under this section for a taxable year,
> (B) on such return there is a substantial understatement of tax attributable to grossly erroneous items of one spouse,
> (C) the other spouse establishes that in signing the return he or she did not know, and had no reason to know, that there was such substantial understatement, and
> (D) taking into account all the facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such substantial understatement,
> then the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent such liability is attributable to such substantial understatement.
> I.R.C. § 6013(e)(1).[86]

A substantially similar statute, Section 66(c), provides relief in cases where the spouses file separate returns, but, under community-property laws, each spouse is considered to have earned half of the other's income.[87] In addition, I.R.C. § 6663(c) provides that the seventy-five

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85. Tax Reform Act of 1984, Pub. L. No. 98-369, div. A, § 424, 98 Stat. 494, 801 (1984). See *infra* text accompanying notes 94–99 for discussion of changes made by the 1984 amendments.

86. Before 1984, § 6013(e) provided relief only if the understatement of tax was caused by an omission of income. The Deficit Reduction Act of 1984 § 424 amended § 6013(e) to include deficiencies attributable to any claim of deduction, credit or basis for which there is no basis in fact or law. The 1984 amendments are retroactively applicable to all open tax years to which the Internal Revenue Code of 1954 applies. Tax Reform Act of 1984, Pub. L. No. 98-369, div. A, § 424(a),(c), 98 Stat. 494, 801–03 (1984).

87. The statute provides that:

> Under regulations prescribed by the Secretary, if-
> (1)an individual does not file a joint return for any taxable year,
> (2)such individual does not include in gross income for such taxable year an item of community income properly includable therein which, in

percent fraud penalty shall not apply to a spouse who signs a joint return unless some part of the underpayment on the return is due to fraud on the part of that spouse.[88]

A "substantial understatement of tax" is any understatement that exceeds $500.[89] A "grossly erroneous item" is defined as any omission of an amount that should be included in gross income, and any claim of a deduction, credit or basis for which there is no foundation in fact or law.[90] In addition, in the case of erroneous deductions, credits, and so forth, innocent spouse relief is available only if the understatement exceeds specified percentages of the petitioner's adjusted gross income

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accordance with the rule contained in section 879(a), would be treated as income of the other spouse,

(3)the individual establishes that he or she did not know of, and had no reason to know of, such an item of community, and

(4)taking into account all facts and circumstances, it is inequitable to include such item of community income in such individual's gross income, then,

for purposes of this title, such item of community income shall be included in the gross income of the other spouse (and not in the gross income of the individual).

I.R.C. § 66(c) (1994). Like the pre-1984 version of section 6013(e), section 66(c) does not address the case of deductions without a basis in fact or law that have the effect of reducing stated tax liability. A companion statute, I.R.C. § 66(b) (1994), permits the IRS to disregard the state-law effect of any community property law and charge the income-earning spouse with the full amount of income earned if such spouse acted as if he were solely entitled to the income and failed to notify the other spouse of the nature and amount of such income before the due date for the relevant tax return. I.R.C. § 66(b) (1994). Prior to the adoption of the § 66 rules, courts uniformly declined to extend innocent spouse protection in the case of separated, but not divorced, spouses in community property jurisdictions who filed separate returns and omitted their theoretical share of community income earned by the other spouse, but about which they had no knowledge. Chance, *supra* note 29, at 307–08. The courts simply applied the requirement of § 6013(e)(1)(A) that a joint return must be filed to qualify for relief, and did not inquire any further. *See, e.g.*, Coffman v. Commissioner, 33 T.C.M. (CCH) 1416 (1975). For discussion of I.R.C. § 66, see generally Nancie Quick & Joseph N. DuCanto, *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*, 17 FAM. L.Q. 65, 77–86 (1983).

88. I.R.C. § 6663(c) (1994). In a community-property state, however, this protection may be of limited value because the Internal Revenue Service can collect an assessment against the fraudulent husband from the couple's community property, even if the wife had no part in the fraud. *See* Kwong v. Commissioner, 65 T.C. 959 (1976) (construing the predecessor of § 6663(c)).

89. I.R.C. § 6013(e)(3) (1994).

90. I.R.C. § 6013(e)(2) (1994).

(including that of her spouse) for the year before the year in which the IRS issues a deficiency notice.[91] The percentage limitation does not apply in the case of omissions of income on the original return.[92]

As originally enacted in 1971, the innocent spouse statute granted relief where: (1) gross income attributable to the prospective non-innocent spouse exceeded 25% of the gross income stated on the return; (2) the income had been omitted from the return without the knowledge of the innocent spouse; and (3) the omission occurred under circumstances in which the innocent spouse had not benefited from the omission and in which it would be inequitable to treat the innocent spouse as liable for the omission.[93] In 1984, Congress enacted three significant changes to § 6013(e).[94] First, the 25% test for omission of gross income was replaced by a "substantial understatement of tax" test,[95] with the result that relief was extended to situations in which a deficiency arose from erroneous deductions, credits or basis, as well as omissions of

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91. I.R.C. § 6013(e)(4) (1994). If the spouse's adjusted gross income for the pre-adjustment year (i.e., the year before the deficiency notice is issued) is $20,000 or less (including any adjusted gross income of her then-spouse) then innocent spouse relief is available only if the liability for tax (including penalties and interest) attributable to the grossly erroneous items of the non-innocent spouse for the year at issue exceeds 10% of that adjusted gross income (AGI). If, however, the putative innocent spouse's adjusted gross income for the pre-adjustment year exceeds $20,000, then relief is available only if the liability exceeds 25% of that adjusted gross income. For example, assume H and W filed a joint return for 1988 showing adjusted gross income of $32,000. H and W divorced in 1989, when W's AGI was $15,000. In 1990, W's AGI was $21,000. In January, 1991, the Internal Revenue Service issued a deficiency notice with respect to the 1988 return, showing unpaid tax of $3,000, interest of $900 and penalties of $750, for a total liability of $4,650. The deficiency resulted from H's taking fraudulent business deductions.

The "pre-adjustment year" in this case is 1990, when W's AGI was $21,000. Twenty-five percent of that amount is $5,250. Accordingly, innocent spouse relief is not available, because the liability does not exceed this threshold. If, however the deficiency notice had been issued in December, 1990, the pre-adjustment year would have been 1989, when W's AGI was $15,000, and the 10% test would have applied, thus making innocent spouse relief possible. *See* O'Connell, *supra* note 7, at 226.

92. I.R.C. § 6013(e)(4)(E) (1994).

93. Pub. L. No. 91-679, § 1, 84 Stat. 2063 (1971).

94. *See* Tax Reform Act of 1984, Pub. L. No. 98-369, div. A, § 424, 98 Stat. 494, 801–03 (1984); Susan M. Shepherd et al., *Recent Changes Make More "Innocent Spouses" Eligible for Relief from Tax Deficiencies*, 37 TAX'N FOR ACCOUNTANTS 46 (1986) (commenting on the 1984 amendments). The 1984 amendments applied retroactively to all tax years that were still open as of the time of enactment. H.R. REP. No. 432, 98th Cong., 1st Sess. 202 (1984).

95. I.R.C. § 6013(e)(1)(B) (1994).

income.[96] Second, the lack of knowledge requirement was changed from lack of knowledge of the omitted income to lack of knowledge of the "substantial understatement,"[97] i.e., any tax liability exceeding $500.[98] Third, the requirement that the innocent spouse not have benefited from the omission was deleted, although the legislative history makes it clear that Congress intended that a significant benefit to the person claiming innocent spouse status was still a factor to be considered in determining whether it would be inequitable to hold her liable for the deficiency.[99]

To succeed on an innocent spouse claim, the petitioner bears the burden of proving that she is entitled to relief,[100] and must demonstrate that she satisfies all four elements of the statute.[101] Usually, though not always, there is little question as to whether the parties have filed a joint return.[102] Somewhat more frequently, there is a dispute as to

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96. I.R.C. §§ 6013(e)(1)(B)–(e)(2)(B) (1994).

97. I.R.C. § 6013(e)(1)(C) (1994).

98. I.R.C. § 6013(e)(3) (1994).

99. H.R. REP. No. 432, 98th Cong., 2d Sess. pt. 2, at 1501–02 (1984), *reprinted in* 1984 U.S.C.C.A.N. 697, 1142–44. *See* Estate of Krock v. Commissioner, 93 T.C. 672, 678 (1989) (citing this legislative history).

100. Ratana v. Commissioner, 662 F.2d 220, 224 (4th Cir. 1981); Adams v. Commissioner, 60 T.C. 300, 303 (1973); Sonnenborn v. Commissioner, 57 T.C. 373, 381 (1971).

101. Price v. Commissioner, 887 F.2d 959, 961–62 (9th Cir. 1989); Stevens v. Commissioner, 872 F.2d 1499, 1504 (11th Cir. 1989); Purcell v. Commissioner, 826 F.2d 470, 473 (6th Cir. 1987); Ballard v. Commissioner, 740 F.2d 659, 663 (8th Cir. 1984); Allen v. Commissioner, 514 F.2d 908, 912 (5th Cir. 1975); *Adams*, 60 T.C. at 303; *Sonnenborn*, 57 T.C. at 381.

102. Prior to the adoption of the innocent-spouse statute, at least one court of appeals had developed a theory that joint-return liability could be avoided if the wife knew nothing of her husband's concealed income and did not profit from it, on the basis that the joint nature of such a return was vitiated by the husband's fraud. *See, e.g.*, Scudder v. Commissioner, 405 F.2d 222 (6th Cir. 1968), *rev'g* 48 T.C. 36 (1967). In *Scudder*, the husband embezzled from his wife's business; the Tax Court then held her liable for tax on the embezzled income, plus interest and a 50% fraud penalty. The court of appeals held that the husband's conduct amounted to fraud or duress, relieving the wife of joint-return liability. *Scudder*, 405 F.2d at 226. *Accord*, Sharwell v. Commissioner, 419 F.2d 1057 (6th Cir. 1969); Huelsman v. Commissioner, 416 F.2d 477 (6th Cir. 1969).

The issue of whether a joint return had actually been filed arose in only 12 of the post-1971 innocent spouse cases. *See, e.g.*, Berenbeim v. Commissioner, 63 T.C.M. (CCH) 2975 (1992); Nelson v. Commissioner, 53 T.C.M. (CCH) 1448 (1987); Snyder v. Commissioner, 47 T.C.M. (CCH) 667 (1983); Williams v. Commissioner, 38 T.C.M. (CCH) 718 (1979).

whether the tax deficiency results from "grossly erroneous" items,[103] or whether the erroneous items are solely attributable to one spouse.[104]

In Galliher v. Commissioner, 62 T.C. 760 (1974), the Tax Court rejected an equal-protection challenge to the joint return requirement, holding that the statute did not unconstitutionally discriminate against taxpayers in community-property states. *Galliher*, 62 T.C. at 763. Such taxpayers may now obtain relief, even if they file separate returns. I.R.C. § 66 (1994).

103. The legislative history of the 1984 amendments to the statute provides the following cryptic guidance: "Relief may be desirable, for example, where one spouse claims phony business deductions . . ." H.R. REP. No. 432, 98th Cong., 2d Sess. (1984); *reprinted in* 1984 U.S.C.C.A.N. 697, 1143. A number of cases discuss whether deductions disallowed by the Internal Revenue Service met the I.R.C. § 6013(e)(2) standard of having "no basis in fact or law." *See, e.g.*, Douglas v. Commissioner, 86 T.C. 758 (1986), where the Tax Court defined the standard as follows:

> [A] deduction has no basis in fact when the expense for which the deduction is claimed was never, in fact, made. A deduction has no basis in law when the expense, even if made, does not qualify as a deductible expense under well-settled legal principles or when no substantial legal argument can be made to support its deductibility. Ordinarily, a deduction having no basis in fact or in law can be described as frivolous, fraudulent, or, to use the word of the committee report, phony.

Douglas, 86 T.C. at 762–63. *See also* Bokum v. Commissioner, 992 F.2d 1136, 1142 (11th Cir. 1993) (deduction of partnership losses, although disallowed by the IRS, not "grossly erroneous" because similar oil and gas investment deductions had been allowed in other cases); LaMothe v. Commissioner, 58 T.C.M. (CCH) 1358, 1362 (1990) (tax shelter partnership deductions had a basis in fact or law even though partially disallowed).

The mere fact that the IRS disallows deductions will not necessarily establish that the deductions had no basis in fact or law. *Douglas*, 86 T.C. at 763. The burden of proving such lack of factual or legal basis is on the petitioner, who must present some evidence to that effect. Purcell v. Commissioner, 86 T.C. 228, 240 (1986), *aff'd*, 826 F.2d 470 (6th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988). *See also* Hawbaker v. Commissioner, 55 T.C.M. (CCH) 1742, 1745 (1988); Neary v. Commissioner, 50 T.C.M. (CCH) 4, 6 (1985).

The logical shortcomings of the "grossly erroneous" requirement are discussed at length in Borison, *supra* note 29, at 841–60 and in Philipps & Braford, *supra* note 29, at 56–60. Professor Borison argues for adoption of a standard for declaring deductions to be grossly erroneous that falls somewhere between mere disallowance and the fraud or frivolous requirement most frequently articulated by the courts. Borison, *supra* note 29, at 846–55.

104. *See, e.g.*, Hayman v. Commissioner, 992 F.2d 1256 (2d Cir. 1993) (investments made in petitioner wife's name or as joint owner with husband; court rejected arguments that she acted merely as a "front" for her husband and hence could be regarded as an innocent spouse); Keene v. Commissioner, 38 T.C.M. (CCH) 553 (1979) (husband's claim that income earned by him but omitted from the return prepared by his wife was not "attributable" to him summarily dismissed).

Income earned by taxpayers subject to state community property laws is, under the statute, nonetheless "attributable" to the spouse who earns the income or who

The requirement poses no problem with respect to omissions of income; any omission of income that results in a tax liability exceeding $500 is "grossly erroneous."[105] With respect to deductions, credits, and claims of basis that are ultimately disallowed, however, the statute merely provides that a "grossly erroneous item" is "any claim of a deduction, credit, or basis . . . for which there is no basis in fact or law."[106]

This standard provides little in the way of guidance for the courts. For example, in two cases, different outcomes followed from substantially similar facts. In *Shenker v. Commissioner*,[107] the Court of Appeals for the Eighth Circuit allowed innocent spouse relief where a worthless stock actually lost its value in the year after the tax year in question,[108] ignoring the issue of whether there was a "basis in fact or law" for claiming the deduction in the earlier year. In contrast, in *Purcell v. Commissioner*, the Court of Appeals for the Sixth Circuit, dealing with the same issue, found that "there was both an arguable factual and legal basis for claiming [the deductions] in the tax year in which they were taken,"[109] and hence denied innocent spouse relief.

Although the "grossly erroneous" definition affects fewer taxpayers than the knowledge or reason-to-know standard, it could stand some legislative clarification. The ability of a wife to prove that her husband's deductions were "'fraudulent,' 'frivolous,' 'phony' or 'groundless'"[110] may be particularly limited where the husband has died or there has been a divorce and the ex-wife has no practical way of obtaining whatever records the husband may have had. In addition, the case law defining grossly erroneous deductions makes it clear that where the husband had some arguable claim to make on behalf of the deduction,

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(separately) owns the property from which the income is derived. I.R.C. § 6013(e)(5) (1994).

105. I.R.C. § 6013(e)(3) (1994).

106. I.R.C. § 6013(e)(2)(B) (1994).

107. Shenker v. Commissioner, 804 F.2d 109 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 2460 (1987).

108. *Shenker*, 804 F.2d at 115.

109. Purcell v. Commissioner, 826 F.2d 470, 476 (6th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988).

110. Feldman v. Commissioner, 20 F.3d 1128, 1135 (11th Cir. 1994) (quoting Bokum v. Commissioner, 992 F.2d 1136, 1142 (11th Cir. 1993) (citations omitted)). *See also* Flynn v. Commissioner, 93 T.C. 355, 364 (1989) ("deduction has no basis in law when the expense, even if made, does not qualify as a deductible expense under well-settled legal principles or when no substantial legal argument can be made to support its deductibility").

but where it was ultimately disallowed, then relief is unavailable.[111] Presumably the theory is that even if the husband had fully explained the claimed deduction to the wife, and if she had hired her own experts to examine the return, she still would have signed it.[112] Whether such a strict interpretation fits well with the supposedly remedial purposes of the statute as a whole is at least open to question.

By far the greatest number of cases turn on whether, as in Janet Bliss's case, the spouse or ex-spouse claiming relief under I.R.C. § 6013(e) knew or had reason to know of the deficiency.[113] Generally, the Tax Court decisions show a willingness to accept at face value a petitioner's testimony as to actual knowledge of an understatement,[114] because a judge inclined to deny innocent spouse relief can find that there was reason to know without impugning the credibility of the petitioner.[115]

The cases sometimes, but not often, deny innocent spouse relief *solely* on the basis that it would not be inequitable to hold the petitioner

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111. *See, e.g.*, Bokum v. Commissioner, 58 T.C.M. (CCH) 1183, 1196 (1990) (IRS concession to allow some but not all of a claimed deduction means that the portion not allowed is not grossly erroneous).

112. *Cf.* Bokum v. Commissioner, 94 T.C. 126, 141–44 (1990), *aff'd*, 992 F.2d 1136 (11th Cir. 1993) (mischaracterization of ordinary income as capital gain is not grossly erroneous).

113. Fifty-five percent of reported post-1971 innocent spouse cases found that the petitioning spouse had "reason to know." In addition, 107 of the 435 cases, or 24.6%, found that the petitioning spouse had actual knowledge of the understatement. Because some cases do not determine whether the spouse had actual or constructive knowledge, but merely state that she had one or the other, the total number of cases involving the knowledge issue is less than the sum of the two items. *See* data on file with author, described *supra* note 8.

114. *See, e.g.*, Anderson v. Commissioner, 34 T.C.M. (CCH) 508, 512–13 (1975) (wife's testimony as to lack of actual knowledge of husband's embezzlement accepted, even though I.R.S. agent testified that the wife had told the agent that she knew of the embezzlement income); Cecere v. Commissioner, 34 T.C.M. (CCH) 1593, 1599–1600 (1975), *aff'd*, 547 F.2d 1159 (3d Cir. 1976) (wife liable for tax on husband's income from loan sharking, even though she was found to have no reason to know of the omitted income, because she benefitted from the joint ownership of real property purchased with the omitted income and hence failed to qualify as an innocent spouse).

115. *But see* Bliss v. Commissioner, 66 T.C.M. (CCH) 522 (1993) (Judge Whalen found petitioner's testimony that she did not know every detail of her about-to-be-ex-husband's finances to be unbelievable). For a discussion of women's approach to divorce negotiations, see *infra* text accompanying notes 300–324. The reason-to-know standard is discussed in more detail *infra* text accompanying notes 127–177.

liable.[116] More frequently, where relief is denied, the denial will be based either on the petitioner's supposed or constructive knowledge or on a combination of the knowledge and equity grounds.[117] In those cases that do turn on the equity issue, the opinions generally focus on whether the petitioning spouse received a significant benefit from the omitted income or the understatement of tax. The analysis of what constitutes a benefit, however, is not always consistent. For example, in *Adams v. Commissioner*,[118] the petitioner (the husband in this case) received $297,000 as part of a divorce settlement in a year after the year at issue in the tax proceeding. The court held that the transfer constituted significant benefit in view of the husband's net worth of $33,000

116. That it would not be inequitable to hold the petitioner liable was the *sole* reason for denying relief in 49 of the 435 cases (11.3%). *See* data on file with author, described *supra* note 8. *See, e.g.*, Estate of Krock v. Commissioner, 93 T.C. 672, 681 (1989) (even though petitioner was very wealthy and could have supported a lavish lifestyle without resort to the understatements of tax attributable to her husband, that fact alone is insufficient to satisfy her burden of proof to show that she did not benefit from the understatements); LaMothe v. Commissioner, 58 T.C.M. (CCH) 1358 (1990) (denying relief both on the ground that the deductions at issue had a basis in fact or law, although they were disallowed, and that it would not be inequitable to hold the petitioner, who had inherited over $650,000 from her husband, liable for a tax deficiency of approximately $18,000 attributable to the husband's deductions). The test of whether it would be "inequitable" to hold the petitioning spouse liable has generally been phrased by the courts as whether she received substantial benefits from the understatement of tax. Purificato v. Commissioner, 9 F.3d 290 (3d Cir. 1993) (relief denied solely on "inequitable" grounds, and despite petitioners' frugal lifestyles, because measurable assets had been accumulated as a result of the understatements of tax); Hammond v. Commissioner, 58 T.C.M. (CCH) 1196, 1200 (1990); Hinds v. Commissioner, 56 T.C.M. (CCH) 104, 106 (1988); Purcell v. Commissioner, 86 T.C. 228, 241 (1986), *aff'd*, 826 F.2d 470 (6th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988). Normal spousal support is generally not considered a "benefit" for purposes of this test. Treas. Reg. § 1.6013-5(b) (1974); Flynn v. Commissioner, 93 T.C. 355, 367 (1989). However, unusual or lavish support will be considered a benefit. *Estate of Krock*, 93 T.C. at 679.

The Internal Revenue Manual makes it clear that if substantially all of one spouse's omitted income is used for gambling, supporting extramarital affairs, benefitting third parties, purchasing of assets not in joint ownership and not used for joint benefit, supporting a living style not enjoyed by the non-culpable spouse, or maintaining separate bank accounts or other caches of funds unavailable to the other spouse, then no benefit is to be imputed to that spouse. INTERNAL REVENUE MANUAL § 45(11)(20).

117. *See, e.g.*, Adcock v. Commissioner, 66 T.C.M. (CCH) 1103, 1108 (1993) (wife was aware of husband's guilty plea to extortion charge and failed to show that she had not benefitted from the extortion income).

118. Adams v. Commissioner, 60 T.C. 300 (1973).

immediately before the couple's separation.[119] In contrast, the transfer of $155,000 to the petitioner in *Terzian v. Commissioner*[120] following divorce was held not to constitute a significant benefit. In the court's view, the amount was in lieu of alimony payments and hence was "ordinary support."[121]

3. The Relevance of Divorce

The legislative history of the innocent spouse provision specifically directs attention to the situation of women who have been abandoned, separated, or divorced after the tax year at issue, suggesting that a divorcing woman should not be held liable for her husband's tax deficiencies, especially when the ex-husband has disappeared, leaving the former spouse to "'face the music' alone."[122] The Senate Finance Committee's report on the 1971 enactment of the innocent spouse provision stated that the purpose of the legislation was to correct the obviously unfair prior case law that held innocent wives liable for the tax consequences of their husbands' misdeeds,[123] particularly in cases where the Service assesses a deficiency after the putatively innocent spouse has been abandoned or divorced by the husband who was responsible for the understatement of tax on the joint return. The legislation was also designed "to bring government tax collection practices into accord with basic principles of equity and fairness."[124] The courts have generally regarded the fact of divorce as a factor to be taken into account as part of the determination as to whether it would be inequitable to hold the petitioning spouse liable for the deficiency.[125] As Janet Bliss's case

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119. *Adams*, 60 T.C. at 304.

120. Terzian v. Commissioner, 72 T.C. 1164 (1979).

121. *Terzian*, 72 T.C. at 1172. The *Terzian* court drew on the legislative history to find that reasonable alimony or its equivalent would not be considered a significant benefit. *Terzian*, 72 T.C. at 1172. *See* S. REP. No. 1537, 91st Cong., 2d Sess. 1, 3 (1970).

122. *Cf.* Hayman v. Commissioner, 992 F.2d 1256, 1263 (2d Cir. 1993) (holding that a well-informed separated but not divorced wife was liable for tax deficiencies). *See* Sonnenborn v. Commissioner, 57 T.C. 373, 381 (1971); S. REP. No. 1537, 91st Cong., 2d Sess. 1, 3–4 (1970).

123. S. REP. No. 1537, 91st Cong., 2d Sess. 1, 2 (1970). *See, e.g.*, Huelsman v. Commissioner, 27 T.C.M. (CCH) 436 (1968), *remanded*, 416 F.2d 477 (6th Cir. 1969).

124. S. REP. No. 1537, 91st Cong., 2d Sess. 1, 2 (1970).

125. *See, e.g.*, Purificato v. Commissioner, 9 F.3d 290, 296 (3d Cir. 1993) ("If the spouse did not specifically benefit, was subsequently deserted, divorced, or

indicates, however, divorce is a factor that the court can use to support either the granting or denial of innocent-spouse relief.[126]

B. The Reason-to-Know Standard

Joint tax liability is one of the few areas in Anglo-American law to depart from the general rule that people are not held liable for the misdeeds of others. Congress therefore must have intended the innocent spouse statute to be construed liberally in order to avoid, whenever possible, the unfairness of charging unknowing spouses with errors for which they had no responsibility.[127] Even before adopting the innocent-spouse statute, Congress had, in private laws, recognized that injustice could occur under the joint-liability principle, and had relieved individuals of such liability.[128]

To a certain extent, case law under the innocent spouse provision appears to recognize the liberal, remedial purposes of the statute. Courts have recognized, for example, that the implicit purpose of the statute "is to protect one spouse from the over-reaching or dishonesty of the other."[129] And numerous decisions refer to the statute's broad function of remedying injustice, with the implication that the statute should not be interpreted in an overly rigid manner.[130]

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separated, and would have to pay the tax and additions from his or her own assets, equity may weigh in favor of relief.").

126. *Bliss* appears to be one of only two of the 435 cases examined that raise the issue of whether the process of divorce itself, with its attendant involvement of lawyers and accountants, is relevant to the spouse's reason to know of an understatement of tax. The other such case is Levin v. Commissioner, 53 T.C.M. (CCH) 6, 7 (1987), also denying relief where a joint return for 1977 was signed by the petitioner in May, 1978, two weeks after her divorce became final. The rationale of these cases, however, has also been applied in cases of marital discord that had not yet reached the divorce courts. For example, in Young v. Commissioner, 42 T.C.M. (CCH) 1156, 1160 (1981), the court suggested that the emotional strain on the petitioning wife because of marital problems might have caused her "to scrutinize more carefully her husband's actions than she ordinarily might have."

127. S. REP. No. 1537, 91st Cong., 2d Sess. 1 (1970).

128. *See, e.g.*, Priv. L. No. 90-362, 82 Stat. 1438 (1968) (relieving wife of tax liability with respect to husband's embezzlement income). *See also* Priv. L. No. 95-27, 91 Stat. 1661 (1977) (permitting taxpayer to apply the rules of I.R.C. § 6013(e) retroactively to a tax year prior to the enactment of the statute).

129. Purcell v. Commissioner, 826 F.2d 470, 475 (6th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988).

130. *See, e.g.*, Price v. Commissioner, 887 F.2d 959, 963–64 n.9 (9th Cir. 1989); Sanders v. United States, 509 F.2d 162, 166–67 (5th Cir. 1975); Allen v.

When, however, it comes to determining whether a woman had reason to know of her husband's understatement of tax, these broad liberal sentiments disappear more frequently than not. Although the courts early on rejected the IRS's proposed standard—that an innocent-spouse petitioner prove she was completely without fault and could not possibly have discovered the omission of income before signing the return[131]—the standard that they have substituted in its place is not appreciably more forgiving, at least to those taxpayers who are not full-time lawyers, accountants, or business people.

The generally stated rule with regard to the reason-to-know test is whether a reasonably prudent taxpayer, under the circumstances at the time of signing the return, would have had reason to know that the tax liability stated on the return was erroneous or that further investigation was warranted.[132] Thus, in theory at least, the spouse seeking relief need not prove that she was entirely without fault nor that she could not possibly have discovered omissions of gross income before signing the joint return; such a test would be too stringent and inconsistent with the purposes of the statute.[133] But theory and reality too often part company when this rule is actually applied.

The courts generally apply two different reason-to-know tests, one for omissions of income and another for disallowed deductions. In the omission-of-income cases, the usual test is whether the taxpayer knew or should have known of the transaction that produced the income which the other spouse failed to report on the joint return.[134] In these cases, "[m]ere knowledge of the underlying transaction that produced the omitted income is sufficient to deny innocent spouse relief."[135] In

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Commissioner, 514 F.2d 908, 915 (5th Cir. 1975); Sonnenborn v. Commissioner, 57 T.C. 373, 381 (1971).

131. *Sanders*, 509 F.2d at 166. There is at least some support in the legislative history for a strict rule with respect to knowledge of the understatement. Representative Byrnes, one of the floor managers of the 1971 legislation, stated that relief required "complete ignorance of the omission [of income]." 116 CONG. REC. 43,351 (1971).

132. Stevens v. Commissioner, 872 F.2d 1499, 1505 (11th Cir. 1989). A similar test, also cited frequently, is whether a reasonably prudent taxpayer, with the particular petitioner's knowledge of all the relevant circumstances, and bearing in mind her level of intelligence, experience, and education, would have had no reason to know of the understatement. *Sanders*, 509 F.2d at 167.

133. *Sanders*, 509 F.2d at 166.

134. Hayman v. Commissioner, 992 F.2d 1256, 1261 (2d Cir. 1993); Erdahl v. Commissioner, 930 F.2d 585, 589 (8th Cir. 1991).

135. *Erdahl*, 930 F.2d at 589; Price v. Commissioner, 887 F.2d 959, 963 n.9 (9th Cir. 1989). In cases involving the community-property analog to § 6013(e), I.R.C.

deduction cases, however, knowledge of the underlying transaction is almost always present, because the tax return itself lists the deduction on its face, and application of the "mere knowledge" test would virtually wipe out innocent spouse protection.[136] Accordingly, the United States Courts of Appeals for the Second, Eighth and Ninth Circuits have adopted a more lenient test for deduction cases: the taxpayer must establish that "she did not know and did not have reason to know that the deduction would give rise to a substantial understatement."[137]

In both erroneous deduction and omission-of-income cases, the courts have generally cited four factors that are said to be relevant in analyzing whether a spouse had reason to know of a substantial understatement of tax on a joint return:

(1) the spouse's level of education and sophistication;
(2) the spouse's degree of involvement in the family finances and business affairs;
(3) the presence of expenditures (known to the petitioning spouse) that appear lavish or unusual when compared to the family's past levels of income, standard of living and spending patterns; and

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§ 66(c), the standard has been even more rigorous. The Tax Court has consistently held that a spouse's unawareness of the amount of community income is not sufficient to justify relief under § 66(c) as long as the spouse had some knowledge of the mere existence of an income-producing activity. *See, e.g.*, McGee v. Commissioner, 979 F.2d 66, 70 (5th Cir. 1992) (petitioner knew of husband's dental practice, but not the amount of income); Abrams v. Commissioner, 57 T.C.M. (CCH) 1433, 1435 (1989) (petitioner knew her husband was a lawyer, but not the extent of his income); Thatcher v. Commissioner, 56 T.C.M. (CCH) 707, 710 (1988) (petitioner knew of the existence of husband's business); Roberts v. Commissioner, 54 T.C.M. (CCH) 94, 97 (1987), *aff'd*, 860 F.2d 1235, 1239–40 (5th Cir. 1988) (petitioner knew her husband was involved in real estate transactions, but knew no details of those transactions); Baldwin v. Commissioner, 52 T.C.M. (CCH) 22, 24 (1986) (petitioner knew her husband was a university teacher and earned a salary, although she did not know the amount). In these cases, the courts have imposed a duty of inquiry on the non-income-earning spouse. In *McGee*, for example, the court said that the wife should have asked the accountant who prepared the tax return for the information that would have enabled her to determine whether the husband's income, as stated on the return, was correct. *McGee*, 979 F.2d at 70.

136. *Price*, 887 F.2d at 963 n.9; *accord*, Guth v. Commissioner, 897 F.2d 441, 444 (9th Cir. 1990).

137. *Price*, 887 F.2d at 963; *accord*, *Erdahl*, 930 F.2d at 589; *Hayman*, 992 F.2d at 1261.

(4) the culpable spouse's evasiveness and deceit concerning the family's finances.[138]

The rule is generally phrased in gender-neutral terms, although recognition of the petitioner's knowledge of all the relevant circumstances must inevitably include recognition of gender differences.[139]

At least one commentator has noted that, despite the frequent listing of these reason-to-know criteria in the cases, the result in any particular case is still difficult to predict.[140] There is no formula for weighting the various factors, and in practice, the individual Tax Court judges seem often to rely on their own evaluation of the credibility of the innocent-spouse petitioner.[141]

Nonetheless, examining the court-imposed standards, some clear patterns emerge. First, with regard to the spouse's educational background and sophistication, the ideal petitioner is apparently someone like Emilia Pietromonaco, who has at most a high school education and minimal familiarity with business matters. Once a wife has more than a high school education, the balance apparently begins to tilt against her. A high school graduate married to a man with a professional degree may sometimes qualify for relief,[142] while more educated women will face a stricter standard.[143] Janet Bliss, for example, was held to a higher standard, even though she did not begin her college and law school career until several years after she had signed the fateful tax return. The courts' reliance on a woman's educational level as a measure of whether she can be expected to spot tax cheating ignores the realities of women's role in family finances.[144]

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138. Stevens v. Commissioner, 872 F.2d 1499, 1505 (11th Cir. 1989).

139. For a discussion of the reasonable woman standard, see *infra* text accompanying notes 294–299.

140. Borison, *supra* note 29, at 832.

141. Borison, *supra* note 29, at 832. *See, e.g.*, Bliss v. Commissioner, 66 T.C.M. (CCH) 374 (1993) (Tax Court judge determines, without explanation, that wife's testimony was not sufficiently credible to qualify her for innocent spouse relief).

142. *See, e.g.*, DeMartino v. Commissioner, 51 T.C.M. (CCH) 1278 (1986) (wife was high school graduate, husband was futures trader); Zinser v. Commissioner, 37 T.C.M. (CCH) 1109 (1978) (wife was high school graduate, husband had M.D. degree).

143. *See, e.g.*, Hayman v. Commissioner, 992 F.2d 1256, 1258 (2d Cir. 1993) (petitioner was vice president of large retail clothing company, with responsibility for million-dollar budget; no relief granted).

144. *See* PHYLLIS CHESLER & EMILY JANE GOODMAN, WOMEN, MONEY & POWER 132 (1975) (contrasting the role expectations of a "dutiful" wife with the ability to take

A corollary of the background and sophistication criterion is the wife's emotional state. Tax Court judges, perhaps afraid of unleashing a torrent of expert psychological testimony similar to that frequently offered in sexual harassment and battered women's criminal defense cases, rarely make this factor explicit in their opinions. In one of the cases that does raise the issue, the Court of Appeals for the Fifth Circuit found that the wife's severe emotional problems and alcoholism were relevant to the inquiry as to whether she had reason to know of an understatement of tax, and that consideration of such factors was consistent with a liberal, remedial reading of the innocent spouse statute.[145] By extension, this kind of analysis could also be applied where the tax return in question has been prepared during the course of a divorce proceeding, in which case the wife's approach to handling divorce matters would be a relevant factor in assessing her reason to know of any understatement on the return.

Similarly, too great an association with the dominant middle-class culture weighs against the petitioner. Relief has frequently been granted to immigrant wives who speak little or no English and whose lawyers can cite alien cultural patterns as the reason that the wives left virtually all financial management to men.[146] The fact that many American middle- and working-class households operate in much the same way seems largely to have escaped the judges' attention. This cultural factor overlaps with the second factor generally cited by the courts—the degree of involvement of the innocent spouse petitioner in family finances and business affairs. Where a spouse was routinely involved in day-to-day business matters that led to the tax understatement,[147] or was physically present during the specific transactions that gave rise to the

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an active role in family financial decisions).

145. Sanders v. United States, 509 F.2d 162, 166 (5th Cir. 1975).

146. *See, e.g.*, Aina v. Commissioner, 53 T.C.M. (CCH) 88 (1987) (petitioner and her husband were born in Nigeria; her husband controlled the family finances; innocent-spouse relief granted even though petitioner had a college degree and was a registered nurse); Ratana v. Commissioner, 40 T.C.M. (CCH) 1119 (1980), *rev'd in part and aff'd in part*, 662 F.2d 220 (4th Cir. 1981) (petitioner was Filipina, husband was Thai).

147. *See, e.g.*, Most v. Commissioner, 31 T.C.M. (CCH) 1062 (1972) (wife worked in husband's insurance office and therefore, in the court's view, might well have known of husband's misappropriation of insurance proceeds that were due to policy holders).

understatement,[148] courts routinely find that the spouse either knew or had reason to know of the understatement.[149]

The cases are contradictory in their assumptions as to the extent to which a wife who is nominally an officer of her husband's business, but who has little or no real involvement with it, should be held to have knowledge of the business income. For example, in *Sonnenborn v. Commissioner*,[150] one of the first Tax Court cases interpreting the innocent spouse statute, the Tax Court attached considerable significance to the petitioner's title as treasurer of her husband's business, holding that she had failed to meet her burden of proving that she had no access to the business records.[151] But in *Carter v. Commissioner*,[152] where the petitioner was the corporate secretary of her husband's business, the court assumed that, given the nature of her "symbolic" position, she had no access to the company's financial records.[153]

The occasional leniency of the courts with respect to symbolic participation in a husband's business does not extend, however, to participation in family finances. Where a wife is regularly part of the family's budgeting and financial decision-making, she will almost always be held to have reason to know of a tax understatement.[154] The ideal version of innocence with respect to this criterion is embodied by Emilia Pietromonaco, who received an allowance from her husband and

148. *See, e.g.*, Heywood v. Commissioner, 33 T.C.M. (CCH) 1311 (1974) (wife was present when husband cashed money orders that represented the fruits of his embezzlement).

149. *See, e.g.*, Hayman v. Commissioner, 992 F.2d 1256, 1258 (2d Cir. 1993) (Petitioner signed checks for tax shelter investments, but was advised by husband that the investments were "legal." Petitioner was also generally responsible for paying household bills, although the couple's tax returns were prepared by an accountant.).

150. Sonnenborn v. Commissioner, 57 T.C. 373 (1971).

151. *Sonnenborn*, 57 T.C. at 382.

152. Carter v. Commissioner, 36 T.C.M. (CCH) 1295 (1977).

153. *Carter*, 36 T.C.M. (CCH) at 1296.

154. *See, e.g.*, Young v. Commissioner, 42 T.C.M. (CCH) 1156, 1159 (1981) (wife had bachelor's and master's degree and handled all the family bill-paying); Estate of Jackson v. Commissioner, 72 T.C. 356, 359–60 (1979) (even though wife had only a sixth-grade education and no actual knowledge of her husband's narcotics dealing, court held that she had reason to know of omitted income because of the large discrepancy between the amount of money required to maintain the family's lifestyle and the amount actually reported on the return); Nicholas v. Commissioner, 70 T.C. 1057, 1067 (1978) (wife kept the family checkbook and paid most of the bills).

never asked any questions.[155] On occasion, however, a wife who has some involvement in family finances may be found to lack a reason to know of an understatement if the husband's finances are particularly complex.[156]

As to the third factor, what constitutes lavish and extravagant expenditures in an innocent spouse case is a matter of perspective.[157] If family spending is reasonably consistent with the amount of income that was actually reported on the couple's tax return, or when spending in excess of income could reasonably have been financed by savings, gifts, or borrowing, then courts will often find that a spouse did not necessarily have reason to know of an understatement.[158] In contrast, where the observable family spending far exceeds the reported income, the wife will generally be held responsible for knowledge of that income.[159] Similarly, where the unreported income is used for the "ordinary support of the innocent spouse," that use will not bar relief under § 6013(e).[160]

This criterion includes an adjustment for the petitioner's "station in life,"[161] with the result that the same expenditures will be held to be

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155. Pietromonaco v. Commissioner, 3 F.3d 1342, 1344 (9th Cir. 1993). The role of a dutiful wife in this cultural setting is apparently to ask no questions and to accept whatever the husband chooses to provide as "table money." *See* JIMMY BRESLIN, TABLE MONEY *passim* (1986).

156. *See, e.g.*, Hayes v. Commissioner, 34 T.C.M. (CCH) 976, 981 (1975) (wife with a 10th-grade education plus some bookkeeping experience and control of the family checking account held not to have had reason to know of her frequently absent husband's omission of income on the joint return).

157. For example, the Code permits a deduction for "traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish and extravagant under the circumstances) while away from home in the pursuit of a trade or business." I.R.C. § 162(a)(2) (1994). The Code, however, provides no definition of "lavish and extravagant."

158. *See Pietromonaco*, 3 F.3d 1342 (wife could have believed that the difference between reported income and household expenditures came from savings or from borrowing); Mysse v. Commissioner, 57 T.C. 680, 698–99 (1972) (wife reasonably believed that the family's expenses were paid either from reported income or from bank balances available at the beginning of the year).

159. *See* Estate of Jackson v. Commissioner, 72 T.C. 356, 361 (1979) (reported income of $10,000, but spending that reflected an income of $86,000).

160. *Mysse*, 57 T.C. at 698.

161. The determination of reasonableness by reference to a litigant's "station in life" or standard of living is not limited to tax law. The concept is familiar in trust litigation, where distributions for support of a trust beneficiary are often related to the standard to which the beneficiary is accustomed. *See, e.g., In re* Estate of Rockefeller, 260 N.Y.S.2d 111, 115 (N.Y. Sur. Ct. 1965) (in exercising discretion,

lavish and extravagant if incurred by a working-class family of modest means, but held to be ordinary support if incurred by a family that is already well-off. For the high-income family, the purchase of a new home or car, gambling trips to Las Vegas, or the purchase of a vacation condominium in the Bahamas may be so ordinary as not to create any reason to know,[162] while the same expenses incurred by a poorer family would be deemed to be lavish, creating a reason to know.[163]

The fourth factor, the level of the other spouse's evasiveness and deceit, is more problematic. On the one hand, some courts have held that such deceitful behavior by one spouse creates a further duty of inquiry on the part of the other spouse, resulting in her having reason to know, even if he will not tell her.[164] On the other hand, there are some courts that decline to find a reason to know where there is a persistent, long-standing pattern of withholding information from the other spouse.[165] The legislative history is enigmatic regarding the effect

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trustees can be expected to consider the beneficiary's "station in society" as well as beneficiary's requirements in her present circumstances).

162. Sanders v. United States, 509 F.2d 162, 168 (5th Cir. 1975).

163. *Compare Estate of Jackson*, 72 T.C. at 357–58 (couple, prior to the year in which income was omitted from the return, paid a monthly rent of $95, while in the following year, they purchased a three-story home for $36,500, as well as new furniture, two Cadillacs and two trucks for the husband's business) *with* Enterline v. Commissioner, 40 T.C.M. (CCH) 454, 460 (1980) (the purchase of a new Cadillac and department store charges of more than $10,000 for furniture and clothes held not to be lavish or extravagant in the context of total family expenditures of $63,478).

164. *See, e.g.*, Carsendino v. Commissioner, 67 T.C.M. (CCH) 2248, 2253 (1994) ("[husband's] absolute withholding of the details of the tax returns would indicate that petitioner should have been on notice that the returns she signed may have been incomplete"); Alberts v. Commissioner, 52 T.C.M. (CCH) 665, 667 (1986) (husband refused to answer wife's questions about business and finance); Dickey v. Commissioner, 50 T.C.M. (CCH) 1041, 1047 (1985) (petitioner should have been on notice because of his knowledge of his wife's earlier embezzlement); Adams v. Commissioner, 60 T.C. 300, 302 (1973) (wife repeatedly refused to furnish petitioner husband copies of tax returns).

165. *See, e.g.*, Smith v. Commissioner, 53 T.C.M. (CCH) 743, 745 (1987); Walker v. Commissioner, 50 T.C.M. (CCH) 105, 110 (1985); Cox v. Commissioner, 45 T.C.M. (CCH) 333, 339 (1982); Ratner v. Commissioner, 42 T.C.M. (CCH) 251, 253 (1981); Feingold v. Commissioner, 40 T.C.M. (CCH) 309, 311 (1980); Bonhag v. Commissioner, 40 T.C.M. (CCH) 250, 251 (1980) (all granting relief despite, or even because of, the culpable spouse's pattern of secrecy). *See also* DeMartino v. Commissioner, 51 T.C.M. (CCH) 1278, 1293 (1986) (no duty of further inquiry because wife would not have understood husband's straddle transactions even if they had been explained).

of a culpable spouse's pattern of evasiveness and deceit.[166] The only plausible interpretation of charging a wife with a *higher* duty of inquiry where the husband is evasive or deceitful is that Congress intended to turn marital partners into part-time IRS agents, responsible for investigating their partners' tax affairs in great detail. Such a policy is difficult to ascribe to Congress without more of a basis than the legislative history provides.

Even in the case of one of the more obvious forms of evasiveness and deceit—embezzlement or other illegal activity by the culpable spouse that results in arrest and therefore is likely to bring the law-breaking to the other spouse's attention—the cases are inconclusive and contradictory. In *Enterline v. Commissioner*, the petitioner was held not to have reason to know of her husband's understatement of tax on a return that she signed before he had filled it out even though she knew that he had admitted embezzling money from his employer and that a complaint had been filed against him.[167] By contrast, in *Leon v. Commissioner*, a wife who knew of her husband's arrest for operating a brothel was held to have reason to know of his income from that activity.[168]

Ignorance of the law, as in most areas of tax law,[169] is no excuse for a would-be innocent spouse.[170] As one judge commented, section

166. Neither the committee report on the original 1971 legislation nor that on the 1984 amendments have any reference to the duty of inquiry on the part of a wife whose husband appears to be deceitful or evasive. *See* S. REP. No. 1537, 91st Cong., 2d Sess. 2 (1971); H.R. REP. No. 861, 98th Cong., 2d Sess. 1119 (1984).

167. Enterline v. Commissioner, 40 T.C.M. (CCH) 454, 459–60 (1980).

168. In *Leon*, the wife was held to have reason to know of the unreported income as of the date of her husband's arrest; this finding resulted in innocent spouse relief for the year preceding the year of his arrest and a denial of relief for the year of his arrest. Leon v. Commissioner, 42 T.C.M. (CCH) 1060, 1064–65 (1981).

169. There is, however, a state of mind element required for a determination of either civil or criminal tax fraud. Gano v. Commissioner, 19 B.T.A. 518, 533 (1930).

170. *See, e.g.*, Stevens v. Commissioner, 872 F.2d 1499, 1505 n.8 (11th Cir. 1989); Price v. Commissioner, 887 F.2d 959, 964 (9th Cir. 1989); Ratana v. Commissioner, 662 F.2d 220, 224 (4th Cir. 1981). *But cf.* Altman v. Commissioner, 475 F.2d 876, 880 (2d Cir. 1973) (suggesting that knowledge of receipt of funds, combined with a good-faith belief that the funds were a gift, and hence excludible from gross income under I.R.C. § 102, would not constitute actual knowledge or reason to know of an understatement). In *Altman*, the court found that the petitioner did not have a good-faith belief that the funds in question were a gift. *Altman*, 475 F.2d at 1880. In *Ratana*, the court rejected the argument, apparently accepted in *Altman*, that "while relief from joint liability cannot be predicated on ignorance regarding the taxability of known amounts of gross income, it can be predicated on ignorance regarding whether certain income is viewed as 'gross income' for tax purposes." *Ratana*, 662 F.2d at 224.

6013(e) was not "designed to abate joint and several liability where the lack of knowledge of the omitted income is predicated on mere ignorance of the legal tax consequences of transactions the facts of which are either in the possession of the spouse seeking relief or reasonably within his reach."[171] Nor is an understatement of tax that results from a mistake by a tax return preparer or from the shared error of both husband and wife as to the tax consequences of a transaction sufficient to support innocent spouse relief; in such cases, courts have held that both spouses are equally "innocent," and thus there is no inequity in holding them both liable for the deficiency.[172] On the other hand, where a spouse's deceitful practices are consistent over a long period of time and have not given the other spouse prior reason to be suspicious, some courts will hold that there was no reason for the other spouse to know of the understatement.[173] Events such as tax audits or criminal investigations constitute reason for suspicion.[174]

Disagreement among the courts of appeals is particularly acute in cases of understatements engendered by fraudulent or unsubstantiated deductions. For example, the Courts of Appeals for the Sixth and Eleventh Circuits have held that knowledge of the underlying transaction

171. McCoy v. Commissioner, 57 T.C. 732, 734 (1972). *See also* Price v. Commissioner, 53 T.C.M. (CCH) 1414 (1987) (denying innocent spouse relief where wife knew of husband's embezzlement income and its omission from return, but believed embezzlement income was not taxable); Sanders v. United States, 509 F.2d 162, 166 n.5 (5th Cir. 1975); Quinn v. Commissioner, 524 F.2d 617, 626 (7th Cir. 1975); Newton v. Commissioner, 60 T.C.M. (CCH) 1323 (1990); Mayworm v. Commissioner, 54 T.C.M. (CCH) 941 (1987).

172. *McCoy*, 57 T.C. at 735. *See also*, Hayman v. Commissioner, 992 F.2d 1256, 1262 (2d Cir. 1993) (relief also denied on other grounds); Bokum v. Commissioner, 94 T.C. 126 (1990), *aff'd*, 992 F.2d 1132 (11th Cir. 1993) (neither husband nor wife was aware of the tax consequences of receiving real estate sales proceeds as corporate dividends, hence no inequity in holding both liable for the deficiency).

173. *See, e.g.*, Smith v. Commissioner, 53 T.C.M. (CCH) 743 (1987) (wife held to have had no reason to know of truck driver husband's omission of reimbursement income, even though she cashed the reimbursement checks, apparently because of her obvious inability, in the court's view, to manage the family finances); Walker v. Commissioner, 50 T.C.M. (CCH) 105 (1985) (wife embezzled large amounts from her employer and her less well educated husband was granted innocent spouse relief, in part because his wife lied to him whenever he asked about the family budget); Ratner v. Commissioner, 42 T.C.M. (CCH) 251 (1981) (wife held to have had no knowledge of the scope of income from husband's adult publishing business because husband controlled financial information and led wife to believe that some of his available funds represented gifts from family members).

174. *See, e.g.*, United States v. Buahlow, 832 F. Supp. 574, 576 (E.D.N.Y. 1993) (wife present when criminal investigators interviewed husband and innocent spouse status denied).

is tantamount to knowledge of the tax understatement,[175] while the Court of Appeals for the Ninth Circuit has adopted a somewhat more flexible test:

> [I]f a spouse knows virtually all of the facts pertaining to the transaction which underlies the substantial understatement, her defense in essence is premised solely on ignorance of law. In such a scenario, . . . she is considered as a matter of law to have reason to know of the substantial understatement. . . .[176]

Whichever test is applied, the broadly remedial aims of the innocent spouse statute are being swallowed up by the elaboration of detailed nonstatutory tests that make establishing one's entitlement to relief ever more difficult. For example, in an omission-of-income case, with respect to the "know or reason to know" test of I.R.C. § 6013(e)(1)(C), the petitioner must not only show that she did not actually know of the understatement and that she did not know of the underlying transaction, but she must also show that, faced with some evidence of fraud on the face of the return, she exercised her duty of inquiry—even if, had she in fact inquired, she would have received a satisfactory explanation that would not have given her reason to know of the understatement.[177] What is expected of the "reasonably prudent taxpayer" is based on a hyper-rational model of the educated, middle- or upper-class, male taxpayer, who carefully reviews each line of his tax return and asks penetrating questions of the accountant who prepared the return whenever he has the slightest doubt about an item. Whether

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175. Stevens v. Commissioner, 872 F.2d 1499, 1505–06 (11th Cir. 1989); Purcell v. Commissioner, 826 F.2d 470, 473 (6th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988).

176. Price v. Commissioner, 887 F.2d 959, 964 (9th Cir. 1989) (citations omitted). Similar standards have been adopted by the Second and Eighth Circuits. *Hayman*, 992 F.2d at 1261–62; Erdahl v. Commissioner, 930 F.2d 585 (8th Cir. 1991). The Tax Court, however, has refused to adopt this more lenient rule, except in cases that are appealable to the Courts of Appeals for the Second, Eighth, and Ninth Circuits. *Bokum*, 94 T.C. at 126. Under the rule in Golsen v. Commissioner, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971), the Tax Court considers itself bound by a court of appeals decision only in cases that are appealable to that same court of appeals.

177. *See, e.g.*, Kappenberg v. Commissioner, 67 T.C.M. (CCH) 3132 (1994) ("spouse is not entitled to 'innocent spouse' relief unless she can show that she inquired about and laid to rest any doubts that a reasonably prudent taxpayer in her position would have had about the accuracy of the joint returns" (citing Langberg v. Commissioner, 67 T.C.M. (CCH) 2981 (1994))).

the model applies to any but a small minority of taxpayers of either gender is questionable; that it applies to very many women whose husbands prepare their joint returns is even more implausible.

II. The Reasonable Woman

Would it make a difference to the outcome of the innocent spouse cases if the "reasonably prudent taxpayer" were replaced by the "reasonably prudent woman taxpayer"? Are there sub-categories of the "reasonable person" or the "reasonably prudent taxpayer" that could be used in the innocent spouse context to produce results that are consistent with the economic and psychological reality underlying the cases? Such gender-specific changes have begun to emerge in other areas of law in the past decade, and one might at least question whether some of the intuitively unreasonable outcomes in the innocent spouse cases discussed above might have been avoided had the standard been the reasonable woman—or one of a number of sub-categories of reasonable women—rather than the "reasonably prudent taxpayer."[178]

The following sections of this Article describe the evolution of the reasonable man standard and some recent developments in the elaboration of the reasonable woman as a standard of behavior in a variety of non-tax legal arenas.

In addition to its role in tax law, the "reasonable man" standard (or, in a largely cosmetic revision, the "reasonable person" standard) is a fixture in such disparate areas of law as administrative law,[179] bailments,[180] constitutional law,[181] contracts,[182] and the law of trusts.[183] In

178. *See, e.g.*, Sanders v. United States, 509 F.2d 162, 166–67 (5th Cir. 1975) (adopting reason-to-know test of a "reasonable person in the taxpayer's subjective position" and rejecting the IRS argument for a reason-to-know test that would require the innocent spouse petitioner to demonstrate that she was "completely without fault and could not possibly have discovered the omission before executing the returns"); *Stevens*, 872 F.2d at 1505.

179. *See* 2 Am. Jur. 2d *Administrative Law* § 656 (1994).

180. Chester H. Smith & Ralph E. Boyer, Survey of the Law of Property 463 (2d ed. 1971) ("bailee is liable for ordinary negligence or failure to observe ordinary care, the care that would be exercised by a reasonably prudent man under the circumstances").

181. *See, e.g.*, Rogers v. United States, 422 U.S. 35, 44 (1975) (Marshall, J., concurring).

182. *See* John D. Calamari & Joseph M. Perillo, The Law of Contracts § 2-12 (2d ed. 1977).

183. Johnson v. Clark, 518 F.2d 246, 251 (10th Cir. 1975). *See also* George G. Bogert & George T. Bogert, Handbook of the Law of Trusts § 93 (5th ed. 1973).

several areas, however, there has been some movement toward either a different "objective" standard, the "reasonable woman," or to a more individualized and subjective standard. These include tort law[184] and, significantly, the tort-like statutory cause of action for sexual harassment,[185] and criminal law, in particular the case of battered women who assault or kill their batterers.[186]

In each of these areas, the "reasonable man" or "reasonable person" standard has come under increasing criticism in recent years for its gender and class bias.[187] A brief review of the critiques in these areas, as well as of the changes that courts and commentators have proposed in order to meet the criticisms, will help us to understand both the roots of the problem in the innocent spouse area and the difficulties involved in establishing a more satisfactory standard.

A. The Evolution of the Reasonable Man Standard

The "prudent and reasonable man" first appears in the common law reports in 1856, in *Blyth v. Birmingham Waterworks Co.*[188] He had been preceded by the "man of ordinary prudence," first mentioned in *Vaughan v. Menlove* in 1837.[189] His twentieth-century English embodiment, the man on the Clapham omnibus, arrived in 1933, in *Hall v. Brooklands Auto Racing Club*,[190] together with his suburban American counterpart, "the man who takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves."[191] The reasonable woman, in contrast, is nowhere to be found in the common law reports before the late twentieth century.[192]

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184. *See infra* text accompanying notes 202–224.

185. *See infra* text accompanying notes 225–261.

186. *See infra* text accompanying notes 264–293.

187. *See, e.g.*, Leslie Bender, *A Lawyer's Primer in Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 20–25 (1988).

188. Blyth v. Birmingham Waterworks Co., 156 Eng. Rep. 1047, 1049 (1856).

189. Vaughn v. Menlove, 132 Eng. Rep. 490, 493 (1837).

190. Hall v. Brooklands Auto Racing Club, [1933] 1 K.B. 205, 224.

191. *Hall*, 1 K.B. at 224.

192. For a feminist critique of the reasonable man standard, see, e.g., Bender, *supra* note 187, at 20–25. On the development and history of the reasonable man concept, see Collins, *supra* note 18; Green, *supra* note 18; James, *supra* note 18; Reynolds, *supra* note 18; Austin, *supra* note 18.

As has been pointed out elsewhere,[193] the "reasonable man" or "reasonable person"[194] standard tends to reflect the ways in which white middle-class men think and act, and to denote as "unreasonable" the ways in which persons from other groups think and act. The maleness of the standard is not unexpected, given that the large majority of cases elaborating the standard have arisen from activities that, at least until fairly recently, were primarily male,[195] and that the large majority of the judges deciding the cases have, until very recently, been male.[196]

Even though one knows that the reasonable man standard does not reflect reality, one could make an argument for the adoption of such a standard in tort law in order to provide some workable rules for handling the large volume of personal injury and other negligence cases that arise every year. But the justification for such an inaccurate standard is considerably less in other areas of the law, where there would be no particularly dire effects of adopting more flexible and realistic definitions of reasonableness. In the case of innocent-spouse claims under I.R.C. § 6013(e), for example, the adoption of a "reasonably prudent taxpayer" standard[197] does not seem to have noticeably simplified the task of the Tax Court judges evaluating such claims. Each case still requires a fact-intensive inquiry and a construction by the court of the hypothetical reasonably prudent taxpayer's response to the particular facts and circumstances of the individual case. In contrast, many of the cases in which the reasonable man appears in American jurisprudence[198] likely involve recurring and predictable situations. A simple, apparently

193. *See, e.g.*, Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 57–65 (1989); Parker, *supra* note 19.

194. In most jurisdictions, references to the reasonable man have recently been superseded by the "reasonable person," a presumably genderless construct. Parker, *supra* note 19, at 108. The actual standard of conduct expected of this androgynous being, is still based largely on the development of the reasonable man in the common law, with the result that the standard continues to incorporate the previously explicit male perspective of its predecessor. Parker, *supra* note 19.

195. Parker, *supra* note 19, at 109 (reporting on an analysis of New Zealand negligence cases that showed most of them arising in commercial and industrial situations, with males as the protagonists).

196. On the predominantly male makeup of the judiciary, see sources cited *supra* note 27.

197. *See, e.g.*, Sanders v. United States, 509 F.2d 162, 166–67 (5th Cir. 1975) (adopting reason-to-know test of reasonable person in the taxpayer's subjective position); *accord*, Stevens v. Commissioner, 872 F.2d 1499, 1505 (11th Cir. 1989).

198. *See* Austin, *supra* note 18, at 481 n.16 (reporting 23,320 occurrences of the reasonable man in U.S. state cases as of December 3, 1991).

objective rule for decision-making would be very useful in cases of rear-end collisions, stairways in ill repair, or sponges left in the bodies of surgery patients. Perhaps any "reasonable person" standard, whether a single, genderless ideal or a collection of more particularized models, is inappropriate in those areas of the law that demand a detailed examination of the specific facts and circumstances that arise from an individual's actions in a situation unlikely to be repeated by others. Even if a general rule exists (as it does in the innocent spouse statute), the application of that rule in practice may not even be efficient.

One approach to the difficulties raised generally by the maleness of the "reasonable man" or the "reasonable person" standard is the use of a "reasonable woman" standard for matters where women's reactions or behavior may be expected to differ from men's.[199] As we shall see, however, even this reform may not go far enough. Is there only one reasonable woman or does a particular woman's reasonableness depend on her background, education, class, race, and on the specific situation in which she is asked to exercise that reasonableness?[200] For that matter, are there certain attributes of women's behavior that stretch the notion of "reasonableness" beyond the breaking point, fatally diminishing the utility of the concept?[201]

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199. The outer boundaries of such an approach may not be easy to determine. For example, Ann C. Scales, *Feminists in the Field of Time*, 42 FLA. L. REV. 95, 98–99 (1990), argues that the law's definitions of time, space, and causality are themselves narrow, rigid, linear, and "white male." In Scales' view, women have a fundamentally different sense of causality and time, one that is multiple, contingent, repetitive, and cyclical. Scales, *supra*, at 109–10, 120. Accommodating such a fundamental change in the notion of tort law causation might amount to a revolution in the law's treatment of women, and might lead to predictable opposition from those who would emphasize the need for certainty and predictability in legal rules, even if the rules are wrong.

200. *See* Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1434 (1992) (discussing the propensity of a single reasonable woman standard to mask differences among women attributable to race, class, or employment experience).

201. *See, e.g.*, Carol Gilligan & Jane Attanucci, *Two Moral Orientations*, *in* MAPPING THE MORAL DOMAIN 73 (Carol Gilligan et al. eds., 1988). Some feminist critics, however, fear that resort to such an alternative standard for women would reinforce the very differences and subordinate position ascribed to women by the dominant male structures of society. *See, e.g.*, Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 39 (1990); Cahn, *supra* note 200, at 1402–03; Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 199–200 (1986).

B. The Reasonable Woman in Tort Law

In its primary arena, negligence law, the "reasonable man" standard served a variety of goals. It purported to reconcile the individual freedom essential to Western liberalism with society's needs for some minimum level of protection for individuals to be free of the harm caused by others, while at the same time creating a safe harbor for individual variations—in effect, establishing the maximum permissible legal limits of individual human failings.[202] In addition, the "reasonable man" standard in tort law had a number of socially useful and administratively efficient functions.[203] It provided a rule of conduct that was conceivably within the grasp of most people and that could change over time in response to changes in technology and in societal mores.[204] The "reasonable man" standard eliminated the need for the judiciary or the government to elaborate detailed codes of prescribed behavior in a variety of specific circumstances, subsuming all such rules within the general rubric of reasonableness and waiting until specific facts emerged in litigation to determine whether a specific behavior was in fact "reasonable."[205] At the societal level, the standard discouraged idiosyncrasy and encouraged conformity, by holding out the threat of legal liability for non-conforming behavior.[206]

Despite attempts to hide the gender-specific nature of the "reasonable man" standard, either by arguing that "man" is a generic term for human being, or by transmuting the term into "reasonable person,"[207] the standard's maleness is clear. When *Vaughn v. Menlove* was decided in England in 1837, no woman in the Western world had the right to vote, and few had full legal rights with respect to property.[208] Because they lacked economic standing, women were unlikely to be named as

202. Parker, *supra* note 19, at 106.

203. Parker, *supra* note 19, at 106.

204. Parker, *supra* note 19, at 106–07.

205. Parker, *supra* note 19, at 107.

206. Parker, *supra* note 19, at 107.

207. Parker, *supra* note 19, at 108–110. *See also* Robert Unikel, Comment, *'Reasonable' Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 Nw. U. L. Rev. 326, 334 (1992).

208. Parker, *supra* note 19, at 108.

defendants in tort actions.[209] The rules that evolved in the common law from those actions quite naturally reflected an exclusively male point of view.[210] The activities and actions of the typical negligence case were male activities and actions.[211] Even before one raises questions about whether "reasonableness" is a term that is useful in resolving specific conflicts between people (as contrasted to its utility in permitting an efficient judicial system and in establishing societal norms of conduct), one must at least acknowledge the male bias inherent in the standard.[212] Typically, 19th-century cases held that a woman could not even meet the "reasonable man" standard, belying any attempted gloss on the word "man" to mean "human being."[213]

While courts tended, in the more gender-conscious environment of the 1970s, to move away from the overt use of "reasonable man" as a standard,[214] the resulting shift to "reasonable person" generally represented only a cosmetic change, as the substantive content of the standard was still based predominantly on the experience of male litigants, as interpreted by male judges.[215] Advocates of this facially neutral standard might argue that

> [b]y refusing to establish one group's ideals as dominant and, instead, relying on prevailing social norms for its definition, the reasonable person standard approximates the objectivity and neutrality that are ideally required by the concept of "reasonableness." Unlike either the reasonable man standard or the reasonable woman standard, the reasonable person standard does not preordain an outcome.[216]

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209. Parker, *supra* note 19, at 108.

210. Parker, *supra* note 19, at 108.

211. Parker, *supra* note 19, at 108.

212. *See, e.g.*, Bender, *supra* note 187, at 20–25; Cahn, *supra* note 200, at 1404.

213. *See, e.g.*, Daniels v. Clegg, 28 Mich. 32 (1873) (holding that a 20-year-old woman could not be held to the "reasonable man" standard because women generally were more like children than like men). In addition to using males as the standard of reasonable behavior, tort law has also traditionally evaluated damage claims from a male point of view. *See, e.g.*, Ellen Smith Pryor, *Flawed Promises: A Critical Evaluation of the American Medical Association's Guides to the Evaluation of Permanent Impairment*, 103 HARV. L. REV. 964, 970–71 (1990) (book review) (noting the systematic under-valuation of female-specific injuries).

214. Unikel, *supra* note 207, at 334.

215. Bender, *supra* note 187, at 22.

216. Unikel, *supra* note 207, at 335 (footnote omitted).

Such pious, abstract thoughts run afoul of the actual application of the reasonable person standard, which often perpetuates an exclusively male viewpoint.[217]

Former Yale Law School dean and now appellate judge Guido Calabresi, a member of the generally white, male, and upper-class legal establishment, has questioned whether a key function of the reasonable person standard is to promote conformity to the male, WASP paradigm of behavior.[218] The notion that there is a single Platonic archetype of the "reasonable person" implies that those who differ from that archetype, as it is interpreted in the context of centuries of male shaping of the common law, are somehow undeserving of the law's protection.

The law of fright and the intentional infliction of emotional distress provide a specific example of the courts' imposition of a gender-specific standard in tort law and the gradual evolution of that standard to reflect gender differences. Early emotional-distress cases required a physical impact as a pre-requisite to any recovery. Martha Chamallas and Linda K. Kerber have noted that this requirement has different implications for men and women:

> [T]he legal rules that emerged from the opinions were worded neutrally. But the fright-based injuries themselves at issue in the classic cases were not gender-neutral. Miscarriage, premature birth and "hysterical" disorders described women's health problems; the case law administering the impact rule was necessarily the law's administration of redress for gender-related harms.[219]

In these cases, the "normal" or reasonable response to fright was a male response; women's injuries, like miscarriages, premature births or other

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217. *See, e.g.*, Rabidue v. Osceola Ref. Co., 805 F.2d 611, 622 (6th Cir. 1986) (holding, after applying the reasonable person standard, that supervisor's obscenities and pornographic posters in the workplace did not amount to actionable sexual harassment "when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places").

218. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 26–28 (1985).

219. Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright*, 88 MICH. L. REV. 814, 832 (1990).

fright traumas, were often held to be abnormal, hypersensitive, or unreasonable.[220]

Eventually, some courts recognized the woman-specific injuries caused by fright and reversed the impact rule, permitting women to recover for emotional distress where they witnessed the death or injury of their children.[221] This result, while not going as far in recognizing the validity of some women-specific injuries as some might think desirable,[222] does at least demonstrate the possibility of progressive case-law development that takes a male-oriented reasonableness rule and then changes that rule to accommodate the real responses of women.

A further extension of the recognition of group-specific characteristics of tort plaintiffs might provide recovery for such varieties of infliction of emotional distress as the abuse or harassment of employees (in addition to statutory remedies under Title VII, discussed below)[223] or the emotional effect of hate speech.[224] Such an extension of traditional tort concepts would threaten the carefully constructed edifice of tort law, but would also make the legal system more responsive to the real injuries suffered by real people, even if such people did not share a white, male, middle-class viewpoint.

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220. Chamallas & Kerber, *supra* note 219, at 832–33. *See also* Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 578 (1993).

221. *See, e.g.*, Dillon v. Legg, 441 P.2d 912, 925 (Cal. 1968).

222. *See, e.g.*, Chamallas & Kerber, *supra* note 219, at 816.

223. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1072–74 (1991), amended Title VII to permit the awarding of compensatory damages for emotional distress and other harms resulting from sexual harassment. On employment-related emotional distress as a tort, see Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988); Alice Montgomery, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U. L. REV. 879 (1980); Sarah E. Wald, *Alternatives to Title VII: State Statutory and Common-Law Remedies for Employment Discrimination*, 5 HARV. WOMEN'S L.J. 35 (1982); Krista J. Schoenheider, Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461 (1986); Benson A. Wolman, Comment, *Verbal Sexual Harassment on the Job as Intentional Infliction of Emotional Distress*, 17 CAP. U. L. REV. 245 (1988).

224. On possible tort remedies for hate speech, see Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, *in* MARI J. MATSUDA ET AL., WORDS THAT WOUND 89 (1993); Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123 (1990).

C. Sexual Harassment Law[225]

Perhaps the most complete development of a "reasonable woman" construct has been in the law of sexual harassment, under Title VII of the Civil Rights Act.[226] This law prohibits discrimination in the terms

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225. The following text is only a brief discussion of the development of the reasonable woman standard in sexual harassment litigation. For more detailed analysis, see CATHARINE A. MACKINNON, *Sexual Harassment: Its First Decade in Court, in* FEMINISM UNMODIFIED 103 (1987); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773 (1993); Eileen M. Blackwood, *The Reasonable Woman in Sexual Harassment Law and the Case for Subjectivity*, 16 VT. L. REV. 1005 (1992); Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95 (1992); Sarah A. DeCosse, *Simply Unbelievable: Reasonable Women and Hostile Environment Sexual Harassment*, 10 LAW & INEQ. J. 285 (1992); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990); Elizabeth A. Glidden, *The Emergence of the Reasonable Woman in Combating Hostile Environment Sexual Harassment*, 77 IOWA L. REV. 1825 (1992); Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 WAKE FOREST L. REV. 619 (1993); Kathleen A. Kenealy, *Sexual Harassment and the Reasonable Woman Standard*, 8 LAB. L.J. 203 (1992); Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35 (1990); Howard A. Simon, Ellison v. Brady: *A "Reasonable Woman" Standard for Sexual Harassment*, 17 EMPLOYEE REL. L.J. 71 (1991); Bonnie B. Westman, *The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace*, 18 WM. MITCHELL L. REV. 795 (1992); Steven H. Winterbauer, *Sexual Harassment—the Reasonable Woman Standard*, 7 LAB. L.J. 811 (1991); Saba Ashraf, Note, *The Reasonableness of the "Reasonable Woman" Standard: An Evaluation of Its Use in Hostile Environment Sexual Harassment Claims Under Title VII of the Civil Rights Act*, 21 HOFSTRA L. REV. 483 (1992); Deborah S. Brenneman, Comment, *From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. CIN. L. REV. 1281 (1992); Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 855 (1993); Lynn Dennison, Note, *An Argument for the Reasonable Woman Standard in Hostile Environment Claims*, 54 OHIO ST. L.J. 473 (1993); Jeffrey A. Gettle, Comment, *Sexual Harassment and the Reasonable Woman Standard: Is It a Viable Solution?*, 31 DUQ. L. REV. 841 (1993); Sally A. Piefer, Comment, *Sexual Harassment from the Victim's Perspective: The Need for the Seventh Circuit to Adopt the Reasonable Woman Standard*, 77 MARQ. L. REV. 85 (1993); David L. Pinkston, Note, *Redefining Objectivity: The Case for the Reasonable Woman Standard in Hostile Environment Claims*, 1993 B.Y.U. L. REV. 363; Unikel, *supra* note 207.

226. 42 U.S.C. § 2000e-2(a)(1) (1994).

and conditions of employment on the basis of, among other things, sex.[227] The emergence of a gendered standard here has made it possible for female plaintiffs to prevail in at least some situations where application of a "reasonable man" or even an androgynous "reasonable person" standard would not have permitted recovery.

Sexual harassment claims typically allege either *quid pro quo* discrimination, in which on the job rewards are conditioned upon providing sexual favors, or "hostile environment" discrimination, in which the overall working situation is so antagonistic to women that it amounts to discrimination.[228] In *Meritor Sav. Bank v. Vinson*,[229] the Supreme Court held that a "hostile environment" toward women workers could form the basis for a Title VII claim.[230] The test elaborated by the Court was whether the conduct of the employer (including conduct attributed to the employer under the doctrine of *respondeat superior*) "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[231] Thus, the *Meritor* Court assumed, without

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227. Sex was added to Title VII as a protected category in 1964, by way of a floor amendment with little legislative history. 110 CONG. REC. 2577–84 (1964). Title VII provides that:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1994).

228. Ellison v. Brady, 924 F.2d 872, 875 (9th Cir. 1991).

229. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

230. *Meritor* 447 U.S. at 67. The *Meritor* decision built on a long line of cases holding that Title VII reached something more than overt discriminatory denials of promotion or failure to hire. *See, e.g.*, Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87, 88 (8th Cir. 1977) (dealing with national origin discrimination); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 514–15 (8th Cir.) (racial discrimination), *cert. denied*, 434 U.S. 819 (1977); Gray v. Greyhound Lines E., 545 F.2d 169, 176 (D.C. Cir. 1976) (racial discrimination); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (racial discrimination), *cert. denied*, 406 U.S. 957 (1972); Compston v. Borden, 424 F. Supp. 157, 160–61 (S.D. Ohio 1976) (religious discrimination). Prior to the decision in *Meritor*, a number of lower federal courts had reached a similar conclusion regarding sex discrimination. *See, e.g.*, Katz v. Dole, 709 F.2d 251, 254–55 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 943–46 (D.C. Cir. 1981); Zabkowicz v. West Bend Co., 589 F. Supp. 780, 783–84 (E.D. Wis. 1984).

231. *Meritor*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a)(3)).

discussing the issue, that there could be a universal, "objective" standard of reasonableness by which behavior could be evaluated.

In its only other pronouncement on hostile environment sex discrimination, *Harris v. Forklift Systems,*[232] the Supreme Court, in contrast to its opinion in *Meritor,* appears to have accepted the notion that reasonableness may be a gendered construct. Although the actual holding of the case is phrased passively and androgynously,[233] the Court refers at least once to whether the work environment would be perceived as hostile to a reasonable woman.[234] The opinion in *Harris,* however, also refers a number of times to the perception of a "reasonable person,"[235] leaving it uncertain whether, were the Court squarely presented with the issue of gendered reasonableness, the sanitized language of "reasonable person" would prevail over any more explicitly gendered conception.

Pending such an authoritative pronouncement from the Supreme Court, the lower federal courts and some state courts have disagreed as to the appropriate standard for determining whether a particular work environment is hostile and abusive.[236] While a few courts have explicitly

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232. Harris v. Forklift Sys., 114 S. Ct. 367 (1993).

233. The standard is whether the environment would reasonably be perceived, and is perceived, as hostile or abusive. *Harris,* 114 S. Ct. at 371. The actual issue decided in *Harris* was whether the conduct in a hostile environment discrimination case must "seriously affect [an employee's] psychological well-being," or merely create a hostile environment. *Harris,* 114 S. Ct. at 370. The Court held that a psychological effect was not required, *Harris,* 114 S. Ct. at 371, thereby resolving a split of authority among the circuits. *See* Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied,* 481 U.S. 1041 (1987); Downes v. F.A.A., 775 F.2d 288, 292 (Fed. Cir. 1985) (all holding that a psychological well-being effect was required to state a claim under Title VII); Ellison v. Brady, 924 F.2d 872, 877–78 (9th Cir. 1991) (psychological effect not required).

234. *Harris,* 114 S. Ct. at 370 (noting that the district court had found that the employer's conduct "would offend the reasonable woman").

235. *Harris,* 114 S. Ct. at 370–72 (Scalia, J., concurring).

236. The full test of whether a plaintiff states a claim for sex discrimination involves five elements: (1) whether the plaintiff is in a protected category (e.g., a category defined by sex); (2) whether the plaintiff was subject to unwelcome sexual harassment; (3) whether the harassment was based on sex; (4) whether the harassment affected a term, condition, or privilege of employment; and (5) whether the employer knew or should have known of the harassment and failed to take prompt, effective remedial action (*respondeat superior*). *Rabidue,* 805 F.2d at 619–20. *See also* Andrews v. City of Phila., 895 F.2d 1469, 1482 (3d Cir. 1990); *Meritor,* 477 U.S. at 66–69; Henson v. City of Dundee, 682 F.2d 897, 903–05 (11th Cir. 1982); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991).

adopted a gender-neutral "reasonable person" perspective,[237] the majority have adopted either a "reasonable woman"[238] or a "reasonable victim"[239] standard.

A few of the leading cases illustrate the specific standards that have been adopted, and how these standards have influenced the outcome in each case. For example, in *Rabidue v. Osceola Ref. Co.*, the Court of

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Application of a "reasonable woman" or "reasonable person" test goes to the fourth of these elements.

In addition, most courts that have considered sexual harassment require that the plaintiff show both that the work environment is *objectively* hostile and abusive, by reference to some hypothetically reasonable plaintiff, and that the environment was *subjectively* perceived as hostile by the particular plaintiff. Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 534 (7th Cir. 1993); *Andrews*, 895 F.2d at 1483; Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 875–76 (D. Minn. 1993); Smolsky v. Consolidated Rail Corp., 780 F. Supp. 283, 294 (E.D. Pa. 1991). The subjective requirement obviously places more resilient, less "sensitive" women at a disadvantage. *See, e.g.*, Burns v. McGregor Elec. Indus., 807 F. Supp. 506, 508–09 (N.D. Iowa 1992) (finding that plaintiff did not subjectively perceive a blatantly chauvinist workplace as abusive and hostile largely because the plaintiff had, prior to commencing employment, posed nude for a national magazine), *rev'd*, 989 F.2d 959 (8th Cir. 1993). A few courts have adopted an exclusively objective test. *See, e.g.*, Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 458 (N.J. 1993).

237. *See, e.g.*, *Rabidue*, 805 F.2d at 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); Radtke v. Everett, 501 N.W.2d 155, 164–67 (Mich. 1993). In *Radtke*, the Michigan Supreme Court expressly rejected the "reasonable woman" standard that had been adopted by a lower appellate court. *Radtke*, 501 N.W.2d at 165. The Michigan case was interpreting a statute, MICH. COMP. LAWS ANN. § 37.2202(1)(a), closely modeled on Title VII, but which explicitly recognized "hostile environment" as a basis for a claim. MICH. COMP. LAWS ANN. § 37.2103(h)(iii) (West 1985).

238. *Andrews*, 895 F.2d at 1486 ("women of reasonable sensibilities"); Ellison v. Brady, 924 F.2d 872, 878–79 (9th Cir. 1991); Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987); Bell v. Crackin Good Bakers, Inc., 777 F.2d 1497, 1503 (11th Cir. 1985); *Smolsky*, 780 F. Supp. at 294; Austen v. State of Hawaii, 759 F. Supp. 612, 628 (D. Haw. 1991); *Toys 'R' Us, Inc.*, 626 A.2d at 453–54, 457–58.

239. *See, e.g.*, King v. Board of Regents of Univ. of Wis. Sys., 898 F.2d 533, 537 (7th Cir. 1990); *Andrews*, 895 F.2d at 1482 ("reasonable person of the same sex in that position"); Stingley v. Arizona, 796 F. Supp. 424, 429 (D. Ariz. 1992) ("reasonable person of the same gender and race or color"); *Smolsky*, 780 F. Supp. at 294; Harris v. International Paper Co., 765 F. Supp. 1509, 1516 n.12 (D. Me. 1991) ("reasonable person from the protected group of which the alleged victim is a member"), *vacated in part*, 765 F. Supp. 1529 (D. Me. 1991). In some cases, the court is unclear whether it is adopting a "reasonable woman" or "reasonable victim" standard. *See, e.g.*, *Ellison*, 924 F.2d at 879–80. In practice, virtually all sexual harassment complaints are brought by women, so that the distinction may be of little practical importance.

Appeals for the Sixth Circuit adopted the following test of whether profanity, obscenity, and the like in the workplace amounted to hostile environment sexual discrimination:

> [T]he trier of fact . . . must adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances. Thus, in the absence of conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances, a plaintiff may not prevail . . . regardless of whether the plaintiff was actually offended by the defendant's conduct.[240]

In *Rabidue*, the plaintiff, who worked in an overwhelmingly male shipyard, argued that repeated obscenities directed at her by a co-worker, and exposure to workplace pornography, amounted to sex discrimination.[241] The court, apparently relying on its view of what the hypothetical reasonable person would think, held otherwise.

In *Radtke v. Everett*, the plaintiff argued that an attempted forcible sexual encounter by her boss amounted to sexual harassment.[242] The lower court applied a "reasonable woman" standard for evaluating whether the boss's attempt to restrain the employee on a couch and kiss her amounted to actionable harassment.[243] The Michigan Supreme Court reversed, however, holding that whether a particular work environment was "hostile," "intimidating," or "offensive" should be determined by an "objective" reasonableness standard, rather than by the subjective perceptions of a particular plaintiff, as had been argued by Ms. Radtke.[244] The Michigan court held that a supposedly gender-neutral "reasonable person," expressly incorporating the long case law history of the reasonable man, should be used to apply this "objective"

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240. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986). The *Rabidue* court's requirement for actual effect on work performance or actual psychological harm was overturned by the Supreme Court's decision in Harris v. Forklift Sys., 114 S. Ct. 367, 371 (1993).

241. *Rabidue*, 805 F.2d at 615.

242. Radtke v. Everett, 471 N.W.2d 660 (Mich. App. 1991), *rev'd*, 501 N.W.2d 155 (Mich. 1993).

243. *Radtke*, 471 N.W.2d at 664.

244. *Radtke*, 501 N.W.2d at 164–65.

standard. The court stated that any deviation from a facially gender-neutral approach was a matter for the legislature and not the courts.[245]

In contrast, a number of cases, many of them drawing on Judge Damon Keith's forceful dissent in *Rabidue*,[246] explicitly adopt the perspective of a "reasonable woman." For example, in *Lehmann v. Toys 'R' Us, Inc.*,[247] the New Jersey Supreme Court, interpreting a statute modeled on federal law, adopted a "reasonable woman" standard. The court held that: "[t]o state a claim for hostile work environment sexual harassment, a female plaintiff must allege conduct that . . . a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment."[248] Thus the court adopted a supposedly objective standard, but one that has a gendered content.[249] The principal justification for such a gendered standard was that the use of supposedly gender-neutral standards might serve to perpetuate discrimination and offensive behavior that was built into the day-to-day fabric of the workplace, while the purpose of the sex discrimination statute was to force changes in that pattern of behavior.[250]

In addition to these two standards in sexual harassment cases, a number of courts have attempted to craft even more specific rules that incorporate characteristics of the plaintiff that go beyond gender.[251] In *Harris v. International Paper Co.*, the U.S. District Court in Maine adopted a standard of evaluating the workplace environment from the point of view of "the reasonable person from the protected group of which the alleged victim is a member" in a racial discrimination case.[252] And in *Stingley v. Arizona*, the district court adopted a standard of

245. *Radtke*, 501 N.W.2d. at 165–66.

246. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 623 (6th Cir. 1986) (Keith, J., concurring in part and dissenting in part).

247. Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445 (N.J. 1993).

248. *Toys 'R' Us, Inc.*, 626 A.2d at 453.

249. The New Jersey court held that if a sexual discrimination plaintiff were male, the standard to be applied would be that of the "reasonable man." *Toys 'R' Us, Inc.*, 626 A.2d at 458.

250. *Toys 'R' Us, Inc.*, 626 A.2d at 458.

251. Harris v. International Paper Co., 765 F. Supp. 1509 (D. Me.), *vacated in part*, 765 F. Supp. 1529 (D. Me. 1991) (discussing racial harassment); Stingley v. Arizona, 796 F. Supp. 424 (D. Ariz. 1992) (discussing racial and sexual harassment).

252. *Harris*, 765 F. Supp. at 1516 n.12.

viewing the alleged hostile environment from the point of view of "'a reasonable person of the same gender and race or color.'"[253]

While no clear consensus has yet emerged in the sexual harassment cases as to the applicable standard for evaluating whether a particular work environment is reasonably perceived as hostile, offensive or intimidating, there is ample evidence that many, if not most, courts are rejecting easy reliance on the traditional "reasonable man." Courts are groping for a standard that more accurately reflects both the differences among plaintiffs and the remedial aims of anti-discrimination legislation.

As the cases and commentators addressing sexual harassment have often noted, the principal justification for a gendered standard is simply that, in general, men and women tend to view the same actions differently, as a result of their socialization and as a result of their appropriately differing perceptions of the dangers associated with sexual aggression.[254] Numerous courts have commented that what many men would find unobjectionable may reasonably be perceived as offensive by women.[255]

The standards described above all reflect the appeal that some concept of reasonableness has for the courts. They hold out the hope that courts may be able to decide cases by applying some external rule to a limited set of legally relevant facts, rather than being compelled to delve into the messy particulars of the specific situation. In fact, at least one court argued that the adoption of an objective standard alone, without requiring any analysis of the claimant's subjective perception of her work environment, actually benefits women:

> [A]n extraordinarily tough and resilient plaintiff might face harassing conduct that was, objectively viewed, sufficiently severe or pervasive to make the working environment hostile

253. *Stingley*, 796 F. Supp. at 428–29 (following Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991)).

254. *See, e.g.*, Abrams, *supra* note 225, at 1205 ("American women have been raised in a society where rape and sex-related violence have reached unprecedented levels . . . . Because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience.").

255. *Ellison*, 924 F.2d at 878; Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988); Yates v. Avco Corp., 819 F.2d 630, 637 n.2 (6th Cir. 1987). *See also* Ehrenreich, *supra* note 225, at 1207–08; Abrams, *supra* note 225, at 1203 (asserting that males view sexual harassment as "comparatively harmless amusement," and that this view is expressed in many court opinions).

> or intimidating, but because of her toughness, she might not personally find the workplace hostile or intimidating. Under our [purely] objective standard, such a plaintiff would state a claim even if she personally did not experience the workplace as hostile or intimidating. . . Sexual harassment is illegal even if the victim is strong enough not to be intimidated.[256]

Certainly, the requirement for an evaluation of the claimant's subjective response to an admittedly "objectively" hostile work environment can, at a minimum, impose additional litigation burdens. For example, in *Jenson v. Eveleth Taconite Co.*,[257] a hostile-environment class action, the court required each individual class member to prove that she was "as affected as the reasonable woman" by the employer's actions.[258]

On balance, adoption of a "reasonable woman" or "reasonable victim" standard in sexual harassment cases has likely made it easier for women to recover in sexual harassment cases. This is especially true where courts recognize that the construct of a reasonable woman is not monolithic, as Judge Marie Garibaldi of the New Jersey Supreme Court did in *Lehmann v. Toys 'R' Us, Inc.*:

> The category of reasonable women is diverse and includes both sensitive and tough people. A woman is not unreasonable merely because she falls toward the more sensitive side of the broad spectrum of reasonableness. Nor should "reasonable" be read as the opposite of "emotional." Perhaps because "reasonable" contains the word "reason," some have interpreted reasonableness as requiring a Vulcan-like rationality and absence of feeling. The reasonable woman standard should not be used to reject as unreasonable an emotional response to sexual harassment. On the contrary, such a response is normal and common.[259]

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256. *Toys 'R' Us, Inc.*, 626 A.2d at 458.

257. Jenson v. Eveleth Taconite Co., 824 F. Supp. 847 (D. Minn. 1993).

258. *Jenson*, 824 F. Supp. at 876.

259. *Toys 'R' Us, Inc.*, 626 A.2d at 458. Judge Garibaldi also pointed out, as have many academic commentators, that the reasonable person standard, despite its apparent gender neutrality, tends to be male-biased, as a result of the courts' general tendency to view a male perspective as normal. *Toys 'R' Us, Inc.*, 626 A.2d at 459.

Some commentators on recent developments in sexual harassment cases have expressed the fear that, as Judge Garibaldi noted, a single, supposedly objective, "reasonable woman" standard might still leave many women devoid of protection, because their personal characteristics fail to conform to the posited standard.[260] On the other hand, the proliferation of ever more precise standards, as in the *Stingley* court's "reasonable person of the same gender and race or color,"[261] runs counter to the desire of courts for simplicity and predictability in handling numerous largely similar cases. Use of more specific standards also raises the question of whether the trier of fact in these cases can put himself (or less frequently herself) in the position of the victim to the extent necessary to make a fair evaluation of the circumstances from the victim's perspective.

Nonetheless, the use of a "reasonable woman" standard in the sexual harassment cases undoubtedly represents a significant improvement over the prior, ostensibly gender-neutral, "reasonable person" standard. Despite the uncertainties associated with implementing the reasonable woman concept, it clearly provides a vehicle for making the working environment more woman-friendly than it would otherwise be.

If applied to tax law in general, and the innocent spouse statute in particular, the substitution of the same sort of reasonable woman's perspective that we have seen in the sexual harassment cases in place of the reasonably prudent taxpayer (a clearly male construct) now embodied in the case law would likely cause judges to pay somewhat more attention to the context of the situations that present themselves as innocent spouse petitions. They might stop for a moment and ask whether the response of this particular woman in signing a return without carefully reviewing it, or in accepting her husband's assurances that all the deductions must be legitimate because, after all, the accountant prepared the return was, *from the point of view of a woman in her position*, reasonable. The extent to which even such a substitution, however, could erase the hyper-rational model of the prudent taxpayer embodied in current law seems somewhat problematic.

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260. *See, e.g.*, Abrams, *supra* note 225, at 1214 ("Courts also should consider the exploitation of sensitivities arising from socialization as a woman of a particular racial, ethnic or socio-economic group.").

261. Stingley v. Arizona, 796 F. Supp. 424, 429 (D. Ariz. 1992).

D. Standards for Criminal Responsibility

The other principal area of law in which the concept of a reasonable woman has developed is in the field of criminal law generally, and in the defense of battered women in particular. For example, the Model Penal Code proposed by the American Law Institute would establish a defendant-specific model of reasonableness:

> Criminal homicide constitutes manslaughter when: . . . (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.[262]

The Code's proposed standard adopts the point of view of the specific actor while requiring some minimal degree of reasonableness, *as determined from the actor's point of view.* The standard asks: what do triers of fact know of the particular individual's situation, and how might she act in that situation, given all that has occurred to her?

While the criminal law requirement of mens rea[263] bars holding defendants to an abstract, generalized standard of reasonableness, the subjective modification of a general reasonable-person standard suggests that the criticisms of a "reasonable woman" standard as unworkable have not convinced all elements of the legal community. If the trier of fact in a criminal case can adopt the "viewpoint of a person in the actor's situation," then why should it not be possible for a trier of fact in a variety of civil-litigation settings, including tax law, to adopt the presumably more general viewpoint of the "reasonable woman"?

The acceptance of a more particularized standard of reasonableness and responsibility in the criminal law in general is reflected in the specific area of battered women who kill or attack

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262. MODEL PENAL CODE § 210.3(b) (Proposed Official Draft 1962).

263. *See* WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 60–61 (1978).

their abusive husbands or lovers.[264] The battered woman's defense has developed out of the self-defense doctrine.[265]

A person has the right to use deadly force in self-defense if that person reasonably believes that he or she is in *imminent* danger of death or, in some states, danger of serious bodily harm, and that the use of deadly force is necessary to avoid this danger.[266] The applicable standard contains three elements: (1) the defendant must honestly and reasonably have believed that she was in imminent (or immediate) danger of death or serious bodily harm, from which she could not save herself without using deadly force; (2) the defendant must have availed herself of all reasonable means to avoid physical combat before using deadly force; and (3) the defendant must have used no more force than was reasonably necessary in the circumstances.[267]

The rule raises difficulties for the repeatedly battered woman who, fearing a resumption of violence, attacks her spouse or lover while he is sleeping or his back is turned.[268] As Cynthia Gillespie has noted:

> The law of self-defense is a law for men. It developed over many centuries in response to two basic kinds of situations

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264. For a more detailed discussion of the development of the concept of reasonableness as part of battered women's defense strategies, see CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 129–56 (1989); Beth I.Z. Boland, *Battered Women Who Act Under Duress*, 28 NEW ENG. L. REV. 603, 612–22 (1994); Michael Dowd, *Dispelling the Myths About the "Battered Women's Defense:" Towards a New Understanding*, 19 FORDHAM URB. L.J. 567 (1992); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991); Victoria M. Mather, *The Skeleton in the Closet: the Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545 (1988); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992); Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149 (1978).

The leading studies of the so-called "battered women's syndrome," which has been used by many courts to evaluate the reasonableness of a woman's actions in defending herself against an abusive male, are LENORE E. WALKER, THE BATTERED WOMAN (1979) and LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (1989).

265. Dowd, *supra* note 264, at 574–75.

266. IRVING J. SLOAN, THE LAW OF SELF-DEFENSE: LEGAL AND ETHICAL PRINCIPLES 1 (1987).

267. Boland, *supra* note 264, at 612–13.

268. *See* Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 633–34 (1980).

> that men found themselves in. The first was the sudden assault by a murderous stranger, such as when someone, perhaps bent on robbery, comes out of a dark alley with a gun and threatens to kill a person walking innocently down the street. The second is the fist fight or brawl that gets out of hand and suddenly turns deadly. Usually this is the sort of bar-fight situation where both participants willingly enter into a punching match; and one of them, believing he is losing, suddenly pulls out a weapon and threatens to kill the other.[269]

The bar-room brawl model, however, does not make the application of the self-defense rules problematic for all battered women. Between seventy and ninety percent of all battered women who kill do so when faced with an ongoing physical attack or the imminent threat of death or serious injury, rather than an attack on a man momentarily incapacitated by sleep or alcoholic stupor.[270]

A minority of states require a woman to justify the use of deadly force by demonstrating a threat of "immediate," rather than "imminent" harm.[271] States using the imminence test are more receptive to evaluating a battered woman's defense in the context of her overall situation and to admitting expert evidence on the effect of the battered women's syndrome on the particular defendant.[272]

Both of these standards presume something in the nature of a bar-room brawl between two male antagonists. Moreover, the bar-room brawl analogy posits the stereotypical aggressive male reaction as "reasonable."[273] Women were viewed as inherently unreasonable, hysterical, emotional, or intuitive.[274]

Prior to the 1970s, women who killed abusive husbands or lovers generally pled guilty or pled insanity and were routinely convicted.[275] Beginning, however, with *State v. Wanrow*[276] in 1977, a more specific woman-focused standard of responsibility has become common.

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269. GILLESPIE, *supra* note 264, at 4.

270. Maguigan, *supra* note 264, at 384–85.

271. Maguigan, *supra* note 264, at 464–67.

272. Dowd, *supra* note 264, at 580; Maguigan, *supra* note 264, at 414–15.

273. *See* Collins, *supra* note 18, at 323 (female traits have traditionally been viewed in law as the antithesis of reasonableness).

274. Schneider, *supra* note 268, at 624–30.

275. Schneider & Jordan, *supra* note 264, at 149.

276. State v. Wanrow, 538 P.2d 849 (Wash. App. 1975), *aff'd*, 559 P.2d 548 (Wash. 1977).

In *Wanrow*, a five-foot four-inch-tall woman, wearing a cast and using crutches to get around, was convicted of second-degree murder for shooting and killing a six-foot two-inch tall intoxicated man who broke into the house where she was staying, apparently because the jury, on instructions from the trial judge, found Wanrow not to have satisfied the objective standard of reasonableness.[277] The Washington Court of Appeals reversed.[278] That reversal was affirmed by the Washington Supreme Court, which held that the traditional "objective" standard applied to defendants in determining whether their actions met the legal test for self-defense should, at least in the case of women, be replaced by a standard that instructs the jury to view a woman's actions "in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's 'long and unfortunate history of sex discrimination.'"[279]

Similarly, in *State v. Kelly*, the defendant and her husband had an argument, involving at least some degree of violence on his part, in the street.[280] Immediately thereafter, Kelly left the scene of the argument and went to find her daughter.[281] She was then approached by her husband, who ran toward her with his arms raised.[282] In the ensuing scuffle, she pulled out a pair of scissors and stabbed him to death.[283] Kelly was convicted of reckless manslaughter in the trial court, but the New Jersey Supreme Court reversed, holding that the trial court should have permitted Kelly to introduce expert testimony regarding her status as a battered woman.[284] Kelly had argued that the testimony would have tended to show that her actions in pulling out the scissors when confronted by her abusive husband were reasonable, if looked at from the point of view of a battered woman.[285]

In these and many similar cases, courts have begun to move in the direction of establishing a test for self-defense that asks whether a "reasonable battered woman" would have acted as the particular

277. *Wanrow*, 559 P.2d at 555.
278. *Wanrow*, 538 P.2d at 849.
279. *Wanrow*, 559 P.2d at 559 (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)).
280. State v. Kelly, 478 A.2d 364, 369 (N.J. 1984).
281. *Kelly*, 478 A.2d at 369.
282. *Kelly*, 478 A.2d at 369.
283. *Kelly*, 478 A.2d at 368–69.
284. *Kelly*, 478 A.2d at 375–81.
285. *Kelly*, 478 A.2d at 369, 378.

defendant did in fact act.[286] The reasonableness test that has evolved in the case of battered women contains both objective and subjective elements—the defendant must have an honest, subjective apprehension of imminent or immediate bodily harm *and* her apprehension must be reasonable.[287] What is "reasonable," however, is not entirely clear. At least three formulations have been used: (1) a gender-neutral "reasonable person" standard that considers "all the circumstances surrounding the participants at the time of the incident," including their characteristics and interpersonal history;[288] (2) a "reasonable woman" standard that emphasizes the generic differences between men's and women's reasonable perceptions of harm from a particular set of circumstances;[289] and (3) a "reasonable battered woman" standard that recalls the "reasonable victim" approach of sexual harassment law, creating subcategories of the gender archetypes and specifically incorporating the well-established evidence that a history of battering changes the ways in which the victim perceives the world.[290] Each of these standards would clearly produce different results in practice. The reasonable person would be held to the historical standard of the bar-room brawl or the unexpected and sudden assault; the reasonable woman would, as perhaps Yvonne Wanrow was, be evaluated in the light of women's generally lesser

286. *See, e.g.*, State v. Stewart, 763 P.2d 572, 579 (Kan. 1988) (endorsing a separately defined standard of the "reasonable battered woman" to be applied where a woman who can show that she was in fact battered claims self-defense); *accord*, State v. Williams, 787 S.W.2d 308, 312–13 (Mo. Ct. App. 1990); State v. Felton, 329 N.W.2d 161, 173 (Wis. 1983).

287. Boland, *supra* note 264, at 614. A minority of states require only one or the other element, though no state apparently permits the defendant to choose between a subjective and an objective standard. *See* SLOAN, *supra* note 266, at 55–95 (survey of state laws).

288. Dowd, *supra* note 264, at 571. *See also* Mather, *supra* note 264, at 571.

289. Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 152 (1985); Mather, *supra* note 264, at 573. *See also* Maguigan, *supra* note 264, at 402–05. Use of the reasonable woman standard, however, in battered women's cases is subject to the same criticisms—that it stereotypes women and reinforces the perception of them as helpless, while excluding from its protection those women who are insufficiently "female"—as in the case of the sexual harassment standard. *See* Dowd, *supra* note 264, at 572; Mather, *supra* note 264, at 573.

290. Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 416 (1988); Mather, *supra* note 264, at 571–72. *See, e.g.*, People v. Aris, 264 Cal. Rptr. 167, 179–80 (Cal. App. 1989); State v. Kelly, 478 A.2d 364, 377 (N.J. 1984); Commonwealth v. Watson, 431 A.2d 949, 952 (Pa. 1981) (all dealing with the relevance of a history of abuse to the defendant's self-defense claim).

physical strength and stature. The reasonable battered woman would be judged in the light of her altered perceptions of imminent threat that are a direct result of her history as a victim.

As in other areas of law, however, it is not at all clear that there should be a single self-defense standard applicable to all in the general category of "battered women." There may be great differences, attributable to race, class, age and other factors, in the ways in which a history of battering occurs and in which that history systematically affects a woman's perceptions.[291]

Although one of the leading practitioners of battered women's defense believes that a gender-neutral standard actually produces fairer trials than the other formulations,[292] that conclusion may be a result of the unwillingness of (especially female) jurors to think that they, as women, might ever be in the unenviable position of the defendant. A gender-neutral standard, which can encompass specific facts and circumstances, may permit a more favorable evaluation of a specific defendant. In comparison to the "reasonable battered woman," the gender-neutral formulation is particularly attractive to jurors, and avoids the difficulties inherent in the limiting and reductive nature of the term "battered woman."[293]

Substitution of the "reasonable battered woman" or the "reasonable woman" in place of the traditional reasonable man of self-defense law is not wholly without risk. To the extent that such a standard permits judges or juries to superimpose their own preconceptions of the archetypal woman on a case, instead of looking at the actual litigant, the standard will treat some women unfairly for their failure to conform to the trier of fact's stereotype. Nonetheless, the substitution of a gender-specific standard is an improvement on the adamantly gender-neutral formulation, clearly rooted in the historic "reasonable man" that previously prevailed in the criminal law.

III. Applying the Reasonable Woman Standard to Tax Law

In both the sexual harassment cases and the battered women's self-defense cases, the adoption of a gender-specific standard for evaluating

291. Schneider, *supra* note 264, at 548.

292. Dowd, *supra* note 264, at 571 n.18.

293. Maguigan, *supra* note 264, at 444–45; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); Schneider, *supra* note 264, at 562–63.

the reasonableness of women's behavior appears to have benefitted the women involved more often than not. It is apparent that the reasonable woman standard can be used in ways that both increase and decrease women's access to what we might ordinarily think of as justice or fairness. In sexual harassment cases, for example, the standard tends to increase women's power in litigation, while in many, though not all, of battered-women's cases, the "reasonable woman as victim" standard requires women to conform to a predetermined and gender-inflected ideal of behavior before the legal system will recognize their experience as reasonable.[294]

The gender of the actor or of the complainant is clearly relevant in cases involving sexual harassment and battered wives and girlfriends. In contrast, one might argue that there is no need for a gender-specific standard in tax law. Men and women both earn money, and both are presumed capable of understanding the need to fill out tax returns. Why, one might ask, should there be a gender-conscious standard in this area of law that appears so divorced from the day-to-day gender differences that so clearly affect harassment and battery?

There are two answers. First, dealing with tax matters *is* a gendered activity, at least within most marriages. Men are more likely to be responsible for preparing the joint return, or supervising its preparation by an accountant. Just as working is a gendered activity, for purposes of sexual harassment law,[295] so too is tax preparation in the context of most marriages. At a minimum, adoption of a reasonable woman standard or standards would acknowledge this reality.

In his own way, in deciding *against* Janet Bliss, Tax Court Judge Whalen was using a "reasonable woman" standard. The judge had decided that, at least when they are going through a divorce, women generally conform to a stereotypical pattern. As he so delicately put it, "it's difficult for me to believe that somebody didn't wake up and say . . . 'what was the SOB making.'"[296] I do not think Judge Whalen's formulation is what feminists have in mind when they ask judges to recognize the ways in which women's and men's experiences and

294. Cahn, *supra* note 200, at 1401. *See also* SUSAN ESTRICH, REAL RAPE (1987) (describing the behavior society expects from a woman who has been raped).

295. *See, e.g.*, Rabidue v. Osceola Ref. Co., 805 F.2d 611, 623–24 (6th Cir. 1986) (Keith, J., concurring in part and dissenting in part) (describing the isolated position of a woman employee in a predominantly male environment).

296. Transcript of Record at 295, Bliss v. Commissioner, 66 T.C.M. (CCH) 522 (1993), *aff'd*, 59 F.3d 374 (2d Cir. 1995).

attitudes differ. But, like the holdings of the judges in some of the battered women's self-defense cases, his ruling is an example of what happens when judges are permitted to believe that they are applying gender-neutral universal norms in a situation where nothing is gender-neutral and where universals do not exist. In this case, and in other tax cases, a "reasonable woman" standard, or, even better, a "reasonable divorcing woman who has not worked outside the home" standard, incorporating sociological and psychological findings on the real ways in which such women are likely to behave, would have been better and more fair than the standard Judge Whalen pulled out of thin air. Using a "reasonable woman" standard may perpetuate an ideology of female inferiority, where women are seen as "sensitive, fragile and in need of a more protective standard."[297] However, the costs incurred in perpetuating this ideology are outweighed by the benefits of using a "reasonable woman" standard.

Adoption of a "reasonable woman" standard or standards for tax cases would also be a second-best or partial solution to the innocent spouse problem for both sexes. The law could respond more fairly to the reality of each group's experience either by eliminating the "know or have reason to know" requirement of I.R.C. § 6013(e)(1)(C) or by eliminating joint and several liability altogether.[298] But these more radical remedies are unlikely to be enacted by Congress, as the Treasury would likely portray both of them as posing severe threats to the fisc. In contrast, the adoption of a reasonable woman standard for purposes of the innocent spouse statute could be accomplished through the courts, on a circuit-by-circuit basis, in exactly the same way that such a standard has emerged in sexual harassment law.[299] While it would not eliminate the uncertainty and the occasional unfairness inherent in the innocent spouse statute as a whole, using a reasonable woman as the touchstone for analyzing and deciding these cases could not help but improve the odds for women whose husbands have left them with the tax bill.

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297. Radtke v. Everett, 501 N.W.2d 155, 167 (Mich. 1992) (declining to apply a "reasonable woman" standard in a sexual harassment case).

298. *See supra* part I.A.1.

299. *See supra* part II.C.

IV. The Realities of Divorce

Janet Bliss's story demonstrates the incongruence of a hyperrational model with the reality of someone undergoing a divorce. Judge Whalen, summarizing his view of the evidence at the end of Janet's trial, commented that:

> [I]t's still an uphill battle I think for the petitioner in the sense that, you know, despite her—or regardless of her education, she was—this was a matter in litigation and she was being represented by attorneys and clearly there was information given to her which would have disclosed the nature of these loan accounts . . .
>
> [T]o some extent it gets to be a little incredible that . . . Mr. Bliss moves out and she continues to have unquestioning faith and confidence that he would give her a [tax] return which was completely accurate and she would have no curiosity as to what his income was . . . . [T]he normal course of events is that formerly married or separated persons become very suspicious of one another and—and, you know, hire investigators and refuse to believe anything and are extremely curious as to the events and circumstances surrounding the other party. . . .
>
> [I]t's quite frankly very difficult for me to believe that somebody didn't wake up and say, "Look, there are these loan accounts and here's all this financial information and what was the SOB making?" I mean, you know, that's—that's exactly what kind of thing goes on and it's very difficult to believe that somebody would have exhibited this much lack of interest in—or curiosity about the financial affairs of somebody who was obviously not a very nice person. . . .[300]

Although Judge Whalen found Janet Bliss's behavior irrational under these circumstances, the relevant sociological and psychological literature[301] makes it abundantly clear that Janet's reaction was normal and commonplace; many women in the midst of divorce proceedings rely entirely on their lawyers, never themselves studying the documentation that is produced during the proceedings. Judge Whalen apparently

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300. Transcript of Record at 292–96, Bliss v. Commissioner, 66 T.C.M. (CCH) 522 (1993), *aff'd*, 59 F.3d 374 (2d Cir. 1995).

301. *See infra* text accompanying notes 304–314.

expected that any woman in the midst of a divorce would vigilantly search out all her husband's assets.[302] In theory, divorce is not necessarily a factor that the Tax Court has held to create a greater duty of inquiry in the "innocent" spouse.[303] Nonetheless, Judge Whalen's comments probably reflect a widely held view of the typical divorcing woman—a view that bears little relation to reality.

The leading study of women's reactions to the divorce process, Lenore Weitzman's *The Divorce Revolution,*[304] shows that women are much less likely than men to focus on the economic aspects of divorce and much more likely to focus on interpersonal issues.[305] As an earlier study of women's knowledge of family finances found:

> Most women are no more involved with the economics of their marriage than they are with the economics of the nation or the world. They [are] ignorant about financial matters even—perhaps especially—those that affect them most directly. Being a "dutiful wife" seems to require sentiment and loyalty that are somehow projected as being inconsistent with concern with the woman's own financial protection.[306]

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302. Transcript of Record at 293–96, *Bliss,* 66 T.C.M. (CCH) at 522.

303. *See, e.g.,* Bell v. Commissioner, 56 T.C.M. (CCH) 1467 (1989); Streit v. Commissioner, 57 T.C.M. (CCH) 571 (1989); Hinds v. Commissioner, 56 T.C.M. (CCH) 104 (1988); McRae v. Commissioner, 55 T.C.M. (CCH) 1560 (1988); Shapiro v. Commissioner, 55 T.C.M. (CCH) 1472 (1988); Bouskos v. Commissioner, 54 T.C.M. (CCH) 1117 (1987); Guth v. Commissioner, 54 T.C.M. (CCH) 878 (1987); Feingold v. Commissioner, 40 T.C.M. (CCH) 309 (1980); Hackney v. Commissioner, 35 T.C.M. (CCH) 420, 426 (1976) (all noting that divorce is a factor to be taken into account).

304. LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985). For similar findings, see RUTH SIDEL, ON HER OWN: GROWING UP IN THE SHADOW OF THE AMERICAN DREAM (1990); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children,* 21 FAM. L.Q. 351 (1987); Jana B. Singer, *Divorce Reform and Gender Justice,* 67 N.C. L. REV. 1103 (1989); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault,* 60 U. CHI. L. REV. 67 (1993).

305. WEITZMAN, *supra* note 304, at 313. Numerous commentators suggest that men typically have a superior bargaining position in divorce cases, an advantage that is enhanced by the application of so-called neutral legal rules. *See, e.g.,* Ann L. Diamond & Madeleine Simborg, *Divorce Mediation's Strengths . . . and Weaknesses,* CAL. LAW., July 1983, at 37; Janet Rifkin, *Mediation From a Feminist Perspective: Promise and Problems,* 2 LAW & INEQ. J. 21 (1984); Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom,* 132 U. PA. L. REV. 1399 (1984).

306. CHESLER & GOODMAN, *supra* note 144, at 132.

If, in fact, women aggressively pursued their economic interests in divorce proceedings, as Judge Whalen seems to assume they will, then one would expect the economic outcomes of divorce cases to reflect that aggressive stance. But virtually all empirical studies reflect that "[d]ivorce impoverishes women and the minor children in their households, both absolutely and in relation to their ex-husbands and fathers. Although women's standard of living drops dramatically as a result of divorce, men's standard of living typically improves."[307] One study shows that "divorced men experience a 42 percent rise in their standard of living in the first year after the divorce, while divorced women (and their children) experience a 73 percent decline."[308] These outcomes reflect the fact that for husbands, but generally not for wives, money is the bottom line; and husbands, but not wives, go after that bottom line in a divorce proceeding. Women are usually at a disadvantage in these proceedings because their husbands, as in Janet Bliss's case, typically control the family money and are willing to fight to keep that control even after the divorce.[309]

In addition, women may focus less on financial matters than men in the divorce process because they are more often primary caregivers for children and are often willing to give up financial benefits to ensure obtaining custody of the children.[310]

There is also ample evidence that many, perhaps most, women, hesitate to become embroiled in disputes over financial issues:

> Women are systematically convinced that they shouldn't try to take over control of money. They are made to feel uncomfortable about it. They're very insecure about their decisions. And one thing feeds on the other, and they feel stupid, and they ARE stupid, and then because they are stupid, they think they have no capacity to learn beyond that.[311]

Even when the marriage has deteriorated, and a divorce proceeding is underway, many women continue to trust their husband's word on financial matters, perhaps as a way of maintaining some form of

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307. Singer, *supra* note 304, at 1104.

308. WEITZMAN, *supra* note 304, at 323.

309. LOIS BRENNER & ROBERT STEIN, GETTING YOUR SHARE: A WOMAN'S GUIDE TO DIVORCE STRATEGIES 17 (1989).

310. *See* BRENNER & STEIN, *supra* note 309, at 99 (referring to husbands' threats to seek child custody in order to obtain financial concessions).

311. CHESLER & GOODMAN, *supra* note 144, at 52.

relationship with the former spouse.[312] And even in the divorce situation, because women often have a lower tolerance for conflict than men,[313] a woman may not investigate the about-to-be-ex-husband's finances with the diligence that a (male) judge would expect of the "reasonably prudent taxpayer."

Women, particularly those whose husbands have left them, typically cope with divorce with a combination of denial, avoidance and ambivalence.[314] Many women may be slow to come to terms with the reality that the divorce process is indeed going forward in court, and that they need to take steps to protect their interests. They may tend to show a greater commitment to the marriage, and to hope, sometimes until the end of the divorce process and even beyond, that the marriage can somehow be repaired.

This reality gap could be bridged by imputing the knowledge of engaged representatives for purposes of the reasonableness standard of § 6013(e)(1)(C). After all, cannot one expect that women will rely on their lawyers to represent their interests zealously in divorce proceedings, and, in particular, to pursue the husband's financial assets? That is certainly what Janet Bliss did when she relied on her lawyer to "take care" of the financial aspects of her divorce.[315] But many women may be no more likely to press their lawyers for information than they are to press their spouses. Women's attitudes towards their (often male) lawyers may mirror their diffidence in dealing with their husbands in divorce cases.[316] Among the factors that make it unlikely that a female divorce client will, in fact, come to know all there is to know about her husband's finances through the intermediary of her lawyer are: "the client's expectation that the lawyer will 'step in and straighten things out'; the client's attempt to avoid responsibility for making a decision; . . . the client's inflated view of the legal profession; the client's low self-esteem; and, finally, the attorney's psychological need to occupy a

312. WEITZMAN, *supra* note 304, at 313.

313. WEITZMAN, *supra* note 304, at 315.

314. John F. Crosby, et al. *The Grief Resolution Process in Divorce*, 7 J. DIVORCE, Fall 1983, at 3, 5–6.

315. Transcript of Record at 50, Bliss v. Commissioner, 66 T.C.M. (CCH) 522 (1993), *aff'd*, 59 F.3d 374 (2d Cir. 1995).

316. Ignorance of the law makes clients anxious and it also makes it difficult for them to question their attorney's decision-making abilities. *See generally* James R. Elkins, *A Counseling Model for Lawyering in Divorce Cases*, 53 NOTRE DAME L. REV. 229 (1977).

dominant role in the interaction."[317] Often, in fact, lawyers may attempt to increase their authority by "shielding" their clients from involvement in proceedings,[318] or by taking over the decision-making role without fully communicating the options to their clients.[319] The styles adopted by lawyers for these approaches to lessening client autonomy include the "leave it all to me" lawyer, who generally brushes aside clients' questions and practically pats the client on the head, telling her not to worry;[320] the "boy am I busy" lawyer, who strongly communicates to the client that she shouldn't impose on his busy schedule by asking questions;[321] and the "Arnie Becker" star lawyer, who tells clients what a celebrity he is.[322] All three of these types, and all possible permutations of them, are easily recognized by anyone with experience with the divorce bar.

Thus, any realistic view of the role that lawyers play in the divorce process, combined with the evidence that women in the midst of divorce proceedings are generally not active and aggressive in pursuing their own economic interests, suggests that women will not get full information from their lawyers. Women are positioned such that they do not have access to the lawyer's understanding of the divorce issues, much less to any complex position that the soon-to-be-ex-husband may have taken on the final joint tax return. When combined with the fact that the lawyers themselves may not be able to determine the financial facts, it seems somewhat unreasonable to hold the client responsible for the lawyer's imputed knowledge. Once again, Janet Bliss's case provides a clear example of this reality; her own lawyer testified that he did not understand Janet's husband to have been earning the income that the husband eventually owned up to.[323] How, in these circumstances, can it be fair to assume that the lawyer's client had greater knowledge than the lawyer himself?

While there are few, if any, other cases that involve the application of the innocent spouse statute to a tax return that was executed in the

317. Elkins, *supra* note 316, at 236.

318. Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 732 (1990).

319. Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 320–21 (1987).

320. BRENNER & STEIN, *supra* note 309, at 11–12.

321. BRENNER & STEIN, *supra* note 309, at 13.

322. BRENNER & STEIN, *supra* note 309, at 13–14.

323. Transcript of Record at 127, Bliss v. Commissioner, 66 T.C.M. (CCH) 522 (1993), *aff'd*, 59 F.3d 374 (2d Cir. 1995).

midst of divorce negotiations, the particular situation of a divorcing wife does illuminate the broader problem of creating a reasonableness standard in innocent spouse cases. As long as we pretend that there is a single reasonable person standard, judges will be able to insert their own gender-based biases into the standard, asking, as did Henry Higgins in *My Fair Lady*, "why can't a woman be more like a man?"[324] But, even if we recognize that the existing standards are out of touch with the social and psychological reality faced by most women, especially by women in the midst of the divorce process, what do we put in the place of these unrealistic standards that will not denigrate and disempower women, in the same way that Judge Whalen's ruling misunderstood and demeaned Janet Bliss?

CONCLUSION AND SUGGESTIONS FOR REFORM

How could the inequities of the innocent spouse statute, as it is applied in practice, be remedied? Possible solutions embody at least four approaches. First, the concept of a reasonable woman could be explicitly incorporated into the law. Second, the "no basis in fact or law" standard could be modified. Third, the arbitrary dollar limitations in the statute could be enlarged or eliminated. Finally, joint and several liability itself could be eliminated.

Within the existing structure of the Internal Revenue Code, there is relatively little room for change, whether statutory or administrative, that would substantially ameliorate the often unfair and even more often unpredictable impact of joint and several liability. Nonetheless, some minor tinkering with I.R.C. § 6013(e) would eliminate some continuing sources of inequity.

A. Knowledge and Reason to Know

The most difficult problem arises with respect to the knowledge issue in I.R.C. § 6013(e)(1)(C). While determinations of a wife's actual knowledge of an understatement of tax may be relatively easy, a determination of whether a wife had "reason to know" is fraught with difficulty, both for the trier of fact and for the wife claiming innocent spouse status. The reasonably prudent taxpayer model generally adopted

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324. REX HARRISON, *I'm an Ordinary Man*, *on* MY FAIR LADY: ORIGINAL CAST RECORDING (Columbia Records 1959).

by the courts appears overly broad, insufficiently attuned to the actual situation of most women, and susceptible to implementation by mostly male judges in ways that reinforce an unrealistic view of the process by which most people prepare and submit their tax returns.

A more realistic approach would be to replace "the reasonably prudent taxpayer under the circumstances of the spouse at the time of signing the return,"[325] or even the slightly more nuanced "reasonably prudent taxpayer, with the particular petitioner's knowledge of all the relevant circumstances and bearing in mind her level of intelligence, experience and education"[326] with a specifically gendered standard. Such a standard—perhaps the reasonable woman, or the reasonable working-class woman, or the reasonable woman who is not employed outside the home—would at a minimum permit those judges who so choose to incorporate into their analyses of the cases some conception of how a woman would react to a specific set of circumstances. The repeated incredulity of judges faced with the fact that women sign tax returns prepared by their husbands without substantial investigation suggests that the reasonable person standard fails to offer much useful guidance; a more specific standard, focusing attention on women's specific ways of dealing with tax matters, would be fairer.

B. "No Basis in Fact or Law"

Second, the requirement that a claim of deduction, credit, or basis have "no basis in fact or law"[327] should either be repealed or, at a minimum, significantly clarified. It is not at all clear what Congress intended when the provision was enacted in 1984,[328] and subsequent case law has eliminated only some of the uncertainty, and in such a way as to deny relief to many women on hyper-technical grounds. For example, the case law that bars relief where some, but not all, of a deduction is disallowed seems unnecessarily restrictive.[329] Also, the

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325. Stevens v. Commissioner, 872 F.2d 1499, 1505 (11th Cir. 1989).

326. Sanders v. United States, 509 F.2d 162, 166–67 (5th Cir. 1975).

327. I.R.C. § 6013(e)(2)(B) (1994).

328. *See supra* text accompanying note 106.

329. *See, e.g.*, Douglas v. Commissioner, 86 T.C. 758 (1986) (some, but not all, of claimed business deductions could not be substantiated and were therefore disallowed; innocent spouse relief denied with respect to the disallowed portion).

conflicting case law as to the meaning of "no basis in fact or law" leaves taxpayers with no certainty as to whether their claim might be upheld.[330]

The "grossly erroneous" restriction might be justified on the grounds that the purpose of the innocent spouse statute is to prevent overreaching by one spouse at the expense of the other. If there is some legitimate uncertainty as to the outcome of a claim for a particular deduction, there is no overreaching, but merely normally aggressive reporting of one's tax position. If some positive version of innocence is required, then perhaps this rationale makes sense, but if the aim of the statute is to protect spouses who have been victimized by their husbands, then such a strict requirement is not necessary.

C. Dollar Limitations

There seems to be little or no need for the dollar limitations that bar some women from appealing for innocent spouse relief—the $500 minimum for understatements of tax[331] and the additional requirement, applicable to claims of deduction, credit, and basis, that the understatement exceed a specified percentage of the petitioning spouse's income.[332] The dollar limitation is particularly harsh on low-income women, for whom a $450 tax deficiency may create serious hardship. For a better-off taxpayer, a $10,000 deficiency may be merely a bothersome detail that will not force her to choose between paying the government and feeding her children. The percentage-of-income limitation for claims of deduction, credit, and basis seems to have no logical support, even if some dollar value minimum is desirable. Why should that dollar value be only $500 in omitted income cases, but some higher, and variable amount, in other cases? While the percentage-of-income limit does create the appearance of fairness, in that it seemingly relates to ability to pay, its impact may still be severe for lower-income

330. *Compare, e.g.*, Purcell v. Commissioner, 826 F.2d 470 (6th Cir. 1987) (where deduction for worthless stock was taken in the wrong year, court found some basis in fact or law for the claim and hence no innocent spouse relief), *cert. denied*, 485 U.S. 987 (1988) *with* Shenker v. Commissioner, 804 F.2d 109 (8th Cir. 1986) (no basis in fact or law for claim of deduction for stock that became worthless in a year other than the tax year at issue and innocent spouse relief granted), *cert. denied*, 107 S. Ct. 2460 (1987).

331. I.R.C. § 6013(e)(3) (1994).

332. I.R.C. § 6013(e)(4) (1994).

women. For example, a woman with an adjusted gross income of $15,000 in the "preadjustment year"—would not be able to invoke innocent spouse protection for a deficiency of less than $1,500 occasioned by erroneous deductions taken by her ex-husband. For someone with this level of income, a tax bill of $1,400 that just fails to meet the threshold could be catastrophic.

It might be argued that the dollar limitations are justified by the danger of opening floodgates of litigation. After all, the innocent spouse provision already accounts for a significant number of cases, some fifty or more annually in recent years. But this argument overstates the danger. Of the estimated 10,000 divorced or separated women taxpayers a year who each are required to pay for their spouses' deficiencies,[333] perhaps one percent go as far as filing a Tax Court petition or otherwise contesting the deficiency. It is hard to imagine that eliminating the dollar limitations would so overwhelm the Tax Court or the IRS that the decline in tax administration would outweigh the gain in fairness.

D. Eliminating Joint Liability

None of the above remedies, however, addresses the disparity between the supposedly remedial nature of the innocent spouse statute and the plethora of discrete, specific rules and burdens for the petitioner that have been enacted by Congress and further developed by the courts. Instead of tinkering with the existing elements of the law, Congress could more effectively support the underlying purpose of its legislation by repealing I.R.C. §§ 6013(e)(1)(A)–(C) and retaining only the requirement that is now in I.R.C. § 6013(e)(1)(D), that "taking into account all the facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency. . . ."[334] The result in any given case would probably be no more unpredictable than it is today, and the attention of the courts would be focused more directly on the underlying legislative purpose.

At a more fundamental level, the problem that is addressed by the innocent spouse statute is a direct result of the joint and several liability that has been exacted as the price of filing a joint return and taking advantage of the I.R.C. § 1(a) rate schedule.[335] For reasons that have

333. *See* Beck, *supra* note 7, at 327.

334. I.R.C. § 6013(e)(1)(D) (1994).

335. *See supra* text accompanying notes 73–81.

been more than adequately explored elsewhere,[336] there is no particular logical connection between the filing of a joint return, and holding each of the joint filers liable for the tax due on the income of the other. More than tinkering with the innocent spouse statute, the abolition of joint and several liability would simply assign responsibility for payment of tax where it belongs, with the earner of the income.

In addition, the abolition of joint and several liability, and the introduction of a "household" return, independent of marital status,[337] would more closely reflect the economic and social realities of American households in the 1990s. Relatively fewer Americans live in traditional marriages, and relatively more live in other domestic arrangements, than in the past.[338] In any event, it is clear from the stories of many of the innocent spouses whose cases were discussed in this Article that the existing statutory system severely penalizes many of those who try to live their lives traditionally, staying at home and raising the children, and letting their husbands take care of the finances. When women like these get the deficiency notice from the IRS and find that they are liable for their husband's tax bills, the message that is sent, if any, is that adherence to conventional morality is a mistake, something that only the innocent, naive and gullible will do. Is this really the message that our tax laws should be sending? ⚘

336. *See, e.g.*, Beck, *supra* note 7, at 369–82 (rebutting arguments that the tax benefit of income splitting on a joint return justifies the imposition of joint and several liability).

337. *See, e.g.*, Edward J. McCaffery, *Taxation and the Family: a Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1993) (suggesting a revision of the rate structure that would lower rates on "secondary" earners and raise rates on "primary" earners in a household).

338. Frederick R. Schneider, *Which Tax Unit for the Federal Income Tax?*, 20 U. DAYTON L. REV. 93, 94–95 (1994).