

# SAVE THE CLEAVERS: TAXATION OF THE TRADITIONAL FAMILY

*Joel S. Hollingsworth*

*"As the family goes, so goes the nation and so goes the whole world in which we live."<sup>1</sup>*

## I. INTRODUCTION

Over the last thirty-five years, the dual-earner family has gradually displaced the single-earner family as the "typical" family paradigm. Due in part to this paradigm shift, the quality of child care has undergone a negative transformation. Traditional families, because they sacrifice additional disposable income to ensure a nurturing environment for their children, should, at the least, not be penalized for balking at the modern trend. This article examines the effect on the traditional family of certain tax provisions, specifically the joint return and the child care credit, and proposes certain modifications.

Part II of this article begins by distinguishing between nurturing care—defined as the loving, attentive guidance of a child's emotional, social, and intellectual development requiring a significant investment of time—and mere supervisory care—defined as the provision of an environment in which the child is monitored and kept safe. Due in part to the increase in dual-earner families, many children currently receive inadequate levels of nurturing care from their parents. Parents often substitute "quality time" for "quantity time" and delegate the nurturing role to day care facilities, steps that are generally inadequate. Part II concludes that since becoming a dual-earner family is often a choice rather than a necessity, tax legislators should carefully consider the effect of the tax system on families who choose to forgo additional income to properly nurture their children.

Part III of this article demonstrates how the joint return results in (1) injury to many modern couples; (2) injury to many traditional families during their non-child-rearing years; and (3) perceived gender bias, specifically against married women. The rationale for the joint return, that married couples are appropriately taxable as units because

---

Judicial Clerk for the Honorable Charles D. Susano, Jr., of the Tennessee Court of Appeals; J.D., University of Tennessee College of Law (1999); B.B.A., Belmont University (1995). I would like to thank Amy Hess and Don Leatherman for their insight and assistance in writing this article. The opinions expressed in this article, as well as any mistakes contained in the article, are, of course, my own.

<sup>1</sup> *Pope Ends Aussie Visit with Blast at Abortion*, CHI. SUN-TIMES, Dec. 1, 1986, at 24 (quoting Pope John Paul II).

such couples share assets, is somewhat questionable. Part III concludes with a proposal to (1) replace the current system of filing categories with a system based on separate returns; (2) replace the current progressive tax with one that is much more proportional; and (3) allow allocation of unused standard deductions between spouses.

Part IV examines the current child care credit and concludes that it is insufficient for single parents and families in which both spouses work due to financial necessity. However, in allowing certain dual-earner families, those who do not require two incomes, to recapture a percentage of their out-of-pocket expenses, the child care credit is unfair to traditional families whose child care expense is in the form of forgone income. Part IV suggests modification of the Internal Revenue Code (the "Code") § 21 "applicable percentage" in order to increase the credit for those who truly need assistance and to eliminate the credit for families who do not. Part V concludes this article by demonstrating some of the positive effects of combining the proposals described in Parts III and IV.

## II. THE TRADITIONAL FAMILY

### *A. Familial Models*

Throughout this article, I refer to several familial models to which, for convenience, I have assigned names associated with television shows. The models do not imply any information (such as level of income) outside the stated definition.

#### 1. The Cleavers

The Cleavers represent the traditional family model. The family consists of a husband and wife who are the parents of one or more children. While their children are young, one parent works outside the home to earn income and one parent cares for the home and the family. Before the children are born and after the children are grown, the husband and wife both work outside the home.<sup>2</sup>

#### 2. The Huxtables

The Huxtables represent the modern family model. This family also consists of a husband and wife who are the parents of one or more children. The Huxtables differ from the Cleavers in that both parents work outside the home and arrange for child care while they are at work.

---

<sup>2</sup> A variation of this paradigm is the "tag-team" family. In this family, the husband and wife with young children both work outside the home, but arrange their schedules on a daily alternating basis so that one of them is always available to care for their children.

### 3. Murphy Brown

Murphy Brown represents the single parent. She (or he) is either unmarried, divorced, or widowed and has one or more children. Since she is uncoupled and generally cannot both make money and care for her children, she works outside the home and, while her children are young, pays for child care out of her earnings.

### 4. Jerry Seinfeld

Jerry Seinfeld represents the individual taxpayer who is unmarried, divorced, or widowed and has no children. He (or she) has one or more incomes and no child care expenses.

This article focuses on how the current tax system inflicts a dual injury on the traditional family. The marriage penalty injures the Cleavers before and after they have young children (and the Huxtables even while they are raising young children), and the child care credit, by favoring the Huxtables, injures the Cleavers when they have young children. While I believe a persuasive argument can be made that the traditional family should be encouraged and rewarded more so than the modern family, this article will not undertake to make that argument. I will merely argue that the marriage penalty harms both families by favoring individuals over married couples and that the child care credit injures the Cleavers by favoring the Huxtables. I then propose modification of the current tax system to place families on equal footing with individuals and traditional families on equal footing with modern families.

#### *B. The Quality of Child Care*

##### 1. The Importance of Attachment

A child's emotional, social, and intellectual skills are best developed under supervision of a loving, attentive care-giver who is able to devote a significant amount of time to the child during the child's early developmental years.<sup>3</sup> Crucial to this task is the development of a secure attachment to a responsive care-giver.<sup>4</sup> "Diseases of nonattachment" can produce varying degrees of mental illness and anti-social behavior later in life.<sup>5</sup> Many experts believe that even older children who spend

---

<sup>3</sup> See *infra* notes 4-10 and accompanying text.

<sup>4</sup> See Ann L. Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 792-97 (1993).

<sup>5</sup> See *id.*; see also David Johnston, *Daycare Dilemma: How Do You Find the Right Place for Your Child?*, MONTREAL GAZETTE, Jan. 26, 1997.

significant periods of time without parental supervision are more likely to develop certain social pathologies.<sup>6</sup>

This attachment, so crucial to the well-being of children, can only be developed through time. However, many modern parents invest as much or more time in work than in their children. For instance, assuming a child is awake twelve hours a day,<sup>7</sup> a parent who works a typical forty hour work week is, at the most, available for only forty-four hours per week of the child's awake time.<sup>8</sup> Considering that a parent normally needs to take care of both the children and the home, the time the parent actually spends with the child is undoubtedly lower. Indeed, according to one survey, the average time mothers devote to undivided child care is only 6.6 hours per week for working mothers and 12.9 hours per week for at-home mothers.<sup>9</sup> Many child development experts, based in large part on the foregoing reasons, are reluctant to encourage mothers of young children to work full-time.<sup>10</sup>

## 2. Attachment Substitutes

Many modern parents currently rely on other means to provide their children with the foundation upon which to build future social and intellectual skills. Two of the most common substitute methods are "quality time" and commercial day care.

### (a) Quality Time

Many parents incorrectly believe a lack of "quantity time" can sufficiently be offset by ensuring that the limited time available is "quality time." This notion arose out of research conducted in the early

---

<sup>6</sup> See, e.g., NEIL POSTMAN, *THE DISAPPEARANCE OF CHILDHOOD passim* (1982); MARIE WINN, *CHILDREN WITHOUT CHILDHOOD passim* (1983).

<sup>7</sup> This assumption is based on a period of fourteen hours between waking up and going to sleep with some combination of two hours of nap time during the day.

<sup>8</sup> This assumes the parent works during the day. Even if the parent works during the night, however, the parent is presumably spending at least part of the child's waking hours sleeping.

<sup>9</sup> See Laura Shapiro, *The Myth of Quality Time*, NEWSWEEK, May 12, 1997, at 62, 65. The study also shows almost no difference regarding time devoted to undivided child care between working fathers and at-home fathers. See *id.* This identifies an additional problem concerning the difference between fathers and mothers as parents. A discussion on such a problem is outside the scope of this paper.

<sup>10</sup> See, e.g., T. BERRY BRAZELTON, *WORKING AND CARING* (1985); EDWARD F. ZIGLER & MARY E. LANG, *CHILD CARE CHOICES: BALANCING THE NEEDS OF CHILDREN, FAMILIES, AND SOCIETY* 24-25 (1991); Barbara Kantrowitz, *The Clamor to Save the Family*, NEWSWEEK, Feb. 29, 1988, at 60; Penelope Leach, *Are We Shortchanging Our Kids?*, PARENTING, Apr. 1991, at 86; Penelope Leach, *Daycare Centers Are Fine for Preschoolers, But What About Babies?*, PARENTING, June/July 1991, at 58.

1970s which found that babies' cognitive and social abilities were more developed when the mothers were actively involved with them.<sup>11</sup> Many mistakenly concluded that since children responded best to quality time, quality time was all that mattered.<sup>12</sup> However, quality time is without meaning unless it is rendered in adequate quantities.<sup>13</sup> When parents merely substitute quality time for quantity time, their availability to the child, which is a factor in development of the parent-child attachment, diminishes.<sup>14</sup> This often leads children to believe that their parents are more interested in spending time away from home than spending time with them and can result in children with low self-esteem.<sup>15</sup>

Moreover, many dual-earner couples, although filled with good intentions of making up for lost time through substituted use of quality time, discover that fulfilling these intentions is difficult. Kevin Dwyer, assistant executive director of the National Association of School Psychologists, has observed that many working parents are inconsistent in disciplining their children simply because they are exhausted at the end of the work day.<sup>16</sup> He adds that inconsistent discipline often leads the children to exhibit increased aggression and deviance.<sup>17</sup> Thus, the intention of parents to provide developmental guidance to their children through the use of quality time without investing substantial amounts of actual time often goes unrealized.

#### *(b) Commercial Day Care*

Many modern parents also seek assistance with their children's developmental processes by delegating the care-giving role to commercial day care facilities. However, psychologists and other mental health professionals disagree considerably over whether such facilities adequately assist parents in raising their children. An ongoing study sponsored by the National Institute of Child Health and Human Development (the "Study") is currently observing 1,300 families from the birth of their children through age seven.<sup>18</sup> An April 1997 report released by the group has been declared reassuring by both proponents and

---

<sup>11</sup> See Shapiro, *supra* note 9, at 64.

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See Barbara Vobejda, *Day Care Study Offers Reassurance to Working Parents*, WASH. POST, Apr. 4, 1997, at A1.

opponents of commercial day care.<sup>19</sup> In support of a conclusion that children are not disadvantaged by being placed in quality day care, some commentators point to findings that high-quality day care can boost a two- or three-year-old's language and cognitive skills.<sup>20</sup> Those who emphasize this aspect of the Study assert that the issue is not whether day care is good or bad for children. Rather, the argument goes, the discussion should focus on the need for quality day care because good day care does not disadvantage children.<sup>21</sup>

However, the assertion that society should focus on the need for quality day care, rather than the question of whether day care as an institution is detrimental to children, seems to concede that the current state of day care is often disadvantageous to children. Indeed, the Study rated only 15% of day care facilities as excellent.<sup>22</sup> Fifteen percent of facilities were rated "abysmal," and the vast majority (70%) were rated "barely adequate."<sup>23</sup> Children in the "barely adequate" category were safe from harm, but did not receive consistent emotional support or intellectual stimulation.<sup>24</sup> Consistent with the above discussion stating that most psychologists agree that a child's attachment to his primary care-giver forms the foundation for his emotional development,<sup>25</sup> the Study found that children whose mothers stayed at home were more attached to their mothers than children who were cared for by someone else for more than ten hours per week.<sup>26</sup> Additionally, mothers whose children are in day care experience more negative feelings toward them when they are fifteen months old than do mothers who do not use day care.<sup>27</sup> The Study also found that the 15% of facilities that were found to be less than adequate could hinder development of a two- or three-year-old's language and cognitive skills.<sup>28</sup> Thus, while it is probable that some high-quality day cares provide children with developmental guidance

---

<sup>19</sup> See, e.g., Julia Duin, *Day Care Study Provides "Cautionary Note" to Mothers*, WASH. TIMES, Apr. 5, 1997, at A3; Vobejda, *supra* note 18, at A1.

<sup>20</sup> See, e.g., *Quality of Day Care the Issue at Hand*, YORK DAILY REC., Apr. 11, 1997, at 8; Judy Hill, *Quality Time with Kids Matters Most*, TAMPA TRIB., Apr. 14, 1997, at 1; Ruth Sheehan & Tinker Ready, *Study: Day Care Doesn't Hinder Children*, THE PATRIOT LEDGER, Apr. 4, 1997, at 3.

<sup>21</sup> See *Quality of Day Care the Issue at Hand*, *supra* note 20, at 8; Sheehan & Ready, *supra* note 20, at 3.

<sup>22</sup> See Vobejda, *supra* note 18, at A1.

<sup>23</sup> Shannon Brownlee et al., *Lies Parents Tell Themselves About Why They Work*, U.S. NEWS & WORLD REPORT, May 12, 1997, at 58, 61 (discussing the National Institute Child Health and Human Development Day Care Study).

<sup>24</sup> See *id.*

<sup>25</sup> See *supra* notes 4-6 and accompanying text; Brownlee, *supra* note 23, at 61.

<sup>26</sup> See Duin, *supra* note 19, at A3; Sheehan & Ready, *supra* note 20, at 3.

<sup>27</sup> See Duin, *supra* note 19, at A3.

<sup>28</sup> See Brownlee, *supra* note 23, at 61.

more effectively than some parents do, the current state of day care facilities suggests that most do not.<sup>29</sup>

### 3. The Inadequacy of Attachment Substitute Justifications

Many dual-earner couples assert that the substitution of quality time for quantity time and the delegation of some care-giving responsibility to day care facilities is necessary because (1) the family needs two incomes to survive and (2) neither spouse's job is flexible enough to allow much time for the children.

#### (a) Financial Necessity

While it is undoubtedly true that some families need two incomes just to provide family necessities, becoming or remaining a dual-earner couple is often a choice. A substantial percentage of married couples with children are financially able to have one parent stay at home even though the median income for such families is below \$32,000.<sup>30</sup> Despite an increased financial ability, families with higher incomes are about as likely as truly needy families to have both spouses in the labor force.<sup>31</sup> Additionally, when many dual-earner families speak of requiring two incomes to survive, they in fact mean that they need two incomes to maintain their middle-class lifestyle.<sup>32</sup> Indeed, 31% of the families in which both parents work are generating income of more than \$70,000.<sup>33</sup> Thus, even though one income is sufficient for many families, some couples become or remain dual-earner couples not because they require two incomes to pay for necessities but because they choose to maintain a higher standard of living.

---

<sup>29</sup> Improvement of commercial day care facilities certainly merits discussion, but an adequate treatment is beyond the scope of this article. This article instead focuses on the tax consequences of a family deciding to remedy this problem themselves by providing at-home parental care.

<sup>30</sup> See Brownlee, *supra* note 23, at 60 (stating that almost seven million married couples with children choose to have one parent stay at home); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 469 tbl. 724 (116th ed. 1996) (showing that the median income for single-earner married couples with children in 1993 was \$30,218).

<sup>31</sup> See Brownlee, *supra* note 23, at 60.

<sup>32</sup> See *id.* This article relates the results of two surveys, one in 1975 and one in 1995, asking respondents to define "the good life." *Id.* In 1975, a majority defined "the good life" as consisting of a car, a lawn, a home, a happy marriage, an interesting job, and being able to afford college for their children. *Id.* In 1995, a majority defined "the good life" as consisting of "a lot of money" and a job that pays "much more than average." *Id.* Between 37 and 40% included such luxury items as vacation homes and swimming pools. See *id.*

<sup>33</sup> See *id.*

(b) *Employment Inflexibility*

Similarly, while many dual-earner families claim that neither spouse's job is flexible enough to allow them to spend more time with their children, this assertion is also often untrue. Seventy-two percent of the nation's companies offer flextime while 64% allow part-time employment.<sup>34</sup> Additionally, 36% provide job-sharing opportunities and 20% allow employees to work from home.<sup>35</sup> However, few employees eligible for such flexible employment opportunities take advantage of them.<sup>36</sup>

One reason for not taking advantage of such opportunities is that doing so may limit one's career advancement. Often, those who ask to utilize flextime are viewed as not being completely committed to the company.<sup>37</sup> However, a more revealing reason also exists: many parents simply prefer the relative serenity of an office to the chaos of children and home.<sup>38</sup> Additionally, employed women tend to feel healthier, happier, and more appreciated than women who stay at home.<sup>39</sup>

The evidence suggests that a child's emotional, social, and intellectual skills are best developed under supervision of a loving, attentive care-giver who is able to devote an adequate amount of time to the child during the child's early developmental years.<sup>40</sup> While one income is sufficient for many families, there is substantial financial pressure for both spouses to work. However, dual-earner families probably do not provide adequate developmental guidance for their children by substituting quality time for quantity time. Furthermore, most do not adequately provide for their children by delegation of this responsibility to day care facilities because most day cares merely provide a safe environment for children.<sup>41</sup> Therefore, since becoming a dual-earner family is often a choice rather than a necessity, tax legislators should carefully consider the effect of the tax system on families who choose to forgo additional income in order to most effectively nurture their children. In the next section of this article, I will

---

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND* 25-27 (1997).

<sup>37</sup> See Brownlee, *supra* note 23, at 62; Shapiro, *supra* note 9, at 67-68.

<sup>38</sup> See Brownlee, *supra* note 23, at 62; HOCHSCHILD, *supra* note 36, at 25-34.

<sup>39</sup> See Shapiro, *supra* note 9, at 67; see also Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 370-71 (1994) (reporting that one survey revealed that 57% of respondents preferred the two-earner family over the traditional family despite an even stronger belief that the traditional family was better for children).

<sup>40</sup> See *supra* notes 4-10 and accompanying text.

<sup>41</sup> See *supra* notes 18-29 and accompanying text.



discuss the relatively recent familial paradigm shift and its contributing factors.

### C. The Cleavers' Demise

Despite the positive contribution of traditional families to their children, the typical familial paradigm has shifted from the Cleavers to the Huxtables over the past thirty-five years. The labor force participation rate for married women with one or more children under the age of six increased from 18.6% in 1960 to 59.6% in 1993.<sup>42</sup> Additionally, the labor force participation rate for married women with one or more children under the age of seventeen increased from 27.6% in 1960 to 67.5% in 1993.<sup>43</sup> Therefore, while married couples with children used to more closely resemble the Cleavers, today most look more like the Huxtables.

There are undoubtedly many factors contributing to this trend. As discussed earlier, although necessity is overused as a justification for dual-income families with children,<sup>44</sup> for many families with children it is certainly true.<sup>45</sup> Further contributing to the fact that two incomes are necessary for some families is the migration of millions of women from the home to the labor force over the last thirty-five years which has dramatically increased the number of available workers.<sup>46</sup> The fundamental economic principle of supply and demand suggests that such an increase in supply would decrease demand and would in turn lower wages. As a result, more workers would be needed to achieve the same actual income as one worker could have achieved before the increase in supply.

Another factor contributing to the shift from the Cleaver paradigm to the Huxtable paradigm is the rise of certain feminist ideals that arguably have the effect of subordinating parental duties to career

---

<sup>42</sup> See U.S. BUREAU OF THE CENSUS, *supra* note 30, at 400 tbl. 626.

<sup>43</sup> See *id.* The figures in this and the immediately preceding footnote apparently continued to increase in 1994 and 1995. See *id.* However, the census data in this category is "not strictly comparable with data for earlier years" beginning in 1994. See *id.* Additionally, these figures do not distinguish between full-time and part-time participation. See *id.*

<sup>44</sup> See *supra* text accompanying notes 30-33.

<sup>45</sup> See U.S. BUREAU OF THE CENSUS, *supra* note 30, at 473 tbl. 732 (showing that the poverty threshold for a family of four in 1994 was \$15,141); see also *id.* at 462 tbl. 711 (showing that a combined 11.6% of four-person households had income below \$15,000 in 1994).

<sup>46</sup> See *id.* at 400 tbl. 626 (showing that the number of women in the labor force increased from 22.6 million in 1960 to 60.6 million in 1995).

goals.<sup>47</sup> The parental role has been further devalued because the rise in educational attainment levels of women has increased the earning capacity of women as a group, which in turn has made it more costly for many women to forgo earnings by becoming a full-time parent.<sup>48</sup>

These and other factors have contributed to the familial paradigm shift from the Cleavers to the Huxtables. The focus of the remainder of this article deals with how current tax issues—specifically the joint return and the child care credit—factor into the analysis.

## II. THE JOINT RETURN

### A. Negative Consequences of the Joint Return

#### 1. Marriage Penalty for the Huxtables

The joint tax return is horizontally inequitable in that it treats similarly situated people—couples living as a single economic unit—differently based solely on marital status. The joint return injures substantially equal income couples like the Huxtables who decide to get or stay married by imposing a higher tax on them than substantially equal income couples who do not legally marry.

For example, assume that Cliff and Claire Huxtable, living as a single economic unit, have a taxable income of \$50,000 each and a combined taxable income of \$100,000. Their tax liability is \$23,528.50.<sup>49</sup> The result would be the same even if they filed separate returns as a married couple.<sup>50</sup> Now assume that Murphy Brown and Jerry Seinfeld also live together as a single economic unit and that their financial situation exactly mirrors that of the Huxtables. The only difference

---

<sup>47</sup> See, e.g., Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2001-06 (1996) (noting that one of the fundamental goals of feminist tax policy is to encourage women to participate in the labor force); Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: the Joint Return*, 54 WASH. & LEE L. REV. 1469, 1484 (1997).

<sup>48</sup> See Ellen R. Zieve, *To Work or Not to Work, and What About the Kids?*, 3 S. CAL. REV. L. & WOMEN'S STUD. 163, 164 (1993).

<sup>49</sup> See I.R.C. § 1(a) (1998). The calculation is as follows:

20,165 + [(0.31)(100,000-89,150)]

20,165 + [(0.31)(10,850)]

20,165 + 3363.50

\$23,528.50

<sup>50</sup> See *id.* § 1(d). If the Huxtables filed separately as married individuals, the calculation would be as follows:

(2)[10,082.50 + (0.31)(50,000-44,575)]

(2)[10,082.50 + (0.31)(5425)]

(2)[10,082.50 + 1681.75]

(2)[11,764.25]

\$23,528.50

between the two couples is that Cliff and Claire are married and Murphy and Jerry are not. The Brown/Seinfeld couple's combined tax liability is only \$22,254<sup>51</sup> even though their individual and combined taxable incomes are the same as the Huxtables'. The Huxtables pay \$1274.50 more in tax than Brown/Seinfeld only because Cliff and Claire are legally married. Thus, many modern couples in which both spouses earn substantially equal incomes are treated unfairly by the joint return. There is considerable unhappiness with this result.<sup>52</sup> Some couples have been so displeased as to make an annual event of divorcing each December and re-marrying each January.<sup>53</sup>

## 2. Marriage Bonus/Penalty for the Cleavers

The joint return can also result in a marriage bonus to families in which one spouse earns substantially more than the other. For instance, consider the Cleavers at a stage in their relationship during which June is absent from the labor force so she can take care of their young children. Assume that Ward's taxable income is \$100,000. If the Cleavers file jointly, their tax liability will be \$23,528.50.<sup>54</sup> Now assume that Murphy Brown has a taxable income of \$100,000. Her tax liability would be \$26,522,<sup>55</sup> or almost \$3000 more than Ward's. The result is horizontally inequitable because Ward and Murphy both have the same taxable income, but different tax liabilities.<sup>56</sup> Thus, when one focuses on the individual as the taxable unit, the result is a marriage bonus for the Cleavers.

---

<sup>51</sup> See *id.* § 1(c). Brown's and Seinfeld's calculation is as follows:

(2)[3315 + (.28)(50,000-22,100)]

(2)[3315 + (.28)(27,900)]

(2)[3315 + 7812]

(2)[11,127]

\$22,254

<sup>52</sup> See, e.g., Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 359 (1994).

<sup>53</sup> See, e.g., *Boyer v. Commissioner*, 668 F.2d 1382 (4th Cir. 1981) (remanding for a determination of whether the divorce was a sham); see also Rev. Rul. 76-255, 1976-2 C.B. 40.

<sup>54</sup> See *supra* note 49.

<sup>55</sup> See I.R.C. § 1(c). The calculation is as follows:

12,107 + [(31)(100,000-53,500)]

12,107 + [(31)(46,500)]

12,107 + 14,415

\$26,522

<sup>56</sup> In contrast, when one compares the Cleavers to the Huxtables, horizontal equity is achieved because each taxable unit—the married couple—has the same taxable income and the same tax liability.

Although the joint return results in a marriage bonus to the Cleavers at the stage of their relationship during which one of them is at home caring for the children, this bonus is only temporary and is potentially offset by a penalty incurred both before and after the child-rearing years. The data supporting the assertion that the secondary earner in a traditional family participates in the labor force before and after the child-rearing years is sparse, but such an inference may properly be drawn from data showing a general trend of increased participation in the labor force by married mothers as their children grow older.<sup>67</sup> Thus, the joint return harms not only many modern families but also injures traditional families during non-child-rearing years.

### 3. Perceived Gender Bias

On a more general level, some critics argue that the joint return also disadvantages married women as a group by taxing their income at a higher effective rate than their husbands' incomes.<sup>68</sup> The argument generally proceeds as follows: if one views the wife as the secondary earner, the joint return treats her income as an addition to her husband's income. Thus, her first dollar of income is taxed at or above her husband's highest marginal rate. Thus, if her husband's taxable income is \$100,000, parts of his income are taxed at 0%, 15%, 28%, and 31% while all the wife's income is taxed at 31% or higher.<sup>69</sup>

These commentators criticize this result for a variety of reasons. Many assert that this effect of the joint return discourages secondary income earners from working,<sup>60</sup> and since most secondary earners are women, this results in a gender-biased tax code.<sup>61</sup> Additionally, at least one scholar points out that the joint return even discriminates against

---

<sup>67</sup> See U.S. BUREAU OF THE CENSUS, *supra* note 30, at 400 tbl. 626 (showing that, in 1995, the labor force participation rate increased from 63.5% for married mothers of children under six to 76.2% for married mothers of children between the ages of six and seventeen).

<sup>68</sup> See, e.g., Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 108 (1993); Edward J. McCaffery, *Taxation and the Family: a Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1993); Zelenak, *supra* note 39, at 365-72.

<sup>69</sup> See I.R.C. § 1(a).

<sup>60</sup> See, e.g., Kornhauser, *supra* note 58, at 108; McCaffery, *supra* note 58, at 983; Zelenak, *supra* note 39, at 365-72.

<sup>61</sup> See McCaffery, *supra* note 58, at 1039. The usual rebuttal to this argument is that the tax code is gender neutral because it does not distinguish between the husband's and the wife's income. If society views the wife's income as secondary to the husband's, the rebuttal continues, then it is a societal problem, not evidence of gender bias in the code. See, e.g., Michael J. McIntyre, *Individual Filing in the Personal Income Tax: Prolegomena to Future Discussion*, 58 N.C. L. REV. 469, 484 (1980).

the wife in the traditional one-earner family because it makes her jointly liable for the tax but ignores the “reality of economic dominance of the earner.”<sup>62</sup>

### *B. Misplaced Reliance on the Pooled-Income Justification*

Despite these inequities, many justify the joint return on the basis that because married couples share their income, the couple is a proper taxable unit.<sup>63</sup> However, Congress created the joint return in 1948, not out of concern that married couples shared income and thus should be treated as a single taxable unit, but rather to remedy inequity between married couples in community property states and those in non-community property states.<sup>64</sup>

#### 1. Historical Rationale for the Joint Return

Prior to 1948, when spouses were treated as two separate taxable units, the progressive nature of the tax system created an incentive for high-marginal-rate husbands to shift income to lower-marginal-rate wives.<sup>65</sup> In 1930, the Supreme Court in *Lucas v. Earl*<sup>66</sup> held that a husband could not reduce his tax liability by entering into a contract providing that future income earned by either spouse was to be treated as belonging one-half to each.<sup>67</sup> However, later that same year, the Supreme Court ruled in *Poe v. Seaborn*<sup>68</sup> that in community property states half of a husband’s earned income was to be treated as the wife’s for federal income tax purposes.<sup>69</sup> Thus, only couples in community property states were allowed to benefit from income-splitting.

As a result of these decisions, many states adopted community property systems and those that did not witnessed increasingly complex attempts by their citizens to shift income through devices such as gift-giving and creation of family partnerships.<sup>70</sup> In 1948, Congress created the joint return to allow married couples in non-community property

---

<sup>62</sup> Kornhauser, *supra* note 58, at 108. *But see* I.R.C. § 6015 (effectively limiting such joint liability).

<sup>63</sup> *See, e.g.,* Don Fullerton & Diane L. Rogers, *Lifetime Versus Annual Perspectives on Tax Incidence*, 44 NAT’L TAX J. 277, 280 (1991).

<sup>64</sup> *See infra* text accompanying notes 66-74.

<sup>65</sup> *See Zelenak, supra* note 39, at 344-45.

<sup>66</sup> 281 U.S. 111 (1930).

<sup>67</sup> *See id.* at 113-15.

<sup>68</sup> 282 U.S. 101 (1930).

<sup>69</sup> *See id.*

<sup>70</sup> *See Zelenak, supra* note 39, at 345.

states the same income-splitting benefit that married couples in community property states enjoyed.<sup>71</sup>

Congress explained that the reason for enacting the joint return was to forestall the “impetuous enactment of community-property legislation by States that have long used the common law” and to reduce the “incentive for married couples in common-law States to attempt the reduction of their taxes by the division of their income through such devices as trusts, joint tenancies, and family partnerships.”<sup>72</sup> Thus, the joint return was not enacted out of a belief that a married couple should be treated as one taxpaying entity because they share income. Still, this after-the-fact rationalization remains the main asserted justification for the joint return.<sup>73</sup>

## 2. Skepticism of the Pooled-Income Justification

Not only is the pooled-income explanation for the joint return merely an after-the-fact rationalization, but reliance on the presupposition that married couples share assets as a basis for treating the married couple as a taxable unit has been the subject of skepticism. Specifically, whether married couples in fact do share assets is up for debate.<sup>74</sup> Even if they do, it is not clear whether this sharing is merely legal or actual.<sup>75</sup> Finally, even if most married couples actually share assets, changing societal norms indicate that they are not the only group to do so.<sup>76</sup>

Commentators disagree over whether married couples share assets. For instance, Marjorie Kornhauser asserts that the presupposition that married couples necessarily share assets is “largely unsupported by empirical evidence.”<sup>77</sup> On the other hand, Lawrence Zelenak looks to Bureau of Labor Statistics data on household income and expenditures and concludes that “most spouses have no choice but to share roughly equally in the consumption of their combined income.”<sup>78</sup>

---

<sup>71</sup> See Revenue Act of 1948, Pub. L. No. 80-471, tit. III, pt. I, 62 Stat. 110, 114-16.

<sup>72</sup> S. REP. NO. 80-1013, at 25 (1948).

<sup>73</sup> See Zelenak, *supra* note 39, at 344; see also Kornhauser, *supra* note 58, at 96-100 (stating that the main rationales are economic unity, marital obligations, and economies of scale).

<sup>74</sup> See Kornhauser, *supra* note 58, at 102; see also Zelenak, *supra* note 39, at 351-53.

<sup>75</sup> See Kornhauser, *supra* note 58, at 109; see also Zelenak, *supra* note 39, at 355.

<sup>76</sup> See Kornhauser, *supra* note 58, at 66-67.

<sup>77</sup> *Id.* at 80 (stating that the major collectors and reporters of data, such as the Census Bureau, provide data only on the family as a whole and not on income allocation within the family).

<sup>78</sup> Zelenak, *supra* note 39, at 351-53; see also McIntyre, *supra* note 61, at 14-15.

Even if married couples legally share their assets, it is often the case that the primary earner exercises substantially more actual control over the assets than does the other spouse.<sup>79</sup> The control issue is important because, outside of the marriage relationship at least, tax is generally assessed to the one possessing significant actual control over an asset even where legal control rests with someone else.<sup>80</sup> Thus, even if married couples share legal control of an earner's income, treatment of the couple as a taxable unit may be improper where one spouse possesses more actual control over that income than does the other.<sup>81</sup>

Additionally, treating a group of individuals as a single tax-paying unit solely because the group shares income would seem to suggest that such treatment should not be limited to married individuals. Changing demographics demonstrate that married couples are not necessarily the only people who live as a single economic unit. Non-marital households increased from 1,094,000 in 1970 to 4,440,000 in March 1991.<sup>82</sup> A "household" includes unrelated persons sharing the same housing unit and probably includes unrelated persons who are living as economic units.<sup>83</sup> Additionally, some individuals may live as an economic unit even if they do not live in the same household.<sup>84</sup> Though a wide variety of households share income, a married couple is the only group of individuals that is treated as a single unit for purposes of personal income taxation.<sup>85</sup> Thus, the joint return seems to turn more on marital status than on whether couples share their assets.

Reliance on the presupposition that married couples share their resources as the basis for concluding that married couples should be treated as a single taxpaying entity is problematic. The joint return is under-inclusive in that it does not allow some economic units to reap its benefits simply because they are not married, and it is over-inclusive in that it allows some couples who live as separate economic units to take advantage of it simply because they are married.

---

<sup>79</sup> See Kornhauser, *supra* note 58, at 109; see also Zelenak, *supra* note 39, at 355; PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* 94-111 (1983).

<sup>80</sup> See, e.g., *Helvering v. Horst*, 311 U.S. 112 (1940).

<sup>81</sup> See Bea Ann Smith, *The Partnership Theory of Marriage: a Borrowed Solution Fails*, 68 TEX. L. REV. 689, 697-706 (1990).

<sup>82</sup> See U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* 46 tbl. 56 (112th ed. 1992).

<sup>83</sup> Frederick R. Schneider, *Which Tax Unit for the Federal Income Tax?*, 20 U. DAYTON L. REV. 93, 94 n.12 (1994).

<sup>84</sup> Due in part to factors such as increasing divorce rates, aging population, and changing societal mores, these groups probably include children supporting their elderly parents, parents supporting their adult children, and members of the opposite or same sex living in a platonic or sexual relationship. See Kornhauser, *supra* note 58, at 66-67.

<sup>85</sup> See I.R.C. § 1 (1998).

### C. Positive Consequences of Adopting a Separate Return System

Many of the problems occurring as a result of the joint return could be remedied by adoption of separate returns for all taxpayers regardless of marital status. Doing so would result in (1) a more accurate reflection of income because separate returns is in accord with the notion that income should be taxed to the person who earns it; (2) the elimination of perceived gender bias; and (3) mitigation of horizontal inequity.

#### 1. Enhanced Accurate Reflection of Income

Normally, income tax is assessed to the person who earns it. The question of who earns income is generally answered by determining who actually controls the income, giving little consideration to the beneficial party.<sup>86</sup> This control test is an especially useful mechanism to accurately reflect earned income because an earner is the only person who can produce such income.<sup>87</sup> Additionally, empirical data shows that in the case of many couples who legally share their assets, much, if not all, of the couple's income is in fact controlled by the primary earner.<sup>88</sup> By allowing income-splitting, the joint return ignores the question of who actually earned the income being taxed. Thus, separate returns are a more accurate reflection of income.

#### 2. Elimination of Perceived Gender Bias

Separate returns would also eliminate perceived gender bias in the tax code and may increase economic efficiency. By allowing each spouse to file separately, both spouses would be able to take advantage of their own lower bracket rates. Even if one views the wife as the secondary earner, her income is not treated as merely an addition to her husband's income. Her first dollar of income is not taxed at or above her husband's highest marginal rate, but at her own lowest rate.

#### 3. Mitigation of Horizontal Inequity

##### (a) *Marriage Neutrality Versus Couples Neutrality*

In a progressive tax scheme, one must choose between horizontal equity as between all married couples or horizontal equity as between married couples and individuals.<sup>89</sup> For instance, consider again the current system in which the Huxtables, who each have taxable income of

---

<sup>86</sup> See *supra* text accompanying note 78.

<sup>87</sup> See Kornhauser, *supra* note 58, at 109.

<sup>88</sup> See *supra* text accompanying notes 77-79.

<sup>89</sup> See Zelenak, *supra* note 39, at 358-63.



\$50,000, pay more tax than Seinfeld and Brown, each of whom also has a taxable income of \$50,000, pay together. The result is a marriage penalty: horizontal inequity as between married couples and non-married couples with the same combined income.

However, horizontal equity exists as between the Huxtables and the Cleavers. This equity is sometimes referred to as “couples neutrality.”<sup>90</sup> Though the income of the two families is unequally distributed—the Huxtables have two \$50,000 incomes and the Cleavers have one \$100,000 income—each family pays the same amount of tax. Thus, there is horizontal equity as between married couples because similarly situated taxable units—married couples with a combined taxable income of \$100,000—are taxed similarly.

When one attempts to eliminate the existing horizontal inequity between married couples and individuals, one creates horizontal inequity between married couples with differently distributed, yet equally combined, incomes. For instance, consider yet again the Huxtables, each of whom has a taxable income of \$50,000, and the couple of Seinfeld and Brown, each of whom also has a taxable income of \$50,000. Now also assume that the taxable unit is no longer the married couple, but rather the individual. Each couple now pays the same amount of tax: \$22,254.<sup>91</sup> The result is horizontal equity as between married couples and individuals, or, as it is sometimes referred to, “marriage neutrality.”<sup>92</sup>

However, now there is horizontal inequity between the Huxtables and the Cleavers. Each family has the same aggregate taxable income of \$100,000, but because the incomes are differently distributed, the Cleavers pay almost \$3000 more tax. Thus, there is horizontal inequity because similarly situated taxable units—married couples with a combined taxable income of \$100,000—are taxed differently.

#### *(b) Selection of Marriage Neutrality Over Couples Neutrality*

The choice, then, is between marriage neutrality—equal-income couples paying the same amount of tax regardless of marital status—and couples neutrality—equal income families paying the same amount of tax regardless of distribution of income within the family. As one commentator has noted, this choice cannot be made purely on the basis of tax theory, but must also take into account “collective social

---

<sup>90</sup> *Id.* at 362-63

<sup>91</sup> *See supra* note 51.

<sup>92</sup> Zelenak, *supra* note 39, at 342.

preferences" regarding "society's assumptions about the role of marriage and the family."<sup>93</sup>

There are at least two reasons the tax system should choose marriage neutrality over couples neutrality. First, as one scholar has argued, the public seems to prefer marriage neutrality.<sup>94</sup> As a society, we seem to believe that it is more important for the tax system to neither encourage nor discourage marriage than it is to ensure that equal-income couples pay equal taxes.<sup>95</sup>

Second, the whole premise of couples neutrality may itself be fallacious. It is not necessarily true that families with differently distributed, yet equal, aggregate incomes have the same ability to pay. One way to arrive at a contrary conclusion is to argue that single-earner couples have an increased ability to pay by virtue of having more imputed income.<sup>96</sup>

Another way to arrive at the conclusion that families with a single earner have a different ability to pay than a two-earner family with the same aggregate income is to note that it is unusual for single-earner families to have the same aggregate income as a dual-earner family anyway. The median income for single-earner families in 1993 was \$30,218.<sup>97</sup> The median income for a dual-earner family was \$51,204<sup>98</sup>—substantially more than that of a single-earner family. Thus, the proper analysis is not one of horizontal equity at all, but rather vertical equity.

Therefore, the joint tax return should be eliminated because it produces horizontal inequity between married couples and individuals. The primary justification for the joint return, that married couples share their income, is an insufficient reason by itself to treat married couples differently than other groups of taxpayers living as an economic unit. Finally, viewing the individual as the proper taxable unit more accurately reflects income, eliminates the perception of gender bias in the tax code, and arrives at the proper choice between marriage neutrality and couples neutrality.

---

<sup>93</sup> Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1392, 1463 (1975).

<sup>94</sup> See Zelenak, *supra* note 39, at 363 (arguing that because the public complains more about the lack of marriage neutrality in the income tax than it does about the lack of couples neutrality in the social security tax, the public prefers marriage neutrality).

<sup>95</sup> See *id.* at 362-63. Zelenak concedes that a possible explanation for the fact that more people complain about the marriage penalty is that they are simply more aware of it. See *id.*

<sup>96</sup> See, e.g., *id.* at 361.

<sup>97</sup> See U.S. BUREAU OF THE CENSUS, *supra* note 30, at 459 tbl.724.

<sup>98</sup> See *id.*

#### 4. Proposal for Elimination of the Marriage Penalty

The above analysis concludes that, in a progressive tax system, one must choose whether to live with inequity between married couples and individuals or with inequity between married couples with equal combined, yet differently distributed, incomes. However, either inequity can be mitigated by replacing progressivity with proportionality. Although a strictly proportional tax structure may unfairly tax those with lower incomes, this can be alleviated by allowing a sufficiently large standard deduction to ensure that couples below the poverty threshold do not pay tax. Such a deduction creates a moderately progressive tax because it creates two brackets—a no-tax bracket and a tax bracket. However, since it is much more flat than our current multi-bracket structure, it is much less progressive. Furthermore, since it is much less progressive, any inequity caused by choosing between marriage neutrality and couples neutrality will be largely decreased.

The first step in implementing such a proposal is to eliminate the joint return and tax each individual on his or her own income. Next, to eliminate the resulting couples inequity, proportionality should replace progressivity. To alleviate hardship on low-income taxpayers, the final step should be to formulate a standard deduction which is allocable between spouses.

##### *(a) Elimination of the Joint Return*

The first order of business is to eliminate the joint return and tax all individuals on their own earned income. As stated in the immediately preceding section, this would result in a more accurate reflection of income, elimination of the perception of gender bias in the tax code, and the proper choice of marriage neutrality over couples neutrality.

##### (1) Illustration One

For the first example, assume the following: (1) Ward earns taxable income of \$100,000 for the Cleavers; (2) Cliff and Claire each earn taxable income of \$50,000 for the Huxtables; (3) Murphy Brown and Jerry Seinfeld, a single economic unit, each earn taxable income of \$50,000; and (4) the current progressive rate structure in Code § 1(c) applies.

Eliminating the joint return results in a more accurate reflection of income because all of the individuals are taxed on the income they earn. Cliff, Claire, Murphy, and Jerry all are taxed on the \$50,000 they earn; Ward is taxed on the \$100,000 he earns.

Elimination of the filing categories also will help to reduce the perception of gender bias in the tax code. Murphy's and Claire's incomes

are taxed in the same manner as Jerry's and Cliff's. When June decides to return to work, she will be able to take advantage of her own lower bracket rather than having her first dollar of income taxed at Ward's highest marginal rate.

Additionally, elimination of the joint return properly chooses marriage neutrality over couples neutrality. The marriage penalty is eliminated because both the Huxtable and the Brown/Seinfeld couples pay \$22,254 in tax.<sup>99</sup> As expected, this creates inequity as between these couples and the Cleavers, who pay over \$4000 more in tax than either couple, because the Cleavers' income is differently distributed.<sup>100</sup> One can attempt to justify this result by saying that it is more important to avoid encouraging or discouraging marriage than it is to ensure the Cleavers pay the same amount of tax as the Huxtables or Brown/Seinfeld. One can also argue either that the Cleavers should pay more tax because they have a higher ability to pay due to June's imputed income or that using this example to create a rule would be wrong because it is no longer the norm for one person to earn as much taxable income as two.

*(b) Replacement of the Progressive Rate Structure with a Proportional Rate Structure*

However, even if the inequity to the Cleavers in the above example can be justified, it would be better to simply eliminate it by replacing progressivity with proportionality.<sup>101</sup> Moving to a strictly proportional system would ensure that all three couples in the above scenario would have equal tax liability.<sup>102</sup>

(1) Illustration Two

Consider the effect of replacing the progressive rate structure in Illustration One above with a proportional tax of 24%.<sup>103</sup> Again, income is

---

<sup>99</sup> See *supra* note 51.

<sup>100</sup> Cf. note 51 with note 55.

<sup>101</sup> Doing so would also reduce Ward's incentive to shift income to June because she is in a lower bracket. This would not be the first time Congress enacted legislation to discourage self-help income-shifting among spouses. See *supra* text accompanying note 70.

<sup>102</sup> I advocate the move to proportionality in this section because of its result in achieving equitable tax treatment for the article's model families. A discussion of all potential side effects of such a move and the proper selection of the proportional rate and the amount of the standard deduction discussed in this section is beyond the scope of this article. For one of many discussions concerning various proportional tax proposals, see Carl T. Reed, *Flat Tax, Fairness and Feasibility*, 6 KAN. J.L. & PUB. POL'Y 125 (1997).

<sup>103</sup> Selection of 24% as a proportional tax rate was an arbitrary one made for illustrative purposes only. It is difficult to determine the rate at which a proportional tax should be set to collect the same aggregate amount of tax as is collected under the current

accurately reflected because all individuals are taxed on the income they earn and the perception of gender bias is reduced. Additionally, equity exists not only between the Huxtables and Brown/Seinfeld, but also extends to the Cleavers because all couples are taxed a total of \$24,000. Thus, there is both marriage neutrality and couples neutrality.

(c) *The Standard Deduction Problem*

One of the common objections to a proportional tax is that a strictly proportional tax—one that taxes *everyone* the same rate regardless of ability to pay—is unfair to lower-income taxpayers. To be fair to this segment of the population, a fairly high standard deduction should be allowed.

(1) Illustration Three

Consider now the effect on the above Illustration Two of allowing a \$7500 standard deduction for all taxpayers.<sup>104</sup> Again, Cliff, Claire, Murphy, and Jerry all are taxed on the same amount (\$42,500 or \$50,000 minus the \$7500 deduction) and at the same rate (24%). Thus, they each pay \$10,200 in tax. Ward pays tax at the same rate, gets the same deduction, but pays more tax because he earned more.

However, we again have inequity as to the Cleavers as a unit. The Huxtables and Brown/Seinfeld as units each receive the advantage of two deductions and consequently have equal tax liabilities of \$20,400. The Cleavers, on the other hand, receive the advantage of only one deduction because June does not have taxable income, and, thus, pay tax on a higher percentage of the couple's income. The result is a penalty for couples who choose to have one parent stay at home during the couple's child-rearing years.

(d) *Solution to the Standard Deduction Problem*

This presents a particularly thorny problem for one arguing for encouragement of stay-at-home parenting and against the marriage penalty on the ground that marriage neutrality is more important than couples neutrality. This dilemma can be resolved through the

---

progressive system. It is logical, however, that the rate must be somewhere between the progressive system's lowest and highest marginal rates.

<sup>104</sup> I do not mean to assert that \$7500 is the proper figure to use as a standard deduction. I merely choose \$7500 to illustrate the effect of any deduction on my proposal. This figure is not completely out of the question, considering the current standard deduction of \$4150 for singles and the current poverty threshold for singles of \$7547. See I.R.C. § 63(c) (1998); U.S. BUREAU OF THE CENSUS, *supra* note 30, at 473 tbl. 732. However, some flat tax proposals suggest much higher deductions. See Reed, *supra* note 102.

examination of three options: (1) allow all couples to shift unused deductions between the individuals; (2) prohibit all couples from shifting unused deductions between the individuals; and (3) allow shifting of unused deductions between spouses only.

### (1) Allocation of Deductions Allowed Between All Couples

The first option is to allow all couples to shift unused portions of deductions between the individuals. This would allow June Cleaver to allocate her unused \$7500 deduction to Ward which would in turn put them on equal footing with the Huxtables and Brown/Seinfeld. It would also allow Brown/Seinfeld to do the same if their \$100,000 taxable income was earned by only one of them. This seemingly equitable treatment, however, presents some difficulty. Even if the system limits taxpayers to one additional standard deduction, what prevents taxpayers from pretending that they and their unemployed friends are "couples" in order to use up otherwise wasted deductions? Should adult children be allowed to use their parents' deductions if they are supporting them in their old age? What about parents supporting adult children? What proof will be required to show an adequate relationship? Thus, allowing all couples to shift deductions between themselves could be administratively infeasible.

Additionally, allowing all couples to allocate unused portions of their deductions to others would face a high political hurdle. The Republican-dominated Congress would most likely infer that those most likely to benefit include not only married couples but also intimate same-sex couples or heterosexual couples. Today's Congress is unlikely to extend favorable tax treatment to homosexuals or non-married, sexually-intimate couples, pointing out that extending allocation of deductions to "non-family couples" might also extend favorable treatment to children caring for their elderly parents. Parents caring for their adult children would probably be rebutted by saying that those situations are already provided for by the dependent exemptions. Therefore, allocation of deductions will probably need to be either prohibited or allowed for married couples only.

### (2) Allocation of Deductions Prohibited

A second option is to simply prohibit allocation of deductions between taxpayers entirely. As stated earlier, this results in a penalty for couples who choose to have one parent stay at home during the couple's child-rearing years. Because it is beneficial for one potential earner in an economic unit to stay at home during the couple's child-

rearing years,<sup>106</sup> prohibiting any and all couples from shifting deductions is not a particularly satisfying alternative.

### (3) Allocation of Deductions Allowed Only for Spouses

A third option is to allow spouses, and spouses only, to shift unused deductions between themselves. Allowing such allocation between spouses would result in equity between modern couples like the Huxtables and traditional couples like the Cleavers because both couples would be allowed to use two full deductions regardless of the distribution of income within the marriage. Thus, this option removes the penalty imposed on married couples who choose to have one parent stay at home during the couple's child-rearing years.

However, this option also sacrifices a degree of marriage neutrality. To illustrate, assume again that June is allowed to allocate her \$7500 deduction to Ward. The Cleavers as a unit then would be on equal footing with both the Huxtables and Brown/Seinfeld because each couple's tax liability would be \$20,400. Now assume that Brown earned taxable income of \$100,000 and Seinfeld stayed home to care for the couple's children. Brown/Seinfeld then would only receive one deduction and, thus, would be in the same inequitable position the Cleavers were in before being allowed to shift June's deduction to Ward. In short, Brown/Seinfeld would be penalized for *not* being married, and, thus, marriage neutrality would be subordinated to couples neutrality.

At first glance, this result seems to be at odds with the argument that the marriage penalty should be eliminated because marriage neutrality is more important than couples neutrality. However, the proposed tax system as it stands cannot result in a marriage penalty. Because the system taxes individuals similarly without regard to marital status, no couple is either penalized or rewarded for getting or staying married. Allowing spouses to shift deductions and prohibiting non-spouses from doing the same can only result in a bonus to the married couple and a penalty to the unmarried couple. Thus, the choice is no longer between marriage neutrality and a couples neutrality which could result in either marriage penalties or marriage bonuses. Now the choice is between marriage neutrality and a couples neutrality which could only result in a marriage bonus. Couples neutrality in this situation is arguably more beneficial because it can only encourage, not discourage, marriage.

Additionally, marriage neutrality in this context has a more detrimental effect than in the marriage penalty/bonus debate because it benefits neither the Cleavers nor the Brown/Seinfeld couple. Both

---

<sup>106</sup> See *supra* notes 4-39 and accompanying text.

couples pay more tax than the Huxtables because both have chosen to have one parent stay at home to care for the children.

Thus, the choice comes down to this: (1) prohibit allocation and impose a penalty on all families, regardless of marital status, who choose to have one parent stay at home to take care of the children; or (2) allow allocation between spouses and impose a penalty only on those same couples who are not married. Allowing allocation for spouses injures fewer families than does prohibiting allocation altogether. Thus, spouses should be allowed to shift unused portions of their deductions between themselves.

#### (4) Seinfeld's Objection

Allocation of deductions between spouses may also be objected to on the ground that it is unfair to single taxpayers. Since someone like Jerry Seinfeld is allowed only one deduction for himself, it may be viewed as inequitable to allow a person like Ward Cleaver to take advantage of two deductions. However, the argument that this is inequitable can effectively be rebutted by pointing out that average expenditures for two, at \$36,198, are substantially greater than average expenditures for one, at \$21,861.<sup>106</sup>

#### (e) Inequity Capped at \$1800

This proposed system is better than the current system not only because it allocates inevitable inequity to the proper party but also because it limits the amount of inequity that can occur. Under our current system, marriage penalties and bonuses are limited only by the aggregate income of the couple and the distribution of that income within the couple.

For example, assume that Cliff and Claire Huxtable each have taxable income of \$500,000, resulting in a combined taxable income of \$1,000,000. Their tax liability under the current system would be \$372,528.50.<sup>107</sup> Now assume that Murphy Brown and Jerry Seinfeld, each having a taxable income of \$500,000, are living together as an economic unit. Their individual and combined taxable incomes are the same as the

<sup>106</sup> See U.S. BUREAU OF THE CENSUS, *supra* note 30, at 459 tbl. 706.

<sup>107</sup> See I.R.C. § 1(a). The calculation is as follows:

75,528.50 + [(0.396)(1,000,000-250,000)]

75,528.50 + [(0.396)(750,000)]

75,528.50 + 297,000

\$372,528.50



Huxtables', but their combined tax liability is only \$357,544.<sup>108</sup> The Huxtables suffer a marriage penalty in the amount of \$14,984.50.

Under the proposed system, though, any inequity is limited to \$1800 because the only inequity arises out of allocation of one unused standard deduction. For example, assume that the Cleavers have a taxable income of \$1,000,000, all of which is earned by Ward. Murphy Brown and Jerry Seinfeld are living together as an economic unit, but Murphy earns a taxable income of \$1,000,000 while Jerry stays home to care for the couple's children. The Cleavers are taxed on \$985,000 because June is allowed to shift her unused standard deduction to Ward. Thus, the family pays \$236,400 (24% of \$985,000) in tax. Brown/Seinfeld, however, are taxed on \$992,500 because Jerry cannot shift his unused standard deduction to Murphy. Thus, the family pays \$238,200 (24% of \$992,500) in tax. The difference between the two tax liabilities is \$1800, or 24% of \$7500.

#### IV. THE CHILD CARE CREDIT

In addition to the marriage penalty, the current child care credit<sup>109</sup> injures the traditional family because it is available for parents who pay someone else to care for their children but is not available for stay-at-home parents. This result is defended on the grounds that traditional families are advantaged by the non-taxation of imputed income, that the child care credit is necessary for the accurate reflection of income, and that elimination of the child care credit would further disadvantage single parents and families for whom working outside the home is financially necessary. Although elimination of the credit clearly would disadvantage those who need to work outside the home, the other two justifications for limiting the child care credit to parents working outside the home are questionable. Specifically, imputed income analysis is inadequate because it does not account for non-tax incentives to seek employment; horizontal equity analysis is improper because it presupposes the exception—that single-earner households earn incomes identical to dual-earner households—rather than the norm; and child care expenses are not needed to accurately reflect income because they are personal, rather than business, expenses.

---

<sup>108</sup> See *id.* § 1(c). The calculation is as follows:

(2)[79,772 + (.396)(500,000-250,000)]

(2)[79,772 + (.396)(250,000)]

(2)[79,772 + 99,000]

(2)[178,772]

\$357,544

<sup>109</sup> See *id.* § 21.

### A. History of the Child Care Credit

Traditionally, cash outlays for child care were non-deductible because such expenses were viewed as a consequence of having children and not as a result of accepting out-of-the-home employment.<sup>110</sup> However, as the dual-earner family model grew in popularity, cash outlays for child care came to be viewed as an expense of employment. The rationale is that if parents do not work, they do not need to pay someone else to care for their children, and, thus, the expense is a result of employment. This notion was the basis for Congress's enactment of Code § 214 in 1969. This early legislation created an itemized deduction for work-related child care expenses.<sup>111</sup>

This deduction was transformed into a credit in 1976 because Congress realized that the § 214 deduction, while purporting to benefit those low-income taxpayers who needed child care assistance the most, was instead more beneficial to taxpayers in high marginal brackets.<sup>112</sup>

Today, Code § 21 provides a tax credit for care of a "qualifying individual."<sup>113</sup> The credit is defined as a percentage of actual expenses. This percentage begins at 30% and decreases by 1% for every \$2000 of income over \$10,000 until it reaches 20% at \$30,000.<sup>114</sup> The dollar amount of the credit cannot exceed \$2400 for one child or \$4800 for two or more children.<sup>115</sup> The credit is only allowed for "employment-related expenses," which are defined as expenses "incurred to enable the taxpayer to be gainfully employed."<sup>116</sup>

### B. Effect of the Child Care Credit

To illustrate the effect of the child care credit, consider the difference between the Cleavers and the Huxtables. Assume both families have a combined taxable income of \$100,000. Ward earns all of the Cleavers' income, and June stays home to care for their only child. Cliff and Claire Huxtable each earn \$50,000 in taxable income and pay \$7500 to a day care facility to care for their only child. Under the current

---

<sup>110</sup> See *Smith v. Commissioner*, 40 B.T.A. 1038 (1939), *aff'd*, 113 F.2d 114 (2d Cir. 1940).

<sup>111</sup> See I.R.C. § 214 (1976).

<sup>112</sup> See Internal Revenue Amendment, Pub. L. No. 94-455, § 504 (1976) (codified at I.R.C. § 214 (1976)), *reprinted in* LEGISLATIVE HISTORY OF THE TAX REFORM ACT OF 1976, at 3040 (1976).

<sup>113</sup> I.R.C. § 21 (1998). "Qualifying individuals" generally include children under the age of thirteen and the taxpayer's dependents or spouse who are unable to care for themselves. *Id.* § 21(b)(1).

<sup>114</sup> See *id.* § 21(a)(2).

<sup>115</sup> See *id.* § 21(c).

<sup>116</sup> *Id.* § 21(a)(1), (b)(2)(A).

tax system, the Huxtables' tax liability before the child care credit would be \$23,528.50.<sup>117</sup> After applying their \$1500 child care credit, their tax liability is \$22,028.50.<sup>118</sup> On the other hand, because their child care is not an "employment-related expense," the Cleavers do not receive the benefit of the child care credit. Thus, their tax liability is \$1500 more than the Huxtables'.

### C. Child Care Credit Justifications

Proponents of the child care credit justify this dissimilar tax treatment on several grounds. One argument is that June's services in the home constitute imputed income, and, because imputed income is not taxed, the Cleavers already have an advantage over the Huxtables. A second argument is that child care is a work-related expense, and, therefore, a child care credit represents a more accurate reflection of income. Additionally, many argue that allowing a child care credit for couples is only fair because many people have no choice but to work.

#### 1. The Imputed Income Justification

The first argument is based on the fact that parent-provided child care is widely recognized as "imputed income." Imputed income includes income derived from performing services for the benefit of one's own family.<sup>119</sup> Since imputed income is not taxed, a tax incentive exists to self-perform services rather than pay for them with after-tax dollars.

There are several reasons for the non-taxation of imputed income. One of the principal reasons is that taxing all services which individuals perform for themselves would simply be administratively impractical.<sup>120</sup> Part of the impracticability is that valuation of imputed income, because it is wildly subjective, is extremely difficult.<sup>121</sup> Some taxpayers self-perform services because they view the market cost of the service as too high. They would rather perform the service themselves than pay someone else more than they think it is worth. Others may decide to self-perform services simply because they enjoy the activity.

The fact that imputed income escapes taxation has been used as a basis for limiting the child care credit to employment-related expenses.

---

<sup>117</sup> See *supra* note 49 and accompanying text.

<sup>118</sup> Since each of the Huxtables earn \$50,000, their applicable child care credit rate is 20%. This results in a figure of \$1500. Since this figure is below the maximum allowed for one child (\$2400), their child care credit is \$1500. See I.R.C. § 21 (1998).

<sup>119</sup> See MARVIN A. CHIRELSTEIN, *FEDERAL INCOME TAXATION* 22-23 (8th ed. 1999).

<sup>120</sup> See Michael A. Johnson, *A Gap in the Analysis: Income Tax and Gender-Based Wage Differentials*, 85 GEO. L.J. 2287, 2298 (1997).

<sup>121</sup> See *id.*

To illustrate, assume that annual care for the Cleaver child would cost \$7500. If June Cleaver decided to fulfill this responsibility herself, the result would be a \$7500 benefit to the Cleaver family. If June decided to leave the home and go to work, she would need to pay someone else \$7500 for child care. However, if June's marginal tax rate was 31%, she would need to earn \$10,869.57 in gross income in order to have \$7500 net left over to pay someone else. Thus, the system creates a tax benefit for families in which one spouse stays at home and self-performs services for the family. Since at-home parents already receive a tax benefit, the argument concludes, the child care credit should be limited to employment-related expenses.

There are at least two problems with this reasoning: (a) the argument examines tax incentives in isolation without regard to countervailing incentives; and (b) the argument's presupposition that single-earner and dual-earner families earn the same aggregate income is the exception and not the norm.

#### (a) *Optimal Tax Theory*

The first problem with the imputed income justification for limiting the child care credit to employment-related expenses is that it examines tax incentives in isolation without regard to countervailing social and economic incentives to work. The argument concludes that since at-home parents receive a tax benefit resulting from their choice to stay at home and working parents suffer a tax penalty resulting from their choice to work outside the home, the tax on the latter is unfair and should be mitigated through a work-related child care credit.

This analysis does not take into account the relative values different parents place on at-home child care. Helpful to this analysis is a brief description of optimal tax theory. Optimal tax theory posits that an effective tax is based on the relative elasticities of the subject of taxation in order to minimize deadweight losses.<sup>122</sup> A deadweight loss refers to the consumer or supplier surplus lost as a result of the tax.<sup>123</sup> A tax on

---

<sup>122</sup> See McCaffery, *supra* note 58, at 1035-36; Zelenak, *supra* note 39, at 366. For purposes of simplification, optimal tax theory posits the following: (1) generally, the best tax is one that generates the most revenue; (2) generally, revenue increases as the tax rate increases; (3) at some point, however, the tax rate will reach a level at which the revenue will begin to decrease as people modify their behavior to avoid the high tax; and (4) therefore, the most effective tax rate for any given tax should be high enough to generate as much revenue as possible yet low enough to avoid diminishing returns. See McCaffery, *supra* note 58, at 1035-46. The "elasticities" of the subject of taxation refer to the taxed behavior's degree of sensitivity to the tax. *Id.* For instance, cigarette smoking is relatively inelastic because smokers as a group tend to continue smoking even when cigarette taxes become extraordinarily high. See *id.* at 1044.

<sup>123</sup> See *id.* at 1035.

activity— such as employment of secondary earners— will result in some measure of movement away from the taxed activity towards increasingly more attractive substitutes—such as at-home parenting. The higher the tax on the activity becomes, the more attractive the substitutes become. For this reason, an efficient tax will take into account the value of the activity to the taxpayer engaged in the activity. Where the activity is high in value, the tax should be high, but where the activity is low in value, the tax should be low. Achieving the most efficient middle ground will raise the most revenue by taxing the activity only to the point where a sufficient number of people will remain engaged in the activity.<sup>124</sup>

The above analysis presupposes economic efficiency as the ideal goal of a tax and concludes that a system that taxes secondary earners at a higher rate than primary earners is inefficient because the elasticity of secondary earners is greater than it is for primary earners. However, if we assume that ensuring the well-being of children is at least as worthy a goal as market efficiency, the elasticities of secondary earners takes on new meaning.

As stated in Part I above, many couples with children decide to enlist both parents in the labor force even when doing so is not financially necessary.<sup>125</sup> Additionally, many parents work outside the home simply because full-time work is more appealing to them than full-time parenting.<sup>126</sup> In 1995, the labor force participation rate of married women with children was 70.2%.<sup>127</sup> The data suggests that despite the tax disincentive to work, taxation of secondary income at the primary earner's highest marginal rate, the marriage penalty, and the rising cost of day care, many married women with children still choose to become secondary workers rather than stay-at-home mothers. Thus, since this decision is still quite inelastic, it can withstand the dissimilar treatment arising out of the non-taxation of imputed income.

### *(b) Misplaced Reliance on Horizontal Equity Analysis*

The second problem with the imputed income justification for limiting the child care credit to employment-related expenses is that it assumes that the average family with two incomes and child care expenses has equal income to the average family with one income and no child care expenses. This scenario is the exception and not the norm.

---

<sup>124</sup> See *id.* at 1037.

<sup>125</sup> See *supra* text accompanying notes 30-33.

<sup>126</sup> See *supra* text accompanying notes 38-39.

<sup>127</sup> See U.S. BUREAU OF THE CENSUS, *supra* note 30, at 400 tbl. 626.

In 1993, the median income of a married couple in which the wife was in the paid labor force was \$51,204.<sup>128</sup> The median income of a married couple in which the wife was not in the paid labor force was \$30,218.<sup>129</sup> Thus, although the two families may sometimes have equal incomes, usually they do not. The proper analysis, therefore, is not one of horizontal equity—that is, because the two families have the same amount of income, the tax system should ensure that they pay the same amount of tax—but rather of vertical equity—that is, because the two families are not similarly situated, the tax system should take into account each family's different ability to pay.

Thus, since the median income for single-earner families is almost \$21,000 less than the median income for dual-earner families, the dual-earner family has a higher ability to pay child care expenses. When this higher ability to pay is coupled with the added overall incentive for the secondary earner to work identified above, the result is that secondary earners do not need the additional incentive of a child care credit.

## 2. The Work-Related Expense Justification

A second argument used to justify the unavailability of the child care credit to at-home parents is that child care is a work-related expense, and as such, it represents a more accurate reflection of income. This argument first received attention in *Smith v. Commissioner*.<sup>130</sup> In that case a working wife, a relatively unusual taxpayer in 1940, argued that payments made to a child care provider were deductible work-related expenses.<sup>131</sup> She argued that if it were not for the child care provider, she could not leave her child; if she could not leave her child, she could not pursue employment; and if she were not employed, she would owe no tax.<sup>132</sup> In other words, the cash paid to the provider was a cost of generating taxable income, and to accurately reflect her actual income, it should be deductible.<sup>133</sup>

Although the court rejected this line of reasoning in 1940, Congress today has embraced it. Now, a percentage of payments made to child care providers are deductible, but only if "incurred to enable the taxpayer to be gainfully employed."<sup>134</sup> Therefore, child care is now viewed as an expense of working.

---

<sup>128</sup> See *id.* at 469 tbl. 724.

<sup>129</sup> See *id.*

<sup>130</sup> 40 B.T.A. 1038 (1939), *aff'd*, 113 F.2d 114 (2d Cir. 1940).

<sup>131</sup> See *id.*

<sup>132</sup> See *id.*

<sup>133</sup> *Id.*

<sup>134</sup> I.R.C. § 21(b)(2)(A) (1998).

However, this reasoning can be extended to encompass a variety of obviously personal expenses.<sup>136</sup> Clothes, food, and other living expenses could be viewed as necessary to the generation of taxable income.<sup>136</sup> So, too, could automobiles, haircuts, and doctor bills. Yet these types of expenses are personal and, thus, non-deductible.

Child care, too, is a personal expense rather than a business expense. The responsibility of child care does not arise when one decides to enter the labor force; it begins upon creation of the child. Such a responsibility necessarily incurs a cost whether it be out-of-time or out-of-pocket. When a parent delegates this responsibility to another in order to engage in other pursuits, the parent merely substitutes out-of-pocket expense for out-of-time expense. This cost accrues whether the parent spends the traded-for time at a building in a business suit or at the beach in a bathing suit. In other words, child care is a cost of raising a child, not an employment-related expense.

### 3. The Financial Necessity Justification

An additional justification for allowing a child care credit to working parents is that financial circumstances require some parents to work, and if these parents were not allowed a child care credit, they would be at a disadvantage with respect to workers without children. For example, assume Murphy Brown, being a single parent, has no choice but to work. She earns a taxable income of \$25,000 and has child care expenses of \$7500. Jerry Seinfeld earns a taxable income of \$25,000 and has no child care expenses. If Murphy was denied a child care credit, she would have the same tax liability as Jerry (\$4127), but would not be able to recoup any of her \$7500 of child care expenses.<sup>137</sup> Murphy would end up with \$13,373 after taxes while Jerry would have \$20,873. Even with a child care credit, Murphy still is only able to claim a credit of \$1725.<sup>138</sup>

---

<sup>136</sup> See *Smith*, 40 B.T.A. at 1038-39.

<sup>136</sup> A common method of distinguishing such necessities from child care is to note that precisely because they are common to everyone, it is more administratively practical to simply deny deductibility to everyone. See, e.g., CHIRELSTEIN, *supra* note 119, at 99.

<sup>137</sup> Again, this analysis ignores aspects of the tax system such as the earned income credit for the purpose of a clearer illustration. The earned income credit here would have a substantial effect because it would benefit Murphy significantly but Jerry not at all. However, the fact that the earned income credit may mitigate the effect of a system without a child care credit does not mean that the absence of a child care credit is fair under this analysis.

<sup>138</sup> Since Murphy's income is \$25,000, her applicable child care credit percentage is 23%. This results in a figure of \$1725. Since this is less than the maximum of \$2400 for one child, Murphy may use all of the \$1725.

While necessity is often overused as a justification for dual-earner families,<sup>139</sup> the survival of some families does indeed depend on the work-force participation of both spouses.<sup>140</sup> Additionally, most, if not all, single parents undoubtedly must work to provide for themselves and their children.<sup>141</sup> Thus, elimination of the child care credit would result in inequity between workers with children and childless workers and could further disadvantage those families for whom working is necessary.

#### *D. Proposal to Modify the Child Care Credit*

The above analysis concludes that a child care credit is (1) necessary to create equity between necessary workers with children and workers without children; (2) necessary to assist single parents and families in which both spouses need to work; but (3) unnecessary to counteract any perceived inequity between families in which both spouses do not need to work and families in which one parent forgoes additional income to become a stay-at-home parent. My proposal is, thus, to increase child-care assistance as to low-income single parents and families in which both spouses need to work, but to eliminate the child care credit with respect to families in which both spouses work when they do not need to.

The general underpinnings of this proposal seem to have at least some support in Washington. Congress recently passed a resolution to recognize that

- (1) many American families make enormous sacrifices to forgo a second income in order to have a parent care for their child at home;
- (2) there should be no bias against at-home parents; . . . (5) any quality child care proposal should reflect careful consideration of providing financial relief for those families where there is an at-home parent.<sup>142</sup>

Though this Resolution was merely a statement of ideals, its unanimous passage seems to indicate a growing concern for stay-at-home parents.<sup>143</sup>

My proposal will recognize a per se need for single parents to work. Thus, taxpayers who are unmarried, divorced, or widowed and have one or more young children will continue to benefit from a child care credit. However, in order to help the lowest income single parents the most, I propose the following modification of the rate schedule in Code § 21.

---

<sup>139</sup> See *supra* text accompanying notes 30-33.

<sup>140</sup> See *supra* note 45 and accompanying text.

<sup>141</sup> See U.S. BUREAU OF THE CENSUS, *supra* note 30, 473 tbl. 732 (showing that the poverty threshold for a family of two in 1994 was \$9661); *id.* at 462 tbl. 711 (showing that 8.1% of two-person households had an income below \$10,000 in 1994).

<sup>142</sup> H.R. Con. Res. 202, 105th Cong. (1998).

<sup>143</sup> The strongest opposition to the Resolution was the manner in which it was brought to the floor. See, e.g., *id.* (statement of Rep. Martinez).



Current Applicable Percentage	Proposed Applicable Percentage	Income
30%	85%	<\$10,000
30%	85%	\$10,000
29%	80%	\$12,000
28%	75%	\$14,000
27%	70%	\$16,000
26%	65%	\$18,000
25%	60%	\$20,000
24%	55%	\$22,000
23%	50%	\$24,000
22%	40%	\$26,000
21%	30%	\$28,000
20%	20%	\$30,000
20%	20%	Over \$30,000 but below national median
20%	0%	Above national Median

The primary difficulty in this proposal is in distinguishing between dual-earner families that require two incomes and those that do not. As the above chart shows, I propose that those dual-earner families whose aggregate taxable income exceeds the national median income—\$51,204 in 1993<sup>144</sup>—should be prohibited from claiming a child care credit while those dual-earner families whose aggregate taxable income falls below the national median may continue to benefit from the § 21 credit

#### V. THE POSITIVE EFFECTS OF COMBINING PROPOSALS

The charts included in the Appendix of this article illustrate the effect of combining my proposal for elimination of the marriage penalty with my proposal for modification of the child care credit. The first chart compares the tax treatment of the Cleavers, the Huxtables, Murphy Brown, Jerry Seinfeld, and the Brown/Seinfeld couple. Excluding Ward and June Cleaver, who earn \$100,000 as a traditional family unit, each individual earns \$50,000. Allowing June to allocate her unused standard deduction of \$7500 to Ward results in the same effective tax rate for all individuals and couples. Because Murphy Brown earns more than \$30,000 but less than the latest available national median income of

<sup>144</sup> See U.S. BUREAU OF THE CENSUS, *supra* note 30, at 469 tbl. 724.

\$53,309, she may recover 20% of her child care expenses. The Huxtables, however, may not recover any child care expenses because their \$100,000 combined income is more the national median.

The second chart compares the same taxpayers, but at 50% of their previous taxable incomes. Again, allowing June to allocate her unused standard deduction of \$7500 to Ward results in the same effective tax rate for all individuals and couples. The difference here is the amount the Huxtables and Murphy Brown may recover as child care expenses. The Huxtables' combined income of \$50,000 is over \$30,000 but less than the national median,<sup>146</sup> so they may recover 20% of their child care expenses. Murphy Brown, however, may recover 50% of her child care expenses because her taxable income is only \$25,000.

The final chart compares the effect of the allocable standard deduction on the Cleavers and Brown/Seinfeld where both couples have decided to have one individual work outside the home and the other to stay at home to care for the couple's children. June is allowed to allocate her unused standard deduction of \$7500 to Ward because the Cleavers are legally married. Jerry Seinfeld, however, is not allowed to allocate his unused standard deduction to Murphy Brown because he is not married to Murphy. The chart illustrates that any inequitable tax treatment is limited to \$1800, or 24% of \$7500.

## VI. CONCLUSION

The current tax structure penalizes the traditional family through interaction of the joint return and the progressive rate structure and by operation of the child care credit. Eliminating the joint return, replacing the progressive system with a more proportional system, and allowing allocation of unused standard deductions between spouses will help to alleviate most of the inequity that arises as a result of the joint return in a progressive system. Additionally, modification of the rate schedule of the child care credit will better serve those who need assistance the most and will mitigate the disadvantage to at-home parents that occurs through the use of the child care credit by those who do not need it. These proposals do not create a perfect tax system, but because they do decrease the degree of inequity of the current system, they should be carefully considered.

---

<sup>146</sup> See *id.*

## APPENDIX

CHART 1

	Cleavers		Huxtables		As Individuals		As a Couple
	Ward	June	Cliff	Claire	Murphy Brown	Jerry Seinfeld	
	\$100,000.00		\$50,000.00		\$50,000.00		\$50,000.00
	\$0.00		\$50,000.00			\$50,000.00	\$50,000.00
<b>Total</b>	<b>\$100,000.00</b>		<b>\$100,000.00</b>		<b>\$50,000.00</b>	<b>\$50,000.00</b>	<b>\$100,000.00</b>
Allocable Standard Deduction	\$15,000.00		\$15,000.00		\$7,500.00	\$7,500.00	\$15,000.00
Tax (24%)	\$20,400.00		\$20,400.00		\$10,200.00	\$10,200.00	\$20,400.00
<b>Total After Tax</b>	<b>\$79,600.00</b>		<b>\$79,600.00</b>		<b>\$39,800.00</b>	<b>\$39,800.00</b>	<b>\$79,600.00</b>
Effective Rate	20.4%		20.4%		20.4%	20.4%	20.4%
Actual Child Care Expenses (one child)	\$0.00		\$7,500.00		\$7,500.00	\$0.00	\$7,500.00
Allowed Child Care Credit	\$0.00		\$0.00		\$1,500.00	\$0.00	\$1,500.00
Percentage of Child Care Expenses Recoverable	\$0.00		0.00%		20.00%	\$0.00	20.00%
<b>Total After Tax and Credit</b>	<b>\$79,600.00</b>		<b>\$72,100.00</b>		<b>\$33,800.00</b>	<b>\$39,800.00</b>	<b>\$73,600.00</b>
Effective Rate	20.4%		27.9%		32.4%	20.4%	26.4%

CHART 2

	Cleavers		Huxtables		As Individuals		As a Couple
	Ward	June	Cliff	Claire	Murphy Brown	Jerry Seinfeld	
	\$50,000.00		\$25,000.00		\$25,000.00		\$25,000.00
	\$0.00		\$25,000.00			\$25,000.00	\$25,000.00
<b>Total</b>	<b>\$50,000.00</b>		<b>\$50,000.00</b>		<b>\$25,000.00</b>	<b>\$25,000.00</b>	<b>\$50,000.00</b>
Allocable Standard Deductions	\$15,000.00		\$15,000.00		\$7,500.00	\$7,500.00	\$15,000.00
Tax (24%)	\$8,400.00		\$8,400.00		\$4,200.00	\$4,200.00	\$8,400.00
<b>Total After Tax</b>	<b>\$41,600.00</b>		<b>\$41,600.00</b>		<b>\$20,800.00</b>	<b>\$20,800.00</b>	<b>\$41,600.00</b>
Effective Rate	16.8%		16.8%		16.8%	16.8%	16.8%
Actual Child Care Expenses (one child)	\$0.00		\$7,500.00		\$7,500.00	\$0.00	\$7,500.00
Allowed Child Care Credit	\$0.00		\$1,500.00		\$3,750.00	\$0.00	\$3,750.00
Percentage of Child Care Expenses Recoverable	\$0.00		20.00%		50.00%	\$0.00	50.00%
<b>Total After Tax and Credit</b>	<b>\$41,600.00</b>		<b>\$35,600.00</b>		<b>\$17,050.00</b>	<b>\$20,800.00</b>	<b>\$37,850.00</b>
Effective Rate	16.8%		28.8%		31.8%	16.8%	24.3%

CHART 3

At \$100,000					
Difference	Cleavers			Brown/Seinfeld	Difference
	Ward	\$100,000.00		Murphy	\$100,000.00
	June	\$0.00		Jerry	\$0.00
		\$100,000.00			\$100,000.00
		\$15,000.00			\$7,500.00
<b>\$1,800.00</b>		<b>\$20,400.00</b>			<b>\$22,200.00</b>
<b>\$1,800.00</b>		<b>\$79,600.00</b>			<b>\$77,800.00</b>
		20.4%			22.2%