1-1993

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Recommended Citation

Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol45/iss1/3

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Love, Money, and the IRS†: Family, Income-Sharing, and the Joint Income Tax Return

by
MARJORIE E. KORNHAUSER*

True love must single-hearted be—

Chorus: Exactly so!

From every selfish fancy free—

Chorus: Exactly so!

It follows then, a maiden who,

Devotes herself to loving *you*

Is prompted by no selfish view

Chorus: Exactly so!¹

Introduction

The songs tell us that when two people are in love, their souls unite; their two hearts beat as one. The tax code also tells us that their two tax liabilities can be as one, united in a joint tax return—but only if they are not simply in love, but are also married. While tax theorists have debated the appropriateness of the joint return, they have not examined the premise behind the joint return: that married people—and only married people—share not only their hopes and dreams, but also their money.

† Cf. WILLIAM VAN ZANDT & JANE MILMORE, *LOVE, SEX AND THE IRS* (1980).

* Professor of Law, Tulane School of Law. My thanks to Professors Michael Asimow, Lloyd Bonfield, Lynne Henderson, Edward J. McCaffery, James Wilson, and the faculty at the University of Puget Sound Law School for their careful readings of prior drafts and helpful comments. Additionally, I am greatly indebted to Margaret Seboldt for her skilled analysis of the data from my survey, and the staff at Cleveland-Marshall College of Law for processing the data. I would also like to thank Dean John Kramer of Tulane Law School for a research grant that helped support the completion of this Article. Last, but not least, my thanks to all those who took the time to fill out my questionnaire.

1. WILLIAM SCHWENCK GILBERT & ARTHUR SULLIVAN, *PATIENCE*, act 1, finale (Belwin Mills ed., 1975) (1881) (*Patience* singing). Judge Nichols quotes this song as an example of the phenomenon that “[l]ove and marriage defy economic analysis.” *Mapes v. United States*, 576 F.2d 896, 898 (Ct. Cl.), *cert. denied*, 439 U.S. 1046 (1978).

This Article explores the premise that married couples share or pool their income. It surveys the changing concept and reality of "family" and examines several empirical studies, including my own, that address the issue of the allocation of financial resources between members of a couple living together.² This focus on "pooling" sheds new light on the more commonly asked questions about the joint return: Does it comport with theoretical concepts of income? Does it promote family values? Should it (and the tax system generally) promote family values? Is it justified by other concerns such as economic ones?

Many people believe that the joint return is necessary because it promotes family values. To the extent that the return does so, it does so poorly. The joint return discriminates against many groups that provide their members with the same values of responsibility, caring, sharing, and support that traditional families provide. Moreover, contrary to popular myth, the joint return harms many traditional families, as was highlighted by the debates on the 1993 tax law. Under the new marginal rates, two single individuals living together who each earn \$115,000 would pay \$4,500 less tax than two married individuals earning the same amounts.³ By "penalizing" the second worker, the joint return discourages married couples from having a second earner (usually the wife), putting both psychological and economic stress on these families, on the wife in particular.

The joint return, as all students of tax know, is the result of two Supreme Court cases, *Lucas v. Earl*⁴ and *Poe v. Seaborn*.⁵ In *Lucas*, the Court stated that couples could not split their income, despite a valid contract that assigned money earned by one spouse to the other.

2. Whether couples pool income has significance in many other fields, such as divorce and inheritance law. This Article focuses, however, on the tax consequence of pooling only as it affects the choice between the individual or the family as the proper unit of taxation.

3. Under § 1(a) and (c), the 36% bracket affects individuals with income in excess of \$115,000 and married couples with income in excess of \$140,000. I.R.C. § 1(a) and (c) (West 1993). Unmarried couples who make \$230,000 combined (\$115,000 each) remain in the 31% bracket, whereas married couples with the *same* income have a 36% marginal rate. Thus, the married couple would pay \$4,500 more tax than the individuals. The \$4,500 figure is derived by subtracting \$140,000 from \$230,000 (\$90,000) and then multiplying that figure by the difference between the 36% and 31% marginal tax rates (5%). The math is as follows: $[(\$230,000 - \$140,000) = \$90,000] \cdot [(.36 - .31) = .05] = \$4,500$. See, e.g., Ellen R. Schultz, *Marriages May Become Too Dear if Changes in Tax Law Go Through*, WALL ST. J., Feb. 18, 1993, at C1. See also *infra* notes 97-98, 143 and accompanying text for examples of how marital status affects tax liability.

4. 281 U.S. 111 (1930).

5. 282 U.S. 101 (1930).

In contrast, the Court in *Poe* held that in a community property state, the nonearner spouse would be taxed on half the income of the earner spouse.⁶ As a consequence of these decisions, taxpayers in common-law states devised various devices, such as trusts, to achieve the income-splitting results that occurred under community property laws. Additionally, some common-law states began switching to community property regimes. To stem both practices, in 1948, Congress ended the tax disparity between community property states and common-law states by enacting the joint return provision.⁷ Under this provision married couples were permitted to split the income of the single-earner spouse just as in community property states.

Part I of this Article briefly describes the social and legal realities of family living arrangements that contrast with the one-earner, heterosexual married couple model upon which the joint return is based. Part II probes the concept of pooling from a practical standpoint by examining several empirical studies that address the allocation of financial resources by a couple. Part III summarizes the theory and history of the taxable unit and the taxable unit as it exists today. Part IV concludes that our tax system ought to use separate, rather than joint, returns. Taxation based on the individual comports better with reality, social policies promoting families, tax theory, and economic considerations than the joint return.

I. Changing Patterns of Living: Changing Legal Patterns

A. What is a Family?

As Martha Minow has rightly observed, "The tension between official legal forms and functional families has created issues for centuries."⁸ Today those tensions are greater than ever due to rapid changes in society. Minow was primarily concerned with new scientific technology enabling procreation to occur in a variety of uncon-

6. There are numerous good histories of the joint return. See sources cited *infra* note 94. In *Lucas*, Mr. Earl signed a valid contract with his wife that entitled her to one-half of whatever he earned. Although this was not an income-avoidance device, since the contract predated the income tax, the Court held the tax law attributed income in a common-law property system to the one who earned it. 281 U.S. at 114-15. Thus, Mr. Earl was taxed on his entire salary. In contrast, the Court held in *Poe* that the wife was taxed on one-half of her husband's earnings because of her rights to his earnings under community property law. 282 U.S. at 106.

7. See Revenue Act of 1948, ch. 168, §§ 301-305, 62 Stat. 110, 114-116 (codified as amended in scattered sections of 26 U.S.C.).

8. Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 270 (1991).

ventional ways. Other changes, however, have affected living arrangements dramatically and increased tension between legal forms of families and functional families. For example, longer life-spans have resulted in a greater population of elderly, many of whom live together as economic units.⁹ In the past few decades women's employment opportunities have expanded, in turn affecting their choice of living arrangements and their roles within the family. The current state of the economy requires that more families have two earners for the family to achieve an acceptable living standard. Finally, standards of morality have shifted, removing much of the stigma attached to the cohabitation of unmarried heterosexual couples and to homosexual couples.

The major demographic changes of the past thirty years—declining fertility, rising divorce rates, increasing rates of out-of-wedlock births, aging population¹⁰—have caused the decline of the traditional nuclear family and an increase in the number of divorces, single-parent families, nonmarried cohabitation, and two-earner families.¹¹ Nonmarital households in the United States increased nearly 400 percent from 1970 to March 1991.¹² The rapid rise in nontraditional liv-

9. Paula Dressel & Beth Hess, *Alternatives for the Elderly*, in CONTEMPORARY FAMILIES AND ALTERNATIVE LIFESTYLES 271, 277-81 (Eleanor D. Macklin & Roger H. Rubin eds., 1983).

10. Constance Sorrentino, *The Changing Family in International Perspective*, MONTHLY LAB. REV., Mar. 1990, at 41, 55.

11. The changes are not unique to the United States, but are common to the major developed countries. The United States is both a trend setter and a trend follower; it has the highest incident of divorce and single-parent families, but trails behind other countries, especially Scandinavia, in unmarried cohabitations. *Id.* at 46, 55. These changes have also affected the relationships *within* each unit. *See infra* Part I.B.

12. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES tbl. 56 (112th ed. 1992) [hereinafter STAT. ABSTRACT]. There were 1,094,000 nonfamily households in 1970 and 4,440,000 in March 1991. In 1988, nonfamily households comprised 4.4% of total households, but only 1.7% in 1970. U.S. BUREAU OF THE CENSUS, CHANGES IN AMERICAN FAMILY LIFE, CURRENT POPULATION REPORTS ser. P-23, no. 163 (1989), at 10 [hereinafter CHANGES IN AMERICAN FAMILY LIFE]. The figures are difficult to grasp. For example, Table No. 71, "Nonfamily Households, by Age of Householder and Presence of Nonrelatives: 1980 to 1991," shows a steady growth of households in which a nonrelative was present—from 2,930,000 in 1980, to 4,258,000 in 1990, to 4,400,000 in 1991. STAT. ABSTRACT, *supra*, at tbl. 71. A householder is the first adult household member listed on the questionnaire, which calls for listing first the person (or one of them) in whose name the home is owned or rented. *Id.* at 6.

One of the difficulties in dealing with statistics about nonmarital families is the lack of agreement over the definition. The statistics of some countries, such as Canada, Sweden, and France, include unmarried cohabitants within the definition of a married couple. Sorrentino, *supra* note 10, at 47 n.1. In 1980, the United Nations recommended that for purposes of population censuses, "couples living in consensual unions should be regarded as married couples." *Id.* at 57 (citing UNITED NATIONS, PRINCIPLES AND RECOMMENDATIONS

ing arrangements calls into question assumptions about patterns of sharing resources, as well as the concept of family itself.

Existing data in the United States for studying the growth of non-traditional groups that may pool resources is not entirely satisfactory. The major unit of classification in the U.S. Census, the primary source of American population statistics, is the "household," which consists of "all persons who occupy a 'housing unit.' . . . A person living alone or in a group of unrelated persons sharing the same housing unit is also counted as a household."¹³ However, this term and definition give no indication of how the members of a group live; they do not reveal whether people in a household cohabit, or more importantly for tax purposes, whether they pool resources.

The household concept encompasses people who physically live together, but who may not be an economic unit because they do not pool resources.¹⁴ Thus, roommates may count as one household for census purposes, but may only share the rent on the apartment. In contrast, two or more people may live together and share all expenses. People may live together either in a platonic or intimate sexual relationship, or they may live in a religious community or a hippie commune. In each situation people can and do share resources. These people functioning as one economic unit must be examined in discussing the taxable unit. However, people may function as an economic unit even if they do not live in the same house. Children may support their parents and vice versa. Nonrelated men and women also can support each other.¹⁵

Flawed as they are, the statistics indicate the decline of the traditional, one-earner nuclear family on which both the joint return and the married couple as taxable unit are based. For example, the statis-

FOR POPULATION AND HOUSING CENSUSES, STATISTICAL PAPERS, ser. M, No. 67, at 72). In the United States, however, "married couple" in official documents refers to a husband and wife living together in the same household. STAT. ABSTRACT, *supra*, at 6.

13. *Id.* Comparative studies are further complicated by the varying definitions countries give to the terms. See *supra* note 12. The Census itself has trouble defining the term. In prior years, such as 1977, the term required that the "household head share . . . the living quarters with an unrelated adult of the opposite sex." Eleanor D. Macklin, *Nonmarital Heterosexual Cohabitation: An Overview*, in CONTEMPORARY FAMILIES AND ALTERNATIVE LIFESTYLES, *supra* note 9, at 49, 50.

14. Census subcategories of "family" and "nonfamily" have similar problems; for tax purposes, they do not adequately distinguish groups that share resources from groups that do not.

15. Traditionally men have supported mistresses. In a more modern variation, women and men may provide economic and psychological support for each other even if they live apart.

tics show a sharp rise in one-parent families,¹⁶ in dual-earner couples,¹⁷ and in nontraditional families.¹⁸

The difficulty in defining "family" reflects uncertainty among both lay people and experts.¹⁹ As the varieties of living arrangements blossom, so does the confusion about the definition of "family." In a recent survey, ten percent of respondents said a childless couple was

16. From 1970 to 1988, they more than doubled, and in 1988 they comprised 27% of all families with children under 18. *CHANGES IN AMERICAN FAMILY LIFE*, *supra* note 12, at 13. While only about 22% of white families with children had single parents, 59% of black families with children had single parents. *Id.* A variety of reasons for the presence of a single-parent family exist, such as divorce, widowhood, and out-of-wedlock births.

17. The proportion of all married-couple families with both partners working increased from 37% in 1976 to 49% in 1987. Moreover, among married couples with the wife between 18 and 44 years old, the proportion with only the husband employed and wife and child(ren) at home (the model for the joint return) dropped from 43% in 1976 to 28% in 1987. Meanwhile, dual-earner couples with children rose from 33% to 46%. *CHANGES IN AMERICAN FAMILY LIFE*, *supra* note 12, at 18. The text of *Changes in American Family Life* does not, however, match the accompanying chart, which shows that in 1976 both spouses were employed in 44.8% of married couples and by 1987 the percent of dual-earner couples had risen to 59.7%. *Id.*

Even in 1948, the one-earner couple, upon which the joint return is premised, was not universal. In 1950, 33.9% of all married women participated in the work force. *STAFF OF JOINT COMM. ON TAXATION, 96TH CONG., 2D SESS., THE INCOME TAX TREATMENT OF MARRIED COUPLES AND SINGLE PERSONS 64* (comm. print 1980) [hereinafter *INCOME TAX TREATMENT*].

The two-earner deduction enacted in 1986 reflected this increase in the number of dual-earner couples. The Joint Committee reported an increase of female participation in the marketplace from 33.9% in 1950 to 51% in 1979. *Id.* Table A-1, at 64. Participation in the labor force means either holding a job or looking for one. Of women in their "principal child-bearing years (25-34)," only 34% participated in 1950 versus 63.8% in 1979. *Id.* In 1960, 37.7% of the civilian labor force consisted of women. Of the women working, 31.9% had husbands present; 41.6% were widowed, divorced, or separated; and 58.6% were single. In 1991, 57.3% of the civilian labor force was women: 58.5% had husbands present; 46.8% were widowed, divorced, or separated; and 66.5% were single. *STAT. ABSTRACT*, *supra* note 12, at tbl. 619 (including women age 16 and older in the civilian, noninstitutional population).

The Census does have a table analyzing unmarried couples. However, its definition of an "unmarried couple" as "two unrelated adults of the opposite sex sharing the same household" limits its usefulness in studying pooling of assets. For instance, the table excludes all same-sex couples who share. *STAT. ABSTRACT*, *supra* note 12, at tbl. 52.

18. See *supra* notes 11-13 and accompanying text.

19. One researcher's definition of the difference between family and household is, "[W]hile household may refer to the traditional co-residence and food- and fire-sharing, family may reflect kinship ties which extend beyond household." Susan Scrimshaw, *Combining Quantitative and Qualitative Methods in the Study of Intra-Household Research Allocation in Intra-Household Resource Allocation*, in *INTRA-HOUSEHOLD RESOURCE ALLOCATION ISSUES AND METHODS FOR DEVELOPMENT POLICY AND PLANNING* 86, 92 (Beatrice Lorge Rogers & Nina Schlossman eds., 1990) [hereinafter *INTRA-HOUSEHOLD RESOURCE ALLOCATION*]. A household may get some (or most) of its resources from its family, as when a young couple is subsidized by parents. *Id.* at 93.

not a family and only seventy-three percent thought the term "family" included an unwed father living with his children.²⁰ For some people, a family is self-defined: If you think you're part of a family, then you are.²¹ Under such a broad definition, components of a family need not live under the same roof.

Some European researchers focus on the "criterion of common residence or common residence under marriage-like conditions (e.g., 'two adult persons of different sex living together under marriage-like conditions in the same household without having officially confirmed their relationship through marriage')." ²² Their definition combines elements of "family" with "household." However, this definition obviously omits several kinds of living arrangements in which the members consider themselves a family unit, such as same-sex couples and nonsexual living arrangements.

Other cohabitation researchers believe that the essence of a family is the *commitment* of the members. If commitment is key, then sexual cohabitation and gender of partners is irrelevant. For instance, two same-sex adults, one adult and her children, or three adult siblings can comprise a family unit.

Some cohabitation researchers have stated that commitment has two aspects:

- (1) personal commitment, or the extent to which one is personally dedicated to continuing the relationship; and (2) behavioral or structural commitment, i.e., acts, and the consequences of those acts, that tend to bind one into a relationship (e.g., the extent to which others know of the relationship and support its continuing, the number of possessions owned in common, and the changes one would have to make in one's life were one to leave).²³

20. In contrast, 81% applied the term to a never-married mother living with her children. Alan L. Otten, *Giving Definition to Family Makeup*, WALL ST. J., Jan. 4, 1993, at B1 (analyzing survey conducted by the Roper Organization). It is also interesting to note that 84% defined family to include a divorced mother living with her children, and 80% included a divorced father living with his children in the definition. Almost everyone—but not everyone—said a married couple living with their children was a family. *Id.*

21. See Macklin, *supra* note 13, at 55-56 (referring to definitions of cohabitation).

22. *Id.* at 56 (citing C.L. Cole, *Cohabitation in Social Context, Marriage and Alternatives*, in MARRIAGE AND ALTERNATIVES: EXPLORING INTIMATE RELATIONSHIPS 62, 79 (R.W. Libby & R.N. Whitehurst eds., 1977)).

23. Macklin, *supra* note 13, at 60. Catherine Chilman, Fred Cox, and Elam Nunnally define family "to mean two or more people in a committed relationship from which they derive a sense of identity as a family." Catherine Chilman et al., *Variant Family Forms*, in 5 FAMILY IN TROUBLE SERIES 10, 10 (Catherine S. Chilman et al. eds., 1988). Some teenager-on-the-street interviews confirm the "commitment" definition of family. In response to the question of what is a family, a 17-year-old from Staten Island replied: "Your family is people who love you, people who love you and are going to support you through thick

The commitment definition of family is well suited for the purpose of determining a taxable unit on economic grounds because it is based on functions such as sharing resources, rather than on arguably irrelevant factors such as legal status or bloodlines. Some courts have applied this functional approach to expand the concept of family.²⁴

and thin." *Children of the Shadows: Shaping Young Lives; I Want to Be the First One to Stay Married*, N.Y. TIMES, Apr. 4, 1993, at I21. An 18-year-old from Brooklyn expressed similar sentiments: Family is "friends, when we're all gathered around. I can go to them for any support, love and understanding." *Id.*

In 1973 the American Home Economics Association defined family as "two or more individuals who share goals, resources and a commitment over a period of time." *Quoted in* Kris Franklin, "A Family Like Any Other Family": *Alternative Methods of Defining Family in Law*, 18 REV. OF L. & SOC. CHANGE 1027, 1029 (1990-91).

For a variety of definitions of "family," see Mary P. Treuthart, *Adopting A More Realistic Definition of "Family"*, 26 GONZ. L. REV. 91, 96-99 (1991). Treuthart cites a 1989 survey by the Massachusetts Mutual Life Insurance Company in which approximately three-fourths of the randomly selected adult respondents used a functional definition of family as "a group of people who love and care for one another," rather than a traditional definition based on blood, marriage, or adoption. *Id.* at 97.

24. See, e.g., *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53 (N.Y. 1989) (holding that a man could inherit a rent-controlled apartment from his male lover under a law that stated a landlord cannot evict "either the surviving spouse or some other member of the deceased tenant's family who has been living with the tenant"); *Curry v. Dempsey*, 520 F. Supp. 70, 72, 74 (W.D. Mich. 1981) (finding that, while the relationship was not directly approved for aid from Aid for Families with Dependent Children (AFDC), legal guardians unrelated to their wards would ensure an adequate home environment for a child), *rev'd*, 701 F.2d 580 (6th Cir. 1983). The Supreme Court has stated that the "family unit accorded traditional respect in our society . . . is typified, of course, by the marital family, but also includes the household of unmarried parents and their children. Perhaps the concept can be expanded even beyond this . . ." *Michael H. v. Gerald D.*, 491 U.S. 110, 123 n.3 (1989).

In January 1993, New York City Mayor Dinkins signed an executive order allowing domestic partners to register at City Hall. Partners must be at least 18 years old, be unrelated, attest that they have "a close and committed personal relationship," and swear before a notary that they have lived together before registering (no specified length of time is required). These registered domestic partners qualify for apartments and inheriting leases in residential buildings owned or overseen by the city's housing body. Alan Finder, *Rights of 'Domestic Partners' Broadened by Dinkins Order*, N.Y. TIMES, Jan. 8, 1993, at A1; see also *infra* notes 26-27. The executive order achieves the same result as that in *Braschi*.

Partners register at City Hall by signing a notarized affidavit and paying a \$20 fee. Partners may terminate their registration upon payment of a \$15 fee. Jonathan P. Hicks, *A Legal Threshold Is Crossed by Gay Couples in New York*, N.Y. TIMES, Mar. 2, 1993, at A1.

Some courts have also created a pooling between unmarried cohabitants by implying contract rights between them that give one member rights in the other's property. The leading case in this area is *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). See, e.g., Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family"*, 29 J. FAM. L. 497, 508 (1991) (noting that California was one of the first states to recognize property rights of unmarried cohabitants through implied contract).

There has been a recent spate of articles, especially student notes, on the issue of changing definitions of family and the evolving legal rights of these nontraditional groups.

The main problem with such a functional approach is uncertainty. Whether a court will uncover enough factors to find the arrangement the functional equivalent of a family is unpredictable.²⁵ Moreover, as Martha Minow suggests, a functional approach may lead to abuse of the system by those who wish to be treated as a married couple for some but not all purposes.²⁶ Finally, basing tax liability on a func-

Franklin, *supra* note 23, at 1027; see, e.g., Treuthart, *supra* note 23, at 91 (explaining that broader (i.e., more functional) judicial or legislative definitions of family would help, but the ultimate solution may be that benefits should not be based on marital or family status); John C. Beattie, Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415, 1416 (1991) (proposing that state laws prohibiting marital status discrimination can help protect nontraditional families); Melton, *supra*, at 516 (proposing that courts should focus on the "societal interests of protecting long-term, supportive relationships," even if they are not considered traditional families, in order to "fashion flexible remedies to support the parties' reasonable expectations"); Note, *Looking For a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1641, 1657-59 (1991) (concluding that a functional approach should be abandoned because it is "indeterminate, intrusive, and most important, unfair with respect to traditional relationships that enjoy legal presumptions based on blood, adoption, and marriage," and that legislatures should provide open registration for nontraditional relationships). For a discussion of the moderate expansion of the rights of nonmarried couples in recent years in both the United States and the Commonwealth countries, see Carol S. Bruch, *Cohabitation in the Common Law Countries a Decade after Marvin: Settled In or Moving Ahead?*, 22 U.C. DAVIS L. REV. 717, 718 (1989).

25. Minow, *supra* note 8, at 276.

26. *Id.* at 277 (using the example of sham marriages for immigration purposes). In the tax context, the situation is often the reverse; given the "marriage" penalty for two-earner couples, it is to their advantage to be unmarried. As a consequence, the IRS was often in the position of arguing that the divorce was a sham, and the couple was married for tax purposes despite their divorce. See, e.g., *Nevitt Ensminger v. Comm'r*, 610 F.2d 189 (4th Cir. 1978).

Because nontraditional families have become so much more prevalent and so much more accepted, and because family status can be such an important determinant of legal rights, there is a growing movement to legally recognize nontraditional living arrangements as families. At least 25 city, county, or state governments have recognized some rights of unmarried domestic partners, New York City being among the most recent. Jonathan P. Hicks, *A Legal Threshold is Crossed by Gay Couples in New York*, N.Y. TIMES, Mar. 2, 1993, at A1. Under the New York City executive order, registered domestic partners employed by the city have the same right to unpaid child care leave as married partners. All registered domestic partners can visit their partners in municipal hospitals and jails on the same bases as married partners. They also have equal status with married couples to qualify for apartments or to inherit residential leases in buildings owned or overseen by the city. *Id.*; see also SEATTLE, WASH., FAMILY LEAVE ORDINANCE 10,7342 (Aug. 18, 1989), reprinted in Treuthart, *supra* note 23, at 104 n.38 (authorizing sick leave and funeral leave for domestic partners who were registered with the city). San Francisco enacted a similar domestic partners law in 1990. SAN FRANCISCO, CA., ADMINISTRATIVE CODE §§ 62.1-62.8 (1991). In November 1991, this law withstood an initiative calling for its repeal. *Voters Force Runoff in San Francisco*, CHRISTIAN SCI. MONITOR, Nov. 7, 1991, at 6. Citations to various legislative enactments extending some family benefits to alternative living arrangements may be found in Melton, *supra* note 24, at 503-06. As recognition of nontraditional

tional approach invites administrative complexity. Proof of pooling, for example, would require detailed documentation by taxpayers, probable invasion of privacy by the Internal Revenue Service (IRS), and most likely increased litigation. Requiring some type of registration by taxpayers might solve these problems, but might invite abuse by taxpayers who would choose to be a unit only for tax purposes. Requiring groups to register as units for all legal purposes could eliminate this abuse, but might be viewed as unduly intrusive.²⁷

arrangements grows, the discrepancy between tax and nontax treatment of couples will also increase. Such discrepancies create both a fecund ground for the abuse Minow talks about, and confusion among citizens. It is more difficult for couples to understand what their legal rights are when they seem to change so whimsically with context: now they are legally recognized as a couple (or parent or family) and now they are not.

Curry provides an example of the multiplicity of definitions of family and demonstrates how narrow definitions can defeat the purpose of the law. Plaintiffs had been denied, at the administrative level, AFDC benefits because as legal guardians, they were not related to their wards as required by the statute and regulations. Health and Human Service regulations provided benefits to children if they lived with various relatives, including uncles, aunts, and first cousins, but not if they lived with unrelated persons, such as the plaintiffs, even if such person provided for the child materially and emotionally.

The district court ruled that the plaintiffs were entitled to benefits because "[i]t is apparent . . . that the intent of Congress was to provide aid to needy children in many types of family settings where they would be likely to receive the care, affection, and support necessary for their development into productive citizens." *Curry*, 520 F. Supp. at 73. In its ruling, the court applied a functional approach to the definition of family: "A stable and nurturing home environment for needy children is what the Act seeks to support, not merely a living arrangement with someone who happens to share a common ancestor." *Id.* at 74.

The court of appeals reversed, holding that Congress did not intend to include legal guardians within the act's ambit. "Congress was obviously aware that legal guardianship can be equated . . . with parenthood" because it had done so in another act. 701 F.2d at 583 (citing 42 U.S.C. § 675(4)(B) (1988), relating to child welfare services). Determining how revenues are distributed to improve general public welfare is within Congress's discretion. *Id.* The appellate court, in contrast to the district court, took a formalist view of the definitions despite the fact that such a view created inconsistency among related statutes (thus creating the opportunity for confusion and selectivity among the citizenry) and that such a formalist view ignored the purpose of the statute and the reality of the living arrangement.

27. This solution is similar to that adopted by New York City, *see Hicks, supra* note 26, and San Francisco, *see Domestic Partnership Act, SAN FRANCISCO, CA., ADMINISTRATIVE CODE* §§ 62.1-62.8. Under these provisions couples register as domestic partnerships. The problem with this solution is twofold. First, any statutory solution inevitably will include a definition to provide guidance. Such a definition may, however, still exclude certain living arrangements in which people pool. *See Franklin, supra* note 23, at 1066. Second, couples who currently choose not to marry because they oppose governmental intrusion into personal affairs would not be covered. *Id.* at 1065. To solve this second problem, the statute could simply allow parties to self-define their families by a simple declaration. *Id.* at 1069-73. Even under such a system, however, many people might not file due to laziness, ignorance, or a reluctance to deal with a bureaucracy.

Income pooling can occur within a multiplicity of living arrangements, not just in marriages. Moreover, the numbers of these types of relationships are increasing in society. Although documentation of pooling involves some administrative complexity, the expanding existence of alternative relationships underscores the growing under-inclusiveness of allowing only marital units to file joint returns.

B. Pooling and the Legal and Social Concepts of Marriage

Today the law largely assumes that marriage is based on a partnership model. Before 1948, however, two distinct systems provided the legal underpinnings for the tax treatment of married couples.²⁸ First, the community property system treated marriage as a bilateral contract that created a new relationship—the marital partnership or community.²⁹ Second, under the traditional common-law system, ownership followed title, with each spouse retaining ownership, possession, and use of all property acquired before or during marriage.³⁰

28. See *supra* notes 2-4 and accompanying text.

29. W.S. McCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES § 2:27 (1982). Although the community property states each had somewhat different community laws, the basic theory was similar: Property was divided into two classes, separate and community. Community property—generally, property acquired *during* the marriage—was deemed to be equally acquired by each spouse. Separate property, consisting of any property a spouse owned before the marriage, remained the property of the spouse who owned it prior to the marriage; the other spouse received no interest—present or future—in it. Additionally, property received during the marriage by gift or inheritance was separate property of the recipient spouse. States differ on the issue of whether the earnings on separately owned property are community property. See, e.g., *id.* § 2:22; ROBERT L. MENNELL & THOMAS M. BOYKOFF, COMMUNITY PROPERTY IN A NUTSHELL (2d ed. 1988); WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES (3d ed. 1991). Additionally, Cynthia Samuel kindly discussed community property with me at a basic level I could understand. I thank her for her efforts; any mistakes herein, of course, are mine. See McCLANAHAN, *supra*, § 2:24, at 34-35, 44-49, and 137-99 for a summary of the different systems.

30. Additionally, in common-law states, each spouse has an interest, probably not present or vested, in the other spouse's estate upon dissolution of the marriage. McCLANAHAN, *supra* note 29, § 2:26. These laws vary widely.

Historically, under the common law, a woman lost her property rights when she married and the husband gained the right to use and manage all her property and receive her income, regardless of when or how she acquired the property. In return, she received an inchoate dower right, which was a mere expectancy that if she survived her husband she would receive a portion of his estate. Changes in this regime began in the nineteenth century, and by the turn of the century, most states had enacted a married women's property act giving women, among other things, the right "to retain ownership, possession and use of their personal property, whether acquired before or during marriage, and to acquire, own, hold, manage and convey real property." *Id.* § 2:21. The result of such a system was that marriage was the "equivalent of civil death for the wife." *Id.* § 2:20 (referring to a statement by Charles Beard).

The joint return was created to eliminate the inconsistent tax treatments that arose, according to the Supreme Court, from differing state marital property systems.³¹ Federal tax treatment should not be determined by geographic contingency.

Despite these differences, the two systems were never as separate as these paradigms suggest. Under both systems, the wage earner largely controlled the income earned. Although a non-wage earner spouse in a community property state owned an *interest* in her husband's income, such an interest was not the equivalent of common-law ownership.³² Ownership in the common-law sense includes the rights of management and control, rights that are critical to the proper allocation of income under our tax system.³³ Under traditional community property laws, the husband had the right to manage and control community property.³⁴ Although this basic right of management has been altered³⁵ to give the wife some management rights, community property rights are not yet identical to common-law ownership be-

31. *Lucas v. Earl*, 281 U.S. 111, 114 (1930).

32. *McCLANAHAN*, *supra* note 29, § 2.31.

33. *See infra* text accompanying notes 107-108.

34. Bea Ann Smith rejects the traditional view that the early community property laws treated women as equal partners in the marriage. Rather, she sees these laws "as attempts to remove married women's severe legal disabilities . . . and are similar to the married women's property acts enacted at the same time in common-law states." Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 *TEX. L. REV.* 689, 692, 697-706 (1990). Smith states, for example, that in the nineteenth century a married woman had the same disabilities as an infant; she could own property, but only her husband could control it. "Marriage could at best be characterized in nineteenth-century Texas as a limited partnership with the husband as a general partner and the wife as a limited partner with few rights." *Id.* at 699.

35. In California, for example, the husband and wife generally have equal rights in the management and control of community property in that *either* spouse may manage and control the community property. *CAL. CIV. CODE* § 5125 (West 1983 & Supp. 1993). Texas, in contrast, gives spouses equal, joint control over property, except that each spouse has sole management rights over community property that the spouse would have owned if single, such as personal earnings. *TEX. FAM. CODE ANN.* § 5.22 (West 1993); *MENNEL & BOYKOFF*, *supra* note 29, at 233. Property is presumed to be subject to the spouse's sole control and management if it is held in that spouse's name. *TEX. FAM. CODE ANN.* § 5.24 (West 1993); *accord* *N.M. STAT. ANN.* § 40-3-14 (Michie 1989). For a summary of all the community property statutes, see *McCLANAHAN*, *supra* note 29, ch. 4. As Reppy and Samuel point out, statutory schemes such as New Mexico's and Texas's make the equal management rights a "mirage rather than a reality. All a laboring spouse need do is put his paycheck in a bank account in his name alone or invest it in stocks in his name alone, etc., and such funds are shifted from equal to one-spouse management." *REPPY & SAMUEL*, *supra* note 29, at 14-3. A spouse deprived of equal management can sue for relief in court, but generally must prove bad faith. *Id.*; *see also* *McCLANAHAN*, *supra* note 29, §§ 9:12 and 9:14 (examining various judicially created remedies for deprivation of equal management).

cause current community property laws allow many instances of separate or sole management of community property.

Traditionally, the power to manage and control determines whether income should be attributed to a taxpayer. For example, basic assignment of income principles and the grantor trust rules state that if a taxpayer has such a power, she is taxed on the income even if she is not the legal or beneficial owner of the property.³⁶ Therefore, to the extent that current community property laws do not give equal control to both partners, current tax principles should *deny* income splitting. Most importantly, even if ownership under community property law were identical to common-law ownership, an earner spouse still exercises ultimate control over his property by having the choice to follow the community property system. This choice is exercised in two ways: first by choosing to live in a community property state, and second, and more importantly, by opting to follow the community property system. Since couples may elect out of community property, a decision not to do so is an exercise of control over property.

More recently, the two property systems have become less distinct. Common-law marital property systems have adopted "equitable distribution" statutes premised on the same idea as community property systems—marriages are partnerships in which the assets are shared and jointly owned.³⁷ Although equitable distribution princi-

36. See *infra* note 108 and accompanying text.

37. Elizabeth A. Cheadle, Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. REV. 1269, 1282-84 (1981). Common-law states apply the sharing concept on event of the dissolution of a marriage in several ways. Two basic methods are:

(1) *Deferred approach*. Community property principles apply upon divorce, but not during the marriage. Generally property acquired during the marriage by the labor of either spouse is community property to be divided equally upon divorce; property obtained prior to the marriage or acquired during the marriage through gift or inheritance is separate property.

(2) *Equitable distribution approach*. Under this approach the court is empowered to distribute the property in an equitable or fair manner regardless of title. In some states the statutes specify criteria for the judge to use in dividing the property; in other states the statute is more vague, giving the court even more discretion.

Ohio's recent legislation, effective January 1, 1991, is a striking example of the importation of community property principles to common-law states. First, it defines marital property as all property acquired by either or both spouses during the marriage, including (with some exceptions) income and appreciation on separate property due to a contribution of labor or property by either spouse during the marriage; separate property is property acquired prior to the marriage, gifts or inheritances acquired during the marriage, property subject to a prenuptial agreement, and passive income and appreciation acquired during

ples ostensibly apply only upon dissolution of the marriage,³⁸ they can affect sharing during the marriage. In determining equitable distribution, when a spouse claims that more property would be available for distribution but for consumption or mismanagement by the other spouse, the court may consider the dissipated or wasted property when dividing the remaining property.³⁹ In this manner, the threat of a future dissipation action may constrain the spouse's use of property titled in his name. Equitable distribution thus casts a shadow over traditional property rights that had given the nominal owner exclusive rights over the property.

The partnership model of marriage now incorporated into both community property and common-law systems as the basis for the joint return can be criticized from two perspectives. The first accepts the validity of the partnership model as an ideal, but holds it irrelevant for tax purposes. The second line of criticism attacks the paradigm of the marital partnership.

The first line of criticism argues that even if the partnership paradigm is true, tax policy requires taxation of the individual. As Part III shows, basic tax principles dictate that if a person retains significant control over an asset, she is taxed on the income generated by the asset, regardless of who benefits from it. Under both the community property and common-law systems, the earner retains significant con-

the marriage from separate property. OHIO REV. CODE ANN. § 3105.17(A) (Anderson 1992). Marital property is to be divided equally, unless such a distribution is inequitable, in which case the court is to divide property equitably considering such factors as duration of marriage, assets, and liabilities of each spouse. OHIO REV. CODE ANN. § 3105.17(C), (E), (F) (Anderson 1992); see Smith, *supra* note 34, at 724-29 (discussing other common-law equitable distribution statutes).

38. See, e.g., OHIO REV. CODE ANN. § 3105.17(A).

39. Lewis Becker, *Conduct of a Spouse That Dissipates Property Available for Equitable Property Distribution: A Suggested Analysis*, 52 OHIO ST. L.J. 95, 97-98 (1991) (stating that the court also "may make an offset for the dissipated property by considering the property as still being available for distribution, awarding the dissipated property to the dissipating spouse, and awarding a corresponding amount of property to the other spouse"). It is difficult to determine precise guidelines for when an action constitutes dissipation, and courts seem to decide cases on an ad hoc basis. See generally *id.* at 111-16 (discussing expenditures and conduct constituting dissipation). Of course, the generally hostile setting of the divorce or dissolution may frequently color a spouse's allegations about whether past actions of the other spouse were dissipating actions.

While the scope of the dissipation doctrine is unclear, it always affects to some extent the spouse in whose name the property is titled by imposing constraints on that spouse's ability to control the property. Nevertheless, no court has so broadly interpreted dissipation so as to take away from the owner all vestiges of control and management of the property. For example, some courts hold that the doctrine may be considered only after there has been a breakdown of the marriage; others focus on intent; still others focus on the nature of the dissipating expenditure. *Id.* at 105-07.

trol over property. Moreover, earners exercise control over money they earn in the most basic sense because they choose whether to work. Finally, as Part II shows, earners retain power over resources once earned.⁴⁰

The second line of criticism has several variations, all of which question the appropriateness of the partnership model of marriage in light of today's society. One branch of this criticism notes that the whole idea of a marital partnership is faulty because it is premised on the ideal of equality and women are not equal partners in reality.⁴¹ The idea of community property, another view holds, is based on a model in which one spouse works outside the home and the other cares for the home and children. Given the growing participation of women in the work force, such a model is no longer appropriate.⁴²

The most radical variation of the second line of criticism questions the very premise of the partnership model by asserting the rise of individualism and autonomy in marriage. In every marriage a tension exists between "the community of life that marriage involves and the separate, autonomous existence of the individuals who are associated in this community of life."⁴³ As an individualistic society, we rec-

40. See *infra* notes 48-90 and accompanying text.

41. See, e.g., Smith, *supra* note 34, at 732-36. Martha Fineman states that for many in the divorce reform movement, equality, in the guise of partnership, provided the measure of ultimate fairness from which both to argue women's victimization and to fashion the solution to it. The theory was that a housewife-partner's tasks were to be equally valued with her husband's economic contribution. MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 4 (1992).

Fineman finds several problems with this approach. First, most women contribute more than half of the marriage's total economic production by means of outside work and household work. As a consequence, "[o]ne could view them as deserving more than an equal partnership share." *Id.* at 4. "Moreover, from a result-equality perspective, [Fineman] argue[s] that, metaphors and paradigms aside, the economic and social inequalities women as a group suffer in society are such that an equal share of assets is seldom sufficient to provide security for women and children after divorce." *Id.* at 4-5. This is especially true since women typically assume more care for the children after divorce than men, despite joint custody agreements. *Id.* Finally, pre-reform divorce law took into account the wife's economic dependence. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 70 (1985).

42. Mary Ann Glendon, *Is There A Future for Separate Property?*, 8 FAM L.Q. 315, 318-21 (1974) [hereinafter Glendon, *Future*]; MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 123-35 (1989) [hereinafter GLENDON, *TRANSFORMATION*].

43. Glendon, *Future*, *supra* note 42, at 323; see also Judith T. Younger, *Light Thoughts and Night Thoughts on the American Family*, 76 MINN. L. REV. 891, 898 (1992) ("[C]ultural emphasis on self-fulfillment inhibits the creation of stable families.").

Lenore Weitzman believes the divorce reforms "reflect larger cultural themes: the rise of individualism, the emphasis on personal fulfillment, the belief in personal responsibility,

ognize that, though we have much in common with others, each individual also has her own needs and interests that differ from those of even her close loved ones. A single person, therefore, cannot always speak or act for the couple or the family unit. Our desire for independence and the separateness of our needs and interests illuminate the fallacy of the partnership model and its premise of unity. This mythic unity was based on the hegemony of the Husband and Father.⁴⁴ The breakdown of this hegemony and the rise of the individual argues against total pooling; members of families who desire to retain some measure of emotional and financial independence frequently keep some or all of their assets separately. This separation of assets might be particularly true in nontraditional families, but it is also true in traditional families.⁴⁵

and the importance we attach to individual 'rights.'" WEITZMAN, *supra* note 41, at 374. To her, the new divorce laws reward individual achievement (as in the acquisition of a professional degree), rather than investment in the family partnership and a common financial future with obligations extending beyond the termination of a marriage. The new laws, which provide minimal child support, little or no alimony, and only half of *tangible* assets, "convey a clear message to the young woman who is planning her future. They tell her that divorce may send her into poverty if she invests in her family ahead of—or even alongside of—her career." *Id.* at 372-73. If the major asset of the family, the earning capacity of the breadwinner, is not available to the housewife either as joint property or alimony, then the only safe course for the wife is to invest in her own career, not her spouse's.

Professor Elizabeth Scott agrees that today's marriages are based on the idea of self-fulfillment, but states that the common interpretation of such marriages is incorrect. Citing to other scholars, she posits a model of marriage in which individuals find self-fulfillment *through* the vehicle of a committed, long-term marriage. Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 23-24 (1990).

Professor Carl Schneider finds that emphasis on the individual, rather than on the family entity, is reflected in various facets of family law, including no-fault divorce, short periods of alimony, and abortion. Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1856-57 (1985). He notes, for example, that in the area of contraception the Court switched from viewing the right to privacy as residing in the marital relationship (as it did in *Griswold v. Connecticut*, 381 U.S. 479 (1965)), to residing in the individual:

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion . . .

Id. at 1856 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

44. *Id.* at 1859-60 (asserting that the breakdown of the family unit is the breakdown of the hegemony of the father); *see also infra* note 104 and accompanying text.

45. *See* PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 47 (1983) [hereinafter *AMERICAN COUPLES*]. Even in traditional patriarchal marriages, women are often given "pin" money to give them some small measure of independence. In the more comfortable strata of English society in former times, an amount of income for the wife was often settled as part of the marriage negotiations because it was "better that young

Even within the traditional family unit, changes have transformed the nature of the relationship. Once the family was the major determinant of social and economic status. As a consequence, the individual was an inseparable part of the family whose job was to benefit the unit. Today the family still plays an important role in an individual's social and economic status, but the individual is not nearly as dependent on the family for social and economic achievement.⁴⁶ Consequently, the individual's goals are no longer identical to the family's. Therefore, individual fulfillment, not familial fulfillment, is now the objective; the family serves the individual, rather than vice versa.⁴⁷ If the family is not a monolithic entity, but the vehicle through which the individual finds satisfaction, then logic dictates that pooling is not universal, as is commonly assumed, because an individual's resources would serve her own rather than the family's interests.

married women should have a fixed income They knew then what they ought to spend, and all their little charities, or any presents they wished to give would be the fruits of their own self-denial; . . . [even] the most devoted and liberal husbands would, after a certain term of married life, object to milliners' bills" EMILY EDEN, *THE SEMI-DETACHED HOUSE* 114 (Houghton-Mifflin 1948) (1859).

46. The declining role of the family as a determinant of the economic and social status of an individual has increased stress on the individual. GLENDON, *TRANSFORMATION*, *supra* note 42, at 292. Glendon quotes a French jurist, Alain Benabent, as illustrating this point:

· Instead of the individual "belonging" to the family, it is the family which is coming to be at the service of the individual. The preeminent place of the family among our institutions is retained, but not for the same reason: no longer is it because the family serves society, but because it is a means for the fullest development of the individual. When it no longer fulfills this role, the bonds diminish or disappear.

Id. at 292-93 (quoting ALAIN BENABENT, *LA LIBERTE INDIVIDUELLE ET LE MARIAGE*, *REVUE TRIMESTRIELLE DU DROIT CIVIL* 440, 495 (1973)).

Obviously, this position is extreme; in reality the family serves the individual and vice versa. The point is that there has been movement along a continuum towards the individual and away from the family. One reason there can be a greater stress on the individual is that the individual is no longer as economically dependent on the family as in earlier times, when the whole family worked on the farm or in the small family business in order to provide support for all.

47. Professor Praeger, among others, believes that individualism is overstated. Susan Westerberg Praeger, *Sharing Principles and the Future of Marital Property Law*, 25 *UCLA L. REV.* 1, 6 (1977). For example, even two-earner couples may still share assets and decisions. Spouses may make decisions regarding their jobs based on the needs of the other spouse (where to live, for example) or of the family (one spouse takes time off, or takes a less demanding job so as to care for children). So long as this interdependency exists she believes that sharing principles have relevancy, even in a two-earner world with no sex discrimination. *Id.* at 6-10. She states, for example, that one spouse may forego her most desired job because it is in a city in which the other spouse cannot find a job or does not wish to live, and one spouse's job may be affected, temporarily or permanently, by the other's educational needs or family needs. *Id.* at 8.

III. Empirical Studies of Asset Pooling and Control Sharing

A. Difficulty of Data Interpretation

The theoretical justification for the joint return—the belief that married couples share resources—is largely unsupported by empirical evidence.⁴⁸ Recently, however, a number of studies have explored intra-family allocations because of a growing recognition of this issue's importance to a wide array of social welfare programs.⁴⁹ These studies indicate "that individual incomes are not simply pooled and then spent to meet household needs in some unified fashion. Rather, they are spent at least in part according to the earner's own preference."⁵⁰ As Michael Young has stated, "The bread-winners are often the meat-eaters."⁵¹ This apportionment phenomenon is true even when the couple states that they pool or share resources.

48. There is little literature on *intra-family* allocation of income—as opposed to allocation among families. As one commentator has said: "We know less about money matters [within a family] than about family violence or even marital sex." Viviana Zelizer, *The Social Meaning of Money: "Special Monies,"* 95 AM. J. SOC. 342, 352 (1989). This dearth of information results in part because major data banks, such as the Census, only provide information on the family as a whole, not on income allocation within the family. Other reasons for using the family or household as the unit of analysis are: (1) Many consumption decisions are made at the family level, such as where to live; (2) Like public goods, there are many "family" goods, the use of which by one family member does not preclude the use by another (for example, the security of a home, or shared durables); (3) Many nonpecuniary resources, such as leisure, are allocated within the family and affect resource allocation but are difficult to measure; and (4) "[T]he family festers with externalities." EDWARD LAZEAR & ROBERT MICHAEL, *ALLOCATION OF INCOME WITHIN THE HOUSEHOLD* 19-21 (1988). Lazear and Michael's book is one of the exceptions to the typical neglect of intra-family allocations. The focus of their work is the allocation between adults and children. Even the long-running (20-plus years) *A Panel Study of Income Dynamics*, conducted by the Institute for Social Research at the University of Michigan, which studies over 7,000 households, does not examine intra-household resource allocation. It does ask, however, some questions about intra-family allocation, such as whether respondents had given or received help from parents or other relatives. On the need for research in this area, see Louise Dulude, *Taxation of the Spouses: A Comparison of Canadian, American, British, French and Swedish Law*, 23 OSGOOD HALL L. J. 1, 88 (1985); Julie A. Nelson, *Tax Reform and Feminist Theory in the United States Context: Incorporating Human Connection*, 18 J. ECON. STUD. 11, 11 (1991); Praeger, *supra* note 47, at 7.

49. For example, money given to the "family" to provide food for sick children will not necessarily be used for that purpose. Which family member receives the money can affect whether it ultimately is used for the program's purpose (child nutrition) or is redirected to another use. Beatrice Lorge Rogers, *The Internal Dynamics of Households: A Critical Factor in Development Policy*, in *INTRA-HOUSEHOLD RESOURCE ALLOCATION*, *supra* note 19, at 1, 1-3.

50. *Id.* at 1.

51. Michael Young, *The Distribution of Income Within the Family*, 3 BR. J. SOC. 305, 314 (1952), *cited in* LAZEAR & MICHAEL, *supra* note 48, at 14-15. Young found that in British working-class families between World Wars I and II, the male earner gave his wife a

In the spring of 1991 I began exploring this issue further by conducting my own informal survey. First, I simply talked to a variety of people in order to get a feel for the issue and its complexities. Anecdotal evidence I received from interviewing various people prior to undertaking my survey supported my hypothesis that in America today, pooling is less monolithic in reality than it is in theory. Colleagues, friends, and near strangers were amazingly willing, even eager, to speak of their financial arrangements. I believe that their willingness sprang from the economically and psychologically convoluted nature of the issue. Because couples were grappling with these issues, they were eager to discuss them and hear how others handle these problems. The people with whom I talked used a wide variety of financial systems, which were often quite complicated. Nominal title to assets did not even begin to touch on the reality of what was "mine, his, and ours."

The complexity and sensitivity of the issue makes allocation of financial resources within a couple a phenomenon that is difficult, if not impossible, to capture precisely in a survey. Respondents' statements about whether they pool or believe in pooling are not totally reliable. Spouting vague generalities about sharing is easy, especially when such sentiments are approved morally by tradition.⁵² It is also unclear what a person really means when he states he practices or at least believes in pooling assets:⁵³ Is it pooling when one person makes

flat weekly allowance and disposed of the rest of the income as he wished. The wife frequently was ignorant of how much he made and how he spent it. Young, *supra*, at 314.

52. Interviews in a study by Jan Pahl noted the discrepancies between what couples stated in their joint interview and the realities each partner described in a separate interview. JAN PAHL, *MONEY AND MARRIAGE* 83-84 (1989).

53. The notorious gender gap is a major obstacle in evaluating family financial matters. According to sociologist William Aguilino, spouses tend to lie about money matters when discussing them in the presence of the other spouse: Men say they earn less than they actually do while women overstate their earnings. *Gender Gap—It's All Talk*, THE PLAIN DEALER (Cleveland), Apr. 23, 1992, at 6D; see also *Honesty Not Best Marital Policy?*, THE TIMES-PICAYUNE (New Orleans), Nov. 18, 1992, at E-3 ("Sixty-six percent of married women surveyed by McCall's magazine said it is ethical to hide a portion of their spending money in a secret stash."). People also view the same situation differently. Pahl gives a superb description of the many problems in analyzing financial allocations within a family. Despite what the spouses say, reality is often different. Additionally, the reality often differs within a family unit. Pahl notes that the interviewers for her study "remarked on the disparities between claims made by the couple in the joint interview and the practical realities described in the separate interviews." PAHL, *supra* note 52, at 83-84. Moreover, Pahl notes the great difference between control and management:

Control is mainly exercised at the point where money enters the household. It is concerned with decisions such as which allocative system should be adopted within the household, which spouse should have the final say on major financial

all the decisions? Is it pooling when both partners nominally make the decisions, but in reality one partner is so subservient that she always yields—consciously or unconsciously—to the dominant partner? Is it really pooling if he says “my assets are your assets,” but meanwhile they are all titled in his name so that legally he can do whatever he wishes with them? Is it really pooling when she does not even know what all the assets are?

Factual descriptions of how assets are held can also be misleading; nominal or legal status of parties does not always represent how people really treat their financial assets. For example, joint accounts often are treated as separate accounts and separate accounts are viewed frequently as joint assets. As a consequence, simple tabulation of responses might look accurate and precise, but really could be deceptive. To illustrate, a respondent may check the answer “separate accounts” when asked how the couple holds its money, but a fuller inquiry may reveal that the separate accounts are really for convenience. For instance, the wife may pay household bills out of her separate account while the husband pays other bills out of his. Individually, this may appear to be separate financing, but taken as a whole the couple may in fact be pooling their resources and just dividing up the responsibilities for making payments.⁵⁴

decisions, and with the extent to which spouses have control over personal spending money of their own and access to joint money.

Management is concerned with putting into operation the particular allocative system which the couple have adopted. Household expenditure takes place within a number of different categories, such as food, fuel, clothes, rent or mortgage, insurance, transportation, leisure activities and so on. The management function can extend over all of these categories or it may be confined to just one or two.

Id. at 57.

The difference between management and control is unclear. Pahl states, for example, that in the joint interview, only three couples disagreed as to who managed the money, but in the separate interview “29 of the 102 couples disagreed about who ‘controlled’ the money.” *Id.* at 79. Certain factual patterns frequently correlated with the manner of management and control, but not entirely; the spouse in charge of checking the bank statement was usually seen as the person who controlled the finances. *Id.* at 85-87. Pooling couples more frequently had joint accounts than nonpoolers. *Id.* at 85. Within this group of 66 pooling couples with joint accounts, the wife controlled the finances in 41% (27) of the couples and the husband controlled in 59%. *Id.* at 89.

54. One of my random respondents, for example, stated that wages were held separately and that income from investments, gifts, and inheritances were all held partly jointly, partly separately. In the question asking for a brief description of finances, he stated that while he paid all bills, she took care of food, and they split day care and child's clothing, even though he made more money than she did. Random Study Questionnaire # 39. Another random respondent stated that all checking, saving, and money market accounts, as

Conversely, assets may be jointly titled, but in reality treated as separate. Several questionnaire respondents and interviewees stated that they had two joint checking accounts. However, each partner knew that one account belonged to each partner. The accounts were titled jointly only for convenience, so that, for example, when one partner travelled frequently the other could make necessary deposits.

Even when assets are titled jointly *and* the couple states they share, sharing might not be actually occurring. Although a partner may have equal access to funds for personal spending, many factors, including cultural patterns, can cause the nonearner partner to defer to the spending preferences of the earner.⁵⁵ In fact, studies suggest that the earner partner controls the finances although the nonearner may manage them.⁵⁶ Thus, who pays the bills might not indicate who has control; the manager may simply be implementing the controller's plan. The difference between "control" and "management" is appreciable but difficult to define.⁵⁷

In order to capture all the complexity concerning financial resources, any survey must be somewhat complicated. This complexity, in turn, makes statistical analysis difficult.⁵⁸ I suspect, however, that

well as investments, were held either jointly or *by himself*. Nevertheless, in the comment section, he states: "to have and to hold—jointly." Random Study Questionnaire # 49.

55. As Pahl states, "[T]here were many ambiguities about the realities of shared management." PAHL, *supra* note 52, at 83. One interviewer, for example, noted:

The joint interview gave the impression that they were a pooling couple, but in the individual interview it became apparent that the wife never really handled money, although she did legally have access because of the joint account. The husband (the only earner) always went to the bank and wrote the cheques. The wife saw child benefit [a British governmental support program] as her only really independent source of income; she stated that she felt a difference between this money, which she had autonomy over, and her husband's salary, which she had to ask to use.

Id. at 84. As another example, in Amy Tan's *The Joy Luck Club*, one couple shares all expenses except personal expenditures. The wife, Lena, in response to her mother's question about what a list represents, says that the list is of items she and her husband share. On the list is ice cream, something Lena has hated for years. Yet Lena has never told her husband that. Although he has noticed she never eats it, he continues to buy it and it remains a shared expense. AMY TAN, *THE JOY LUCK CLUB* 176-77 (1989).

56. PAHL, *supra* note 52, at 49-56.

57. *Id.* at 79-83. In Pahl's study, responsibility for paying bills strongly correlated with control over finances. *Id.*

58. For example, my first question asked for current marital status and my second asked for current living arrangement. Answers to both these questions help make relevant classifications for pooling analysis. They distinguish, for example, between a married person living with someone and an unmarried person living with someone. A few respondents were confused by these relatively simple questions. One respondent, for example, did not know why I asked the second question and left it blank. Two others complained about "complexity."

respondents would answer inconsistently not because of confusion, but simply because they themselves are inconsistent; they say one thing and do another. For example, a respondent in my study would state that the couple placed income in joint accounts, but in the next question would respond that certain accounts were held separately. Another respondent would state that wages were held in joint accounts, but when asked how checking, saving, and money market accounts were held, he would respond that all were in his name. The fact that nominal or legal status does not always match the reality of financial patterns further complicates analysis. Simple tabulation of results gives tidy data, but not necessarily the truest picture.

In summary, the complexity of the issue and the difficulty in discerning the real situation (e.g., whether the joint account really is joint) means that percentages in my study or any study of this nature must be regarded cautiously. They should be taken not as absolutes, but as indications of the relevant frequency of pooling and separate maintenance of assets.

B. Data

I examined three studies of intra-family resource allocation as well as my own. My study was an anonymous ninety-three question survey that was distributed twice. First it was distributed in June 1991 to households randomly picked from a phone book that covered six economically and racially diverse suburbs of Cleveland, Ohio (the random study).⁵⁹ The second distribution was in October 1991 and went to all full- and part-time students at Cleveland-Marshall College of Law, Cleveland State University (the CSU study).⁶⁰ Eighty-three surveys were returned in the first survey and 179 in the second, resulting in a response rate of seventeen percent for both. The three prior intra-family studies I examined were the vast study in the 1983 book *American Couples* by Philip Blumstein and Pepper Schwartz,⁶¹ a small

59. Responses to the Random study will be cited as "Random Study Questionnaire # ____."

60. The results of this study, as well as the difficulties in conceiving, conducting, and analyzing the data, are the subject of another article that is in progress. The respondents in my CSU survey were more heterogeneous than one might initially expect. The school, being a large urban school with a significant night division, has many older, fully-employed students. In fact, 17 CSU respondents or their partners individually had income over \$100,000. Responses to the CSU study will be cited as "CSU Questionnaire # ____."

61. *AMERICAN COUPLES*, *supra* note 45. A description of the survey method is in the book's appendix. The authors' research was much publicized in the media. *Id.* at 17. In response to this media coverage and to the public addresses given by the authors to various groups, 22,000 38-page questionnaires were either mailed to people who requested them or

1986 study of dual-career couples in the greater Chicago area by Rosanna Hertz,⁶² and an English study of 102 married couples conducted specifically on the issue of money and marriage by Jan Pahl.⁶³

were picked up by people from public places where they had been left. *Id.* The authors used 12,000 of these; each had been filled out by both parties in the couple. Additionally, the authors intensively interviewed 300 couples: 120 were heterosexual (72 married and 48 cohabiting), 90 lesbian, and 90 gay male. *Id.* at 15-19.

Shere Hite also conducted a large, wide-ranging survey of American couples in 1980. *SHERE HITE, WOMEN AND LOVE: A CULTURAL REVOLUTION IN PROGRESS* (1987). The questionnaire, consisting of 127 essay questions, was distributed beginning in 1980 to clubs and organizations in 34 states and counseling and walk-in centers for women and families in 43 states. *Id.* at 777. Additionally, women who wrote and requested a copy were sent one. *Id.* Of the 100,000 questionnaires distributed, 4,500 were returned. *Id.* "This is almost twice as high as the standard rate of return for this kind of questionnaire distribution, which is estimated at 2.5 to 3 percent." *Id.* My rate of response at 17% compares quite favorably to Hite's rate. Hite chose essay questions because of the difficulty of studying emotions. *Id.* at 776. However, the difficulty of tabulating essays responses—despite Hite's elaborate categorization system—makes her statistical analysis suspect. Although exact percentages are questionable, the overall trends of sharing and nonsharing are not. Moreover, the book provides insightful excerpts from respondents.

Question 41 of the questionnaire asked:

Do you share the money? Who controls the money? Do you both work outside the home? Who pays the rent or mortgage? Buys the groceries? How do you feel about the financial arrangements? Do they affect the relationship?

Id. at 791.

62. Rosanna Hertz interviewed 21 white, dual-career couples (42 interviews, average length 2 1/2 hours) in the Chicago area. At least one spouse in each couple worked in a large corporation; each individual was either an established professional or at least a mid-level manager. The individuals were in their mid-thirties, had a median individual income of \$47,500 for males and \$40,200 for females (joint income averaged \$90,250), and had been married an average of 9.0 years. *ROSANNA HERTZ, MORE EQUAL THAN OTHERS: WOMEN AND MEN IN DUAL-CAREER MARRIAGES* 23-25 (1986). Eleven couples (about 52%) maintained separate finances (each spouse contributed a fixed amount—either equal or proportionate to income—towards basic expenses); 10 couples (about 48%) pooled their money (money was viewed as jointly owned even if spouses had separate charge cards or minimal personal allowances). *Id.* at 90-91. Whether the couple had children did not seem to determine the choice of financial systems. Of those who pooled, three had no children and eight had children. Of those who kept their finances separate, four had no children and six had children. *Id.* at 91 n.3.

63. *PAHL, supra* note 52, at 186. The study involved 102 married couples and used written questionnaires and oral interviews of both spouses living within 30 miles of each other. *See id.* app. 1 (describing the research method). Of the 102 couples, half the women and most of the men were gainfully employed. *Id.* at 63. The men made substantially more than the women. For example, 34% of the women made less than £19 per week and 49% made between £19 and £57; no men made less than £19 and only 6% made between £19 and £57 and some made as much as £300 per week. Only 2% of women made between £96 and £134; none made more. Seventy-two percent of the men made £96 or more. *Id.* at 65. Only half the couples had savings (either jointly or individually) and these were modest amounts. Only nine couples had joint savings greater than £1000. *Id.* at 63. Pahl has also published an article based on this data on the control of money. Jan Pahl, *Household*

Despite the many differences in the studies and their limitations,⁶⁴ all the studies produce remarkably similar data. Couples do not universally share or pool finances, let alone universally *believe* in such a system. In fact, a significant percentage (ranging from thirty percent to approximately fifty percent) do not share all their income. In my random study, only seventy percent of the married respondents who answered the question, "Do you and your partner place money received from wages and salaries into joint and/or separate accounts?" stated that they placed such money solely in joint accounts.⁶⁵ In contrast, in the CSU survey a mere 55.6 percent of respondents, married or unmarried, who lived with another in a long-term relationship kept all wages jointly. Moreover, a sizeable minority of 27.2 percent kept *all* wages separate.⁶⁶ In Hertz's and Pahl's studies only approximately

Spending, Personal Spending and the Control of Money in Marriage, 24 Soc. 119 (1990) [hereinafter Pahl, *Control*].

64. For example, Pahl's study was limited in its scope since it focused solely on money and only within the context of marriage. Additionally, a study based on English couples has obvious cultural limitations. The Hertz study relied on an extremely small sample, examined only a very narrow slice of the population, and presented its data primarily in anecdotal form without any tables. The *American Couples* study, as reported in the book, discussed only whether couples *believe* in pooling resources, even though the raw data underlying the study had more specifics on how they actually kept their money. The data is available on computer tape through the Murray Institute at Radcliffe College. Due to the data's age, I did not analyze it. Both American studies are based on old data: Hertz did her research in 1981 and 1982, HERTZ, *supra* note 62, at 219, and *American Couples* is based on data gathered from 1978 to 1981. AMERICAN COUPLES, *supra* note 45, at 549 n.12. My study is limited by its failure to obtain responses from both partners and by its multiple-choice written format.

I performed the CSU study partly to offset any sampling problems I encountered in my random survey. By using the whole population, I eliminated sampling errors. Obviously, the CSU study is open to the criticism that law students are not a representative population. This criticism loses force in two respects. First, the CSU population is more diverse than average given its urban location, its part-time division, and its historical mission to admit nontraditional students. Second, even if the CSU population does not represent the entire United States population, but merely a strata, the study provides evidence as to that population's pooling practices. Data showing that a substantial portion of a significant segment of society does not pool is by definition meaningful data.

65. Fourteen couples, or 20.9%, kept their money partially joint and partially separate. Six couples, or 9.0%, kept such money entirely separate.

66. According to the CSU survey, 17.3% kept wages partially joint and partially separate. Pahl states that a 1987 study by R. Jowell, S. Witherspoon and L. Brook, *British Social Attitudes: The 1987 Report* (Social & Community Planning Research, London 1987) reported that of 1086 couples, 15% stated they either kept their money separately or only partially pooled. PAHL, *supra* note 52, at 106. However, for couples with income exceeding \$18,000, 25% kept their money in such a manner. *Id.* Nearly half of nonmarried cohabiting couples handled their money this way. *Id.* In comparison, Blumstein and Schwartz's figures showed that more than two-thirds of spouses *believed* in pooling, but less than half of nonmarried cohabitators did. AMERICAN COUPLES, *supra* note 45, at 101;

half stated they actually share.⁶⁷ *American Couples* reported that over two-thirds of spouses *believed* in pooling all property and financial assets, whereas less than half of unmarried cohabitators so believed.⁶⁸

My CSU survey statistics are consistent with Pahl's and Hertz's statistics, while the results of my random survey among older, longer-married couples are closer to those in *American Couples*. On the one hand, my random survey results are consistent with the finding in *American Couples* that the longer a couple had been together, the more they favored pooling.⁶⁹ On the other hand, the CSU survey of a younger population more accurately reflects present and future trends. Even if the group veers a little toward pooling as they age, their varied lifestyles, including more dual careers, should increasingly resemble the results of Hertz more than those in *American Couples*.⁷⁰

My survey also shows that the method for handling finances can vary over the course of a relationship. Some respondents stated that

see also *infra* note 69. While the book *American Couples* focused on attitudes and opinions, the questionnaire did ask some specifics about financial matters such as: Do you and your partner both have separate incomes from any source? Whose income . . . pays for the following expenses? Do partners have joint or separate checking and savings accounts and who contributes to them? Do partners discuss with each other the amount they should have for personal spending? Whose money was used for investments and how are they held? *Id.* at 626-28.

67. HERTZ, *supra* note 62, at 91 (48%); PAHL, *supra* note 52, at 78 (56%). In Hite's study, only 36% placed all money in a joint account. HITE, *supra* note 61, at 445.

68. Sixty-nine percent of 3,637 wives and 75% of 3,642 husbands favored pooling, 19% and 17% respectively were neutral, and 12% and 8% respectively were opposed to pooling. According to *American Couples*, full-time homemakers favored pooling (72%) more than wives employed part-time (69%) or full-time (68%), and wives earning over \$30,000 favored pooling less than those who earned under \$10,000 (61% versus 71%). Of 651 female cohabitators, 27% favored pooling, 29% were neutral, and 44% opposed it. Of 650 male cohabitators, 32% favored pooling, 31% were neutral, and 37% opposed it. AMERICAN COUPLES, *supra* note 45, at 101, fig. 9. In a recent newspaper article, Pepper Schwartz is quoted as saying that about 80% of couples share money. Brenda Richardson, *Family Finance Options*, THE TIMES-PICAYUNE (New Orleans), Apr. 11, 1993, at F-8. She gives no details as to how she reached this figure, which is clearly greater than what the text of *American Couples* suggests.

69. According to *American Couples*, the longer a couple had been together, the more they favored pooling. But regardless of the duration of the arrangement, wives and female cohabitators favored pooling less than husbands and male cohabitators. AMERICAN COUPLES, *supra* note 45, fig. 8 at 95. Gay men favored pooling more than males involved in heterosexual cohabitation but less than husbands. For men in a relationship of two to 10 years, 74% percent of husbands, 32% of male cohabitators, and 44% of gay men in couples favored pooling. *Id.* For those women in a relationship two to 10 years, 66% of wives, 27% of female cohabitators, and 40% of lesbians favored pooling. *Id.*

70. Hertz noted that some of the couples who had separate finances began sharing during their marriages. She concluded that although arguments about money led to the switch, "in each case the wife's career and increasing income were the real catalysts behind the change." HERTZ, *supra* note 62, at 95.

while finances were kept separately in the early years of their relationship, they were held jointly later.⁷¹ Others stated that finances were separate while both worked, joint while one was a student, and would become separate once again when the student returned to work.⁷² Change from single to married status could also shift financial patterns from separate to joint.⁷³ As part of my interviewing while developing the questionnaire, but not in the survey, I learned that the birth of children can also cause a switch from separate to joint finances.

Closely connected to the issue of sharing or pooling income is the question of control; in other words, who decides how the money should be spent? If one person dominates the decision-making process, true sharing cannot exist. The term "sharing" covers various disparate situations. Bob Breadearner "shares" his income with his spouse Betty, but he decides how that money is spent. In contrast, Sid Sharingsworth likewise earns all the family income, but decisions are jointly made with his wife Sharon. The "reality" of Sharon's portion of the income is probably very different from Betty's.

Empirical evidence suggests that even among couples who nominally pool assets, such as Sid and Sharon, true sharing frequently does not occur because power arising from both cultural sources and earning power is distributed unequally. Eighty-seven percent of Shere Hite's respondents felt uncomfortable being financially dependent on their partner and made such comments as, "I felt guilty asking for any money and I wouldn't ask unless it was for groceries"⁷⁴ or "I was financially dependent on a man I was married to. I felt guilty spending his money."⁷⁵ Hite states that "[e]ven if a woman is comfortable being financially dependent on a man, still there may be insidious psychological effects" such as feelings of inferiority.⁷⁶ If a woman feels inferior, is she going to act as if she shares equally in the financial assets and spend them as freely as the earner spouse? According to Hite's study, eighty-two percent of women under twenty-five want to be financially independent.⁷⁷

71. CSU Questionnaire ## 45, 61, 71, 73, 77, 108, 115, and 168. Respondents gave a variety of reasons such as convenience, growing trust in each other, or going back to school.

72. CSU Questionnaire ## 37, 56, and 135.

73. CSU Questionnaire ## 46 and 122.

74. HITE, *supra* note 61, at 432.

75. *Id.* at 433.

76. *Id.* at 435.

77. *Id.* at 438. My study could not explore this issue well due to its multiple choice format. However, several respondents stressed the need for independence in the optional comment section. Perhaps the most striking comment came from a woman in my random

American Couples found that among married couples, heterosexual unmarried couples, and gay couples, the amount of money one partner earned relative to the other determined relative power and control over resources.⁷⁸ Among married couples, the higher the wife's income, the more financial autonomy she had, and the more likely she was to have her own personal savings account. This result was even more pronounced among unmarried couples.⁷⁹

sample who had been married 47 years. She wrote: "I had no financial power in the relationship until I worked, or inherited. I learned to keep some of what I had for independence, if I was to ever have any. Husbands are not interested in giving wives financial independence." Random Study Questionnaire #14.

78. Only in lesbian relationships did income not affect power. This shows the effect of culture on control. *AMERICAN COUPLES*, *supra* note 45, at 53. The evidence that control follows earning power has been suggested by other studies. See, e.g., PAHL, *supra* note 52, at 47-57. Pahl states that the "historical evidence suggested that the higher the household income, the more likely it was that overall control would be in the hands of the husband The historical evidence also suggested that when wives earned in their own right, or when they were the producers of goods for sale, such as eggs and butter, wool and cloth, then they were likely to have more say in financial management." *Id.* at 47. But note that *management* is different from *control*. See *id.* at 83-84, for Pahl's discussion of the difference.

79. *AMERICAN COUPLES*, *supra* note 45, at 53. Blumstein and Schwartz base their conclusions as to autonomy on the responses to their question, "Do you talk with your partner about how much money . . . you should have for personal spending?" *Id.* at 628. Fifty-six percent of wives earning less than \$10,000 (N = 2,241) did not discuss this issue with their spouses; 61% earning between \$10,000 and \$30,000 (N = 1,209); and 78% of those with incomes greater than \$30,000 (N = 96). *Id.* at 554 n.2. Female partners in heterosexual nonmarried couples, like gay men, placed a greater emphasis on independence:

Sixty-seven percent of female cohabitators who earn less than \$10,000 (N = 311) do not discuss with their partners how much they should have for personal spending money, as compared to 75 percent of women with income between \$10,000 and \$30,000 (N = 314) and 94 percent of those earning more than \$30,000 (N = 16).

Id. at 555 n. 13. In both groups, the higher the income, the more likely the female was to have an individual savings account. The responses to the question, "Do you have a savings account in your name only?" were as follows:

<i>Income</i>	<i>Wives</i>	<i>Family Cohabitators</i>
< \$10,000	33% (N = 2,251)	69% (N = 309)
\$10,000-\$30,000	40% (N = 1,206)	86% (N = 316)
> \$30,000	57% (N = 96)	100% (N = 16)

Id. at 554 n.3 & 555 n.13.

Notice that the percentage of married women at every income level who claim they do not discuss personal spending decisions with their spouses exceeds the percentage of those who have their own savings account. Does the fact that they are using a joint account (or money provided by their husbands) subtly affect their personal spending decisions so that these decisions are not as independent as the wives say? In contrast, the percentage of nonmarried female cohabitators with individual savings accounts exceeds the percentage

The authors concluded that the financial choices all couples face usually revolve around demands for equality and autonomy, or the sacrifice of one or both to achieve intimacy, trust, and interdependence. These last are critical for creating commitment, but may interfere with the individual rights of the partners. In traditional marriage, interdependence is usually achieved at the cost of the wife's autonomy and her participation on an equal basis in decision making.⁸⁰

Despite the presence of joint accounts and a belief in resource sharing, control of the money generally still resides with the earner.⁸¹ Moreover, this psychological ownership of money created in the earner spouse could interact with cultural roles to increase that spouse's control of money.⁸² The more money a wife earns the more likely she is to control money in a joint account.⁸³ Frequently, a change in earning power is reflected by a change in the system of finances. However, a strong ideological belief in shared finances based on a commitment to partnership, or in separate finances based on autonomy, can override such a change.⁸⁴

One researcher, Carole Burgoyne, found that

all the non-earning women whose husbands controlled the pool, said that if and when they started earning they would keep their money separately This suggests that despite an overt ideology of shared income, these women may have felt the need for a greater

who claim not to discuss personal spending decisions with partners. These figures demonstrate the difficulty in interpreting data. Independently held assets may not be as independent as legal title suggests. Likewise, statements and behavior may not always coincide.

80. *Id.* at 109.

81. *E.g.*, Carole B. Burgoyne, *Money in Marriage: How Patterns of Allocation Both Reflect and Conceal Power*, 38 SOC. REV. 634, 639 (1990) (studying 13 middle-aged, middle-class English women and nine of their partners).

82. *See id.* at 635 (citing M. Edwards, *Financial Arrangements Within Families*, SOC. SECURITY J. 1, 1 (Dec. 1981)); *see also* Pahl, *Control*, *supra* note 63, at 124 (noting social class also affects control of money, particularly in couples with joint accounts, and that when one spouse is middle class and the other working class, the middle class spouse controlled the money). "Wife control of finances was particularly common in low income, working class households . . . [whereas] . . . husband control was associated with relatively high income levels." *Id.* at 123. Husband control was typical when he was the main or sole earner. *Id.* When there was a joint account, the more the woman earned, the more likely she was to control the money. *Id.*

Hite reports that 91% of the women in her study responded that they balanced the books and were responsible for paying bills. HITE, *supra* note 61, at 442, 869. Nevertheless, a large number of women reported feeling guilty spending money they had not earned themselves, even if it was to purchase necessities. Even a small amount of independent resources relieved this guilt. *Id.* at 433, 436.

83. Pahl, *Control*, *supra* note 63, at 124.

84. Burgoyne, *supra* note 81, at 645-46.

element of control, and perhaps the opportunity to have some money for themselves. This must also cast doubt on the psychological reality of sharing in these households.⁸⁵

When married women contribute significantly to the joint income, the couples frequently keep earnings separate.⁸⁶ Hertz concludes that, by itself, the mere fact women earn independent incomes does not lead to separate finances. Rather, "a correlation seems to exist between the type of accounting system . . . and the authority relations within their marriages. In general, those couples who have chosen separate accounting systems have made a step toward altering the traditional balance of marital authority."⁸⁷

The evidence from empirical studies indicates that neither assertions of pooling nor nominal arrangement of assets in a pooling manner accurately reflect the reality of financial arrangements. Behind the facade of sharing is a deep-seated, though often subtle, control of the income by the earner spouse. This control springs both from the individual's feelings of psychological ownership of earnings and from cultural stereotypes of gender and marital roles. Perhaps in recognition of this reality, as women increase their earnings, women will increasingly keep their money separately. As one woman in my CSU survey stated, separate finances are necessary for the stability and longevity of the relationship.⁸⁸ Such a reality contradicts the premise of a joint income tax liability.

Unmarried couples are wary of dependence and pooling; they know relationships frequently do not last. As the divorce rate rises,⁸⁹ married couples too have been made aware of this fact. Thus, some commentators believe that the separate financial arrangements of unmarried couples will also become common among married couples.⁹⁰

85. *Id.* at 649.

86. *Id.* at 650 (reporting that the three women who contributed significantly kept their money separately). In Hertz's study of mid-level dual-earner couples, approximately 52% kept their finances separate. HERTZ, *supra* note 62, at 90.

87. *Id.* at 112.

88. CSU Questionnaire # 117. One male respondent commented that when both respondents produce income, it is "natural" not to share all. CSU Questionnaire # 31.

89. STAT. ABSTRACT, *supra* note 12, at tbl. 127.

90. AMERICAN COUPLES, *supra* note 45, at 109.

III. A Short History of the Taxable Unit Theory and Practice

A. Theory

Our income tax is premised on the principle that the burdens of tax ought to be distributed according to relative ability to pay.⁹¹ Ability to pay is best determined by looking at income. Under the classic Haig-Simons definition, income is the sum of consumption plus the increase in net worth (*i.e.*, accumulation) between two points in time.⁹² This definition does not make any judgment as to the appropriate taxable unit for determining ability to pay, and according to Professor Boris Bittker, it cannot. In an area "so entangled with social and psychological issues of a non-tax character, it is absurd to think that an economist's definition can provide a uniquely 'correct' solution."⁹³ Theorists do not agree as to the appropriate taxable unit and throughout our income tax history the law has taken various positions.⁹⁴ There are several possibilities from which to choose. Most

91. WILLIAM A. KLEIN & JOSEPH BANKMAN, *FEDERAL INCOME TAXATION* 16-17 (9th ed. 1993).

92. According to the Haig-Simons definition, "Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question." HENRY C. SIMONS, *PERSONAL INCOME TAXATION* 50 (1938). Haig defined income as "the increase or accretion in one's power to satisfy his wants in a given period in so far as that power consists of (a) money itself, or, (b) anything susceptible of valuation in terms of money." Robert Haig, *The Concept of Income—Economic and Legal Aspects*, in *THE FEDERAL INCOME TAX* 7 (Robert Haig ed., 1921). Of course, in practice this definition is modified. Most notable, perhaps, is the requirement that some event beyond the mere accretion of income occurs before tax liability attaches; in tax parlance that event is realization. See *Cottage Savings Ass'n v. Comm'r*, 499 U.S. 554, 601 (1991); *Eisner v. Macomber*, 252 U.S. 189, 208 (1920).

93. Boris I. Bittker, *Federal Income Taxation and the Family*, 27 *STAN. L. REV.* 1389, 1421 (1975). McIntyre and Oldman, in contrast, believe that the Haig-Simons definition can play a role in the choice of taxable unit, and that the rule "most in harmony with the Haig-Simons definition is that each family member should be taxed on the items he actually consumes or accumulates, regardless of source." Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in Comprehensive and Simplified Income Tax*, 90 *HARV. L. REV.* 1573, 1576 (1977). They actually favor income splitting. *Id.* at 1578-79. Simons, however, seemed to vacillate on this point. SIMONS, *supra* note 92, at 136-42.

94. A variety of articles, books, and conferences have examined the issue of the appropriate tax unit. See, e.g., HAROLD GROVES, *FEDERAL TAX TREATMENT OF THE FAMILY* 4 (1963); Boris I. Bittker, *supra* note 93, at 1398; Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 *TEX. L. REV.* 1, 5-10 (1980) [hereinafter Gann, *Marital Status*]; Pamela B. Gann, *The Earned Income Deduction: Congress's 1981 Response to the "Marriage Penalty" Tax*, 68 *CORNELL L. REV.* 421, 468 (1983); Philip J. Harmelink, *Marital Status Tax Discrimination After Tax Reform: Proposals to Resolve the Penalty/Bonus Issues*, 26 *WILLIAMETTE L. REV.* 593, 594 (1990); Carolyn Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 *LAW & HIST.*

broadly, the issue is whether tax liability should be determined on the basis of each individual or on the basis of each economic unit. In the context of the personal income tax, the economic unit itself may be variously defined as the marital unit (husband and wife), the nuclear family (husband, wife, and minor children), extended family (certain individuals related by blood, marriage, or adoption), or the household family (all individuals sharing the same living quarters).⁹⁵

Different theories underlie the two basic types of taxable units. If the tax unit is the individual, then tax-paying ability is based solely on each individual's earnings and on income produced by property titled in her name. This position holds that only individuals, not groups, have tax-paying capacity. The contrasting theory holds that the family is the taxable unit since the family, not the individual, is the basic eco-

REV. 259, 262 (1988); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 985 (1993); McIntyre & Oldman, *supra* note 93; Douglas Thorson, *An Analysis of the Sources of Continued Controversy Over the Tax Treatment Of Family Income*, 18 NAT'L TAX J. 113, 113 (1965); Laura Ann Davis, Note, *A Feminist Justification for the Adoption of an Individual Filing System*, 62 S. CAL. L. REV. 197 (1988).

For a good early history of the joint return as a taxable unit as well as a discussion of the joint tax liability that arises from joint returns and the resulting "innocent spouse" problem, see Richard Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed*, 43 VAND. L. REV. 297, 317 (1990). Cf. Dulude, *supra* note 48, at 67.

Until recently, most theorists supported the family as the taxable unit. See Bittker, *supra* note 93, at 1395. Lay opinion agreed. GROVES, *supra*, at 69. Today, although controversy still exists, growing numbers of commentators support a "marriage neutral" system under which marital status would not affect the amount of tax liability. Under this system the taxable unit would be the individual, possibly with some adjustments for dependents. See, e.g., Gann, *Marital Status, supra*; Harmelink, *supra*; McCaffery, *supra*; Davis, *supra*, at 218. Some of these commentators, such as Davis, justify on feminist grounds their conclusions that the current joint system is unfair to women because it supports traditional patriarchal family structures. See Davis, *supra*, at 233 nn.197-202; see also *id.* at 214 (discussing protectionist attitudes concerning women's dependence on men).

95. In keeping with most theorists who do not differentiate among the types of economic units, I shall use "family unit" to refer generally to all types of group economic units, in contrast to the individual tax units.

Other ways of dealing with the tax unit issue is to tax individuals but permit deductions for dependents, or to tax individuals with dependents at different rates, as in head-of-household rates in § 1 (b) of the Internal Revenue Code. I.R.C. § 1 (b) (West 1993). This Article does not deal with these aspects of the problem.

"Tax unit" can refer to several things: the assessment unit, the filing unit, or the tax-paying unit. These various aspects of the concept need not be defined identically, and in actual legislation, have not been. Thorson, *supra* note 94, at 114.

As Professor Deborah Geier pointed out to me in conversation, the issue of the proper taxable unit for entities is also in flux with the reexamination of issues such as intercorporate dividends. The issue of integration of the corporate tax with the personal income tax is a major taxable unit question.

conomic unit within which financial resources are shared, regardless of the source of the wage or investment income.⁹⁶

The family or economic group unit theory ignores actual legal title and rights to property, whereas the theory of the individual as the taxable unit respects them. Thus, if the family is the relevant taxable unit, horizontal equity occurs when two families with identical *total* income, regardless of how the income is earned or distributed *within* the family, are taxed equally. If the individual is the proper tax unit, horizontal equity is achieved when two individuals with equal income are taxed equally regardless of their marital status. A tax system that achieves horizontal equity between families will create inequities between families and individuals with similar incomes if the system is progressive. The nature of the inequities will depend upon the schedule of tax rates for individuals and families. Some schedules will favor married couples, thus imposing a "singles" tax, while other schedules might create a "marriage" penalty, taxing married couples disproportionately.

Consider, for example, three couples each with no children. Mary and Mike, a married couple, who have \$60,000 of income earned all by Mike; Betty and Bob, also a married couple, who have \$60,000 of income with \$30,000 earned by each, and Sid and Sally, an unmarried couple who live together, and also have a total income of \$60,000, all earned by Sally. Assume that (1) the tax system determines tax liability based on each economic unit; (2) only a married couple is defined as an economic unit; (3) economic units consisting of more than one member must use the split-income⁹⁷ approach, and (4) the

96. Fullerton and Rogers, for example, state that using household income, as our tax system does,

makes good sense, since the well-being of an individual depends not simply on his or her own income wealth, but rather on the income or wealth of the entire household. . . . In the lifetime perspective, however, it becomes extremely difficult to think about the "lifetime" of a household. Household composition varies tremendously over an individual's lifetime due to marriage, births, divorce, deaths and the moving out of adult children.

Don Fullerton & Diane Lim Rogers, *Lifetime Verses Annual Perspectives on Tax Incidence*, 44 NAT'L TAX J. 277, 280 (1991). They therefore use the *individual*, not the household unit, to look at lifetime income. Their statement that the income tax system uses household income is, however, not entirely accurate; the system uses household income for only certain types of households (married couples, heads of households).

97. There are three basic approaches to determining the tax on the unit. The *unit* approach taxes each unit at the same marginal rate. All income of every member of the tax unit is aggregated, and then a common marginal rate is applied. Thus, a married couple in which the husband and wife each earn \$30,000 will pay the same amount of tax as a single person earning \$60,000. The "kiddie tax" under § 1(g) is an example of the unit

tax rate is ten percent on the first \$30,000 of income and twenty percent on the next \$30,000. Since a married couple is one taxable unit, Mike and Mary, and Betty and Bob can effectively split their income. Thus each of their total tax liabilities would be \$6,000. In contrast, Sid and Sally's total tax liability would be \$9,000, or fifty percent more than the married couples who had the identical amount of income.⁹⁸

The above example illustrates tax equality between similarly situated economic units when the economic unit is defined by marital status. Mary and Mike, and Betty and Bob are each one unit but Sally and Sid are two separate units. Thus, the tax system is tax-neutral based on the assumption that married couples, and only married couples, are an economic unit within which the members share financial resources and individual legal rights to property are irrelevant. The system is not marriage-neutral, however, since the difference in tax liability among the couples is based solely on marital status. If Sid and Sally were to alter nothing but their marital status, their tax liability would change. Moreover, the system clearly creates inequities between similarly situated individuals (ignoring their marital status). Take for example Larry, an individual living alone with \$60,000 in income. Larry will pay \$9,000 in taxes, fifty percent more than Mike's share of tax liability for the \$60,000 he earned.

approach. Under this section, the unearned income of children under age 14 is taxed at the parents' marginal rate. I.R.C. § 1(g) (West 1993).

The *per capita* approach reduces the marginal rate of the married couple so that it equals the rate of a single person with one-half the income of the married couple. All the income of all the members of the tax unit is aggregated and that total is then divided by the number of people in the unit, each of whom is then taxed individually at a marginal rate that is applied to all individuals, regardless of whether they are individuals or part of a greater taxable unit. This can be accomplished by either of two methods: splitting the income of the married couple and then using the same marginal rates for the married couple, or doubling the tax brackets for the married couple.

The third approach, the *modified per capita* method, yields results in between the two other methods by instituting different rate schedules for different types of taxable units, or by phasing out the per capita method at higher levels of income, or both. See, e.g., Thorson, *supra* note 94, at 118-23.

98. Under a unit approach, each unit would pay tax at the same marginal rate on the same income of \$60,000. Thus each marital unit earning \$60,000 would pay \$9,000 in taxes, as would Sally. Under this approach, Bob and Betty are paying a "marriage penalty" and would be better off if they were single. If single, each would be a sole taxable unit and the tax liability of each would be \$3,000, for a total of \$6,000. A modified per capita approach would modify the pure per capita approach of the split income example by, for example, phasing out the rate differential as the marital unit's income increased. See also *infra* note 143.

The justifications for treating the marital unit as the appropriate tax unit are economic unity, marital obligations, and economies of scale.⁹⁹

(1) *Economic Unity*

The first and most important justification is economic unity. Traditionally, society views a marriage as an economic unit in which the members share the economic resources. As the Canadian Royal Commission on Taxation stated:

We believe firmly that the family is today, as it has been for many centuries, the basic economic unit in society. Although few marriages are entered into for purely financial reasons, as soon as a marriage is contracted it is the continued income and financial position of the family which is ordinarily of primary concern, not the income and financial position of the individual members. Thus, the married couple itself adopts the economic concept of the family as the income unit from the outset.¹⁰⁰

There are several criticisms of this justification. First, people other than married couples pool income. This criticism accepts the economic unit theory, but holds that the marital unit is only one type of economic unit. To single it out for special tax treatment is unjust. A fairer approach would be to treat all households or families as economic units, although such an approach has its own problems, such as defining "household" and "family."¹⁰¹

Second, some critics attack the underlying assumption of pooling that couples always share income. For example, taxpayers ignore many opportunities to lower their taxes by means of intra-family gifts, not simply because of ignorance or inertia, but possibly because they attach significance to legal title.¹⁰²

Third, the women's rights movement undermines the pooling justification by emphasizing women's increasing access to economic independence as yet another indication that title is significant.¹⁰³ More

99. Bittker, *supra* note 93, at 1420-25 (listing some of these justifications).

100. REPORT OF THE ROYAL COMMISSION ON TAXATION (1966) (*quoted in* Bittker, *supra* note 93, at 1393).

101. See *supra* Part I.A.

102. Bittker, *supra* note 93, at 1394. The significance attached to legal title seems to be particularly true at upper income levels. Thorson, *supra* note 94, at 116.

103. Bittker, *supra* note 93, at 1394. Thorson states that historically, coordinating the tax unit with the legal property unit was of great importance. For example, the family was the tax unit under the Civil War income tax statutes, because under property law, the husband substantially owned both his wife's and children's income. Thorson, *supra* note 94, at 115. By the time the income tax was instituted under the Sixteenth Amendment in 1913, married women's property rights had been established, which necessitated considering the

importantly, feminist theory undercuts the very premise that the family is an economic unit. The economic unit theory assumes that the family is a monolithic, homogeneous group in which all members share the same tastes and resources, including income, equally. Under this "benign patriarch" theory of the family, the male "head of household" traditionally speaks and acts for the unit.¹⁰⁴ True pooling presumes equality, if not in contribution to the pool, then at least in free access to the pool. Although partners are moving toward more equal arrangements, disparities still exist.¹⁰⁵

Finally, the pooling rationale is criticized because it focuses on income consumption, which is more appropriate for a consumption-based tax than an income tax that measures accessions to wealth.¹⁰⁶ Our income tax traditionally attributes income to the taxpayer who controls it even if no benefit is obtained through her own personal enjoyment or use of the income. For example, under section 674 of the Internal Revenue Code (IRC) a taxpayer is still considered the owner of property placed in an irrevocable trust for the benefit of others because the taxpayer can affect the beneficial enjoyment of that property.¹⁰⁷ Similarly, a taxpayer who gives away the income from property that he owns is still taxed on that income, on the theory that control of the underlying property is, in effect, control of the in-

individual as the taxable unit. The "deep commitment" to this approach is evident in the Supreme Court's 1930 rulings in *Lucas v. Earl*, 281 U.S. 111 (1930), and *Poe v. Seaborn*, 282 U.S. 101 (1930). In *Poe*, the Court held that spouses in community property states could each file separately with respect to one-half of the community property income despite the fact that it was all earned by one spouse. 282 U.S. at 118. In contrast, *Lucas* precluded spouses in common-law states from splitting their income despite a legally binding contract requiring the earner spouse to transfer one-half of his income to his wife. 281 U.S. at 114-15. The contract had been entered into without any tax evasion intent (because the contract was executed prior to the institution of the income tax). *Id.* at 113-14; *see also* Jones, *supra* note 94, at 262 (discussing how gender roles influenced the 1948 enactment of the joint return).

104. Patricia F. Apps & Ray Rees, *Taxation and the Household*, 35 J. PUB. ECON. 355, 355 (1988) (referring to GARY BECKER, A TREATISE ON THE FAMILY (1991 enlarged ed.)). Needless to say, this view of the family has not gone unchallenged. A few recent articles which have addressed the joint tax return as an example of patriarchal benevolence are McCaffery, *supra* note 94; Nelson, *supra* note 48; and Davis, *supra* note 94. *See also supra* note 44 and accompanying text.

Susan Moller Okin states that power within the family is ignored either because it is seen as "natural" or that it is exercised altruistically. SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 128 (1989).

105. *See supra* Part II.

106. Gann, *Marital Status*, *supra* note 94, at 25.

107. I.R.C. § 674 (West 1993).

come.¹⁰⁸ Property control, in fact, presently governs community property income for certain purposes of the current Code, such as self-employment income and income of nonresident aliens.¹⁰⁹

(2) *Marital Obligations*

Another justification for treating a married couple as a taxable unit is that marriage alters an individual's rights and obligations, thereby justifying treating a married couple as one taxable unit. Critics note, however, that individuals other than spouses have a legal obligation of support, and question why these people are treated differently than spouses.¹¹⁰ Moreover, spousal support obligations

108. See, e.g., *Helvering v. Horst*, 311 U.S. 112 (1940). In *Helvering*, the Court held that the taxpayer could be taxed on income from transferred coupons when the taxpayer retained the bonds: "The power to dispose of income is the equivalent of ownership of it. The exercise of that power to procure the payment of income to another is the enjoyment, and hence the realization, of the income by him who exercises it." *Id.* at 118.

109. See I.R.C. § 1402(a)(5)(A) (West 1993) (including in the husband's self-employment income all income derived from a trade or business, which is community income unless "the wife exercises substantially all of the management and control of such trade or business"); I.R.C. § 879(a)(1) (West 1993) (treating earned income as income of the spouse who earned it where one individual of a couple is a nonresident alien who has community income).

The 1921 Revenue Bill proposed to clarify the treatment of community income by attributing community income to the spouse who had management and control over it. See, e.g., 61 CONG. REC. 5292-93 & 5811 (1921).

110. In fact, having a head-of-household rate schedule has made some allowance for this argument. This schedule was enacted in 1951. However, to qualify for this schedule, an unmarried person must maintain his home as the principal place of residence for dependents. The given definition of dependents precludes some people who live together and share social and emotional bonds from qualifying for either the joint or head-of-household schedules.

Gary S. Becker has been the leading proponent of extending economic analysis into the family area. His intent, as stated in the preface to the new edition of his seminal *A Treatise on the Family*, is

to analyze marriage, births, divorce, division of labor in households . . . and other nonmaterial behavior with the tools and framework developed for material behavior. That is to say, this book contains an economic approach to the family, not in the sense of an emphasis on the material aspects of family life, but in the sense of a particular theoretical framework for analyzing many aspects of family life.

BECKER, *supra* note 104, at ix.

According to this economic view, there is indeed a marriage market, and decisions such as whether to have children and, if so, how many, have economic components. Accord Lloyd Cohen, *Marriage, Divorce, and Quasi Rents*; or, "I Gave Him the Best Years of My Life", 16 J. LEGAL STUD. 267, 267 (1987). But cf., e.g., Allan Carlson, *A Pro-Family Income Tax*, 94 PUB. INTEREST 69, 74-75 (1989) (arguing that attempts to compensate for imputed income for self-performed child care would result in "an odd tax structure"); Younger, *supra* note 43, at 891 (asserting that couples should marry "for benefit of minor children" and not for economic convenience).

can be viewed as voluntary decisions that should be treated no differently than other voluntary decisions to consume. The rejoinder is that the decision to marry differs greatly from other decisions, such as whether to take a trip or eat a peach.

(3) *Economies of Scale*

A final justification for treating the married couple as a taxable unit is that economies of scale that result from living together need to be taken into account. It is not, however, exactly clear how to evaluate the economies of scale¹¹¹ in determining ability to pay and, hence, tax liability. Again, the critics reply that people other than two married people live together and share resources. It is inequitable to treat them differently. Moreover, economies of scale are too varied and difficult to measure.¹¹²

111. Arguably, two married people should pay less tax than one single person with the same amount of income. However, two single persons living separately whose combined income equals that of two married persons should pay less than the married couple due to economies of scale; even if two cannot live as cheaply as one, there is a benefit to sharing. For example, a married couple only needs one kitchen, not two. But how much more cheaply they can live is unclear, and therefore so is the "proper" rate differential between single and married. Bittker states, for example, that if

a one-person household can maintain the same standard of living as a two-person household for 75 percent of the latter's cost, . . . it is customarily argued that the taxpaying capacities of the two units bear the same relationship and that their tax liabilities should be fixed accordingly. On these assumptions, a single person with \$3,000 of income should pay the same tax as a married couple with \$4,000 of income

Bittker, *supra* note 93, at 1424 (citation omitted).

Additionally, a married couple often has the advantage of all the household services provided by a nonworking spouse, the values of which are tax-free since our system does not tax imputed income. See, e.g., Joseph A. Pechman, *Income Splitting*, 1 TAX REVISION COMPENDIUM 473, 479-80 (1959); Bittker, *supra* note 93, at 1425-26.

Professors Oldman and Temple laid out the following equitable principles, based on economies of scale:

1. An unmarried person should pay the same or a greater tax than a one-worker married couple with equal income.
2. A one-worker married couple should pay a greater tax than a two-worker married couple with equal income.
3. A two-worker couple should pay more than two single persons with the same total income.

Oliver Oldman & Ralph Temple, *Comparative Analysis of the Taxation of Married Persons*, 12 STAN. L. REV. 585, 603-04 (1960).

112. See, e.g., Gann, *Marital Status*, *supra* note 94, at 29.

B. The Dilemma of the Current Situation

Today a taxpayer's marital status affects her tax liability in a variety of ways;¹¹³ the rate schedule is merely the most noticeable. For example, taxability of transfers from one member to another¹¹⁴ and fringe benefits¹¹⁵ can hinge on marital status. These various provisions are inconsistent in how they treat a married couple. Sometimes the couple is treated simply as one unit so that it gets the same treatment as an individual. For instance, the capital loss limitation of IRC section 1211 is \$3,000 for both a couple and for an individual.¹¹⁶ Sometimes the couple is treated as a unit but each member is treated as an individual. In these instances, the couple as a whole gets double the deduction or credit, such as in IRC section 1244's ordinary loss provision for small business stock.¹¹⁷ At other times the unit is totally ignored, as in the imposition of social security taxes.¹¹⁸

Not only is the marital unit treated inconsistently throughout the tax code, but even the conceptual definition of the taxable unit fluctuates. The taxable unit is either the individual, the married couple, or

113. See Harmelink, *supra* note 94, at 603-15, for a discussion of the various treatments. His list is extensive, but not comprehensive. For example, he omits § 1361(c)(1), which treats a husband and wife as one shareholder for purposes of determining the number of shareholders of an S-corporation, I.R.C. § 1361(c)(1) (West 1993), and § 68, which phases out itemized deductions when adjusted gross income exceeds the "applicable amount" (\$108,458 for 1993) and which is identical for single persons and married persons filing jointly, I.R.C. § 68 (West 1993).

114. Section 1041 states that no gain or loss shall be recognized on a transfer of property to a spouse or to a former spouse if the transfer is incident to a divorce. I.R.C. § 1041(a) (West 1993).

115. In a private letter ruling, an employer expanded health care benefits to include nonspouse cohabitants of employees. Priv. Ltr. Rul. 90-34-048 (May 29, 1990). The issue was whether the benefits provided to a nonspouse cohabitant could be excluded from gross income, as are benefits provided to an employee's spouse. *Id.* at 1. The Treasury based its ruling primarily on § 1.106-1 of the Treasury Regulations. Section 106 excludes employer-provided health insurance from an employee's gross income. I.R.C. § 106 (West 1993). Section 1.106-1 states that the employee does not have gross income if the employer contributes to a health plan for the employee, the employee's spouse, or dependents, as defined in § 152. Treas. Reg. § 1.106-1 (1956). Thus, if the cohabitant is not married to the employee she does not qualify as a spouse, unless it is a common-law marriage recognized by the state. Priv. Ltr. Rul. 90-34-048 at 4. Moreover, under § 152(b)(5), even if the employee supports the cohabitant, the cohabitant cannot qualify as a dependent of the employee if their living together violates local law. *Id.* at 5. Thus, the employee would have gross income based on the employer's provision of health care for the cohabitant. *Id.* at 8. The ruling states that the amount of the gross income is not the cost to the employer of the insurance, but the fair market value it would have in an arm's length transaction. *Id.* at 9.

116. I.R.C. § 1211 (West 1993).

117. I.R.C. § 1244 (West 1993).

118. I.R.C. § 1301 (West 1993). Social security benefits, however, can be based on the spouse's earnings.

the head of household. The common underlying principle is that each is an economic unit within which income is shared. Yet the tests are not only inconsistent, but also inaccurate measures of whether there is in fact pooling. Unlike marital status, head-of-household status requires that the taxpayer and the other members of the taxable unit live together for more than half of the year, presumably to ensure that the group regards itself as a unit. The members of a married couple, in contrast, can live on opposite coasts, keep two separate abodes, and still file jointly.¹¹⁹ Married status automatically assumes that each spouse pools income, but the reality might be completely separate finances. In contrast, to qualify as a head of household, a taxpayer must meet specific economic tests by providing more than half the support of the dependent living in her home.¹²⁰ While married people qualify simply by meeting the state requirements of marriage, heads of households must live with people who are related by law (stepchildren) or related by certain blood relationships (parent, child, or descendant of child).

Another overriding inconsistency is the treatment of the income of the other individuals within the unit. If the proper taxable entity is the economic unit, the income of all dependents should be aggregated with that of the parents (or head of household). However, under I.R.C. section 1(g), our system currently aggregates only the unearned income of children under fourteen.¹²¹ All other members of the household, including those under fourteen who have an earned income, are treated as separate taxable units. This rule is directly contrary to the assumption that households pool their income.

Not only is our present treatment of the taxable unit inconsistent and inaccurate, but it is based on outdated, unexamined premises. In 1948, when the joint return was established, certain assumptions prompted creation of the joint return as a response to perceived inadequacies in the system.¹²² First was the assumption that spouses

119. Certain married people living separately can choose to be treated as not married under §§ 7703(b) and 2(c). See I.R.C. §§ 2(c), 7703(b) (West 1993).

120. I.R.C. §§ 2(b), 152(a) (West 1993).

121. I.R.C. § 1(g) (West 1993).

122. See H.R. 1274, 80th Cong., 2nd Sess. (1948), reprinted in 1948-1 C.B. 241, 257-59 (discussing problems the joint return is designed to solve). A 1947 Treasury Department report entitled *The Tax Treatment of Family Income* made no recommendations but merely "examine[d] alternative methods of correcting discriminations which arise in the treatment of family income under present Federal income-tax law." Treasury Department, *The Tax Treatment of Income*, reprinted in 47 U.S. REVENUE ACTS: 1909-1950: THE LAWS, LEGISLATIVE HISTORIES & ADMINISTRATIVE DOCUMENTS 844-74 (Bernard Reams, Jr. ed., 1979). Professors Robinson and Wenig state that income splitting was adopted not out of

pooled all their resources regardless of who earned or owned them. The second assumption was that sharing of income automatically meant that control of the income was also shared. Finally, the joint return, in order to be helpful to married couples, assumed a "traditional" marriage in which there was only one earner in each family. In today's world, these assumptions are no longer tenable.¹²³

Even in 1948 these assumptions were not entirely accurate. If all income were jointly shared, then why had all states not switched to a community property system? Carolyn Jones presents evidence that many states rejected community property laws precisely because they gave rights to spouses who had not earned the income.¹²⁴ Nevertheless, pooling of income, at least at the lower levels of income, was generally assumed despite a general absence of empirical evidence to support it.¹²⁵ The second assumption concerning equal control, a pre-

ability-to-pay considerations, but out of necessity to stem the flight to community property law. But they do recognize that the change was "tax reform" to the extent that it reduced taxes for middle and upper class couples in common-law states. Toni Robinson & Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant*, 8 VA. TAX REV. 773, 777-79 (1989).

123. See *supra* Parts I, II.

124. Jones, *supra* note 94, at 269-70. Some questioned, however, whether community property laws actually produced joint ownership, since the earning spouse still controlled the income. *Id.* (citation omitted). Jones also states that another reason that states resisted converting to a community property system was the legal, financial, and administrative difficulties of such a conversion. *Id.* at 271-73.

125. The need for research has been stressed in Dulude, *supra* note 48, at 88; Nelson, *supra* note 48; Praeger, *supra* note 47, at 7 n.20. Since Dulude's 1985 article, there have been increased inquiries into the intra-household allocation of resources. See studies cited *supra* Part II.B.

Louise Dulude states that, given how "crucial" the pooling assumption is, it is remarkable that not a single survey was ever carried out in North America to verify its accuracy. When American professors McIntyre and Oldman wrote that "married couples should be assumed to share their income equally" because "common experience suggests that at least partial pooling of sources to finance community consumption is almost universal," the best support they could find for this assumption was a 1965 article based on unsupported statements of various sociologists in the 1950s and early '60s . . . Generalized pooling and sharing is now a fundamental tenet of the American and British tax systems, but the foundation on which they are built is still a mystery.

Dulude, *supra* note 48, at 88 (citing McIntyre & Oldman, *supra* note 93, at 1578, 1594).

McIntyre responded that Dulude's challenge to the sharing assumption failed because "for purposes of the benefit principle, the question to be decided is whether marital partners share the benefits of income. Control over income, which is what Dulude generally is commenting upon, should be relevant only in a tax system that makes control over income the measure of taxable capacity." Michael J. McIntyre, *Tax Justice for Family Members After New York State Tax Reform*, 57 ALB. L. REV. 789, 792-93, 797 n.7 (1987). This is an odd comment, since control is a measure of taxable capacity in our system. See *supra* note 108 and accompanying text. However, even if the benefit principle should prevail, income

requisite to taxability under general tax principles, lacked universality.¹²⁶ The final assumption of one-earner couples also was not uniformly true: In April 1948, 23.1% of all married women participated in the labor force.¹²⁷

These discrepancies are even greater today than they were in 1948.¹²⁸ First, many more nonlegal families exist. To the extent that these families are treated differently from married couples, such treatment is inequitable. Furthermore, while the partnership model of marriage may be more true today from a legal standpoint than it was in 1948, pooling, which is a concomitant of the partnership model, is far from universal. Legally, even the community property system still does not require complete joint management and control.

To the extent laws require joint management and control, they come closer to justifying income-splitting than did the pre-1948 statutes. But they do not really justify income-splitting because in most community property states the couple can opt out of the community property system.¹²⁹ Thus, by choosing to stay within the community property system, the earner-spouse, in fact, exercises control over his

should be pooled only if the *benefits* of that income are in fact shared equally. The assumption of pooling should not go unchallenged, even under a benefits theory.

Using Census Bureau data, David Hernandez, chief of the marriage and family branch of the Census Bureau, states that even in the 1940s many children were not born into "traditional" families in which the father worked full-time and the mother stayed home. Diane Crispell, "*Traditional Families Have Thin Tradition, People Patterns*," WALL ST. J., May 12, 1993, at B1 (reporting that 41% of children born in the 12 months prior to the 1949 census and 45% in the 12 months prior to the 1950 census were born into non-traditional families). Today, he states, only approximately 20% are so born. *Id.* Even fewer older children live in such traditional families. Hernandez found that only 26% of 17-year-olds lived in such families in 1940 and only 10% in 1989. *Id.*

Of course, to the extent that the family pools income, children's income should be included in the taxable unit. Even if children are allowed to keep their money separate, their income affects the parents' spending habits and support of the children. *See, e.g.,* Bittker, *supra* note 93, at 1397 (referring to the Canadian Royal Commission's rationale for taxing families on their consolidated income).

126. *See supra* Part II.

127. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, tbl. 274 (80th ed. 1960). By 1991, that figure had risen to 58.5%. STAT. ABSTRACT, *supra* note 12, at tbl. 619.

128. *See supra* Part I.

129. McCLANAHAN, *supra* note 29, at 409; *see, e.g.,* LA. CIV. CODE art. 2329 (permitting couples to opt out of community property without any court action if done prior to marriage or within the first year of domicile within the state; otherwise, court approval is necessary).

entire earnings, which makes them taxable to him alone.¹³⁰ Moreover, to the extent that statutes still permit a spouse to control property by himself, basic tax principles attributing income to the one who controls it are still being violated. Even if the community property laws were to create legal ownership rights truly equivalent to common-law rights, couples themselves frequently would not treat the property as equally owned.¹³¹

Finally, state property rights need not govern tax law. Congress can easily mandate uniform tax treatment in this area despite state differences. Congress did just that in 1984 in a related area when it established uniform tax treatment of alimony and property settlements despite varying state laws.¹³² In fact, Congress had already overridden community property law for certain tax purposes. Section 879(a) of the Internal Revenue Code (dealing with a married couple, one or both of whom is a non-resident alien)¹³³ and section 1402(a)(5) (dealing with self-employment income) attribute all income and deductions to the spouse who earned it, despite community property laws, unless *the wife exercises substantially all of the management and control*.¹³⁴ In fact, even in two community property states, tax law is not controlled by community property.¹³⁵

Common-law equitable distribution statutes do not justify income-splitting since the rights arise only on dissolution of marriage.¹³⁶ While the statutes might put restraints on management *during* marriage, these restraints are much too limited to impose income-splitting when the majority of control of the property still rests with the earner.

Moreover, a significant number of couples do not pool their income.¹³⁷ Even when couples state that they do pool, nominal sharing frequently does not lead to actual sharing.¹³⁸ Only the *real* economic

130. Justices Douglas and Black so argued. *Commissioner v. Harmon*, 323 U.S. 44, 51-57 (1944) (Douglas & Black, JJ., dissenting); see also Bittker, *supra* note 93, at 1411 (discussing the *Harmon* dissent).

131. See *supra* Part II.

132. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 421, 98 Stat. 494 (1984) (amending I.R.C. § 71 and adding I.R.C. § 1041).

133. I.R.C. § 879(a) (West 1993).

134. I.R.C. § 1402(a)(5) (West 1993). If the wife exercises management and control, then all the income and deductions are attributable to the wife. *Id.*

135. In Arizona and California, the state tax can tax either the earner on the total earned income, or the community property owners each on one-half of the income. SECTION ON TAXATION, ABA COMMITTEE ON DOMESTIC RELATIONS PROBLEM, LEGISLATIVE RECOMMENDATION 13 (Draft, June 21, 1993).

136. OHIO REV. CODE ANN. § 3105.17(A) (Anderson 1992).

137. See *supra* Part II.

138. *Id.*

system matters for tax purposes, not the nominal or formal relationship. Under traditional income tax principles, control typically governs taxation. The mere receipt of a benefit does not cause a person to be taxed. For example, when Taxpayer A assigns her salary or rent from property she owns to Taxpayer B, without consideration given by B, A is taxed on the salary or rent despite the fact that B has the beneficial enjoyment. Thus, the mere fact that B *enjoys* the house, car, and general lifestyle purchased with the spouse's salary is not a sufficient basis to tax A and B as if B had received half the income. B's benefits are tax-free gifts.

Finally, even in those rare instances of true pooling, income-splitting of earned income is not justified since the earner has ultimate control over the money by virtue of his decision to work. A taxpayer who donates \$10,000 of his salary to charity still has to include that \$10,000 in gross income, although he may get a charitable deduction.¹³⁹ Similarly, a taxpayer who pools \$10,000 of his salary should include that amount in income, although a dependency deduction could be allowed for all or part of that amount.

Conclusion

As long-term living arrangements have grown increasingly varied and complex, financial arrangements also have been shaped by cultural, sociological, psychological, and economic factors. Because of the complexity and the prevailing myth of marital pooling, survey data is likely to be biased in favor of pooling: Respondents are more likely to overstate, not understate, the extent of sharing. Nevertheless, my study and the others discussed in this Article clearly establish several facts: (1) not all couples pool assets; (2) pooling is not confined to married couples, and separation of assets is not confined to nonmarried couples; (3) financial arrangements sometimes change during the course of the relationship; and (4) even among those couples who say they pool, in reality the nonearner spouse often does not have equal access to assets; instead the earner controls the money. In short, the empirical evidence on pooling refutes the basic assumption underlying the joint return. The evidence highlights the unfairness of the current joint filing system, which is both under-inclusive (barring some unmarried poolers from its benefits) and over-inclusive (bestowing its benefits on nonpooling married couples).

139. See I.R.C. § 170(a) (West 1993).

The number of couples who keep some or all of their income separate is substantial. In fact, in Hertz's study the majority of couples kept finances separately. Even if seventy percent of couples state they pool *all* income (the random survey), that means thirty percent do not. Thirty percent is not insignificant. In fact, given the morally and psychologically charged nature of the issue, the number of people who in reality do not pool everything is undoubtedly understated. Peoples' statements about sharing household income are similar to their statements about the related question of whether couples share household chores. As Arlie Hochschild found, "more people *wanted* to share and imagined that they did" than actually did.¹⁴⁰ Because the dominant cultural myth regarding income is that people share their income, people state that they share or believe in sharing even when they do not. The lack of sharing may be subtle, discernable for example only through a pattern of deference by the wife to the husband's decisions.¹⁴¹ Surely, when sixty-six percent of married women say "it's ethical to hide a portion of their spending money in a secret stash,"¹⁴² the freedom that nonearner women feel to spend "shared" income must be called into question.

Despite the inaccuracies of pooling, some people advocate the joint return as a means to promote the "family" and "family values."¹⁴³ In reality, the joint return is disadvantageous for many fami-

140. ARLIE HOCHSCHILD, *THE SECOND SHIFT* 20 (1989).

141. Hochschild cites a revealing instance in regard to household chore sharing in which the couple stated they shared all the housework. Yet the father, who was holding the baby, asked the mother what time she wanted him to put the child to bed. He thus indicated that in reality the wife was in charge of child care. *Id.*

142. *Honesty Not Best Marital Policy?*, *supra* note 53 (citing a *McCall's* magazine survey).

143. The National Commission on America's Urban Families, for instance, issued its report in early 1993. It stated: "The optimal family form for childrearing, and for long-term personal and societal well-being, is the intact, two-parent family anchored by marriage, in which both father and mother love and provide for their children." NATIONAL COMMISSION ON AMERICA'S URBAN FAMILIES, *FAMILIES FIRST: REPORT OF THE NATIONAL COMMISSION ON AMERICA'S URBAN FAMILIES* 29 (1993). It recommended that policies, programs, individuals, and organizations "should empower the family, strengthen marriage, build support for families, and give families priority." *Id.* at 40. One method of empowering families, it suggested, was to "establish greater tax fairness for families" by, among other things, "[e]nhanc[ing] the favorable treatment for married couples in the tax code by increasing the differential between single earners and married couples and/or by enhancing opportunities for married couples to split their incomes." *Id.* at 41.

The Omnibus Budget Reconciliation Act of 1993 raised the marriage penalty by increasing the marginal rates while elevating the penalty for many two-earner couples, but many "traditional" families (*i.e.*, families with one earner) would continue to receive a "bonus." Pub. L. No. 103-66, 107 Stat. 312, 13201-13202. Accounting professionals maintain that the wealthy are the chief beneficiaries of the marriage bonus, since most wealthy

lies, such as those in which both partners of a married couple work. The joint return also fails to help alternative families in which there is no married couple. Alternative groups, which are a rapidly increasing percentage of the population, serve traditional family functions: They are cohesive groups whose members show great personal commitment to each other and provide multivariied support to each other.¹⁴⁴ In a society that traces many of its ills to social disintegration and alienation, is it wise to disadvantage any group that counteracts these trends? A rational family policy should support any type of group that promotes commitment, support, and sustenance.

Thus, assuming that one goal of the tax system is to assist families and assuming that joint returns help families, one way to promote families and eliminate the present inequities between similarly situated groups would be to extend the joint filing system to all "families." As we have seen, the functional approach to families is indefinite and open to abuse: How would the IRS determine whether a group met this definition? Should the IRS even be involved in such an inquiry?

Moreover, to make any sense from a tax standpoint, the joint return, if it is justifiable at all, is only justified for those families who in fact pool income. This Article has shown that not all couples pool their incomes. Consequently, only those groups, married or unmarried, who actually pool should be allowed to file a joint return.

Such a regime, however, would violate another tax principle—simplicity.¹⁴⁵ Because pooling is so fact-specific, proof of pooling would be very intrusive. Further complications would arise because whether a couple pooled could change from year to year. Moreover, true pooling would be difficult, if not impossible, to discern due to the many psychological and sociological factors implicated in the issue.

men are married to nonworking spouses. Ellen E. Schultz, *Living in Sin to Cut Tax Bill Would Look Even Better to Some Under Clinton Plan*, WALL ST. J., Mar. 9, 1993, at C1; see also *supra* note 98 and accompanying text.

Families can switch from having a marriage penalty to a marriage bonus, or vice versa, as their circumstances change. For example, in 1992 the First Family—Bill and Hillary Rodham Clinton—paid a marriage penalty as a two-earner couple. In 1993 they will receive a marriage bonus because Bill is the only earner. Schultz, *supra*. The Clintons' situation illustrates how difficult it is to craft a tax provision that favors families unless it defines families so narrowly that it excludes many Americans (two-earner couples).

144. See *supra* Part II.

145. JOINT COMMITTEE ON TAXATION, ANALYSIS OF PROPOSALS RELATING TO COMPREHENSIVE TAX REFORM, 99th Cong., 1st Sess. 3 (1985); Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567, 568 (1965). Simplification can have many meanings, such as more easily understood statutes, more easily understood forms, and easier and more efficient administration. Charles E. McClure, *Budget Process and Tax Simplification/Complication*, 45 TAX L. REV. 25, 42 (1990).

Detailed inquiry into financial arrangements and interpersonal dynamics by the IRS would be expensive and invasive, but not conclusive, and would inevitably result in a great deal of litigation.

Even if the tax system could overcome these problems, a joint return system would not aid all families. The "family" rhetoric often used in connection with the joint return hides the reality that the joint return is disadvantageous for many families. The joint return places an extra burden on the increasing number of two-earner families. It also discourages some women from working outside the home who might otherwise do so for economic and social reasons. As for the "typical" one-earner family that the joint return was designed to benefit, the joint return places the burden of tax liability on the nonearner by making her jointly liable for the tax, but ignores the reality of economic dominance of the earner. The joint return ignores the issues raised by the empirical studies. Many men and women do not want to pool all their income; indeed, the relationship between the couple will be more stable if each partner retains some independence. This evidence suggests that in some situations the joint return not only does *not* promote traditional family functions, but may in fact be detrimental to them.

The joint return ought to be abolished. A system that treats each person as a separate taxable unit is more equitable, more consistent with basic tax principles, more efficient, and ultimately better able to accomplish social family goals.¹⁴⁶

146. Exact details of such a system can be found in *INCOME TAX TREATMENT*, *supra* note 17, at 38-68. This system arguably has some potential complications. For example, although wage earnings cannot easily be manipulated, investment earnings can. The high-earning partner, for example, can transfer investment assets to the lower-bracket partner. This problem, however, is not insurmountable. First, such transfers would not always occur, even if they are advantageous from a tax standpoint, because such a transfer has independent significance. Title does matter and many partners are unwilling to give it up. Second, some kind of joint return only for investment income could be developed. Each partner could perhaps be permitted a set amount of independent investment income. This amount could be a percentage of earned income. Investment income in excess of this amount would be combined and taxed either at a separate rate or the higher rate of the two partners. Such a limited joint return is less objectionable than one for all income. Investment income could be controlled by either partner, whereas control of earned income would always ultimately rest with the earner. If the earner does not work, the money would not be earned. Furthermore, the ease of manipulation of investments makes a joint return for such income a justifiable administrative compromise, whereas no such administrative complexities mar the determination of who earned wage income. *See, e.g.*, I.R.C. § 879 (West 1993) (dealing with the tax treatment of community income of non-resident aliens).

Julie Nelson proposes that the appropriate tax unit is neither the individual, nor the family, but the "person in relation," that is

Separate taxation is more equitable because it treats similar taxpayers similarly. Our system is an *income* tax; by taxing each individual on her income, the system does not unfairly discriminate based on certain taxpayers' living arrangements. If we wish to use the tax system to assist people who have taken on dependents, then Congress can enact tax provisions giving deductions or credits for dependents, be they adults or children.

Separate taxation also is consistent with our tax system's basic principle that the person who controls the income should be taxed on it even if another benefits. The control principle is particularly apt for earned income since only the earner can produce that income. As the empirical studies show, the earner usually controls the income even if the couple states that they pool.

Separate taxation also would be more efficient than joint taxation. For example, the joint return discourages the second earner from working by placing her in a higher marginal bracket. Studies show that the wages of the second earner, usually the wife, are sensitive to the tax rate, whereas the wages of married men and singles are relatively insensitive.¹⁴⁷ Joint returns thus discourage wives from

an individual earner plus his or her dependants [sic]. By "dependants" I mean those persons who, unable to support themselves for reasons such as youth, advanced old age, or chronic disability, rely on the earner for their economic support. Able-bodied adults are never engulfed in this definition: even if they are non-earners, their productive capacity is recognized and they are never considered as dependants.

Nelson, *supra* note 48, at 23. Her system is a marriage-neutral system that respects the integrity of the individual. A nonearning adult "neither files nor provides anyone with an exemption." *Id.* at 24. Each earning adult files a return. Presumably only one of them will be able to claim a personal exemption amount for their children or other dependents.

Laura Ann Davis argues for a separate return system for all individuals under which community property laws would be ignored for tax purposes. An individual would be taxed on all her earned income and on her proportionate share of jointly owned property. Income from community property would be treated like that from joint bank accounts—allocated according to relative contributions. Davis, *supra* note 94, at 238.

147. The Joint Committee on Taxation indicated:

Considerations of economic efficiency dictate that tax rates be lowest on persons whose work effort would be most responsive to lower taxes. Virtually all statistical studies of the issue conclude that a wife's work effort is more responsive to reduced taxes than her husband's However, the present system may have countervailing benefits to the extent society gains from uncompensated work performed by wives.

INCOME TAX TREATMENT, *supra* note 17, at 5. Statistical studies since 1980 continue to demonstrate that the wife's earnings are more tax sensitive. McCaffery, *supra* note 94, at 1039 n.211. As to the countervailing benefits from uncompensated work done by wives, there is an inefficient allocation of resources if different types of income (imputed v. earned) are treated differently for tax purposes.

working by placing them in higher marginal brackets than they would be in as individuals. Thus, it is more economically efficient to treat individuals as separate taxable units so as not to discourage women from working.

Separate taxation would also further certain "family values" better than joint taxation. For example, there has been much debate about the plight of children in general and the rising number of poor children; proposals have been made to enact child tax credits to benefit children.¹⁴⁸ However, there is no "guarantee," as Judith Younger has stated, that "a family receiving the credit would spend its extra dollars on its children."¹⁴⁹ Arguably, there is a better chance that the money would be spent for the children if the woman gets the credit. Studies show that women are more likely than men to allocate more of their earnings to children.¹⁵⁰ Separate taxation can strengthen the family unit by permitting the second partner to work without suffering a tax penalty whenever economic or psychological factors encourage or dictate a two-earner family. Separate taxation may also strengthen families by reinforcing a sense of independence and self-worth in both partners. Such feelings form the basis of modern, healthy relationships which are built not on paternalism, but on true equality. If marriages are partnerships they are or should be partnerships between equal members.

The individual tax unit is superior to the joint tax return in many respects: It is fairer, simpler, more in accord with principles of taxation, more economically efficient, and better equipped to accomplish certain social goals. Empirical studies show that not all couples share their income. Even if all poolers could be correctly identified, joint returns are a poor policy choice. Since the income tax is a tax based on an individual's ability to pay, the tax unit logically should be the individual. Pooling is a normative issue with complicated social and psychodynamic implications. A joint return that applied only to families that pooled would add complications to an already overly compli-

148. E.g., H.R. 2242, 102d Cong., 1st Sess. (1991) (Working Family Relief Act introduced by Rep. Thomas J. Downey (D-N.Y.) with 56 Democratic cosponsors, which provided for a refundable credit instead of the current deduction); H.R. 2434, 103d Cong., 1st Sess. (1993) (Putting Jobs and the American Family First Act of 1993 introduced by Rep. Rodney Grams (R-Minn.) with 64 Republican cosponsors, which provides for a \$500 tax credit per child; this bill was still pending as of October 22, 1993, and still adding cosponsors); see also NATIONAL COMMISSION OF CHILDREN, FINAL REPORT, BEYOND RHETORIC: A NEW AGENDA FOR CHILDREN AND FAMILIES 94-95 (1991), cited in Younger, *supra* note 43, at 898 (recommending a \$1000-per-child refundable credit).

149. Younger, *supra* note 43, at 898.

150. See, e.g., Rogers, *supra* note 49, at 8.

cated code, without furthering any goals of the tax system. On the other hand, the joint return as it exists now does not further family values since it does not help *all* families.

The individual return is not the perfect solution to the taxable unit issue because no perfect solution can exist when it must inevitably rest on social and political values. Nevertheless, because the individual return is a better solution than the joint return, the joint return ought to be abolished.