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THE POLITICS OF THE MARRIAGE PENALTY

Bruce Bartlett

different in community property states, in common law states, usually, the only legal enforcement of the equal economic marital partnership comes at the marriage's end, either on divorce through equitable distribution or on death through the existence of the elective share and, of course, those devices are notoriously manipulable, fallible and, frankly, open to all kinds of evasion. Our income tax system is riddled with inequity, deficiency and downright irrationalities. Before we "reform" it in the name of fair treatment of marriage, we need to confront what our ideas about marriage really are.

PROF. BECK: Our final panelist is Bruce Bartlett.

THE POLITICS OF THE MARRIAGE PENALTY

Bruce Bartlett

MR. BARTLETT:[*****] Thank you. They have asked me to talk about right and wrong ways to fix the marriage penalty, but what I really want to do is talk about the politics of all of this and pick up on Professor Christian's question in the last panel.

The recent history of concern about the marriage penalty really results from June O'Neill's efforts. The Congressional Budget Office ("CBO") report in 1997 was the trigger, which began a lot of this discussion.[40] I like to think I had something to do with it. I wrote the first article in a newspaper that called attention to the CBO

[*****] Mr. Bartlett is a Senior Economist and Senior fellow at the National Center for Policy Analysis. He was Deputy Assistant Secretary for Economic Policy in the Treasury Department from 1988 to 1993, and Senior Policy Analyst at the White House from 1987 to 1988. He is an expert commentator on taxes and economic policy, the author of two books and, a syndicated columnist. Mr. Bartlett is the author of *The Marriage Penalty: Origins, Effects, and Solutions*, which appeared in Tax Notes, vol. 80, no. 11 (Sept. 14, 1998). In addition, his other articles have appeared in many papers including *The Wall Street Journal* and *The New York Times*; Mr. Bartlett regularly appears on national television and radio programs.

[40] *See generally* CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX (1997).

study.[41] Immediately, thereafter, a number of Republican congressmen and senators picked up on this issue and began to agitate and attempt to do something about this issue.[42] I think it is important to understand that politically most of this discussion about the marriage penalty and tax policy is going on in the Republican Party. This has a lot to do with the various factions within that party and their particular perspectives.

The marriage penalty appeals to both the liberal and conservative factions of the Republican Party. On the one hand, the conservative Christian coalition-types believe discouraging marriage is a bad idea because they are against people living together in the absence of marriage. On the other hand, the more liberal types are concerned about the impact on working women, since working women tend to be on the liberal side of the Republican coalition. Initially, it seemed like this was a marriage made in heaven; the two factions coming together to deal with a specific problem. However, they quickly realized their interests diverged.

The Christian coalition-types — I will use that as a euphemism for a number of groups whom share that point of view — came to the realization that one of the major consequences of getting rid of the marriage penalty would be to encourage more women to work.[43] As such, you are, on the one hand, encouraging marriage, which they like, but on the other hand you are encouraging women to leave the home and no longer stay and take care of the children, which is an idea they do not like. So the emphasis very quickly moved away from the simple notion of allowing people to simply choose their

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[41] *See* Bruce Bartlett, *Marriage Still Takes Its Toll on Taxpayers*, DETROIT NEWS, July 23, 1997, at A11.

[42] *See, e.g.*, H.R. 2593, 105th Cong. (1997); Ryan J. Donmoyer, *Over 120 House Members Call for Clinton Support to End 'Marriage Tax'*, TAX NOTES TODAY, Jan. 15, 1998, at 10, *available in* LEXIS, Fedtax Library, TNT file; Sen. Lauch Faircloth et al., *Three Senators' Letter to President On Marriage Tax*, TAX NOTES TODAY , Jan. 21, 1998, at 13, *available in* LEXIS, Fedtax Library, TNT file. *See generally Unofficial Transcript of Ways and Means Hearing on Reducing Tax Burden*, TAX NOTES TODAY, Feb. 5, 1998, at 24, *available in* LEXIS, Fedtax Library, TNT file.

[43] *Cf.* Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1485 (1997) (stating that "[w]ives would no longer be discouraged from working in the paid labor force").

filing status in a way which allows them to come out ahead. First they came to the realization that there are also bonuses in the Tax Code. Various people in this area started to lobby, not so much for getting rid of the marriage penalty, but rather, for expanding the bonuses because what they really wanted is the traditional single or nuclear family to be the prime social organization.

This realization has spawned several initiatives on the part of the Christian coalition. The first of which was to come up with a bill that called for going back to pure income splitting. That is to say, if the primary earner is making say $50,000 a year, and the secondary earner is making $30,000 a year, the couple would be taxed as if each one was making $40,000. This is similar to the system that existed from 1948 to 1969.[44] This would have the effect of really doing nothing about the marriage penalty, but would expand marriage bonuses. The problem with this proposal is that expanded bonuses go almost entirely to upper income couples, so it was really not a viable political alternative. Since then they have advocated increasing the standard deduction so that it is exactly twice what it is for single earners. One of the earlier panelist pointed out that this does not really deal with the marriage penalty either, it is just a type of generalized tax cut for low-income earners. It may be perfectly justified on various tax and social grounds, but it has nothing whatsoever to do with the marriage penalty.

What the Christian coalition has done is take the whole debate away from a genuine concern about the meaningful problem of marriage penalties to a generalized way of subsidizing families, where family is defined as married couples, not necessarily involving children. Personally, I just do not see any reason why, as a matter of policy, we should be giving increased tax incentives for people to get married simply for the sake of getting married. If you are concerned about family policy, you should be concerned about the status of children in that relationship; I believe we ought to be orienting our tax policies in that direction.

More recently another sort of schism has developed, that is a question of across-the-board tax rate reductions versus targeted tax

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[44] *See* Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 380 & n.200 (1994).

cuts. This has come about as a result of the existence of the federal budget surpluses — for the first time in two or three decades.[45] The surplus would allow for at least the possibility of doing something, having some sort of broad-based or large tax cut, such as we had in 1981.[46] In this scenario you have the free marketers against the social engineers. The social engineers are very much represented by the conservative faction, social issue people, the Christian coalition-types who really do want to engineer Government policy to be much more explicitly pro family in the European sense, where they have family allowances and the Government routinely sends checks to families for various purposes.[47] They really like that kind of system without realizing its implications for control of the family and for growth of the governmental sector.

You also have the supply-siders who have a Reaganesque notion that tax policy should be as neutral as possible. They believe we should move toward a flatter tax system on a broad base; that we should be getting rid of tax preferences instead of adding them to the tax code, getting rid of things like the $500 child credit which was put in at the last Congress at the behest of the pro-family types;[48] and moving toward, ultimately, a flat-rate tax system. This is embodied in the proposal to cut all tax rates by 10 percent across-the-board which

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[45] *See* Michael J. Graetz, *Paint-By-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609, 675 (1995) (discussing how a "speed-up" technique was partially responsible for the last federal budget surplus in 1969); Benjamin M. Friedman, *Saving Surplus*, BOSTON GLOBE, Oct. 30, 1998, at A27 (detailing the factors contributing to "the first budget surplus since 1969").

[46] *See* Richard W. Stevenson, *G.O.P. Leaders Try to Stem a Revolt Over Big Tax Cut*, N.Y. TIMES, July 21, 1999, at A1 (discussing pending House vote on the largest tax cut since 1981); Janet Hook, *House G.O.P. Puts Down Revolt on Tax Cut Plan*, L.A. TIMES, July 22, 1999, at A1 (commenting on GOP's debate on "what to do with the federal budget surplus").

[47] *Cf.* Albert R. Hunt, *The Wrong Tax Cuts at the Wrong Time*, WALL ST. J., July 8, 1999, at A19 (noting that Repblican tax bills make an effort to end the marriage penalty to placate religious conservatives).

[48] *See* Sen. Charles Grassley, *New Tax Credit*, CONG. PRESS RELEASES, (Fed. Doc. Clearing House, Inc.), Mar. 22, 1999 (lauding the passage of $500 per child tax credit); *see also* Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 798 (1997) (suggesting that a flat-tax system, instead of a progressive tax system, is one way to remove the marriage bonus/penalty).

various people are trying to make the main thrust of Republican tax policy. This is being very much opposed by the more liberal elements, whose opposition stems from not wanting to do anything for the rich and not believing the tax cut does anything for the poor. The result is that they have adopted this idea of just going back to the marriage penalty. They have gotten behind this idea of increasing the personal exemption or the standard deduction. The liberal elements have been joined, once again, by the pro-family types who have rejoined their brethren in an unholy alliance to have more of a social engineering type tax code.

So you sort of have the free marketers and supply-siders out there by themselves now fighting with the fiscal conservatives who want to pay off the national debt and not cut taxes. This is really where the debate has come to. It is absolutely unclear how it is going to be resolved. In part this is because nobody really knows what the President's views are about these matters. He is not going to voice any opinion on this; other than to say we cannot have tax cuts until we save Social Security.[49] However, we also do not know what his plan is for that. This is the current state of the debate. Personally, I would like us to think in terms of getting rid of the marriage penalty by moving towards, as Diana Furchtgott-Roth talked about, a flat-rate tax system. I think it was implicit in the last panel's discussion that we should keep progressivity, but deal with the marriage penalty by changing the filing status. We can do that, but I would rather move towards a flat-rate tax system that treats everybody the same regardless of whether they are married or single.

I would just like to finish by pointing out how little all this discussion and analysis really has to do with tax policy, because so often the decisions are made on the basis of flimsy kinds of analyses. A specific example is the $500 child credit, which I spent a good deal of time working on last year, because I was writing an article for the National Tax Journal, trying to figure out exactly whose idea it was.[50]

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[49] *See* Greg Hitt, *GOP Tax-Cut Plans May Face Clinton Resistance*, WALL ST. J., July 12, 1999, at A2; Laurie McGinley & Jacob M. Schlesinger, *Clinton Drug-Benefit Plan Recasts Medicare Debate*, WALL ST. J., June 28, 1999, at A28.

[50] *See* Bruce Bartlett, *Tax Aspects of the 1997 Budget Deal*, 51 NAT'L TAX J. 127 (1998); *see also* Tony Snow, *Keep it Simple, Bob; Cut Taxes*, USA TODAY, May 6,

The Heritage Foundation, which is very influential in the Republican Party, had been pushing for many years to increase the personal exemption to keep it in line with inflation.[51] What they discovered is that it was very hard to explain to people what the benefits of this were, because it was a function of your tax bracket; that is, how much tax savings you would get is a function of your rate and that was really complicated to explain to people. So they just said, we are going to change it to credit because it is a lot easier to do the math. They put out tables showing how much of a tax saving you would get in each congressional district in every state. This was very simple to do because they just multiplied $500 times the number of children in the state to pretty much get an idea of what the tax savings would be.

They made this fundamental change in tax policy, going away from increasing the personal exemption and going toward a tax credit, just because it was easier for somebody to calculate the tax savings purely for publicity purposes. Unfortunately, that is the way these kinds of things are done. The next step is to then have a focus group or a pollster running around asking questions. And one day Newt Gingrich decided this is going to be the policy and that was the way it was done.[52] They never held any hearings, they never did studies, the Joint Committee on Taxation never had anything to say about it, the House Ways and Means Committee never had anything to say about it; the next thing we know it is part of the law and this is the reality of how tax policy is made in Washington, D.C. Thank you.

PROF. BECK: Thanks very much. I would like to invite the

1996, at 13A.

[51] *See, e.g.*, Heritage Foundation, *Mission Statement* (visited Oct. 26, 1999) <http://www.heritage.org/mission.html> (stating that "[t]he Heritage Foundation is a research and educational institute — a think tank — whose mission is to formulate and promote conservative public policies . . .."); Heritage Foundation, *Taxes* (visited Oct. 26, 1999) <http://www.heritage.org/library/taxes.html> (listing current and archived documents published by the Heritage Foundation); Jack Torry, *Ridge Invokes Kemp in Scolding GOP for Inaction on Cities*, PITTSBURGH POST-GAZETTE, May 7, 1999, at A8 (stating that the Heritage Foundation has influenced the Republican Party's tax policies); Eric Schlosser, *Tales from the Inquisition*, ROLLING STONE, Mar. 19, 1998, at 42 (remarking that the Heritage Foundation among other conservative institutions "wield enormous influence within the Republican Party.").

[52] *See* Douglas Jehl, *Republicans Say Clinton's Tax Cuts Aren't Deep Enough*, N.Y. TIMES, Dec. 17, 1994, at A11.

panelists to comment and perhaps start with a pretty simple idea. I think it is difficult for many people to understand why we do not simply allow married people to file as single persons. The reason is largely a matter of history. We would have something like the German system if we allowed married people to file either at single rates and also to have the choice of income splitting, in other words, a choice of bonus only without penalty.

Germany has that system because in the Nazi period mandatory joint returns stacked married women's earnings on top of their husband's earnings and automatically taxed them at a higher rate. That disincentive furthered an explicit policy that women should stay at home and make warriors for the Reich. However, in the 1950s the German Supreme Court overturned this marriage penalty as a constitutional question and forced the introduction of income splitting as the remedy.[53] Unfortunately, we have had different results in our courts. One reason for the difference is that Germany has a constitutional provision to the effect that the state must protect marriage and the family, and we have no such provision.[54] Instead, our taxpayers have lost under equal protection and are taxed.[55] Moving to something like the German system would solve the problem, provided that *Poe v. Seaborn* is repealed. I suspect it is more difficult, politically, to get rid of the bonus that people are enjoying than it is the penalty.

MR. BARTLETT: The main barrier to moving towards

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[53] *See* HENRY J. GUMPEL, TAXATION IN THE FEDERAL REPUBLIC OF GERMANY 429 (2d ed. Harvard Law School World Tax Series 1969) (citing the decision of the Federal Constitutional Court of Jan. 17, 1957, BGB1 1957 I p. 186, stating that Germany's Federal Constitutional Court found unconstitutional the tax policy that treated husband and wife as a single unit).

[54] *See* GRUNDGESETZ [Constitution] [GG] art. 6(1) (F.R.G.) (stating "[m]arriage and family are under the special protection of the state.").

[55] *See, e.g.*, Druker v. Commissioner, 697 F.2d 46 (2d Cir. 1982) (holding that ". . . 'marriage penalty' deprives [parties] of no constitutional right."); Pierce v. Commissioner, 41 T.C.M. (CCH) 580 (stating that "[t]he marriage penalty, inequitable as it is, has been upheld as constitutional."); Mapes v. United States, 576 F.2d 896 (Cl. Ct. 1978) (upholding the constitutionality of the "marriage penalty"); Johnson v. United States, 422 F.Supp. 958 (N.D. Ind. 1976). *See generally* Antoinette M. Pilzner, *Tax Liability Differences Between Married and Unmarried Couples: Do the Married Filing Statutes Violate Equal Protection?*, 40 WAYNE L.REV. 1337 (1994).

choosing your filing status, at the moment, is the revenue. It would cost about $30 billion a year in lost revenue.[56] Given the budgetary situation, that is the problem. I also believe once they start to think about it some more they will realize that there are a lot of practical problems associated with choosing your filing status, such as how do you allocate income from jointly owned assets? How do you allocate deductions from jointly owned things such as houses? How do you allocate the mortgage interest deduction? Another consideration is that you would really have to do your taxes three times, each spouse would have to do their taxes individually and then they would have to do them together to figure out which way they come out ahead. I think that in the short run it is really a revenue consideration.

PROF. BROWN: I would point out that in addition to the revenue issue — based on the Census Bureau data — if you had a system where you had no penalties, but you had marriage bonuses, not having penalties would obviously help the African-American households who are disproportionately paying the penalties, but only having bonuses would, in effect, disproportionately help the White couples that disproportionally have the marriage bonuses.[57] From a race-based perspective I would have a problem with a system that kept bonuses but, of course, it would be better than what we have now, which is a system that has penalties that are disproportionately born by African-American households.

PROF. CHRISTIAN: I, too, oppose marriage bonuses. That is, I take exception to proposals that eliminate marriage penalties but that retain marriage bonuses. As we have discussed, marriage bonuses tend to fall disproportionately on disparate-income couples, couples in which one spouse works and the other does not or in which one spouse works and the other works only part-time. That such couples receive a marriage bonus means our government is subsidizing the idea of a stay-at-home spouse, a spouse who minimizes her connection with the paid work force. A couple receives a marriage bonus, a subsidy, if one spouse, probably the wife, stays out of the work force.

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[56] *See* Bruce Bartlett, *Yes, Eliminate the Marriage Tax Penalty*, N.Y. TIMES, Mar. 16, 1998, at A27.

[57] *See* Brown, *supra* note 1.

Now, you might view this as an acceptable or even a desirable policy if you think the government should encourage one parent to stay at home with his or her children. You would simply pay one parent, through the marriage bonus, not to work. The problem is that the marriage bonus is not targeted to this problem. That bonus is not limited to couples who have children. If a subsidy for the stay-at-home parent is desirable, it ought to be made available only to couples who have children. It ought to be paid only to parents. Paying such a subsidy through the marriage bonus system, however, makes the subsidy available to all kinds of disparate-income couples, even those who have no children. The current system of marriage bonuses does not limit its benefits to parents, the couples for whom society might have a reason to desire one spouse to limit his or her work-force participation.

PROF. LaPIANA: And, of course, finally, there are other transfer tax problems. There is no barrier to the transfer of capital between spouses, and those transfers can be structured in ways that minimize or eliminate the "donee's" control of the property. It becomes extraordinarily easy to start shifting investment income around with no problems at all and that somehow looks far from the kind of reform we are trying to accomplish.

PROF. BECK: I would like to point out that while there would be serious problems, as Mr. Bartlett points out, in allocating deductions, expenses and so forth between the spouses to file as single persons, we have recently faced this problem with reforms on joint and several liability. In that instance we came up with solutions that seem halfway reasonable. I believe that even if we move to what I think is a more rational system whereby everyone files separate returns, we will still have those problems. We are always going to have to decide how mortgage interest and other deductions should be allocated, as long as we keep a system with deductions in place. Therefore, I am not sure that this is a stumbling block to the halfway position of giving married couples a choice.

MR. BARTLETT: You might just say it is a matter of complexity. I believe it is something that people have not thought about. I think we can deal with these. It is not a barrier.

PROF. BROWN: I agree with Bruce. There is only one article

that I have read that actually tackled the issue. I think people say, okay, we can go to individual filing and we can work it out but I think the devil is in the details, so I am just not convinced that it is as simple and straightforward as people might suggest. Particularly, given what we just heard about married couples being able to shift assets.

PROF. BECK: Well, as we heard earlier, many countries in the world are moving away from, or already have moved away from, family taxation to individual taxation and so these problems have, presumably, been faced elsewhere. Canada, for example, has never had joint filing; it's always had single filing, so these problems are soluble in principle and in fact.[58]

PROF. BROWN: I believe taking a historical perspective is often helpful when you ask how did we get here? Well, it started with the joint tax return and there is a question as to, why did we have the joint tax return, and scholars might debate why we have the joint tax return. Professor Caroline Jones has done some excellent work in the area that points out that one of the reasons why Congress stepped in and enacted the joint tax return was to help those states that refused to change to community property in response to the *Poe v. Seaborn*[59] decision. So what you have is, I believe, a deeply embedded gender bias in the Internal Revenue Code.

It appears that the IRC's goal is, on some level, to disempower women. When you are talking about what type of family is promoted in the federal tax law, it is the sole wage-earner family. Historically, that has been the man who works in the paid labor market and the woman who works at home. We give benefits to that couple. We don't tax the imputed income, which is the value of the household services she provides to her family. Congress must have thought it was a really good thing. A really bad thing is those dual equal-earning households. That's bad, we don't want that and we tax them to death. So we did not get here by accident. We got here, I believe, by conscious bias that says we want men to work outside the home

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[58] *See, e.g.*, Samuel R. Baker, *Planning for United States Corporate Executives Moving In and Out of Canada*, *in* DOING BUSINESS IN CANADA 55, 65-66 (E. Newberger ed., 1975) (stating that in Canada "joint husband and wife returns are not provided for").

[59] 282 U.S. 101 (1930).

and we want the women to work inside the home.

I don't believe those biases are gone, so we are in a political process with people who have those biases. I do not know how we get from here to there because I think those households that are receiving a marriage bonus will fight to the death to keep their marriage bonuses. As someone in the earlier panel said, they think of this as an entitlement. This is right, this is the right answer, I should get more money because I am married; who said that? Well, we have had a joint return since 1948,[60] that's who said that. So, you know, I think the biases that are embedded in the Code are embedded in the legislators that are in Congress that make the laws that basically penalize, coequal I call them, coequal wage-earning households.

MR. BARTLETT: There is another important bias that was brought up, and that is the bias against single people. Being a single person I am acutely aware of this, I pay more taxes than a married couple with the same income. In fact, the reason the marriage penalty came about in 1969 was because the disparity was as much as 40 percent.[61] Congress decided to cut tax rates for single people so that the disparity was not more than 20 percent.[62] So you are still being disadvantaged by 20 percent but you are less disadvantaged than you were under the previous law. All of the proposals for doing something about the marriage penalty would almost invariably go back in the other direction of increasing the disparity between single persons and married couples and I think that is something to consider.

PROF. LaPIANA: As a single person, I certainly agree. I am in a situation where if we could marry, my partner and I would receive a large marriage bonus. But if I put my legal historian hat on for a minute, I think we have to understand, too, the degree to which this problem really is caused by an interesting coming together of factors. As was mentioned earlier this morning, many of the problems we are discussing under the rubric "marriage penalty" did not occur until the need to finance the Second World War made many more people

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[60] *See* Revenue Act of 1948, ch. 168, 1948 U.S.C.C.A.N. (62 Stat. 110) 91.

[61] *See* Beck, *supra* note 9, at 371.

[62] *See id.*

subject to the income tax.[63] In addition, for one brief, wonderful moment in the post-war period, as this country became wildly prosperous, people who could never before believe that they would have a middle class life found themselves doing exactly that. Many factors contribute to the creation of this remarkable time, not the least of which, of course, was the government's subsidization of higher education for millions of (mainly white) veterans, many of whom were from social groups who would never have had that opportunity absent the War and the G.I. Bill. It is probably fair to say that before the Second World War many married women may have, indeed must have, worked for wages outside the home. Their wage earning did not raise the questions we consider today. Perhaps they worked "off the books," or perhaps they and their families were too poor to worry about the income tax. After the Second World War, however, the United States economy is such that a family can sustain a middle class level of existence on the wages of only one spouse. That moment, however, seems to have been very fleeting and is gone, maybe forever. It is not surprising, then, that today we are concerned with the effect of income taxation on married couples. In other words, the image of the "traditional" one earner (the husband) married couple may be an accident of the unprecedented growth of the middle class after the War, made possible by unprecedented prosperity. The belief that the marriage penalty is something new and perverse may simply be the product of historical accident — the existence of a brief time when married women did not work outside the home or rather, when it was possible to believe they did not.

PROF. BECK: One of the depressing problems about tax reform is, what I like to call "The Immortality of Bad Law." We cannot seem to kill a law that is clearly and obviously wrong, instead we create exceptions. We have lurched from one set of complications and complication exceptions to the next. We saw a very interesting example in this last year's reform of the innocent spouse rules. Instead of just removing joint and several liability from the Code and removing the *Poe v. Seaborn*[64] liability, Congress enacted a much

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[63] *See* Edward J. McCaffery, *Taxation and The Family: A Fresh Look at Behavioral Gender Biases in The Code*, 40 U.C.L.A. L. REV. 983, 990 (1993).

[64] 282 U.S. 101 (1930).

more complex set of rules then we had before. This had the interesting effect of making official the discrimination against married people. It is much easier to get relief from joint liability if a wife is separated or divorced than if a she is still married.

However, *Poe v. Seaborn* remains a big problem. This was the immortal case with which income-splitting began in this country. It began as a tax dodge for high-earning husbands in the western states, who took the position that community property laws required their non-earning wives to file returns showing half of their husbands' income in order to beat the progressive system. When the Supreme Court blessed this tax dodge, in one of its worse decisions ever, it created a rate disparity between common law states and community property states.[65] The community property states refused to give up their advantage so, eventually, the same advantage had to be given to everyone, hence the 1948 income-splitting on joint returns.[66] But the marriage penalty itself also comes from *Poe v. Seaborn* because in 1969 the changes that Mr. Bartlett mentions, when single people were given a better rate, could not be extended to married people as long as *Poe v. Seaborn* was in effect. That is because people on the West Coast — married single-earner couples — could otherwise have split their income filing separately under *Poe v. Seaborn* and used the new favorable single rate, as well, but single-earner couples in the common-law states could not, because they cannot split their income on separate returns. This would have created an East–West rate disparity, which the 1948 compromise was designed to avoid. That is the sole reason why a new unfavorable rate had to be imposed for married people filing separately. Well, it would have been easy for Congress simply to overrule *Poe v. Seaborn*, and a much better solution than creating a marriage penalty. However, the *Seaborn* case lives on and, I fear, will live on forever.

THE AUDIENCE: This is a question for Professor Christian. Regarding your point that couples with dramatically different incomes are the ones more likely to file jointly thereby subjecting the lower or non-earning spouse to joint and several liability, precisely when it

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[65] *See* Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1408 (1993).

[66] *See* Beck, *supra* note 9, at 369-70.

makes no sense; it seems that some of those non-delinquent spouses, probably the women, would win under the innocent spouse provision? I am wondering if that, in itself, is a problem because it encourages women to stay financially illiterate thereby creating the very power dynamics and the worries about intra-family power disparities that the last panel talked about?

PROF. CHRISTIAN: Great question. It is very difficult for the non-delinquent spouse, often the wife, to escape the problem of joint and several liability through the innocent spouse rules. For example, to prove she is an innocent spouse, a married woman must show under [I.R.C.] § 6015(b)(1)(C) that she had no actual or constructive knowledge of the understatement of tax.[67] Unfortunately, courts have often construed this provision and its predecessor as requiring that the wife must prove she is uneducated and woefully ignorant of the family's financial affairs.[68] Cases exist in which courts have held that the requirement was not satisfied because the spouse seeking relief had an advanced degree, was reasonably intelligent, and therefore, presumably should have known that the tax

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[67] I.R.C. § 6015(b)(1) (1999) provides relief from liability for a joint filer when:

> (A) a joint return has been made for a taxable year;
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> (B) on such return there is an understatement of tax attributable to erroneous items of one individual filing the joint return;
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> (C) the other individual filing the joint return establishes that in signing the return he or she did not know, and had no reason to know, that there was such understatement;
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> (D) taking into account all the facts and circumstances, it is inequitable to hold the other individual liable for the deficiency in tax for such taxable year attributable to such understatement; and
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> (E) the other individual elects (in such form as the Secretary may prescribe) the benefits of this subsection not later than the date which is 2 years after the date the Secretary has begun collection activities with respect to the individual making the election.

[68] *See, e.g.*, Price v. Commissioner, 887 F.2d 959 (9th Cir. 1989); Friedman v. Commissioner, 53 F.3d 523, 530 (2d Cir. 1995) (finding wife had no actual or constructive knowledge considering in part her status as a "housewife and unemployed former secretary with a high school education . . .."); Shea v. Commissioner, 780 F.2d 561, 567 (6th Cir. 1986) (noting that "a [wife's] minimal involvement" in her "family's financial affairs can satisfy the 'reason to know' standard.").

return contained an understatement of liability.[69]

In this manner, the innocent spouse rules set up an unfortunate dichotomy for spouses who seek their application. The rules tend to reward those wives who keep themselves illiterate either financially or in other ways, and they tend to penalize those women who seek to educate themselves even when the education does not extend to tax issues. So yes, the innocent spouse rules do encourage women to stay financially illiterate and this, of course, exacerbates other problems like power disparities within the family.

Incidentally, this problem in the innocent spouse rules arises only for spouses who are still together at the time the IRS seeks payment of the deficiency.[70] Thus, the new innocent spouse rules retain a "fault system" for people who remain married. For example, if you are married and your husband created the tax deficiency, the Internal Revenue Service can come after you, the wife, for the tax deficiency. The wife can get out of that deficiency under the innocent spouse rules, but only if she shows certain things tending to indicate her lack of "fault."[71] She must show, for example, that she did not benefit from the fact that her husband understated the tax liability. She must show that she did not know about the facts underlying the misstatement on the return. As I have already stated, she must show that she had no knowledge of the tax deficiency and that she had no

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[69] *See, e.g.*, Cohen v. Commissioner, 54 T.C.M. (CCH) 944 (1987); Hayman v. Commissioner, 992 F.2d 1256, 1261-62 (2d Cir. 1993); Cockrell v. Commissioner, 1997 WL 346134 (2d Cir.).

[70] I.R.C. § 6015(c)(1) (1999) provides a new limit on individual liability of spouses who are no longer together, using the following language:

> (1) In general. Except as provided in this subsection, if an individual who has made a joint return for any taxable year elects the application in this subsection, the individual's liability for any deficiency which is assessed with respect to the return shall not exceed the portion of such deficiency properly allocable to the individual under subsection (d).

Id. § 6015(c)(1). *Compare* I.R.C. § 6015(c)(1) (1999) *with* I.R.C. § 6013(e) (1998).

[71] *See, e.g.*, I.R.C. § 6015(b)(1)(C) (1999). *See also* Sanders v. United States, 509 F.2d 162, 167, 170 (5th Cir. 1975) (spouse must show lack of actual or constructive knowledge of deficiency in tax statement and no personal benefit from that deficiency); Resser v. Commissioner, 74 F.3d 1528, 1538 (7th Cir. 1996) (finding spouse's education did not bar her from "innocent spouse" protection because she proved the complexity of her husband's financial affairs).

reason to know of the tax deficiency. This system which applies to spouses who are still together, is a fault-type system.

On the other hand, for spouses who have separated or divorced, the new innocent spouse rules under I.R.C. § 6015 now take a new, non-fault approach.[72] "No-longer-married" spouses now have the option, if they meet certain requirements, of avoiding the fault system and electing to use a more beneficial, proportional liability system. That option is not available at all to people who remain married.[73] So, ironically, an incentive has arisen within the innocent spouse rules for spouses to divorce or separate to enable the non-guilty spouse to avoid both the draconian rule of joint and several liability and the difficult hurdles of the fault-based innocent spouse system. By divorcing or separating, the non-guilty spouse makes herself eligible for the beneficial proportional liability system. This, in and of itself, is a marriage penalty, one that is embedded in the new innocent spouse rules. A non-delinquent spouse is penalized by staying married and, in this manner, the new innocent spouse rules encourage divorce.

THE AUDIENCE: This is a question for Professor Brown. According to the Bureau of Labor Statistics, in almost a quarter of all married couples the female is or the wife is the higher earner and this is a growing percentage, it has grown from 15 percent 15 years ago.[74] Your data would seem to imply that a disproportionate share of these higher earning women are probably in Black families. Does your data show that and what implications does that have for some of the discussion in the earlier panel about power sharing within the relationship?

PROF. BROWN: My data shows that with respect to African-American households at high-income levels, I have more men then women who are sole wage-earner providers; the percentage is around twenty something, I am now talking families earning $120,000 and over, and 5 percent or 9 percent, actually, are women.[75] So you have

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[72] *See supra* note 70 and accompanying text.

[73] *See supra* note 70 and accompanying text.

[74] *See* Ann E. Winkler, *Earnings of Husbands and Wives in Dual-Earner Families*, 121 MONTHLY LAB. REV., Apr. 1998, at 42.

[75] *See* Brown, *supra* note 1, at 292-99.

some Black women who are sole wage earners, but you have more Black men that are sole wage earners at the upper income level. What I found interesting is that at the lower income levels it was more likely that the sole wage earner would be a Black woman than a man, although at the higher percentile it is more likely to be a Black man than a woman. This proportion is higher among African-Americans; there are more Black women who are high income earners then there are White women who are sole wage-earners at the high income level, yes.[76]

PROF. BECK: We have time for just one more question.

THE AUDIENCE: This is regarding your discussion of spousal joint and several liability. The major asset that most families in the United States own is their home and that is held jointly by comparative title by the husband and wife. How would you handle, from a collection point of view, the fact that their major asset is tied up jointly? If the wife would not be liable for tax consequences, how would the Government be able to collect those taxes?

PROF. CHRISTIAN: Let us say the husband is the one who generated the tax deficiency. This is not always the case, but for purposes of this example, we will say that the husband is responsible for the tax deficiency. In this situation, the Internal Revenue Service should be attempting collection from the husband and not the wife. If the home is owned solely by the husband, then the IRS's levy on the home is not a problem. The tax burden is falling on the proper party, the spouse whose income created the burden. However, joint ownership of property, obviously, raises a big problem, because if the Internal Revenue Service satisfies the husband's liability by taking a jointly owned asset, in essence, the wife will bear part of that tax burden.

THE AUDIENCE: But they would not be able to get it, they would not be able to execute on it. The husband would have the right of survivorship therefore, unless the wife was dead the Internal Revenue Service would not levy on that home unless the judgment was against the wife and the husband.

PROF. CHRISTIAN: If a couple filed separately, and its

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[76] *See id.*

primary asset is the jointly owned home, what does the Internal Revenue Service do in that case? Are you saying that for New York taxpayers, the IRS cannot attach the home?

THE AUDIENCE: I would say in New York State, the IRS could not execute on jointly held property. I don't know the law in Michigan but in New York State I would say that the home would not be reachable.

PROF. LaPIANA: If I can just jump in here? The problem is there are at least three different views of the rights of creditors to jointly held property, and sometimes the rules are different for tenancies by the entireties (which can only exist between husband and wife).[77] There simply is no one nationwide answer to the question of creditors' rights in jointly held property. The interplay of federal tax law and state property law varies from state to state. I believe, however, that you are right about New York — entireties property cannot be levied on by the creditor of one spouse.

PROF. BECK: Thank you very much.

[77] *See* Sawada v. Endo, 561 P.2d 1291 (Haw. 1977).