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The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed.

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FBI agent (intimidating mobster's widow into informing for the government):
"I also have here a report from the IRS. Something about undeclared income and defrauding the government. That's an additional 10-15 in a federal pen."
Widow:
"Yeah, but Frankie always took care of the taxes."
FBI agent:
"You signed the returns."[1]

I. INTRODUCTION

Husbands and wives who elect to file joint federal income tax returns are jointly and severally liable for the entire tax due.[2] Ninety-nine percent of married couples who file income tax returns make the election to file jointly, and each spouse thereby incurs personal liability for the other spouse's income taxes.[3] This Article argues that the rule is unfair and unjustified and should be repealed.

Part II of the Article describes the nature and scope of the problems caused by joint and several liability of spouses filing joint returns (hereinafter "joint return liability"). When separation or divorce

1. *Married to the Mob* (Orion Pictures Corp., 1988).

2. I.R.C. § 6013(d)(3) (1982). The Internal Revenue Code states: "[I]f a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax sball be joint and several." *Id.*

This rule has been in the statute since 1938, but before that date it was controversial and the subject of litigation. *See infra* notes 95-123 and accompanying text.

3. In 1985 there were 47,809,791 joint returns filed, and 895,789 returns of married persons filing separately. I.R.S., STATISTICS OF INCOME—1985 INDIVIDUAL INCOME TAX RETURNS, table 1.2, at 16 (1988); *id.* table 1.3, at 19.

is involved, the rule of joint return liability often causes an unfair shifting of tax liability from (ex-)husbands to (ex-)wives. Although the statute itself is gender-neutral, the actual effect of the law is not. An estimated ninety percent of collections from the "wrong" or nonearning spouse penalize women.[4] The Internal Revenue Service (IRS) may collect from either spouse at its pleasure, and apparently chooses its target simply from the point of view of ease of collection.

If the wife is forced to pay her husband's taxes in such a situation—and women apparently are forced to do so in thousands of cases each year[5]—the effect is a coerced transfer of wealth from wife to husband, as if the IRS arbitrarily had chosen the husband's side in the couple's property settlement. The wife may be harmed seriously by such collections, because the amount of her joint return liability can easily exceed any reasonable measure of her ability to pay.

Part III of the Article will describe and discuss the origins of the

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4. The term "wife" will be used hereinafter to refer to whichever spouse is forced to pay taxes on the other spouse's earnings, and "husband" to refer to the spouse whose liability is thus discharged, unless the context indicates otherwise. The same terms will be used to refer to former spouses who are divorced, as well as separated spouses, and spouses living together, unless the context indicates otherwise.

The statute is of course gender-neutral, but the vast majority of the reported innocent spouse cases (over 90% in 1987) involve wives who are forced to pay their husbands' taxes. *See infra* note 33. One may suppose that the innumerable instances in which such deficiencies are paid rather than contested involve a similarly high proportion of women.

The fundamental argument of this Article is that the rule of joint return liability is unfair to everyone, male or female, who is forced to pay the other spouse's taxes. The argument is grounded in the basic principle of the income tax that each taxpayer should be liable only according to bis or her own ability to pay. Because the rule has a disproportionately adverse effect on women, however, both as to frequency of collection and severity of consequences, a strong argument can be made that the rule is discriminatory in effect.

The effect seems ultimately due not to any discriminatory intent in the tax rule itself, however, but to the fact that women on average are in an economically inferior position in American society. Women have less economic independence than men because women have lower average earnings than men, and fewer women than men are self-employed. *See infra* note 277 and accompanying text. Self-employed persons have much greater opportunity to conceal income and to take aggressive tax positions. Thus, joint return deficiencies are more likely to be caused by the husband and more likely to be greater in amount than deficiencies caused by the wife. A deficiency caused by the husband will, on average, be more onerous for the wife to pay than the other way around because the deficiency is likely to be larger, and because her earnings and ability to pay it are less. These consequences are aggravated by the high rate of divorce, which has increased enormously the frequency with which such collections are made from ex-spouses since the rule was first enacted in 1938. *See infra* note 308.

The larger issues involving women's economic inferiority are beyond the scope of this Article. Feminists have written a wide body of literature on the subject, however. *See, e.g.*, Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) (citing a number of sources that discuss women's economic inferiority). It seems clear that the rule of joint return liability contributes to the "feminization of poverty," and it should be condemned on that ground alone.

5. The IRS keeps no statistics on its collections through joint return liability whether by gender or otherwise, but it may be estimated that there are at least 10,000 such instances per year. For a way to arrive at this estimate, see *infra* note 34.

rule of joint return liability. Before Congress enacted joint return liability in 1938, the Treasury sought to impose the rule by administrative decision. Taxpayers challenged the rule in the Ninth Circuit case *Cole v. Commissioner*.[6] In *Cole* the Government unsuccessfully argued that the rule was required by administrative necessity, because the Government would be unable to determine the separate incomes and expenses of the spouses from the aggregated numbers reported on joint returns.[7] The *Cole* court held that, at least in cases in which the spouses could demonstrate their respective net incomes, joint return liability would deny unjustifiably each taxpayer's right to be taxed only in proportion to his or her own income, in accordance with ability to pay.[8]

Three years after the government's 1935 defeat in the Ninth Circuit, Congress overruled the *Cole* decision by enacting the rule of joint return liability, and offered as its sole explanation the same claim of administrative necessity that the Ninth Circuit had rejected.[9] This section will argue that the Ninth Circuit's reasoning was correct and that the rule of joint return liability was not then, and cannot now be, justified by the government's arguments.

Part IV of the Article analyzes and criticizes the innocent spouse rules that Congress enacted in 1971 as section 6013(e) of the Internal Revenue Code (the Code).[10] These rules exonerate the wife from the general rule of joint return liability under certain very limited circumstances. Relief is available only for omissions of income and for illegal claims of deduction, credit, or basis, and then only if the deficiency is substantial.[11] In addition, the wife must prove that she did not know and had no reason to know of the husband's illegal claims in order to obtain relief.[12] This innocence requirement has proved particularly troublesome in application, and has led to inconsistent and unpredictable case law.

Commentators generally agree that the innocent spouse rules are overly restrictive and foreclose relief in many deserving cases.[13] Unlike most commentary, this Article does not recommend that the innocent spouse rules should be amended to provide greater relief, but rather that the rule of joint return liability should be repealed. Amending the statute does not provide a principled means of solving the current

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6. Cole v. Commissioner, 81 F.2d 485 (9th Cir. 1935).
7. *Id.* at 486-88.
8. *Id.* at 487-88.
9. *See infra* Part III(F).
10. *See* I.R.C. § 6013(e) (1982 & Supp. V 1987).
11. *Id.* § 6013(e)(1), (2) (Supp. V 1987).
12. *Id.* § 6013(e)(1)(C).
13. *See infra* note 233 and accompanying text.

problems because the concept of innocence in which the rules are grounded is simply inappropriate as a basis upon which to grant relief. Current law places an unrealistic and unjustifiable duty on the wife, similar to that of an auditor or return preparer, to examine the joint return and inquire into questionable items.[14]

Part V of the Article considers two other possible rationales for justifying the rule of joint return liability, although neither the Treasury nor Congress has articulated any other rationale than the administrative difficulty of calculating proportional liability. First, contrary to widely held belief, the tax benefits that married taxpayers may enjoy by filing jointly cannot justify joint return liability as a quid pro quo because in many cases the taxpayers receive no benefit from joint filing, and for those who do benefit, the amount saved bears no relation to the amount of liability incurred.[15] Also, the benefit, if any, is usually enjoyed by the husband, while the liability is borne by the wife.[16]

Given United States divorce statistics, no theory of economic unity of the family can justify making the economic resources of both spouses available to pay the taxes of either one. There is no evidence that couples are indifferent as to which spouse holds legal ownership of their property, nor is it even clear that couples generally share all their assets during marriage. After separation or divorce any such sharing between spouses usually is terminated, and their economic interests often become adverse. If joint return liability applies, however, the tax law still treats them as if their economic interests were identical.[17]

Part VI of the Article contrasts the rules for taxing married couples in the United States with corresponding rules in other countries. No developed country in the world except the United States permits its government as a general rule to force wives to pay their husbands' taxes. Further, there is an international trend to limit or abolish any remaining vestiges of earlier rules that imposed such liability.

Part VI also briefly reviews United States state income tax law concerning joint returns and discusses the great diversity of rules at the state level. Several states do not impose joint return liability at all, many follow the federal rules, and others impose joint return liability without providing innocent spouse relief. California is unique in providing much more generous relief than the federal rules.

Part VII of the Article discusses the consequences of repealing joint

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14. *See infra* Part IV(B)(3), (4).

15. *See infra* Part V(A)(2).

16. *See infra* Part V(A)(3).

17. Application of joint return liability implies that couples are indifferent as to which spouse's assets are used to satisfy a deficiency. *See infra* Part V(B) (refuting the validity of this implication).

return liability and the problems of implementing a regime of separate proportional liability. This section argues that no changes in the structure of tax rates would be necessary, and that the current rules for returns of married persons filing separately are generally adequate for the purpose of allocating the separate incomes and deductions of the spouses on joint returns. In the interest of fairness, however, and in order to minimize the need for recordkeeping, personal deductions and dependent exemptions should be allocated to the spouses in proportion to their adjusted gross incomes.

Part VII also argues that the repeal of joint return liability will create little or no abuse potential for tax avoidance, and that the current remedy of transferee liability is sufficient to police any such problems. Transferee liability is much more fair than joint return liability because it applies only if the husband is insolvent and cannot pay, thus forcing the IRS to exhaust its remedies against him before turning to the wife. In addition, the wife's liability cannot exceed the value of the property transferred, which limits her liability to the amount by which she actually benefited from her husband's tax delinquency.

II. The Problem

The following case illustrates a typical and all too common problem under current law. Robert and Anna[18] filed joint returns for the years 1983, 1984, and 1985, reporting about 35,000 dollars of taxable income each year. Anna, a German national and United States resident, earned a salary of about 12,000 dollars per year as a school teacher. Robert earned fees as a freelance photographer. Taxes were withheld from Anna's salary, but not from Robert's fees. Robert prepared and filed the joint returns each year and assured Anna that all the taxes were paid. In fact, he paid only a small part of the taxes due each year on his income. In addition, Robert's business deductions were later disallowed. Robert failed to appear at scheduled appointments with IRS auditors to defend the deductions, however, and also failed to tell Anna of his problems with the IRS.

In 1986 Robert left the marital home, and the couple has remained separated. Anna continues to live in the couple's condominium and provides the sole support for their ten-year old son. The couple has no savings. Robert never has made any child support or alimony payments. In 1987 the IRS filed a notice of lien against the couple's condominium and levied upon Anna's salary to collect the unpaid taxes, leaving her only one hundred dollars per week out of her salary on which to live.

18. The Author has altered the names and some details to prevent identification of the taxpayers.

The IRS claims that Anna owes over 12,000 dollars in back taxes, interest, and penalties, which is more than an entire year's income for her, and which she cannot pay except by selling her home. All the amounts due are because of Robert's income and disallowed deductions. Anna's own share of the taxes was paid fully through withholding. Nevertheless, the IRS can collect Robert's taxes from Anna because she signed joint returns with him.

Anna knows where Robert lives and that he still works as a photographer. In addition, Robert has a savings account and now has regular earnings that can be levied upon. His income is substantial, and he has a much greater ability to pay than Anna. Nevertheless, Anna has been unable to persuade the IRS to try to collect from him. Apparently the sole reason collection is being made from Anna alone is that Anna's salary was easier for the IRS to reach at the time collection proceedings began.

Anna also has been unsuccessful in seeking an IRS review of the disallowed deductions. The deductions appear in fact to be legitimate and allowable, but Robert has refused to cooperate. Without Robert's records Anna probably will not succeed in establishing his expenses even if she does obtain a hearing, because the deficiency is presumptively correct, and she will have the burden of disproving it.

A. *Fairness and Ability to Pay*

Anna is justifiably resentful because joint return liability violates the most basic principle of a fair income tax: the right of taxpayers to be taxed only according to their own actual net income and ability to pay. Anna's own taxes were paid in full. Further, Robert's income and tax liability are far greater than Anna's. The IRS's collection efforts bear no relation at all to her ability to pay and are ruinous for her.

Except for joint return liability and the related problem of community property liability,[19] income taxes are assessed and collected on an

19. A wife who resides in a community property jurisdiction is subjected to liability for one-half of her husband's taxes under the doctrine of Poe v. Seaborn, 282 U.S. 101 (1930). *Seaborn* construed the family property law in community property states (California, Nevada, Washington, Idaho, Arizona, New Mexico, Texas, Louisiana, and since 1987, Wisconsin) to create a separate liability of each spouse for one-half of the tax on the income of the other. The Court based this construction on the theory that all earnings during marriage inure to the marital community and are therefore owned by and taxable to each spouse in equal amounts. This form of liability does not depend upon filing a joint return and results automatically from residence in a community property jurisdiction. *See, e.g.*, United States v. Mitchell, 403 U.S. 190 (1971) (holding wife liable out of her separate property for one-half the taxes due on her husband's earnings, which were community property under Louisiana law although no returns were filed).

A spouse cannot gain protection from this form of liability even by filing separately without first dissolving the community of property. *See, e.g.*, Shoenhair v. Commissioner, 45 B.T.A. 576 (1941) (holding that a valid oral agreement under Arizona law between spouses that the husband's individual basis. The income tax system is elaborately designed to reflect the individual taxpayer's actual ability to pay. Indeed, this design often is extolled as the tax system's chief virtue: it is the fairest method of taxation. The rates of tax on net income are progressive for each individual.[20] A myriad of deductions, credits, and exclusions are allowable in order to ensure that taxable income reflects the taxpayer's true economic gain for the taxable year. The entire elaborate structure is undercut when one taxpayer is required to pay the taxes of another, without limit, and without regard to ability to pay. In these circumstances, the income tax can become the most unfair of all methods of taxation.

Anna not only resents her plight; she is astonished that the United States imposes joint return liability at all. In her native Germany, most married persons elect to file jointly and receive a tax advantage from doing so. In the event of an underpayment, however, the government is not permitted to collect more tax from either spouse than the amount that is proportional to individual income.[21] Under the German model, not only is liability limited to the tax on her income, but the rate advantage of filing joint returns is preserved.

B. Notice

Most Americans probably would share Anna's astonishment. It seems unlikely that many women are aware of the liability they assume on joint returns.[22] Unless a woman is unusually sophisticated in tax matters, she may find it hard to believe that she could be forced to pay her husband's taxes simply because she was married to him at the time the income was earned. No warning appears anywhere on the individual income tax return Form 1040. There is a warning in the Instructions to Form 1040,[23] but unless the wife prepares the return herself, she will

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income from the practice of law would be his separate property prevented taxation of one-half of such earnings to the wife). The Code provides limited relief for the innocent spouse from community property liability, analogous in many respects to relief under I.R.C. § 6013(e). *See* I.R.C. § 66 (1982 & Supp. V 1987).

A discussion of these problems, which are historically unrelated to the problem of joint return liability, is beyond the scope of this Article. For discussions of the problem of community property liability, see Minnick, *The Innocent Spouse Doctrine: The Need for Reform and Planning Alternatives in the State of Texas*, 66 TAXES 56 (1988), and Murray, *Problems of Taxation of the Income of Spouses in the Context of Divorce and Separation*, 14 COMMUNITY PROP. J. 20 (1987).

20. The exception to this rule is the new "Kiddie Tax" under § 1(i) of the Code, which taxes unearned income of children under 14 at the highest rate of tax applicable to either parent. I.R.C. § 1(i) (Supp. V 1987).

21. *See infra* notes 336-37 and accompanying text.

22. In an informal canvassing of nonlawyer friends, the Author could find no one who was aware of the rule at all.

23. Even if the wife does read the Instructions, she easily could miss the warning, which

have no occasion to consult the Instructions. The warning fails to mention that joint liability extends to items that later are disallowed by the IRS and even to items that do not appear on the return at all.[24]

C. *Innocent Spouse Relief*

Recognizing that collections under joint return liability may be at least sometimes unfair, Congress in 1971 provided relief from joint return liability in certain limited circumstances by enacting the so called "innocent spouse" rules.[25] Relief is available only for tax items of the other spouse that are "grossly erroneous"[26] and only if such items result in an understatement exceeding 500 dollars.[27] The seeker of innocent spouse status has the burden of proving her innocence:[28] she must prove that at the time of filing the joint return she did not know, and had no reason to know, of the existence of her husband's grossly erroneous tax

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appears on page 7 of the 1989 Instructions to the federal Form 1040. Preceding it is a section entitled "Filing Status," which compares filing statuses by rates alone.

Immediately following this section of the Instructions is the section entitled "Married Filing Joint Return," which contains the warning. The warning in its context, is as follows:

> A husband and wife may file a joint return even if only one had income or if they did not live together all year. However, both persons must sign the return and both are responsible. This means that if one spouse does not pay the tax due, the other may have to.
>
> If you file a joint return for 1989, you may not, after the due date for filing that return, amend that return to file as married filing a separate return.

INTERNAL REVENUE SERVICE, DEPT'T OF THE TREASURY, INSTRUCTIONS FOR FORM 1040 7 (1989).

24. The innocent lay reader of these instructions who is cautioned that he or she may be responsible for "any tax due on a joint return" if the other spouse fails to pay, will naturally think only of the bottom line shown on the return. This conclusion is in accord with common sense. One does not normally sign papers obligating oneself to pay another's debts in uncertain, undisclosed, and unlimited amounts.

25. *See* I.R.C. § 6013(e) (Supp. V 1987). Section 6013(e) states in pertinent part:

> (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 tbe 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.

Id. For analysis and criticism of the innocent spouse rules, see *infra* Part IV.

26. Section 6013(e)(2) defines "grossly erroneous" items as (1) omitted gross income, or (2) a claim of deduction, credit, or basis in an amount for which there is no basis in fact or law. I.R.C. § 6013(e)(2) (Supp. V 1987).

27. *Id.* § 6013(e)(3). For a discussion of the additional dollar limitations for items of deduction, credit, or basis nnder § 6013(e)(4), see *infra* Part IV(A)(8).

28. Lessinger v. Commissioner, 85 T.C. 824, 838 (1985).

item. In addition, she must prove that it would be inequitable for the IRS to tax her for the grossly erroneous item;[29] to show such inequity she must prove that she did not derive any significant benefit from such item over and above ordinary support.[30] Even if the wife succeeds in proving her innocent spouse status as to one or more grossly erroneous items, she remains liable for all other items of her husband on the joint return.[31]

In Anna's case, the innocent spouse rules afford no relief. Because the return was correct as filed, there was no "grossly erroneous" item.[32]

D. *Incidence of Collection from Wrong Spouse*

Joint return liability has caused and continues to cause much litigation. There are about 300 reported cases since 1971 of taxpayers contesting the imposition of joint and several liability by claiming relief as innocent spouses, making section 6013(e) among the most frequently litigated sections in the Code. Of these cases, over ninety percent involve women petitioning the courts for relief from liability for their husbands' taxes, and more than two-thirds of these women have been unsuccessful.[33] These numbers do not begin to convey the true extent of the problem. Most collections under section 6013(d) probably are less than 500 dollars and therefore too small to qualify for innocent spouse relief. Many other collections do not qualify because of some other restriction on relief or simply because the wife does not have the knowledge or means to litigate.

The IRS does not compile statistics of collections based upon joint return liability, and therefore it is difficult to state the incidence of such collections with any degree of accuracy. A reasonable estimate can be made from indirect evidence and a certain amount of guesswork, however, and on that basis it appears that at least 10,000 divorced or separated women per year may be forced to pay some part or all of their (ex-)husbands' taxes.[34]

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29. *See* I.R.C. § 6013(e)(1)(C), (D) (Supp. V 1987).

30. *See infra* notes 191-93 and accompanying text.

31. *See* I.R.C. § 6013(e)(1) (Supp. V 1987).

32. Somewhat perversely, Anna would be in a better position if Robert fraudulently had omitted his income from the return altogether. By filing the return accurately, he foreclosed Anna from relief.

33. There are 299 reported cases since 1971 in which § 6013(e) was an issue, for an average of some 18 cases per year. In 1987 there were 32 such cases. Using the cases reported during 1987 as a sample, only 2 out of 32 petitioners were men, both of whom lost; 21 out of the 30 women petitioners that year also lost. List of reported decisions on file with Author.

34. The rate of divorce in 1981 was 22.6 per 1000 married women per year, which means that about two percent of all married couples divorced per year. Thus approximately six percent of all married couples will be divorced during the three years that returns remain open after filing. Approximately 3,000,000 joint returns are found to have deficiencies each year. It may be estimated

The revenue loss from repeal of joint return liability would not necessarily be as great as these figures might suggest. In most cases collection can (and should) be made from the husband. Thus, the major part of any revenue loss probably would result from the administrative cost of the extra efforts the IRS would be required to make to find and collect from the husband. If the husband is insolvent and cannot pay, the IRS often still could collect from the wife as a transferee in situations in which it now relies upon joint return liability.[35]

E. Effect on Separated and Divorced Persons

If the couple is separated or divorced, the deficiency assessment based upon joint return liability may arrive after the couple already has settled their division of property. Imposition of joint return liability against the wife at that point has the effect of an arbitrary *ex parte* revision of the property agreement. Unless the wife can qualify for innocent spouse status, there is little she can do.

The IRS has no duty to pursue the husband first, and the wife has no right to require the IRS to do so at any time.[36] Procedural difficulties seem to prevent the wife from joining the husband as a party to any tax litigation itself. No procedure is available for impleading the husband in the Tax Court, nor is there any way to force the IRS at the appeals level to assess or collect the tax from the husband.[37]

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that in two percent of these, or 60,000 cases, the couple filing jointly will be divorced when the deficiency notice is received. This figure is conservative, because it neither takes account of separations that do not lead to divorce within three years, nor of cases of simple nonpayment of tax.

Of these 60,000 cases, it is estimated that about half can be settled amicably between the (ex-) spouses, leaving perhaps 30,000 cases in which the IRS must choose whether to pursue one spouse or both. In at least half of these cases, the nonearner will be forced to pay taxes on the other (ex-)spouse's income, and of that estimated 15,000 cases, more than half will involve wives forced to pay their (ex-)husbands' taxes. Telephone interview with Norman Fox, IRS Chief of Operations Research (Aug. 9, 1988). If the ratio of women to men is the same 9:1 as women to men claiming innocent spouse status, then the incidence would be about 13,000 cases per year. The IRS keeps no statistics on the incidence of innocent spouse relief granted or rejected at the administrative level, and it is unclear what effect that should have on these estimates.

35. *See* I.R.C. § 6901 (1982). For a discussion of transferee liability, see *infra* Part VII(B). If property is transferred to the wife without adequate consideration at a time when the husband is insolvent due to tax liabilities, whether they have been assessed or not, the transfer may be set aside under state fraudulent conveyance law, or federal bankruptcy law, if applicable.

36. *See, e.g.*, Francis v. Commissioner, No. 7549-86-S (T.C. May 4, 1987) (finding no legal basis for taxpayer's conditioning his agreement to $308 deficiency by insisting that the IRS collect half from the wife, who had received half the refund for that year).

37. The husband might possibly become a codefendant for contribution in a refund suit against the United States in district court, or perhaps an involuntary plaintiff, but there appear to be no reported cases of anyone making such an attempt. In any event, the necessity of paying the tax first before suing in district court may be an insuperable obstacle.

One may suspect that the same obstacle often has prevented the wife from obtaining a jury trial, which is available in district courts but not in the Tax Court.

Having signed a joint return, the innocent spouse cannot avoid this problem even by the most careful planning. A property settlement agreement that specifies which spouse is to pay contingent tax deficiencies will not bind the IRS, which remains free to pursue whichever spouse seems most convenient for purposes of collection.[38]

F. Economic Hardship

The consequences of joint return liability may be particularly harsh for separated and divorced women, because women typically suffer economic hardship as a result of divorce. The additional burden of paying her ex-husband's taxes is likely to be especially onerous and unfair when the wife's ability to pay is at its lowest. Since the advent of no-fault divorce in most states during the 1970s, the average size of alimony, child support, and property awards to women has decreased.[39] Women's average standard of living often declines substantially after divorce. Indeed, divorce has recently been described as a financial disaster for most women.[40] By contrast, the standard of living for men generally does not decline to the same extent, if at all.[41]

The decline in size of women's divorce settlements may in part be due to changing perceptions of employment opportunities for women;

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38. *See, e.g.*, Shapiro v. Commissioner, 55 Tax Ct. Mem. Dec. (CCH) 1472 (1988) (innocent spouse case caused by the husband's investment in a fraudulent tax shelter). There, the couple's separation agreement provided that the husband was to pay any contingent taxes, but it did not prevent the IRS from attempting to collect from the wife instead. The Tax Court found the wife "innocent" under a traditional § 6013(e) analysis, giving little weight to the separation agreement. *Id.*

39. *See* S. HEWLETT, A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA 55-59, 61 (1985).

40. According to Stanford sociologist Lenore Weitzman:

> [D]ivorce is a financial catastrophe for most women: in just one year they experience a dramatic decline in income and a calamitous drop in their standard of living. It is difficult to imagine how they survive the severe economic deprivation: every single expenditure that one takes for granted—clothing, food, housing, heat—must be cut to one-half or one-third of what one is accustomed to. . . . [I]t is not surprising that divorced women report more stress and less satisfaction with their lives than any other group of Americans.

Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1252 (1981), *quoted in* S. HEWLETT, *supra* note 39, at 66-67. Weitzman's claim that divorced women's standard of living declines by 30% to 70% or more seems exaggerated, however, because it is measured by per capita income. Thus for a family of four, if the husband pays alimony and child support equal to half of his income, and the wife earns nothing, the husband's standard of living after divorce will apparently have doubled, and the wife's standard of living will have declined by 33% according to the per capita method of calculation.

41. *See* McLindon, *Separate but Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 352 (1987). McLindon states that men's standard of living generally increases after divorce, but this seems unlikely, because it is based upon the same per capita method of calculation criticized in the preceding footnote. Moreover, the husband's loss of the wife's unpaid household services is not considered.

the average earnings for women, however, are only about sixty-five percent of the average earnings for men.[42] The median household income for women with no husband present is only about half that of men with no wife present.[43]

In light of the general economic inequality of the spouses and the typically poor financial condition of women after divorce relative to men, it seems particularly unfair to hold women liable for their husbands' taxes. In doing so, the IRS in effect coerces a further transfer of wealth from wife to husband.

G. *Effect on Married Couples Living Together*

Joint return liability should be abolished for everyone, including married couples who are living together. When joint return liability is the only avenue to collection, it can be just as harmful to women who still are living with their husbands as to those who are divorced. A deficiency that is too large for the husband to pay almost necessarily implies some financial irresponsibility on his part.[44]

In such situations, it is difficult to see any fair policy reason for adding to the wife's burdens by forcing her to pay her husband's taxes out of her own money, which may be all the couple has left to live on. Or worse, she may wish to divorce her husband, possibly even because of his financial irresponsibility, but find that she lacks the means to support herself because the IRS has confiscated her property and levied upon her salary.

Joint return liability is not needed to prevent collusive tax avoidance between spouses. If, for example, the husband transfers property to the wife in order to safeguard it from the IRS and is insolvent as a result, the wife will be liable as a transferee under general rules that apply to all taxpayers, quite independently of filing status.[45]

Finally, if relief from joint return liability were limited to persons who are separated or divorced at the time of assessment or collection,[46] wives would be given an incentive to break up their marriages if they foresee tax problems in the future. Such an incentive would be unfortu-

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42. According to the *New York Times*, a Rand Corp. survey found in 1986 that working women's average wages in 1986 were 65% of men's average wages, up from 60% in 1980. The survey predicted that women would make at least 74% of men's wages by the year 2000. *Women Gain Ground in Wages, Study Shows*, N.Y. Times, Feb. 9, 1989, at C11, col. 3.

43. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1989, at 441 (1989) [hereinafter STATISTICAL ABSTRACT].

44. For example, he may have claimed illegitimate tax shelter losses and later suffered financial reverses leaving insufficient funds to pay the deficiency, or he may have failed to report income later gambled away or otherwise squandered.

45. *See infra* Part VII(B).

46. It is, however, the rule in France. *See infra* Part VI(A)(1).

nate from the point of view of public policy.

H. Contribution

If the wife is forced to pay, her only remedy is to sue her (ex-)husband afterwards for contribution,[47] or to enforce the terms of their property settlement, in the event that it provides for allocation of contingent tax liabilities. In partial justification of its decision denying her innocent spouse relief, at least one court cited this right of an aggrieved woman.[48] Suits for contribution are extraordinarily rare, however, probably because of the high cost of litigation.[49]

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47. The wife who has paid more than her share of a joint tax obligation generally may bring an action in equity for contribution against ber husband under state law according the same legal principles as apply to other kinds of joint obligations. *See, e.g.*, Murchison v. Murchison, 219 Cal. App. 2d 600, 33 Cal. Rptr. 285 (1963) (holding that a husband is entitled to offset the amount he is forced to pay for his wife's share of a joint tax against the unpaid balance of the property settlement he owes her); *see also* Chappell v. Chappell, 253 So. 2d 281 (Fla. Dist. Ct. App. 1981); Bormaster v. Bormaster, 177 Kan. 1, 274 P.2d 757 (1954); Miller v. Miller, 62 Misc. 2d 755, 310 N.Y.S.2d 18 (Civ. Ct. 1970). It is noteworthy that all the reported cases involve men suing women.

48. *See* Cohen v. Commissioner, 54 Tax Ct. Mem. Dec. (CCH) 944 (1987). Like Shapiro v. Commissioner, 55 Tax Ct. Mem. Dec. (CCH) 1472 (1988), this was an innocent spouse case in which tbe husband had invested in a fraudulent tax shelter. The taxpayer protested that her husband was not a party in court and had not even been assessed by the IRS. The Tax Court answered that she had a right of contribution against him and that because the couple's property settlement was not yet complete, the joint tax liability simply constituted one more item to be divided. *Id.* at 947.

49. If a woman is unable to collect on her right to contribution, she is denied a bad debt deduction. The Tax Court has twice upheld the IRS's disallowance of a wife's claim for a nonbusiness bad debt deduction in this situation, on the ground that it would circumvent the prohibition against deduction of federal income taxes. *See* Rude v. Commissioner, 48 T.C. 165, 170-75 (1967). In *Rude* the husband had left the country, and the wife's right to contribution for his share of joint taxes that she paid in full was uncollectible. The bad debt deduction was denied as an indirect deduction of a federal tax. *Id.* The Tax Court followed the *Rude* decision in Haynes v. Commissioner, 27 Tax Ct. Mem. Dec. (CCH) 1531 (1968).

The decisional law in this area, however, is of doubtful validity. It makes no difference generally for purposes of the nonbusiness bad debt deduction under § 166(d), what use the borrower makes of the loan proceeds. If the debt becomes worthless and the lender has a basis in the debt, it is deductible even if the borrower uses the proceeds for an expenditure tbat is nondeductible to himself, to the lender, or both. Bad debt status erases the tax character of the underlying obligation.

The *Rude* decision was inconsistent with prior law in this respect. *See* Martin v. Commissioner, 38 T.C. 188 (1962). The Tax Court in *Martin* held that the taxpayer who paid materialman's liens on his personal residence, satisfying contractor's obligation, was subrogated to materialman's claims against insolvent contractor. Thus, the deduction was allowed under § 166(d) despite the fact that the expenditures were for the construction of his personal residence. Two years after the *Rude* decision, the Treasury in effect reversed its position in Rev. Rul. 69-411, 1969-2 C.B. 177. In the ruling, the taxpayer who had received probate assets thereby became secondarily liable for, and paid, the share of estate taxes owed by an insolvent beneficiary of the decedent's life insurance. The Treasury held that, because the taxpayer was subrogated to the executor's claim against the insurance beneficiary, a valid debt arose by operation of law that was worthless in taxpayer's hands and therefore deductible under § 166(d). It did not matter that the underlying obligation was a nondeductible tax. *Id.*

I. *Public Policy*

Joint return liability is not only unfair; it is also bad public policy. If spouses desire to protect themselves from joint return liability, the only way they can do so is to refuse to sign a joint return. The husband may take this refusal, which will cost him an increase in taxes, as a statement that his wife either does not trust him in financial matters or does not expect to be with him much longer, or both. No other likely reason exists for her refusal to sign a joint return. Existing joint return rules give her an unpleasant choice between endangering her economic interests or her marriage.[50]

III. Origins of Joint Return Liability

Joint and several liability of each spouse for the entire tax due on a joint return has been the law for more than fifty years.[51] It is so familiar a part of the tax landscape that its origins and rationale scarcely ever are questioned. Yet the historical foundations of the doctrine are surprisingly unsound.

The early income tax systems in Europe generally were based on the matrimonial property law of the same period. Thus, for example, when family law consisted of the old type of community property regime under which the husband had sole power of administration, the tax law generally followed suit and required joint taxation with the husband primarily or solely responsible for payment of the tax on both incomes. Such was the case in Sweden, France, and Germany. The first income tax in England, introduced in 1799, also followed the matrimonial property regime of that period. Under the common law, the wife's property (and debts) were those of the husband, and the tax law required the husband to report and pay the tax on both incomes. As the matrimonial property laws evolved in each country to provide women with more freedom to manage their own property, legislators encountered pressure to make women more responsible for their own taxes. The results have been divergent in each country.[52]

For a more detailed discussion of *Rude*, see Beck, *The Deductibility of a Worthless Right to Contribution for Joint Income Taxes: The Mistaken Line of Cases Under* Rude v. Commissioner, 9 VA. TAX REV. 313 (1989). There the Author suggests that the husband should be liable for tax on discharge of indebtedness income in the same amount as the wife's bad debt deduction. Partial relief would thereby be provided to the wife, and to that extent the tax liability would be sbifted back to the husband. Both results seem required under current principles of law, without any need for legislation.

50. In the case of community property liability, the situation is even worse. The wife cannot protect herself by filing separately, and she apparently cannot protect herself at all except by dissolving the community of interest or by divorcing. *See supra* note 19.

51. This liability was created by the Revenue Act of 1938, ch. 289, § 51(b), 52 Stat. 447, 476.

52. *See generally* Dulude, *Taxation of the Spouses: A Comparison of Canadian, American,*

When the present United States income tax law was adopted in 1913, the tax law followed the prevailing matrimonial property law of the period, except for that of the community property states.[53] Separate returns were mandatory for each individual subject to the tax, probably because married women already had the right to manage their own property in the common-law states.[54] In contrast to the situation in Europe, joint returns were introduced in the United States after separate returns, in 1918.[55] Joint returns were not adopted in order to conform with matrimonial property law, but rather were and remain optional. They appear to have been introduced for the sole purpose of convenience, both to taxpayers and to the Treasury.[56]

Congress did not enact joint and several liability for joint returns until 1938,[57] although the Bureau of Internal Revenue began insisting upon it in 1923,[58] some five years after the introduction of joint returns. Again contrary to the situation in Europe, joint return liability in the United States originally was not based on any underlying matrimonial property law. In fact, it appears that the Treasury originally invented the doctrine out of whole cloth, without authority either in legislation or in the common law.

A. Common Law

At common law, the husband was liable for the wife's debts, but the wife was never liable personally for the debts of the husband. The

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British, French and Swedish Law, 23 OSGOODE HALL L.J. 67 (1985).

53. If it had been thought necessary to respect the matrimonial property law of the community property states for purposes of taxing earned income, the result probably should have been as in Europe: mandatory joint returns with the husband primarily responsible for payment as sole administrator of the community property. This would have been a far more realistic interpretation of community property law than the *Poe v. Seaborn* decision, which imputed half of the husband's earned income to the wife. *See* Poe v. Seaborn, 282 U.S. 101 (1930). Also, it would not have created the intolerable disparities in the level of tax burden between the states which arose as a consequence.

Apparently, no other income tax system in the world today except that in the United States imputes earned income from one spouse to the other on the ground of community property law, including Spain, France, and Mexico, from which our state community property laws derive. *Cf.* F. Sura v. M.N.R., 62 D.T.C. 1005 (1957). The Canadian Supreme Court held that a Quebec taxpayer was not permitted to split his income with his wife through community property law. *Id.*

54. Separate returns were also the rule under the first federal income tax imposed during the Civil War. The separate return was almost invariably that of the husband alone, however, which included the income of his wife and children to the extent that the common law made him substantially the owner of their earnings. Such separate returns were in substance joint returns of family income, as in the United Kingdom. *See* G. BOUTWELL, A MANUAL OF THE DIRECT AND EXCISE TAX OF THE UNITED STATES 302-03 (1863).

55. *See* Revenue Act of 1918, ch. 18, § 223, 40 Stat. 1057, 1074.

56. *See, e.g.*, Fawsett v. Commissioner, 31 B.T.A. 139, 141 (1934).

57. *See* Revenue Act of 1938, *supra* note 51.

58. *See infra* notes 85-86 and accompanying text.

wife's property nevertheless could be used to satisfy the husband's debts because the wife's property belonged to the husband. As Justice Holmes noted in *Hoeper v. Tax Commission*: "[At common law] husband and wife are one, and that one the husband; and . . . as the husband took the wife's chattels he was liable for her debts."[59]

After the states enacted married women's property laws in the period before the Civil War, the trend was toward separate liability so that neither spouse was liable for the debts of the other.[60] Marriage was not a partnership under the common law, and a creditor could not hold a woman liable for the debts of her husband under a theory of agency.[61] In fact, several states actually prohibited the creation of partnerships between husband and wife for the very purpose of protecting the wife against creditors.[62]

The filing of a joint return alone does not create a partnership or conveyance of property between the spouses. State courts determining ownership rights to a tax refund from a joint return consistently have held that the filing of a joint return does not constitute a conveyance of property between husband and wife, create a joint enterprise or a partnership, or alter prior underlying property rights between the spouses.[63]

Finally, although the effect of joint and several liability is to make each spouse a kind of surety or guarantor for the taxes of the other on a joint return, this obligation could not be created by a joint return under any theory of common law. A joint return is not a bill or note, and the government advances nothing in reliance on the guaranty of the cosigners of the return, unless the tax saving, if any, from filing jointly is viewed as such an advance.[64]

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59. 284 U.S. 206, 219 (1931).

60. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 209-11 (2d ed. 1985). Despite the enactment of women's property laws, the common-law doctrine of marital unity judicially survived until the end of the nineteenth century, subverting the efforts of reform legislation. *See generally* N. BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 200-23 (1982).

61. Liability did attach, however, to purchases of household necessities. *See* N. BASCH, *supra* note 60, at 51-52.

62. *See* C. JONES, SPLIT INCOME AND SEPARATE SPHERES: TAX LAW AND GENDER ROLES IN THE 1940's, at 37-38 (1987) (Institute for Legal Studies, Legal History Program, Working Papers Series 2). Note, moreover, that even if marriage did create a partnership, for federal tax purposes each partner would still be liable for tax only for his or her own ratable share of partnership income. I.R.C. §§ 701, 702 (1982 & Supp. V 1987).

63. *See* Annotation, *Right of Surviving Spouse to Tax Refund Resulting from Joint Income Tax Return*, 67 A.L.R.3d 1038, 1038-39 (1975).

64. Even under such a theory, the advance for which each spouse stands as a surety would be limited at most to the tax saving from filing jointly as compared to filing separately. By contrast, joint and several liability extends to the entire tax due on the return, not just to the tax saving.

Note also that the quasi-suretyship created by the joint return is in another respect far more onerous than the analogy with the law of joint obligations might suggest. Courts routinely have

B. *Joint Returns: One Taxpayer or Two?*

The joint return has been authorized since the Revenue Act of 1918.[65] The Revenue Act of 1921 clarified the 1918 Act, stating that a husband and wife may either file returns individually, or include "[t]he income of each . . . in a single joint return, in which case the tax shall be computed on the aggregate income."[66] The 1921 Act was silent, however, as to allocation of the tax liability between husband and wife. This question was uncertain and controversial for twenty years until Congress settled the matter by enacting joint and several liability of the spouses in the Revenue Act of 1938.[67]

The allocation of liability was not the only uncertainty regarding the effects of filing a joint return. It was not entirely clear from the beginning whether the joint return should be regarded as a return of net family income, as if husband and wife were a single taxpayer, or as the sum of the net incomes of two separate taxpayers reported on one piece of paper.[68]

In the latter case, it would make no difference in principle whether husband and wife filed jointly or separately,[69] except that the tax would be higher on a joint return if the two net incomes when aggregated were pushed into a higher bracket of the progressive rate structure.[70] If carried to its limits, this two-taxpayer or binary conception of the joint return only could increase a couple's taxes and never could produce any tax advantage.[71]

In 1921 the Solicitor General of the Internal Revenue construed the provision for joint returns in the Revenue Act of 1918 as requiring a unitary or single entity approach:

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held cosigners of a joint return liable for taxes on the other spouse's undisclosed income. This liability obtained even when the cosigner had no knowledge of the unreported income—that is to say, the cosigner was responsible for taxes for which he or she could not intentionally have volunteered to be a surety. *See, e.g.*, Scudder v. Commissioner, 48 T.C. 36 (1967), *rev'd*, 405 F.2d 222 (6th Cir.), *cert. denied*, 396 U.S. 886 (1968).

65. *See* Revenue Act of 1918, *supra* note 55.

66. Revenue Act of 1921, ch. 136, § 223(b)(2), 42 Stat. 227, 250.

67. *See* Revenue Act of 1938, *supra* note 51.

68. That the joint return tax should be the sum of the two separate taxes of the spouses (as on some current two-column state tax returns), without aggregation of their separate incomes, seems never to have been considered.

69. The joint return enjoyed no special tax rate until Congress enacted income splitting in the Revenue Act of 1948, ch. 168, § 301, 62 Stat. 110, 114. Income splitting often reduces the taxes on a joint return by using a rate equal to twice the tax on one-half the aggregate income. *See infra* Part V(A).

70. Until 1938, unless both spouses had income, it was doubtful whether they could file a joint return. The Revenue Act of 1938, *supra* note 51, § 51(b), 52 Stat. at 476, settled the question by expressly providing that joint returns may be filed even if one spouse had no income.

71. This example ignores the issues of personal exemptions and the standard deduction.

If a single joint return is filed it is treated as the return of a taxable unit and the net income disclosed by the return is subject to both normal and surtax as though the return were that of a single individual. In cases, therefore, in which the husband or wife has allowable deductions in excess of his or her gross income, such excess may, if joint return is filed, be deducted from the net income of the other for the purpose of computing both the normal and surtax.[72]

Under this unitary approach, joint filing might make a difference in the total tax due for many reasons, some that provide opportunities for tax savings, and others that would increase the tax. For example, the unitary approach allows one spouse to use his or her losses and other deductions to offset the other spouse's gains or income, which provides a tax saving. On the other hand, the single entity approach might suggest that only a single personal exemption amount[73] or a single standard deduction[74] should be allowed in the same amount as for an individual taxpayer filing separately. The choice between joint and separate filing became complex, even before income splitting.[75]

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72. Op. Solicitor 90, 4 C.B. 236, 238 (1921), *cited in* Taft v. Helvering, 311 U.S. 195, 197 (1940).

73. In the early years, a unitary approach predominated concerning the personal exemption. The exemption for a married person was larger than that for a single person. In 1918 the amounts were $2000 and $1000, respectively, *see* Revenue Act of 1918, *supra* note 55, § 216(c), 40 Stat. at 1069, and in 1921 $2500 and $1000, respectively, *see* Revenue Act of 1921, *supra* note 66, § 216(c), 42 Stat. at 243. Only a single personal exemption was allowed to a couple filing jointly or separately, however, and if the couple filed separately, the exemption could be divided between them in any way they chose. *See* Revenue Act of 1921, *supra* note 66, § 216(c), 42 Stat. at 243; Revenue Act of 1918, *supra* note 55, § 216(c), 40 Stat. at 1069.

74. The standard deduction, introduced in 1944, permitted all taxpayers to deduct the lesser of $500 or 10% of gross income in lieu of claiming other deductions. The standard deduction was allowed only once on a joint return, but couples filing separately could each take the standard deduction unless the other spouse itemized. For lower income levels when 10% of combined gross income was less than or equal to $500, the standard deduction would not affect the decision whether to file jointly or separately. For higher income levels, separate filing might secure two standard deductions, but the deductions allowable to high earners usually would be worth more than the standard deduction. Then, as now, one spouse could not take the standard deduction on a separate return if the other spouse itemized. *See* I.R.C. § 63(c)(6)(A) (Supp. V 1987). Also, under wartime tax rates, joint filing was often disadvantageous because of the progressive effect of aggregating income into higher brackets.

75. In 1926 taxpayers were advised that if their combined net income exceeded $6500, separate returns should be filed, unless one spouse had a net loss. 1926 U.S. Income & War Tax Guide (CCH) 28-29.

In 1947 the same advisor summarized the advantages and disadvantages as follows: (1) if both spouses have net incomes, there would be a disadvantage in filing a joint return if their combined net income, in excess of the $1000 combined exemptions and the exemption for dependents, exceeds $2000; (2) if one spouse has a net income and the other has offsetting deductions in excess of income, a joint return might result in a tax saving; and (3) if the combined adjusted gross income of both is over $5000, each has adjusted gross income, and they elect to take the standard deduction, they should file separately. 1947 Master Tax Guide (CCH) 42-43.

There were other considerations as well. One commentator pointed out, for example, that a husband and wife filing jointly could claim the wife's niece as a dependent, even though the niece's chief support was provided by the husband, whereas the claim would be disallowed to both spouses filing separately. *See* Rudick, *Marriage, Divorce and Taxes*, 5 N.Y.U. INST. ON FED. TAX'N 679, 689

In 1935 the Treasury Department changed its 1921 unitary approach to joint filing. It promulgated new regulations that disallowed any netting of gains and losses between spouses,[76] together with other regulations that limited the charitable deduction to fifteen percent of the separate net income of each spouse, whether they filed jointly or separately.[77] These regulations would have removed any financial incentive to joint filing.[78]

In effect, the Treasury had it both ways: unitary computation when it increased the tax by aggregation, but binary computation when the unitary model decreased the tax because of offsetting deductions. The Supreme Court overturned both regulations in the 1940 companion cases *Helvering v. Janney*[79] and *Taft v. Helvering*,[80] as inconsistent with Congress's intent to tax the aggregate income of the spouses and with the Treasury Department's longstanding earlier construction of the statute.[81]

The unitary theory, however, had limits. For example, in the 1932 case *Gummey v. Commissioner*,[82] the Board of Tax Appeals allowed taxpayers filing jointly to deduct stock market losses of one spouse when the other spouse made simultaneous purchases of the same securities. The wash sales rules[83] would have disallowed such losses if the

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(1946).

76. Article 117-5 of Regulations 86 (1935), *cited in* Helvering v. Janney, 311 U.S. 189, 194 (1940).

77. Article 23(o) of Regulations 86 (1935), *cited in* Taft v. Helvering, 311 U.S. 195, 198 (1940).

78. *See* Pierce v. Commissioner, 100 F.2d 397, 397 (2d Cir. 1938) (remarking that "it is only when the allowable deductions of one spouse exceed his or her income, that any advantage can be derived from filing a joint return").

Nevertheless, and ratber surprisingly, in 1938 only about 6% of all married couples filed separately; the otber 94% elected to file jointly. *See* H.R. REP. No. 1040, 77th Cong., 1st Sess. at 16-17 (1941), *reprinted in* 1941-2 C.B. 413, 426-27.

These couples may have filed jointly because federal income tax rates were so low that it made no difference in most people's tax rates whether they filed jointly or separately. In 1938 a couple remained in the lowest tax bracket from $2000 up to nearly $5000 of taxable income (approximately $45,000 in 1989 dollars, *see* STATISTICAL ABSTRACT, *supra* note 43, table 748, at 462). Such couples enjoyed no advantage by reporting each spouse's income separately because all the income was already in tbe lowest tax bracket. *See* H.R. REP. No. 1040, *supra*, at 14-15, *reprinted in* 1941-2 C.B. at 424. It seems that most people reported jointly just for the convenience of filling out one form rather than two, and not because there was any tax advantage to doing so.

79. 311 U.S. 189 (1940).

80. 311 U.S. 195 (1940). The government later invoked the *Taft* and *Janney* cases upholding the aggregate or unitary approach as authority for imposing joint and several liability. *See* Moore v. United States, 37 F. Supp. 136 (Ct. Cl.), *cert. denied*, 314 U.S. 619 (1941); *see also infra* note 94.

81. Under the 1986 Code, the joint return may be described as still reflecting the unitary conception of joint reporting, as in the Solicitor General's 1921 opinion, *see* Op. Solicitor 90, *supra* note 72, but with innumerable exceptions. *See infra* note 265.

82. 26 B.T.A. 894 (1932).

83. The Revenue Act of 1928, ch. 852, § 118, 45 Stat. 791, 826, tbe predecessor of current §

same taxpayer had made the purchases. The court explained its decision as follows:

> Had the petitioner and his wife filed separate returns, there would be no question about the deductibility of the losses sustained by each. In filing a single joint return, they lost none of such rights; each remained an individual, and as such, a taxpayer, within the meaning of section 118 of the statute.[84]

Thus, the unitary approach does not dissolve the spouses' identities into a single person, but merely serves as a principle of computation.

C. I.T. 1575: Joint Return As a "Taxable Unit"

The Bureau of Internal Revenue made its first pronouncement on the subject of joint and several liability in 1923 in its office ruling I.T. 1575.[85] This ruling stated that husband and wife "are individually liable for the full amount of tax shown to be due on [a joint] return."[86] The Bureau based this conclusion upon the ground that "a single joint return is one return of a taxable unit and not two returns of two units on one sheet of paper."[87] This statement was necessarily metaphorical. A married couple, apart from the husband and wife as individuals, cannot literally be a taxable unit, or taxable at all in the sense that it can owe money to the government. A marriage, apart from its component spouses, is not a juridical person and therefore cannot owe anything, own anything, or sue or be sued for taxes or anything else.

It follows that this taxable unit or unitary principle cannot explain shifting the imposition of a tax from one spouse to another. The only candidates for involuntary collection remain the individual spouses, and in order to collect the tax, the "unit" must be divided into its components. The question thus remains unanswered: which of the components should be liable, and to what extent?

The unitary principle is merely computational, and carries no implications as to liability for the tax. To deduce that using the entity method of computing the aggregate tax requires joint and several liability is simply to beg the question.[88] Nevertheless, this fallacy often was repeated by the government in later litigation.[89]

1091, disallowed losses if the taxpayer purchased shares of the same corporation within 30 days before or after the date of the loss sale.

84. *Gummey*, 26 B.T.A. at 896.

85. I.T. 1575, II-1 C.B. 144 (1923).

86. *Id.*

87. *Id.*

88. Many income tax systems permit or require income aggregation without imposing joint and several liability. *See infra* Part VI(A); *see also* IND. CODE ANN. § 6-3-4-4(d) (Burns 1989); MO. ANN. STAT. § 143.491 (Vernon 1976); N.C. GEN. STAT. § 105-152.1 (1989).

89. *See, e.g.*, Moore v. United States, 37 F. Supp. 136 (Ct. Cl.), *cert. denied*, 314 U.S. 619 (1941); Cole v. Commissioner, 29 B.T.A. 602 (1933), *rev'd*, 81 F.2d 485 (9th Cir. 1935); *see also*

D. *Voluntary and Involuntary Payment*

The circumstances that occasioned I.T. 1575 suggest some even more serious confusion on the part of the government. The complete ruling reads as follows:

> Husband and wife filed a joint return for the year 1920 and the amount of tax shown by the return to be due was paid by the wife. It appears that if separate returns had been filed instead of the joint return, the wife would have had no tax to pay for that year. By filing a joint return, the husband's tax liability was reduced from 5*x* dollars to 4*x* dollars. They were divorced after the payment was made.
>
> Inquiry is made as to whether there is any way in which the wife can secure a refund of the tax or any part thereof paid in connection with the joint return.
>
> Held, that a single joint return is one return of a taxable unit and not two returns of two units on one sheet of paper. Accordingly, where a husband and wife filed a joint return they are individually liable for the full amount of tax shown to be due on such return. No relief can therefore be afforded the wife in this case.[90]

The Bureau could have denied relief in these circumstances simply by observing that the wife assumed liability for the entire tax when she voluntarily made payment herself. It would then make no difference whether it was the husband alone, or both spouses jointly, who were originally liable before her voluntary assumption. Even if the original joint return liability were entirely the husband's, on the ground that all the income was his, when she paid his taxes, she assumed and discharged her husband's tax liability. In so doing, she gave him a gift, just as if she had paid his debts to a trade creditor. When the transaction is viewed in this light, it becomes apparent that the wife should not be able to force the IRS to return her gift years later, any more than she could force a private creditor to give her a refund under similar circumstances. The Treasury's revenues would be intolerably uncertain if either spouse were entitled to a refund any time the spouse might regret having paid more than his or her proportional share of the couple's taxes.[91]

The same reasoning would apply even absent a joint return. If a father pays his son's taxes, he in effect assumes the son's tax liability to the extent of his payment and extinguishes it at the same time. If the father's payment is due to a mistake, however, such as the father's erroneous belief that he was himself liable for the tax, he should be entitled to a refund.[92] Absent any mistake, however, if the father simply changes

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infra notes 94-95 and accompanying text.

90. I.T. 1575, *supra* note 85, at 144.

91. Moreover, if the IRS did refund the tax under such circumstances, it might have difficulty collecting the tax from the other spouse, even assuming that the statute of limitations permitted the collection and that the earning spouse could be found and was solvent. The earning spouse would have a good defense that his or her liability was extinguished because the other spouse assumed it through voluntary payment.

92. *See* M. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 11.07 (1981).

his mind about making the gift, no ground exists for a refund.

Under the facts of I.T. 1575, the Bureau had no need to address the question who should be liable for an unpaid tax deficiency on a joint return. The facts did not involve a deficiency or an attempt at involuntary collection, but rather a voluntary payment by the wife of more than her proportional share of the tax. The Bureau did not need to announce a sweeping rule that each spouse is individually liable for the full amount of the tax. Instead, the ruling should have concluded that on a joint return, both spouses are proper taxpayers of the joint tax only in the limited sense needed to avoid any liability of the Treasury to make a refund on grounds of a mistaken or later regretted apportionment. This approach would have left the spouses to decide themselves whether each would pay his or her own share to the penny, or in some other proportion. Their decision would have no effect on the Treasury's interests.

Such a rule would have answered the question at hand, and yet would have implied nothing at all regarding the question which spouse should be liable for an unpaid deficiency on a joint return when an involuntary payment is demanded. The distinction between voluntary and involuntary payment is a critical one,[93] and the failure to make the distinction at the outset in I.T. 1575 may have confused the subsequent development of the law.[94]

93. Note that the wife's right to the equitable remedy of contribution from her husband arises only when the wife has been compelled to pay more than her share of the joint tax. If she pays voluntarily, as in I.T. 1575, she cannot force her husband afterwards to make reimbursement, any more than she can compel the IRS to make her a refund. This result is consistent with the analysis above that such a voluntary overpayment is a gift.

94. The confusion is evident, for example, in Moore v. United States, 37 F. Supp. 136 (Ct. Cl.), *cert. denied*, 314 U.S. 619 (1941):

> "Or take the case, a common one, where a joint return is filed and the tax shown due thereon is paid, but the commissioner later finds a deficiency. Must the commissioner not merely analyze all the figures and determine what part of the total tax was originally owed by each, but also find out, if he can, the contributions of each to the prior payments made on account of the tax and credit each accordingly? Such complexities in tax gathering 'are not lightly to be imputed to legislators.'

Id. at 140 (citation omitted) (quoting Commissioner v. Rabenhold, 108 F.2d 639, 641 (2d Cir. 1940) (Patterson, J., dissenting)); *see also infra* note 121.

The answer to the court's question is no. Because each spouse should be the proper taxpayer for the entire tax due, it would not matter who made the prior payments. It would only be necessary to determine whose income occasioned the deficiency and to assess that spouse alone for the deficiency, no matter how much that spouse had already paid.

Note conversely, however, that in the context of refunds of overpayments from joint returns, both the separate liability of each spouse and their respective prior payments are in fact routinely determined with no apparent difficulty. *See infra* Part VII(A).

E. Cole v. Commissioner

The first reported case to determine the issue whether spouses filing a joint return are jointly and severally liable was *Cole v. Commissioner* in 1933.[95] In *Cole* the Board of Tax Appeals found no difficulty in upholding the government's theory of joint and several liability:

> In our opinion the theory of petitioner's counsel requires little discussion. In the first place the joint return contains no data upon which the separate taxable income of the two spouses can be computed. There is no segregation of the amounts of gross income severally received or any designation of the deductions to which each would be entitled. Since the joint return, though made by the husband, reports the income as a unit, we think it is perfectly clear that liability for the tax is joint and several and may be asserted against and collected from either spouse.[96]

The Ninth Circuit did not find the question perfectly clear, however, and reversed the Board after much discussion and with a concurring and a dissenting opinion.[97] Its decision remains the only one in which the issues have been considered to any extent.

The equities in *Cole* were very favorable to the government.[98] According to the stipulated facts, Frida Cole had a separate income of 253,479.41 dollars for the year 1929, and her deceased husband had income of 9614.47 dollars. A deficiency of 27,568.59 dollars, due entirely to Frida's income, was undisputed.[99] The statute of limitations barred the Commissioner from collecting the deficiency from Frida. Thus, the Commissioner attempted to collect the deficiency from the deceased husband's estate, as to which the statute of limitations was still open. Frida, as executrix, defended on the ground that, because the deficiency was due to her income, the liability was hers alone, and could not be enforced against the estate. As a result, the government could not col-

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95. 29 B.T.A. 602 (1933), *rev'd*, 81 F.2d 485 (9th Cir. 1935). The court also decided a companion case of the same date against the taxpayer as well but without discussion. *See* Buchhalter v. Commissioner, 29 B.T.A. 600 (1933).

In Burkhart v. Commissioner, 11 B.T.A. 275 (1928), the Commissioner somewhat unaccountably attempted to tax the wife on half, rather than all, her husband's income reported on joint returns, without mention of joint and several liability. The Board of Tax Appeals rejected the Commissioner's attempt, finding that the wife had earned an amount that was less than the one-half of the exemption to which she was entitled on a joint return. *Id.* at 277-78.

96. *Cole*, 29 B.T.A. at 604-05.

97. *See Cole*, 81 F.2d at 485. A second ground of opinion of the Board of Tax Appeals was that the plea for separate liability effectively was a request for withdrawal of the joint return and replacement with separate returns, which was, and remains, impermissible after the time for filing has passed. *See Cole*, 29 B.T.A. at 605. The Ninth Circuit's majority opinion did not address this issue, the Commissioner apparently having abandoned the argument on appeal. *See Cole*, 81 F.2d at 485.

98. It is also noteworthy that the case involved shifting the liability from wife to husband. Both factors may have played a role in Congress's decision to overrule the result in *Cole* by enacting joint return liability three years later, in the Revenue Act of 1938, *supra* note 51.

99. *Cole*, 81 F.2d at 485.

lect the deficiency at all.[100]

In response to the Commissioner's argument that a husband and wife filing jointly become a single taxpaying unit, the Ninth Circuit first noted that the Bureau of Internal Revenue had adopted a contradictory position in the regulations under the Revenue Act of 1934, which limited deductible capital losses to the amount of the taxpayer's capital gains. Article 117-5 of the Regulations[101] stated, "In the application of section 117, a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers."[102]

The Commissioner argued that a husband and wife must accept the necessary concomitant conditions if they choose to reduce their taxes through the unusual privilege of filing jointly.[103] The court found that the "unusual privilege" did not require the taxpayers to surrender their individuality as separate taxpayers. The court quoted *Fawsett v. Commissioner*,[104] in which the Board allowed the losses of one spouse to be deducted on a joint return even though the other spouse, as in *Gummey v. Commissioner*, simultaneously purchased identical securities:

> "Sections 11 and 12 of the Revenue Act of 1928 . . ., the imposing provisions of the statute, impose a tax upon the taxable income of each individual. Each is defined as a taxpayer and the fact that the Congress, having regard to the marital status and in order to eliminate a large number of returns, sees fit to permit the inclusion in the one return of the income of husband and wife, does not serve to deny to these individual taxpayers the other benefits of the taxing statutes. Hoeper v. Tax Commission of Wisconsin . . . would seem to be authority for the proposition that Congress could not forcibly require a husband and wife to jointly return their income, and while the Federal taxing acts have never pretended to do so, but have only permitted married people to file joint returns, we feel that *this privilege is not bought by the sacrifice of their other rights under the statutes. The acceptance of the privilege of filing a joint return by a married couple carries with it no denial of their individual rights under the statute. Congress has exacted no penalty for the privilege it has granted and the Commissioner may not exact one.*"[105]

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100. *See id.* at 486.

101. This regulation had just been promulgated in 1935, the same year as the Ninth Circuit's opinion

102. *Cole*, 81 F.2d at 487. These regulations, promulgated in 1935, were later held to be invalid by the Supreme Court in Helvering v. Janney, 311 U.S. 189 (1940), as contrary to congressional intent and to settled law since 1921.

103. It is not clear how this tax reduction was supposed to come about, however, because at that very time, the Treasury's new 1935 regulations began limiting capital losses and charitable deductions on joint returns to the separate capital gains and 15% of the separate net income, respectively, of each spouse individually, rather than computing the limits on the aggregate joint income. *See supra* notes 76-78 and accompanying text.

Thus, if the court had held for the Commissioner, the joint return would rarely have created any tax benefit, and its only effect would have been the detriment of joint liability.

Note that in 1938, when Congress enacted joint and several liability, 94% of all married taxpayers filed jointly, even though it appears that the vast majority derived no tax benefit from the election. *See supra* note 78 and accompanying text.

104. 31 B.T.A. 139 (1934).

105. *Cole*, 81 F.2d at 487 (citations omitted) (emphasis in original) (quoting Fawsett v. Com-

The *Cole* court then concluded:

> One of the fundamental principles of taxation is that the incidence of a tax should be in accordance with the ability to pay. In income taxation, this means that the tax should be levied in proportion to income. That is all which the petitioner herein asks. If this cardinal principle is followed, justice will be done.[106]

Much mischief could have been avoided had Congress followed the Ninth Circuit's eminently sound reasoning.

F. Administrative Necessity

The most significant argument advanced by the Commissioner[107] was that of administrative necessity.[108] The Commissioner maintained that because the joint return did not segregate the respective income and expenses of the spouses, it would be impossible for him to determine their respective liabilities.

The taxpayer quite sensibly responded that if the Commissioner asserts a deficiency on the basis of an examination, the examination necessarily reveals the respective net income of each spouse. That was the case in *Cole*, in which the respective net incomes of the spouses were stipulated. In such cases, the calculation of the proportion of the deficiency for which each spouse should be liable is a simple step.[109]

The taxpayer further argued that if a case arose in which the Commissioner could not determine which spouse should be liable for a deficiency, the Commissioner's remedy should be to assert the entire deficiency against each spouse separately, thus placing the burden of proof upon them.[110] The Commissioner did not address this suggestion

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missioner, 31 B.T.A. 139, 141-42 (1934)). The *Hoeper* decision struck down as violative of due process a Wisconsin income tax act that required compulsory aggregation of family income and made the husband liable for the total tax due, with the wife secondarily liable for the total tax if not paid by him:

> [A]ny attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income.

Hoeper v. Tax Comm'n, 284 U.S. 206, 215 (1931).

The only apparent difference between the Wisconsin tax struck down in *Hoeper* and the federal imposition of joint and several liability is the supposedly voluntary nature of the federal election to file jointly.

106. *Cole*, 81 F.2d at 487.

107. This argument became significant because it was accepted by Congress when it overruled the Ninth Circuit three years later.

108. The Commissioner also argued that joint and several liability had been settled practice for years, but was able to cite only its own 1923 ruling I.T. 1575 in support of this contention. The court did not criticize I.T. 1575, but simply dismissed the ruling as informal, lacking the force of a Treasury Decision and without authority even to bind the Treasury to any interpretation of the law. *See Cole*, 81 F.2d at 488.

109. *See Cole*, 81 F.2d at 487.

110. *Id.* at 487-88. The IRS successfully used this same argument in United States v.

in his brief, but the Ninth Circuit found it to be a sufficient solution to any administrative problems the Commissioner might encounter under a regime of separate liability proportional to net income.[111]

A still more telling point, inexplicably overlooked in the *Cole* litigation, was that in other contexts, the Treasury was insisting on making the very same allocations which it argued in *Cole* that it was unable to make. The *Cole* appeal was decided in 1935, the same year that the Treasury first promulgated its regulations limiting the deduction for charitable contributions on a joint return to fifteen percent of the donor spouse's separate net income.[112] Determining each spouse's separate net income on a joint return for purposes of limiting the charitable deduction necessarily involves precisely the same calculation as determining each spouse's net income for purposes of limiting the overall tax liability of each spouse.[113] What the government was willing to do for its own benefit, it also could do for taxpayers if it chose.[114] Despite Treasury's ability to make the calculations when the government would benefit, the government continued to argue administrative necessity.[115]

Nowicke, No. 84-14 (E.D. Ky. Aug. 20, 1987), in the context of crediting a joint refund against one spouse's separate tax liability. The court allowed the IRS to apply the entire joint refund against the separate liability because the taxpayer could not prove his separate net income on the joint return.

111. *Cole*, 81 F.2d at 488. Another possible solution to the purported administrative problem would have been to redesign the joint return form so as to provide space for reporting the separate income and expenses of each spouse. Some states (Arkansas, Iowa, Maryland, Missouri, North Carolina, and Virginia) currently provide such space by using two-column returns for combined reporting. Such a redesigned form would have solved the purported administrative difficulty. The taxpayer might have argued that because the return forms were drafted by the Treasury, the taxpayer should not be penalized if the forms were poorly designed and did not provide space for the information reasonably required by the Treasury. The taxpayer might have argued further that the government's position was tantamount to claiming that its return forms ought to determine the law, rather than that the law should dictate the return forms.

112. *See supra* note 77 and accompanying text. The Supreme Court later invalidated this regulation in Taft v. Helvering, 311 U.S. 195 (1940). *See supra* notes 102-03 and accompanying text.

113. *Cf.* Van Vleck v. Commissioner, 31 B.T.A. 433 (1934), *aff'd*, 80 F.2d 217 (2d Cir. 1935), *cert. denied*, 298 U.S. 656 (1936). In *Van Vleck* the taxpayer had suffered net losses for the year 1929 that he reported on a separate return; he attempted to carry forward the losses to offset income reported on a joint return for 1930, a year in which he again had net losses but his wife had net income. The Commissioner claimed, and the Second Circuit agreed, that the husband's loss carryforward from the separate return year could only be used to offset his own income in the joint return year, of which he had none, and could not be used to offset the income of his wife, thus rendering the loss carryforward useless. *Van Vleck*, 80 F.2d at 218. In order to limit loss carryforwards in this manner, it is of course necessary to ascertain for the joint return year the respective income and deductions of each spouse separately.

114. *See* Surber v. United States, 285 F. Supp. 775 (S.D. Ohio 1968). In *Surber* the court expressed skepticism as to the existence of any administrative problem in allocating proportional liability on joint returns: "We have been unable to find out what the 'administrative reasons' are." *Id.* at 778.

115. Moore v. United States, 37 F. Supp. 136 (Ct. Cl.), *cert. denied*, 314 U.S. 619 (1941).

The government's continued insistence on administrative necessity was surprising in light of contemporaneous congressional action. In 1941 the House of Representatives proposed enacting mandatory joint returns.[116] The bill explicitly ruled out imposing joint and several liability on mandatory joint returns, however, in order to avoid vulnerability to constitutional attack.[117] The House Report accompanying the bill gave a complete account of how the proportional separate liabilities of the husband and wife would be calculated and even included a lengthy example.[118] Nowhere in the thorough discussion is there any expression of concern about an administrative problem in making such calculations. Yet Congress had enacted joint and several liability only three years earlier, under the purported compulsion of administrative necessity.[119]

After its 1935 defeat in the *Cole* litigation, the Treasury did not adopt measures to alleviate its alleged administrative difficulties. Instead, the Treasury continued to insist on joint and several liability in litigation, losing in every judicial forum. Other circuit courts as well as the Board of Tax Appeals followed without exception the 1935 *Cole* decision that filing jointly does not require joint and several liability.[120] This holding remained established law until Congress overturned it in the Revenue Act of 1938.[121]

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116. *See* H.R. REP. No. 1040, *supra* note 78, at 10, *reprinted in* 1941-2 C.B. at 420. The purpose of tbe bill (which was not enacted) was to equalize the tax treatment of couples in common law states with that of couples in community property states who were enjoying a rate reduction by reporting balf of each spouse's income on the other spouse's separate return pursuant to Poe v. Seaborn, 282 U.S. 101 (1930).

117. For an excellent discussion of this constitutional question in the House Report accompanying the proposal for mandatory joint returns in the Revenue Act of 1941, see H.R. REP. No. 1040, *supra* note 78, at 17-22, *reprinted in* 1941-2 C.B. at 427-31.

The voluntary nature of the current election is perhaps exaggerated in light of the income splitting rate reductions for joint returns introduced by the Revenue Act of 1948, *supra* note 69, which provide an offer "that could not be refused." Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 140 n.55 (1975). In 1985, 99% of married couples elected joint filing. Professor Boris Bittker has called joint returns "mandatory in fact." *See id.*

118. *See* H.R. REP. No. 1040, *supra* note 78, at 10-11, *reprinted in* 1941-2 C.B. at 420-22. The formula is identical to the "separate tax formula" discussed below in connection with refunds. *See infra* Part VII(A)(2).

119. *See* H.R. REP. No. 1860, 75th Cong., 3d Sess. 29-30 (1938), *reprinted in* 1939-1 C.B., pt. 2, at 728, 749.

120. *See, e.g.*, Sachs v. Commissioner, 111 F.2d 648 (6th Cir. 1940); Crowe v. Commissioner, 86 F.2d 796 (7th Cir. 1936); Estate of Hague v. Commissioner, 45 B.T.A. 104, *aff'd sub nom.* Commissioner v. Uniacke, 132 F.2d 781 (2d Cir. 1941); Seder v. Commissioner, 38 B.T.A. 874 (1938); Flaherty v. Commissioner, 35 B.T.A. 1131 (1937); Darling v. Commissioner, 34 B.T.A. 1062 (1936); Commissioner v. Rabenold, 8 B.T.A.M. (P-H) ¶ 39,121 (1939), *aff'd*, 108 F.2d 639 (2d Cir. 1940).

In situations in which the spouses could not prove their separate incomes, however, joint liability was imposed. *See* Rogers v. Commissioner, 111 F.2d 987 (6th Cir. 1940); *see also* Anderson v. United States, 48 F.2d 201 (5th Cir. 1931).

121. *See* Revenue Act of 1938, *supra* note 51, § 51(b), 52 Stat. at 447.

Indeed, *Cole* probably remains valid law today in situations in which it has not been overruled legislatively. For example, a number of states impose joint and several liability for joint returns by administrative decision without direct authority from the state income tax statute.[122] Such administrative practice would appear to be vulnerable to attack under the authority of *Cole*, although no cases seem to be reported.[123]

It is noteworthy that the ratio of joint returns to married filing separately was relatively constant during the years 1938-1950, and was always over 90%, except for the war years when the rate dropped to a low of about 75%. Telephone interview with Barry Winthrop, IRS (July 29, 1988).

Enactment of joint and several liability in 1938 had no apparent deterrent effect upon the rate of joint filing, probably because then as now, most people were unaware of the rule or failed to anticipate its application to themselves. But Congress must have known in 1938 that the new rule of joint and several liability would burden nearly all married taxpayers and that the vast majority of them were deriving little or no tax benefit from filing jointly.

After 1938, the courts began holding that joint and several liability had always been the law, in effect interpreting the new law as having retroactive application. In Moore v. United States, 37 F. Supp. 136 (Ct. Cl.), *cert. denied*, 314 U.S. 619 (1941), the court of claims upheld the Commissioner's assessment of a deficiency for the year 1932 against the wife, who had no income of her own for the year, on the ground of joint and several liability. *See id.*; *see also supra* note 94 and accompanying text. The *Moore* court quoted the language of H.R. Rep. No. 1860, *supra* note 125, to conclude that the new legislation was intended only to "clarify" what had always been the law and therefore applied the rule of joint and several liability retroactively for the tax year 1932, despite the *Cole* case and its progeny. *See Moore*, 37 F. Supp. at 140-41. The statute itself makes no mention of retroactive application, however, and the House Report is at best ambiguous.

Moore was nevertheless followed in its retroactive application to tax years before 1938 by the Board of Tax Appeals in Schoenhut v. Commissioner, 45 B.T.A. 812 (1941), when it announced it would no longer follow its prior holdings denying joint and several liability, and its decision in Gillette v. Commissioner, 46 B.T.A. 573 (1942).

In addition to rehearsing the Commissioner's arguments of administrative necessity that the *Cole* court rejected, the *Moore* court relied on the recent 1940 Supreme Court decisions in Taft v. Helvering, 311 U.S. 195 (1940), and Helvering v. Janney, 311 U.S. 189 (1940), which overturned the Treasury's binary approach to limiting deductions for charitable contributions and capital losses, respectively. The court erroneously thought the *Taft* and *Janney* cases constituted evidence that a joint return creates a joint "taxable unit." The court left unspecified how it derived joint and several liability from this observation. *See Moore*, 37 F. Supp. at 139.

Finally, the court concluded with an etymological argument: "We think that the natural meaning of the word 'joint,' in its context, is that both spouses should be liable for the resulting tax." *Id.* at 140.

The context seems to be that the word "joint" in "joint return" made the court think of the word "joint" in "joint and several liability." One is left to wonder whether this etymological connection may not have been the reason that joint and several liability suggested itself to the government in the first place. Is it possible that the problem might never have arisen if the joint return had been called "combined" rather than "joint"?

122. *See, e.g.*, Letter from James A. Chakulski to Professor Richard Beck (June 30, 1988) (Connecticut); Letter from Louis L. Goldstein to Richard Beck (June 17, 1988) (Maryland); Letter from Alan S. Curtis to Carl D. Gensib (Nov. 16, 1988) (Tennessee).

123. A 1968 memorandum of the North Dakota Tax Department Legal Division so concluded. Memorandum of Kenneth M. Jakes, North Dakota Tax Department, Legal Division (June 24, 1968). No joint return liability is imposed in North Dakota now by statute.

It is interesting to note that the vast majority of states that provide for joint returns require couples to file jointly if they filed jointly for federal tax purposes. It is therefore at least arguable

G. Legislation

In the Revenue Act of 1938, Congress explicitly enacted joint and several liability into the statute for the first time,[124] with minimal explanation. The House Report stated:

> Section 51(b) of the bill expressly provides that the spouses, who exercise the privilege of filing a joint return, are jointly and severally liable for the tax computed upon their aggregate income. It is necessary, for administrative reasons, that any doubt as to the existence of such liability should be set at rest, if the privilege of filing such joint returns is continued.[125]

One must suppose, in the absence of any further explanation, that the "administrative reasons" referred to are none other than those that were rejected decisively in *Cole*. The government never has provided a satisfactory answer to the *Cole* court's objections,[126] and, indeed, none seems possible.

The actual administrative problem seems to have been only that in situations in which the Bureau of Internal Revenue was unsure which spouse earned the income, occasionally the Bureau neglected to assess both spouses, and as a result, the statute of limitations ran and insulated the true earner, as in *Cole*. The Bureau apparently could not tolerate seeing one spouse enjoy untaxed income of the other, even when the situation arose entirely out of the Bureau's own negligence.

When Congress enacted joint and several liability, it is possible that it thought it was doing no more than providing the Bureau with a shield to redress cases of unjust enrichment at the Treasury's expense when no other method seemed feasible. Eventually, however, the Bureau was to turn this shield into a sword, and to wield it against innocent women in situations of separation and divorce when the equities were entirely on the side of the taxpayer.

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that such joint returns are compulsory, and if they are compulsory, joint return liability may be vulnerable to constitutional attack under *Höeper* even when imposed by state statutes.

124. *See* Revenue Act of 1938, *supra* note 51, § 51(b), 52 Stat. at 447.

125. H.R. REP. No. 1860, *supra* note 120, at 749, *reprinted in* 1939-1 C.B., pt. 2, at 728, 749.

126. The same spurious justification for joint and several liability was repeated by the government as late as 1970 in the House Report accompanying the Innocent Spouse Act:

> Since a joint return does not show the respective incomes and deductions of the husband and wife, individually, and since the statute imposes a single tax upon the aggregate income, administrative simplicity makes it necessary that the filing of such a return create a liability that is joint and several.

H.R. REP. No. 1734, 91st Cong., 2d Sess. 2 (1970).

This justification is all the more remarkable because in the area of refunds from joint returns it was by then already well established that separate net incomes and separate prior payments must be determined in order to effect a proper allocation. *See, e.g.*, Maragon v. United States, 153 F. Supp. 365 (Ct. Cl. 1957).

IV. The Innocent Spouse Rules

A. *Current Relief from Joint and Several Liability*

1. Origins

The rule imposing joint return liability was not well founded when originally adopted. On the other hand, before the post-war explosion in the rate of divorce, the enormous harm that the rule would later cause was perhaps not easily foreseeable.[127] By the time it became evident in the 1950s and 1960s that the rule of joint return liability frequently caused serious injustice, it had become so familiar and entrenched that imagining its repeal apparently became difficult.[128]

The injustice of joint return liability became particularly obvious in the wake of the Supreme Court's 1961 decision in *James v. United States*[129] that embezzled funds constitute gross income to the embezzler. The IRS then began asserting joint return liability for large deficiencies against embezzlers' wives, even in situations when they knew nothing of the embezzlement and had received none of the embezzled funds. In such cases, the courts found themselves under pressure to find or encourage inventive ways to circumvent the inequitable results of joint return liability.[130] These methods included permitting the defenses that the wife had no intention to file jointly and signed by mistake,[131] that the wife signed only under the husband's duress,[132] and that her signature was procured by the husband's fraud.[133]

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127. Indeed, all six of the cases that litigated the question of joint and several liability in 1938 or earlier involved either marriages that were still intact but the husband for some reason could not pay, *e.g.*, Darling v. Commissioner, 34 B.T.A. 1062 (1936); Buchhalter v. Commissioner, 29 B.T.A. 600 (1933), or where the husband had died during marriage, *e.g.*, Crowe v. Commissioner, 86 F.2d 796 (7th Cir. 1936); Cole v. Commissioner, 81 F.2d 485 (9th Cir. 1935); Seder v. Commissioner, 38 B.T.A. 874 (1938); Flaherty v. Commissioner, 35 B.T.A. 1131 (1937). None involved divorce.

Still, some observers were astute enough to foresee the problem. *See, e.g.*, 4 R. Paul & J. Mertens, The Law of Federal Income Taxation § 39.08 (1934).

128. Apparently, the only exception was the excellent article Ritz, *The Married Woman and the Federal Income Tax*, 14 Tax L. Rev. 437 (1959).

129. 366 U.S. 213 (1961).

130. *See generally* Note, *Innocent Spouses' Liability for Fraudulent Understatement of Taxable Income on Joint Returns*, 56 Va. L. Rev. 1268 (1970).

131. *See* Payne v. United States, 247 F.2d 481, 484 (8th Cir. 1957) (relieving housewife without income of liability "as a matter of fairness" because she signed 1942 joint return mistakenly thinking she was required to sign because she helped to fill it out).

132. *Compare* Hickey v. Commissioner, 14 T.C.M. (CCH) 546 (1955) (holding elderly woman without income who signed at request of husband relieved of liability because she was instructed by husband's doctor to comply with all husband's wishes on account of his heart disease) *with* Estate of Aylesworth v. Commissioner, 24 T.C. 134, 146 (1955) (finding no relief for wife because her signatures were "voluntary, although perhaps distasteful, acts" even though there was uncontroverted testimony of husband's actual and threatened violence if she refused to sign).

133. *E.g.*, Scudder v. Commissioner, 405 F.2d 222 (6th Cir. 1968), *rev'g* 48 T.C. 36 (1967),

The Sixth Circuit developed the theory that if the wife knew nothing of her husband's concealed income and did not profit from it, her signature on the joint return might be the involuntary result of fraud, at least as to the omitted items.[134] In *Scudder v. Commissioner*,[135] a particularly heartrending decision of the Tax Court, the husband committed embezzlements that he did not disclose on the joint return. The wife was forced to pay not only her husband's taxes and interest but also the fifty percent civil fraud penalty, even though she knew nothing of her husband's tax fraud and did not benefit from it. Still worse, the wife was actually the victim of her husband's embezzlements because she and her sisters owned the business he was managing. Nonetheless, the IRS pursued her for taxes and penalties on their joint "income," which consisted of her own money that her husband embezzled from her. Although the Tax Court expressed regret and called for legislative change, it upheld the Commissioner, even as to the fraud penalty.[136] The Sixth Circuit reversed the case, however, on the theory that she could not have intended to file jointly as to such an item, and her signature as to that item was the product of fraud.[137]

Finally, Congress provided limited relief from the consequences of joint return liability through the Innocent Spouse Act of 1971.[138] Congress enacted the rules in response to such cases as *Scudder*, which the legislative history specifically mentioned.[139] The "innocent spouse" rules reflect Congress's original, quite limited aim to legislate reversal of the result in such egregious cases. In fact, the legislative solution adopted by Congress closely reflects the Sixth Circuit's approach. The "innocent spouse" rules limit relief *inter alia* to situations when the husband committed an illegal tax act of which the wife knew nothing, and from which she did not benefit. For that reason, the relief provided today unfortunately is very limited and quite unsatisfactory.

Congress also has occasionally provided relief in the form of private tax bills,[140] and more recently, in the form of private relief couched in

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cert. denied, 396 U.S. 886 (1969); *see also infra* note 137 and accompanying text.

134. *Scudder*, 405 F.2d at 225-27; *see also* Sharwell v. Commissioner, 419 F.2d 1057 (6th Cir. 1969); Huelsman v. Commissioner, 416 F.2d 477 (6th Cir. 1969).

135. 48 T.C. 36 (1967), *rev'd*, 405 F.2d 222 (6th Cir. 1968), *cert. denied*, 396 U.S. 886 (1969).

136. *See Scudder*, 48 T.C. at 39-41.

137. *See Scudder*, 405 F.2d at 222, 226 (wife relieved of liability for tax on husband's embezzlements from her own business because her signature was the "product of conduct equivalent in wrong to the fraud, trickery and, indeed, the duress which the Tax Court appears to concede will insulate its victim from liabilities"); *see also supra* note 133 and accompanying text.

138. Pub. L. No. 91-679, § 1, 84 Stat. 2063, 2063 (1971) (codified as amended at I.R.C. § 6013(e) (Supp. V 1987)). The section was revised in 1984 to expand protection for the innocent spouse. *See infra* notes 206-08 and accompanying text.

139. H.R. REP. No. 1734, *supra* note 126, at 2.

140. Congress relieved Sondra D. Shaw of a tax liability of $12,608.74 plus accrued interest

general terms as part of a public revenue statute.[141] Such private relief is no doubt merited, but it is unfair to the tens of thousands of other victims of joint return liability who also deserve relief.

2. Current Relief

The relief provisions under section 6013(e) do not apply at all unless there is a "grossly erroneous item on the return," namely, the omission of an item of income, or a claim of deduction, credit, or basis for which there is "no basis in fact or law."[142] Even then, relief is available only for the tax on such grossly erroneous items.[143] In effect, relief is limited to particular items of negligence or fraud. No relief is available, for example, to a woman in the common situation in which the return is correct but her husband simply fails to pay the tax.[144]

In addition, the innocent wife must establish that she neither knew nor had any reason to know of the grossly erroneous item.[145] Further, she must show that when all the facts and circumstances are taken into account, it would be inequitable to hold her liable for the taxes, including interest, penalties, and other amounts.[146] The principal inquiry in applying the equity test is whether the innocent spouse benefited from the erroneous items beyond the level of ordinary support.[147] These requirements have proven to be difficult hurdles, particularly because the

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on account of her husband's embezzlements between 1958-1963. *See* Priv. L. No. 90-362, 82 Stat. 1438 (1968).

Congress allowed another taxpayer, Charles P. Bailey, to redetermine his tax liability for the year 1962 under the innocent spouse rules of § 6013(e) through a private law waiving the statute of limitations and res judicata. Priv. L. No. 95-27, 91 Stat. 1661 (1977).

141. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6004, 102 Stat. 3342, 3685 (codified at I.R.C. § 6013 note (West 1989)). The statute enacted retroactive relief for any taxpayer who filed before January 1, 1985, when: (i) the disallowed deductions of the other spouse exceeded tbe taxable income shown on the joint return; and (ii) the marriage terminated and immediately afterwards the net worth of the innocent spouse was less than $10,000. *Id.* The relief is termed a "transitional rule" and seems aimed at one taxpayer, but apparently because of the outcry over "rifie shot" transitional rules in the Tax Reform Act of 1986, tbe provision is drafted broadly enough that it should apply to at least some other taxpayers.

142. I.R.C. § 6013(e)(2) (Supp. V 1987).

143. *Id.* § 6013(e)(1).

144. California, however, does permit such relief in its version of the innocent spouse rules and so does France, *see infra* note 320 and accompanying text. *See generally infra* Part VI.

The wife's plight does not become less deserving of relief because her husband's part of the joint return was correct. There is something perverse in the current rules under which a wife could be in a better position if her husband fraudulently omits income from the return than if be reports it honestly but fails to pay the tax.

145. I.R.C. § 6013(e)(1)(B) (Supp. V 1987).

146. *Id.* § 6013(e)(1)(C). The Innocent Spouse Act also added § 6653(b)(3) to the Code, which relieves tbe wife from the civil fraud penalty if the underpayment was not due to any fraud of her own. Innocent Spouse Act of 1971, *supra* note 138, § 2, 84 Stat. at 2063. She is still responsible for other penalties, however.

147. *See infra* Part IV(A)(6).

burden of proof as to all elements of relief is on the wife and because the wife must establish every element of relief in order to prevail.[148] In addition, these rules have produced imprecise standards and unpredictable results in the case law.[149]

3. Reason to Know

The innocence requirement has proved to be perhaps the most difficult test because the burden of proof is on the wife to prove both no actual knowledge of the items in question and no reason to know of them. The leading case in this area is *Sanders v. United States*,[150] involving the widow of a chiropractor turned marketer of pyramid sales operations who had substantial unreported income. The widow herself had earned only about two thousand dollars for the two years in question, but the deficiency assessed against her and her deceased husband's insolvent estate was over thirty thousand dollars.[151]

In *Sanders* the Fifth Circuit upheld the lower court's decision that the taxpayer qualified as an innocent spouse and interpreted the phrase "reason to know" by adopting a standard of "reasonable care" from the *Restatement (Second) of Agency*.[152] The Fifth Circuit approved the district court's consideration of seven factors in its factual inquiry: (i) the complexity of the husband's financial affairs; (ii) the wife's education, experience, emotional state, and general subjective condition; (iii) the degree to which the husband confided his business affairs to her; (iv) her trust in their accountant; (v) the degree and kind of her participation in his business affairs; (vi) the extent of her participation in their family budget; and (vii) the extent to which the couple had made lavish or unusual expenditures.[153] These factual inquiries take into ac-

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148. *See* Allen v. Commissioner, 514 F.2d 908, 912 (5th Cir. 1975).

149. An entire treatise might be written on the vast and conflicting caselaw reported under § 6013(e). The following discussion does not pretend to provide any degree of completeness.

150. 509 F.2d 162 (5th Cir. 1975), *aff'g* 369 F. Supp. 160 (N.D. Ala. 1973).

151. *See id.* at 165.

152. *See id.* at 170. The court quoted the relevant provision of the *Restatement*:

> "A person has reason to know of a fact if he had information from which a person of ordinary intelligence, or of the superior intelligence which such person may have, would infer that the fact in question exists or that tbere is such a substantial chance of its existence that, if exercising reasonable care with reference to the matter in question, his action would be predicated upon the assumption of its possible existence."

Id. at 167 (quoting RESTATEMENT (SECOND) OF AGENCY § 9 comment d (1958)).

It is unclear why tbe *Sanders* court looked to the law of agency for a definition. The law of torts would seem a more appropriate source. On the other hand, the reasonable care test actually adopted undoubtedly would have been the same in any event. The district court below used the standard of a reasonably prudent taxpayer, *see Sanders*, 369 F. Supp. at 166, of which the Fifth Circuit seemed to approve as equivalent. *See Sanders*, 509 F.2d at 166.

153. *See Sanders*, 509 F.2d at 162.

count the subjective state of the wife and are for that reason alone imprecise and lead to unpredictable results. Even the more objective standards raised doubts for the Fifth Circuit. For example, the district court found that the husband had a policy of not confiding financial information to his wife, yet also found that he had asked her to balance checkbooks and keep other financial records.[154]

The cases have held that knowledge of the existence of an item, not knowledge of its tax consequences, is controlling. This approach sometimes has led to harsh results. For example, in *McCoy v. Commissioner*[155] the court rejected a woman's contention that as a layperson she could not be expected to know that incorporation of a deficit partnership, which her husband reported on the return, triggered taxable gain under section 357(c).

The innocence test is separate and distinct from the equity test, although they almost always overlap. Again, the major inquiry in the equity test is whether the wife received a significant benefit over and above normal support.[156] Significant benefits such as lavish expenditures beyond the standard of living attainable with the amounts of income reported on the return also give rise to a reason to know of unreported income or erroneous deductions.[157] Because the tests are distinct, however, a wife may be held liable if found to have had reason to know of mistakenly unreported gain, even if she did not profit from it, as in *McCoy*.

4. Confiicting Caselaw Concerning Reason to Know

The cases have held that the wife has a duty to review the tax return and to make inquiries about items that should arouse suspicion in a reasonable person under the circumstances.[158] The cases, however, are not easily reconcilable in this area. Some recent tax shelter cases illustrate the difficulties in applying the reasonable person standard.

In the 1987 case *United States v. Flomenhoft*[159] a housewife without business experience was held liable for judgments to which her husband had consented in the amount of 170,057 dollars for 1975 and 281,908 dollars for 1976 due to the disallowance of phony partnership losses for those years of 200,000 dollars and 500,000 dollars, respectively. She testified that she did not read the returns, and the court found that she had no actual knowledge of the understatements. The

154. *Id.* at 168 n.11.
155. 57 T.C. 732 (1972).
156. *See infra* Part IV(A)(6).
157. *See* Mysse v. Commissioner, 57 T.C. 680, 699 (1972).
158. Terzian v. Commissioner, 72 T.C. 1164 (1979).
159. No. 86-C-1588, (N.D. Ill. Feb. 27, 1987) (LEXIS, Genfed library, Dist file).

district court found, however, that she was aware of the "staggering losses" reflected "directly over her signature" and determined that a reasonable spouse who is a housewife with a high school education should have known that the couple could not have enjoyed their standard of living on a negative reported income. The court found that she should have been alerted that her husband had not actually suffered the losses claimed.[160] The court also decided that to hold her liable would not be inequitable because she continued to enjoy the fruits of her husband's fraud in the form of an expensive house and Mercedes automobile.[161]

By contrast, in *Shapiro v. Commissioner*,[162] a 1988 tax shelter case, a housewife likewise without business experience was relieved of liability for a 96,490 dollar deficiency due to a 172,000 dollar loss disallowed on the joint return because she had no reason to know of the existence of the shelter. Although she had signed the return without reading it, she trusted her husband's accountant who had prepared it. Further, her attorney probably reviewed the return because she signed it as part of a separation agreement that made the husband responsible for any additional taxes and allowed him any refund.[163] Although the couple lived very well and the husband reported income of 170,000 dollars, the joint return showed a tax due of only 8994 dollars.[164] Under the separation agreement she received property valued at over 375,000 dollars, in addition to their four-bedroom house, Lincoln Continental, and other valuable property.[165] Contrary to *Flomenhoft*, the *Shapiro* court did not seem to think that the wife's suspicion should have been aroused by the 172,000 dollar reported loss or by the couples high standard of living.[166]

In *Flomenhoft*, unlike *Shapiro*, the couple was still married and there was no evidence that they would separate. Mr. Flomenhoft was in prison for tax fraud, and because he consented to the deficiency judgments, it may be inferred that the IRS had tried to collect from him but could not, perhaps because of insolvency.[167] The court may have

160. *Id.* at 12. The court also found as a second reason that she should have known because she was an officer and a cotrustee-partner in the husband's companies that were used to generate the fraudulent deductions. *Id.* The testimony, however, indicated that her actual activity was minimal, and the court did find, as noted above, that she had no actual knowledge of the understatements. *Id.* at 9-10.

161. *Id.* at 10.

162. 55 T.C.M. (CCH) 1472 (1988).

163. *Id.* at 1473.

164. *Id.* at 1474.

165. *Id.* at 1473. None of this went beyond ordinary support under *Sanders* because the husband had been doing very well. *See infra* notes 192-93 and accompanying text.

166. *Shapiro*, 55 T.C.M. (CCH) at 1474-75.

167. *See Flomenhoft*, No. 86-C-1588. If so, the IRS could have proceeded against her as a transferee and avoided the inquiry into her innocence and reason to know.

feared that Mr. Flomenhoft would enjoy the fruits of his own fraud as a result and perhaps held against his wife for that reason. Conversely, the court in *Shapiro* simply may have felt that the husband should pay the deficiency, particularly in light of their separation agreement requiring him to do so.[168] As in nearly all the innocent spouse cases, the opinions reveal nothing about why the IRS did not collect, or at least try to collect, from the husband. Such information is crucial to an evaluation of the fairness of these cases. While these cases may have been decided fairly from the point of view of the outcome, they are certainly inconsistent as to the stated criteria for the reason to know standard of inquiry.

A third recent tax shelter case seems completely inconsistent with *Shapiro* and seems unjustifiable on any reading of the statute. In *Cohen v. Commissioner*[169] a divorced school teacher was held liable for a 4586 dollar deficiency due to a loss reported from a fraudulent tax shelter. It was stipulated that the husband did not know that the shelter was fraudulent. The husband, a certified public accountant and partner in the tax department of Peat, Marwick, Mitchell & Co., prepared the return and gave it to her for signature.[170] She did not question him or anyone else about the shelter, but the court held that as a college graduate, she should have known of her responsibility to review the return and that her "ostrich imitation" was unreasonable.[171] The court indicated that her failure to question her husband about the item amounted to intentional ignorance.[172] If she had questioned her husband, however, what would she have learned? It was stipulated that the husband himself was deceived as to the shelter. The husband was a tax specialist and partner in the world's largest accounting firm. Could the wife, a school teacher without business experience, be expected to undeceive him? Surely reliance upon the expertise of a qualified professional should be due diligence sufficient to satisfy the reasonable person standard. The *Cohen* standard almost seems to be a return to strict liability, at least for spouses who have some minimum level of education.

In other tax shelter cases, however, the duty to review and investigate the return seems to have been overlooked entirely. In *Bouskos v. Commissioner*[173] a divorced housewife was held to have no reason to know that a coal mining shelter was abusive because her husband did

168. It seems that if the wife had lost she still would have been able to enforce the provision of the separation agreement requiring her husband to pay the taxes. Because she was not yet divorced, the divorce court probably still had jurisdiction, and the amounts involved suggest that it would have been worthwhile for her to proceed against him.

169. 54 Tax Ct. Mem. Dec. (CCH) 944 (1987).

170. *Id.* at 945.

171. *Id.* at 947.

172. *Id.*

173. 54 T.C.M. (CCH) 1117 (1987).

not discuss finances with her, she had no financial background, and the couple made no unusually lavish expenditures beyond their generally high standard of living. An accountant prepared the return, and the wife did not even look at it when she signed it.[174] The court did not mention any duty on the part of the wife to review the return, let alone to investigate a huge deduction attributed to coal mining in West Virginia although the husband's financial success was attributable to a California supermarket business.[175] To the contrary, the court seemed to count her failure to review and investigate the return as more evidence that she had no reason to know of the item.[176]

Similarly, the duty to review seems to have been ignored in *Guth v. Commissioner*.[177] In *Guth* the wife, a nurse's assistant, was exonerated from liability for her husband's disallowed deductions of some 8000 dollars per year for contributions to his own chapter of the Universal Life Church.[178] The court accepted her testimony that she thought the chapter had been formed to further his religious beliefs and that he had deceived her as to his true motive of tax avoidance.[179] Once again, the court stressed factors such as her lack of business or tax experience, her lack of involvement in the family's finances, and the absence of unusual or lavish expenditures that might have put her on notice, but the court ignored any duty to review the return.[180] A reasonable person reading the return, however, and seeing the huge charitable deductions would have wanted to learn more about the husband's expensive religious activities. In addition, she was "treasurer" of the Universal Life Church chapter, which, had the court applied the *Flomenhoft* standards, should have given her reason to know.

One suspects that in both *Bouskos* and *Guth* sympathy for the wife motivated the court to overlook the duty to review the joint return and inquire as to questionable items. Neither case provides much information regarding the wife's financial condition at the time of trial. In other reported cases, however, it is reasonably clear that the court's overriding consideration was sympathy. In *Smith v. Commissioner*,[181] for example, a disabled widow without employment or assets and with a small child to support was held to have had no reason to know that her de-

174. *Id.* at 1119.

175. To he sure, the deductions were apparently reported on a partnership return that the wife probably never saw, but the amounts were reported on the joint return and inquiry would have disclosed the nature of the deductions.

176. *See Bouskos*, 54 T.C.M. (CCH) at 1119-20.

177. 54 T.C.M. (CCH) 878 (1987).

178. *Id.* at 880-81.

179. *Id.* at 880.

180. *Id.* at 881.

181. 53 T.C.M.(CCH) 743 (1987).

ceased husband, a truck driver, had omitted all but 5612 dollars out of his 1981 income of 19,122 dollars. The widow had little education and no business experience, and her husband neither confided his business affairs to her nor showed her the joint return he required her to sign.[182] She had cashed nearly 11,000 dollars in checks for her husband, however, and had paid approximately 6000 dollars in household bills at his direction.[183] Despite her lack of education, it is difficult to believe that if the widow had seen the return, she would not have realized that the family was living on more than the 5612 dollars reported in 1981. The court would have been heartless to render a decision against her; furthermore, such a decision would have been useless because of the widow's inability to pay the 6000 dollar deficiency. In order to arrive at a fair decision, however, the court was compelled to find her free from liability on the ground that she had no reason to know of the omitted income.[184]

5. Purpose of Innocence Requirement

The lack of consistency in these cases is lamentable, but because the purpose of the innocence requirement itself is not clear, it is far from clear what could or should be done to correct it. The legislative history provides little guidance other than, as suggested above, Congress's desire to reverse the results of certain cases like *Scudder*.[185] In light of *Scudder*, the no reason to know requirement seems aimed at ensuring that the wife is genuinely a victim of her husband's misdeeds and has not condoned them by turning a blind eye toward them. How should courts effectuate that purpose in cases like *Shapiro*[186] and *Cohen*,[187] in which both spouses apparently were victims of fraudulent tax shelter promotions? What should be the result in cases like *McCoy*,[188] in which both spouses may have been innocent of the tax effect of incorporating a deficit partnership? The question seems unanswerable

182. *Id.* at 744. She apparently did not ask for such information. Other cases have held that a guilty spouse's refusal to show the tax return or provide financial information to the petitioner for innocent spouse status puts the petitioner on notice that something is amiss and defeats innocence. *See, e.g.*, Adams v. Commissioner, 60 T.C. 300 (1973). Like the voluntary failure to review the return, the husband's refusal to show the return has cut both ways.

183. *Smith*, 53 T.C.M. (CCH) at 744.

184. *See id.* at 744-46.

185. Scudder v. Commissioner, 405 F.2d 222 (6th Cir. 1968), *cert. denied*, 396 U.S. 886 (1969); *see supra* notes 135-37 and accompanying text.

186. Shapiro v. Commissioner, 55 T.C.M. (CCH) 1472 (1988); *see supra* notes 162-66 and accompanying text.

187. Cohen v. Commissioner, 56 T.C.M. (CCH) 944 (1987); *see supra* notes 169-72 and accompanying text.

188. McCoy v. Commissioner, 57 T.C. 732 (1972); *see supra* notes 155-57 and accompanying text.

without some other guiding principle or purpose.

The Sixth Circuit recently stated in *Purcell v. Commissioner*[189] that "[t]he purpose of the innocent spouse rule is to protect one spouse from the overreaching or dishonesty of the other." If so, then perhaps it was appropriate to deny relief both in *Cohen* and in *McCoy* because neither case seems to have involved dishonesty or overreaching by the husband. The statute itself makes no such requirement, however, and many courts have granted relief when the earning spouse does not appear to have been guilty of any wrongdoing, as in *Shapiro*, when no evidence was reported that the husband knew that the tax shelter in question was abusive.

In effect, the innocence or due diligence requirement has evolved into a hopelessly inconsistent test that is now little more than an opportunity for a court to grant relief whenever it feels that the tax liability would be inequitable under the circumstances. The situation regarding the equity test seems no different.

6. Equity and Significant Benefit

Under the equity test, the wife must prove that to hold her liable for the tax would be inequitable under all the facts and circumstances.[190] The test requires an investigation into whether the wife received a significant benefit from the erroneous item beyond ordinary support.[191] This test can be ambiguous, because, as the Fifth Circuit stated in *Sanders v. United States*, "[O]ne person's luxury can be another's necessity, and the lavishness of an expense must be measured from each family's relative level of ordinary support."[192] In *Sanders* the wife was held to have no reason to know of the husband's unreported income, despite the purchase and improvement of a new home, new cars, a condominium in the Bahamas, and gambling trips to Las Vegas because the deceased husband was a wealthy physician.[193] The court also found no significant benefit to the wife, despite the couple's lifestyle, apparently because after the doctor's death, she was left with no

189. 826 F.2d 470, 475 (6th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *see infra* notes 213-15 and accompanying text.

190. I.R.C. § 6013(e)(1) (Supp. V 1987).

191. Tax Reform Act of 1984, Pub. L. No. 98-369, div. A, § 424, 98 Stat. 494, 801, omitted the explicit requirement of a significant benefit to the innocent spouse, but the Committee Report explained: "The bill does not specifically require that the determination of whether it would be inequitable to hold the innocent spouse liable include the consideration of whether such spouse benefitted from the erroneous item, but that factor should continue to be taken into account." H.R. REP. No. 432, 98th Cong., 2d Sess., pt. 2, at 1502 (1984).

192. Sanders v. United States, 509 F.2d 162, 168 (5th Cir. 1975), *aff'g* 369 F. Supp. 160 (N.D. Ala. 1973).

193. *See id.* at 166, 170.

assets other than about 150,000 dollars in life insurance proceeds.[194] The court below explained at length that because she was a housewife with no employment prospects and with a small child to support, the life insurance proceeds probably would be insufficient for her needs, and in any case, any benefit received from the deceased husband's unreported income would accrue eventually to the child for its feeding, shelter, and education.[195]

Similarly, in *Dakil v. United States*[196] the widow of a wealthy doctor who had omitted substantial amounts of income was exonerated from a deficiency of about 30,000 dollars, despite the fact that a jury interrogatory held against her on the issue of significant benefit. The Tenth Circuit, upholding the court below, held that it was not convinced she had benefited from a luxurious lifestyle during marriage because no evidence was presented as to what would be ordinary support in her circumstances. Moreover, the court held that the equity requirement must be met in addition to the substantial benefit test, and the court found that to impose her husband's taxes on her would be overwhelmingly inequitable. The widow had accumulated no cash from the marriage, she worked part-time helping senior citizens at one dollar and sixty cents per hour, and she received social security payments of 207 dollars per month.[197] The court said: "The unnecessarily harsh attempt to collect from her individually the tax liabilities of her husband should never have been made, and, having been made, should be cast into oblivion. Even a tax collector should have some heart."[198] The court made no findings as to her net worth, however, and it appears that she did own a home and automobiles.[199]

Even in circumstances in which the wife in fact received significant amounts of property, the ordinary support limitation seems to have provided some courts an opportunity to dispense mercy. In *Terzian v. Commissioner*[200] the Tax Court held that 155,000 dollars transferred to the wife in lieu of alimony, some of which was traceable to omitted income of the husband, did not constitute a significant benefit. In *Terzian* the wife was fifty-three years old at the time of divorce and had no skills or reasonable prospect for employment. The court held that the settlement would provide the wife with no more than reasonable sup-

194. It appears that the husband may have paid the premiums in part out of his unreported income, however. *See Sanders*, 369 F. Supp. at 166.

195. *Id.* at 166-67.

196. 496 F.2d 431 (10th Cir. 1974).

197. *Id.* at 433.

198. *Id.*

199. *See id.*

200. 72 T.C. 1164 (1979).

port for the rest of her life, but did not inquire into what level of support the husband could have provided if he had paid his taxes correctly.[201]

In all three cases it appears that the courts were moved to apply the significant benefit test with leniency out of sympathy for the taxpayers. A finding in any of these cases that the wife had benefited would have required her to pay the entire deficiency, without limitation to the amount by which she actually benefited from the omitted income.

It is not easy to find a case in which a court denied relief solely on the ground of significant benefit.[202] The language of the statute requires a finding of no actual or constructive knowledge as well as a finding that it would be inequitable to deny relief.[203] The cases deciding against taxpayers on the ground of significant benefit, however, seem invariably to find also that the petitioner for relief had constructive knowledge, perhaps because benefits that are large enough to be significant are ipso facto sufficiently large to put the spouse claiming innocence on notice that something is wrong. Even if the wife was not aware of the significant benefit at the time of signing the return, the IRS still can argue that if she had made proper inquiry, she would have known of the erroneous items. For example, in *Adams v. Commissioner*[204] the husband, who was the spouse claiming relief, was found to have received a significant benefit from his wife's omission of sales commissions because his property settlement at divorce was 257,000 dollars, while prior to divorce his separate net worth was only 33,000 dollars. His claim to innocence on the ground that his wife refused to show him the joint returns and refused to disclose her separate income also was rejected, however, because her refusal to be forthright should have put him on notice. In addition, he made no attempt to set straight his separate tax liability.[205]

Under the case law, it appears that in practice, if not in theory, the equity and significant benefit tests are not separate from the innocence test. At best they may be aspects of a single global test of fairness. Often, however, the tests seem little more than ritual formulas that a court must recite in order to grant relief in sympathetic cases.

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201. *See id.* at 1172.

202. A district court did, however, make such a decision in Busse v. United States, 75-2 U.S. Tax Cas. (CCH) ¶ 9714 (1975), *aff'd in part, rev'd in part*, 542 F.2d 421 (7th Cir. 1976).

203. *See* I.R.C. § 6013(e)(1)(C), (D) (Supp. V 1987).

204. 60 T.C. 300 (1973).

205. *Id.* at 303.

7. No Basis in Fact or Law

As originally enacted in 1971, the innocent spouse rules applied only to omissions from gross income. The Tax Reform Act of 1984[206] broadened the rules to provide relief for deficiencies resulting from erroneous claims of deduction, credit, or basis, but only if they are "in an amount for which there is no basis in fact or law."[207] The burden is upon the spouse claiming innocence to prove that such an erroneous claim has no basis in fact or law,[208] and sustaining this burden is sometimes difficult. The phrase is new to the tax law and has no clear definition.[209] The committee reports provide some guidance by using the phrase "phony business deductions" as an example of the kind of item intended.[210] In addition, it is clear at least that a deduction will not qualify for relief merely because it is disallowed.[211] Beyond that, the standard is ambiguous, as can be seen from two recent cases involving deductions for worthless stock losses. In *Shenker v. Commissioner*[212] the Eighth Circuit reversed the Tax Court and held that because the facts found by the Tax Court clearly indicated that the corporation in question remained viable until 1972, there was simply no basis for claiming the loss in 1971, and the standard therefore was met.

By contrast, in *Purcell v. Commissioner*[213] the Sixth Circuit affirmed the Tax Court's conclusion that because the corporation was in financial straits in 1977 some arguable factual and legal basis existed for claiming the loss in that year, and that the standard therefore was not met. The *Purcell* court attempted to distinguish *Shenker* by arguing that if there had been some basis there for claiming the loss in 1971, the Eighth Circuit would have reached the same result as the Sixth Circuit.[214] Judge Jones disagreed, however, and offered a concurring opinion in *Purcell* in which he argued that the court simply should have rejected the Eighth Circuit's analysis as erroneous on the ground that it in effect "equated the nondeductibility of a claimed loss with the conclusion that a deduction taken for that loss has 'no basis in fact or law.' "[215] Measuring the degree of arguability for a deduction promises to be a very troublesome, if not hopeless task.

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206. Tax Reform Act of 1984, *supra* note 191, § 424, 98 Stat. at 801-03.

207. I.R.C. § 6013(e)(2)(B) (Supp. V 1987).

208. *See* Allen v. Commissioner, 514 F.2d 908, 912 (5th Cir. 1975).

209. For an extended discussion of this problem, see Borison, *Innocent Spouse Relief: A Call for Legislative and Judicial Liberalization*, 40 TAX LAW. 819, 842-60 (1987).

210. *See* H.R. REP. No. 432, *supra* note 191, pt. 2, at 1502.

211. *See id.*

212. 804 F.2d 109 (8th Cir. 1986).

213. 826 F.2d 470 (6th Cir. 1987).

214. *Id.* at 475.

215. *Id.* at 476-77 (Jones, J., concurring).

One commentator has pointed out that placing the burden of proof on the wife to demonstrate the lack of any factual or legal basis of disallowed deductions may put her in the "proverbial 'Catch-22.' "[216] If the wife is able to prove the phoniness of the deduction in the year of trial, the IRS may argue that she could have done so in the year the return was filed. Therefore she had reason to know of the understatement and should be denied relief on that ground.[217]

Another difficulty is that the wife's burden may require her to prove fraud on the part of her husband. If the couple is still married, such a requirement would invite either marital disharmony or collusion. Both are troubling from the point of view of public policy.[218]

Finally, it should be noted that a wife is often not in a position to prove anything at all with respect to her husband's deductions if she is separated or widowed. For example, in *Douglas v. Commissioner*[219] the husband died before the IRS audited the joint return, and because his record keeping was inadequate, the widow was unable to substantiate his deductions. She claimed innocent spouse relief, but because she could not prove that the deductions were without foundation in fact or law, relief was denied.[220]

8. Dollar Limits

The innocent spouse rules also impose certain arbitrary dollar limits. Unless the grossly erroneous items, independent of interest and penalties, result in a tax understatement exceeding 500 dollars, for example, they are not considered substantial, and no relief is available.[221] This standard is unfair to the relatively poor individuals for whom amounts under 500 dollars may be quite substantial.[222]

For a grossly erroneous claim of deduction, credit, or basis to qual-

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216. Borison, *supra* note 209, at 854.

217. *See id.*

218. *Id.* at 852.

219. 86 T.C. 758 (1986).

220. *Id.* at 762-63.

221. *See* I.R.C. § 6013(e)(3) (Supp. V 1987). Before the Tax Reform Act of 1984 introduced amendments, an omission in excess of 25% of the gross income stated in the return was required in order for a taxpayer to qualify for relief. *See* I.R.C. § 6013(e)(1)(A) (1982). Courts construed this requirement very strictly, which sometimes led to harsh results. In Estate of Klein v. Commissioner, 537 F.2d 701 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976), a widow was denied relief for a $45,000 omission although that was more than half of the gross income stated on the joint return, on the ground that a partnership return that the husband had filed had to be read together with the personal return. The court further held that "gross income" meant gross receipts without deduction for cost of goods sold, and because the husband's share of gross receipts of the partnership was over $1,000,000, the court denied relief. *Id.* at 706 & n.11.

222. A nonqualifying deficiency even may exceed $500, when interest and penalties are included.

ify for relief as a substantial understatement, it must meet in addition some onerous percentage of income requirements.[223] If the wife's income for the preadjustment year is 20,000 dollars or less, the tax liability attributable to the erroneous claim (not the claim itself) must exceed ten percent of such adjusted gross income (AGI).[224] Further, if such AGI for the preadjustment year is more than 20,000 dollars, the tax liability attributable to the claim must exceed twenty-five percent of such AGI.[225] Preadjustment year is defined as the most recent taxable year ending before the date the deficiency notice is mailed.[226] These requirements seem designed to ensure that only very burdensome amounts of liability that might strain the wife's present ability to pay will qualify for relief.

If the wife has remarried, she must include her new husband's income in the preadjustment year income test, even if she did not file a joint return with her new husband.[227] Because the new husband will not be liable personally for the wife's former taxes, this provision does not measure her ability to pay. In addition, the new husband may be put in the position of having to pay the first husband's taxes in order to avoid seizure of his wife's property, garnishment of her wages, or bankruptcy. The rule is wholly unjustified.

9. Hardship

No statutory relief exists for hardship or inability to pay. No matter how impoverished the wife, and no matter how large the husband's tax deficiency, the IRS can and does levy upon the wife's salary, car, or home to pay the husband's taxes.[228] Some courts have considered hardship as an explicit factor for relief under the equity test.[229] Even if relief is finally granted in court, however, the anguish and cost of litigation may cause an indigent wife substantial hardship. In cases like *Smith v. Commissioner*,[230] in which it was obvious that the wife could not pay

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223. *See* I.R.C. § 6013(e)(4) (Supp. V 1987).

224. *Id.* § 6013(e)(4)(A).

225. *Id.* § 6013(e)(4)(B).

226. *See id.* § 6013(e)(4)(C).

227. *Id.* § 6013(e)(4)(D).

228. Note here that state law exemptions from enforcement of private judgments do not apply to federal tax collections. IRS collection powers are enormously greater than those of any private creditor. *Compare* I.R.C. § 6334(d) (1982) (establishing IRS right to levy upon all the taxpayer's wages or salary except only $75 per week (plus $25 for each dependent)) *with* N.Y. Civ. Prac. L. & R. § 5205(d) (McKinney 1978) (requiring an exemption of 90% of the debtor's income, leaving only 10% subject to garnishment by creditors).

229. *See, e.g.*, Dakil v. United States, 496 F.2d 431 (10th Cir. 1974); *see also supra* notes 196-99 and accompanying text. *Contra* Instruction Administrative of Feb. 18, 1985, 5-B-10-85, no. 14 (providing that hardship is an explicit reason for relief).

230. 53 T.C.M. (CCH) 743 (1987); *see also supra* note 181 and accompanying text.

the tax in any event, the IRS collection efforts seem pointless.

10. No Obligation to Pursue the Husband First

The IRS has no obligation to pursue the husband first and exhaust collection attempts against him before turning to the wife. Indeed, almost the reverse situation exists. Joint return liability seems to have no other purpose than to provide the IRS with the power to choose whichever spouse has assets more easily available for levy, without regard for which spouse is responsible for the deficiency.

Recently, however, the IRS has announced a new policy that is at least a step in the direction of pursuing the husband first. The IRS will permit its field personnel to defer collection involving potential innocent spouses. Instead, they may pursue the "responsible" spouse first, before making a determination of the innocence claim. If collection cannot be made from the responsible spouse, the IRS then could determine the validity of the innocent spouse claim.[231] This policy would be of immense value if it were mandatory rather than discretionary and if it applied to all cases, rather than only to those in which there is a colorable claim for innocent spouse relief.

11. Position to Defend Deficiency

A consequence of permitting the IRS to pursue the wife first is that sometimes she effectively may be prevented from contesting an incorrect deficiency. If the items in question relate to the husband's income or deductions, the wife may not have knowledge of or access to the relevant records. Without such access to the facts she may not be able to submit evidence in her defense. Because the Commissioner's assessment has the presumption of correctness, she has the burden of proof, and she cannot prevail without presenting evidence. Thus, the wife may be forced to pay taxes relating to her husband's income that he himself might have been able to prove that he did not owe. This irony appears to be the situation in Anna's case with which this Article began. She may have the curious problem of proving—without records—that Rob-

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231. *See* Letter from Grant A. Newman, Director, Office of Field Operations (July 6, 1988), *quoted in* O'Connell, *Innocent Spouse Rules Can Avoid Unexpected Liability on Joint Returns with Former Spouse*, 17 TAX'N FOR LAW. 226, 229 (1989). The letter, as quoted, reads:

> In our next revision of Internal Revenue Manual 5300, we will install language permitting our field personnel, with managerial concurrence, to defer collection on potential "innocent spouse" situations. Field personnel will he made aware under what conditions Internal Revenue Code 6013(e) permits a spouse to qualify for relief as an "innocent spouse" and to refer that case to the Examination Division for consideration. Collection activity against the "responsible spouse" will proceed as normal.

Id.

ert's deductions were either phony, as the wife in *Douglas*[232] could not, or legitimate; nothing in between will suffice.

B. *Proposals for Amending the Innocent Spouse Rules*

The rules for relief often have been criticized as too restrictive, and many commentators have cried for reform to provide relief in more situations.[233] Many improvements easily might be made. For example, the relief provisions would be much more fair if all of the dollar limitations were repealed,[234] as California has done in its version of the innocent spouse rules.[235] The "no basis in fact or law" restriction might be repealed so that any disallowed claim of deduction, credit, or item would qualify for potential relief.[236] California also has taken this step.[237] The legislature might reverse the burden of proof, as it is for the civil fraud penalty, so that the government would be required to prove actual or constructive knowledge and significant benefit.[238] This measure would be an improvement, but would not solve the problems of ambiguity inherent in these criteria.

No good reason seems to support continuing to exclude simple nonpayment of tax from the list of situations qualifying for relief. If the husband fails to pay his share of the tax, that may be just as irresponsible as underreporting, and the consequences may be just as unfair to the wife. California, again, provides some relief in this situation, but unfortunately hedges the relief with innocence and equity requirements.[239]

A dramatic improvement could be made by requiring the IRS to pursue the husband first in all cases, and then permitting collection

232. Douglas v. Commissioner, 86 T.C. 758 (1986); *see supra* notes 219-20 and accompanying text.

233. *See* Borison, *supra* note 209; Goldstein, *The Innocent Spouse Act*, 45 TEMPLE L.Q. 448 (1972); Lax, *The Innocent Spouse Provision Under Section 6013(e) of the Internal Revenue Code: Relief or Refuse?*, 12 U. ARK. LITTLE ROCK L.J. 25 (1989); Panny & Faust, *The Innocent Spouse Provisions of the Internal Revenue Code: In Search of Equity*, 32 U. MIAMI L. REV. 137 (1977); Phillips & Braford, *Even a Tax Collector Should Have Some Heart: Equitable Relief for the Innocent Spouse Under IRC § 6013(e)*, 8 N. ILL. U.L. REV. 33 (1987); Quick & 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 (1983); Note, *The Innocent Spouse Rule: Recent Developments and Proposed Changes*, 14 SW. U.L. REV. 129 (1983).

234. *See* Borison, *supra* note 209, at 863.

235. *See infra* note 367 and accompanying text.

236. *See* Borison, *supra* note 209, at 863.

237. *See infra* note 366 and accompanying text.

238. This was suggested in Goldstein, *supra* note 233, at 459, and again in Panny & Faust, *supra* note 233, at 170.

239. *See infra* Part VI(B).

from the wife only when such efforts have proved fruitless.[240] This rule is used in France and Belgium.[241] Such a measure probably would eliminate the vast majority of cases. As noted above, the IRS apparently has taken a first step in this direction.

1. Impossibility of Repairing the Innocent Spouse Rules

There seems to be no natural or fair stopping point for expanding the scope of the innocent spouse rules because no clear policy or principle justifies joint return liability in the first place. Without such a principle, any amendments short of outright repeal of joint return liability necessarily will be arbitrary. This contention can perhaps be seen most clearly by analyzing the rationale of the innocence requirement, which lies at the heart of the relief rules.

2. Inappropriateness of the Innocence Requirement

The innocence requirements under I.R.C. section 6013(e) are inappropriate as a theoretical basis for relief both under current law and under any proposed reform. Even a requirement of actual knowledge before liability could be imposed would be unjustified unless joint return liability itself can be justified independently.

Certainly, no duty of innocence exists in any form if each spouse files separately. A wife filing separately will not become liable even if she has actual knowledge of the other spouse's tax cheating. Indeed, that may be the very reason she is filing separately. The wife even can enjoy gifts out of the proceeds of the husband's tax cheating, provided she is not herself a participant in the tax fraud, and provided the husband does not become insolvent as a result of the transfers.[242]

This drastic difference in the wife's level of duty cannot be justified by the fact that the wife signs the joint return under penalty of perjury.

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240. Such a rule would not he unique in the Code. In 1982 Congress enacted amendments to § 302(c) allowing waiver of attribution from entities in the context of stock redemptions. These amendments include a related rule of joint and several liability, which is enforceable in just this manner. *See* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 228, 96 Stat. 324, 493 (codified at I.R.C. § 302(c)(2)(C) (1982)) (TEFRA). According to the Staff of the Joint Committee on Taxation:

> The entity and beneficiaries are jointly and severally liable in the event of an acquisition by any of them within the 10-year period. . .Congress intended that the tax will he collected from a heneficiary only when it cannot be assessed against or collected from the entity, such as when the entity no longer exists or has insufficient funds. Further, it was intended that the tax will he assessed and collected from the beneficiary whose acquisition causes the deficiency before it is asserted against any other beneficiary.

General Explanation of TEFRA, Joint Committee on Taxation, 97th Cong., 2d Sess. 146 (1982).

241. *See infra* Part VI(A).

242. Spouses may incur transferee liability according to the same rules as any other taxpayer. *See infra* Part VII(B).

Such reasoning is circular. The Treasury never has explained adequately why one spouse should be required to certify the accuracy of the other's tax items.

3. From Strict Liability to Due Diligence

The courts interpret the innocence test as whether a "reasonable person under the circumstances" would have reason to know of the understatement.[243] The test sounds as if it were imported from tort law. In fact, much of the case law reads as if the wife actually owed some duty of care to protect the IRS from negligence or fraud on the part of her husband. Such a duty would be analogous, for example, to the duty of an accountant to inquire into the facts of underlying transactions that appear suspicious in order to protect third persons who may rely on the accountant's client's financial statements.[244] If such a duty existed, the appropriate damages for its breach would be to make good the government's loss, namely, to pay the husband's taxes plus interest.

The law recognizes no duty on the part of a spouse to act as an auditor for the IRS. It appears, however, that the innocent spouse rules accidentally have created the equivalent of such a duty. If such a duty were recognized, however, some rationale for joint liability would be provided. It is perhaps for this reason that the law appears to be moving in the direction of replacing the rule of strict liability under I.R.C. section 6013(d) with a theory of negligence or due diligence as the principle for imposing joint return liability.[245]

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243. *See, e.g.*, Sanders v. United States, 509 F.2d 162, 170 (5th Cir. 1975); *see also supra* note 152 and accompanying text.

244. Courts have imposed liability on accountants in connection with public offerings of securities. *See, e.g.*, SEC v. Seaboard Corp., 677 F.2d 1301, 1311 (9th Cir. 1982). *Seaboard* held that an accountant may be liable for securities fraud under rule 10b-5, 17 C.F.R. § 240.10b-5 (1989), if the accountant knows or is reckless in not knowing that facts reported in a prospectus materially misrepresent the financial condition of issuer. Rule 10b-5 was promulgated by the Securities and Exchange Commission under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982).

245. It would not be inaccurate to describe the present state of law, at least as applied to grossly erroneous items that exceed the dollar floor limitations, as follows: the wife is not liable for her husband's taxes on a joint return unless she knows or should have known of the erroneous item, *i.e.*, fails to exercise due diligence. This formulation of the law is of course backwards: the statute imposes strict liability in the absence of relief for due diligence.

The two formulations are fully equivalent in effect, but they carry vastly different implications. If the wife acquires liability only through negligence, the rule implies that she originally has no such liability. In short, it is logically a rejection of joint return liability, to the extent that such liability means the wife is herself the taxpayer with respect to her husband's taxes.

There is a difference between incurring a tax liability, and being the taxpayer with respect to it. Thus, an employer is liable for the withholding of tax from an employee, but the employer is not the taxpayer, and as a result can deduct withheld taxes as compensation expense, despite the prohibition against deducting federal income taxes under I.R.C. § 275 (1982 & Supp. V 1987). One can never avoid one's own taxes merely by showing that there was no reason to know of an item of

It is appealing to view the wife's liability as caused by some fault of her own, rather than as the result of a rule that appears purely arbitrary and therefore intuitively unfair. All the proposed reforms of the innocent spouse rules discussed above would enlarge the areas governed by negligence and contract the area of strict liability. Eliminating the dollar limitations on relief, eliminating the requirement that erroneous claims must have no foundation in fact or law, and reversing the burden of proof as to innocence all would move the law in the same direction. Unfortunately, however, joint return liability based on fault is only superficially appealing and will not survive analysis.

4. Wife As Return Preparer

A comparison with the legal duty upon return preparers is instructive. Return preparers are liable for the penalty under section 6694(a) for negligent disregard of rules and regulations if they know or have reason to know that a taxpayer has provided them with inaccurate or incomplete information: in short, a preparer has a duty to inquire into questionable items.[246] The due diligence test under the innocent spouse rules is very similar to the test under section 6694(a). Ordinarily a preparer will not be familiar with the taxpayer's personal finances and will not know of extraordinary expenditures or a lavish lifestyle of the taxpayer. If the preparer, however, is aware of inconsistencies between the taxpayer's actual transactions and those reported because he or she is a friend or family member of the taxpayer, or because he or she has prepared related returns, the accountant will be liable for the penalty if he or she fails to inquire into the apparent discrepancies.

At this point the analogy to the duty of preparers breaks down. The penalty for a preparer's negligence is 100 dollars per return.[247] The government never has attempted to require a negligent preparer to pay the resulting deficiency of the taxpayer. Yet the government has a much stronger case for reliance on a preparer's professional integrity and expertise than on a wife who may know little or nothing about taxes, and who does not purport to be responsible for the correctness of her husband's tax items. Moreover, the wife claiming innocence is not a preparer at all.[248] If the husband prepared the return, it is difficult to

income. To be sure, this leaves out the benefit test, but it is at least thinkable that an item of taxable income might provide no economic benefit because, for instance, it becomes useless before the taxpayer becomes aware of its existence.

246. *See* I.R.C. § 6694(a) (1982); *see also* Rev. Rul. 80-265, 1980-2 C.B. 378 (holding that a preparer of a corporate return indicating interest paid to a shareholder has a duty to inquire when preparing a return of a shareholder who did not furnish any information as to interest received).

247. I.R.C. § 6694(a) (1982).

248. It is nearly unthinkable that a wife who in fact prepared the return might achieve inno-

see why the IRS should have any right to rely on the wife's signature for the accuracy of his tax items.

The duty of due diligence on the part of preparers arises from their professional responsibility in a system of self-assessment which is so complex that professional assistance is generally essential to its administration. If the taxpayer is unwilling to provide complete information to the preparer, the preparer is free to resign, and the taxpayer will be forced to seek another preparer, who will be subject to the same obligations as the first. In such circumstances, it makes sense for the IRS to claim some right to rely on the preparer's due diligence.

The wife's duty of due diligence did not arise from any perception of a need to protect the Treasury from irresponsible certification of the husband's return. Quite the reverse, the duty arose from a perception that the wife needs protection from IRS collection powers under section 6013(d).[249]

If the wife is dissatisfied with the return as prepared by her husband or his accountant, assuming she reads the return and makes inquiries, she can try to persuade her husband to make the return accurate, or she can refuse to sign. She already has an incentive to encourage her husband to file accurately, namely, to keep him from potential difficulties with the IRS that may subject him to serious financial or even criminal penalties. If he refuses and insists on her signature, she risks the stability of her marriage by defying him.

The IRS gains no assurance that the husband's tax items are correct when the wife signs the joint return.[250] The IRS has no reason to rely on her signature as to the accuracy of his part of the return; her signature is likely at best to mean no more than that she considers marital tranquility more important than involving herself in her husband's financial affairs.

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cent spouse status under current law (although nothing in the statute would appear to prevent it).

249. *See* I.R.C. § 6013(d) (1982). If Congress had not overruled the *Cole* case, and proportional (separate) liability were the general rule for joint returns, it would he extremely unlikely that anything like the current innocence requirements would have developed to impose liability on the wife for her husband's taxes. There would be no duty of due diligence for her to breach, and no reliance interest on the part of the IRS. It would be obvious that the wife's signature related only to her own tax items. Even if she prepared the return for her husband as well, she would at worst become liable for the preparer penalties.

250. On the other hand, the IRS might adopt a policy of routinely auditing husbands who file separately, on the ground that their wives may be filing separately in order to avoid liability for dubious items. If so, the wife's separate return would be regarded as a tacit denunciation to the IRS of the husband's return. It of course would be intolerable to impose such a duty explicitly: the wife must either pay the husband's delinquent taxes herself, or notify the IRS of tax fraud.

5. Innocence Requirement Defeats the Purpose of Joint Filing

A duty of due diligence requires the wife to become involved in tax matters. The original purpose of introducing joint returns was, at least in part, to relieve her of that burden. Joint returns originally were introduced simply for convenience. Both taxpayers and the government benefited from the convenience of filing one return instead of two, long before tax rates and joint liability became issues. Under a due diligence requirement, the wife may not, under peril of joint return liability, entrust the family tax affairs to her husband. In effect, both spouses must prepare the joint return, which frustrates the original intention behind joint filing. Requiring both spouses to prepare the return is wasteful and inefficient. One may suppose that in most families one spouse takes responsibility for preparing the return, and the other simply provides any relevant information and records. Under such circumstances, it is unclear why the IRS should be able to assert that it is entitled to rely on the nonpreparing spouse's signature for anything but that spouse's own taxes.

V. Other Justifications for Joint Return Liability

A. *Tax Benefit of Income Splitting as Justification*

Policy reasons for imposing joint and several liability for the privilege of filing a joint return are obscure at best. The widely held belief that such liability is the price one must pay in exchange for the tax benefits of income splitting is not correct either historically or logically. As a matter of history, the statute has required joint and several liability since 1938, but income splitting was not introduced until ten years later.[251]

Income splitting permits couples with substantially disproportionate incomes to lower their taxes by dividing their aggregate income into two equal parts that are taxed separately, so that some of the higher earner's income may be taxed in a lower bracket. The effect of income splitting is built into the tax tables for married taxpayers filing jointly. When income splitting first was enacted in the Revenue Act of 1948,[252] it was a relatively simple concept. The effect on the rate of tax was the same as if each spouse separately reported one-half of his or her own income together with one-half of the other spouse's income, just as couples were doing in the community property states on the authority

251. *See supra* notes 51, 69, and accompanying text.

252. *See* Revenue Act of 1948, *supra* note 69, § 301, 62 Stat. at 114.

of *Poe v. Seaborn*.[253] Indeed, that was precisely the intended effect, because Congress's purpose in enacting income splitting for joint filers was to equalize the tax rates for married couples in common law states who were disadvantaged in comparison to couples in community property states.[254]

If joint and several liability had any justification as a quid pro quo for lower taxes, Congress plausibly might have imposed it on all married couples who by right of their marital status enjoy the option of choosing whichever filing status is less costly. In every year since 1918, when joint returns were first introduced as an optional filing status,[255] some couples have paid less tax by filing separately.[256] Why not charge them some price for this benefit? It is all a matter of perspective. If joint returns originally had been mandatory for married couples in 1913, as they were in the United Kingdom,[257] for example, and a new option of separate filing had been introduced afterwards, the new option, which could avoid aggregating two incomes into a higher tax bracket, would have been regarded as the valuable privilege. The benefits to couples in both filing categories ultimately derive from the privilege of choosing the category in which they will pay the least tax.

Even if one supposes *arguendo* that the enjoyment of income splitting should require the exaction of some price, the quid should bear some reasonable relation to the quo. The tax saving from filing jointly may be insignificant, however, compared to the total tax liability thereby assumed. For the benefit justification to make sense, the maximum liability assumed should be the saving achieved by filing jointly over filing separately.

It is not entirely clear how the tax benefits of income splitting should be calculated, and often it is not clear whether such benefits exist at all. For many couples who are subject to joint return liability, there is a tax benefit only when joint filing is compared to married filing separately. For most two-earner couples, there is a tax detriment if

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253. 282 U.S. 101 (1930).

254. *See* H.R. REP. No. 1040, *supra* note 78, at 12, *reprinted in* 1941-2 C.B. at 422-23.

255. *See* Revenue Act of 1918, *supra* note 55, § 223, 40 Stat. at 1074.

256. Before income splitting was enacted, it was usually advantageous for high income couples who both had income to file separately in order to avoid aggregating their incomes into a higher bracket. If one spouse had losses, however, it was advantageous to file jointly so that the losses could offset the other spouse's income.

After income splitting was introduced in 1948, it became more rare, but still possible, that couples could reduce their taxes by filing separately. For example, one spouse may have large medical expenses or casualty losses that would be allowable on a separate return, but disallowed on a joint return because they are allowable only to the extent they exceed 7.5% and 10% of adjusted gross income, respectively. *See* I.R.C. § 213(a) (Supp. V 1987); *id.* § 165(h)(2)(A)(ii); *see also infra* note 265.

257. *See* Ritz, *supra* note 128, at 445 & n.59.

joint filing is compared to filing as single persons, a detriment known as the marriage penalty.

1. Marriage Penalty

The marriage penalty arose in 1969 as a result of amendments to the 1948 rate structure that Congress enacted in response to complaints of single taxpayers.[258] A single taxpayer could be liable for as much as forty-one percent more than the tax on a couple having the same aggregate income but filing jointly. In 1969 Congress reduced the rate on single persons so that their tax would never exceed 120 percent of the tax payable by married couples at the same income level.[259]

Married persons filing separately, however, are not permitted to use the reduced rate applicable to unmarried persons. Permitting them to do so would reintroduce the very problem of geographical disparity that income splitting was designed to resolve.[260] For that reason, married persons filing separately are required to use the old rate for unmarried persons, now called the rate for married filing separately.[261]

As a result, married persons now often must pay higher taxes than they would if they were unmarried: hence the terms "marriage penalty" and "marriage tax."[262] The marriage penalty affects two-earner couples, and as their incomes become more nearly equal, the penalty increases. For couples whose incomes are substantially disproportionate and for one-earner couples, the joint return rates remain advantageous. Under 1988 rates fifty-three percent of all couples will receive an average marriage subsidy of about 609 dollars, and forty percent of all couples will pay an average marriage tax of about 1100 dollars. The total of the marriage subsidy is estimated at 17.4 billion dollars, but the total marriage penalty is greater, at 24 billion dollars.[263]

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258. *See* S. REP. No. 91-552, 91st Cong., 1st Sess. 262 (1969).

259. *See id.*

260. Otherwise, couples resident in community property states could reduce their taxes below the joint return rate by dividing their income evenly under *Poe v. Seaborn* and filing separately using the new reduced rate for unmarried persons. Couples in common-law states could not reduce their taxes by filing separately, however, unless their incomes were in fact approximately equal.

261. Thus income splitting now produces a tax that is higher than twice the tax on half the same income reported by an unmarried taxpayer; however, the joint tax is equal to twice the tax on half the income reported as married filing separately.

262. The problem was exacerbated when the Tax Reform Act of 1986 repealed former § 221, the deduction for two-earner married couples, which provided some limited relief from the marriage penalty. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 131, 100 Stat. 2085, 2113; *see also* Subotnik, *The Marriage Tax Revisited: An Analysis of the Tax Consequences of Marriage*, 90 W. VA. L. REV. 1127 (1988).

263. *See* Rosen, *The Marriage Tax Is Down but Not Out*, 40 NAT'L TAX J. 567, 573-74 (1987). The marriage tax was reduced somewhat by the rate changes of the Tax Reform Act of

Thus, it cannot accurately be said that the status of marriage always provides a valuable tax option. For two-earner couples, marriage often occasions an unfortunate and expensive disadvantage because neither filing status for married persons is as beneficial as not being married at all.[264] Under current tax rules, neither marital status is good or bad in itself; everything depends on the taxpayer's situation in the tangle of rules. The argument that income splitting justifies joint return liability seems hollow for that forty percent of married couples who suffer the marriage penalty. While they may be better off filing jointly than filing separately, they would be still better off if they had never married, or were divorced. From this vantage point, filing jointly, as ninety-nine percent of married persons do, involves an overall tax detriment, rather than a benefit. If joint return liability were justified on a quid pro quo theory, the liability probably should have been abolished in 1969, when the marriage penalty arose.

2. Variability of Benefits

The tax system is designed almost to force married persons to file jointly rather than separately, primarily through the irresistible incentive of income splitting.[265] The joint return aptly has been called

1986, and the subsidy is somewhat higher than before.

It does not appear that Rosen's calculations take into account the right of spouses to offset each other's gains and losses on a joint return, but, on the other hand, it is not clear what difference that would make if it were taken into account.

264. The marriage penalty was held to be constitutional in the United States but unconstitutional in Germany. *See* Druker v. Commissioner, 697 F.2d 46 (2d Cir. 1982) (upholding the constitutionality of the marriage penalty in a test case brought by a lawyer and his wife who filed separately but attempted to use the rate table for unmarried persons). The court conceded that the penalty had an adverse effect upon marriage, but said that the effect was merely indirect, and that couples are not thereby "absolutely prevented" from getting married. The Drukers had in fact divorced by the time of the decision in order to escape the marriage penalty, and continued to live together. *Id.* at 50.

This result contrasts with the very similar constitutional objection that was successfully raised in Germany against a marriage penalty arising from compulsory aggregation of both spouses' incomes on mandatory joint returns. *See infra* Part VI(A)(2).

265. There are also other tax detriments to married persons filing separately, however.

The general rule for items of deduction, exemption, exclusion, or credit is that each spouse filing a joint return is entitled to the same deductions to which he or she would be entitled if single, unless otherwise specified. Thus, trade or business expenses, for example, are generally deductible under I.R.C. § 162 (1982), without any disadvantage to joint filers. There are many items of deduction, exemption, exclusion, or credit, however, which have their own particular restrictions for joint filers. Such rules do not appear to evidence any consistent philosophy, except that nearly all such sections work to the disadvantage of married persons. Perhaps the philosophy is that an overly generous benefit is already given in the form of income splitting, and joint filers should be required to relinquish some of this benefit through the special restrictions. If so, the theory is seriously flawed, because the recapturing restrictions strike equally those who are benefited by joint returns and those who are already injured by the marriage penalty.

In any event, an unfortunate result is that elaborate calculations must sometimes be made to determine whether it is more advantageous to file jointly or separately. Note here that several of the limitations listed below seem to have the purpose of discouraging married persons from filing separately, perhaps to prevent such status shopping.

Wherever items involve dollar limits or percentage of income limitations, there are almost always special rules for joint filers. Nearly all such sections tend to reduce the advantage of filing jointly. Many sections prescribe dollar limits for deductions but allow joint filers a deduction that is something less than twice the amount allowable to a single person; often it is the same amount as if the joint return were a single person. Married persons usually cannot avoid the problem by filing separately, however, because the statute generally allows only half the joint deduction to each spouse filing separately, and sometimes nothing at all, rather than the amount allowable to unmarried taxpayers. Such sections include, for example: I.R.C. § 55(d) (Supp. V 1987) (providing an alternative minimum tax exempt amount, which is $40,000 for joint returns, $30,000 for singles, and $20,000 for married filing separately); *id.* § 63(c)(2) (providing the standard deduction, which is $5000 for joint returns, $3000 for singles, and $2500 for married filing separately); *id.* § 121(b) (1982) (providing a one-time exclusion of gain from sale of a principal residence, which is $125,000 for joint filers and singles, but $62,500 for married filing separately); *id.* § 129(a)(2) (Supp. V 1987) (providing the dependent care exclusion, which is $5000 for joint returns and singles, but $2500 for married filing separately); *id.* § 163(d) (1982) (providing the investment interest limitation, currently being phased out, which is $10,000 for joint returns and singles, but $5000 for married filing separately); *id.* § 163(h)(3) (Supp. V 1987) (providing the qualified residence interest deduction, which permits deductions for two residences in the same manner for a joint return as for a single person, but which under § 163(h)(5)(A)(ii) limits married persons filing separately to only one residence each); *id.* § 179(b) (1982 & Supp. V 1987) (limiting the election to expense depreciable business assets, which is $10,000 for joint returns and singles, but $5000 for married filing separately); *id.* § 217(b)(3) (1982) (providing the two moving expense limitations for housing, which are $3000 (purchases) and $1500 (leases) both for joint returns and for singles, but reduced to $1500 and $750, respectively, for married filing separately); *id.* § 219(g)(3)(B) (Supp. V 1987) (providing the pension plan applicable dollar amounts, which are $40,000 for joint returns, $25,000 for singles, but $0 for married filing separately).

Some sections seem to evidence a new category of specially disfavored taxpayers: married spouses filing separately who did not live apart at all times during the taxable year. These include: *id.* § 86(c) (providing the Social Security exclusion base amount, which is $32,000 for joint returns, $25,000 for others, but $0 for married filing separately and not living apart); *id.* § 469(i)(5) (providing limitations to the $25,000 offset to the passive loss rules for rental real estate activities, which treat joint returns and singles in the same manner, provide only half of such amounts to married filing separately, but nothing at all to separate filers not living apart at all times during the taxable year).

Also generally unfavorable to married persons are those sections imposing floors to deductibility that are expressed as a percentage of adjusted gross income. Aggregation of the spouses' incomes increases the threshold floor amount that must be exceeded in order to qualify for the deduction. These sections include: *id.* § 67 (providing a 2% floor on miscellaneous itemized deductions); *id.* § 165(h)(2)(A)(ii) (providing a 10% floor for personal casualty losses); *id.* § 213(a) (providing a 7.5% floor for medical expenses). These floors are determined as a percentage of the AGI on the return, whether it is joint or separate, and thus the floor may be lowered by filing separately, and in some cases that will result in a net tax saving.

An income ceiling to the earned income credit under § 32(b)(2) phases out the credit as a percentage of AGI. *See id.* § 32(b)(2). Aggregating income is thus disadvantageous to married taxpayers, but married persons must file jointly in order to claim the credit at all and thus cannot escape aggregating their incomes.

Aggregation of income is also unfavorable for the § 21 dependent care credit, because the percentage of employment related expenses (household services and dependent care) allowable as a credit declines as aggregate AGI exceeds $10,000. *See id.* § 21(a)(2). The fact that the couple's employment related expenses are aggregated on a joint return will not help because the credit is also limited to the amount of the lesser-earning spouse's earned income under *id.* § 21(d)(1)(B).

"mandatory in fact".[266] The benefits of income splitting, comparing now the permissible statuses of filing jointly versus married filing separately, are highly variable, depending upon the amount of the couple's total joint income and the degree to which the earnings of the spouses are disproportionate.[267] The greatest benefits, as a percentage reduction of taxes over separate filing, are enjoyed by upper middle class, single-earner families. In principle, the maximum absolute amount anyone could save filing jointly over filing separately through the rate system alone is 3194 dollars, and this saving would be available to single-earner couples having a taxable income between 34,350 dollars and 71,900 dollars.[268]

For both larger and smaller household incomes there may be no

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The problem cannot be avoided by filing separately, because a married person cannot claim the credit at all except on a joint return, unless (i) the taxpayer is legally separated under a decree of divorce or separate maintenance, or (ii) the taxpayer maintains a separate household (of which the spouse is not a member during the last six months of the year) for more than half the year that is the principal abode of a qualifying dependent, and furnishes over half the cost of maintaining such a household. *Id.* § 21(e)(4).

A few dollar limited deductions do not appear unfavorable to joint filers, at least in the sense that such filers are no worse off than two single persons. These include: *id.* § 151 (1982) (personal exemption amounts); *id.* § 911(b)(2) (Supp. V 1987) (exclusion of up to $70,000 per year of foreign earned income).

At least one dollar limited deduction may sometimes put married taxpayers filing jointly in an even better position than two single persons: § 1244(b) allows a deduction for losses on small business stock of $50,000 per year, or $100,000 for married persons filing jointly, even if only one spouse suffered the entire loss. *See id.* § 1244(b) (1982).

Finally, the limitations on the charitable deduction in § 170(b), which are expressed as percentages of AGI, may also sometimes favor joint filers because the aggregation of income may produce a greater AGI and hence a higher ceiling to the deductible amount. *See id.* § 170(b) (1982 & Supp. V 1987).

It is difficult to estimate how many of the couples currently filing separately do so for reasons of privacy rather than for tax benefits. Also, some couples may file separately because a state tax advantage outweighs the federal tax disadvantage, and the state tax rules require use of the same filing status as that used for federal purposes. For example, the Connecticut progressive tax on dividends and capital gains in excess of certain floor amounts undoubtedly induces some couples to file separately in order to split such items between joint owners on two returns.

266. *See* Bittker, *supra* note 117, at 140 n.55.

267. The benefits of income splitting derive entirely from the progressive rate structure. Taxing couples by doubling the tax on one-half of their combined income can only produce a savings if some income is thereby moved into a lower tax bracket. In a flat rate tax system, income splitting would have no effect. The more equal the spouses' incomes, the smaller the benefits. A married couple with exactly equal incomes derives no benefit from income splitting as such, because the joint tax is always equal to twice the tax on one-half the combined incomes filing separately.

268. This result is calculated as follows: filing jointly, an extra $14,875 of the husband's taxable income will be taxed at 15% rather than 28%, for a savings of $1934. Next, the wife's exemption of $2000 and standard deduction of $2500, which are useless to her if she has no income, will permit an additional $4500 of the husband's income otherwise taxable to the husband at 28% to escape tax altogether on a joint return. With taxable income over $71,900, however, the 15% bracket begins to be phased out under § 1(g), and the benefits decline. This calculation ignores the effect of exemptions for dependents and the odd effect of the last sentence of § 1(g)(2). *See* I.R.C. § 1(g)(2) (Supp. V 1987).

benefit at all to filing jointly. At 1989 rates, if either spouse has taxable income over 71,900 dollars, the five percent surtax under section 1(g), which phases out the fifteen percent bracket, effectively eliminates all brackets lower than twenty-eight percent, and the effect is that of a flat tax.[269] For such persons there no longer may be any rate advantage to filing jointly, but joint and several liability applies nevertheless.

At lower income levels the benefits of income splitting are hardly any more proportional to the liabilities assumed. The following example illustrates this point: A two-earner family with two children and combined income of 38,300 dollars,[270] of which the wife earns 12,500 dollars[271] and the husband 25,800 dollars, would pay 3795 dollars in taxes filing jointly at 1989 rates. Filing separately, the wife's taxes would be 1200 dollars (taking one exemption) and the husband's would be 2910 dollars (taking three exemptions), making the couple's combined taxes filing separately 4110 dollars. The couple's combined saving from filing jointly is thus 315 dollars, or 7.7 percent of the combined taxes filing separately. The saving results entirely from the fact that 2425 dollars of the husband's taxable income is moved from the twenty-eight percent into the fifteen percent bracket.

If none of the couple's income is in the twenty-eight percent bracket filing separately, the couple will save nothing by filing jointly. Thus, for two-earner couples in which each spouse earns more than 4500 dollars, the 2500 dollar standard deduction plus 2000 dollar exemption amount, and whose higher earner does not earn more than 23,375 dollars,[272] there is no saving by filing jointly. Because these income figures are very close to the national mean, it appears that a very substantial number, probably over one-third, of all two-earner couples may receive no benefit at all from joint filing under 1989 rates.[273] If the

269. This was evidently the intended effect. Because of an apparent drafting error, however, the last sentence of § 1(g)(2) treats the phase out of the 15% bracket and of the personal exemptions for separate filers as if they filed jointly, with bizarre results for high income couples. Some would incur a penalty as high as $3867.50 for separate filing (those with joint taxable incomes over $250,000, which is relatively evenly divided between them), and others would incur a benefit from separate filing of as much as $546 (certain couples with joint taxable incomes over $180,000, but divided very unequally between them). The results seem unintended. *See* Stuchell, *The Married Filing Separately Anomaly—Is This What Congress Intended?*, 42 TAX NOTES 241, 242-43 (1989).

270. Two-earner families had a median income in 1986 of about $38,300, and one-earner families of about $25,800. STATISTICAL ABSTRACT, *supra* note 43, at 428.

271. Under this assumption, the wife would be contributing 32.6% to total family earnings. The median was 26.7% in 1980. *See* U.S. DEP'T OF LABOR BULLETIN 298, TIME OF CHANGE: 1983 HANDBOOK ON WOMEN WORKERS, tables 1-12, 1-13, at 18-19.

272. These calculations still assume the example with two children. The figure is $19,375 or less if no children and $21,375 if one child.

273. Many would nevertheless suffer a small marriage penalty because the standard deduction is $3000 for a single person, but only $2500 for a married person. *See* I.R.C. § 63(c)(2) (Supp. V 1987). The marriage penalty in the example above is $150. Does this couple have a tax benefit of

lower earners in such couples became aware of the joint return liability they are assuming, and that it is gratuitous and without any benefit to their spouses or themselves, the number of joint returns filed could drop precipitously in favor of filing separately, and the IRS would be overwhelmed with a flood of new returns.

3. Cost Is Borne by the Wrong Spouse

The cost of joint liability usually is paid by the wrong person. The husband ordinarily benefits most (or exclusively, as in the above example) from income splitting as the higher or sole earner, but it is the wife who incurs the larger additional liability for his taxes. She may herself receive little or no benefit from the tax saving, unless one makes the assumption that reducing the husband's taxes always directly benefits the wife. Even when tax refunds are divided equally, as may be common in divorces, the respective liabilities assumed by the spouses are often greatly disproportionate.

In the above example, the wife incurs an additional potential liability of 2687 dollars,[274] which is more than eight times greater than the joint saving.[275] It should be noted that the wife's taxes would be identical whether she files jointly or separately; all the saving is on the husband's side of the return.

The above examples concern liability only for taxes that are explicitly shown due on the return. If the return is incorrect, and it is later found that some of the husband's income was not declared or deductions relating to his income are disallowed, the wife becomes liable for the resulting deficiencies, together with penalties and interest, unless she can qualify for relief as an innocent spouse.

Finally, it should be noted that deficiencies are far more likely to be caused by the husband's misreporting of tax items than by the wife's. Tax cheating is risky behavior, which is probably more common in men than in women.[276] Husbands also generally have more opportu-

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$315 (filing jointly over filing separately) or a tax detriment of $150 (filing jointly because they are not permitted to file as two single persons)?

274. This amount is 70.8% of the joint taxes, which is the husband's proportional share of the taxes filing jointly. The husband assumes an additional liability of $1108.

275. If one makes the assumption that the savings from joint filing are not shared evenly, but that each spouse keeps his or her own share, the imbalance between costs and benefits becomes even more striking. In the above example, the wife's 29.2% share of the savings from filing jointly is $92, but she must assume liability for her husband's $2687 share of the joint taxes, which is an amount 29 times greater than her share of the joint saving.

It is likely in many cases that the IRS saves more by joint filing than the wife, because it is spared the cost of processing an extra return.

276. *See* Kinsey, *Survey Data on Tax Compliance: A Compendium and Review*, in AMERICAN BAR FOUNDATION TAXPAYER COMPLIANCE PROJECT WORKING PAPER 84-1, at 32 (Dec. 1984).

nities both to cheat and to take aggressive reporting positions than wives, because men are more frequently self-employed as professionals or small businessowners than women.[277] Women are more commonly employees, and opportunities for salaried workers to take aggressive or dishonest tax reporting positions are far more limited than for the self-employed.[278]

4. Liability and Rates

There is no necessary connection between joint return tax rates and joint return tax liability. It is perfectly possible for a tax system to impose joint liability without providing a beneficial tax rate for married persons, as federal law did between 1938 and 1948, and as several states within the United States currently do.[279] A tax system just as easily may provide a beneficial rate for married couples, including income splitting, without imposing marital liability, as do Germany and Belgium, for example.[280] Of course, a tax system may provide neither a special rate for joint returns, nor any marital liability, as in several state income tax systems.[281]

B. Justification That Marriage Is an Economic Unit

If joint liability can be justified at all, it is only through an appeal to some special economic nature of the marital relationship. Implicit in the spouses' right to offset each other's gains and losses on a joint return is the idea that each suffers from the losses incurred by the other because their property is somehow pooled: one flesh, one pocketbook.

Before considering whether the one pocketbook theory is an accurate description of the average marriage, some peculiarities may be noted. First, the joint return is and always has been optional each year. The same couple can file jointly one year, separately the next, and then jointly again without restriction, simply according to which status ap-

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277. *See id.*; *see also* STATISTICAL ABSTRACT, *supra* note 43, table 627, at 380.

278. *See, e.g.*, ABA SECTION OF TAXATION & AM. BAR FOUND., REPORT OF THE SECOND INVITATIONAL CONFERENCE ON INCOME TAX COMPLIANCE (M. Durst reporter 1988), *reprinted in* 42 TAX LAW. 705, 716-21 (1989).

In explicit recognition of this fact, a salaried worker in France is permitted a deduction of 20% of salary just in order to offset the lack of opportunity to understate income. Code General des Impots (C.G.I.) art. 158-5; *see also* Martinez & di Malta, Droit Fiscal Contemporain 233 (Paris, Litec 1985).

279. For example, Illinois, Massachusetts, and Michigan, which all have flat rate taxes, employ this system. *See infra* Part VI(B).

280. *See infra* Part VI(a)(2) (Germany); *infra* note 318 (Belgium). The vexing question whether married persons with disproportionate incomes should continue to enjoy a rate advantage over single persons having the same family income is beyond the scope of this Article, which is addressed solely to the question of marital liability on joint returns.

281. Iowa and Maryland take this approach on combined returns. *See infra* Part VI(B).

pears more advantageous in any given year.[282]

Second, joint liability presumes absolute and total pooling of all family property. Such a presumption extends far beyond the degree of sharing prescribed under the community property law of any jurisdiction. All community property regimes recognize some separate property of the spouses that is outside the community and is neither subject to division upon divorce, nor reachable by the separate creditors of the other spouse. Generally, such separate property of each spouse includes property owned before marriage, to the extent it is not subsequently commingled, and the separate gifts and inheritances of each spouse during marriage.[283] Joint return liability is personal to each spouse, however, and thus all property of one spouse becomes subject to the other's tax obligation, even property that would be separate property under community property law.[284]

1. No Actual Sharing of Property Is Required

Couples who file jointly do not necessarily share their property or income more than couples who file separately. Aggregating income and deductions for purposes of computing the tax neither requires nor creates any actual sharing of property.[285] Couples are permitted to file jointly even under circumstances in which it is obvious that they have no intention of sharing anything. There is no requirement, for example, that a couple even be living together in order to file a joint return.[286] Many couples file jointly after separating, sometimes pursuant to the terms of a final property settlement agreement,[287] and sometimes even

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282. After the due date for filing of either spouse has expired, however, the election to file jointly cannot be revoked in order to file separate returns. Treas. Reg. § 1.6013-1(a) (1989). This is of course a necessary backstop to joint and several liability.

On the other hand, a joint return may be filed at any time after separate returns have been filed within three years of the due date of filing. *Id.* § 1.6013-2.

283. *See* Murray, *Problems of Taxation of the Income of Spouses in the Context of Divorce and Separation*, 14 COMMUNITY PROP. J., July 1987, at 20, 23 .

284. *See infra* note 318 and accompanying text. Under Belgian law there is no joint and several liability, but there is a rebuttable presumption that the wife's property may be used to satisfy the husband's taxes. She can rebut by proving the property is her separate property under the applicable matrimonial property regime. *Id.*

285. *See infra* note 334 and accompanying text. In Germany couples who have elected the matrimonial regime of separation of property are not permitted to file jointly and cannot enjoy the benefits of income splitting or of offsetting each other's gains and losses. *Id.*

286. Congress repealed such a requirement in 1944. *See* Income Tax Act of 1944, § 11(a), 58 Stat. 231, 240 (1944) (amending § 51(b) of the 1939 Code).

287. A court may not order a person to sign a joint return against his or her will as part of a property settlement, however, because the Code requires a voluntary election. *See* Leftwich v. Leftwich, 442 A.2d 139 (D.C. 1982) (holding that wife could not be forced to sign a 1978 joint return and thereby incur joint liability when her wages had already been garnished in 1977 and a lien placed on the family house for husband's failure to pay a $10,000 1977 tax deficiency, still

after a final divorce decree.[288] Quite obviously, such couples intend to share little or nothing. Couples file jointly whenever it appears that there is a tax advantage in doing so, or at least when there is no tax disadvantage, and not because they actually share their property.[289]

2. Do Couples Actually Share?

Although the government never has made the argument explicitly, it may be that married couples have been permitted to aggregate their gains and losses on joint returns since 1918 because it appeared that couples in fact share all their property as if it were some sort of common pool. This theory would imply that husbands and wives should be indifferent as to who holds title to property, which is, on this supposition, all in the family anyway.[290] If these were the government's assumptions about family finances, the facts do not appear to support them.

In the 1930s and 1940s, husbands and wives usually did not share all their property to such an extent that they were indifferent as to who had legal ownership. Tax returns from the period, before income splitting was introduced in 1948, show that wealthy married individuals commonly reported large amounts of investment income from separately owned property on separate returns. Moreover, many of the tax reduction techniques of the 1930s and 1940s involving family partnerships, short term trusts, and the like had as their common denominator the husband's retention of control of capital assets while diverting some

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unpaid at time of decision, although husband characterized her stand as "spiteful vindictiveness").

288. Under § 6013(d)(2), a couple need only be married, and not "separated under a decree of separate maintenance," as of the last day of the taxable year to be eligible to file jointly. *See* I.R.C. § 6013(d)(2) (1982). Thus a couple that divorces on January 1 can still file jointly on April 15 for the prior year. It is not altogether clear what "separated under a decree of separate maintenance" means, however. *See* Robinson & Wenig, *Marry in Haste, Repent at Tax Time: Marital Status As a Tax Determinant*, 8 VA. TAX REV. 773, 802-06 (1989).

289. In 1973, however, Representative Richard Fulton of Tennessee introduced the so called "Bonnie Bill." H.R. 9325, 93d Cong., 1st Sess., 119 CONG. REC. 24,253 (1973). This bill would have required any couple wishing to take advantage of income-splitting to attest to an oath stating that both spouses in fact had "equal ownership, management, and control of the income, assets, and liabilities of the marriage partnership, with penalties for perjury and fraud inhering to the oath." ' " 119 CONG. REC. 11,821 (1973) (statement of Rep. Richard Fulton, including testimony of Virginia Cavan given before the House Ways and Means Committee), *cited in* Robinson & Wenig, *supra* note 288, at 775 n.4.

Cf. infra note 334 and accompanying text (requiring that income splitting is permitted only for couples living under a regime of community property).

290. This line of thought would suggest that technicalities of ownership between husband and wife should be ignored in order to avoid opening the door to maneuvering and tax evasion. The argument was made in defense of the Wisconsin income tax that was declared unconstitutional in Hoeper v. Tax Comm'n, 284 U.S. 206 (1931).

The Wisconsin tax required aggregation of family income, including children's income, and imposed joint and several liability on all persons whose income was aggregated. *Id.* at 213.

or all of the annual income, and taxes on the income, to the wife. If husbands had been willing simply to transfer some capital to their wives outright, no such artful schemes would have been necessary.[291]

These observations apply only to couples who owned investment assets, and perhaps nothing can be deduced regarding the vast majority of couples who were less affluent. On the other hand, couples who enjoyed no more than their current income probably were constrained to spend it all on living expenses, which necessarily involved some sharing. In order to be any more precise, one would need to know which spouse had control of spending decisions. Little information appears to be available on the subject from that period. If contemporary behavior is any guide, however, one may assume that the person who earned the money also exercised control over spending.[292]

3. Recent Studies of Family Sharing

Two recent surveys of contemporary intrafamily financial behavior do not point in the direction of complete sharing of income or savings as the family norm. Shere Hite reports in a study of 4500 questionnaires returned by American women, half of whom were married, that seventy-five percent of wives who work are working at least in part for the financial independence it brings, and that eighty-two percent of women under twenty-five say they never want to be financially dependent on a man.[293] These women clearly do not regard their property as belonging equally to their husbands. Hite further reports that only thirty-six percent of two-earner married couples pool their income into one account. From the anecdotal evidence presented, it appears that such couples typically may be young or have low incomes.[294] The rest either split expenses evenly, usually out of separate accounts (twenty-eight percent), or each pays for specific expenses (thirty-two percent), apparently also out of separate accounts.[295] Hite's study did not reveal statistics about sharing of savings or capital assets, but presumably such sharing is much less common than for current expenses, especially for assets owned before marriage.[296]

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291. *See generally* Jones, Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s (Legal History Program, Institute for Legal Studies, University of Wisconsin-Madison Law School Working Paper 2:5) (1987), *reprinted in revised form in* 6 LAW & HIST. REV. 259 (1988).

292. *See infra* Part V(B)(3).

293. S. HITE, WOMEN AND LOVE: A CULTURAL REVOLUTION IN PROGRESS 432, 438 (1987).

294. *Id.* at 445.

295. *Id.* at 443-47.

296. *See* Dulude, *supra* note 52, at 88-89 (discussing Pahl, *Patterns of Money Management Within Marriage*, 9 J. Soc. POL'Y 313, 314 (1980)). Dulude summarizes Pahl's findings as follows:

> Applying this information to determine whether spouses generally pool and share all or

Blumstein and Schwartz, in their study of some 12,000 American couples, reported that more than two-thirds of married persons favor pooling over keeping money separate.[297] According to the study, women generally favor keeping their own money separate more than men because it gives them some autonomy to make purchases without having to ask permission of their husbands. The percentage of married persons reported to favor pooling increased with the number of years the persons had been married. Pooling seems to be regarded as an index of commitment to the marriage, and prenuptial agreements that limit pooling are regarded as evidence of a limited commitment.[298]

Blumstein and Schwartz' findings are somewhat ambiguous for our purposes, however, because the authors inquired into attitudes toward pooling and not into actual behavior. Because their respondents regarded pooling as an index of commitment to marriage, and commitment is seen favorably, it follows that the respondents also will regard pooling as desirable. For that reason, the results probably cannot be taken as a measure of actual sharing without serious risk of overstatement. For example, a key question asks whether "the two partners should pool all their property and financial assets,"[299] which presumably includes even assets acquired before marriage. Sixty-three percent of women and sixty-seven percent of men married two years or less answered in the affirmative.[300] It seems unlikely, however, that couples in such numbers actually transfer their separate property into joint ownership upon getting married. The newlywed husband may think of his car as now theirs, but it probably will not occur to him to change its registration.

Blumstein and Schwartz found that the more strongly their respondents believed in marriage as a lifetime institution, the more likely they were to favor pooling. Approximately half of the married persons without strong commitment to the institution of marriage favored pool-

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

Id. at 89. Dulude's interpretation of Pahl's study has been criticized, however, partially upon the ground that Pahl's reports all derive from a center for battered women and are therefore unrepresentative. *See* McIntyre, *Tax Justice for Family Members After New York State Tax Reform*, 51 ALB. L. REV. 789, 792 n.17 (1987).

297. P. BLUMSTEIN & P. SCHWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX 94-109 (1983).

298. *Id.* at 96.

299. *Id.* at 608.

300. *Id.* at 95.

ing.[301] The authors concluded that the more couples are committed, the more they favor pooling, and the more people pool, the more committed they become.[302] This conclusion seems very plausible, as does the converse: the less couples are committed, the less they favor sharing, and the less they share, the less they are committed. It follows that the couples most likely to divorce are those least likely to pool their assets. Thus, in the most critical cases—those involving separation and divorce—the one pocketbook model of marriage provides the least support for imposing joint return liability.

4. Sharing Cannot Justify a Shift in Liability

At most, one might assume that each spouse is to some extent economically benefited if the other spouse has property or income, because the burden of household expenses may be shared. This observation might indicate that the family's ability to pay taxes is enhanced when there are two earners,[303] and that married couples should therefore be taxed on their aggregate incomes and should not be permitted to file separately using the same rate as unmarried persons. The argument, however, cannot justify any transfer of tax liability from one spouse to the other, and it may be noted, the Treasury never has advanced any such argument.

VI. Marital Liability in Other Jurisdictions

A. *Foreign Jurisdictions: Marital Liability in the United States Is Unique*

No other country in the developed world permits its government to collect a husband's taxes from a divorced wife. The United States is unique, at least among the major industrial nations, in making husbands and wives personally liable for payment of each other's income taxes as a general rule. The trend among the developed nations is toward individual taxation, and away from joint or family taxation. As of 1977, of the twenty-four nations in the Organization for Economic Cooperation and Development (OECD), fourteen allowed separate taxation of husbands and wives, and seven of those had adopted separate

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301. *Id.* at 104.

302. *Id.* at 559 n.8. Note, however, that the divorce rate is at or above the national average in all the community property states. *See* Statistical Abstract, *supra* note 43, table 134, at 88. This may tend to contradict the general statement, or more probably, it may mean that community property law has little or no effect on sharing during the marriage.

303. For characteristic expressions of this assumption, see Hoeper v. Tax Comm'n, 284 U.S. 206, 219-20 (1931) (Holmes, J., dissenting); H.R. Rep. No. 1040, *supra* note 78, at 19-20, *reprinted in* 1941-2 C.B. at 429. Both expressions were made in the context of justifying compulsory aggregation of income for married persons in a progressive rate system.

taxation since 1970.[304]

Even in countries in which the couple or the family is treated as the basic tax unit for computational purposes, it is rare for spouses to be held liable for each other's taxes, particularly for the taxes on earned income. Of the major industrial countries, only the United Kingdom, France, and the United States impose any marital liability for the other spouse's earned income.[305] In the United Kingdom, marital liability applies only to the husband; the wife never can be taxed on the husband's income.[306] In France, the wife may be taxed on the husband's income if she still is living with him in the same household, but separated, divorced, widowed, or abandoned women virtually are exempt from marital liability under administrative practice.[307] The United States appears to be alone in requiring women in such situations to pay their (ex-)husbands' taxes.

The rate of divorce in the United States is by far the highest in the world: twice as high as in Canada, the United Kingdom, Australia, Sweden, or West Germany; three times higher than in France; and twenty times higher than in Italy.[308] It is thus particularly striking that the United States is alone in allowing its government to collect a husband's taxes from his divorced wife, because it is in the United States that

304. OECD countries having individual taxation before 1970 were as follows: Australia, Canada, Greece, Japan, New Zealand, Portugal, and Turkey. Those adopting some form of individual taxation between 1970 and 1977 were Austria (1973), Belgium (1976), Denmark (1970), Finland (1976), Italy (1977), Sweden (1971), and the United Kingdom (1972).

OECD countries having joint taxation in 1977 were the following: Germany, Iceland, Ireland, Luxembourg, Norway, Spain, Switzerland, and the United States. Countries listed as baving family taxation were France and the Netherlands. *See* COMMITTEE ON FISCAL AFFAIRS, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE TREATMENT OF FAMILY UNITS IN OECD MEMBER COUNTRIES UNDER TAX AND TRANSFER SYSTEMS 15-17 (1977). Ireland, Norway, and the Netherlands have since introduced separate taxation for earned income. *See, e.g.*, COMPARATIVE TAX SYSTEMS: EUROPE, CANADA, AND JAPAN 8 (J. Pechman ed. 1987) (Netherlands) [hereinafter COMPARATIVE SYSTEMS].

While the trend is clear, the actual situation in many of the countries listed is a great deal more complex and difficult to classify than the above list would suggest. "Joint" taxation is ambiguous. It may mean that returns may or must be made jointly of aggregate income of the spouses; it may mean in addition that special rates apply to such joint returns; and finally it may mean that the spouses are jointly liable for some or all of the tax under varying circumstances.

305. *See generally* COMPARATIVE SYSTEMS, *supra* note 304. No marital liability is imposed at all in Australia, Canada, Japan, Italy, Spain, and Sweden. *See generally id.* Neither Germany nor Belgium imposes joint and several liability of the spouses, despite the provision of joint returns with favorable income-splitting rates in both countries. *See infra* notes 318, 333-34 and accompanying text.

306. *See supra* note 257 and accompanying text.

307. *See infra* notes 316-31 and accompanying text.

308. *See* S. HEWLETT, *supra* note 39, at 412 n.55. In 1983 it was projected that half of all first marriages in the United States would end in divorce and that 41% of all people of marriageable age would at some time experience a divorce. P. BLUMSTEIN & P. SCHWARTZ, *supra* note 297, at 33-34.

women have the greatest need for protection from consequences of divorce.

Moreover, in most European countries divorced women and their children are afforded far greater economic protection than in the United States. In Sweden and France, for example, a government agency pays court ordered amounts of support directly to the wife, and the husband pays the support to the agency. These payments are guaranteed to the wife, whether or not the husband honors his support obligation. If the husband is unable to provide a sufficient amount for reasonable support in the first instance, courts will order adequate support in any case, and the agency will make up the difference.[309] Also, many European countries have government provided day care and generous policies of maternity leave for working mothers, as well as universal free health care.[310] These benefits relieve divorced women in Europe from significant economic burdens faced by women in the United States. The insecure economic position of divorced women in the United States is exacerbated by the tax rule imposing joint return liability.

The United Kingdom has an extraordinarily complex and archaic system of rules[311] under which the husband alone is required to file a return of aggregate family income, and sometimes may be held liable for the wife's taxes, unless certain elections are made. As of April 6, 1990, however, the United Kingdom will abolish the old system and institute separate returns with separate liability for the tax.[312] The current system will therefore not be described here.

Most other countries, including Canada, Australia, and Japan, have only separate returns and no liability shifting.[313] Some other countries require the higher earning spouse to pay the tax on the other spouse's investment income, as in the Netherlands.[314] Sweden imposed the same rule until 1987, when it switched to completely separate returns and separate liability.[315]

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309. S. HEWLETT, *supra* note 39, at 68; *see also* McLindon, *supra* note 41, at 401.

310. *See* S. HEWLETT, *supra* note 39, at 91-99.

311. *See* Kerridge, *Taxation and Marriage*, 47 CAMBRIDGE L.J. 77 (1988). Kerridge wrote of the United Kingdom's system:

> Nobody in his right mind would, were he asked to draw up a set of rules for the taxation of married couples, consider enacting from scratch a system remotely resembling tbe shambles we have today. It is the result of a series of historical accidents and owes little or nothing to any particular view or purpose.

Id. at 77 (footnote omitted). Exactly the same might be said of the American system.

312. *See* Finance Act 1988, § 32, scbed. 14, Part VIII, *repealing* Tax Act 1988, § 279; *see also* E. SIMON'S TAXES § 5.103A.

313. *See* COMPARATIVE SYSTEMS, *supra* note 304, at 22.

314. *See id.* at 8 (Netherlands); *id.* at 26-27 (Japan).

315. *See id.* at 5.

A brief sketch of the rules for the income tax liability of husbands and wives in two European countries that do impose some form of liability shifting, although more in theory than in practice, will provide some useful comparisons. The countries to be examined are France and Germany.

1. France

Married persons living together in France are taxed on a household basis (foyer fiscal) and are required to aggregate their income, together with that of their children under eighteen years old, and report it on a joint declaration signed by both spouses.[316] A family quotient system not only permits income splitting for husband and wife, but also allows additional splitting for minor children. Thus, a husband and wife each has one "part" for calculating the family quotient, the first and second children have one-half part each, the third child one part, the fourth and succeeding children again one-half part each.[317] The aggregate household income then is divided by the number of parts, the progressive tax rate is applied to the quotient, and the resulting tax is then multiplied by the number of parts again to determine the final tax.

A married woman may be forced to pay her husband's taxes in France, but relief provisions make such collections very rare in practice, unless the couple still is living together at the time of collection.[318] Each spouse is jointly liable (*tenu solidairement*) for the entire tax, including penalties and interest.[319] Either spouse may apply for release from the joint obligation of payment, however, by requesting administrative relief (*juridiction gracieuse*). The relief will be granted in cases in which it appears that the spouse has been a victim of the other spouse's irresponsibility, that the spouse has not been complicit in any fraud, or that the spouse is financially incapable of bearing the burden of the joint obligation.[320] Simple nonpayment by the other spouse qualifies as

316. *See* Code General des Impots (CGI) 170-1.

317. CGI Arts. 193-196.

318. In contrast, Belgium has a system of income splitting on household tax returns which is similar to that of France, but does not impose joint and several liability. *See* Bolus, *La Femme Mariee: Un Contribuable a Part Entiere*, in REFLEXIONS OFFERTES A PAUL SIBILLE: ETUDES DE FISCALITE 190-97 (1981). The government may attempt to collect the husband's taxes out of the wife's property in Belgium (after exhausting its remedies against the husband) under a provision imposing a presumption of fraud, but the wife may defend by showing that the property in question is her separate property under her marital property regime. The presumption of fraud provision seems more akin to transferee liability than joint return liability. As in France, there is a right to contribution under private law to the wife who is forced to overpay. *See id.*

319. CGI Art. 1685.

320. Instruction Administrative of Feb. 18, 1985, 5-B-10-85, no. 14; *see also* Letter from M.E. Barbier, Bureau Francis Lefebvre, to Monsieur Richard Beck (Oct. 12, 1987).

irresponsibility.[321]

The Treasury has directed that special protection is to be given to divorced or abandoned wives, particularly those who subsist on modest salaries or have heavy family responsibilities. The discharge of liability usually does not extend, however, to the portion of tax due to the wife's own earnings.[322] In practice, it appears that more than eighty percent of the separated or divorced wives who apply for relief are completely relieved of liability for the husband's share of the tax.[323] Because collection proceedings against the wife cannot begin until all remedies against the husband are exhausted, very few such cases occur.

A taxpayer may appeal an unfavorable decision by the tax administration to an administrative court, but the decision can be reversed only on grounds of an error of law, error of fact, obvious error of valuation, or abuse of discretion.[324] The courts do not appear especially generous in granting such appeals, but it is difficult to be sure because the reported cases publish very few facts.

Before the enactment of the law 82-1126 of December 29, 1982, the husband alone filed and signed the household tax return, and he alone had standing to deal with the tax authorities. He was primarily liable for the household's income tax, and the wife was secondarily liable.[325] Although her liability was joint and several, the government was very circumspect in applying the rule against widows, divorcees, and abandoned wives. A Treasury directive states that before proceeding against the wife, all efforts to tax the husband first must be exhausted. If the husband has disappeared, attempts must be made to trace him through the fiscal services, police, and *gendarmerie*.[326]

If the government does proceed against the wife after all efforts to tax the husband are exhausted, relief from joint liability through *juridiction gracieuse* is available as a last resort. This procedure for administrative relief formerly applied only to the wife. The law of December 29, 1982, equalized women and men in tax matters, giving both spouses equal rights to contest the tax, requiring both spouses to sign the return, and granting to the husband for the first time the right to request remission from joint liability through *juridiction gracieuse*.[327] The new law also removed the requirement of proceeding against the

321. *Id.*

322. Letter from Vincent Durufle, Inspecteur Adjoint, Tresorerie Principale de Neuilly s/ Seine, to Richard Beck (June 25, 1988).

323. *Id.*

324. *See* Mme. Anne-Marie Popon, Conseil d'Etat, Section du Contentieux, 6 Janvier 1984.

325. *See* Letter from M.E. Barbier, *supra* note 320.

326. *See* Inst. CP 7 Juillet 1980, 80-118-A1. The "Gendermarie" is a sort of a national guard.

327. *See* Letter from M.E. Barbier, *supra* note 320.

husband first, and now apparently requires that the responsible spouse be proceeded against first on a gender neutral basis.[328]

Although France has a statutory community property regime that is both optional and highly variable by agreement, it is altogether irrelevant to the determination of income tax on earned income.[329] According to one commentator, many people in France are under the misapprehension, however, that if they have elected not to live under the community property law, joint and several liability does not apply to them.[330] As in the United States, France recognizes a right to contribution between the spouses under private law for overpayment of one spouse's share of the joint liability, despite joint liability under the tax law.[331]

2. Federal Republic of Germany

The West German tax system permits married couples to elect either separate assessment (*getrennte Veranlagung*) or joint assessment (*Zusasmmenveranlagung*).[332] If a couple elects joint assessment, the progressive rates may be abated through income splitting: the tax is then equal to twice the tax on half of the spouses' combined incomes.[333] The election may be made by couples living under either of the two community property regimes discussed below. The election is not available to couples living under a separate property regime (*Gutertrennung*), however, on the ground that such couples live under the applicable family law economically as individuals.[334]

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328. *Id.*

329. *Id.*

330. Droit Fiscal, n. 127, Nov. 14, 1987, p. 7.

331. Memento Pratique Francis Lefebvre, para. 90, rem. 2.

332. Einkommensteuergesetz (EStG) 26.

333. EStG 32 a V. The Federal Republic of Germany introduced income splitting in 1957 in imitation of American law, following a 1957 decision of the German Supreme Court invalidating prior law. Prior law had made joint returns requiring aggregation of the spouses' incomes compulsory and caused two-earner married couples to pay higher taxes than if they were unmarried. cite This law was struck down on the ground that it constituted an impermissible burden on marriage and violated article 6(1) of the German Constitution, which guarantees special protection of the State to marriage and family. Grundgesetz [GG] art. 6 (W. Ger.). No special rate for married filing separately was enacted, because that too would have been unconstitutional for the same reason. No such rate was needed in any case, because there is no equivalent in Germany to the *Poe v. Seaborn* decision. *See* K. TIPKE, STEUERRECHT 28-29, 298-99 (9th ed. 1983).

334. *See* K. TIPKE, *supra* note 338, at 300.

German family law provides for three different regimes governing matrimonial property. Unless the spouses elect either separate property (Gutertrennung) or community property (Gutergemeinschaft), they are governed by the regime of community of gains (Zugewinngemeinschaft). For a short description of these regimes, see Angerhofer v. Commissioner, 87 T.C. 814, 820-29 (1987).

Under the Gutergemeinschaft regime, both spouses own property jointly as a marital community, including gains acquired during marriage, and the community property (Gemeingut) is jointly

Spouses electing joint assessment become joint debtors (*Gesamtschuldner*) for the entire tax.[335] Nevertheless, the tax authorities cannot actually enforce collection from either spouse of the tax by levy (*Zwangsvollstreckung*), except in proportion to that spouse's income, if either spouse applies for limitation of liability (*Beschrankung der Haftung*).[336] Thus, if the wife, for instance, earned nothing, nothing could be collected from her against her will.[337] Either spouse may request the limitation of tax liability at any time before the tax liability is finally extinguished through levy or otherwise. The limitation causes the tax liability to be divided according to the respective incomes of the spouses. A tax that already has been paid can no longer be so divided.[338]

The division of tax liability is made through a fictive separate assessment of each spouse.[339] Then, the proportion of each spouse's separate tax to the total of their separate taxes is determined, and that

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managed, unless by agreement it is managed by one spouse subject to restrictions protecting the other spouse's interest in the property. Upon divorce, the property is divided equally between the spouses. Bürgerliches Gesetzbuch (BGB) § 1471 (W. Ger.). A deceased spouse's half share of the marital property belongs to his or her estate and thus passes to that spouse's heirs. *Id.* § 1482. Under this regime each spouse clearly would have a "present, vested interest" in the community property in the sense of *Poe v. Seaborn.*

For income tax purposes, however, tax liability depends entirely upon the activity of the spouse who earned the income, and not at all upon the community property status of the earnings or gains. Thus, earned income is taxable to the spouse who earned it, notwithstanding that it is community property under the Gutergemeinschaft regime. Further, profits from community business property are taxable to the spouse whose management activity produced them. HHR Kommentar 26a Anm. 4e. In *Angerhofer* it was held that the Zugewinngemeinschaft regime did not qualify as community property under *Poe v. Seaborn,* on the grounds that each spouse owns and manages his or her own property separately, and upon divorce has only an equalization claim against the other spouse for the cash value of half the increase (Zugewinn) in the other spouse's estate to the extent such increase exceeds the increase in the claimant's own estate. *Angerhofer,* 87 T.C. at 827. The equalization right of the spouse with the lesser Zugewinn is lost entirely if the marriage is terminated by death rather than by divorce, and because it is not descendable unless the marriage ends inter vivos, the equalization claim is not a "present, vested interest" in the sense of *Poe v. Seaborn. Id.* In order to buttress this conclusion, Judge Parr observes that for purposes of the German income tax, spouses living under the Zugewinngemeinschaft and filing separately would be taxed only on their own earned income, and not, as the petitioners desired, on half of their combined income. *Id.* at 828. But the same is true for the Gutergemeinschaft regime, which clearly would qualify as community property under *Poe v. Seaborn.*

335. Abgabeordnung (AO) 44.

336. Hermann/Heuer/Raupach, Einkommensteuer- und Korperschaftsteuergesetz mit Nebengesetzen Kommentar, 19th ed., ("HHR Kommentar") EStG 26b Anm. 6.

337. Letter from Professor Klaus Tipke to Richard Beck (May 13, 1987).

338. HHR Kommentar 26b Anm. 6.

339. *See* HHR Kommentar EstG 26a Abs. 2 Erlauterungen. For purposes of the separate assessment, some personal deductions may be divided between the spouses in any way they may decide (*e.g.*, charitable contributions), others must be divided evenly (*e.g.*, the allowance for handicapped dependents), and still others must be allocated only to the spouse who incurred the expense (*e.g.*, insurance premiums). *Id.*

fraction is multiplied by the total joint tax to be divided.[340] In this way the beneficial rates of income splitting are preserved, but each spouse's liability for his or her share of the reduced tax is limited to that proportion of the total taxes he or she would have paid if each had been assessed separately.[341] Refunds of overpaid taxes are made only to the spouse who paid the tax.[342] If both spouses paid taxes, the refund is payable to each spouse in proportion to his or her tax payments and without regard to which spouse's income caused the tax liability.[343]

B. States in the United States

1. A Variety of Approaches

Tbe state income tax systems in the United States exhibit almost every possible combination of rate structures and liability rules for taxing husbands and wives. Some patterns, however, may be discerned. No state apparently allows income splitting without joint return liability. All states that provide for joint returns except North Dakota require joint return liability, some by statute and others by administrative practice.[344] Six states provide for combined (two-column) returns, either alone or in addition to joint returns, and four of these states impose no joint liability for the combined return.[345]

Most states require joint filing if the taxpayer elected joint filing at tbe federal level, thus making the joint return liability compulsory, when applicable.[346] About half of the states now provide for some innocent spouse relief modeled on the federal rules, and there is a growing tendency to enact such rules into the state tax statutes.[347]

Two states have no joint returns and impose no joint liability for filing combined returns tbat provide a separate column of tax items for husband and wife: Missouri and North Carolina, both with progressive rates.[348] Two states impose no joint liability for combined returns, but also provide for joint returns that do require joint return liability: Iowa

340. HHR Kommentar 26b Anm. 3.

341. This method is identical to the method used by the IRS to calculate each spouse's separate share of a refund from a joint return year, and it is the method recommended in this Article for reform of United States tax law.

342. HHR Kommentar 26b Anm. 9.

343. *Id.*

344. *See, e.g.*, COLO. REV. STAT. § 39-22-103(11) (Supp. 1988); *see also* N.D. Tax Dep't Mem. (June 24, 1968) (prepared by Kenneth M. Jakes, Counsel).

345. *See infra* notes 348-51 and accompanying text.

346. *See, e.g.*, COLO. REV. STAT. § 39-22-107 (Supp. 1988).

347. *See infra* notes 362-77 and accompanying text (discussing California's innocent spouse provisions).

348. *See* MO. ANN. STAT., § 143.491 (Vernon 1976); N.C. GEN. STAT. § 105-152.1 (1989).

and Maryland.[349] Colorado and New York recently abandoned such combined returns.[350] Arkansas and Virginia alone impose joint liability for both combined returns and joint returns.[351]

Arranged according to the type of tax rates imposed, flat, single table progressive, and two or more table progressive, the liability rules are as follows:

Of the seven states with flat taxes, which provide no rate advantage to filing jointly, all impose joint return liability. Four of these states provide innocent spouse relief (Illinois, Indiana, Massachusetts, and Michigan),[352] and three do not (New Hampshire, Pennsylvania, and Tennessee).[353]

Of the thirteen states that have a single progressive rate, making joint filing disadvantageous for two-earner couples, all impose joint return liability. Seven of them provide some form of innocent spouse relief (Arkansas, Colorado, District of Columbia, Iowa, Montana, Ohio, and South Carolina),[354] and six provide none (Connecticut, Delaware, Kentucky, Maine, Mississippi, and Virginia).[355]

Of the twenty-seven states with two or more tax rates, providing an income-splitting advantage to joint filers, all impose joint return liability. Eleven provide some innocent spouse relief (Alabama, California, Georgia, Idaho, Kansas, Maryland, Minnesota, New York, Utah, West Virginia, and Wisconsin),[356] and eight provide no relief (Arizona, Hawaii, Louisiana, Nebraska, New Jersey, New Mexico, Oklahoma, and Oregon).[357]

Of the two states with piggy back taxes measured as a percentage of federal tax liability, both impose joint return liability and innocent

349. *See* Letter from Don Flockhart to Richard Beck (June 21, 1988) (Iowa); Letter from Louis L. Goldstein to Richard Beck (June 17, 1988)(Maryland).

350. *See* N.Y. TAX LAW § 651 (Consol. 1989); Letter from Stan Williams to Richard Beck (June 23, 1988)(Colorado).

351. *See* Letter from William E. Keadle to Carl Gensib (Nov. 2, 1988)(Arkansas); Letter from Danny M. Payne to Richard Beck (July 11, 1988)(Virginia).

352. *See, e.g.*, Letter from Jacqueline R. Elledge to Richard Beck (July 1, 1988)(Illinois); Letter from Katherine Reid to Carl D. Gensib (Sept. 27, 1988)(Indiana).

353. *See* Letter from Paul R. Lambert to Carl D. Gensib (Jan. 20, 1989)(New Hampshire); Letter from Lewis J. Levin to Richard Beck (June 21, 1988)(Pennsylvania); Letter from Allan S. Curtis to Carl D. Gensib (Nov. 16, 1988)(Tennessee).

354 *See, e.g.*, Letter from William E. Keadle to Carl Gensib (Nov. 2, 1988) (Arkansas); Letter from Edward M. Mony to Richard Beck (June 27, 1988) (District of Columbia).

355. *See, e.g.*, Letter from Hilda E. Lay to Richard Beck (June 17, 1988)(Maine); Letter from Danny M. Payne to Richard Beck (July 11, 1988)(Virginia).

356. *See, e.g.*, Letter from Deborah Ann Fondren to Richard Beck (June 24, 1988) (Alabama); Letter from Jerry A. Roberts to Richard Beck (June 14, 1988) (Georgia).

357. *See, e.g.*, Letter Barbara M. Dickerson to Richard Beck (June 22, 1988)(Arizona); Letter from Joyce Seray to Richard Beck (July 12, 1988)(New Mexico).

spouse relief.[358]

Most states that provide innocent spouse relief follow the federal standards of section 6013(e). Some states, however, have their own relief statutes, which differ from the federal rules. In New York, the state statute is identical to section 6013(e), except that New York considers 100 dollars rather than 500 dollars a "substantial understatement."[359] On the other hand, with respect to the significant benefit test, one case, eventually reveresed on appeal, ruled that a taxpayer could fail to obtain innocent spouse status in New York although she succeeded in federal court in a jury verdict against the IRS on the same issue.[360] Finally, some states have their own standards of administrative relief. In Idaho, for example, the Tax Commission may abate the tax in particular cases if it would cause undue hardship.[361] California is unique in respect to relief provided to innocent spouses and will be considered separately below.

2. California

California is a community property state with a progressive personal income tax that is not based on the federal income tax. Joint returns are permitted, which allow income splitting.[362] California imposes no marriage penalty because the same rates apply to married taxpayers filing separately as to single taxpayers.[363] Joint returns require joint and several liability,[364] but California's relief provisions are significantly different and more liberal than the provisions under the IRC. The relief takes several forms.

First, there is a provision roughly equivalent to section 6013(e) at section 18,402.9 of the California Revenue and Tax Code,[365] but with the following significant liberalizations: there is no requirement that items of deduction, basis, or credit have no basis in fact or law—it is enough that an item of deduction be "erroneous";[366] and there is no requirement that the understatement be "substantial," thus removing

358. *See* Letter from Robert A. Gross to Richard Beck (June 10, 1988)(Vermont); Letter from Donald C. Gross to Carl D. Gensib (Nov. 7, 1988)(Rhode Island).

359. N.Y. TAX LAW § 651(b)(A), (B) (Consol. 1989).

360. *In re* Sabatine, No. 800025 (N.Y. Div. Tax App. Dec. 17, 1987). The hearing officer's decision was based on the fact that the significant benefit test was deleted from the federal statute as a separate requirement, retroactively to the years in question, but was still in effect under New York law. This questionable reasoning subsequently was overturned. *In re* Sabatine, No. 800025 (N.Y. Tax App. Tribunal 1988).

361. *See* Letter from Daniel D. John to Richard Beck (June 24, 1988).

362. CAL. REV. & TAX CODE §§ 17045, 18402 (West 1983 & Supp. 1990).

363. Id. § 17041.

364. CAL. REV. & TAX. CODE § 18,555(b) (West 1983).

365. *Id.* § 18,402.9 (West 1983 & Supp. 1990).

366. *Id.* § 18,402.9(a).

all dollar limitations from relief.[367]

Next, there are two entirely different and unique relief provisions affecting joint returns, which have no IRC equivalents. Section 18,555(b), enacted in 1976, gives jurisdiction to a court in a proceeding for dissolution of marriage to revise the tax liability of a spouse to be proportionate to his or her income.[368] The only limitations to this power are that (1) relief cannot be given from liability for income earned by or subject to the exclusive management and control of the spouse;[369] (2) liabilities that already have been paid cannot be revised;[370] and (3) clearance must be obtained from the Franchise Tax Board (FTB) if reportable gross income exceeds 50,000 dollars or if the tax liability relieved exceeds 2500 dollars.[371] Under section 18,555(b) a spouse need not prove either innocence or inequity. Spouses, however, must be in divorce court in order to benefit from this provision,[372] which is unfortunate because it appears to create an unwelcome incentive for separated spouses to seek a divorce.

Finally, section 18,555(c), enacted in 1982, provides much needed relief in the all too common situation in which the joint return was correct, but the tax was unpaid.[373] The FTB may revise liability of one spouse to be proportional to the income that spouse earned or subject to that spouse's exclusive management and control, except for taxes already paid.[374] There are, however, unfortunate innocence and inequity limitations. First, the spouse must be innocent of the nonpayment,[375] with the burden on that spouse to establish that he or she did not know of the nonpayment and had no reason to know of it at the time the return was filed.[376] Second, a determination must be made after thirty

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367. *See id.* It should be noted that both of these liberalizations were recommended recently for the IRC in Borison, *supra* note 209. The California changes were introduced in 1977, before which time the law was equivalent to the IRC.

368. CAL. REV. & TAX. CODE § 18,555(b) (West 1983).

369. *Id.* § 18,555(b)(1).

370. *Id.* § 18,555(b)(2)(B). For a discussion of I.T. 1575 and the federal treatment of this issue, see *supra* notes 85-94 and accompanying text.

371. CAL. REV. & TAX. CODE § 18,555(b)(2)(D) (West 1983).

372. *See id.* § 18,555(b).

373. *See id.* § 18,555(c).

374. *Id.* § 18,555(c)(1)(A).

375. The innocence requirement seems misconceived. Suppose husband and wife live together, husband has substantial income but wife has none, and neither is in a position to pay taxes (husband has temporarily run out of money). The wife has no good choices, apparently. If she signs jointly to give her husband the benefit of lower rates and he does not pay later, the wife can get no relief from joint return liability. She cannot file separately, however, without incurring community property liability under *Poe v. Seaborn* for the tax on half of her husband's income, and no relief is available there, either, because she lives with her husband and has knowledge of his income.

376. CAL. REV. & TAX. CODE § 18,555(c)(1)(B)(2) (West 1983).

days notification to the other spouse as to whether under all the facts and circumstances it would be inequitable to hold the spouse liable for the nonpayment.[377]

VII. Implementing Proportional Liability

A. *Calculation of Separate Liability*

1. No Other Changes Necessary

Repeal of joint return liability would be a major step forward both in fairness and simplicity. Unlike much recent tax reform, repeal will result in no increased learning and compliance costs for taxpayers. For a rule that has been in the tax statutes for over fifty years, it may seem surpising that joint return liability can be repealed without making any other changes in the tax system. Our current system of four different rate tables easily can be retained unchanged after repeal of joint and several liability.[378] The issue of liability is entirely independent of issues of tax rates. The administrative convenience of filing a single joint return rather than two separate returns also could be retained because the issue of liability is likewise independent of any questions of reporting format.[379]

No constituency is likely to oppose repeal of joint return liability, and so no transitional rules will be needed. Repeal will create no potential for tax avoidance, and so no antiabuse rules will be required. The only costs involved in repeal apparently will be the IRS's increased administrative costs of assessing and collecting from the correct taxpayer in each case.

2. Separate Tax Formula

The repeal of joint and several liability will require a formula for determining the separate proportional liability of each spouse on a joint return. Fortunately, such a formula exists and is currently employed in several other contexts for related purposes. The formula may be found in the rules for calculating each spouse's separate share of a refund

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377. *Id.* § 18,555(c)(1)(B)(4).

378. No inference should be made that the current rato system is satisfactory, however. It is beyond the scope of this Article to address such issues, but for a discussion of the advantages of strict individual filing by all persons whether married or not, with one tax table for everyone, see Gann, *Abandoning Marital Status As a Factor in Allocating Income Tax Burdens*, 59 Tex. L. Rev. 1 (1980); Munnell, *The Couple Versus the Individual Under the Federal Personal Income Tax*, in The Economics of Taxation 247-78 (H. Aaron & M. Boskin eds. 1980); Rosen, *Is It Time to Abandon Joint Filing?*, 30 Nat'l Tax J. 423 (1977). For a study of the complexity of the current system, see Robinson & Wenig, *supra* note 288.

379. In the Federal Republic of Germany, for example, both joint returns and income splitting are allowed, but liability is proportional. *See supra* Part VI(A)(2).

from a joint return;[380] in the rules that determine for estate tax purposes the deductible amount of an income tax liability of a decedent's estate on a joint tax return;[381] and in the rules for determining a spouse's right to contribution, or to a refund, under local law.[382]

All these rules are based upon the same principle: that a joint return does not alter the underlying property rights of the spouses. A joint return is not a conveyance of property and does not convert income of one spouse into property of the other.[383] The method of determining each spouse's share of the joint tax obligation is the same in all cases. Each spouse's share is the amount that bears the same ratio to the total tax due on the joint return, as the amount of tax for which the spouse would have been liable if he or she had filed separately bears to the total of the amounts for which both spouses would have been liable if they both had filed separately. In this way, a proportional part of the rate advantage of joint filing is preserved in each spouse's share of the joint liability. The formula is thus:

$$\text{separate liability} = \text{separate tax} \left(\frac{\text{joint tax}}{\text{both spouse's separate taxes}} \right)$$

3. Refunds

The usual rule for refunds is that a single check made payable to both spouses is sent to the address on the joint return. If the spouses are separated, however, each spouse may file an amended joint return signed by that spouse alone to claim his or her share of the refund. In such a case, the IRS will send to that spouse a separate check, limited to the amount of the joint overpayment that is proportional to the tax liability the spouse would have had if both spouses had filed separately. Several recent Revenue Rulings have called this the "separate tax method of allocation" or "separate tax formula."[384] No refund can be

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380. *See infra* notes 384-85 and accompanying text.

381. *See* Treas. Reg. § 20.2053-6(f) (1958).

382. *See infra* notes 390-92 and accompanying text.

383. *See, e.g.*, Rosen v. United States, 397 F. Supp. 341 (E.D. Pa. 1975) (holding that spouses have separate interests in any overpayment which is apportionable to the extent each spouse contributed to the overpaid tax).

384. *See* Rev. Rul. 80-6, 1980-1 C.B. 296 (applying the separate tax method of allocation); Rev. Rul. 80-7, 1980-1 C.B. 296 (applying the separate tax formula); Rev. Rul. 80-8, 1980-1 C.B. 298 (applying the separate tax method of allocation).

The rule provides that the overpayment is creditable or payable only to the spouse who actually made payments in excess of his or her own separate liability, but only to the extent aggregate payments of both spouses exceed their aggregate liability. In other words, the separate overpayments are credited only to the proper payor, but the refund is limited so as not to create a made except to the actual payor(s) of the overpayment, however, and then only to the extent the payment(s) exceed the couple's aggregate tax liability. Thus, if one spouse overpays his or her own separate liahility, hut not the aggregate liabihty, that spouse has made a voluntary and nonrefundable assumption of the other spouse's tax liability. This practice was, or at least should have been, the rule of I.T. 1575.[385]

4. Refunds from Net Operating Loss Carryovers

Similar rules apply to limitations on the use of loss carrybacks and carryovers from one year to another when the spouses were married and filing jointly in one of the years, but were not married to each other in the other year. According to the general rule, losses are personal to each taxpayer and can only be used to offset the separate income of that taxpayer in another year. Thus, an allocation using the separate return formula must be made for one or both years.

If the taxpayer reported the loss on a joint return, each spouse's share of the loss must be determined, and only that spouse's share may be carried to a year in which the taxpayer was unmarried or married to a different spouse.[386] If a joint loss with one spouse is carried forward to a year when the taxpayer is married to a different spouse with whom he or she files jointly, an allocation must be made for that year also in order to prevent the loss from offsetting income of either the current or the former spouse.[387]

5. Setoff of Refunds

These rules work to benefit the Treasury to the extent that the question is one of limiting the use of losses. The rules also may work in the taxpayer's favor, however, when the question is whether the IRS may use a refund due on a joint return to offset a separate tax liability of one of the spouses relating to a different year. To the extent that the overpayment is due to one spouse's payment in excess of that spouse's proportional liability, it cannot be used to offset a separate tax liability of the other spouse. The overpayment must be refunded to the spouse who paid it.[388] In the absence of proof of the relative contributions of

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deficiency.

385. *See supra* Part III(C), (D).

386. *See* Rev. Rul. 60-216, 1960-1 C.B. 126, *amplified*, Rev. Rul. 65-140, 1965-1 C.B. 127.

387. *See* Rev. Rul. 75-368, 1975-2 C.B. 480 (citing Calvin v. United States, 354 F.2d 202 (10th Cir. 1965) (limiting net operating loss carryover sustained by a woman prior to marriage to the amount of her own income reported on joint return and not using it to offset any income of her husband)).

388. *See* Maragon v. United States, 153 F. Supp. 365 (Ct. Cl. 1957) (finding tax withheld in excess of woman's separate liability on joint return for 1951 must be refunded to her and cannot be

the spouses to the joint tax liability, however, the entire refund may be credited against the separate tax liability of one spouse.[389]

6. Nontax Property Rights

Similar rules apply to determining ownership rights to tax refunds in other, nontax areas of the law. It has been held, for example, that when one spouse is bankrupt, only that spouse's share of a refund from a joint return may be claimed by the trustee in bankruptcy.[390] Similarly, when an overpayment in a joint return was due entirely to payments from a deceased husband, the refund was required to be paid entirely to decedent's estate rather than to the widow, notwithstanding the fact that the widow would have been jointly liable for any underpayment.[391]

Finally, as noted above, if the tax is underpaid and one spouse is forced to pay more than his or her share on the ground of joint return liability, the overpaying spouse has a right of contribution under local law against the other spouse for the amount overpaid.[392] The amount of the overpayment is calculated according to the same proportional method as in the other situations.

7. Apportioning Items of Income and Deduction

In order to apply the separate tax formula, one must first be able to calculate the tax liability of each spouse as if he or she had filed separately. That requires apportioning items of income, deduction, exclusion, and credit on a joint return to one or the other of the spouses. The current rules for allocating such items on separate returns of married people are fairly clear although there is very little authority on the subject. The paucity of caselaw may mean that the rules are on the whole quite workable and give rise to very little controversy. On the other hand, it may indicate that the issues simply have not arisen because so few married persons living together file separately.[393] The Joint Committee on Taxation has said that such allocations would be unduly complex if all married persons were to file separately, but it offered no

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used to offset husband's deficiency for 1944 when spouses had filed separate returns).

389. *See* United States v. Nowicke, No. 84-14 (E.D. Ky. Aug. 20, 1987).

390. *See In re* Wetteroff, 324 F. Supp. 1365 (E.D. Mo. 1971), *aff'd*, 453 F.2d 544 (8th Cir. 1972).

391. *See, e.g., In re* Estate of Carson, 83 N.J. Super. 287, 199 A.2d 407 (P. Div. 1964). *See generally* Annotation, *Right of Surviving Spouse to Tax Refund from Joint Income Tax Return*, 67 A.L.R.3d 1038 (1975).

392. *See supra* note 47 and accompanying text.

393. B. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS § 111.3.2 (1981).

arguments to substantiate the assertion.[394]

More than 800,000 married persons file separate returns each year.[395] In view of such numbers, it appears significant that there has been so little litigation over issues of allocation. It is not known, however, how many of such persons are living with their spouses at the time of filing. Issues of allocation would be more difficult for such persons, because establishing the facts of payment presents inherent difficulties whenever finances are commingled, even if the legal rules are unambiguous.

The rules themselves are easily stated. Income from community property and jointly owned property is divided equally between the spouses, even if one spouse actually receives all the income.[396] Deductible items that are paid out of community or jointly owned funds are ordinarily divided equally between the spouses. Items paid out of separately owned property, however, usually are deductible only by the payor spouse, even if the payment is for a joint obligation.[397] Nonetheless, even when payments are made out of a joint account or a separate account of the other spouse, if the taxpayer can prove that the funds used were his or her own, the taxpayer will be entitled to the entire deduction. If the source of the funds cannot be traced, one-half of the deduction is allowed to each spouse.[398]

For certain items, such as interest and taxes, it is also necessary that the payor be liable for the obligation. Thus, for example, if the husband makes payments of interest and taxes on a house owned by the wife, he will not be allowed the deductions.[399] Charitable donations,

394. For example, the Joint Committee on Taxation in its General Explanation of the Economic Recovery Tax Act of 1981 stated, in connection with the enactment of the two-earner deduction designed to mitigate the "marriage penalty": "Allowing married couples to file separate returns as single taxpayers would have been very complex because of the necessity for rules to allocate income and deductions between the spouses." *Id.* at 33. The Joint Committee on Taxation gave no arguments or examples, however. By contrast, when the House of Representatives proposed in 1941 to require joint returns of all married couples without joint and several liability, apportionment of separate liability did not appear to raise any problems. For an example of the proposed apportionment, see H.R. REP. No. 1040, *supra* note 78, at 10-11, *reprinted in* 1941-2 C.B. at 420-22.

395. Individual Income Tax Returns 1985, IRS Publication 1304, table 1.3 (Rev. 1988).

396. *See* Finney v. Commissioner, 35 T.C.M. (CCH) 1504 (1976) (holding interest and stock distributions from joint accounts taxable one-half to husband even though wife received and used all the funds hecause husband had unrestricted right to withdraw funds from the accounts).

397. *See* Jolson v. Commissioner, 3 T.C. 1184 (1944).

398. *See Finney*, 35 T.C.M. (CCH) at 1507-08 (finding interest portion of mortgage payments on house owned by the entirety fully deductible by husband because husband met burden of proof that funds were traceable to him, but holding real estate taxes deductible one-half to each spouse in absence of such proof).

399. *See* Johnson v. Commissioner, 39 T.C.M. (CCH) 868 (1980) (holding interest and taxes paid by legally separated husband for house owned by wife not deductible by him because he was not the obligor, even though he was guarantor in the event of her default).

casualty losses, and investment losses are deductible only by the owner of the property contributed or lost.[400]

The exemption for dependents is allowable on a separate return only to the spouse who provides over one-half of the dependent's support for the year.[401] Considerable litigation in the past has grappled with the issue of which spouse is entitled to the exemptions. Most of the pressure probably was relieved by the rules enacted in 1984, which automatically allocate exemptions for children to the custodial spouse in cases of separation and divorce, unless the parents otherwise agree.[402]

8. Problems in Current Rules for Apportionment

These rules create two difficulties. One is that tracing of funds is occasionally necessary, which may require burdensome recordkeeping. The other is a problem of fairness. The spouse who spends earnings on the couple's nondeductible household expenses may be deprived of a fair share of the couple's deductions, for example, if the other spouse makes all payments of deductible amounts out of his or her separate funds.[403] The all or nothing rule for exemptions seems arbitrary and always will be somewhat unfair if both spouses have earnings because both spouses ordinarily can be expected to make some contribution to household expenses, and therefore to the support of dependents. Allocating all dependent exemptions to the higher earning spouse will cause the other spouse's share of the joint tax to be inappropriately high.

Such issues would not appear to present a significant problem under a regime of proportional liability. The issue raised for the personal deductions is similar to the situation in which one spouse pays some or all of the other spouse's share of the joint taxes out of his or her separate funds.[404] In both cases, it simply may be a question of

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Under certain circumstances, however, such payments may qualify as deductible alimony under § 215 if they meet the conditions of § 71. In addition, the deduction for interest and taxes still should be allowable to the recipient regardless of whether the payments are an indirect gift or indirect alimony.

400. *See, e.g.*, Loewenstein v. Commissioner, 27 T.C.M. (CCH) 1112 (1968) (finding that where complete and valid gift of property had been made to wife, casualty loss deduction allowable only to her and not to husband).

401. I.R.C. § 152(a) (1982 & Supp. V 1987).

402. If both spouses fail to meet the test because they are deemed each to have provided exactly half of the dependent's support under community property law, the exemption will be allowed to either spouse, but may not be divided between them. *See* IRS Publication 555 (Rev. Nov. 1985); Priv. Ltr. Rul. 81-22-012 (Feb. 20, 1981).

403. Note that one spouse is not permitted to claim the standard deduction filing separately if the other spouse elects to itemize. *See* I.R.C. § 63(c)(6) (Supp. V 1987).

404. If the joint taxes are not overpaid as a result, no refund can be made to the payor spouse, because such a refund would create a joint deficiency. *See supra* notes 90-91 and accompanying text (discussing I.T. 1575).

which spouse writes the check for a particular expense. If the spouses desire to pay their own precise shares of the joint tax obligation, it is probably not unfair to require them to arrange between themselves to do so.

9. Personal Deductions and Dependent Exemptions Should Be Allocated in Proportion to Adjusted Gross Income

These problems could be avoided, however, if the federal rules were changed to conform to the rules now in effect in a number of state income tax systems. Most states require the spouses to divide personal deductions and/or exemptions between them according to the federal rules;[405] some states allow allocation in any way the spouses choose;[406] other states require an equal division;[407] and still others require or allow the spouses to divide deductions and exemptions between them in proportion to their respective adjusted gross incomes (AGI).[408] On the whole, it appears that the latter method is likely to be the most fair. Each spouse automatically would be entitled to a share of the deductions and exemptions that is proportional to his or her income, and at the same time, cumbersome recordkeeping would be avoided. This approach would be particularly sensible for the dependent exemptions. Business deductions would continue to be allocated only to the business in which they arise, and property losses only to the owners of the property.[409]

Spouses who wish to file separately for purposes of privacy and

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405. For example, Nebraska follows this practice. *See* Letter from Cynthia A. James to Carl D. Gensib (Sept. 28, 1988).

406. For examples of such states allowing allocation of both personal deductions and dependent exemptions, see Letter from Steve Bender to Richard Beck (June 14, 1988)(Montana); Letter from Danny M. Payne to Richard Beck (July 11, 1988)(Virginia). For states permitting allocation of dependent exemptions only, see Letter from Barbara M. Dickerson to Richard Beck (June 22, 1988) (Arizona); Letter from Joyce Spray to Richard Beck (July 12, 1988) (New Mexico); Letter from Rodgers L. Way, Jr. to Richard Beck (June 15, 1988)(Ohio).

407. For states requiring the 50-50 allocation, see Letter from Daniel D. John to Richard Beck (June 24, 1988)(Idaho)(both); Letter from Gerald Yates to Richard Beck (June 21, 1988)(Mississippi)(exemption only); Letter from Edward M. Many to Richard Beck (June 27, 1988) (District of Columbia)(deductions only); Letter from Mark D. Bugher to Carl D. Gensib (Nov. 14, 1988)(Wisconsin) (deductions only).

408. *See, e.g.,* Letter from William E. Keadle to Carl Gensib (Nov. 2, 1988) (Arkansas); Letter from Edward M. Many to Richard Beck (June 27, 1988) (District of Columbia).

Rosen reported that the results obtained in measuring the marriage tax or subsidy were not materially affected when alternate methods of allocating itemized deductions were used, including allocation in proportion to the spouses' AGI. Rosen, *supra* note 263, at 572. While it may make little difference as to the aggregate tax paid, it seems likely to affect materially the burden of the spouses inter sese.

409. Ultimately, the allocation of these deductions would depend on local law. It may be that the wife's ownership rights under local law are unfair and discriminatory. Such issues are beyond the scope of this Article.

who do not wish to disclose their AGI should be allowed to continue using the current rules. If they cannot agree on who paid which amounts and cannot agree to disclose their incomes, the deductions and exemptions should be allocated by giving fifty percent to each.

The proposed rules are a much smaller departure from current federal rules than they first might appear. The personal deductions currently are limited to the payor only in appearance, because the spouses may plan ahead to choose who will make the payments. One spouse can even make cash gifts to the other in order to enable him or her to make payments and thereby transfer the deduction. In short, the present system is de facto largely elective, but only for those few who understand the rules. The proposed rule of automatic allocation in proportion to AGI would eliminate traps for the unwary and produce a fair result in the vast majority of cases, without any need for recordkeeping. In addition, the rule would preserve the elective aspect of the current rules for those few taxpayers who may have some reason to require it.

B. *Transferee Liability*

1. Abuse Potential

If Congress abolished joint and several liability, would opportunities arise for taxpayers to abuse the new rules? One might imagine, for example, that a two-earner couple could plan for the wife to accumulate property with her earnings, while the husband paid all the family living expenses, ran up large debts, and became insolvent and unable to pay his taxes. If the tax law viewed the wife's accumulated property as hers alone, the IRS would not be able to levy on it to pay the husband's delinquent taxes. One difficulty with such a scheme is that the husband will continue to owe his taxes, a debt that usually cannot be discharged even in bankruptcy,[410] and therefore he never will be able to enjoy his own earnings or property again without paying.[411]

In the same example, if tracing problems make it difficult to identify actual transfers of property from the husband to the wife, or if transfers were made at a time when the husband was still solvent and

410. Tax debts generally are not dischargeable in bankruptcy. *See* 11 U.S.C. §§ 507(a)(7), 523(a)(1) (1988). Tax payments could be deferred for up to five years, however, in the context of a Chapter 13 reorganization. *Id.* § 1322(a)(2).

411. If the wife has bought the accumulated property with funds transferred from the husband, and the husband is insolvent or becomes insolvent as a result, the IRS can reach that property without invoking joint return liability, because the wife will be liable as a transferee. Transferee liability is completely independent of marital status, and applies whenever property is transferred without adequate consideration, if the transferors are insolvent and unable to pay their taxes at the time of or as a result of the transfers. *See* I.R.C. § 6901 (1982). For a detailed discussion of transferee liability, see *infra* notes 414-36 and accompanying text.

other losses in subsequent years made the husband insolvent, the government would appear to be without a remedy. On the other hand, there appears to be no abuse potential in this situation. As noted above, the husband would always owe his taxes, including interest and penalties, even after bankruptcy. If taxes could be avoided on any significant scale using such methods, some married couples might do so now. They could simply file separately to avoid joint return liability. The necessity of foregoing the relatively small benefits of income splitting, if any, would scarcely serve as a deterrent.[412]

2. Separation and Divorce

Collusion would be much less likely in cases of separation and divorce, because property is usually divided between the spouses at arm's length. Could the government's legitimate interests be unfairly prejudiced even without collusion? The following hypothetical illustrates the problem. Assume the husband has unreported income or a large refund because of an abusive tax shelter. The wife acquires property from him that is derived from the untaxed income pursuant to a separation agreement. A deficiency is later assessed against the husband because of such items. If the husband had paid his taxes correctly, the couple would have had less property to divide, and the wife would have received a smaller share. In effect she received property that should have been paid to the government. Absent joint return liability, however, the IRS could not proceed against the wife under these circumstances, unless transferee liability applied.

If the husband in this example is solvent and the IRS satisfies the full deficiency out of his share of the divided property, the wife inevitably will enjoy some inequitable enrichment. Because the husband's tax items gave rise to the deficiency, however, it does not seem inequitable to place the burden of payment on him alone. He should be held responsible for calculating his taxes correctly, and he is in the better position to correct or defend against a proposed adjustment. Moreover, he is in a better position to know of the potential tax liability.[413]

If the IRS experiences difficulty or finds it impossible to collect from the husband, the IRS should not be permitted to proceed against the wife under joint return liability on the supposition that she can later recover from him through her right to contribution. If the IRS

412. It is noteworthy that nearly every other government in the world manages to collect its taxes without resorting to joint return liability. *See generally supra* Part VI(A).

413. If the husband is aware of potential tax liabilities at the time of divorce that would materially diminish the amount of marital property to be divided, he can insist that the property agreement itself require the spouses to share contingent tax liabilities or to put property in escrow to pay such liabilities.

cannot collect the tax from the husband with all the resources at its disposal, it seems very unlikely that the wife will be able to do so.

3. Transferee Liability

If Congress repeals joint return liability, the IRS may be expected to rely on transferee liability as a substitute. If the IRS cannot collect from the husband because he is insolvent, transferee liability often will apply to permit the government to collect part or all of the deficiency from the wife. Transferee liability for taxes depends upon state law of fraudulent conveyance or federal bankruptcy law, when applicable, and puts the IRS in the same position as a private creditor seeking to set aside a conveyance of property by an insolvent debtor.[414] This procedure usually will require the IRS to prove that the husband was insolvent at the time of transfer of property to the wife, or that he became insolvent as a result of the transfer and that the property was transferred without adequate consideration.[415] When inadequate consideration supported the transfer, fraud is presumed and the creditors need not prove actual fraudulent intent on the part of either the debtor or the transferee.[416] Transferee liability therefore can apply even to a wife who is an innocent spouse within the meaning of section 6013(e).[417] Even if adequate consideration supports the transfer, however, if the wife is aware of or participates in her husband's fraud on his creditors, the transfer may be set aside as fraudulent.[418]

It is important to note that transferee liability cannot apply unless the husband is insolvent and unable to pay at the time of attempted collection, as well as at the time of the transfer.[419] Thus, if the IRS is restricted to exclusive reliance on transferee liability because joint return liability is unavailable, that will automatically have the desirable effect of forcing the IRS to exhaust all remedies against the husband

414. I.R.C. § 6901 (1982).

415. State law may differ as to what constitutes adequate or fair consideration. *See* T. EISENBERG, BANKRUPTCY AND DEBTOR-CREDITOR LAW 282 (1988). Under the Uniform Fraudulent Transfer Act a transfer from husband to wife may be presumptively fraudulent without regard to the amount of consideration. UNIF. FRAUDULENT TRANSFER ACT § 4(b)(1), 7A U.L.A. 653 (1985).

416. *See, e.g.,* Mysse v. Commissioner, 57 T.C. 680 (1972) (applying Montana law and setting aside a transfer of a $10,000 certificate of deposit to the taxpayer's wife without consideration where the embezzler husband was insolvent at the time of transfer because an unassessed tax liability of over $115,000 from unreported income exceeded his total assets of $46,429).

417. In *Mysse* the court held the wife to be an innocent spouse with respect to § 6013(e) because she had no actual or constructive knowledge of the embezzlements and received no significant benefit beyond ordinary support. She was nevertheless liable as a transferee for her husband's taxes to the extent of the transfer. *Id.* at 696.

418. *See, e.g.,* United States v. Alaska, 661 F. Supp. 727 (N.D. Ill. 1987); Wilkey v. Wax, 82 Ill. App. 2d 67, 225 N.E.2d 813 (1967); *see also infra* notes 423-24 and accompanying text.

419. *See supra* notes 415-17 and accompanying text.

before proceeding against the wife.

4. Transferee Liability and Divorce

The question frequently has arisen whether property transferred by the husband to the wife in exchange for her marital rights pursuant to a separation agreement constitutes an exchange for adequate consideration within the meaning of state fraudulent conveyance law as well as under similar federal bankruptcy law. Here one must distinguish between the wife's rights to support or alimony, children's rights to support, and the wife's ownership rights to marital property.

When property is transferred to the wife in lieu of alimony and in exchange for a waiver of her rights to support, courts often have held the transfer to be supported by adequate consideration, thus putting the property beyond the reach of creditors, including the IRS.[420] On the other hand, the matrimonial dispute or separation must be genuine, and the wife's right to alimony must be both enforceable and reasonable in amount.[421] If the wife would not be entitled to alimony under state law, her waiver of such rights is worthless and does not constitute fair consideration.[422]

Even when the wife's rights to alimony are real and valuable, a transfer still may be set aside if the circumstances indicate that the wife was aware of or participated in her husband's fraud on creditors.[423] A woman's failure to mention her husband's debts to a divorce court when she is aware of them constitutes fraud when the decree leaves the husband without means to satisfy his creditors.[424] It has been held that

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420. *See, e.g.*, Marine Midland Bank v. Batson, 70 Misc. 2d 8, 332 N.Y.S.2d 714 (Sup. Ct. 1972) (holding wife's right to alimony and to widow's right of inheritance election "fair consideration" under New York debtor and creditor law).

421. *See id.* at 11-12, 332 N.Y.S.2d at 718-19 (denying debtor's and wife's motion for summary judgment because genuine issues of fact existed regarding the validity of the marital dispute and separation on the eve of litigation, and as to the actual value of the wife's rights surrendered in exchange for the debtor husband's property).

422. *See* Brown v. Borland, 230 Neb. 391, 432 N.W.2d 13 (1988) (setting aside insolvent husband's transfer of his interest in jointly owned residence in exchange for wife's right to alimony pursuant to separation agreement when alimony would not have been awarded by a court due to husband's poor work history and prison sentence, and when wife was self-supporting).

423. *See Wilkey*, 82 Ill. App. 2d at 67, 225 N.E.2d at 813 (setting aside transfer of all debtor husband's assets to wife in lieu of alimony pursuant to divorce decree when wife was aware that husband was under threat of imminent litigation for damages by widow of man whom husband had murdered and presuming "fraud in fact" from circumstances even when consideration is present).

424. *See Alaska*, 661 F. Supp. at 727. Insolvent husband who was the defendant in a suit to recover several million dollars obtained through medicare fraud transferred all of his assets constituting a $200,000 insurance claim to his wife in exchange for her rights to alimony pursuant to a divorce decree. The transfer was set aside as fraudulent because the husband did not defend the divorce action, and neither the husband nor the wife informed the divorce court of the welfare

a wife without knowledge of the insolvent husband's tax debts is an innocent purchaser of his property in exchange for a waiver of her valuable rights to support pursuant to an antenuptial agreement, and in such circumstances the transfer may not be set aside.[425]

The question whether a wife's waiver of rights to child support in exchange for an insolvent husband's transfer of property constitutes fair consideration sufficient to overcome transferee liability is more problematic. It has been held that although a wife may waive support rights, a minor child may not.[426] Because the husband will remain liable for child support no matter what provision is made by transfer of property into a trust or otherwise for the benefit of children, a waiver of rights to child support does not constitute consideration. Thus, a transfer of property by the boxer Joe Louis in trust for his children at a time when he was insolvent, but made without fraudulent intent, was set aside to pay income taxes.[427] On the other hand, it has been held that transfers of real property by an insolvent husband pursuant to divorce "in lieu of alimony" into two trusts for the benefit of minor children, with life estates reserved respectively to the husband and wife, were supported by adequate consideration except for the life estate reserved to the husband.[428] It also has been held that a transfer in consideration of the wife's agreement not to pursue child support and alimony did not constitute fair consideration when the wife was self-sufficient and the husband was without means because a court probably would not award child support or alimony under such circumstances.[429] That decision seems to imply that an exchange of valuable antecedent rights to child support might constitute consideration for a transfer of property if a court of competent jurisdiction approved. It may be proper to recognize some difference between child support and alimony for these purposes,

fraud litigation, of which wife was aware. *Id.* at 730.

425. In Miele v. United States, 637 F. Supp. 998 (S.D. Fla. 1986), the court upheld an antenuptial agreement into which the wife entered at a time when her husband faced a prison sentence on state charges but before the government made tax assessments over the government's objection that due to insolvency the husband had no separate property out of which to make the antenuptial settlement or to pay support. The court held the consideration valid, reasoning that the husband might someday emerge from debt and prison to become financially sound again. The court cited the Florida Uniform Fraudulent Conveyance Act, which requires actual fraud on the wife's part before a transfer for fair consideration may be set aside, but the government admitted the wife was without knowledge of the husband's nonfiling of tax returns. *Id.* at 1000-01.

426. *See* First Nat'l Bank v. Commissioner, 255 F.2d 759 (7th Cir. 1958).

427. *See id.*

428. *See* Milstead v. Pennington, 268 F.2d 384 (5th Cir. 1959) (applying Alabama law).

429. *See Brown*, 230 Neb. at 391, 432 N.W.2d at 13. The decision was also based upon a finding that such rights of either kind would relate only to future support, and thus neither would constitute an "antecedent debt" as required under Nebraska's Uniform Fraudulent Conveyance Act. *See id.*

however, because child support, unlike alimony, probably could be awarded afterwards on the ground of a later change of circumstances, when rights to both were surrendered in exchange for lump-sum transfers.

The wife's claim to her share of marital property is adequate consideration to the extent of her prior ownership. It has been held that a division of community property is not a fraudulent conveyance because the wife already owned the property transferred.[430] To the extent property is jointly owned in common law jurisdictions, the same reasoning would hold, unless the joint ownership itself is the result of a fraudulent transfer. The conveyance of an insolvent husband's interest in a jointly owned residence to the wife pursuant to a separation agreement has been set aside as fraudulent because she gave up no valuable rights, but received nearly all the marital property.[431] Similarly, under federal bankruptcy law, a trustee successfully has avoided an insolvent debtor's transfer of his interest in a jointly owned residence to his wife pursuant to divorce within one year of his bankruptcy petition because the wife gave no "reasonably equivalent value" in exchange. The residence constituted nearly all the couple's marital property, and because the spouses were on approximately equal economic footing, the wife gave nothing in return for receiving almost all the marital estate.[432] On the other hand, such a conveyance has been held valid against creditors when it was supported by consideration in the form of cancellation of antecedent debts of the husband to the wife from earlier cash advances, together with a fresh cash advance to bail him out of jail and obtain a lawyer.[433]

Applying the above principles to a division of marital property that is in the separate name of one spouse who is insolvent due to unassessed tax liabilities, a division of property under an equitable distribution or similar statute clearly would constitute a fraudulent transfer if the court or the parties did not take into account tax liabilities of which the wife is aware. Even if she is not aware of the tax liability, however, such a division of marital property probably would be voidable for want

430. *See* Irmgard Santos v. Commissioner, 246 F.2d 204 (9th Cir. 1957) (holding that a division of community property was not a transfer for purpose of transferee liability, because wife already owned half under state law).

431. *See, e.g., Brown*, 230 Neb. at 391, 432 N.W.2d at 13 (setting aside husband's transfer of joint interest in residence to wife under separation agreement under Nebraska Uniform Fraudulent Conveyance Act because husband was insolvent at time of transfer, even though wife had made most of the payments on the residence, which were gifts to husband and did not constitute "fair consideration").

432. *See In re* Lange, 35 Bankr. 579 (Bankr. E.D. Mo. 1983) (construing Bankruptcy Code, 11 U.S.C. §§ 548(a)(2), 550(a) (1988)).

433. *See* Barbee v. Pigott, 507 So. 2d 77 (Miss. 1987).

of adequate consideration, because it seems doubtful that her property rights rise to the level of ownership.[434] Although the wife's rights to marital property have been held to be consideration equal in value to the husband's property transferred to her in *United States v. Davis*,[435] it would appear that to the extent the value of the marital estate is reduced by an inchoate tax lien, the wife's property rights to the marital estate also are diminished, and the consideration for the transfer would be *pro tanto* inadequate. If the consideration is inadequate, inquiry into the wife's intent is unnecessary, and transferee liability would apply even if she knows nothing of the husband's tax liability.

Consider the following illustration. Assume the husband has total assets with title in his name of 300x dollars, all of which is marital property subject to division. The wife has 100x dollars of her own separate property. They divide the marital property by agreement in the ratio two to one, 200x dollars to the husband, and 100x dollars to the wife, so that after the division each spouse has 200x dollars of net assets. Subsequently, a tax deficiency is assessed against the husband for 300x dollars, which was an inchoate lien against the marital property in his name. The husband became insolvent as a result of the transfer to the extent of 100x dollars. In retrospect, the marital estate was worth nothing net of the tax lien, and thus the wife's marital property rights also were worth nothing. All 100x dollars of the transfer would thus be without consideration and subject to payment of the husband's taxes. If the tax assessment were for 200x dollars instead, so that the marital estate was worth 100x dollars net of the tax liability, the husband would not be insolvent as a result of the transfer because he would be left with 200x dollars after the division of property, and transferee liability would not apply. The husband would pay the entire tax liability, unless there was a provision in the separation agreement to share contingent liabilities, in which case he would seek reimbursement from the wife.

5. Transferee Liability Compared to Joint Return Liability

By contrast, if the wife were subject to joint return liability, all 200x dollars of her assets, including her separate property, would be subject to levy. Indeed, if the wife inherited additional property from her family subsequent to the divorce, even that property would be subject to joint return liability. Moreover, the IRS would not be required to

434. No inference should be drawn that the underlying local law of family property rights is itself fair and nondiscriminatory. A discussion of such issues is beyond the scope of this Article, which is limited to the tax consequences of such rights.

435. 370 U.S. 65 (1962) (finding husband's transfer of appreciated stock to wife in divorce a taxable sale in exchange for her marital rights).

proceed against the husband first and to prove his insolvency. But the IRS should not be able to collect more from the wife than the maximum amount by which she benefited from the husband's nonpayment of tax. That amount is only the portion of the 100x dollars transfer that was transferred without consideration. The benefit test under transferee liability is thus much more fair than under joint return liability. Under joint return liability, the wife is liable for the entire tax deficiency if she is found to have received a significant benefit over and above ordinary support, even if the deficiency is far larger than her benefit.

As noted above, an innocence test also is required under transferee liability in those cases in which consideration supported the transfer, in order to determine whether the wife is an innocent purchaser for value. Again, the test is much more fair and rational than under joint return liability. The wife would be liable as a transferee only if she had actual intent to defraud creditors, and the IRS would bear the burden of proof to show that she had actual knowledge of the husband's debts and of his insolvency at the time of the transfer.[436]

Transferee liability will not be a complete substitute for joint return liability in all circumstances. If joint return liability is repealed, inevitably some situations will arise in which the IRS will not be able to recover property of the wife that is in part derived from untaxed income. Perhaps the most likely situation is one in which a spouse transfers property into joint ownership during marriage, or outright in divorce, at a time when the husband is solvent, but later becomes insolvent for other reasons. In addition, the IRS may have difficulty proving that the husband was insolvent at the time of transfers made to the wife long before the husband's tax delinquency was discovered. In such cases the wife will have profited, although innocently, at the expense of the IRS. It seems unlikely, however, for reasons discussed above,[437] that such situations are likely to arise frequently or to present a problem serious enough to require a remedy in anticipation.

It is not possible, and not even desirable, that the IRS collect every penny of tax that is owing. The social cost of providing the IRS with excessive collection powers is simply too great to be worth the revenue.

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436. *See* Miele v. United States, 637 F. Supp. 998 (S.D. Fla. 1986). The government had conceded that the wife did not know that the husband had failed to file tax returns. The *Miele* court said:

> For Joanne Miele, the Prenuptial Agreement served one purpose—security. The property was deeded to the Plaintiff so that she could sell it and use the funds to provide for herself and for her baby. In the absence of any evidence of intended fraud by the taxpayer or the Plaintiff's participation in an alleged fraud, this Court declines to set aside the transfer.

Id. at 1001.

437. *See supra* notes 420-35 and accompanying text.

In some circumstances, not collecting taxes is the price of civilization.

VIII. Conclusion

Joint return liability should be repealed because it is unfair to all taxpayers and contrary to the cardinal tax principle of liability measured by individual income and ability to pay. In addition, Congress should repeal the rule because in application it is highly discriminatory against women.

Joint return liability is rooted in long outdated assumptions about the economic integration and permanence of marriage. Rules holding spouses liable for each other's taxes have been repealed, or severely limited, in all other developed countries in which they once existed, and the rule likewise should be repealed in the United States.