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## DECONSTRUCTING THE TAXABLE UNIT: INTRAHOUSEHOLD ALLOCATIONS AND THE DILEMMA OF THE JOINT RETURN

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PROF. SCHWARTZ: The line tends to be more than 1/3 of the total earnings puts you in the penalty area. Whereas with less than 1/3, you are in the bonus area. We will tune in next time to see where they end up.

PROF. THOMAS: I agree. Thank you.

Our next panelist is Marjorie Kornhauser, who is Professor of Law at Tulane Law School in New Orleans.<sup>33</sup> Marjorie is going to talk this morning about some of these questions, but I think from a different perspective. Her talk is titled: "Deconstructing the Taxable Units: Intra-Household Allocations and the Dilemma of the Joint Return."

DECONSTRUCTING THE TAXABLE UNIT: INTRAHOUSEHOLD  
ALLOCATIONS AND THE DILEMMA OF THE JOINT RETURN

*Professor Marjorie E. Kornhauser*

PROF. KORNHAUSER: The basic question underlying our discussion this morning is: What should the taxable unit be? This is a fundamental, but difficult — if not impossible — issue for any tax system. Our tax system currently uses the marital couple as the taxable unit.<sup>34</sup> The proposals of the 105<sup>th</sup> Congress before us today dealing with the marriage penalty/bonus issue still privilege the married couple, although they do allow single filing in some instances.<sup>35</sup> In my comments I want to deconstruct this concept of the

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results in a marriage bonus, a reduction of tax as compared to the liability the couple would have if they were unmarried and co-habiting. See CONGRESSIONAL BUDGET OFFICE, FOR BETTER OR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX (1997).

<sup>33</sup> Professor of Law, Tulane Law School, © 1999 Marjorie E. Kornhauser. This speech draws on my prior work in the area, Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMPLE L. REV. 1413 (1996) and Marjorie E. Kornhauser, *Love, Marriage, and the IRS: Family, Income Sharing, and the Joint Income Tax Return*, 45 HASTINGS L. J. 63, 96-8 (1993).

<sup>34</sup> See Kornhauser, *supra* note 26, at 1436-37.

<sup>35</sup> See Bill Summary and Status for the 105th Cong. (visited Sept. 27, 1999) <<http://thomas.loc.gov/cgi-bin/bdquery>>.

marital unit: explore why we have chosen it and why that choice is wrong.

There are four reasons why our system has chosen the marital couple as the taxable unit: 1) historical, 2) theoretical/economic, 3) social/cultural, and 4) bureaucratic or administrative. Historically, the joint return is the direct result of two Supreme Court cases in 1930 — *Lucas v. Earl*<sup>36</sup> and *Poe v. Seaborn*<sup>37</sup> — which together held that couples in community property states, but not common law states, could split their incomes. The reason the joint return has endured, however, is because of the other three reasons.

The theoretical justification for the joint return is based on a variation of the economic rationale that the proper taxable unit is the group that acts as an economic unit and shares its resources regardless of who earns them. This economic rationale argues for a broader definition of the taxable unit than that which we currently have. Under the economic definition many types of living arrangements would qualify as taxable units, not just the married couple. For example, a religious or secular commune, three elderly siblings who live together, or a same sex couple all would be treated as a taxable unit so long as they met the requirements of sharing resources.

Social and cultural reasons explain why we have chosen the marital unit and not just any economic unit. We privilege marriage above other forms of living for religious, moral, and cultural reasons. This is clearly evidenced in many speeches and rhetoric, including discussions of the marriage penalty, which emphasize the necessity of supporting family values. For example, Section 326 of S. Con. Res. 86<sup>38</sup> resolved, among other things, to “begin to phase out the marriage penalty this year.” The Senate found: “Marriage is the foundation of the American society and the key institution preserving our values.”

This Resolution confuses means with ends. Government’s interest in marriage is not, or should not be, in marriage *per se*, but in those aspects of marriage that promote the general welfare of its citizens. Currently, the family may, in fact, be the most prevalent method of doing this, but it is not the only way. There are a variety of

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<sup>36</sup> 281 U.S. 111 (1930).

<sup>37</sup> 282 U.S. 101 (1930).

<sup>38</sup> See S. Con. Res. 86, 105th Cong. (1998).

social configurations in which the committed members promote the general welfare by preserving and transmitting societal values as well as providing each other with the economic and psychological security they need to flourish.<sup>39</sup>

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<sup>39</sup> In fact, some sociologists define "family" by the presence of commitment, defined as having two aspects: (1) personal commitment, or the extent to which one is personally dedicated to continuing the relationship; and (2) behavioral or structural commitment, i.e., acts, and the consequences of those acts, that tend to bind one into a relationship (e.g., the extent to which others know of the relationship and support its continuing, the number of possessions owned in common, and the changes one would have to make in one's life were one to leave.) See ELEANOR D. MACKLIN, *NONMARITAL HETEROSEXUAL COHABITATION: AN OVERVIEW IN CONTEMPORARY FAMILIES AND ALTERNATIVE LIFESTYLES* (Eleanor D. Macklin & Roger H. Rubin eds., 1983) at 49, 60. Such a definition would include homosexual couples, religious or secular communes, siblings living together and so forth, not just married couples. Its broader scope more accurately includes in the taxable unit living arrangements that were economic and psychological units than does the current limited, or under-inclusive, definition using only the marital unit. Thus, this broader definition would accomplish a more legitimate governmental function — promoting general welfare — than the current marital unit definition which seems to more narrowly encourage just marriage *per se*.

To a limited extent, other tax systems have broadened their definitions of the taxable unit beyond the marital unit. Canada, for example, treats a long-term cohabitation similar to a married couple, in certain instances. More recently, on December 9, 1998 the French National Assembly adopted (316 to 249) PACS (Civil Pact of Solidarity) which provides certain social, civil, and fiscal rights to unmarried couples (whether same or opposite sex) who register under the pact and who "organize their common life." The tax provisions allow registered couples to file jointly after the 3<sup>rd</sup> anniversary of their registration (joint wealth tax would be allowed from the date of registration) and gift and inheritance tax. See *TAX NOTES TODAY* Doc 98-34905 (Dec. 31, 1998) available in LEXIS, Fedtax Library, TNT file. The bill fulfilled an electoral promise by the Socialists and Communists in the spring of 1997 to create a 'more level playing field' between married and unmarried couples. *Id.*

Article 10, one of the most contentious, expanded the definition of registered couples to include two brothers, two sisters, or a brother and a sister ("fratrics") but not direct descendants in a family. The addition of fratrics made the bill more acceptable to those who saw it as 'pandering' to the homosexual lobby; it also helped distinguish it from the original bill that was defeated in October. The French Senate defeated the bill in March 1999. See *World Briefs: Courts Stop Closure of PLO Headquarters*, *TIMES PICAYUNE* (New Orleans), May 12, 1999, at A16. The law finally passed however, in October, 1999. See Suzanne Daley, *Unmarried Couples Gain Legal Status Under French Law*, *TIMES PICAYUNE* (New Orleans), Oct. 14, 1999, at A21. On November 9, 1999 the French Constitutional Council determined that the law was constitutional. See *France's Constitutional Council Rules PACs Consistent with Constitution*, Nov. 12, 1999, available in LEXIS, fedtax database, taxtxt file 1999-36021.

Once the definition of a taxable unit is so broadened it seems senseless to

The final justification for the marital unit is bureaucratic or administrative. A good tax system must be one that can be administered relatively easily. Choosing the marital couple over other groups as the taxable unit has been supported on this administrative basis in two ways: 1) The marital unit is the easiest unit to identify for tax purposes, and 2) It would be too difficult to tax each spouse separately.<sup>40</sup>

In my remaining time, I want to concentrate on the economic rationale because it is the theoretical foundation for using the marital couple, or any group, as the taxable unit instead of the individual. The basic choice for the taxable unit, as you know, is between the individual and some type of a group. Our tax system is based on the principle that tax burdens should be determined by ability to pay. Some commentators therefore believe that the individual is the proper unit because only individuals, not groups, have the capacity to pay taxes. Moreover, if an income tax is the best measure of ability to pay, then the person who controls the income should bear the tax. The tax

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stop where the French did. Why not allow intergenerational families (uncle and nephew)? Why limit the unit to two adults — i.e. why only 2 brothers, but not 3 sisters?

<sup>40</sup> The first basis for the marital unit, under the administrative rationale, is that marriage is the best, i.e., the simplest, administrative method to determine sharing status because the couple has a marriage certificate to verify the marriage. This is wrong for three reasons. First, as long as common law marriages exist, not all marriages will have a marriage certificate to prove marital status (although I admit that most will). Second, the choice of the marital unit is inefficient to the extent that limiting the taxable unit excludes other types of living arrangements that also involve economic sharing. Finally, just because the marriage certificate currently is the document that most widely signals some type of sharing, it is not the only one that could. We could easily create another type of document that would indicate the existence of sharing in non-marital living arrangements. Society is increasingly recognizing the existence of such relationships for non-tax but official purposes, such as health benefits, death benefits, hospital visiting rights. An official form to recognize them could be easily designed.

A final reason given for using the joint is that it is too complicated to determine an individual spouse's income and deductions. This rationale is simply overrated as is evidenced by the fact that many of the other OECD countries use individual, not joint or family returns. In fact, the trend has been towards individual returns for both earned and investment income. See, e.g., Ken Messere, *Taxation in Ten Industrialized Countries Over the Last Decade: An Overview*, 11 TAX NOTES INT'L 512, 518-19 (1995); see also Janet C. Stotsky, *How Tax Systems Treat Men and Women Differently*, 34 FIN. & DEV. 30-33 (1997). Even in the United States, the Code has allowed spouses to file separately. Moreover, new § 6015 (on relief from joint liability) uses individual allocations as do many of the legislative proposals of the 105<sup>th</sup> Congress.

laws enforce this principle through sections such as the grantor trust rules and through general principles such as the assignment of income doctrine.

Economists, on the other hand, generally believe that the family is the correct choice because it acts as an economic unit and shares resources regardless of who earns them. American tax law echoes this, but generally narrows the definition of the family to the married couple for the reasons I just mentioned.

In choosing a group as the taxable unit, both tax law and traditional economics incorrectly assume that complete sharing exists. This assumption occurs because they basically ignore what actually happens within the unit. In short, they treat it as a little black box. The tax law, following family law, accomplishes this by using a partnership model of marriage. Although there are many types of commercial partnerships (e.g., large, small, hierarchical, limited), tax law assumes a very particular type of partnership: the simple idealized Uniform Partnership Act model of a two member partnership in which both partners have equal power and a unity of interests. Traditional economics accomplishes the same result by treating the family as a monolithic entity. That is, it assumes that all family members have the same general interest of maximizing the aggregate well-being of the family (not the individual) and/or that they have differing interests but have equal bargaining power within the family to achieve those interests.<sup>41</sup>

These two premises of both tax law and traditional economics do have a basis in reality. Most marriages and families do have a degree of equality and communal interests. One of the central points I want to make today, however, is that when we closely examine the premises (i.e., deconstruct them) it turns out that the assumptions are false, or rather, not precisely true. There are indeed certain unities of interest and sharing of resources and power, but neither families nor couples have complete equality or complete unity. This incompleteness means that within a family there are different interests

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<sup>41</sup> See, e.g., PARTHA DASGUPTA, AN INQUIRY INTO WELL-BEING AND DESTITUTION 333-35 (1995); see also Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L. J. 63, 96-98 (1993) (discussing the subject of economic analysis of intrahousehold allocations).

and differences in power and sharing. These differences result in different intra-household allocations of resources, and these differences make both the couple and the family problematic as the taxable unit. I will focus on the marital unit because that is what we use, but the same comments hold true for using any group as the taxable unit.

Let's look first at the premise of equality. Truly equal marriages require both resources and responsibilities be shared. To be truly shared, there must be an equal allocation not just of resources and responsibilities but of their management; not just management but decision-making about them. The resources to be allocated are not simply physical assets (such as money) but also intangible assets (such as psychological growth and satisfaction) as well as time itself (leisure versus household labor versus market work time). These equal conditions simply do not exist in most marriages.

Moreover, most people would not choose an equal partnership. Before everyone shakes his head in vigorous dissent, let me clarify what I mean. I am not denying that people *say* that they want equality. I am not even denying the sincerity of their belief. I accept that in theory, many, even most, (but certainly not all,) people believe in equal marriages. What I am saying is that people say one thing and do another. For example, Arlie Hochschild has shown that couples will state that they share household chores equally despite the evidence to the contrary.<sup>42</sup> In other words, there is a gap between reality and belief. Most marriages are not equal marriages. As many critiques of the partnership model of marriage have noticed, if marriages are partnerships, then the wife is usually the junior partner with the majority of both financial and non-market benefits going to the husband.

Even if equality did exist, that is even if there were equal access, control, and use of resources, there is still a problem with the assumed unity of interests that both the partnership and economic models assume. What does this unity of interest mean? Again, using the Uniform Partnership Act as a model, the meaning, at least initially,

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<sup>42</sup> ARLIE HOCHSCHILD, *SECOND SHIFT* 20 (1989) (pointing out that most frequently, when men do household or child care tasks, they do them at the bequest of, or under the supervision and control of, the wife).

was fairly literal — neither partner could act in a self-interested manner; all interests were assumed to be shared.<sup>43</sup> The economic model assumes a particular shared interest: to maximize the well being of the family. Sometimes it relaxes this requirement, but only if the members have equal bargaining power. Since, as I have just stated, equal bargaining power rarely exists within a couple let alone a larger family, I will ignore this and concentrate on the unity of interest.

This requirement means one of two things: either that there are lots of interests and they are all shared, or following the economic model, there is only one shared interest — maximizing the group's well being. Note that even if a shared interest of maximizing group well being does exist, it can lead to unequal intrahousehold allocations between members. For example, if family resources are limited (as most families' are), then it makes sense to apportion the scarce resource (food, education, etc.) to the individual who will have the greater return. In other words, one member receives more total resources than another.

More likely, however, there are many interests, not just one overarching one. And, most likely, in this day of individualism and self-fulfillment, each spouse has his or her own individual needs and interests in addition to any common ones they hold. For example, she likes to spend her time and money on travel whereas he likes to spend his on restoring antique automobiles. These separate interests can and often do lead to separate allocations of resources despite claims of pooling of resources. Sometimes, this separate allocation is not even consensual: spouses hide money from each other all the time, as a 1995 Wall Street Journal article noted,<sup>44</sup> recently, some economists have recognized that the assumptions of equality and unity of interest not only are not true, but hide important aspects of families. They use tools such as game theory to examine intra-household allocations

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<sup>43</sup> The 1997 Uniform Partnership Act ("UPA"), on the other hand, states that a partner's action in his own self-interest is not a violation of his fiduciary duty *per se*. See UPA § 404(e). In other words, it recognizes that although partners have interests in common there is not a complete identity of interests.

<sup>44</sup> See, e.g., Heidi Evans, *Married Women Keep a Tradition Alive: A Bank Account That's All Their Own*, WALL ST. J., Sept. 13, 1995, at B1 (indicating that women keep money hidden from husbands and noting that men also have been doing this for a long time).

(transactions within couples and families), as opposed to the inter-household studies of traditional economics. Their studies of intra-family allocations indicate that differences in interests and power do affect the allocation of intrahousehold resources between spouses and from parent to child. My own empirical research into intrahousehold allocations agrees with these studies.

I want to focus on three major findings of these studies. First, research indicates that a significant number of people (30-50%) do not pool all their resources.<sup>45</sup> And remember that this is probably an underestimation because of cultural biases favoring pooling.

Second, the control of an asset affects its ultimate usage. By this I mean that if one spouse controls the asset either physically or psychologically, then there is no true sharing. While several factors such as gender and class influence control, earning power appears to be the most frequent determining factor.<sup>46</sup> As the British sociologist

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<sup>45</sup> See Kornhauser, *supra* note 41, at 86-87.

Since there are many difficulties in using empirical studies in such a complicated area, their results must be used with care. Perhaps they should be interpreted as trends rather than specific results. The difficulties are caused by a variety of factors. For example, the myth of sharing creates one layer of complications. Although some married couples explicitly do not share or pool, as a group, Americans believe that they believe in marital sharing; the belief, after all, motivates the legal model of marriage as a partnership. The theory, however, often masks a reality of unequal sharing that is difficult to uncover, especially via surveys and questionnaires that require complicated truths to be reduced to a computer readable form.

Another major problem is defining the term "sharing". How much sharing is necessary for sharing to exist? Some couples share many resources but not all. Some do not share each resource, but divide them up equally: the husband takes care of the yard and car; the wife housekeeping and childcare. Is sharing to be defined formally or practically? There may be formal sharing if all assets are in joint names but no real sharing since one partner is not psychologically able to use the assets without the consent of the other partner. Moreover, the fact that one spouse is in charge of the day to day management of finances does not mean that she controls them.

There is a critical difference between *control* and *management* as pointed out by Jan Pahl in JAN PAHL, *MONEY AND MARRIAGE* 57 (1989).

<sup>46</sup> See, e.g., PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 53-55 (1983) (finding that only in lesbian couples did income not affect control). Jan Pahl has noted the role class plays in determining who controls income. Pahl, *supra* note 45, at 123. As to gender, although women who earn more tend to exert more control, there is still a tendency for high income women either to cede control or not take it. See, e.g., ROSANNA HERTZ, *MORE EQUAL THAN OTHERS: WOMEN AND MEN IN DUAL-CAREER MARRIAGES* 85-86 (1986). "Although working wives' income may be important, this

Michael Young has stated, "The bread-winners are often the meat-eaters."<sup>47</sup> This can be true even when the husband and wife nominally pool income. The wife feels psychologically constrained; she does not want to use what she (and he) sees as 'his' income for her own desires, or she uses the money only in ways that she knows that he will approve. This psychological restraint is the impetus behind the desire many women have to possess their own money. Only with their own money do they feel independent and in enough control to use the money as they see fit. This is the impetus for "pin" money and for squirreling away dollars saved from the "grocery" money given to the wife by the husband.<sup>48</sup> It is why some women want to work.<sup>49</sup>

The third important fact is that it matters which spouse owns and controls the assets because the gender of the person in control influences allocations. Husbands and wives spend resources differently, not just between themselves but between themselves and their children, as well. Women generally distribute more assets to their children than men do. If, for example, the government wishes to encourage child development by providing poor families with funds to purchase extra food for the children, that purpose is more likely to be achieved if the monies are given directly to the women rather than to the men.<sup>50</sup>

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contribution to family income does not substantially diminish the authority husbands exercise, particularly over financial affairs." *Id.* When both spouses have high income, there is a greater chance that there will be greater equality between partners because they each have greater independence. *Id.* at 87-89. Some women yield control of their finances at home despite the fact that they hold professional managerial positions. Hertz suggests that this "distaste" for money is cultural; "analogous to women having mental blocks against math." *Id.* at 108.

<sup>47</sup> Michael Young, *The Distribution of Income Within the Family*, 3 Br. J. Soc. 305, 314 (1952), cited in Edward Lazear & Robert Michael, *Allocation of Income Within the Household* 14-15 (1988).

<sup>48</sup> This is not just an old Victorian custom, but is alive and well in late twentieth century America as illustrated by Evans, *supra* note 41, at B1; see also Kornhauser, *supra* note 43, at 88-90.

<sup>49</sup> In my survey one woman who had been married 47 years stated: "I had no financial power in the relationship until I worked, or inherited. I learned to keep some of what I had for independence, if I was to ever have any. Husbands are not interested in giving wives financial independence." See Kornhauser, *supra* note 41, at 88, n.78.

<sup>50</sup> Accord, DASGUPTA, *supra* note 41, at 335. See also Jonathan Friedland, *Mexico Tries to Take Politics Out of Welfare and Focus on Neediest*, WALL ST. J. Oct. 15, 1999, at A1 (reporting that cash is given to the mothers on the belief that they will spend

A letter I received from a female attorney<sup>51</sup> illustrates some of the problems in allocations to children and of income sharing generally. When first married she and her attorney husband earned approximately the same amount of income. According to her, they kept their finances separately, but shared all expenses equally, except for prior student loans.<sup>52</sup>

Once the couple had children, they continued to “share” but with a few very important changes. Most importantly, since her income decreased to 30% of the total income, her share of expenses also decreased. Nevertheless, her share of liabilities still “slightly” exceeded her share of their joint income because *all* child related expenses, including “the au pair, baby clothes, baby toys, uncovered medical bills, etc.”, were paid by her. Since her share of expenses exceeded her income, she occasionally had to “request” (her term, her quote marks) money from him:

If my husband agrees that the expenditure is justified,  
he writes a check to my account or pays the bill

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it the most responsibly).

In a recent Wall Street Journal article on wives' “hidden” accounts, many stated the reason they kept these accounts was to have access to money for their children, especially if they were children of a prior marriage. See Evans, *supra* note 44, at B1.

<sup>51</sup> She wrote the letter, dated December 1994, after reading a short article I had published in Tax Notes on the joint tax return and income sharing. She has given me permission to quote the letter so long as she and her husband remain anonymous.

<sup>52</sup> Some expenses were truly split down the middle. For example, one month she paid the mortgage; the next month he did. Other expenditures were not divided individually with each paying half, but were divided by categories – for example, she paid for groceries; he paid for restaurants. Her letter states that they divided expenses 50/50, yet in her explanation of why she paid for furniture and other household goods and he paid for cars, she states that each cared about the respective category assigned to him or her: she paid for linens, etc. “on the theory that my husband didn't care if we had new sheets or furniture and I did.” Car-related expenses, on the other hand “were paid solely by [her] husband (since he loves cars)”. Although this type of division overall may have approximated 50/50, it represents separate interests. He would not spend his money on sheets; she would not spend hers on cars.

Notice that for the equality to work, each spouse must have individual money to spend; if all the money is hers, he will not get the car he wants. Moreover, for this system to be truly equal, it would seem that each should have approximately the same amount of discretionary income. After all, is it fair if she has to spend all her spare money on sheets while he can buy the car he wants and still have cash to satisfy other desires.

directly. If he disagrees with me about the expenditure, he refuses to write the check and the item is not purchased. If I request money to pay a standard, recurring expense, he asks me to explain why my salary is not sufficient to cover that expense that particular month.

This letter indicates some of the difficulties inherent in the allocation of assets and power in a “partnership” marriage. It is clear, although the wife does not acknowledge it, that the couple does not really share money, interests, or power equally. Why does she pay all child-related expenses? Are the children hers or theirs? Certainly, she might choose to spend more on the children (better childcare, more toys, etc.), just as she chose to spend more on fancy sheets. Nevertheless, the total allocation of all child-related expenses to her also seems to reflect an inequality of power and resources.

Since my time is nearly over, let me give you three more recent examples of the failure of the equal partnership model of marriage, and by implication of any usage of a group as a taxable unit:

Example #1: If marriage is a partnership, why do only 10% of married women use a name other than their husbands? Keep in mind, by the way, that some of these may be using a previous husband’s name so that she and children from that marriage have the same name. One answer is that it is a traditional and practical part of becoming a couple to take the husband’s name.

Millie Bratten, editor in chief of *Bride’s* magazine (we academics will read anything in the name of research — actually, I read this in the newspaper), says that the reason for this low rate, despite modern views on gender equality is that:

[B]rides and bridegrooms are coming to marriage with a greater emphasis on partnership — or at least a different perspective on what partnership in marriage means — than previous generations. Both probably work, making joint decisions more likely. So young women may be less likely to see marriage as a loss of personal identity. Instead, having the same last name declares a ‘united front’ with their husband . . . It’s understood that your identities are separate but your

goals are the same.<sup>53</sup>

Yet, if marriage is a partnership, then it is certainly odd that 90% of the time the partnership is named after the husband. You might say that this results from custom. Nevertheless, the phenomenon exists. Moreover, it is not simply because of tradition. There is real feeling behind it.

Example #2: Consider the reaction of Bobby Brown, Whitney Houston's husband, when somebody calls her Mrs. Houston:

I don't like people calling my wife Whitney Houston. Her name is Whitney Brown. I get [ticked] over that, but that's her stage name. But if anyone walks up to us and says 'Mrs. Houston' and you're standing in front of me and my wife, that's like slapping me in the face.<sup>54</sup>

Now perhaps his reaction is extreme, but how many men would be willing to change their name to their wife's name?

My final example returns us to the world of tax. The whole problem of innocent spouse relief arises because a taxpayer has not shared resources equally with his or her spouse. Congress, in fact, recently recognized the severity of the problem by liberalizing the rules under section 6015 that allow relief from joint liability. Since its passage, the number of taxpayers claiming relief under the statute has grown tremendously.<sup>55</sup> We need this provision because the premise of the joint return is fatally flawed. Innocent spouse relief is needed because one spouse in fact hid assets from another. Although the problem frequently does not become apparent until after divorce, its roots — the lack of sharing — occurred during the marriage.

In the tax context, Congress is now in the very odd position of both upholding and disclaiming the partnership model of marriage —

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<sup>53</sup> See Delia M. Ross, *Most Brides Find Choice of Last Name Change an Easy One*, *TIMES PICAYUNE*, Aug. 24, 1997, at E11.

<sup>54</sup> See *Comedy Central Cutup Kicked Out of Pageant*, *TIMES-PICAYUNE*, Sept. 13, 1997, at A22.

<sup>55</sup> *Receiving Rising Number of Innocent Spouse Relief Cases*, *TAX NOTES TODAY*, June 10, 1999 available in LEXIS, Fedtax Library, TNT file (stating that as of May the IRS was receiving 1200 cases a week, but that some show a misunderstanding of the section, such as a case in which a taxpayer was not even married).

of assuming equal sharing/unity of interests when it is favorable to do so (for determining tax liability) but denying it when it comes time to actually pay the tax. This is good news for the taxpayer and therefore good news for politicians wanting to be re-elected (and therefore, maybe not so odd after all). It is bad policy, however — or rather no policy at all.

In conclusion, the joint return ought to be abolished in the United States. A system that treats each person as a separate taxable unit is more equitable, efficient, and more consistent with basic income tax principles. Separate taxation is more equitable because it treats similar taxpayers similarly. By taxing each individual on her income, the system does not unfairly discriminate based on living arrangements. If we wish to use the tax system to assist people who have dependents, then the legislature can enact tax provisions giving deductions or credits for people who are truly dependents, be they adults or children.

Separate taxation is also more efficient than joint taxation. This is because in a progressive rate system such as ours, the joint return discourages the second earner (usually the wife) from working by placing her in a higher marginal bracket.

Finally, separate taxation is consistent with the tax system's basic principle that the person who controls the income should be taxed on it even if another benefits. The control principle is particularly apt for earned income since only the earner can produce that income. As the empirical studies show, the earner usually controls the income even if the couple states that they pool. Moreover, as I have indicated, cultural, psychological, and sociological factors often make it difficult to determine who is really benefiting from the income.

The fact that economics uses a group unit should not be determinative for tax purposes. As professor Boris Bittker has noted, it is "absurd to think that an economist's definition can provide a uniquely 'correct' solution . . . [because] the issue is so entangled with social and psychological issues of a non-tax character[.]"<sup>56</sup> In actuality, there is no perfect solution to the taxable unit issue. I

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<sup>56</sup> Boris Bittker, *Federal Income Tax and the Family*, 27 STAN L. REV. 1389, 1421 (1975).