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JOINT AND SEVERAL LIABILITY AND THE JOINT RETURN: ITS IMPLICATIONS FOR WOMEN

Amy C. Christian*

I. INTRODUCTION

For sixty years the Internal Revenue Code has imposed joint and several liability on taxpayers who file joint returns—a filing status available only to married couples. Of course, under joint and several liability, each spouse is responsible for any tax deficiency attributable to either spouse. The government need not seek payment from the spouse whose income or improper deduction created the deficiency but, instead, may look to the non-delinquent spouse to satisfy that deficiency even if that spouse neither knew of, nor benefited from, the tax underpayment. Indeed, imposition of liability on the non-delinquent spouse can occur even if the spouses have divorced and a final property settlement has been approved. By obliging the non-delinquent spouse to satisfy a tax deficiency attributable to someone else, joint and several liability works an obvious injustice.

Several justifications are commonly offered in support of joint and several liability and are described in Part III of this Article. As this Article demonstrates, however, each of these rationales is fatally flawed and, in the end, none actually justifies the regime of joint and several liability.

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3. An "innocent spouse" exception to joint and several liability exists, see I.R.C. § 6013(c) (1994), but it often fails to apply even when the non-delinquent spouse neither knew of, nor benefited from, the underpayment. For an excellent discussion of the innocent-spouse rules and their inadequacies, see generally Richard C.E. Beck, The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should be Repealed, 43 VAND. L. REV. 317 (1990); Jerome Borison, Innocent Spouse Relief: A Call for Legislative and Judicial Liberalization, 40 TAX LAW. 819 (1987).
5. See infra notes 69-203 and accompanying text.
Joint and several liability is generally inequitable on its face regardless of which spouse is required to bear its burden because it imposes the tax burden of one person on someone else. Moreover, it also has the effect of burdening women more frequently and more onerously than it does men, both as it is applied and in its very structure. First, the joint and several liability scheme is applied to collect husbands’ tax deficiencies from wives much more frequently than it is to collect wives’ deficiencies from husbands. Second, as demonstrated for the first time in this Article, the very structure and interrelation of the laws governing joint returns impose further inequities on women. When combined with other features of the joint return rate structure, namely income splitting and aggregation, joint and several liability works a particularly pernicious injustice upon women. As this Article explains, aggregation and income splitting make the joint return most beneficial to spouses with disparate incomes: the greater the income disparity, the greater the couple’s incentive to file jointly. Consequently, the ranks of joint filers are likely to be highly populated by couples in which one spouse earns significantly more than the other. Because the husband is much more commonly the higher wage earner in a marriage, this incentive structure causes joint filers to consist frequently of couples in which the husband earns significantly more than his wife. As a further result, it is precisely in this same circumstance—marriages in which the husband earns significantly more than his wife—where the regime of joint and several liability is also most likely to apply. This circumstance of couples filing jointly when the husband earns significantly more than his wife, however, is precisely when joint and several liability is most inequitable because, as this Article will show, it falls upon the person least likely to be responsible for the deficiency and least able to meet it—the lower-earning wife. Put simply, through the combined regimes of joint and

6. See infra notes 277-95 and accompanying text.
7. See infra notes 296-349 and accompanying text.
8. See infra notes 280-88 and accompanying text. See also Beck, supra note 3, at 320.
9. Income splitting is the phenomenon built into the joint return rates whereby the income of one spouse is attributed half to the earner and half to the non-earner for tax computation purposes. Compare the tax brackets in I.R.C. § 1(a) (1994) with the brackets in I.R.C. § 1(d) (1994). In our progressive income tax system, income splitting thereby provides a financial benefit by shielding the higher earner’s top earnings from the highest otherwise applicable tax rates.
Income aggregation is also required whenever a married couple files jointly and is the phenomenon whereby the spouses must aggregate their incomes together beforesubjecting them to joint return rates. See I.R.C. § 6013(d)(3) (1994). In our progressive system, the requirement of income aggregation imposes a financial burden by preventing both spouses from enjoying separate starts up the progressive rate ladder. When a couple files jointly both income splitting and income aggregation apply simultaneously. The impact of these elements of joint filing and their interaction with joint and several liability will be explained further. See infra notes 296-349 and accompanying text.
10. See infra notes 297-304 and accompanying text.
several liability, income splitting, and income aggregation, the joint return produces a powerful structural bias against wives.

The imposition of joint and several liability, thus, poses a significant marital dilemma for many wives. If they elect to file jointly with their husbands to reduce their husbands' tax exposure, they subject themselves to potential liability for deficiencies not of their own making. At the same time, however, if they insist on filing separately to avoid the strictures of joint and several liability, they place marital harmony at risk.11

Part II of this Article discusses the regime of joint and several liability, examining its historical origins.12 Drawing upon the work of Professor Richard Beck and others,13 Part III analyzes and debunks the asserted doctrinal and policy justifications for joint and several liability.14 In connection with the analysis of purported justifications for joint and several liability, Part III also examines the doctrine of transferee liability, an alternative, less draconian means for accomplishing joint and several liability's few valid goals.15 This Article then describes how joint and several liability violates various norms entrenched in the federal tax system, especially the fundamental principle that tax should be imposed in accordance with ability to pay.16 An analysis follows detailing the weaknesses of the current system in which to be made whole, the non-delinquent spouse must institute a state contribution action against the delinquent spouse.17 Part IV of this Article focuses on how joint and several liability interacts with various social and economic patterns that make it of special concern to women. This Part first reviews tax literature that asserts joint and several liability harms women in its application.18 More importantly, as exposed in this Article, joint and several liability interacts with other legal features of the joint return to create a variety of systemic gender-correlated biases. In this manner, the very structure of the Internal Revenue Code is biased against women.19

11. See Beck, supra note 3, at 332; cf. Edison-Smith, supra note 4, at 126 (describing how joint and several liability promotes marital discord because of "the duty placed on spouses to inquire to [sic] each other's tax items").
12. See infra notes 22-68 and accompanying text.
13. E.g., Beck, supra note 3; Edison-Smith, supra note 4.
14. See infra notes 77-203 and accompanying text.
15. See infra notes 173-203 and accompanying text.
16. See infra notes 204-59 and accompanying text.
17. See infra notes 260-73 and accompanying text.
18. See infra notes 280-95 and accompanying text.
19. See infra notes 296-349 and accompanying text.
I have argued recently that the joint return feature of the Internal Revenue Code, through the rate structure, works to the detriment of women and should be repealed or significantly altered. This Article, in turn, demonstrates that joint and several liability is similarly unnecessary, inequitable, and imprudent. Like the joint return, it, too, should be abolished or substantially reformed.

II. THE ORIGINS OF JOINT AND SEVERAL LIABILITY

Under current law, taxpayers who file jointly submit to joint and several liability. When the income tax was adopted in its constitutional form in 1913, spouses had no option other than to file separate, or "individual," returns, the same returns unmarried individuals filed. In

20. See Amy C. Christian, The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law, 13 J.L. & POL. 241 (1997) [hereinafter Christian, Joint Rate Structure]; Amy C. Christian, Joint versus Separate Filing: Joint Return Tax Rates and Federal Complicity in Directing Economic Resources from Women to Men, 6 S. CAL. REV. L. & WOMEN'S STUD. (forthcoming 1998) (manuscript at 443, on file with the University of Cincinnati Law Review) [hereinafter Christian, Complicity] (describing a variety of adverse consequences that flow from the decision to file jointly, including: (1) disincentives that arise under income splitting and aggregation that tend to discourage wives from participating in the paid work force; and (2) a coerced annual transfer of wealth, relative to separate filing results, from the lower-earning to the higher-earning spouse, usually from the wife to her husband). A separate and distinct problem arises from filing jointly-joint and several liability—and is the subject of this Article.


Both the American Bar Association (ABA) and the American Institute of Certified Public Accountants (AICPA) have also recently recommended that Congress repeal joint and several liability for joint filers.

In February of 1995, the House of Delegates of the ABA adopted the following resolution:

RESOLVED that the American Bar Association recommends to the Congress that sections 6013(d) and (e) of the Internal Revenue Code of 1986 be repealed (i) to eliminate joint and several liability of a taxpayer who has signed a joint return with his or her spouse for tax on income properly attributable to his or her spouse, (ii) to substitute separate liability for tax shown to be due on the joint return, and (iii) to repeal innocent spouse relief from liability for tax on the joint return when the liability arises from erroneous items of the taxpayer's spouse.

Domestic Relations Comm., ABA Sec. of Tax'n, Comments on Liability of Divorced Spouses for Tax Deficiencies on Previously Filed Joint Returns, reprinted in 50 TAX LAW. 395, 395 (1997) [hereinafter Comments on Liability of Divorced Spouses].

In comments submitted to the IRS in response to Notice 96-19, 1996-1 C.B. 371, the AICPA also recommends repealing joint and several liability, or in the alternative, eliminating joint returns altogether. See Ken Rankin, AICPA Advises IRS on Fairer Divorce Procedures, 10 ACCOUNTING TODAY, July 29, 1996, at 8, available in 1996 WL 8970070.

22. See I.R.C. § 6013(d)(3) (1994) ("...if a joint return is made, ... the liability with respect to the tax shall be joint and several."); Beck, supra note 3, at 319. For an excellent history of the adoption and development of joint and several tax liability, see generally id.

23. See Tariff of 1913, Pub. L. No. 63-16, ch. 16, § II(A)(2), 38 Stat. 114, 166; Beck, supra note 3, at 333; Toni Robinson & Mary Moen Wenig, Mrs. in Haste, Repent at Tax Time: Marital Status as a Tax
1918, Congress introduced optional joint returns\(^\text{24}\) for the convenience of married taxpayers.\(^\text{25}\) No statutory or administrative rules existed at that time governing the allocation of a couple's tax liability between the husband and wife. A number of different options were theoretically possible: the joint tax liability could be split between the spouses by mutual agreement; it could be split in proportion to the spouses' respective net incomes; it could be divided in proportion to each spouse's respective tax liabilities had they filed as two individuals;\(^\text{26}\) the additional tax attributable to the secondary earner could be charged to that earner, and the tax from the lower brackets charged to the primary earner; or the spouses could be made jointly and severally liable for the combined joint tax liability.

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\(^{24}\) See Revenue Act of 1918, Pub. L. No. 254, ch. 18, § 223, 40 Stat. 1057, 1074 (1919); Beck, supra note 3, at 333; Edison-Smith, supra note 4, at 105.

\(^{25}\) See infra note 142 and accompanying text. At the time Congress made joint returns available, the only other filing option was the individual return, the same one unmarried taxpayers used. Beginning in 1918, spouses could file jointly or individually. See Boris I. Bittker, Federal Income Taxation and the Family, 27 Stan. L. Rev. 1389, 1400 (1975).

In 1923, the Bureau of Internal Revenue, the functional predecessor of the Internal Revenue Service, began insisting on joint and several liability for couples using joint returns.27 The Bureau ruled that a husband and wife "are individually liable for the full amount of tax shown to be due on [a joint] return,"28 basing this liability rule on the notion that when a couple files jointly, it becomes one taxpaying unit not only for filing purposes, but also for liability purposes. "[A] single joint return is one return of a taxable unit and not two returns of two units on one sheet of paper."29 The first time the government adopted a unitary approach to joint filers was in 1921 when it ruled that one spouse's deductions could be used to offset the income of the other in computing tax liability.30 No authority existed, however, for extending this unitary approach to the issue of who was liable for tax.

The first reported court decision to address explicitly whether joint filers should be jointly and severally liable for tax was the Board of Tax Appeals decision in Cole v. Commissioner.31 There, the Board ruled that joint and several liability was appropriate for spouses who had filed a joint return in 1929.

In our opinion the theory of petitioner's counsel requires little discussion. In the first place the joint return contains no data upon which the separate taxable income of the two spouses can be computed. There is no segregation of the amounts of gross income severally received or any designation of the deductions to which each

27. See I.T. 1575, II-1 C.B. 144 (1923) (ruling that when one spouse pays more than her "share" of the joint tax, she is not entitled to a refund from the U.S. Treasury). In that case, none of the tax was attributable to the wife because all of the income for the year in question had been earned by her husband. It is noteworthy that the wife in the ruling could not have instituted an equitable action against her former husband to recover the tax she paid on his income because she had made the payment voluntarily. The option of suing her former husband for contribution would be available to the wife only if the government had compelled her to pay his taxes. See infra notes 60-73 and accompanying text (discussing contribution actions); see also Beck, supra note 3, at 338, 340 n.93.


29. Id.

30. See Op. Solicitor 90, 4 C.B. 236, 238 (1921), cited in Helvering v. Janney, 311 U.S. 189 (1940) (holding that the husband and wife should be treated as one taxable individual if they file jointly, permitting excess deductions of one spouse to be allowed against the net income of the other spouse) and Taft v. Helvering, 311 U.S. 195, 197 (1940) (concerning the limitation on charitable deductions to fifteen percent of the donor-spouse's separate net income). Op. Solicitor 90 stated:

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

31. 29 B.T.A. 602 (1933), rev'd, 81 F.2d 485, 490 (9th Cir. 1935).
would be entitled. Since the joint return, though made by the husband, reports the income as a unit, we think it is perfectly clear that liability for the tax is joint and several and may be asserted against and collected from either spouse.\textsuperscript{32}

The Board ruled that administrative necessity required joint and several liability for couples who filed jointly even though, in other contexts, entities that filed one consolidated return were not held jointly and severally liable for each others’ tax liabilities. Thus, corporations filing consolidated returns were not jointly and severally liable at that time for the taxes of affiliated corporations that were included in the consolidated return.\textsuperscript{33}

In a divided court, the Ninth Circuit reversed the Board’s decision in \textit{Cole} that joint filing required joint and several liability.\textsuperscript{34} Relying in part on Treasury Regulations promulgated in 1935 that treated spouses filing jointly as separate taxpayers, the majority of the Ninth Circuit held that joint filing does not require joint and several liability.\textsuperscript{35} Because the regulations did not treat the joint filers as one individual taxpayer for some purposes,\textsuperscript{36} the Ninth Circuit concluded in \textit{Cole} that joint filing did not transform the spouses into one unified taxpayer for other purposes, and, therefore, joint and several liability did not result.\textsuperscript{37} The Ninth Circuit also relied on the long-standing principle that tax should be

\begin{itemize}
\item \textsuperscript{32} \textit{Id.} at 604-05.
\item \textsuperscript{33} \textit{See Revenue Act of 1926, Pub. L. No. 20, ch. 27, § 240, 44 Stat. 9, 46; see also Woolford Realty Co. v. Rose, 286 U.S. 319, 325-26, 328 (1932) (quoting tax code provision in which tax is “assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then upon the basis of the net income properly assignable to each,” but not upon any or all of the corporations as under joint and several liability).
\item \textsuperscript{34} \textit{81 F.2d 485, 490 (9th Cir. 1935), rev’d, 29 B.T.A. 602, 604-05 (1933).}
\item \textsuperscript{35} By 1935 the Treasury Department, abandoning the approach taken earlier in Opinion Solicitor 90 (1921), had promulgated regulations that prevented joint filers from netting the gains of one spouse against the losses of the other. Article 117-5 of Regulations 86 (1935) stated that “[i]n the application of section 117, a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers. Accordingly, the limitation under section 117(d) on the allowance of losses of one spouse from sales or exchanges of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets.” \textit{Levy v. Commissioner, 46 B.T.A. 1145, 1147 (1942).} In the same year, the Treasury also issued regulations limiting one spouse’s charitable deduction to fifteen percent of the donor-spouse’s separate net income, rather than the spouses’ combined net income, even when spouses had filed jointly. Article 23(o)-1 of Regulations 86 (1935), stated: “Whether a husband and wife make a joint return or separate returns, the 15 per cent limitation on the deduction for contributions or gifts is based on the separate net income (computed without regard to such contributions or gifts) of the spouse making the contributions or gifts.” \textit{Taft v. Commissioner, 40 B.T.A. 229, 230 (1939).} If the spouses really became one taxpayer by filing jointly, then the excess deductions of one should be used to offset the net income of the other, and any charitable deductions would be limited to fifteen percent of both spouses’ combined net income.
\item \textsuperscript{36} \textit{See infra} notes 79-85 and accompanying text.
\item \textsuperscript{37} \textit{See Cole, 81 F.2d at 487.}
\end{itemize}
imposed in accordance with the taxpayer's ability to pay. Tax attributable to one spouse's income should not, therefore, be assessed against and collected from the other spouse. Furthermore, according to the majority in Cole, the Commissioner's argument that joint and several liability was required as a matter of administrative necessity was specious because, among other reasons, the separate net incomes of the spouses in that case had been stipulated.

After the Ninth Circuit's ruling, other circuit courts, as well as the Board, followed Cole, likewise holding that joint returns do not trigger joint and several liability.

In 1938, however, with minimal explanation, Congress abruptly incorporated joint and several liability into the statute for taxpayers that filed jointly. After 1938, the courts continued holding that, for tax years prior to 1938, joint filing did not require joint and several liability, thereby effectively ruling against retroactive application of the new law. However, in 1941, the Court of Claims in Moore v. United States interpreted the new law as merely clarifying existing law, and held that joint filing had always required joint and several liability. In Moore, the Court of Claims upheld the Commissioner's assessment of a deficiency for the year 1932 against a wife who had no income of her own and who had considerable net losses in that year. For a variety of reasons, the Moore court held that joint and several liability was appropriate for couples who filed jointly.

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38. See id.
39. See id. at 490.
40. See, e.g., Sachs v. Commissioner (unreported B.T.A. decision filed June 15, 1937); Crowe v. Commissioner, 86 F.2d 796 (7th Cir. 1936); Seder v. Commissioner, 38 B.T.A. 874 (1938); Flaherty v. Commissioner, 35 B.T.A. 1131 (1937); Darling v. Commissioner, 34 B.T.A. 1062 (1936); Hyman v. Commissioner, 36 B.T.A. 202, 208 (1937).

The only instances in which courts held spouses jointly and severally liable were cases in which the taxpayer negligently or purposely failed during the audit to provide the spouses' respective net incomes, the information needed to apportion liability. See, e.g., Calafato v. Commissioner, 42 B.T.A. 881, 890-92 (1940) (explicitly stating that the court was not overruling Cole, Rabenold, or Seder); Rogers v. Commissioner, 38 B.T.A. 16 (1938), aff'd, 111 F.2d 987 (6th Cir. 1940); Anderson v. United States, 48 F.2d 201 (5th Cir. 1931).

42. See Commissioner v. Rabenold, 8 B.T.A.M. (P-H) ¶ 39,121 (1939), aff'd, 108 F.2d 639 (2d Cir. 1940) (expressly ruling that the 1938 legislation imposing joint and several liability could not be applied retroactively because after the Ninth Circuit's Cole decision, Congress had reenacted prior law without change). The Second Circuit ruled against joint and several liability in Rabenold despite language in the 1938 Act's legislative history indicating that joint and several liability had been enacted to clarify existing law. See infra note 51 and accompanying text. After Cole, Congress would have had to amend the law to make joint filers jointly and severally liable in pre-1938 tax years. See, e.g., Sachs v. Commissioner, 111 F.2d 648 (6th Cir. 1940) (affirming an unreported B.T.A. decision filed on June 15, 1937); Rogers v. Commissioner, 111 F.2d 987 (6th Cir. 1940), aff'd, 38 B.T.A. 16 (1938).
43. 37 F. Supp. 136 (Ct. Cl. 1941).
44. See id. at 140; Beck, supra note 3, at 346 n.121.
First, the Court of Claims asserted that joint and several liability was required as a matter of administrative necessity.\(^{45}\) Second, the court noted that the recent Supreme Court rulings in *Helvering v. Janroy\(^{46}\) and *Taft v. Helvering\(^{47}\) "made clear that the filing of a joint return create[d] a joint ‘taxable unit’ at least to the extent that it [was] to the advantage of one of the spouses to create such a unit."\(^{48}\) Without citing any authority, the Court of Claims then extended this unity theory to the issue of who could be held liable for tax,\(^{49}\) rationalizing its position by claiming that joint and several liability was the cost that must be borne for the privilege and benefits of joint filing.\(^{50}\) Last, the court quoted ambiguous language in the legislative history of the Revenue Act of 1938 to conclude that the new legislation enacting joint and several liability was intended only to "clarify" what the law had always been:

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

As a result, the Court of Claims in effect applied the rule of joint and several liability retroactively to the tax year 1932,\(^{52}\) despite *Cole and the numerous cases following Cole*. The legislative history also stated that "[s]ection 51 of the bill restates in amplified form the provisions relating to filing returns in the case of individuals."\(^{53}\) Although these passages from the legislative history could be read to imply retroactivity, they do not clearly require such an interpretation.\(^{54}\) Rather, it is equally plausible that Congress intended section 51 merely to restate the earlier joint return provisions and to amplify them, adding the new, additional requirement of joint and several liability for tax years following 1938. Despite this possible interpretation, the Board of Tax Appeals followed

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45. See Moore, 37 F. Supp. at 140.
46. 311 U.S. 189 (1940).
47. 311 U.S. 195 (1940).
49. See Beck, supranote 3, at 346 n.121.
50. See Moore, 37 F. Supp. at 140.
52. See Moore, 37 F. Supp. at 140-41.
54. But see Commissioner v. Rabenold, 108 F.2d 639, 641 (2d Cir. 1940) (Patterson, J. dissenting) (interpreting this very language in H.R. REP. No. 75-1860 as implying that joint and several liability, as contained in the new section 51(b), was a restatement in amplified form of existing law). The legislative history as written, however, does not clearly compel the Rabenold dissent's reading.
Moore, applying the 1938 statute retroactively to earlier tax years both in Schoenhut v. Commissioner, in which the Board announced that it would no longer follow the Ninth Circuit’s Cole opinion, and in Gillette v. Commissioner.

Although the Board followed the Moore approach, other courts continued to follow Cole for disputes relating to pre-1938 tax years. In Commissioner v. Uniacke, the Second Circuit, contrary to Moore, ruled expressly that the Revenue Act of 1938 should not be applied retroactively. The Second Circuit reasoned that the statute did not, by its terms, claim to apply retroactively. The court also stated that the 1938 amendment could not be treated merely as declaratory of existing law because the only existing law, the pre-1938 court decisions on point, had all ruled against joint and several liability. The Second Circuit also noted that the government had not adopted joint and several liability in any regulation or administrative pronouncement. The only administrative authority in favor of joint and several liability prior to 1938 had been an office decision from the Income Tax Unit, I.T. 1575, which had little authoritative weight. The Supreme Court had ruled in Helvering v. New York Trust Co., and the Commissioner himself argued in Ambassador Petroleum Co. v. Commissioner, that such Income Tax Unit decisions “have none of the force and effect of Treasury Decisions and do not commit the [Treasury] Department to any interpretation of the law.” According to the Second Circuit in Uniacke, in light of the pre-1938 cases holding against joint and several liability, the legislative history claiming to clarify existing law should be accorded little weight.

55. 45 B.T.A. 812 (1941).
56. 46 B.T.A. 573 (1942).
57. See also United States v. Rosebush, 45 F. Supp. 664, 666-67 (E.D. Wisc. 1942). In Rosebush, the court decided against joint and several liability even though it stated that joint and several liability was the correct approach under Moore. See id. Sitting in the Seventh Circuit, the Rosebush court felt constrained by Crowe v. Commissioner, 86 F.2d 796 (7th Cir. 1936), which had followed the Ninth Circuit in Cole. See id.
59. See Uniacke, 132 F.2d at 782.
60. See id.
61. See id.
62. I.T. 1575, II-1 C.B. 144 (1923); see Beck, supra note 3, at 343 n.108.
63. See Beck, supra note 3, at 343 n.108.
64. 292 U.S. 455, 468, 469 (1934).
65. 81 F.2d 474, 481 (9th Cir. 1936).
66. See Uniacke, 132 F.2d at 783. The dispute between the Moore approach on the one hand and the Cole and Uniacke approach on the other hand was never resolved for pre-1938 tax years. See infra notes 86-107 and accompanying text.
Of course, for post-1937 tax years, the Revenue Act of 1938 required joint and several liability, and cases relating to those later years consistently and correctly held, therefore, that filing a joint return had triggered joint and several liability.

III. JOINT AND SEVERAL LIABILITY IS NOT JUSTIFIED AS A POLICY MATTER

Many arguments have been advanced in support of and against joint and several liability. At various times the government has asserted that joint and several liability is required under the theory that a joint return transforms spouses into one taxpaying unit. The government has also argued that joint and several liability is required as a matter of administrative necessity and that it is a fair price couples pay for obtaining the advantages of joint filing. Another argument in favor of joint and several liability is that it prevents the spouse to whom the deficiency is not attributable from enjoying the economic benefit of the unpaid tax. If one spouse understates his taxes, then the other spouse could consume money that should have been paid to the U.S. Treasury. Imposition of joint and several liability prevents the unjust enrichment of the non-delinquent spouse at the Treasury's expense.

By contrast, joint and several liability has been criticized as unfairly taxing one person on the income of another, violating one of the fundamental norms of taxation by taxing without regard to ability to pay. One rule designed to ensure that tax is imposed according to


68. See, e.g., Grimes v. Commissioner, 20 T.C.M. (CCH) 1662 (1961); Dellit v. Commissioner, 24 T.C. 434, 434-35 (1955). Some cases, however, ruled against joint and several liability for post-1937 tax years on the basis either that the wife’s signature on the joint return was procured fraudulently or by force, or that the wife was so incompetent with regard to financial matters that she should not be treated as having understood the return she filed with her husband. See, e.g., Furnish v. Commissioner, 262 F.2d 727 (9th Cir. 1958) (holding that if the wife had signed the joint return under duress, she could not be held liable for the tax deficiency attributable to her husband’s fraud), remanding Funk v. Commissioner, 29 T.C. 279 (1957); Scudder v. Commissioner, 405 F.2d 222, 222, 226 (6th Cir. 1968) (granting relief to the wife, holding that husband’s fraud against her in embezzling money from her business also constituted fraud in inducing her to sign the joint return and invalidated it), rev’d, 48 T.C. 36 (1967); Frederick v. Commissioner, 16 T.C.M. (CCH) 1022 (1957) (husband’s actions of putting his fingers around his wife’s throat constituted duress and invalidated joint return). These cases served as judicial precursors to the innocent spouse provisions enacted in 1971.

69. See infra notes 77-107 and accompanying text.
70. See infra notes 108-36 and accompanying text.
71. See infra notes 137-65 and accompanying text.
72. See infra notes 166-203 and accompanying text.
73. See infra notes 204-06 and accompanying text; see also Cole v. Commissioner, 81 F.2d 485, 487 (9th Cir. 1935); Beck, supra note 3, at 320 & n.4, 324-25; Murray, supra note 21, at 64 (Suggestion #1);
ability to pay is that the party with a proprietary interest in the earnings should bear the tax liability on those earnings. Liability should not be imposed on a party with no property rights in or control over the taxed earnings. This norm has been generally accepted and firmly entrenched in tax jurisprudence except with regard to the joint and several liability rule. Joint and several liability fails to impose tax on the income owner because it arbitrarily shifts tax liability to the non-earning spouse—a taxpayer who under state law often has no property interest in or legal control over the earnings.

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74. See infra notes 207-53 and accompanying text.

75. See Christian, Joint Rate Structure, supra note 20, at 255-56 & n.52, 321-23. Common-law states confer ownership of earnings solely on the earner. See Jones v. Farris, 69 P.2d 344, 346 (Okla. 1937) (holding that a wife's heirs could not inherit a farm because it had been acquired with the husband's earnings, precluding her from having a vested or divisible interest in it); William J. Brockelbank, The Community Property Law of Idaho 41-43 (1962) (noting that in common-law states savings out of earnings belong to the earner spouse); Gann, supra note 26, at 27; Scott Greene, Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women, 13 Creighton L. Rev. 71, 83 (1979) (“Property acquired by the spouses [subject to the common-law property system] during marriage is either his or hers, never theirs . . . . The common-law system rewards the spouse who is directly responsible for the acquisition of property and generally ignores the nonmonetary contributions of the other spouse toward that acquisition.”) (footnote omitted); O. Kahn-Freund, Inconsistencies and Injustices in the Law of Husband and Wife, 15 Mod. L. Rev. 133, 135-36 (1952) (savings out of earnings belong to the earner spouse); Susan Westerberg Prager, Shifting Perspectives on Marital Property Law, in RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS 111, 116 (Barrie Thorne & Marilyn Yalom eds., 1982); Katharine Silbaugh, Turning Labor into Love: Housework and the Law, 91 NW. U.L. Rev. 1, 51 (1996) (noting that “nothing in family law requires couples to share their monetary income”); Jeannette Anderson Winn & Marshall Winn, Till Death Do We Split: Married Couples and Single Persons Under the Individual Income Tax, 34 S.C. L. Rev. 829, 878 (1983); Elizabeth A. Cheadle, Comment, The Development of Sharing Principles in Common Law Marital Property States, 28 UCLA L. Rev. 1269, 1276, 1307 n.208 (comparing Texas, where only the earner controls his own earnings, with common-law states like Missouri and indicating that, in common-law states, one spouse's earnings are shielded from the other spouse), 1312 (1981). See also Neb. Rev. Stat. § 42-203 (1995) (earnings of a married woman belong solely to her).

Even the Married Women's Property Acts, which were adopted in the last half of the nineteenth century and which gave wives in common-law jurisdictions the right to own and manage their own property, did not give them any present property interest in their husband's earnings. “The act[ ] . . . ignored the realism that it was the husband who was largely responsible for acquiring property during the marriage. The wife was left with hollow legal equality since she had little opportunity to acquire property to which the Married Women's Property Acts could apply.” Greene, supra, at 80 (footnote omitted); see also Henry H. Foster, Jr. & Doris Jonas Freed, Marital Property Reform in New York: Partnership of Co-Equals?, 8 Fam. L.Q. 169, 173 (1974); Mary Ann Glendon, Is There a Future for Separate Property?, 8 Fam. L.Q. 315, 316 (1974); Prager, supra, at 115-16.

Furthermore, IRS Publication 555 establishes that, for federal income tax purposes, only residents of the nine community property states are considered to have a present ownership interest in their spouses' earnings. Internal Revenue Service, U.S. Dept. of the Treasury, Publication 555, Community Property Law, 1, 2 (1996) [hereinafter Publication 555] (implicitly acknowledging that common-law states do not give the non-earner an ownership interest in the earnings of his or her spouse by limiting income splitting for separate filers to residents of the nine community property jurisdictions); see also Murray, supra
Only does state law deny women a present ownership interest in their husbands’ earnings, it also fails to impose duties, either by statute or under case law, on the managing spouse not to misuse or waste the community property not to waste or misuse community property. See Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 379 n.195 (1994); cf. Ross, supra, at 115-17 (discussing how a spouse in a common-law state can use only his own assets, including his own earnings which are usually titled in his own name, to establish creditworthiness. The nonearning spouse generally cannot rely on earnings titled in the other’s name to establish her own credit because she has no present right during the marriage to those earnings). If the couple divorces, however, earlier waste by one spouse may be taken into account under the equitable distribution laws of some states to reduce his or her share of the property division. See Lewis Becker, *Conduct of a Spouse that Dissipates Property Available for Equitable Property Distribution: A Suggested Analysis*, 52 OHIO ST. L.J. 95, 97-98 (1991); Zelenak, supra, at 385.

It is far from clear, however, what constitutes dissipation, beyond the easy case of gifts to a lover. Conceivably dissipation doctrine could some day develop to the point where both spouses would truly share control over property subject to equitable distribution, so that they should be taxed as co-owners, but that day has not arrived. Zelenak, supra, at 385-86 (footnote omitted).

In this manner, the husband’s earnings can be placed beyond the wife’s reach as a practical matter. In common-law jurisdictions, the earner has the sole right to determine how his earnings will be used. He has the sole power to manage and control his earnings. See Greene, supra, at 90; Kornhauser, supra note 73, at 74, 76-77; Ross, supra, at 127. No restrictions for the wife’s benefit limit that power. By contrast, in the community property state of California, for example, each spouse is bound by a fiduciary duty to the marital community not to waste or misuse community property. See CAL. FAM. CODE §§ 1100(e), 721 (West 1998); see also Elizabeth De Armond, *It Takes Two: Remodeling the Management and Control Provisions of Community Property Law*, 30 GONZ. L. REV. 235, 271 n.193 (1995). Other community property states also impose duties, either by statute or under case law, on the managing spouse not to misuse or waste the community property although the duties in those other states do not rise to the level of fiduciary duties. See id. at 271-72 & n.194.

Only by divorcing is it possible for the wife to gain access to her husband’s prior earnings. All common-law jurisdictions have adopted equitable distribution regimes that permit property division upon divorce without regard to title. See Christian, *Joint Rate Structures*, supra note 20, at 325 n.309. In these
jurisdictions, judges have the discretion to divide the marital property, including any accumulated earnings, in an equitable fashion. See Ross, supra, at 115 n.25; Mary A. Throne, Note, Pension Awards in Divorce and Bankruptcy, 88 COLUM. L. REV. 194, 197 (1988). Consequently, upon divorce a wife may acquire part of her husband's earnings from prior years if the couple has property to divide.

Nevertheless, equitable distribution upon divorce does not ensure that wives will share adequately in their husbands' earnings. First, equitable distribution laws are triggered only if a couple divorces. See Greene, supra, at 87, 102 (noting that wives would be better off with a present, vested one-half interest in the marital property than with an inchoate right which a divorce court may bestow on her); Murray, supra note 21, at 1269 n.2, 1312; Osborn, supra, at 910; Ross, supra, at 115 n.23; Lily Kahng, Gender Bias in the Estate and Gift Tax 15, 20 (Aug. 14, 1995) (unpublished manuscript, on file with author). But cf. Kornhauser, supra note 73, at 75-76, 104 (noting that equitable distribution laws apply only upon divorce but suggesting that their existence may constrain one spouse from spending more than his fair share of assets during the marriage). During the marriage the wife continues to lack a legal guarantee to her husband's earnings. See Zelenak, supra, at 379 n.195; Cheadle, supra, at 1312; Kahng, supra, at 21 n.62.

Second, equitable distribution is also insufficient to guarantee wives a fair share of their husband's earnings both because judges have tremendous discretion in fashioning a division of property, see Gann, supra note 26, at 48 (the "uncertainty of [judicial discretion] . . . is unsatisfactory to the economically dependent spouse, who has no automatic right to a part of the property") (footnote omitted); Greene, supra, at 98; Stilbaugh, supra, at 57-59; Cheadle, supra, passim; Osborn, supra, passim, and because equitable distribution does not guarantee equal distribution. See, e.g., Mahaffey v. Mahaffey, 401 So. 2d 1372, 1374 (Fla. Dist. Ct. App. 1981); Cherry v. Cherry, 421 N.E.2d 1293, 1298-99 (Ohio 1981); Scott v. Scott, 218 P.2d 373, 376 (Okla. 1950); Cheadle, supra, at 1290, 1298 & n.163, 1303 n.188; Osborn, supra, at 935. Far-reaching judicial discretion in determining property distribution means that wives often receive less than they should. See LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985) [hereinafter WEITZMAN, THE DIVORCE REVOLUTION]; Saul Hoffman & John Holmes, Husbands, Wives, and Divorce, in 4 FIVE THOUSAND AMERICAN FAMILIES—PATTERNS OF ECONOMIC PROGRESS 23, 28-34, 61-62 (Greg J. Duncan & James N. Morgan eds., 1976); Robert E. McGraw et al., A Case Study in Divorce Law Reform and Its Aftermath, 20 J. FAM. L. 443 (1981-82); Karen Seal, A Decade of No-Fault Divorce: What It Has Meant Financially for Women in California, FAM. ADVOC., Spring 1979, at 10; Cynthia Starnes, Applications of a Contemporary Partnership Model for Divorce, 8 BYU J. PUB. L. 107, 108 (1993) [hereinafter Starnes, Applications]; Cynthia Starnes, Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault, 60 U. CHI. L. REV. 67, 92-95 (1993) [hereinafter Starnes, Dolls]; Lenore J. Weitzman, The Economics of Divorce, Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 UCLA L. REV. 1181 (1981) [hereinafter Weitzman, The Economics of Divorce]; Heather Ruth Wishik, Economics of Divorce: An Exploratory Study, 20 Fam. L.Q. 79, 80, 100 (1986); Osborn, supra, at 915. "Some recent research has indicated that judges have misused the extensive discretion available under modern divorce statutes." Id. at 937 n.130. "[O]ur largely male judiciary has forfeited its traditional claim to extensive discretion by its sorry performance. The data for New Haven and elsewhere is [sic] clear: a discretion-laden system has resulted in uniformly unfair awards to, and decreased standards of living for, women and children." James B. McLindon, Separate But Unequal: The Economic Disaster of Divorce for Women and Children, 21 Fam. L.Q. 351, 404 (1987) (citation omitted).

Judges' wide latitude in determining a distribution of property fails to protect wives because it does not guarantee a right to half of the marital assets. "What person will enter a business or professional partnership or joint venture if the only liquidation rule is that a court will have a discretion to make any order it thinks fit in regard to all the money and property?" Ian F.G. Baxter, Family Law Reform in Ontario, 25 U. TORONTO L.J. 236, 261 (1975) (discussing how judicial discretion in determining property distribution upon divorce provides inadequate protection for wives).

This discretion has frequently resulted in judges awarding the majority of the marital property to husbands. See Greene, supra, at 104 n.189 (acknowledging that wives are normally awarded less than half of the marital property). But see id. at 102 (stating elsewhere that there seems "to be a recent movement in the common-law states toward a more equal division of the property") (footnote omitted). These awards
reflect the view that only the husband contributed economically to the family during marriage. This view, of course, fails to account for wives' very real economic, but nonfinancial, contributions to the family: child rearing and household management. See De Armond, supra, at 240-41; Silbaugh, supra, at 16, 18-19 (asserting that housework and child care have been treated in the disciplines of both sociology and economics as producing economic value); Cheadle, supra, at 1310-11; Osborn, supra, at 907, 914, 931 n.118; Ross, supra, at 115, 158 n.127; Throne, supra, at 197. The domestic services that a wife renders often make it more difficult for her to contribute financially, see supra, at 85; De Armond, supra, at 240; Cheadle, supra, at 1310-11, and furthermore, her services "contribute[ ] indirectly to the [family's economic] acquisitions by making it possible for the . . . [husband] to be employed." Greene, supra, at 85; see also id. at 83 ("Even if she did not contribute directly to the acquisition of property, her services enabled or hastened her husband's ability to acquire property.") (footnote omitted); De Armond, supra, at 240-41; Throne, supra, at 196-97; Joan Acker, Class, Gender, and the Relations of Distribution, 13 SIGNS 473, 474 (1988) (arguing that without women's unpaid labor, the capitalist system could not function as beneficially for men); Cheadle, supra, at 1271 n.11; Sylvia A. Law, Equality: The Power and Limits of the Law, 95 YALE L.J. 1769, 1771 (1986) (reviewing ZILLAH R. EISENSTEIN, FEMINISM AND SEXUAL EQUALITY (1984)) ("[O]ur liberal society depends upon the unpaid work performed by women in the home.").

Judicial discretion permitting unequal property division often fails to provide the wife with an adequate result, precluding her from reaching her husband's earlier earnings. Even when state law requires judges to consider a wife's nonfinancial contribution to the family in determining an equitable distribution, see Timothy B. Walker & Linda D. Elrod, Family Law in the Fifty States: An Overview, 26 FAM. L.Q. 319, 360-61 tbl.6 (1993) (indicating that most states now recognize spouses' nonmonetary contributions in determining equitable distribution upon divorce); Cheadle, supra, at 1311 n.223 (same); Greene, supra, at 103 (same); Osborn, supra, at 914 (same), those judges consider it as only one of many factors in dividing the property, see Greene, supra, at 103; Silbaugh, supra, at 58-59; Cheadle, supra, at 1209-90 (Indiana law), 1302-03 (Massachusetts law), 1304-05 (Ohio law), and they consistently undervalue the wife's contributions. See Greene, supra, at 87 (stating that if the wife does not get the right to half of the marital property, her contribution to the marital unit will be "under-recognized"), 103 (stating that in considering the wife's nonmonetary contributions as a factor in equitable distribution "the possibility exists that the court in the exercise of its discretion will fail to give the factor proper weight"); Silbaugh, supra, at 57-59; Cheadle, supra, at 1293 (discussing trial courts' undervaluation of the wife's contributions in the home in decisions which were reversed on appeal), 1299 n.164 (discussing an Oklahoma court decision that valued a wife's homemaking activities lower than her husband's labors on the farm).

As has been noted, case law often interprets "equitable" as not meaning "equal." As a result, the equitable distribution laws do not guarantee a lower-earning wife access to her husband's earlier earnings upon divorce. During the marriage, as noted above, those laws do not apply at all. In some cases, equitable distribution laws are waived by prenuptial agreements and, consequently, do not apply even upon divorce. See Kahng, supra, at 20. Therefore, state property and divorce laws are inadequate to ensure the wife's access to any part of her husband's earnings. Accord Kahng, supra, at 51.

Some critics might argue that a wife has access to her husband's earnings because state law obligates him to support her. See, e.g., Bittker, supra note 25, at 1420-22; Greene, supra, at 77; Kornhauser, supra note 73, at 98-99. The support obligation, however, has never been successfully invoked to enable a wife to recover from her husband taxes she paid on his behalf under joint and several liability. Modern courts tend not to interfere or to enforce the husband's obligation to support his wife except in extreme cases, like a husband refusing to pay his wife's hospital bill. See, e.g., Cranford v. Cranford, 772 S.W.2d 48 (Tenn. Ct. App. 1989) (holding that husband's alimony payments are to be increased based on his obligation to support wife who suffered debilitative multiple sclerosis). The support obligation was a creature of common law, especially before the advent of the Married Women's Property Acts. Before wives could own property of their own, they needed, and the law provided them with, support from their husbands. See, e.g., Greene, supra, at 77; Throne, supra, at 195. Once wives could own their own property under the Married Women's Property Acts, see Greene, supra, at 79 n.43; Ross, supra, at 114 n.20, the support obligation under common law, although not ceasing altogether, see Cheadle, supra, at 1275 n.31, gradually became less important, as is evidenced by the recent decline in the importance of alimony, see Osborn, supra, at 908, 915, a payment traditionally based on the concept of spousal support. See Cheadle, supra, at 1274 & n.26, 1283, 1295
criticized as being inconsistent with the government's administrative approach to tax refunds. The following discussion addresses and criticizes the various arguments that have been asserted in favor of joint and several liability.

A. Taxpayer Unity

As discussed above, the government has asserted that filing a joint return causes the spouses to become one taxpaying unit. Under this argument, tax liability may be collected in full from either part of that unit. This argument fails both as a matter of logic and legislative history. Although it may be true that the taxpayer-unity theory applies for computational purposes, it does not follow that the theory should apply in determining who can be held liable for tax.

The theory of taxpayer unity was the Commissioner's primary argument in Cole v. Commissioner and was the same argument the government asserted in I.T. 1575. The Ninth Circuit rejected the Commissioner's taxpayer-unity argument, however, noting that the government had not permitted taxpayer unity in a variety of other contexts in which doing so would have benefited the taxpayer. For example, under 1935 Treasury Regulations interpreting the Revenue Act of 1934, the Treasury Department abandoned the unitary approach with regard to whether spouses could net the gains of one against the losses of the other. The regulations disallowed such interspousal nettings of gains and losses under the theory that the husband and wife were different taxpayers and that a taxpayer may offset gains only to the extent of his or her own losses. If the government treated joint filers

n.142, 1298 & nn.160-61. Alimony has also lost importance under no-fault property division regimes. See Starnes, Dolls, supra, at 85, 97. Not only has the support obligation lost importance over time, but it also is "not directly enforceable between the parties when married. The support obligation may be enforceable during a marriage only by third party creditors who may sue one spouse for certain very narrow categories of debts [such as necessities like food and shelter] undertaken by the other." Silbaugh, supra, at 34 (footnote omitted); see also McGuire v. McGuire, 59 N.W. 2d 336 (Neb. 1953) (holding that because husband and wife were not separated or living apart, the wife could not maintain an action against her husband for maintenance).

76. See infra notes 254-59 and accompanying text.
77. Cole v. Commissioner, 81 F.2d 485, 486 (9th Cir. 1935).
78. I.T. 1575, II-I C.B. 144 (1923).
79. See Article 117-5, Regulations 86, quoted in Cole, 81 F.2d at 487. "In the application of section 117 (dealing with capital gains and losses), a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers." Id. The Supreme Court later held these regulations to be invalid as contrary to congressional intent and to settled law since 1921. See Helvering v. Janney, 311 U.S. 189, 194-95 (1940).
separately for some purposes, reasoned the Ninth Circuit, then it must also do so when collecting the liability.

For further support, the Ninth Circuit in *Cole* also referred to other contexts in which married taxpayers filing jointly had been treated as separate taxpayers contrary to any theory of taxpayer unity. In *Gumney v. Commissioner*, spouses who had filed joint returns were treated as separate taxpayers for purposes of § 118 of the Revenue Act of 1928, the statutory predecessor to I.R.C. § 1091. Under that provision, a taxpayer could not recognize a loss upon the disposition of property if that taxpayer acquired or reacquired substantially identical property within 30 days before or after the disposition. In *Gumney*, one spouse had sold stock on the market at a loss, and within 30 days the other spouse purchased stock of the same company on the market. The Commissioner argued that by filing jointly the spouses had become one taxpayer, and thus, the stock had been disposed of and reacquired by the same taxpayer. Under the Commissioner’s theory, §118 should apply to prevent the loss deduction. The Board of Tax Appeals ruled to the contrary. According to the Board, the fact that joint filing required tax to be computed on the spouses’ aggregate net incomes did not render the spouses one taxpayer. Because the spouses remained separate taxpayers, the spouse incurring a loss did not reacquire the stock, and thus, § 118 did not prevent loss recognition.

The Ninth Circuit in *Cole* also cited *Van Vleck v. Commissioner* to illustrate another context in which joint filers remained separate taxpayers despite having filed jointly. In *Van Vleck*, it was the Commissioner who argued that jointly filing spouses remained separate taxpayers. In that case, the husband incurred a net operating loss for 1929, a year in which he had filed a separate return. He attempted to carry the loss forward to 1930, and he filed jointly to use the loss to offset his wife’s 1930 income. Under the loss carryforward provision in place at the time, the deduction for losses that had been carried forward was available only to the taxpayer who had sustained the loss. Thus, the only means by which the husband’s loss could be reduced by her husband’s loss carryforward would be by treating the wife as having sustained the earlier loss, that is, by treating the wife and the husband as one unitary taxpayer. The Board, agreeing with the Commissioner, ruled against the taxpayers, holding that the couple was composed of two separate taxpayers despite having filed jointly, and that the husband’s loss could not be carried forward to offset his wife’s income.

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80. 26 B.T.A. 894, 895 (1932).
81. 31 B.T.A. 433, 435 (1934), aff’d, 80 F.2d 217, 218 (2d Cir. 1935), cert. denied, 298 U.S. 656 (1936).
Uihlein v. Commissioner also supported the Ninth Circuit's decision in Cole to reject the theory of taxpayer unity. In a reviewed decision, the Uihlein court overturned the Commissioner's assessment of a tax deficiency against a couple in which the husband, having sold stock to his wife at a loss, had deducted the loss on their joint return. The Commissioner had disallowed the loss deduction on the basis that the joint return made the husband and wife one taxpayer and that the taxpayer could not realize a loss by selling property to himself. Ruling otherwise, the Board of Tax Appeals held that joint filing does not cause the spouses to become one taxpayer. Therefore, the husband's good faith sale of stock to his wife was not a sale to himself, and the resulting loss could be recognized.

Because joint filing did not result in taxpayer unity in other contexts, and because the government's own position was contrary to taxpayer unity in both Van Vleck and Article 117-5 of Regulations 86, the Ninth Circuit rejected the Commissioner's theory of taxpayer unity in the context of who could be held liable for tax. The decision in Cole was consistent with numerous prior decisions in which taxpayer unity had been rejected. After Cole, other courts continued consistently to reject the theory of taxpayer unity.

82. 30 B.T.A. 399, 402 (1934), aff'd, Commissioner v. Brumder, 82 F.2d 944 (7th Cir. 1936).
84. See, e.g., Fawsett v. Commissioner, 31 B.T.A. 139, 141 (1934) (same fact pattern, holding and reasoning as in Hammerstein); Brochon v. Commissioner, 30 B.T.A. 404, 406 (1934) (same fact pattern, holding and reasoning as in Hammerstein); Fleitman v. Commissioner, 22 B.T.A. 1291, 1294 (1931), aff., X-2 C.B. 24 (1931) (allowing the husband a bad-debt deduction on a joint return for a loan previously made to his wife that she could no longer pay back. Had the husband and wife become one taxpayer by virtue of filing jointly, then a bad-debt deduction for the husband would have been inappropriate, the bad debt being owed by the husband to himself); Hill v. United States, 12 F. Supp. 798, 800 (Ct. Cl. 1935) (holding that losses from interspousal sales may be deducted even if spouses file jointly because joint filing does not cause the spouses to become one taxpayer).
85. See, e.g., Seder v. Commissioner, 38 B.T.A. 874, 877 (1938) (rejecting the taxpayer-unity theory and joint and several liability for the 1933 tax year); Pierce v. Commissioner, 100 F.2d 397 (2d Cir. 1938) (spouses could not net one's losses against the gains of the other for 1933 despite filing jointly because joint filing did not cause the spouses to become one taxpayer); DeMuth v. Commissioner, 100 F.2d 1012 (2d Cir. 1938) (in accord with Pierce); Commissioner v. Rabenold, 108 F.2d 639, 640 (2d Cir. 1940) (rejecting the taxpayer-unity theory and joint and several liability for the 1933 tax year); Flaherty v. Commissioner, 35 B.T.A. 1131 (1937) (rejecting the taxpayer-unity theory and joint and several liability for the 1932 tax year); Janney v. Commissioner, 39 B.T.A. 240, 243 (1939) (spouses could not net losses of one against the gains of the other because joint filing did not make them one taxpayer), rev'd, 108 F.2d 564, 567 (3d Cir. 1939), remand aff'd, 311 U.S. 189 (1940); United States v. Hammerstein, 20 F. Supp. 744 (S.D.N.Y. 1937).
In 1940, the Supreme Court addressed the issue of taxpayer unity for the first time. In *Hewering v. Janney*, the Court invalidated Article 117-5 of Regulations 86 and held that, under the Revenue Act of 1934, spouses filing jointly could use the capital losses of one to offset the capital gains of the other. The Court did not rule directly on the theory of taxpayer unity, per se. However, its reasoning implied acceptance of that theory. The Court noted that the taxing authorities, relying on the theory of taxpayer unity, had interpreted earlier revenue acts as allowing one spouse's capital losses to be netted against the capital gains of the other when they filed jointly. The Treasury Department and the Bureau of Internal Revenue had consequently treated joint filing as making the spouses one taxpayer for tax computation purposes. Because the Revenue Act of 1934 was identical in all relevant respects to the language of the earlier revenue acts, the Supreme Court concluded that in enacting the Revenue Act of 1934 without change, Congress could not have intended to adopt a different approach. However, regulations under the Revenue Act of 1934, promulgated in 1935, changed the administrative interpretation of the Code. The Supreme Court invalidated the changes as contrary to congressional intent, ruling that Congress had, under the doctrine of statutory reenactment, adopted the taxpayer-unity theory with respect to the netting of gains and losses.

We are of the opinion that under the provision of the Act of 1934 as to joint returns of husband and wife, which embodied a policy set forth in substantially the same terms for many years, Congress intended to provide for a tax on the aggregate net income and that the losses of one spouse might be deducted from the gains of the other; and that this applied as well to deductions for capital losses as to other deductions. This, we think, was the meaning of the provision of the Revenue Act of 1934 when it was enacted, and it was subject to

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In *Hammerstein*, the court held that the assessment of a tax against a husband is not an assessment of a tax against a wife simply because the spouses filed jointly. *See id.* at 745. The fact that the spouses filed jointly did not make the husband and wife one taxpayer for purposes of assessment. *See id.* The statute of limitations had run as to the wife, and, therefore, the suit against her was dismissed. *See id.; see also Commissioner v. Brumder*, 82 F.2d 944, 945 (7th Cir. 1936) (losses from interspousal sales may be deducted even if spouses file jointly because joint filing does not cause the spouses to become one taxpayer); Commissioner v. Thomas, 84 F.2d 562 (5th Cir. 1936) (in accord with *Brumder*); Sweet v. Commissioner, 102 F.2d 103 (1st Cir. 1939), cert. denied, 307 U.S. 627 (1939) (spouses could not net losses of one against the gains of the other because joint filing did not make them one taxpayer); Nelson v. Commissioner, 104 F.2d 521 (4th Cir. 1939) (per curiam) (in accord with *Sweet*).

86. 311 U.S. 189 (1940).
87. *See Janney*, 311 U.S. at 192 (referring to Opinion Solicitor 90, 4 C.B. 236 (1921)).
88. *See id.* at 194-95.
change only by Congress, and not by the Department [of the Treasury].

The same day the Supreme Court decided Janney, it also ruled in Taft v. Helvering that Article 23(o)-1 was also invalid. Under this regulation, deductions for charitable contributions had been limited to fifteen percent of the donor-spouse's separate net income, regardless of filing status. In Taft, the Court held that deductions for charitable contributions made by spouses filing jointly were limited to fifteen percent of combined net income, rather than fifteen percent of the donor-spouse's separate net income. Again, the Court did not rule on the theory of taxpayer unity itself. Rather, citing Solicitor Opinion 90, the Court held that the government had always interpreted the statute as treating joint filers as one taxpayer for purposes of tax computation. Therefore, under previous revenue acts, a couple filing jointly could deduct charitable contributions to the extent of fifteen percent of their combined net incomes. In enacting the Revenue Act of 1934, identical in all relevant respects to the earlier statutory language, Congress must have intended to retain the earlier construction. Regulations changing that construction for the first time in 1935 were, therefore, invalid as contrary to congressional intent.

The principle that the joint return is to be treated as the return of a "taxable unit" and as though it were made by a "single individual" would be violated if in making a joint return each spouse were compelled to calculate his or her charitable contributions as if he or she were making a separate return. The principle of a joint return permitted aggregation of income and deductions and thus overrode the limitations incident to separate returns [such as each spouse's entitlement to a deduction only to the extent of fifteen percent of his or her separate net income].

After the Supreme Court rulings in Janney and Taft, some lower courts read those decisions as requiring spouses who had filed jointly to be treated as one taxpayer for all purposes, not merely for purposes of tax computation, but also for purposes of tax collection. Consequently, those courts imposed joint and several liability on jointly filing spouses for pre-1938 tax years. This was the view that the Court of Claims

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89. Id.
90. 311 U.S. 195, 198 (1940).
92. See Taft, 311 U.S. at 197.
93. Id. at 198.
accepted in Moore.94 The Board of Tax Appeals also adopted it in later cases.95 These courts ruled that joint filing made the spouses one taxpayer and, therefore, required joint and several liability.

The extension of the taxpayer-unity concept from tax computation to tax collection was improper, however, as a logical matter. The basis for the Supreme Court's decisions in Janney and Taft related only to tax computation, not to the question of who should bear the burden of the tax liability.96 The statutory language the Court had relied on in both Janney and Taft was found in § 51(b):

If a husband and wife living together have an aggregate net income for the taxable year of $2,500 or over, or an aggregate gross income for such year of $5,000 or over - (1) Each shall make such a return, or (2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.97

Basing its decisions on prior administrative practice, the Supreme Court had interpreted the requirement that tax be "computed on the aggregate income" as requiring a netting of total combined deductions against total aggregate income, rather than as requiring a separate determination of each spouse's net income and then an aggregation of those separate net incomes. The treatment of joint filers as one taxing entity under Janney and Taft, therefore, arose from the interpretation of statutory language that was relevant only to the computation of tax liability. Janney and Taft indicated the Supreme Court's approval of the taxpayer-unity approach, but only for purposes of computing tax. Those cases provided no indication as to whether the Court would approve such an approach for purposes of collecting the liability, once computed, from the respective spouses.98

Despite the Court of Claims approach previously taken in Moore, the Second Circuit in Commissioner v. Uniacke99 recognized the distinction between unity for purposes of computation and unity for purposes of collection. Referring to Janney and Taft, the Second Circuit wrote:

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95. See, e.g., Schoenhut v. Commissioner, 45 B.T.A. 812, 821-22 (1941) (construing Janney to require joint and several liability under the theory of taxpayer unity); Gillette v. Commissioner, 46 B.T.A. 573, 578 (1942) (following Schoenhut); United States v. Rosebush, 45 F. Supp. 664 (E.D. Wis. 1942). In Rosebush, the court decided against joint and several liability even though it stated that approach to be correct under Moore. See id. Sitting in the Seventh Circuit, the court felt constrained by Crowe v. Commissioner, 86 F.2d 796 (7th Cir. 1936), which had followed the Ninth Circuit in Cole. See id.
96. See Beck, supra note 3, at 338, 346 n.121.
98. See Beck, supra note 3, at 346 n.121.
99. 132 F.2d 781, 783 (2d Cir. 1942).
Obviously each case had to do only with computing the tax liability disclosed by a joint return. Neither case involved the question whether a husband and wife were jointly and severally liable for the tax so computed; the levy or incidence of the tax was not an issue nor considered. But the opinions did approve the principle expressed in an opinion of the Solicitor of Internal Revenue that a joint return "is treated as the return of a taxable unit" and as though it were the return "of a single individual." These phrases are seized upon by the Commissioner as implying joint and several liability not only for the tax computed upon the aggregate net income reported in the joint return, but also for any deficiency determined by including unreported income belonging solely to one of the spouses and of which the other had no knowledge. We do not think they carry such an implication.100

Because the Supreme Court denied certiorari in both Uniacke101 and Moore,102 it is difficult to ascertain whether the Court would have extended unity to liability issues or whether the Court would merely have limited the unity concept to computation issues.103 Based on the language and reasoning in Janney and Taft, however, the more convincing view is that of Uniacke. It cannot be assumed that taxpayer unity would have been adopted for any purposes beyond tax computation because Janney and Taft dealt only with the construction of § 51(b)(2), a provision relating solely to tax computation.104 The Supreme Court ruled that joint filers were one taxpayer for purposes of tax computation.105 However, that conclusion required no similar result for purposes of collecting the tax liability once computed.106 Janney and Taft should not have been read to require taxpayer unity for purposes of determining who would have to bear the tax. The taxpayer-unity theory should never have required joint and several liability for pre-1938 tax years.

The theory that jointly filing spouses become one taxpayer should not be viewed as a justification for joint and several liability. The use of that theory to support joint and several liability is a flawed application of the

100. Uniacke, 132 F.2d at 782 (footnotes omitted).
101. 318 U.S. 787 (1943).
102. 314 U.S. 619 (1941).
103. The Court, no doubt, denied certiorari in both cases because the new 1938 law would soon render the issue obsolete as controversies regarding pre-1938 tax years eventually disappeared.
104. See Beck, supra note 3, at 346 n.121.
106. See Beck, supra note 3, at 338 (arguing that taxpayer unity refers to computation and carries no implications regarding the liability for tax).
107. That two spouses' economic interests and well-being may not be aligned is demonstrated by the pattern that spouses increasingly keep their resources segregated. See PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX 101 fig. 9 (1983) (surveying whether or not couples believe in pooling money and finding that the belief is not universal: 69% of wives and 75% of husbands believed in pooling); ROSANNA HERTZ, MORE EQUAL THAN OTHERS: WOMEN AND MEN IN DUAL CAREER MARRIAGES 90-91 (1986) (finding in her survey that only 48% of the couples surveyed claimed to pool their assets); SHERRI HITE, THE HITE REPORT—WOMEN AND LOVE: A CULTURAL REVOLUTION IN PROGRESS 43-49 (1987); JAN FAHL, MONEY AND MARRIAGE 78 tbl.5.3 (1989) (only 56% of couples claimed to share); Kornhauser, supra note 73, at 86 (discussing the results of her own empirical surveys: 30% of couples in one survey and 44.4% in the other survey claimed that at least some wages were not kept in joint accounts); id. at 81 ("[P]ooling is less monopolistic in reality than it is in theory."); Meredith Edwards, Individual Equity and Social Policy, in WOMEN, SOCIAL SCIENCE AND PUBLIC POLICY 95, 98-100 (Jacqueline Goodnow & Carole Patemen eds., 1985) (observing that household members do not share income equally and, in fact, the standard of living of some wives may be lower than those of their husbands); Gann, supra note 26, at 26 (finding that data do “not generally substantiate the assumption that married persons equally share their income[s],” (citing HAROLD M. GROVES, FEDERAL TAX TREATMENT OF THE FAMILY 106 (1965))); Lily Kahng, Fictions in Tax, in TAXING AMERICA 25-44 (Karen B. Brown & Mary Louise Fellows eds., 1996) (questioning the assumption that spouses share their incomes and characterizing it as a fiction); Kornhauser, supra note 73, at 80 (stating that the premise “that married couples share resources . . . is largely unsupported by empirical evidence”) (footnote omitted); Daniel J. Lathrope, State-Defined Marital Status: Its Future as an Operative Tax Factor, 17 U.C. DAVIS L. REV. 257, 259 (1983); Michael J. McIntyre & Oliver Oldman, Taxation of the Family in a Comprehensive and Simplified Income Tax, 90 HARV. L. REV. 1573, 1594 n.76 (1977); Oliver Oldman & Ralph Temple, Comparative Analysis of Taxation of Married Persons, 12 STAN. L. REV. 585, 597 (1960) (acknowledging that even spouses who supposedly share do not necessarily have “complete access to [each] . . . other's income”); Silbaugh, supra note 75, at 49 (questioning the notion that husbands share their financial resources with their wives); Nancy C. Staudt, Taxing Housework, 84 GEO. L.J. 1571, 1592-94 (1996) (noting unequal sharing of income within the family); Diana Wong, The Limits of Using the Household as the Unit of Analysis, in HOUSEHOLDS AND THE WORLD-ECONOMY 56-63 (Joan Smith et al. eds., 1984) (discussing studies of households in various countries and concluding that household members do not share resources equally and often do not even live similar class styles); Laura Ann Davis, Note, A Feminist Justification for the Adoption of an Individual Filing System, 62 S. CAL. L. REV. 197, 216-18 (1988); Note, The Case for Mandatory Separate Filing by Married Persons, 91 YALE L.J. 365, 372-73 (1981); Kahng, supra note 75, at 18-19 (observing that married couples do not uniformly pool resources or make all their decisions about earning, consumption and saving jointly); see also SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 31 (1989) (suggesting that “many social ‘goods,’ such as time for paid work or for leisure, physical security, and access to financial resources, typically are unevenly distributed within families”); Viviana A. Zelizer, The Social Meaning of Money: “Special Money,” 95 AM. J. SOC. 342, 352 (1989); Kahng, supra note 75, at 19. But see Anne L. Alstott, The Earned Income Tax Credit and Some Fundamental Institutional Dilemmas of Tax-Transfer Integration, 47 NAT'L TAX J. 609, 611 (1994) (arguing that the family unit is the best choice for measuring income, asserting that one person’s income alone does not reflect the other available resources or the financial responsibilities that accompany living in a household); Michael J. McIntyre, Individual Filing in the Personal Income Tax: Prolegomena to Future Discussion, 58 N.C. L. REV. 469, 470 (1980) (hereinafter McIntyre, Individual) (agreeing); Richard A. Epstein, The Gender Gap in Compensation: Some Reflections on the Gender Gap in Employment, 82 GEO. L.J. 75, 78-79 (1993) (arguing that the family operates as one economic unit, positing that women share in the gains that men have generated through the division of take-home pay); McIntyre, supra, at 469-70 (while noting that marital pooling is not universal, suggesting that couples probably pool some or all of their incomes); Douglas Y. Thorson, An Analysis of the Sources of Continued Controversy Over the Tax Treatment of Family Income, 18 NAT'L TAX J. 113, 116 & n.11 (1965) (asserting that spouses normally pool their incomes, citing some
family sociologists who based this conclusion on observations from the 1950s and early 1960s). Of course, purported sharing of income four decades ago does not constitute evidence of current pooling. But see Zelenak, supra note 75, at 348-53. Zelenak reinterprets Kornhauser's data and suggests that "patterns of household income and expenditure indicate that most spouses have no choice but to share roughly equally in the consumption of their combined income." id. at 353. Professor Zelenak concludes that spouses nominally pool their resources, but he does not examine empirical studies concerned with spouses' relative consumption patterns. See id. Professor Zelenak suggests that allocation of deductions between spouses is difficult "precisely because there is a great deal of marital pooling." id. at 381.

Furthermore, even spouses who do purport to share resources do not necessarily exercise equivalent control over them. The spouse who earns the bulk of the family income tends to control how resources will be used, and not infrequently uses them primarily for his or her own benefit. See BARBARA R. BERGMANN, THE ECONOMIC EMERGENCE OF WOMEN 211-12 (1986) (noting that men, as primary wage earners, have retained control over consumption patterns); BLUMSTEIN & SCHWARTZ, supra, at 53-56; PAHL, supra, at 146-51 (finding that women married to wealthy men often lack resources for leisure activities although their husbands do not), 143 (observing that women married to wealthy men may lack sufficient funds for necessities); Christine Delphy & Diana Leonard, Class Analysis, Gender Analysis and the Family, in GENDER AND STRATIFICATION 57, 64-65 (Rosemary Crompton & Michael Mann eds., 1986) (arguing that unequal food distribution within the family undermines the assumption of equal sharing of resources and power); Jan Pahl, The Allocation of Money and the Structuring of Inequality Within Marriage, 31 SOC. REV. 237, 251-58 (1983); Jan Pahl, The Allocation of Money Within the Household, in THE STATE, THE LAW, AND THE FAMILY: CRITICAL PERSPECTIVES 36 (Michael D.A. Freeman ed., 1984); Diana Strassmann, Not a Free Market: The Rhetoric of Disciplinary Authority in Economics, in BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS 54, 58-59 (Marianne A. Ferber & Julie A. Nelson eds., 1993) (noting that economists often assume incorrectly that the husband shares power and resources so as to further the best interest of each individual within the household).

According to a Chrisitne Oppong, MIDDLE CLASS AFRICAN MARRIAGE: A FAMILY STUDY OF GHANAIAN SENIOR CIVIL SERVANTS 86-88, 139 (1981); Carole B. Burgoyne, Money in Marriage: How Patterns of Allocation Both Reflect and Conceal Power, 38 SOC. REV. 634 (1990); Heidi I. Hartmann, The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework, 6 SIGNS 366, 366-76 (1981) (arguing that men more often than women control how income will be used and for whose benefit); Kornhauser, supra note 73, at 80, 90-91 (explaining that studies show "that individual incomes are not simply pooled and then spent to meet household needs in some unified fashion. Rather, they are spent at least in part according to the earner's own preference") (quoting Beatrice Lorge Rogers, The Internal Dynamics of Households: A Critical Factor in Development Policy, in INTRA-HOUSEHOLD RESOURCE ALLOCATION: ISSUES AND METHODS FOR DEVELOPMENT POLICY AND PLANNING 1 (Beatrice Lorge Rogers & Nina P. Schlossman eds., 1990)); Kristin A. Moore & Isabel V. Sawhill, Implications of Women's Employment for Home and Family Life, in SOCIOLOGICAL PERSPECTIVES ON WOMEN WORKING: THEORIES AND FACTS IN PERSPECTIVE 201 (Ann H. Stromberg & Shirley Harkess eds., 1978); Staudt, supra, at 1594 n.91 (citing numerous studies which show that access to, and control of, resources is often tied to the gender hierarchy, often with the man controlling how money is used); Michael Young, Distribution of Income within the Family, 3 BRIT. J. SOC. 305, 305 (1952) (stating that, historically, men disproportionately benefit from family resources: "the bread-winners are often the meat-eaters"); id. at 314 (describing the practice whereby husbands provide only limited access to their resources through an allowance system rather than by providing indiscriminate access); Kahng, supra note 75, at 21, 26 n.73 (citing evidence that the earner retains control over the family's resources and that, even in community property states where spouses are given equal management and control over community property earnings, the earner spouse often exerts de facto control over his earnings as the wife has little ability to prevent her husband from dissipating the couple's assets); WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 14-3 (3d ed. 1991) (same). See generally ROBERT O. BLOOD & DONALD M. WOLFE, HUSBANDS AND WIVES: THE DYNAMICS OF MARRIED LIVING (1960); Stephen J. Bahr, Effects of Power and Division of Labor in the Family, in WORKING MOTHERS 167 (Lois W. Hoffman & F. Ivan Nye eds., 1974); Randall Collins, A Conflict Theory of Social Stratification, 19 SOC. PROBS. 3, 13, 16 (1971) (describing sexual stratification in the workplace and in the home). But see Michael J. McIntyre, Tax Justice for Family Members After New York State Tax Reform, 51 ALB. L. REV. 789, 792 n.17 (1987) [hereinafter McIntyre, New York State] (claiming that the
Another argument advanced in favor of joint and several liability is that of administrative necessity. This argument was first articulated in *Anderson v. United States*, a case in which joint and several liability was not at issue. One of the disputes in *Anderson* was whether the taxpayer had filed a joint return on behalf of himself and his wife, or whether his return was, in fact, a separate return. Although it is unclear from the court's opinion why filing status was in controversy, the Fifth Circuit nevertheless stated that when a joint return is made, "the Commissioner is under no obligation to change it and divide it into two separate returns... [because there are no data] upon which to divide the return." The Commissioner claimed that, as an administrative matter, it could not separate the income and losses of the two spouses.

Administrative necessity was first invoked as a justification for joint and several liability in *Cole*. The Commissioner had argued that because spouses' incomes and expenses, as entered on the joint return, were not identified separately, the government could not determine how much tax liability was attributable to each spouse. In *Cole*, the taxpayer countered this assertion with two arguments. First, any examination that revealed a deficiency would also reveal the respective incomes and expenses of the spouses. In such cases, calculating the proportionate deficiencies of each spouse should present no

data in Jan Pahl, *Patterns of Money Management within Marriage*, 9 J. SOC. POL. 313 (1980) are unreprentative). Professor McIntyre also cites data supportive of sharing that was gathered in the 1950s and early 1960s. Again, the possibility of sharing between spouses in those years does not prove that spouses continue to share four decades later.

108. 48 F.2d 201, 202 (5th Cir. 1931) (affirming an unreported decision from the N.D. Tex. (Judge William H. Atwell)).

109. An article by J. Timothy Philipps and L. Bradford Braford asserts that joint and several liability was the issue in *Anderson*. See J. Timothy Philipps & L. Bradford Braford, *Even a Tax Collector Should Have Some Heart: Equitable Relief for the Innocent Spouse Under I.R.C. § 6013(e)*, 8 N. ILL. U. L. REV. 33, 36 n.18 (1987). However, the Fifth Circuit opinion in that case does not disclose why filing status was at issue. See *Anderson*, 48 F.2d at 201-03.


112. 29 B.T.A. 602, 604-05 (1933), rev'd, 81 F.2d 485, 487-88 (9th Cir. 1935).

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

114. *See Cole*, 81 F.2d at 487; *see also* Commissioner v. Uniacke, 132 F.2d 781, 783 (2d Cir. 1942) ("[s]uch [administrative] difficulties appear to be more theoretical than real" because the audit which identifies the deficiency also identifies the spouse to whom the additional income belonged); Beck, *supra* note 3, at 343.
administrative difficulties. Second, if a case arose in which the Commissioner could not apportion tax liability between the spouses, then the Commissioner could simply assess the entire deficiency against each spouse separately, thereby placing the burden of proof upon each of them to prove that a portion or all of the total tax deficiency was attributable to the other spouse. In this instance, a non-delinquent spouse could escape liability by proving that the asserted deficiency was attributable to the other spouse. Under a regime of joint and several liability, such a showing would be legally irrelevant, and the non-delinquent spouse would remain liable by virtue of having filed jointly. The Ninth Circuit noted that this solution in which the Commissioner would simply assess the deficiency against both spouses separately would sufficiently address any administrative problems the Commissioner claimed would result under a regime of separate liability.

Although the Ninth Circuit had soundly and thoughtfully rejected the theory of administrative necessity, Congress summarily invoked it again as the justification for the Revenue Act of 1938 when enacting joint and several liability. Without explaining or identifying any precise need for joint and several liability, the House Report stated:

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

More than three decades later, the legislative history of the innocent spouse rules also referred to administrative necessity as a justification for joint and several liability. That legislative history failed, however, to specify any specific reason why joint and several liability might purportedly be administratively necessary.

Administrative necessity fails to pass muster as a justification for joint and several liability for a variety of reasons. First, current law requires both spouses to attach their W-2 forms to the joint tax return.  

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115. See Cole, 81 F.2d at 487. In Cole, the spouses' respective net incomes were, in fact, stipulated with the government. See id. at 490.
116. See id. at 487-88; Beck, supra note 3, at 343.
117. See Cole, 81 F.2d at 488; Beck, supra note 3, at 344.
119. Id. at 749.
Consequently, much of the information needed to apportion tax liability is already available to the government as a part of the joint return submission. Second, the Commissioner was already making the same allocations in other contexts which he had argued in Cole were administratively impossible to make.\footnote{See Beck, supra note 3, at 344.} For example, at the time of the Ninth Circuit’s ruling in Cole, Article 23(8)-1 of Regulations 86 limited the charitable deduction on a joint return to fifteen percent of the donor-spouse’s separate net income. As noted by Professor Beck, “[d]etermining each spouse’s separate net income on a joint return for purposes of limiting the charitable deduction necessarily involves precisely the same calculation as determining each spouse’s net income for purposes of limiting the overall tax liability of each spouse.”\footnote{Id. at 344.} Furthermore in 1935, Article 117-5 of Regulations 86 prevented the deduction of one spouse’s losses from the gains of the other. This rule could be enforced only by segregating the spouses’ respective gains and losses on the joint return. The Commissioner managed to enforce that rule often enough to generate a substantial body of case law on the issue.\footnote{See, e.g., Pierce v. Commissioner, 100 F.2d 397 (2d Cir. 1938); DeMuth v. Commissioner, 100 F.2d 1012 (2d Cir. 1938); Janney v. Commissioner, 39 B.T.A. 240, 243 (1939), rev’d, 108 F.2d 564, 567 (3d Cir. 1939), reversal aff’d, 311 U.S. 189 (1940); Sweet v. Commissioner, 102 F.2d 103 (1st Cir. 1939), cert. denied 307 U.S. 627 (1939); Nelson v. Commissioner, 104 F.2d 521 (4th Cir. 1939).}

Moreover, administrative concerns did not prevent the Commissioner from separating spouses’ individual net incomes in Van Vleck v. Commissioner despite the fact that the spouses had filed jointly.\footnote{See Van Vleck v. Commissioner, 31 B.T.A. 433 (1934), aff’d, 80 F.2d 217, 218 (2d Cir. 1935), cert. denied, 298 U.S. 656 (1936).} In Van Vleck, the husband attempted to deduct a net operating loss he had carried forward against the income of his wife.\footnote{See supra note 81 and accompanying text for a more complete discussion of Van Vleck.} The Commissioner disallowed the deduction, and the Second Circuit agreed. To disallow a loss carryforward, the Commissioner had to ascertain the spouses’ respective net incomes in the year the joint return had been filed.\footnote{See Beck, supra note 3, at 344 n.113.} As Professor Beck has observed, “[w]hat the government was willing to do for its own benefit, it also could do for taxpayers if it chose.”\footnote{Id. at 344.}
deductions when the Treasury would benefit, the government argued that it could not do so for purposes of allocating liability between the spouses and, thus, argued that a regime of joint and several liability was required as a matter of administrative necessity.

Many other contexts have required the Commissioner to ascertain the individual incomes and deductions of the jointly filing spouses. For instance, cases involving bad-debt deductions taken by one spouse for an earlier loan to the other spouse have required the Commissioner to determine the spouses' separate deductions. In addition, cases involving losses from interspousal sales have also required the Commissioner to disaggregate spouses' respective gains and losses. Again, if the Commissioner has been able to separate the spouses' respective net incomes for purposes of assessing tax deficiencies, he should be able to do so for purposes of assigning tax liability. That is, if separation of information on the joint return is possible when it benefits the government, it must also be possible in other instances.

Indeed, Congress has already contemplated such a result. In 1941, a proposal in Congress would have made joint returns mandatory for married couples. Under this bill, spouses could have elected to apportion their joint tax liability between them on the basis of their respective liabilities had they been able to file separately as individuals. Given the fact that this bill permitted apportioned liability, it is likely that joint and several liability was not, in fact, administratively necessary.

Finally, as Professor Beck notes, the so-called administrative necessity problem could be solved easily by redesigning the joint return form so as to provide space for reporting the separate income and expenses of each spouse. Some states (Arkansas, Iowa, Maryland, Missouri, North Carolina, and Virginia) currently provide such space by using two-column returns for combined reporting. Such a redesigned form would have solved the purported administrative difficulty. The taxpayer [in Cole] might have argued that because the return forms were drafted by the Treasury, the taxpayer should not be penalized if the forms were poorly designed and did not provide space for the information reasonably required by the Treasury. The taxpayer

129. See Fleitman v. Commissioner, 22 B.T.A. 1291 (1931).
130. See, e.g., Hill v. United States, 12 F. Supp. 798 (Ct. Cl. 1935); Commissioner v. Thomas, 84 F.2d 562 (5th Cir. 1936); Uihlein v. Commissioner, 30 B.T.A. 399 (1934), aff'd, Commissioner v. Brumder, 82 F.2d 944 (7th Cir. 1936).
133. See Beck, supra note 3, at 345; Philipps & Braford, supra note 109, at 38.
might have argued further that the government's position was tantamount to claiming that its return forms ought to determine the law, rather than that the law should dictate the return forms.\footnote{Beck, supra note 3, at 344 n.111; see also Domestic Relations Comm. ABA Sec. of Tax'n, supra note 21, at 398 (noting that tax forms could be redesigned without making filing more burdensome by including "separate columns for reporting, but not [for] computing"). Note that Internal Revenue forms "are not a substitution for [Treasury] Regulations and are not authoritative." \textsc{Jacob Mertens, Jr., [Main Volume] Mertens Law of Federal Income Taxation § 3.80 (November 1991). Consequently, the design of tax forms should not determine the law, but rather the law should govern how tax forms are designed. See Beck, supra note 3, at 344 n.111. Prior to 1938, when the law, as established in \textit{Cole}, was that joint filers were not jointly and severally liable, the Treasury Department simply should have redesigned the form of the tax return. \textit{See id.} When a tax form conflicts with the law, it is the administrative material, the form, that should be deemed invalid and redesigned, not the law that should be overturned. \textit{Id.} \textit{Cost}. The Commissioner has also argued that joint and several liability is justified as the cost imposed for the "unusual privilege" of filing jointly.\footnote{See Cole v. Commissioner, 81 F.2d at 487 (9th Cir. 1935); \textit{see also} Pesch v. Commissioner, 78 T.C. 100, 129 (1982); Sonnenborn v. Commissioner, 57 T.C. 373, 380-81 (1971); Edison-Smith, supra note 4, at 125.} The Commissioner has made this argument even at times when joint filing provided no financial benefit.\footnote{See supra note 206 and accompanying text.} For example, in 1935 at the time the Ninth Circuit ruled in \textit{Cole}, income splitting had not yet been made available to joint filers. The primary benefits to be gained by filing jointly were the abilities to offset one spouse's gains with the other's excess losses and to increase allowable deductions that were
limited by net income. However, new regulations promulgated in 1935, and not yet deemed invalid, had eliminated these benefits. Thus, in 1935, jointly filing spouses were prohibited from using the losses of one to offset the gains of the other. They were also prohibited from combining their net incomes to maximize the allowable charitable deduction. Consequently, in 1935, filing jointly provided no appreciable financial benefit, but merely enabled spouses to comply with the filing requirements more conveniently by allowing them to submit one joint return. If it were true that financial benefits justified the imposition of joint and several liability, then the absence of financial benefits should have thrown the propriety of joint and several liability into doubt.

Even before 1935, when joint filing did sometimes confer a financial benefit, no language in the tax code conditioned such benefits on the imposition of joint and several liability.

All that the statute provides is that "the tax shall be computed on the aggregate income." The privilege is granted unconditionally, without declaration that they [the spouses] shall be jointly liable for the tax so computed. Only by implication can an intention be inferred to make them a taxable entity or to impose joint and several liability on both spouses. Taxing statutes are not to be extended by implication; doubts must be resolved against the government.

Another line of cases clarified the conclusion that nothing in the pre-1938 statute required jointly filing spouses to forgo their other rights.

Sections 11 and 12 of the Revenue Act of 1928, the [tax-]imposing provisions of the statute, impose a tax upon the taxable income of each individual. Each is defined as a taxpayer and the fact that the Congress, having regard to the marital status and in order to
eliminate a large number of returns, sees fit to permit the inclusion in the one return of the income of husband and wife, does not serve to deny to these individual taxpayers the other benefits of the taxing statutes. . . . [W]hile the Federal taxing acts have . . . permitted married people to file joint returns, we feel that this privilege is not bought by the sacrifice of their other rights under the statutes. * * * The acceptance of the privilege of filing a joint return by a married couple carries with it no denial of their individual rights under the statute. Congress has exacted no penalty for the privilege it has granted and the Commissioner may not exact one. 145

After the 1940 Supreme Court decisions in Janney and Taft, joint filing required taxpayers to sacrifice individuality for computation purposes, but as discussed above, spouses filing jointly in tax years before 1938 should not have been treated as having sacrificed their individual taxing identities for purposes of determining which spouse was liable for the tax once computed. 146

Congress first imposed joint and several liability as a cost for filing jointly by statute in 1938. Since 1948, joint filing has also conferred a financial benefit in the form of income splitting. The availability of income splitting for jointly filing spouses provides a financial benefit to the couple as a unit because it allows tax liability to be computed as if each spouse had earned half of the combined income. Because of the progressive U.S. tax rates, the ability to shift income from the higher earner to the lower earner permits some of the higher earner’s income to be taxed in a lower bracket and, thus, effects a tax savings. The net effect is that some of the income of the higher-earning spouse would be treated as if the other spouse had earned it and would be shifted into that other spouse’s lower marginal tax bracket. 147 Because joint return rates contain this benefit of income splitting, the argument that joint and several liability is the cost for the benefits provided by the joint return has renewed vigor. Many scholars have acknowledged the widespread belief that the benefit of income splitting justifies joint and several liability. 148 It should be noted, however, that the income-splitting

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145. Cole, 81 F.2d at 487 (alteration in original) (citation omitted) (quoting Fawsett v. Commissioner, 31 B.T.A. 139, 141-42 (1934)).

146. See supra notes 86-107 and accompanying text.

147. See, e.g., Beck, supra note 3, at 369 (explaining that income splitting benefits couples by moving some of the higher earner’s income into a lower bracket).

148. See, e.g., Murray, supra note 21, at 58; Borison, supra note 3, at 819 n.3, 824; Edison-Smith, supra note 4, at 107, 125; Beck, supra note 3, at 322, 342 n.103, 369; Michael W. Kalcheim, Divorce and Uncle Sam: The Tax Consequences of Marital Breakup, 84 Ill. B.J. 466, 471 (1996); Natalie Hoyer Keller, Note, Do You Elizabeth, Promise to Pay John’s Taxes? I Do: A Review of the Innocent Spouse Provisions and a Proposal for Change, 1996 Utah L. Rev. 1065, 1068; see also Pesch v. Commissioner, 78 T.C. 100, 129 (1982); Sonnenborn v. Commissioner, 57 T.C. 373, 380-81 (1971); Bokum v. Commissioner, 94 T.C. 126, 152 (1990), aff’d, 992 F.2d 1132 (11th Cir. 1993). But see ABA Report, supra note 121, at 3 (stating that joint and several
benefit of joint filing is not always great; indeed, some married couples minimize their taxes by filing separately. They enjoy what is, for them, the benefit of filing separately without having to pay any cost for that benefit, that is, without having to bear the burden of joint and several liability. Indeed, some married couples, particularly those in low tax brackets or those with equal incomes, obtain no financial liability was not imposed as a cost for any benefit of joint filing). Income splitting was not enacted for the purpose of justifying joint and several liability, but rather "for the entirely different purpose of equalizing the tax burden between the common law states and the community property states, where income-splitting was already allowed on separate returns under the doctrine of Poe v. Seaborn." ABA Report, supra note 121, at 11 n.16 (citation omitted).

149. Although most couples file jointly, some choose to file separately. See Christian, Joint Rate Structure, supra note 20, at 271-72. Separate returns are often advantageous "with respect to such matters as the limit on the capital loss deduction, medical expenses, charitable contributions, and the matching of long-term and short-term capital gains and losses." Murray, supra note 21, at 57; see also Druker v. Commissioner, 697 F.2d 46, 49 n.1 (2d Cir. 1982); Bittker, supra note 25, at 1414 n.73; McIntyre & Oldman, supra note 107, at 1585 n.46; Davis, supra note 107, at 208-09. Separate filing of federal returns may also be advantageous in case of a state tax benefit from filing separately where states require couples to use the same filing status as that used for federal purposes. See Beck, supra note 3, at 374 n.265.

Filing separately can also be beneficial when the couple has generated significant allocable deductions. In such a case, separate filing often allows the spouses to allocate each deduction to the spouse who can most readily derive a tax benefit from the item. For example, if a deduction is allocable to either spouse and the deduction may be used to the extent it exceeds a floor, a percentage of adjusted gross income, the deduction is more valuable if allocated to the lower-income spouse. It may have no value at all if the couple files jointly, generating a large combined adjusted gross income. See, e.g., Beck, supra note 3, at 373 n.265; Robinson & Wenig, supra note 23, at 839 n.289, 846; Zelenak, supra note 75, at 339 n.1. Among deductions subject to such floors are deductions for medical expenses under I.R.C. § 213 (1994) and miscellaneous itemized deductions under I.R.C. § 67 (1994). Deductions not subject to a floor are generally more valuable if allocated to the higher-income taxpayer because they are used to reduce income that is subject to a higher marginal tax rate. See, e.g., STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES 22 (1973) (referring to this pattern as the "upside-down deduction" because of its regressive effect); JOSEPH A. PECHAM, FEDERAL TAX POLICY 97 (5th ed. 1987) (the tax benefit associated with a deduction depends on the tax rate). But see Thomas D. Griffith, Theories of Personal Deductions in the Income Tax, 40 HASTINGS L.J. 343, 352-60 (1989) (criticizing the widespread belief that deductions are more valuable to high-bracket taxpayers than to low-bracket taxpayers). The spouse for whom a given deduction is most valuable generally may arrange to entitle him or herself to it by incurring and paying the expense. See STAFF OF JOINT COMM. ON TAXATION, 96TH CONG., THE INCOME TAX TREATMENT OF MARRIED COUPLES AND SINGLE PERSONS 3-7 (Comm. Print 1980); Zelenak, supra note 75, at 391 n.245. The spouses cannot make such allocations if they elect to file jointly. In these relatively rare instances in which the benefit from allocating deductions in a certain manner exceeds the normal advantages of joint filing, these married couples benefit from filing separately rather than jointly.

Spouses also file separately on occasion to avoid the regime of joint and several liability, of course. See I.R.C. § 6013(d)(3) (1994).

150. See Beck, supra note 3, at 370.

151. See id. at 375.

152. See Christian, Joint Rate Structure, supra note 20, at 265, 269-70; Mapes v. United States, 576 F.2d 896, 898 (Cl. Ct. 1978); Johnson v. United States, 422 F. Supp. 958, 965 (N.D. Ind. 1976); Beck, supra note 75, at 369; Borton, supra note 3, at 824 n.36; see also Beck, supra note 3, at 369, 374 n.267, 375 (implying that similar-income couples do not experience savings from income splitting by stating that spouses with substantially disproportionate incomes benefit from it); cf Zelenak, supra note 75, at 340 (noting that equal-income couples experience a marriage penalty because of the fact that income splitting conveys no value on them).
benefit whatsoever from income splitting. Why should those couples have to pay a price, joint and several liability, for a so-called benefit which for them is valueless? For such couples, no benefit accompanies the price of joint and several liability.

Despite the logic in the view that benefits carry burdens, the historical evidence contradicts the notion that joint and several liability was justified as being the price for the benefit of income splitting.\textsuperscript{153} Although joint and several liability has existed by statute since 1938, it was not until 1948 that Congress made income splitting available to joint filers residing in common-law marital property jurisdictions.\textsuperscript{154} During the intervening ten years, married couples living in common-law jurisdictions who filed jointly paid the cost of joint and several liability without receiving any benefit of income splitting.\textsuperscript{155} Clearly, income splitting did not justify joint and several liability because income splitting did not exist during that period. If joint and several liability was justifiable because of the income-splitting benefits from joint filing, then it was not justified for the quarter of a century from 1923, when the Treasury first imposed it, through 1948, when Congress finally provided income splitting to jointly filing couples residing in common-law states.

Moreover, if income-splitting does justify joint and several liability, then married couples residing in community property states and filing separately should be subject to joint and several liability because they

\textsuperscript{153} See Beck, \textit{supra} note 3, at 569.

\textsuperscript{154} Under \textit{Poe v. Seaborn}, income splitting was available beginning in 1930 for couples living in community property jurisdictions in which the nonearning spouse had an immediate, vested property right in the earner's income. See \textit{Poe v. Seaborn}, 282 U.S. 101 (1930). As of 1938, when Congress enacted joint and several liability for joint filers, only eight states were community property states. See Gann, \textit{supra} note 26, at 17 (discussing the impact of the 1930 \textit{Poe v. Seaborn} decision and noting that traditionally only eight states had been community property states); Douglas Blount Maggs, \textit{Community Property and the Federal Income Tax}, 14 CAL. L. REV. 351, 353 (1926) (stating that currently, in 1926, community property systems exist in eight states); Gann \textit{supra} note 26, at 15-16 (noting that in response to \textit{Poe v. Seaborn} and \textit{Lucas v. Earl}, which gave residents of community property states the benefit of income splitting, but denied that benefit to residents of common-law states, that many common-law states started converting to community property regimes and noting that the first such state to attempt that conversion was Oklahoma in 1939); \textit{see also} Bittker, \textit{supra} note 25, at 1411 (noting that among common-law states, Oklahoma took the lead in 1939 in converting to a community property system). The remaining states had common-law marital property regimes. Thus, for the vast majority of Americans, as residents of common-law states, joint filing imposed the burden of joint and several liability in 1938 without conferring any concomitant benefit of income splitting. The income splitting available to community property residents under \textit{Seaborn} did not rely on joint filing status, however. As a result, married couples living in community property states received the benefit of income splitting under \textit{Seaborn} even if they filed individual returns and thereby avoided joint and several liability.

\textsuperscript{155} See \textit{Lucas v. Earl}, 281 U.S. 111 (1930) (prohibiting income splitting to married couples living in common-law marital property states); Edison-Smith, \textit{supra} note 4, at 106 n.25, 107; McLachlan, \textit{supra} note 142, at 66; Cummins, \textit{supra} note 155; \textit{ABA Report}, \textit{supra} note 121, at 3.
receive the benefit of income splitting under *Poe v. Seaborn.* However, for joint and several liability to apply, the couple must file a joint income tax return. Thus, couples in community property jurisdictions who file separately benefit from income splitting without incurring joint and several liability as a cost for that benefit. The so-called benefit of

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156. 282 U.S. 101 (1930). In *Poe v. Seaborn,* the Supreme Court permitted income splitting to a couple that had filed separate, individual tax returns. *Id.* at 118. The effects of state law vesting the earnings of one spouse in the marital community were not dependent on the filing status chosen for federal income tax purposes. Consequently, income splitting is mandatory in community property states for spouses regardless of filing status. *See* Beck, supra note 3, at 324 & n.19; Murray, supra note 21, at 21, 53, 57, 61; ABA Report, supra note 121 at 2, 5; *see also* PUBLICATION 555, supra note 75, at 3-4 (stating that if spouses in community property states file separate federal returns, then each spouse must report half of the other spouse's earnings). In *Harrold v. Commissioner,* 22 T.C. 625, 627 (1954), *rev'd on other grounds,* 252 F.2d 527 (9th Cir. 1956), the Tax Court held that when spouses come under the jurisdiction of a community property state, that community property system is "not a means of splitting income which may be voluntarily chosen or elected to minimize taxes." *Id.* at 627-28 (quoting Hunt v. Commissioner, 22 T.C. 228 (1954)). Rather, each separately filing spouse is required to report half of the community earnings as income. *See id.; see also* United States v. Mitchell, 403 U.S. 190 (1971) (invoking a taxpayer who was a resident of a community property state and who owed tax on half of the earnings of her spouse for tax years in which the spouses had filed separately); Galliher v. Commissioner, 62 T.C. 760 (1974), aff'd, 512 F.2d 1404 (5th Cir. 1975) (same); *Quick & DuCanto, supra* note 57, at 78; cf Murray, supra note 21, at 53 (stating that income splitting was not optional, but required, in community property states as a result of *Seaborn*). Income splitting was, therefore, required in community property states even if couples filed separately.


158. See ABA Report, supra note 121, at 5. Although spouses in community property states enjoy the benefits of income splitting without filing jointly and without submitting to joint and several liability, each spouse is subject to limited exposure for the other's tax liability because the other's liability may be satisfied out of the community property, property in which the non-liable spouse has a one-half interest. See United States v. Rodgers, 461 U.S. 677, 700-02 (1983) (noting that I.R.C. provisions allow the government to enforce a lien upon any property owned by a delinquent taxpayer, including homestead property in which the taxpayer's spouse shares an ownership interest); Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles,* 1997 U. ILL. L. REV. 453, 468 n.83 (stating that "[f]ederal tax liabilities also may be imposed against community property"); James J. Hall, *IRS Requests Comments on Tax Treatment of Divorced Taxpayers,* WEST'S LEGAL NEWS, Mar. 27, 1996, available in 1996 WL 259303. Furthermore, each separately filing spouse is liable for the tax on half the other's community property earnings by virtue of his or her one-half interest in those earnings. *See, e.g.,* Mitchell, 403 U.S. at 191-92; Galliher, 62 T.C. at 760; Williams v. Commissioner, 38 T.C.M. (CCH) 718 (1979); Felchland v. Commissioner, 34 T.C.M. (CCH) 1312 (1975); Coffman v. Commissioner, 33 T.C.M. (CCH) 1416 (1974); Ramos v. Commissioner, 28 T.C.M. (CCH) 781 (1969); Quinn v. Commissioner, 31 T.C.M. (CCH) 453 (1972); Beck, supra note 157, at 30, 33; Murray, supra note 21, at 21, 53, 57, 61; *Quick & DuCanto, supra* note 111, at 78; *ABA Report, supra* note 121, at 2, 5.

income splitting may be called into question also because it is frequently less valuable than is the benefit obtained by avoiding the marriage penalty through delaying marriage or through divorce. Consequently, income splitting can hardly be viewed as a benefit at all when compared to the even more beneficial tax rates that apply to single, unmarried taxpayers.

Making joint and several liability the price for the benefit of income splitting is unjust in another respect. The price paid through joint and several liability bears no relation to the value of the benefit received.

(e)(1)(A) (providing that a joint return must have been filed to make spouse eligible for innocent-spouse relief).

159. See Beck, supra note 3, at 372; Edison-Smith, supra note 4, at 125; Zorn, supra note 21, at 435. The benefit of income splitting is frequently too small to counter the penalty imposed upon marrying that exists for many couples under the current rate structure. See Christian, Joint Rate Structure, supra note 20, at 276-77. The marriage penalty is the phenomenon by which a married couple's tax liability is greater than the combined tax liabilities of two single people each earning the same incomes. The couple is essentially penalized for marrying. For excellent explanations and descriptions of the marriage penalty, see generally Bittker, supra note 25; Kornhauser, supra note 73; McCaffery, supra note 26; Zelenak, supra note 75. See also Tax Treatment of Married, Head of Household, and Single Taxpayers: Hearings Before the House Comm. on Ways and Means, 96th Cong. 1 (1980); Economic Problems of Women: Hearings Before the Joint Economic Comm., 93d Cong., 221-87, 604-09 (1973-74) [hereinafter Economic Problems of Women]; STAFF OF JOINT COMM. ON TAXATION, 96TH CONG., THE INCOME TAX TREATMENT OF MARRIED COUPLES AND SINGLE PERSONS 3-7 (Comm. Print 1980); U.S. DEPT OF TREASURY, BLUEPRINTS FOR BASIC TAX REFORM, 102-07, 172-76 (1977). Z. I. GIRALDO, CENTER FOR THE STUDY OF THE FAMILY AND THE STATE, TAX POLICY AND THE DUAL-INCOME FAMILY: THE "MARRIAGE TAX" AND OTHER INEQUITIES (1978). By marrying, the taxpayers forgo two separate starts up the progressive rate schedule for unmarried individuals and, instead, subject their combined incomes to the progressive rates for married couples. Marriage penalties are worst for couples in which spouses' incomes are similar. See Christian, Joint Rate Structure, supra note 20, at 272-76.

160. Another reason why joint and several liability should not be viewed as the price imposed for the benefit of income splitting is that the government is permitting the public to remain unaware that any such price is being charged. That is, the government has failed to publicize adequately that spouses will be subject to joint and several liability if they file jointly. See Beck, supra note 3, at 325 & n.22 (noting based on his informal survey, that it is unlikely that many women are aware that, by filing jointly, they assume joint and several liability for any deficiency that is later assessed). Accord Edison-Smith, supra note 4, at 128. The tax return itself contains no warning that filing jointly triggers joint and several liability. See INTERNAL REVENUE SERVICE, DEPT OF THE TREASURY, FORM 1040 (1996); Beck, supra note 3, at 325; Jerome Borison, Alice Through a Very Dark and Confusing Looking Glass: Getting Equity from the Tax Court in Innocent Spouse Cases, 30 Fam. L.Q. 123, 126 (1996). A short warning appears in the Instructions to Form 1040:

A husband and wife may file a joint return even if only one had income or if they did not live together all year. However, both must sign the return and both are responsible. This means that if one spouse does not pay the tax due, the other may have to.

INTERNAL REVENUE SERVICE, DEPT OF THE TREASURY, 1040 FORMS AND INSTRUCTIONS 11 (1996). However, as Professor Beck has noted, the spouse who does not prepare the return has no occasion to review the instructions, and consequently, may not see that warning. See Beck, supra note 3, at 325-26. Furthermore, as written, the warning may not apprise the reader of the full extent of his or her potential liability by "fail[ing] . . . to mention that . . . liability extends to items [which] . . . are later disallowed . . . [or] to items that do not appear on the return at all." Id. at 326; see also id. at 326 & n.24. The inadequate notice that the income-splitting benefit comes at the cost of joint and several liability encourages people to undertake burdens without meaning to and without knowing that they have. It is my position, however, that even if the public in general, as well as joint filers in particular, were adequately informed of the existence of joint and several liability, that regime would still be unjustified.
through income splitting.\textsuperscript{161} Income splitting may save a couple a few hundred dollars in taxes, or even less.\textsuperscript{162} The price charged each spouse for this benefit is the potential for virtually unlimited liability, one that is limited only by the amount of deficiency the other spouse causes. If joint and several liability were the price charged for the benefit of income splitting, that price should bear some reasonable relation to the benefit received.\textsuperscript{163}

If joint and several liability is the cost imposed for the benefit of income splitting, then any tax reform movement that proposed to eliminate income splitting should be justified in eliminating joint and several liability as well. If income splitting should be eliminated because of its unfair gendered effects,\textsuperscript{164} then repealing joint and several liability, the quid pro quo for income splitting, would also be appropriate. Later, this Article will explain that income splitting should nevertheless not be viewed as a justification for joint and several liability because of systemic gender bias caused by the interaction of those two elements of the tax code.\textsuperscript{165} If income splitting should not be viewed as justifying joint and several liability, then one fewer reason exists for retaining joint and several liability.

\textit{D. Unjust Enrichment}

Perhaps the most compelling argument in favor of joint and several liability is that the non-delinquent spouse may enjoy the benefit of money that the other spouse improperly withheld from the Treasury and, therefore, ought to be responsible for that other spouse's underpayment.\textsuperscript{166} Of course, the law-abiding spouse often receives no

\textsuperscript{161} See Beck, supra note 3, at 322, 376; Edison-Smith, supra note 4, at 125-26.

\textsuperscript{162} For sample calculations of joint versus separate return liability, see Christian, \textit{Joint Rate Structure}, supra note 20, at 269, tbl.2. For example, a couple in which one spouse has taxable income of $80,000 and the other has taxable income of $40,000 would save $637 by filing jointly rather than separately. This example assumes that tax liabilities are computed using tax rate tables that are unadjusted for inflation. See I.R.C. \textit{\textsection} 1(a), (d) (1994); Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, \textit{\textsection} 13201, 1993 U.S.C.C.A.N. (107 Stat.) 416, 458.

\textsuperscript{163} See Beck, supra note 3, at 370; Borison \textit{supra} note 3, at 824 n.36; \textit{ABA Report}, supra note 121, at 3.

\textsuperscript{164} See Christian, \textit{Joint Rate Structure}, supra note 20, at 279-87, 355-63 (describing numerous features of income splitting that tend to harm wives more than husbands, including the disincentive against paid workforce participation of the secondary earner, the transfer of wealth from wives to husbands that joint rates most likely effect \textit{vis-\`a-vis} separate rates, and the fact that automatic income splitting removes any tax incentive for husbands to transfer income-generating assets to their wives).

\textsuperscript{165} See \textit{infra}, notes 326-36 and accompanying text.

\textsuperscript{166} In fact, under the statutory exception to joint and several liability—the innocent spouse rules adopted in 1971—the unjust enrichment of a non-delinquent spouse has become grounds for denying her relief from joint and several liability. See I.R.C. \textit{\textsection} 6013(c)(1)(C)-(D) (providing that innocent spouse relief
financial benefit from the other spouse's underpayment. Many instances have arisen in which joint and several liability applied even when the non-delinquent spouse had not actually been enriched by the other's underpayment. For example, in \textit{Scudder v. Commissioner}, \textsuperscript{167} Mr. Scudder deserted his wife, the taxpayer, and absconded with the income omitted from their joint return. Nevertheless, the Tax Court ruled that because the Scudders had filed jointly, joint and several liability required the wife to pay tax on the omitted income. The court reached this result despite the fact that the wife had not been enriched by any tax savings and had, in fact, been economically harmed by her husband's actions. The income that had been omitted arose when the husband embezzled money from a business his wife owned.\textsuperscript{168} Accordingly, under joint and several liability, the Tax Court ordered Mrs. Scudder to pay tax on capital she already owned because her husband had embezzled it, thereby converting it into his income.

Although the Sixth Circuit reversed, it did not do so on the ground that joint and several liability was improper as a policy matter. Rather, the Sixth Circuit granted the wife relief under the theory that no valid joint return had been filed. The circuit court reasoned that the joint return must have been procured by the husband's fraud because he did not inform his wife of his embezzlement and that, therefore, the return was invalid.\textsuperscript{169} The Sixth Circuit seemed to be influenced by a desire to grant relief in this egregious case despite the fact that Congress had not enacted any exceptions to joint and several liability.\textsuperscript{170} Even though the Sixth Circuit reversed \textit{Scudder}, the Tax Court did not at that time view itself as bound in other cases by the Sixth Circuit's reasoning. Only after \textit{Golsen v. Commissioner}, \textsuperscript{171} which was decided three years after \textit{Scudder}, would the Tax Court view itself as bound by a contrary circuit court view, and even then, it would be bound only in cases appealable to circuits explicitly holding that contrary view. As a result, despite the Sixth Circuit's reversal in \textit{Scudder}, the Tax Court could continue to decide cases like \textit{Scudder} against the aggrieved taxpayer.

\textsuperscript{168} See \textit{James v. United States}, 366 U.S. 213 (1961) (establishing that embezzlement proceeds constitute income and are taxable).
\textsuperscript{169} See \textit{Scudder}, 405 F.2d at 222, 226.
\textsuperscript{170} See \textit{Philipps \\& Braford, supra} note 109, at 38.
\textsuperscript{171} 54 T.C. 742, 756-58 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971), cert. den'd, 404 U.S. 940 (1971).
Joint and several liability may apply even though the aggrieved spouse receives no benefit in other cases as well. For instance, an aggrieved spouse is subject to joint and several liability even when the delinquent spouse uses the improper tax savings to fund an affair with a paramour.\(^{172}\)

Even when the non-delinquent spouse enjoys the benefit of the unpaid tax liability, joint and several liability is not needed to prevent the unjust enrichment. In instances of unjust enrichment, the alternative doctrine of transferee liability provides an adequate means by which the government may collect the deficiency from the unjustly enriched spouse.\(^{173}\) Finally, joint and several liability is not a comprehensive solution to the problem of unjust enrichment because the potential for unjust enrichment exists even when spouses file separately and when joint and several liability does not apply.\(^{174}\) Thus, the joint-and-several-liability solution to unjust enrichment does not apply in all situations in which the problem arises and, thus, is not well suited to address the problem of unjust enrichment.\(^{175}\) It is overbroad in some instances—when the non-delinquent spouse does not enjoy the unpaid taxes—and is too narrow in other instances—failing to apply at all when spouses file separately.

The solution of transferee liability, which already exists in I.R.C. § 6901,\(^{176}\) is much better tailored than joint and several liability to

\(^{172}\) See, e.g., Allee v. Commissioner, 63 T.C.M. (CCH) 3088, 3089 (1992) (holding wife jointly and severally liable for deficiency created by her husband even though she lived modestly and even though during the years at issue, he had spent money on a mistress while telling his wife that they had no money).

\(^{173}\) See Beck, supra note 3, at 323, 400-08; Edison-Smith, supra note 4, at 127-28; cf. ABA Report, supra note 121, at 5 (noting the alternative doctrine of transferee liability but not studying the details of using it as a substitute for joint and several liability). See infra notes 176-203 and accompanying text.

\(^{174}\) Of course, in cases in which joint and several liability does not apply because spouses filed separately, the IRS may assert transferee liability against the unjustly enriched spouse. See, e.g., Edelson v. Commissioner, 829 F.2d 828, 830 (9th Cir. 1987) (the government successfully asserted transferee liability against a wife for a year in which the spouses had filed separate returns).

\(^{175}\) See Beck, supra note 3, at 323.

\(^{176}\) I.R.C. § 6901 (1994).

(a) Method of Collection.—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:

(1) Income, Estate, and Gift Taxes.—
(A) Transferees.—The liability, at law or in equity, of a transferee of property—
(i) of a taxpayer in the case of a tax imposed by subtitle A (relating to income taxes),

in respect of the tax imposed by subtitle A or B.

(h) Definition of Transferee. - As used in this section, the term "transferee" includes donee, heir, legatee, devisee, and distributee, . . . .
address the problem of unjust enrichment. In fact, the government has occasionally asserted transferee liability successfully against the spouse of the delinquent taxpayer in situations in which joint and several liability was unavailable.177

Congress first introduced transferee liability into the Internal Revenue Code in 1926178 in response to taxpayers' efforts to render their tax liabilities uncollectible by transferring their assets to others. Prior to the adoption of transferee liability, the government's only remedy had been to sue in equity to set aside the conveyance as fraudulent. Whenever the transferee-taxpayer remained alive, the government first had to obtain a judgment against the transferor in an action at law before initiating the suit in equity.179 The advent of transferee liability in 1926 facilitated the government's collection efforts by streamlining the procedure. "Section 6901 does not create a separate liability for the transferee; instead, it merely provides for a secondary method of enforcing the liability of the transferor."180

To invoke I.R.C. § 6901 transferee liability against a spouse, the government must show that the spouse generating the tax deficiency transferred property181 to the other spouse without receiving adequate

177. See, e.g., Edelson v. Commissioner, 829 F.2d 828, 830 (9th Cir. 1987) (the government successfully asserted transferee liability against a wife for a year in which the spouses had filed separate returns); Mysse v. Commissioner, 57 T.C. 680, 692, 696 (1972) (the government successfully asserted transferee liability against a wife who could not be held jointly and severally liable because she qualified as an innocent spouse under I.R.C. § 6013(e)); United States v. Floresch, 276 F.2d 714, 718 (10th Cir. 1960), cert. denied, 364 U.S. 816 (1960) (the government could proceed against the spouse of a delinquent taxpayer where the statute of limitations had expired as to the theory of joint and several liability but not as to the theory of transferee liability).


180. Id. at iii; see also Phillips v. Commissioner, 283 U.S. 589 (1931), aff'd, 42 F.2d 177 (2d Cir. 1930), aff'd, 15 B.T.A. 1218 (1929); Commissioner v. Stern, 357 U.S. 39 (1958), aff'd, 242 F.2d 322 (6th Cir. 1957), rev'd, 15 T.C.M. (CCH) 114 (1956).

181. See I.R.C. § 6901(a)(1) (1994). For example, in United States v. Altmark, the court found that no transfer had occurred and, thus, that the alleged transferee could not be held liable. 331 F. Supp. 1347 (E.D.N.Y. 1971); see also Gordon v. Commissioner, 27 B.T.A. 377 (1932), aff'd, XII-1 C.B. 5 (1933).
consideration\textsuperscript{182} and that the transferor-spouse was liable for tax both at the time of the transfer\textsuperscript{183} and also at the time transferee liability was asserted against the transferee-spouse.\textsuperscript{184} If the courts were to decide that the sharing of living expenses over and above normal support does not rise to the level of a property "transfer," Congress could amend § 6901 to specify that such sharing does constitute a transfer.\textsuperscript{185}

Additionally, for transferee liability to apply, the transferor-spouse must generally be insolvent at the time of the transfer either before, or as a result of, the transfer.\textsuperscript{186} Income tax liability is considered in determining whether or not the transferor is insolvent.\textsuperscript{187} The transferor must also be insolvent at the time the IRS asserts transferee liability against the transferee spouse.\textsuperscript{188} Thus, if the transferor-spouse remains solvent despite the property transfer, the IRS cannot use transferee liability as a procedure to collect from the non-delinquent spouse. Appropriately,

\begin{itemize}
\item \textsuperscript{182} See, e.g., Goemans v. Commissioner, 279 F.2d 12 (7th Cir. 1960); Estate of Miller v. Commissioner, 42 T.C. 593 (1964); First Nat'l Bank of Chicago v. Commissioner, 255 F.2d 759 (7th Cir. 1958); Reinecke v. Commissioner, 220 F.2d 406 (8th Cir. 1955), cert. denied, 350 U.S. 829 (1955); Beck, supra note 3, at 402. Unfortunately, transfers made pursuant to a divorce under state equitable distribution laws are probably considered transfers unsupported by adequate consideration, see id., at 405-06, and thus, probably constitute transfers that could subject the wife to § 6901 transferee liability. Holding such transfers to be unsupported by consideration is contrary to the intent of equitable distribution laws which treat the wife as though she owns some of the marital assets, even when title is not in her name.
\item \textsuperscript{183} See, e.g., Papineau v. Commissioner, 28 T.C. 54 (1957); Rosenthal v. Allen, 75 F. Supp. 879 (M.D. Ga. 1948).
\item \textsuperscript{184} See, e.g., Januschke v. Commissioner, 48 T.C. 496 (1967), acq., 467-2 C.B. 2.
\item \textsuperscript{185} Ordinarily one would treat the sharing of living expenses as transfers by the earning spouse that are in satisfaction of that spouse's legal obligation to support his mate. As such, these transfers would ordinarily be viewed as being supported by consideration—the discharge of the support obligation. See Rev. Rul. 68-379, 1968-2 C.B. 414 (holding that a release of support rights constitutes "consideration in money or money's worth" for gift tax purposes). However, in Marine Midland Bank v. Botson, 70 Misc. 2d 8, 11-12, 332 N.Y.S.2d 714, 718-19 (Sup. Ct. 1972), the court ruled that satisfaction of the obligation to support a spouse would constitute consideration for purposes of determining a fraudulent conveyance only in cases of bona fide matrimonial disputes. Thus, sharing of living expenses in intact marriages, though in satisfaction of a support obligation, would be treated as a transfer unsupported by consideration under § 6901 despite legally imposed spousal-support obligations.
\item \textsuperscript{186} See, e.g., Kreps v. Commissioner, 351 F.2d 1, 9-10 (2d Cir. 1965), aff'd, 42 T.C. 660, 669 (1964); Stockes v. Commissioner, 22 T.C. 415, 415, 429 (1954), acq., 1954-2 C.B. 5; Reinecke v. Commissioner, 220 F.2d 406, 407 (8th Cir. 1955), cert. denied, 350 U.S. 829 (1955); Beck, supra note 3, at 323, 402. The element of insolvency arises under the law of the state in which the transfer occurred. Most state fraudulent conveyance statutes require the transfer to be set aside if the transferor was or became insolvent at the time of or as a result of the transfer. The applicability of state law relates to the use of transferee liability in equity, but not to transferee liability at law. Transferee liability at equity arises much more frequently because liability at law is based on the transferee's express agreement to pay the transferor's federal income tax liability. See ALVIN L. STORRS, TRANSFEREE LIABILITY A-9 (Tax Management Portfolios, No. 158-4th, 1992).
\item \textsuperscript{187} See, e.g., Scott v. Commissioner, 117 F.2d 36, 37 (8th Cir. 1941); Kreps v. Commissioner, 351 F.2d 1, 9 (2d Cir. 1965), aff'd, 42 T.C. 660 (1964).
\item \textsuperscript{188} See Beck, supra note 3, at 402.
\end{itemize}
the IRS would be forced to seek payment from the spouse who generated the deficiency before proceeding against the other spouse. Furthermore, because the transferee is merely secondarily liable for the tax, and the transferor remains primarily liable, the IRS generally must exhaust all of its legal remedies against the transferor before proceeding against the transferee. Consequently, liability may not generally be asserted against a transferee if the transferor-spouse is financially able to pay or if the IRS has not attempted to collect the deficiency from the transferor. This treatment is appropriate. Where the delinquent spouse has assets, the IRS should proceed against him or her before attempting to collect from the other spouse. By contrast, the IRS may assert joint and several liability against a non-delinquent spouse even if the guilty spouse has the resources to pay the deficiency and even if the IRS has not instituted any proceedings against the guilty spouse. In these regards, transferee liability is significantly fairer than joint and several liability, insulating the law-abiding spouse whenever the true earner can be found and whenever he has assets enabling him to pay.

The instances in which transferee liability would fail to prevent unjust enrichment seem to be limited to those in which shifting liability to the non-delinquent spouse would be unfair. Thus, as a policy matter, transferee liability, more often than joint and several liability, should lead to the correct result. For example, transferee liability would not always prevent unjust enrichment because it is not available if the transferor-spouse remains solvent. Of course, if the transferor spouse remains solvent, the IRS should appropriately seek payment from that transferor spouse.

In addition, transferee liability may not prevent unjust enrichment if the transfer is deemed to be supported by adequate consideration. A wife's right to support has been held to constitute adequate consideration for these purposes. However, the matrimonial dispute


190. See, e.g., Gordon v. United States, 757 F.2d 1157 (11th Cir. 1985) (holding that wife was liable for joint return deficiency resulting from excessive tax refund to husband even though husband had, in fact, received that excessive refund); Kline v. Commissioner, 68 T.C.M. (CCH) 425 (1994) (holding wife liable for joint tax deficiency attributable to husband even though husband had significant earning power and a successful business).

191. See, e.g., Edison-Smith, supra note 4, at 123 (describing the Internal Revenue Service's "preference for pursuing wives in joint liability actions").

192. See Beck, supra note 3, at 323.

must be real to render her right to support adequate consideration. Transfers between spouses living together in harmony, therefore, would not be treated as being supported by consideration, and transferee liability could, under current law, be imposed on the wife in such instances. Transfers pursuant to divorce generally would be supported by adequate consideration if made in exchange for the wife’s release of her support rights. Consequently, I.R.C. § 6901 would not generally render an ex-wife liable for tax attributable to her former husband. Under joint and several liability, by contrast, a wife can be held liable for the tax of her former husband for tax years in which they filed jointly even if the couple has since divorced and executed a final property settlement agreement. As a policy matter, shifting the tax liability of one spouse to the other is especially undesirable in divorce situations because the spouses have already finalized their financial obligations to each other and because reopening a closed divorce proceeding to make an offsetting adjustment to the property settlement is rarely permitted. The post-divorce imposition of liability on one spouse for taxes on the other’s income effectively changes the division of property contained in the property settlement agreement. Given the financial hardship divorce imposes on many women, any rule that

194. See Marine Midland, 332 N.Y.S.2d at 718-19.
195. See Davis v. Birdsong, 275 F.2d 113, 115 (5th Cir. 1960). The court noted that the widow was responsible under the doctrine of transferee liability for her deceased husband’s tax deficiency because after his death, some of his assets had been transferred to her to satisfy his state-created obligation to support her. See id. The transfer was, therefore, not considered to be supported by adequate consideration even though it discharged a support obligation. See id. at 116. Note that the transfer did not arise in the context of a divorce.
196. Harper v. United States is not to the contrary. 769 F. Supp. 362 (M.D. Fla. 1991). In Harper, an ex-wife was held liable as a transferee for her ex-husband’s income tax liability where he transferred property to her as part of an alleged property settlement. See id. at 364, 367. The court noted that the ex-husband was aware of potential tax liability at the time of the transfer, see id. at 367, that the purported property settlement was never put in writing, see id. at 364, and that the wife’s subsequent sale of transferred assets appeared to be part of an effort to place the property beyond the government’s reach. See id. at 367. The court addressed the issue of whether the transfers were supported by adequate consideration by noting that the “deeds conveying the property reflect[ed] that . . . [the ex-wife had] paid no monetary consideration . . . [and that those deeds] were prepared by [the ex-wife’s] . . . daughter over two months after the divorce was final.” Id. The implication was, therefore, that the property was not transferred pursuant to a property settlement upon divorce, and that consequently, the transfers were not supported by adequate consideration. Presumably, therefore, a property transfer pursuant to divorce would normally be treated as being supported by adequate consideration. But see Beck, supra note 3, at 405-06 (asserting that transfers made pursuant to divorce under state equitable distribution laws are probably considered to be transfers unsupported by adequate consideration for § 6901 purposes).
197. See Beck, supra note 3, at 328; Edison-Smith, supra note 4, at 124.
198. See Beck, supra note 3, at 320, 328; Edison-Smith, supra note 4, at 124.
199. See, e.g., Beck, supra note 3, at 330, 384 (noting the insecure economic position of divorced women in the United States); WEITZMAN, THE DIVORCE REVOLUTION, supra note 75, at 323-56 (asserting that in 1985 women on average experienced a 73% decline in their standards of living in the year after
could require wives to pay their ex-husband's tax liabilities is unjust and may foreseeably lead to harsh consequences. 200

Under I.R.C. § 6901, the transferee's liability is limited to the amount transferred from the delinquent spouse, thereby preventing unjust enrichment without saddling the transferee with liability in excess of that enrichment. 201 By contrast, joint and several liability imposes liability on the non-delinquent spouse for the entire tax deficiency, potentially far beyond any unjust enrichment. Joint and several liability has, in fact, been upheld even when the delinquent spouse's deficiency exceeded the other taxpayer's assets altogether. 202 Transferee liability could prevent unjust enrichment of the non-delinquent spouse more effectively than does joint and several liability without the unfair and harsh results that joint and several liability often produces.

Transferee liability functions to prevent spouses from evading tax liability by arranging for all property ownership to be transferred to the non-earner. Without either transferee liability or joint and several liability, spouses could conspire to place property beyond the reach of the taxing authorities by putting it in the name of the non-earner, the spouse not liable for tax. Transferee liability addresses this problem by allowing the government to proceed after that transferee spouse. 203

E. Property Interest in the Earnings: A Spouse Should Not Be Required to Bear Tax Liability Arising From Income that the Spouse Neither Owns Nor Controls

In other countries, the spouse with an ownership interest in the earnings has historically been the party governments have chosen to tax

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200. See Beck, supra note 3, at 329; cf. Quick & DuCanto, supra note 111, at 67 (noting that when divorce is imminent, the tax savings from joint filing must be weighed against the risks of joint and several liability).

201. See, e.g., Harrison v. Commissioner, 173 F.2d 736 (5th Cir. 1949); Wiener v. Commissioner, 12 T.C. 701 (1949); Reinecke v. Commissioner, 220 F.2d 406 (8th Cir. 1955), cert. denied, 350 U.S. 829 (1955); Beck, supra note 3, at 323, 406-07.

202. See Beck, supra note 3, at 323-24 (discussing facts of a case in which ex-wife was assessed more than $12,000 in back taxes attributable to her ex-husband. The assessment exceeded her annual income. The husband, by contrast, had significant earnings and a savings account); see also LaBelle v. Commissioner, 47 T.C.M. (CCH) 1078 (1984), remanded by an unpublished order, (9th Cir. 1984), rev'd by 52 T.C.M. (CCH) 1256 (1986).

203. See Cummins, supra note 135.
on those earnings.\textsuperscript{204} In fact, the U.S. rule of joint and several liability is unique in the developed world: no other country forces a wife to pay the taxes of her ex-husband.\textsuperscript{205} The reason for the principle that tax should be imposed on the income owner is that the owner of the earnings is considered to have the best financial ability to bear a tax on them. Taxing the earnings to someone with no ownership interest in them would violate the fundamental principle that tax should be imposed in accordance with ability to pay.\textsuperscript{206}

The United States followed this tradition of imposing tax liability on the income owner\textsuperscript{207} until 1938 when Congress enacted joint and several liability. Prior to that congressional action, the United States Supreme Court, in \textit{Poe v. Seaborn},\textsuperscript{208} ruled that the owner of the earnings under

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\textsuperscript{205} See Beck, supra note 3, at 382-83; Cummins, supra note 155; H.J. Cummins, \textit{Paying for the Sins of a Spouse}, \textit{PHILADELPHIA INQUIRER}, Feb., 14, 1994, at D10; \textit{ABA Report}, supra note 121, at 2, 9 n.5; see also id. at 9-10 nn.8-10 (discussing liability rules employed in Spain, France, Germany, and Holland).

\textsuperscript{206} See Christian, \textit{Joint Rate Structure}, supra note 20, at 282-84; Schneider, supra note 23, at 106 (noting that it is unusual for income to be taxed to someone other than the person who received it); Edison-Smith, supra note 4, at 126; Davis, supra note 107, at 222; Walter J. Blum & Harry Kalven, Jr., \textit{The Uneasy Case for Progressive Taxation}, 19 U. CHI. L. REV. 417, 451-55 (1952) (discussing ability to pay as an appropriate goal for the tax system in connection with progressivity); Kornhauser, supra note 73, at 74, 92 (stating that tax burdens ought to be distributed according to ability to pay); Staudt, supra note 107, at 1641-42; Zelenak, supra note 75, at 357; cf. Robinson & Wenig, supra note 23, at 777 (note that the tax system was designed to take ability to pay into account).

\textsuperscript{207} See generally Blum & Kalven, supra, at 480-84 (discussing theories of what constitutes ability to pay); M. Slade Kendrick, \textit{The Ability-to-Pay Theory of Taxation}, 29 AM. ECON. REV. 92, 92-101 (1939). That tax should be imposed in accordance with the taxpayer's ability to pay is so highly ingrained in the U.S. tax system that it appears in a variety of contexts. For example, a taxpayer does not owe tax on the appreciation of property until he or she sells or otherwise disposes of the property obtaining the cash from which the tax can be paid. See Cottage Savings Ass'n v. Commissioner, 499 U.S. 554, 566-67 (1991); Eisner v. Macomber, 252 U.S. 189, 207-19 (1920) (imposing a realization requirement). Similarly, a taxpayer need not recognize gain upon giving away appreciated property. See I.R.C. § 1015(a) (1994) (requiring donor's gain eventually to be taxed to the donee instead of the donor by requiring donee to take a carryover basis); see also Taft v. Bowers, 278 U.S. 470 (1929). By making a gift, the taxpayer would have received no value in exchange from which he or she could satisfy a tax obligation. Of course, some situations exist in which a taxpayer incurs a tax obligation despite a lack of liquidity. See, e.g., Treas. Reg. § 1.451-1(a)(1) (as amended in 1995); Treas. Reg. § 1.446-1(c)(1)(i) (as amended in 1995) (providing that an accrual-basis taxpayer must pay tax on income that has not yet been received). For a list of examples in which Congress has taxed according to ability to pay and other examples in which Congress has taxed without regard to ability to pay, see Staudt, supra note 107, at 1628-29. Generally, Congress departs from ability-to-pay principles only in instances where the other compelling policy justifies a departure from that general rule. See, e.g., id. at 1629 n.255.

state law is the person properly liable for tax on those earnings. In *Seaborn*, the Court held that state community property laws permitted a husband and wife to split their incomes for federal income tax purposes. Under the community property regime in question, the non-earning spouse had an immediate, vested one-half ownership interest in the earnings of the other spouse. As a result, the Court held that the income was properly taxed half to each owner: half to the earner and half to the nonearner. The rationale underlying *Seaborn* indicated that state-created property rights in the earnings governed the selection of the taxpayer for federal income tax purposes.

The wife has, in Washington [state], a vested property right in the community property, equal with that of her husband; and in the income of the community, including salaries or wages of either husband or wife, or both.

The law's investiture of the husband with broad [management] powers, by no means negatives the wife's present interest as a co-owner.

We are of the opinion that under the law of Washington the entire property and income of the community can no more be said to be that of the husband, than it could rightly be termed that of the wife.

We should be content to rest our decision on these considerations.

The Court then approved the taxpayer's arguments on statutory-construction and legislative-history grounds and refuted the Commissioner's arguments before ruling that "[t]he District Court was right in holding that the husband and wife were entitled to file separate returns, each treating one-half of the community income as his or her respective income." Furthermore, eight months earlier, the Supreme Court established in *Lucas v. Earl* that a wife may not be taxed on the income of her husband if she has no present ownership interest in that income under state law.

209. This doctrine has, in fact, also become law as to the issue of assignment of income derived from property. See, e.g., Helvering v. Horst, 311 U.S. 112, 114 (1940). Whoever owns the income-producing property is the proper person to be taxed on that income. See id. at 116-17. The owner of the income, the party with control over the income, is also the party taxed on it. See id.

210. See *Seaborn*, 282 U.S. at 113.

211. Id. at 111.

212. Id. at 113.

213. Id. at 118.

Income splitting, as required under Poe v. Seaborn, affected not only how the tax liability was computed, but also who would bear its burden because the taxpayers in Seaborn had filed separate tax returns.215 Because half of the income was taxed to the wife, she was liable for half of the total tax liability. Even if the husband had voluntarily paid both tax liabilities, technically the wife was the party liable for tax on half of the combined earnings.216 A husband’s voluntary payment of both tax liabilities out of his separate property would be deemed a gift to his wife of his separate property.217 If a husband were to pay both liabilities using community property, then each spouse would essentially bear his or her own half of the total tax liability. In either situation, income was attributed to the wife for purposes of tax computation and for purposes of determining who was liable for the tax. Because the spouses had filed separately, the Court did not need to address the question of who was liable for each half of the total tax liability. Nevertheless, it is unlikely that the Supreme Court would, for the separately filing wife, base her tax computation on her ownership interest in earnings without requiring her to bear the burden of that tax. As the owner of the income, she would properly be treated as bearing the tax on that income under ability-to-pay principles. Because Seaborn not only involved tax computation, but also affected who would be liable for tax, that case can be read as requiring that taxation follows ownership not only for computation purposes, but also for purposes of determining who should bear liability.

The Seaborn Court’s connection of ownership with tax liability is not unusual in American tax jurisprudence. The Supreme Court used the same theory in Hewering v. Horst218 to require income from property to be taxed to the property owner. Similarly, the grantor of a trust is taxed on the trust income if the grantor retains sufficient control over trust property to be considered the corpus owner.219

218. 311 U.S. 112, 114 (1940).
219. See, e.g., Blair v. Commissioner, 300 U.S. 5, 11 (1937); see also Helvering v. Clifford, 309 U.S. 331, 335 (1940) (prohibiting the shifting of income arising from trust assets because the “short duration of the trust, the fact that... [his] wife was the beneficiary, and the retention of control over the corpus by... [him] all... [led] irresistibly to the conclusion that... [the grantor] continued to be the owner”) (emphasis added); Internal Revenue Code of 1954, Pub. L. No. 83-591, §§ 671-678, 1954 U.S.C.C.A.N. (68A Stat. 226), 262-69 (codified as amended at I.R.C. §§ 671-679 (1994)).
The Supreme Court has also indicated that control over earnings, not only ownership, justifies the imposition of tax. Again, having control over earnings renders the controller financially able to bear the burden of the tax on the earnings. An individual lacking control over income may be unable to pay the tax on it. 220 In United States v. Robbins, 221 a California taxpayer attempted to split his income with his wife. The wife’s lack of a present property interest in her husband’s earnings under state law in force at the time led the Court to rule against the taxpayer and to prevent income splitting. At that time California property law conferred on the non-earning wife neither a present ownership interest in her spouse’s earnings nor any right to control them. In important dicta, the Supreme Court noted:

Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, . . . [the husband] alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. . . . That he may be taxed for such a fund seems to us to need no argument. . . . For not only should he who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife’s. 222

Clearly the Court, consistent with the ability-to-pay principle, viewed the issue of who controls the earnings as highly relevant to determining who should be taxed on them. Lack of both legal ownership and the right to control income would substantially impair an individual’s financial ability to pay tax on that income.

In numerous contexts, Congress has also expressed the notion that fairness requires the person with control of, power over, and access to income to be taxed on it, rather than someone else. For example, I.R.C. § 66 223 exempts the non-earning spouse from tax on her share of community income under certain circumstances that prevent her from controlling or enjoying that income. 224 This ability-to-pay rationale was

220. See supra note 206 and accompanying text.
221. 269 U.S. 315 (1926).
222. Id. at 327-28 (citations omitted) (emphasis added).
224. I.R.C. § 66(a) states:
Treatment of Community Income Where Spouses Live Apart.—If—
(1) 2 individuals are married to each other at any time during a calendar year;
(2) such individuals—
(A) live apart at all times during the calendar year, and
(B) do not file a joint return under section 6013 with each other for a taxable
also used to justify the 1941 change in the tax treatment of alimony.\footnote{225}{Prior to 1942, alimony had been excluded from the recipient's gross income and had been nondeductible by the payor.\footnote{226}{Consequently, the alimony payor had borne the burden of the income tax as to that payment even though he had no legal right to keep the payment. In 1941, Congress reversed this treatment\footnote{227}{so that tax on the alimony transferred would be imposed on the recipient—the spouse with the purported better ability to pay tax.\footnote{228}{The alimony payor would receive a deduction,\footnote{229}{and the payee would include alimony received in gross income.\footnote{230}{Taxing the payor on income he was required to pay as alimony had, in fact, resulted in “substantial hardship”\footnote{231}{in a number of cases.\footnote{232}{Therefore, of the two taxpayers eligible for taxation, Congress chose to tax the earnings to the recipient because she had a property interest in and control over them. The recipient was viewed as better able to meet the tax burden by virtue of her possession and control of the alimony payment. In changing the tax treatment of alimony, Congress “was expressing its concern that the incidence of the tax should follow the control of the income or be taxable to the spouse who had the use and benefit of that income.”\footnote{233}{Congress has uniformly applied the principle of taxing based on the ability to pay, that is, based on ownership and control over the earnings, year beginning or ending in the calendar year;

(3) one or both of such individuals have earned income for the calendar year which is community income; and

(4) no portion of such earned income is transferred (directly or indirectly) between such individuals before the close of the calendar year, then, for purposes of this title, any community income of such individuals for the calendar year shall be treated in accordance with the rules provided by section 879(a).

I.R.C. § 66(a) (1994). Under I.R.C. § 879(a), earned income other than trade or business income is treated as “the income of the spouse who rendered the personal services” generating the income. \textit{Id.} § 879(a)(1); see also id. § 66(b)-(c).

225. \textit{See} Murray, \textit{supra} note 21, at 55.


228. S. REP. NO. 673, Part I, 77th Cong. (1941) at 11-12.

Under existing law . . . a husband is taxed upon his entire income even though a considerable amount thereof may be going periodically to his spouse or to his former spouse under a court decree or under a written instrument incident to a divorce or separation. This situation has resulted in substantial hardship in certain cases.

\textit{Id.}


230. \textit{See id.} § 71.


232. Murray, \textit{supra} note 21, at 55.
except for one vast group: the group of joint filers who reside in the forty-two common-law jurisdictions. Since 1938 joint filers have been jointly and severally liable for the tax liability on their aggregate net incomes. Consequently, one spouse may be held liable for tax attributable to the income of the other. This liability rule has been adopted even though common-law states vest only the earning spouse with immediate and automatic property and control rights in the

233. See Beck, supra note 3, at 320 & n.4 (joint and several liability is contrary to notions of ability to pay); Zelenak, supra note 75, at 355 (noting that tax is imposed on the person who controls the income except for joint filers).

234. Presently, forty-one states and the District of Columbia are common-law marital property jurisdictions. The nine community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. See PUBLICATION 555, supra note 75, at 1. In fact, residents of these community property states who file jointly are also subject to joint and several liability, and, therefore, they also face potential tax liability being imposed on them without regard to their ability to pay. For example, under joint and several liability a wife residing in a community property state could find herself liable for a tax deficiency caused by earnings of her husband that he omitted from the joint return. This wife could be held responsible for 100% of the tax deficiency, even though her vested property interest in his omitted earnings extends only to half of them. In this manner, joint and several liability can result in the imposition of tax without regard to ownership of the underlying earnings, that is, without regard to ability to pay, even for residents of community property states. The situation is worse for residents of common-law marital property states in which the non-earning spouse has no ownership right during the marriage in any of the earnings of the other spouse. See supra note 75, and accompanying text. Because the situation is worse for residents of common-law states, I focus my discussion on those geographic regions.


236. The only means by which married residents of common-law states may avoid joint and several liability is to file separately, but by doing so, they lose the sometimes substantial benefits of income splitting. The current system, through income splitting, financially compels the vast majority of couples to file jointly, thereby requiring joint and several liability as a practical matter. See Bittker, supra note 25, at 1409 n.55; Beck, supra note 3, at 372 ("The tax system is designed almost to force married persons to file jointly rather than separately."); Mapes v. United States, 576 F.2d 896, 898 (Cl. Cir. 1978); McCaffery, supra note 26, at 989 n.17 (noting that the rate schedules make filing separately disadvantageous); Cummins, supra note 135 (noting that up to 99% of American couples file jointly). But see supra note 149 and infra note 308 and accompanying text (explaining the rare circumstances in which spouses may prefer to file separately).

In 1993, an estimated 95.2% of all returns filed by married taxpayers were joint returns, and an estimated 97.5% of all married couples filed jointly. These figures were derived from IRS statistics on the number of joint returns and the number of separate returns filed. In 1993, 48,298,687 returns in which spouses filed jointly were submitted to the IRS. See INTERNAL REVENUE SERVICE, U.S. DEP'T OF TREASURY, PUBLICATION 1304, STATISTICS OF INCOME—1993 INDIVIDUAL INCOME TAX RETURNS 35 tbl.1.3 (1996). Only 2,437,311 separate returns were filed by married taxpayers. See id. Consequently, the total number of returns filed by married taxpayers can be estimated to be 50,735,998. Of these, 48,298,687 or 95.2% were joint returns. When one spouse files separately, the other may also file separately or not at all depending on whether that other spouse has sufficient income to trigger the filing requirement. An estimate of the number of such couples would be half of the number of separate returns filed in 1993 or half of 2,437,311. This is not a precise estimate, however, because undoubtedly some spouses of separate filers did not file separately or at all on their own behalf. Nevertheless, assuming 1,218,656 couples filed separately, the total number of married couples who filed returns would amount to 49,517,343 and the percentage of couples who chose to file jointly could be estimated as 48,298,687 divided by the total number of couples who filed, or 49,517,343. In this manner the percentage of couples who filed jointly could be estimated at 97.5%.
earnings. Under joint and several tax liability, one spouse may consequently be held liable for tax attributable to the other’s income even though the first spouse has no property interest in or legal control over that income.

In enacting joint and several liability, Congress disregarded ability-to-pay principles and ignored the Ninth Circuit decision in Cole in which the court ruled explicitly that ability-to-pay concerns ought to trump administrative necessity arguments. In Cole and Uniacke, the Ninth and Second Circuits respectively had ruled against joint and several liability, explicitly stating that the non-earning spouse had no property interest in the income that resulted in the deficiency. The rule of joint and several liability directly contradicts the principle previously set forth in Seaborn in which a spouse may be taxed only to the extent he or she has a recognized legal ownership interest in the earnings. If the wife in a common-law state has no present property right in her husband’s earnings, then under the rationale of Seaborn, she should not be taxed on them. Yet taxing her on income in which she has no property or control rights is entirely possible under the rule of joint and several liability. In this manner joint and several liability subverts the purpose underlying the rule in which ownership and control identify the taxpayer. It subverts the principle that tax should be imposed in accordance with the ability to pay.

In fact, the whole purpose underlying joint and several liability is to separate tax liability from ownership of the income being taxed so that if the owner does not pay the tax, the IRS can proceed against someone.

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237. See supra note 75 and accompanying text.


239. See Cole v Commissioner, 81 F.2d 485, 488 (9th Cir. 1935).

Nor can the plea of administrative difficulty prevail against the fundamental requirement that a tax should be assessed according to the ability to pay. As was observed by the court in McIntosh v. Wilkinson (D.C.) 36 F. (2d) 807, 812, “Matters urged to defeat a liberal view of the statute[,] for example, that ‘great additional labor would be required,’ etc., are (in varying degree) potent against the whole theory of revision, or against any comprehensive system of corrective justice.”

Id. 240. See id. at 487, 489.

241. See Commissioner v. Uniacke, 132 F.2d 781, 783 (2d Cir. 1942).

242. See Cole, 81 F.2d at 490; Uniacke, 132 F.2d at 782-83.


244. See Kornhauser, supra note 73, at 74; see also supra note 206 and accompanying text; Lucas v. Earl, 281 U.S. 111, 114-15 (1930) (income earned by the husband was not taxed to the wife because state law did not give her a present vested ownership interest in his earnings).

245. It is noteworthy that ability-to-pay notions were respected when beneficial to husbands, the usual alimony payors, but that the principle was ignored when it would have helped wives—the spouse more disadvantaged under the regime of joint and several liability. See supra notes 225-32 and infra notes 280-349 and accompanying text.
else—the owner's spouse—to collect the asserted tax deficiency. This purpose is completely at odds with ability-to-pay principles and with the Supreme Court's analysis of the law as enunciated in Poe v. Seaborn and United States v. Robbins. Once Poe v. Seaborn became law in 1930, the Treasury Department should have been foreclosed from continuing any administrative practice of imposing joint and several liability on couples, a practice it first insisted on in 1923\textsuperscript{246} and continued through 1935 even after losing in Cole. The joint and several liability regime was unauthorized until Congress enacted it in 1938. Congress had the power legally to enact joint and several liability despite Poe v. Seaborn because that case was decided merely on statutory-interpretation grounds rather than on constitutional grounds. Because Congress has the power to modify legislation, Seaborn did not prevent Congress from enacting joint and several liability. At the same time, however, Congress's purported reason for enacting joint and several liability was to "clarify existing law," and under the existing law of Poe v. Seaborn, taxing earnings to a taxpayer who did not own those earnings was prohibited.\textsuperscript{247}

Joint and several liability was enacted to clarify existing law, for administrative necessity, and to impose a cost on the so-called benefits of joint filing,\textsuperscript{248} even though financial benefits from joint filing were essentially unavailable at the time.\textsuperscript{249} Although Congress had the power to enact joint and several liability, it should not have done so as a policy matter. The goal of imposing tax according to the ability to pay far outweighed the reasons cited in favor of joint and several liability. To ensure that taxes were imposed in accordance with the ability to pay, a long line of doctrine had established that the individual with ownership in or control over earnings should be chosen as the taxpayer.\textsuperscript{250} With the enactment of joint and several liability, Congress selectively obliterated the ability-to-pay principle for married couples filing jointly without offering coherent reasons for its sacrifice.

Where the system of taxation is generally based on ownership of or control over earnings, a liability scheme that imposes the tax on someone other than the owner or controller is not only unfair but also

\textsuperscript{246} See I.T. 1575, II-1 C.B. 144 (1923).
\textsuperscript{247} See Lucas v. Earl, 281 U.S. 111 (1930).
\textsuperscript{249} No financial benefits were available through joint and several liability in 1938 because income splitting had not yet been enacted for joint filers and because the 1935 regulations prohibiting the use of losses from one spouse to offset the gains of the other and limiting the charitable deduction to fifteen percent of the donor-spouse's separate net income had not yet been invalidated in the Supreme Court's 1940 Jamney and Taft decisions.
\textsuperscript{250} See infra, notes 208-32 and accompanying text.
unjustified in the absence of compelling reasons to depart from the general rule. The government has offered no forceful justification for joint and several liability. In common-law jurisdictions, solely the earner owns and controls the earnings during marriage. 251

By taxing the non-earner, the current tax system, through the combination of income splitting and joint and several liability, gives the earner the best of all possible worlds. Income is shifted to the non-earner for tax computation, or income splitting, purposes, even though the earner keeps and enjoys the shifted earnings. 252 Furthermore, because of joint and several liability, the earner may be able to transfer to the non-earner the tax liability on the entire income, both shifted and non-shifted portions. Filing jointly does not effect a conveyance of the earnings from one spouse to the other for ownership purposes, 253 but it

251. See supra note 75 and accompanying text.
252. See Christian, Joint Rate Structure, supra note 20, at 282-87. Several tax theorists have argued that the current regime of income splitting has permitted husbands to retain legal title to all their property, while transferring half their property to their wives for beneficial tax computation purposes. Providing the benefit of income splitting to married couples regardless of which spouse has legal ownership of the property eliminates any incentive for actual sharing of the property between spouses. See Gann, supra note 26, at 47 ("By solidifying separate ownership ... the irrelevancy of source of income [as between the spouses for tax purposes] may also have contributed to the economic dependence of women."); Winn & Winn, supra note 75, at 878; Robinson & Wenig, supra note 23, at 774-75 n.4; Bea Ann Smith, The Partnership Theory of Marriage: A Borrowed Solution Fails, 68 TEX. L. REV. 689 (1990); Zelenak, supra note 75, at 380 & n.199 ("[T]he tax laws should not reward spouses for sharing that does not exist."); Bittker, supra note 25, at 1395; Gann, supra note 26, at 27; cf. Bittker, supra note 25, at 1402.

[T]he income-splitting joint return authorized by Congress in 1948, which with only minor changes is still in effect, achieves the tax result that Mr. and Mrs. Earl were seeking in [Lucas v. Earl]. It does so, however, without requiring husband and wife to equalize their ownership interest in this respect, the Earl agreement might be regarded as an improvement over the 1948 statutory reform [because it shifted actual ownership of income rather than attempting to shift income for tax-computation purposes only].

Id. (footnote omitted); McCaffery, supra note 26, at 990 n.21 (noting the incongruity of shifting income for tax purposes when it is not shifted for ownership purposes); Zelenak, supra note 75, at 378-79, 386 (noting that by abolishing joint returns and by overruling Lucas v. Earl, that is, by permitting income to be split only if property is actually transferred to the nonearning spouse, an incentive would arise for husbands to share legal ownership of earnings with their wives); Kahng, supra note 75, at 3, 34, 50 (arguing that a similar feature within the estate tax removes the incentive for property to be transferred outright to wives).

253. See In re Illingworth, 51 A.F.T.R. (P-H) 1512 (D. Or. 1956). Although jointly filing spouses would have been jointly and severally liable for any deficiency, the wife in Illingworth was entitled only to that portion of a refund attributable to her own net income. See id. at 1513-14. Because no income or taxes were attributable to the wife, the court ordered her to endorse the refund check to her husband's bankruptcy trustee. See id. at 1514. The filing of a joint return does not change ownership interests between those filing the joint return. See In re Wetteroff, 453 F.2d 544, 547 (9th Cir. 1972); Glauke v. United States, 41 A.F.T.R.2d (P-H) 78-759, 78-760 (E.D. Va. 1978); Pettengill v. United States, 253 F. Supp. 321 (N.D. Ill. 1966); Dunn v. Commissioner, 22 T.C.M. (CCH) 915 (1963); In re Estate of Carson, 199 A.2d 407, 409 (N.J. Camden County Ct. 1964); In re Estate of Trecker, 215 N.W.2d 450, 454 (Wis. 1974); Beck, supra note 3, at 334, 394 & n.383. In these cases, when a joint return generated a refund and only the husband had income and deductions for the year, the husband, the husband's estate, or the husband's bankruptcy trustee, but never the wife, was entitled to the federal income tax refund. The filing of a joint
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F. Joint and Several Liability for Deficiencies is Inconsistent with the Administrative Approach to Tax Refunds

Another criticism of joint and several liability is that it is inconsistent with the IRS's approach to tax refunds. On the one hand, if spouses owe a one dollar tax deficiency, the IRS is entitled to collect it from either spouse under the rule of joint and several liability. On the other hand, had the same couple originally paid an additional two dollars with its tax return submission, then the couple would be entitled to a one dollar refund. Unlike joint and several liability where a deficiency can be collected from either spouse, this refund would not necessarily be made available to either or both spouses. Spouses have federally recognized rights to proportionate parts of a refund check. That is, each spouse's property interest is determined on the basis of what their respective tax liabilities would have been if computed separately and on the basis of the respective amounts withheld from their earnings. Thus, if one spouse owed an outstanding separate tax liability from a previous year, then the IRS would issue a refund check for the current joint return only to the extent that the other, non-

return had not effected a conveyance of post-tax earnings from husband to wife.

Only a few Pennsylvania lower court decisions are to the contrary. Two lower court Pennsylvania decisions allowing the nonearning wives, rather than the husbands' estates, to keep the joint return refund reflected the views of those courts that, under Pennsylvania property law, the filing of a joint federal tax return evidenced the spouses' intention to hold the refund as tenants by the entireties during their lives. Upon the death of either spouse, the right of survivorship operated to vest total ownership in the surviving spouse rather than in the decedent's estate. See In re Estate of MacNeill, 21 Pa. D. & C.2d 480 (1959); In re Estate of Green, 14 Pa. D. & C.2d 595 (1958). But see In re Estate of Jackson, 33 Pa. D. & C.2d 402 (1964) (holding that, by filing jointly, parties did not intend to hold a tax refund as tenants by the entireties). Only under Pennsylvania law has filing a joint return been interpreted as giving the nonearning spouse a property interest in a portion of the other's after-tax earnings, and then it was only in the tax refund portion of those after-tax earnings. See Christian, Joint Rate Structure, supra note 20, at 324 n.299. The wives' property interests did not extend to the husband's other after-tax earnings. See id. Furthermore, Pennsylvania courts take a minority view. All other reported cases dealing with this issue hold that the refund belongs to the spouse whose income and tax payments generated it. See In re Wetteroff, 453 F.2d at 547; Glaubk, 41 A.F.T.R.2d at 78-760; Priest, 253 F. Supp. at 321; Dunn, 22 T.C.M. (CCH) at 915; In re Estate of Carson, 199 A.2d at 409; In re Estate of Trecker, 215 N.W.2d at 454; Beck, supra note 3, at 334, 394 & n.383. In the vast majority of jurisdictions, filing a joint return does not effect a conveyance of any kind between the spouses. In the 40 common-law jurisdictions other than Pennsylvania, joint filing has never been treated as conferring property rights on the non-earner.

delinquent spouse had a property interest in that refund. Consequently, in Matter of Illingworth, the taxpayer’s argument that she would have been jointly and severally liable in the case of a tax deficiency did not, according to the court, entitle her to the joint return tax refund where no income or taxes had been attributable to her. Although jointly filing spouses would be jointly and severally liable for any tax deficiency, as to a refund, each spouse was entitled only to that portion of a refund attributable to his or her own net income.

If the government recognizes an apportionment of a federal tax refund, then it should also recognize spouses’ relative contributions to tax deficiencies as well and assess tax deficiencies to the appropriate spouse, rather than to both on the basis of joint and several liability. The government’s inconsistency in apportioning refunds but not deficiencies is another feature illustrating the one-sided nature of current law and the unfairness of joint and several liability.

G. State Actions for Contribution

It must be acknowledged, of course, that a remedy is available to a spouse who is forced to pay a tax liability attributable to the other spouse. The aggrieved spouse may institute an action in state court, arguing a right of contribution from the delinquent spouse. Unfortunately, this remedy is often ineffective as a practical matter, inefficient for the legal system, and patently unfair in a variety of respects. A system whereby the IRS would be required to collect tax deficiencies from the spouses who generated them would be demonstrably superior.

First, the remedy of suing the delinquent spouse in state court is ineffective as a practical matter. For example, the legal fees an aggrieved spouse would have to incur to institute such an action may far exceed the amount of contribution to which she might be entitled. Furthermore, she may not have the financial resources to retain a lawyer.

258. See id. at 1513-14.
260. See Beck, supra note 157, at 31; Beck, supra note 3, at 331; Borison, supra note 3, at 824; Edison-Smith, supra note 4, at 124-25.
261. See Beck, supra note 3, at 331; Beck, supra note 157, at 32.
to undertake the suit. In such cases, the aggrieved spouse would be discouraged, or foreclosed as a practical matter, from using this remedy. She could very well be better off financially to pay her ex-spouse's tax deficiency and to forgo any type of recovery action against him.

Second, even when the remedy of suing for contribution in state court is pursued, it often leads to inadequate relief. For example, the aggrieved spouse must locate her ex-spouse to institute a legal action against him. Doing so is not always easy in cases where the spouses have divorced. In addition, even if the action against the delinquent ex-spouse is successfully instituted, the aggrieved spouse may receive inadequate relief even when the state court renders a favorable judgment. State courts are not as well versed in federal tax laws as are federal courts. As a result, it is more difficult for a state court to determine how much of the tax deficiency was attributable to the defendant spouse and, thus, how much he should reimburse to the aggrieved spouse. Federal courts would be better equipped to answer the salient questions: How did the deficiency arise? How much of it should the defendant-spouse bear? In fact, state court opinions examining one spouse's right to contribution from the other uniformly gloss over the issue of which spouse generated the deficiency. For example, except when an agreement or stipulation sets the spouses' relative contributions, these courts have commonly divided the tax deficiencies in half or on the basis of the spouses' respective net incomes without even discussing how much of the deficiency was generated by each spouse. Awarding contribution for only a portion of the tax deficiency paid would be completely inadequate if the deficiency arose entirely from the understated income of the defendant spouse. In

262. See Beck, supra note 157, at 32.

263. This incentive not to sue may exist even if the amount of the deficiency is significant to the aggrieved spouse because attorneys' fees may be even more significant.

264. This fact suggests that resolving spouses' relative responsibilities for tax deficiencies would be more efficiently carried out in one federal court proceeding in which the IRS and both spouses are all parties.


266. See Rocha, 297 P.2d at 506-07; Bormaster, 274 P.2d at 759; Rude, 48 T.C. at 174 (discussing whether wife could deduct as a non-business bad debt the amount her husband owed her pursuant to an earlier right of contribution judgment from a California state court); Hanson, 350 P.2d at 861.

267. See Chappell, 253 So. 2d at 285, 287 (party divided tax obligation in half, and had it not been for policy against withholding alimony, court seemingly would have allowed contribution on the basis of respective earned incomes); Miller, 310 N.Y.S.2d at 21.
such an instance, a ruling awarding contribution for the entire deficiency would be the only appropriate outcome. State courts' failures to examine the sources of the deficiencies indicate that even "successful" contribution actions may result in inadequate relief.

Third, state court contribution actions unfairly shift the government's costs of tax enforcement to the aggrieved spouse and shift the burden of proof from the presumed delinquent spouse to the aggrieved spouse. Both patterns contribute to grotesque inefficiencies in pursuing justice. Requiring a state contribution action instead of requiring the IRS to assert liability in the first instance against the delinquent spouse shifts the government's cost of tax enforcement to the aggrieved spouse. It becomes the aggrieved spouse, rather than the government, who must find the delinquent spouse and who must bear the cost of instituting the action to recover. Furthermore, the aggrieved spouse, rather than the government, must bear the costs of enforcing a favorable judgment when the delinquent spouse fails to comply with that judgment. This shifting of enforcement burden is not only unfair, but also inefficient because powerful statutory enforcement mechanisms are available to the IRS when a taxpayer fails to comply with an adverse judgment but are not available to private individual plaintiffs. Consequently, an unpaid judgment is manifestly more easily collected by the IRS than by an ex-spouse. Efficiency concerns suggest that the entity better able to collect the debt, the government, not the private aggrieved spouse, should be the party who pursues the delinquent spouse. Moreover, it is arguable

268. See Edison-Smith, supra note 4, at 125.
269. See Beck, supra note 3, at 362 n.228, 401-02. When contesting a deficiency, a taxpayer may either pay the tax deficiency and sue for a refund in district court or the Court of Claims, in which case the taxpayer will have already complied in the case of an adverse judgment, or petition the Tax Court for a redetermination of the unpaid deficiency.

In the case of a judgment adverse to the taxpayer in this latter scenario, the government enjoys more or less summary procedures for collecting the assessed amount in the face of taxpayer noncompliance. The IRS has the authority under I.R.C. § 6303 to give notice to the taxpayer demanding payment of the unpaid tax. See I.R.C. § 6303(a) (1994). After an unsuccessful notice and demand, the unpaid tax automatically becomes a lien in favor of the government on all of the taxpayer's property. See id. § 6321. Such a lien has priority over the claims of many other creditors. See J. MARTIN BURKE & MICHAEL K. FRIEL, TAXATION OF INDIVIDUAL INCOME 57 (4th ed. 1997). Furthermore, the IRS is authorized under I.R.C. § 6331 to collect the assessed tax by levying on most property on which a lien has been placed, including wages and bank accounts, if the taxpayer fails to pay the assessed tax within 10 days of notice and demand. The government's right to levy in this context "includes the power of distraint and seizure by any means." I.R.C. § 6331(b). Generally, the government must notify the taxpayer before levying on the taxpayer's property. See id. § 6331(d)(1). The levy remedy is available to the government without regard to the 10-day waiting period and without regard to the notice requirement, see id. § 6331(d)(3), if the IRS determines that the collection of the tax is in jeopardy. See id. § 6331(a); see also id. § 6861. Finally, the government is authorized to sell the seized property under I.R.C. § 6335 after notifying the taxpayer and the public of the forthcoming sale. See id. § 6335(b). These statutory remedies make the government far more able than a private plaintiff to enforce a judgment against a delinquent taxpayer.
that because of the government's powerful collection procedures and greater ability to damage the taxpayer's credit rating, a delinquent spouse would be more likely and willing to satisfy an adverse judgment in favor of the IRS than he would be to satisfy one in favor of his ex-spouse. Fewer instances of unpaid judgments should result from requiring the IRS to pursue the delinquent spouse rather than in the current situation in which it is the aggrieved spouse who is left to sue. If the IRS were forced to seek tax directly from the delinquent spouse, then additional suits to enforce favorable judgments should be minimized. By shifting the burden of enforcement from the IRS to the aggrieved ex-spouse, the efficiency of achieving justice is impaired.

Another effect of the current approach is to shift the burden of proof from the delinquent spouse to the aggrieved spouse. If the government sues the delinquent spouse directly, rather than using the rule of joint and several liability to collect from the other spouse, then the delinquent spouse has the burden of proving that the tax deficiency was incorrect. Under the rule of joint and several liability, however, the non-delinquent spouse defends herself from the government, thereby acquiring the burden of proof, often when she lacks the information needed to satisfy that burden. Furthermore, when that aggrieved spouse later seeks contribution from the delinquent spouse in state court, she, as plaintiff, again has the burden of proof. She must prove that she is entitled to contribution, and she may still lack the information necessary to satisfy that burden. Under the current system in which one spouse pays the other's tax deficiency and sues him in state court for contribution, the delinquent taxpayer never bears the burden of proof.

270. See TAX CT. R. 142(a); Lewis v. Reynolds, 284 U.S. 281, 283 (1932) (“The action to recover on a claim for refund is in the nature of an action for money had and received and it is incumbent upon the claimant to show that the United States has money which belongs to him.”).

A recent proposal would shift the burden of proof from the taxpayer to the IRS in some circumstances. See Internal Revenue Service Restructuring and Reform Bill of 1997, H.R. 2676, 105th Cong., 1st Sess. (1997). If this provision becomes law, then the IRS's pursuit of the non-delinquent spouse may not have the effect of shifting the burden of proof from the delinquent to the non-delinquent spouse. Rather, the IRS would have and retain the burden of proof under most circumstances. Most commentators oppose the proposed change in law, however, and it seems unlikely that it will survive in the Senate version of the bill. See CCH Tax Day: Federal, ABA Addresses Shifting the Burden of Proof to IRS in Court Proceedings, Jan. 28, 1998, available in Westlaw, F-98-028-024. The Treasury Department has noted that “it is appropriate for a person in control of the facts, such as the taxpayer, to have the burden of proof and that the [proposed] provision would ‘eventually lead to more intrusive audits.’” Id. Even if the proposed change becomes law, it is, therefore, unlikely to remain the law in the long run. It should be noted that joint and several liability itself, violates the Treasury Department's own argument that the party in control of the facts, the delinquent spouse, should be the party with the burden of proof, because the rule of joint and several liability shifts that burden to a party often lacking access to the relevant facts, the non-delinquent spouse. See accompanying text.

271. See Beck, supra note 3, at 363.

272. See id.
Thus, the current system essentially shifts the burden of proof from the wrongdoer to the innocent spouse and makes the attainment of justice substantially less likely.

The remedy of suing one's spouse or ex-spouse in state court is also harmful to the justice system because it requires the controversy to be resolved through two cases rather than one. Indeed, rather than resolving the question of who should pay the tax deficiency in one federal action, the federal action and a subsequent state action are required.\textsuperscript{273} Plainly, a more efficient use of judicial resources would permit the resolution of responsibility in the initial court action. The rule of joint and several liability and its remedy of a state contribution action thus contribute to judicial inefficiency.

\section*{IV. The Implications for Women of the Regime of Joint and Several Liability}

The tax law, as embodied in the regime of joint and several liability, is not neutral. It not only reflects long-standing social inequalities, but may also exacerbate them. Legal scholars have identified many respects in which the law is "male."\textsuperscript{274} That is, the hidden norm in the law is consistent with male experiences and treats those experiences as neutral. To the extent that women's experiences differ from those of men, those experiences are often not accounted for within prevailing legal doctrines and discourses.

From the IRS's point of view, joint and several liability is justified as a means of facilitating the collection of tax deficiencies: if \( Y \) generates a tax deficiency, then under joint and several liability, the IRS has the option to collect from either \( Y \) or \( X \). Nevertheless, joint and several

\begin{itemize}
\item \textsuperscript{273} See Beck, supra note 157, at 30 (stating that the wife has no right to require that her husband be joined in the IRS's case against her); Beck, supra note 3, at 328. Procedural difficulties seem to prevent the wife from joining the husband as a party to any tax litigation itself. No procedure is available for impleading the husband in the Tax Court, nor is there any way to force the IRS at the appeals level to assess or collect the tax from the husband.

\textit{Id.} With regard to cases in the district courts, there seems to exist no bar to making the husband a co-defendant for contribution in a refund suit against the government, or to making him an involuntary plaintiff. However, no cases seem to exist in which either of these procedures has been pursued. \textit{See id.} at 328 n.37. Of course, for federal district court procedures to be available, the aggrieved taxpayer must be able to gain access to the district court by first paying the tax assessment. \textit{See id.} Almost all innocent-spouse cases, in which the application of joint and several liability is contested, are tried in the Tax Court. \textit{See Borison, supra note 160, at 124 & n.7. Consequently, the procedures that exist in district courts for joining the delinquent spouse to the suit are largely unavailable as a practical matter.

\item \textsuperscript{274} See, e.g., Symposium, \textit{Is the Law Male?}, 69 CHI.-KENT L. REV. 293 (1993) (containing articles in which hidden gender bias is uncovered in the areas of tort law, family law, rape law, and the law of expert witnesses).
\end{itemize}
liability is objectionable not only on the ground that one person should never be held responsible for another's tax liability, but also because it disproportionately and systemically burdens women. Scholars have made compelling arguments that the joint and several liability scheme disproportionately harms women in its application. 275 This Article establishes that joint and several liability harms women systemically as well. The cost to women of joint and several liability is so great that the regime cannot be justified by any extra revenue that is potentially collected under it. 276

A. Women's Objections to Joint and Several Liability as Applied

Although neutral on their face, the joint and several liability provisions in the tax code have a substantially biased effect against women in their application. For a variety of reasons, seemingly neutral tax principles consistently disadvantage women more than men and, therefore, lack real neutrality. Although the code may not have been intended to discriminate against women, it has that effect because of its application to larger, preexisting social patterns. Such patterns include the tendency for husbands to be self-employed more often than their wives, to take more aggressive reporting positions than their wives, and to earn more than their wives. The tax laws did not cause these social patterns; however, they act upon these patterns through the system of joint and several liability to reinforce and exacerbate the economic inequality between men and women. 277

Examining the social context in which law functions is a long-accepted method for analyzing whether the law is biased as applied. 278

275. See Beck, supra note 3, at 320 & n.4, 327-28 n.34 (estimating that approximately 90% of the collections from the spouse who did not generate the deficiency penalized women and that only 10% penalized men); Cummins, supra note 135 (noting that researchers estimate that "95 percent of the [innocent spouse] cases are brought by women, and two-thirds of them lose"); Edison-Smith, supra note 4, at 119, 123-24; Zorn, supra note 21, at 424-25.

276. See Beck, supra note 3, at 407.

277. Cf Edward J. McCaffery, Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change, 103 YALE L.J. 595, 602-03 (1993) [hereinafter McCaffery, Slouching Towards Equality] (presenting a model illustrating how the tax system as a whole contributes to and compounds preexisting discrimination); McCaffery, supra note 26, at 988, 1035-46 (arguing that structural "aspects [of the tax laws] persist to this day, serving as an anchor against the emergence of more modern and flexible family models").

Similarly, the social reality in which the tax laws operate must be scrutinized to determine whether those tax laws function in a biased fashion.\textsuperscript{279}

Professor Beck has demonstrated that joint and several liability, as applied, has been used to collect husbands’ deficiencies from wives and ex-wives much more frequently than to collect wives’ tax bills from husbands and ex-husbands.\textsuperscript{280}

The statute is of course gender-neutral, but the vast majority of the reported innocent spouse cases (over 90% in 1987) involve wives who are forced to pay their husbands' taxes. One may suppose that the innumerable instances in which such deficiencies are paid rather than contested involve a similarly high proportion of women.\textsuperscript{281}

Joint and several liability has not necessarily been applied against women more than men because of discriminatory intent on the part of IRS agents.\textsuperscript{282} Rather, as enumerated by Professor Beck, other economic factors present in U.S. society contribute to the pattern. First,
men are more likely than women to be self-employed,283 and self-employment accords much greater opportunity to conceal income than a salary- or wage-earner would have.284 As a result, men are more likely than women to be able to conceal income and to assert improper deductions, thereby generating tax deficiencies. Second, psychological data suggest that, on average, men more than women tend to take aggressive reporting positions, and, therefore, men are again more likely than women to generate tax deficiencies.285 If true, a system in which deficiencies may be collected from the spouse who did not generate the deficiency would tend to inure to the benefit of the spouse more likely to create such deficiencies—the husband. Third, because women who work are less likely than men to be self employed,286 that is, they are more likely to be employed by someone else, it is often easier for the IRS to institute collection procedures against these women for a husband's deficiency by garnishing her wages than it would be to collect the deficiency from the self-employed delinquent husbands.287 For this same reason it is more likely that the IRS would try to collect a wife's tax deficiency from her than from her husband or ex-husband. Finally, the IRS may institute collection procedures more frequently against wives than against their husbands because after divorce or separation, wives are more easily located, being more likely to have remained in the marital home whose address was reported on the original return.288

Joint and several liability, as applied, is not only more likely to cause wives to pay the deficiencies of their husbands than the converse, but it is also more likely to shift larger burdens from husbands to wives and smaller burdens from wives to their husbands. Because wives have

283. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1989, at 380 tbl.627 (1989) (in 1987 there were 6,617,000 self-employed men and only 3,007,000 self-employed women); see also Beck, supra note 3, at 320 n.4, 377.


285. See Karyl A. Kinsey, Survey Data on Tax Compliance: A Compendium and Review, in AMERICAN BAR FOUNDATION TAXPAYER COMPLIANCE PROJECT WORKING PAPER 8716, at 29 (1987) (suggesting that, psychologically, men are more likely to take aggressive reporting positions than are women and that, in fact, they do so); Beck, supra note 3, at 376.

286. See Beck, supra note 3, at 377; see also supra note 283, and accompanying text.

287. See Beck, supra note 3, at 320.

288. See Cummins, supra note 135; Edison-Smith, supra note 4, at 123; Cummins, supra note 205, at D10; Borison, supra note 160, at 125-26; cf. Rankin, supra note 21 (noting that collection efforts often proceed against the non-delinquent spouse because she remains in the collection region in which the return was originally filed and because the spouse responsible for the deficiency has moved to a different IRS region).
lower average earnings than husbands, see Edison-Smith, supra note 4, at 120; Beck, supra note 3, at 320 n.4. Historically, men have earned significantly more than women. Although the wage gap between men and women diminshed between 1979 and 1993, women on average still earned significantly less than men did. See Tamar Lewin, Wage Difference Between Women and Men Widens, N.Y. TIMES, Sept. 15, 1997, at A1. In 1993, women's median earnings were 77% of men's. See id. Alarmingy, however, the most recent data indicate that the wage gap between men and women is again widening. See id. Thus, the median weekly earnings of full-time working women are approximately 75% of men's median earnings, down from 77% in 1993. See id. Data from the Bureau of Labor Statistics for the fourth quarter of 1995 show that "[w]omen who usually worked full time had median earnings of $407 per week, 74.3 percent of the $548 median for men." BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USUAL WEEKLY EARNINGS OF WAGE AND SALARY WORKERS: FOURTH QUARTER 1995 (1996). Even for men and women in managerial and professional specialty occupations and for college graduates with advanced degrees, men who usually worked full time earned significantly more than women who usually worked full time. See id. Men in those occupations earned $825 per week while such women earned $604 per week. See id. "Among college graduates with advanced degrees . . . the highest 10 percent of male workers earned $1,916 or more [per week], while the highest 10 percent of their female counterparts made [only] $1,403 or more." Id. Data from the Bureau of the Census also demonstrate that men entering the full-time work force earned significantly more than full-time female entrants. From 1991 through 1993, those men earned an average of $459 per week, while their female counterparts earned only $306 per week. See PAUL RYSCAVAGE, BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, CURRENT POPULATION REPORTS, HOUSEHOLD ECONOMIC STUDIES, DYNAMICS OF ECONOMIC WELL-BEING: LABOR FORCE, 1991 TO 1993, P70-48, at 2 tbl.B (1995). Assuming fifty weeks of work per year, the difference of $153 per week amounted to $7,650 less income for women than for otherwise similarly situated men. This disparity constituted half of the women's annual income. Women entering the full-time work force were earning only two-thirds of what full-time male entrants to the work force were making. Data from 1994 indicate that the median annual earnings of all full-time workers were $30,354 for men and $22,205 for women. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, HOUSEHOLD ECONOMIC STUDIES, INCOME AND POVERTY: 1994 INCOME SUMMARY, tbl.A (1996).

The above data compare earnings of full-time working men and women without regard to their marital status. Data comparing earnings of husbands and wives show an even greater disparity because many wives work only part time and others do not participate at all in the paid work-force. In 1992, only 59.2% of all married women were in the waged labor force. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1995, at 405 tbl.636 (1995). In that same year, married women, on average, contributed approximately 32% of their household's income. See LAWRENCE MISHEL & JARED BERNSTEIN, THE STATE OF WORKING AMERICA 1994-95, at 61 (1994). Census data from 1994 indicate that many more women than men work part-time or not at all. Full-time male workers numbered 51,580,000 while full-time female workers numbered only 34,155,000. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, HOUSEHOLD ECONOMIC STUDIES, INCOME AND POVERTY: 1994 INCOME SUMMARY, tbl.A (1996). Assuming a population with at least as many women as men, at least 17,000,000 more women than men worked either part time or not at all. Census data from 1994 indicate that the median income for married men whose wives were present substantially exceeded the median income for married women whose husbands were present. The median income for married men was $28,377, while the median income for married women was only $11,859. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, CURRENT POPULATION REPORTS, P60-165, tbl.P-11 (1997). These median incomes include incomes not only from full-time workers, but also the incomes of spouses who work part time and the incomes from those who do not participate at all in the labor force. See id. Professor McCaffery reports that, on average, married women earn approximately 46% of what their husbands earn. See McCaffery, supra note 26, at 994 & n.35 (citing Nancy E. Dowd, Work and Family: Restructuring the Workplace, 32 ARIZ. L. REV. 431, 445 n.86 (1990)).

In 1994, the percentage of wives who earned more than their husbands was only 18.9%. This figure was arrived at by adding together the number of couples in which wives with earnings earned more than their husbands who had earnings (7,218,000) and the number of couples in which the wife worked while
caused by the husband are likely to be greater than those caused by the wife. "A deficiency caused by the husband will, on average, be more onerous for the wife to pay than the other way around because the deficiency is likely to be larger, and because her earnings and ability to pay it are less."

For this reason, the burden of joint and several liability tends to be more onerous for women than for men. For example, in LaBelle v. Commissioner, the Tax Court held that Mrs. LaBelle, a public school teacher of learning-disabled children, was responsible for $380,000 in taxes and penalties that had arisen from a joint return her husband had filed for 1973, a year in which the LaBelles had been separated. Although she had neither income nor assets with which to pay even a fraction of the huge deficiency, joint and several liability required her to pay it in any event.

Considering the poverty
with which many American women are faced upon divorce, a rule which tends to impose liability on divorced women for the taxes of someone else should be viewed with particular suspicion.

As it applies in a social context in which husbands are self-employed more often than wives, take reporting positions that are more aggressive than those of their wives, and earn more than their wives, the regime of joint and several liability tends to be more harmful to women than to men.

B. Women's Objections to Joint and Several Liability on Systemic Grounds: The Tax Code Is Structurally Biased

Joint and several liability harms women not only as applied in the social context, but also systemically. This Article uses the terms "systemic" or "structural" gender-based objections to refer to means by which the tax system itself is designed internally to favor men over women. That is, systemic gender-based problems in the tax code are means by which two or more features of that code interact in a way that predictably harms women more, or more often, than men. Thus, a structural gender-based objection results from the internal design of the tax code rather than growing out of how one code provision interacts with, or applies to, a set of social patterns.

1. Patterns Inherent in the Joint Return Rate Structure

Joint and several liability interacts with other tax code provisions to create systemic bias in a variety of ways. To understand how joint and several liability interacts with other provisions to create systemic bias, it is necessary to understand the effects of those other provisions.

pay. See id. Fortunately for Mrs. LaBelle, Congress expanded the innocent spouse rules retroactively during her appeal to grant relief for deficiencies arising from improper deductions. See 52 T.C.M. at 1257. Accordingly, Mrs. LaBelle ultimately achieved relief from joint and several liability under the innocent spouse rules. See id. at 1258-59.

294. See supra note 199 and accompanying text.
295. See Beck, supra note 3, at 384; Edison-Smith, supra note 4, at 124.
296. Cf. Susan Girardo Roy, Note, Restoring Hope or Tolerating Abuse? Responses to Domestic Violence Against Immigrant Women, 9 GEO. IMMIGR. LJ. 263, 275-76 (1995) (providing a clear example of systemic or structural bias in the context of cases involving domestic violence against immigrant women). Elected state judges are familiar with domestic violence issues but may hold the electorate's hostility against immigrants, while federal judges understand immigration issues but tend to have little experience with domestic violence issues. See id. at 276. Thus, the required dichotomy between federal and state courts tends to impede the fair and correct resolution of both issues for domestically abused immigrant women. See id.
Specifically, an understanding of the joint return rate structure is necessary.

Joint and separate return rates are related to each other by the concepts of income splitting and aggregation. Those two features are present in the joint return rates and cause a couple to be taxed under joint rates as if each spouse had earned separately half of the aggregate or combined net income. Income splitting permits income from the higher-bracket earner to be shifted into the other spouse's lower bracket for purposes of tax computation and effects a tax savings for the couple as a unit when the couple files jointly. Under aggregation, when spouses file jointly, their incomes are added together prior to the application of the tax rates. Because U.S. tax rates are progressive, aggregation causes some of the spouses' combined income to be taxed at higher marginal rates than would have applied to their incomes separately, thereby imposing additional tax on couples who file jointly rather than separately.

Income splitting and aggregation are both components of, and are built into, the joint return rates. That is, under joint filing, spouses are treated as one taxpayer for tax computation purposes, and that one taxpayer reports both sources of income, moving into a higher tax bracket. However, the tax rates rise half as quickly, that is, tax brackets are twice as wide, relative to the rate schedule for married couples who file separately, to allow for what is, in effect, income splitting. Joint return rates are related to separate return rates in that a joint return tax liability may be derived by applying the separate return tax rates to half of the spouses' combined net income and multiplying the resulting tax by two.

The existence of both income splitting and aggregation in joint return rates has a number of consequences that have been described in previous legal and economic literature. First, income splitting and aggregation each operate independently to favor couples in which only one spouse works and to disfavor those in which spousal incomes are similar, that is, in which both spouses undertake paid labor. Not surprisingly, both features, operating through the joint return rates,

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299. Assuming a husband earned $100,000 and his wife earned $40,000, their joint return liability could be derived by applying the separate return rates to $70,000 and then by doubling the resulting tax. Essentially, each spouse would be treated as if he or she earned half of his or her own income plus half of, the income earned by his or her spouse.
combine to exacerbate this privileging of single-earner couples over two-earner couples and are thought to affect behavior. By penalizing two-earner couples relative to single-earner couples, the joint rates probably encourage conventional marriage roles in which the husband works and the wife does not, thereby discouraging actual labor-force participation among wives. Many tax scholars have described how aggregation probably discourages wives from participating in the paid labor force by subjecting their first dollars earned to the highest marginal rates of their husbands, rather than to the lower tax rate of the lowest tax bracket.\(^{300}\) Essentially, the tax rate on the secondary earner’s first dollar of income is determined by her husband’s income rather than by the lowest tax rate. The income-splitting feature of the joint return rate structure is also likely to discourage married women from participating in the paid work force.\(^{301}\) Because income splitting benefits most those couples in which spouses’ incomes differ significantly, it provides a tax benefit primarily to couples who fit traditional roles in which the husband earns most or all of the income and in which the wife does not work.\(^{302}\)

\(^{300}\) See, e.g., Grace Blumberg, Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers, 21 BUFF. L. REV. 49 (1971); Gann, supra note 26, at 41; McCaffery, supra note 26, at 993; Zelenak, supra note 75, at 365; Davis, supra note 107, at 210. These patterns have been described in Jones, supra note 23, at 261 (discussing impact of automatic income splitting on spouses’ roles); see also Gann, supra note 26, at 35 (stating that the split-income structure is designed to benefit the group of taxpaying couples in which only one spouse works); Edward J. McCaffery, Equality, of the Right Sort, 6 UCLA WOMEN’S L.J. 289, 308-09 (1996); McCaffery, supra note 26, at 987, 992 & n.29 (noting that the tax laws encourage single-earner families); Robinson & Wenig, supra note 23, at 793 n.92 (noting that the tax laws, as reflections of social judgments about lifestyles, reward conformity to traditional roles and penalize departures from them); Zelenak, supra note 75, at 340-41 (noting that the single-earner couple benefits from income splitting). But see Michael McIntyre, Economic Mutuality and the Need for Joint Filing, CAN. TAX., Winter 1979, at 13; McIntyre, Individual, supra note 107, at 469; McIntyre, New York State, supra note 107, at 792 n.17 (questioning economic studies that have been interpreted to say that wives’ labor supply is more discouraged under the current rate structure than is that of husbands, assuming that spouses share their resources to a large extent, and arguing that tax rates are blind as to which spouse’s income is assigned to the lower versus the higher tax brackets). However, Professor McIntyre ignores the social realities that wives tend to earn substantially less than their husbands, that wives generally have more household and child care responsibilities than do husbands, and that, consequently, most couples view the wife’s paid work effort as being more discretionary than that of the husband.


\(^{302}\) See Gann, supra note 26, at 35 (stating that the split-income structure is designed to benefit the group of taxpaying couples in which only one spouse works); Jones, supra note 23, at 261 (discussing impact of automatic income splitting on spouses’ roles); Zelenak, supra note 75, at 340-41 (noting that the one-earner couple benefits from income splitting); see also McCaffery, supra note 26, at 987, 992 & n.29 (noting that the tax laws encourage one-earner families); Robinson & Wenig, supra note 23, at 793 n.92 (noting that the tax laws, as reflections of social judgments about lifestyles, reward conformity to traditional roles and penalize departures from them); Contract with America: Hearings Before the House Comm. on Ways and Means, 104th Cong. 85, 85 (1995) (statement of Anne L. Alstott, Professor of Law, Columbia University School of Law), reprinted in 66 TAX NOTES 1343, 1344 (1995) [hereinafter Contract with America Hearings]; cf. Mapes v. United States, 576 F.2d 896, 898 (Ct. Cl. 1978) (["T]he Code adds to the attractiveness of a prospective
Income splitting discourages married women from undertaking paid labor because it allows spouses to compute their taxes as if their incomes were equal without requiring that the spouses equalize their incomes by actually arranging to earn similar amounts. A second consequence of income splitting and aggregation is that they create an economic incentive for couples to file jointly rather than separately whenever spouses' incomes differ, that is, whenever one spouse earns more than the other. Writing when disparate incomes were virtually universal, Professor Boris Bittker acknowledged this incentive in the rate structure, noting that joint returns, although elective as a technical matter, are "mandatory in fact." As long as one spouse earns more than the other, a financial incentive will induce spouses to elect joint return status. Even when incomes are equal, couples have no financial incentive relating to the rate structure to file separately. Indeed, the vast majority of married couples files jointly rather than separately. The incentive to file jointly is strongest when spouses' incomes differ substantially. The greater the income difference between husband and wife, the more valuable is the benefit from income splitting and the smaller is the harm from income aggregation,

spouse without taxable income, and detracts from one with it.").

303. See Christian, Joint Rate Structure, supra note 20, at 279-82. Prior to the incorporation of automatic income splitting into the joint rates in 1948, spouses often tried to equalize their incomes by having the wife participate in family partnerships. See id. at 281 n.132. These plans succeeded when the wife could show that she participated in good faith in operating the business. See id. Therefore:

These activities by wives demonstrated that the unavailability of automatic income splitting encouraged couples to move towards the income splitting result by arranging for both spouses to work, to earn income. The absence of automatic income splitting did indeed encourage women to work in an effort to reduce the family's tax liability.

Id. By contrast, the presence of automatic income splitting removes the tax incentive for wives to earn as much as their husbands. See id. at 279-82.

304. Empirical studies support the proposition that higher taxes on wives discourage their labor force participation by demonstrating that a married woman's earnings are more tax sensitive than are those of a married man. See, e.g., STAFF OF JOINT COMMITTEE ON TAXATION, 96TH CONG., THE INCOME TAX TREATMENT OF MARRIED COUPLES AND SINGULAR PERSONS 5, 64 (Comm. Print 1980) ("Virtually all statistical studies of the issue conclude that a wife's work effort is more responsive to reduced taxes than her husband's."); Jerry A. Hausman, Labor Supply, in HOW TAXES AFFECT ECONOMIC BEHAVIOR 27, 28, 55-58 (Henry J. Aaron & Joseph A. Pechman eds., 1981); Leuthold, supra note 301, at 98, 103-04; Thomas MacCurdy, Work Disincentive Effects of Taxes: A Reexamination of Some Evidence, 82 AM. ECON. REV.: PAPERS AND PROCS. OF THE 104TH ANNUAL MEETING OF THE AM. ECON. ASSN 243 (1992); Harvey S. Rosen, Tax Illusion and the Labor Supply of Married Women, 58 REV. ECON. & STAT. 167 (1976).


306. Bittker, supra note 25, at 1409 n.55; see also Beck, supra note 3, at 372 (explaining that "[t]he tax system is designed almost to force married persons to file jointly rather than separately").

307. See supra note 236 and accompanying text.
and thus, the greater is the couple’s financial benefit from filing jointly rather than separately. Because the value of income splitting diminishes and because the harm from aggregation increases as spouses’ incomes converge, spouses with similar incomes experience only a minimal financial incentive to file jointly. For spouses with equal incomes, the benefit of income splitting is exactly offset by the harm from aggregation, so the couple is indifferent between filing jointly and filing separately.

Because the rate structure never affirmatively encourages separate filing, it may be difficult to understand why any married couple would ever elect to file separately. Occasionally, separate returns are advantageous for reasons unrelated to the rate structure. In instances in which the rate structure’s incentive to file jointly is weak, that is, when spouses have similar or equal incomes, other factors that favor separate filing occasionally operate to outweigh the small benefit that filing jointly would afford through the rate structure. In these instances, spouses would most likely file separately rather than jointly. The couples who are most likely to do so are those who would obtain little benefit under the rate structure from filing jointly, similar-income couples. By contrast, disparate-income couples obtain large benefits under the rate structure from filing jointly and are unlikely to obtain any benefit from filing separately that is large enough to outweigh that relatively large joint return benefit. Consequently, disparate-income couples are highly likely to file jointly. Furthermore, although few couples file separately, those who do are most likely similar- or equal-income spouses.

Finally, a third consequence of income splitting and aggregation is that they operate together relative to separate return rates to effect a transfer of wealth from the lower-income to the higher-income spouse, usually from the wife to her husband. Upon filing jointly, income splitting and aggregation combine to reduce the tax attributable to the higher-earning spouse and to increase the tax attributable to the lower-earning spouse. Income splitting and aggregation combine to give the higher-earning spouse an income-splitting benefit which is only partially offset by the harm from aggregation. The higher-earning spouse adds half the income of the other spouse to half of his or her own income, and

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308. See supra note 149 and accompanying text; Christian, Joint Rate Structure, supra note 20, at 271-72 & nn.113-14. For example, in the case of medical expenses, a deduction is allowed only to the extent expenses exceed 7.5% of adjusted gross income. See I.R.C. § 213(a) (1994). Filing separately allows the spouses’ respective adjusted gross incomes to be reported separately, thereby minimizing the floor under which one spouse’s medical expense deductions are disallowed. When one spouse has significant medical expenses, separate filing may, therefore, be advantageous.
thereby moves into a tax bracket that is lower than the one that would have applied had his or her own income been taxed separately. In this manner, the combination of income splitting and aggregation benefits the higher-earning spouse. That higher-earning spouse bears a smaller tax burden by filing jointly than he or she would by filing separately.

By contrast, the tax attributable to the lower-earning spouse is greater under the joint return than it would be under separate filing. Income splitting and aggregation combine to cause this result. Income splitting alone could place the lower-earning spouse in a lower tax bracket, but when applied in combination with aggregation, half of that spouse's lower income would be increased by half of the other's higher income. The combination of income splitting and aggregation acts to push the lower-earning spouse into a higher bracket than would have applied had his or her own income been taxed separately. For the lower-earning spouse, the harm from aggregation exceeds the benefit that income splitting confers. Consequently, the lower-earning spouse pays more tax by filing jointly than he or she would by filing separately. Relative to separate return filing, the joint return rates increase the tax attributable to the lower-income spouse and reduce the tax attributable to the higher-income spouse.

Because this pattern operates in a social context in which husbands tend to earn more than their wives, it tends to redound to the benefit of husbands and to the detriment of wives. To the extent the higher-earning husband pays less upon filing jointly and the lower-earning wife pays more, joint filing in effect results in a transfer of wealth from the lower-earning wife to her higher-income husband. While part of the reduction in tax attributable to the husband's income comes at the expense of the U.S. Treasury in the form of a smaller overall tax bill, part of his reduction comes at his wife's expense. It is this amount—the amount by which the wife's tax increases—which she effectively transfers to her husband by filing jointly rather than separately. Joint returns reduce the tax on the family overall, but as between the spouses, they tend to increase the tax on the wife and to grant an economic benefit to the husband. I first exposed this pattern in a previous article, and in that article I dealt with such issues as how to determine the magnitude of the wealth transfer from wife to husband; whether spouses share their resources and whether or not such interspousal sharing can mitigate this transfer-of-wealth problem; as well as other issues relating to the incidence of tax burden between the two spouses.

309. See supra note 289.
310. See Christian, Joint Role Structure, supra note 20, at 305-48; see also Christian, Complicity, supra note 20, at 448-65.
I do not repeat any discussion of those issues here, but rather, I now extend the implications of this new insight into an analysis of joint and several liability.

2. Joint and Several Liability Interacts with the Joint Return Rate Structure to Create Systemic Bias

Joint and several liability interacts with the joint return rate structure to create systemic bias in three different ways.

a. *The Internal Revenue Code is Designed to Cause Joint and Several Liability to Apply to the Very Couples for Whom That System Creates the Greatest Hardship, Disparate-Income Couples*

First, joint and several liability interacts with the incentive within the joint return rate structure that causes many couples to file jointly rather than separately. These two features of joint filing function together to cause joint and several liability to apply most frequently to the very couples for whom shifting liability from one spouse to the other most contradicts ability-to-pay notions. They function together to cause joint and several liability to apply most frequently to disparate-income couples. As described above, joint rates relative to separate rates are structured to create a powerful financial incentive for most couples to file jointly. This inducement is strongest when one spouse's income differs substantially from that of the other spouse. When the two spouses have similar incomes, the incentive to file jointly that is found in the rate structure is still present but is much weaker. Finally, when spouses have equal incomes, no incentive within the rate structure encourages them to prefer either filing status over the other. The greater the income disparity between the two spouses, the greater is the couple's incentive to file jointly rather than separately. Consequently, the greater the disparity in spousal incomes, the more likely it is that a couple will file jointly rather than separately. This incentive for couples to file jointly, an incentive which strengthens the more spousal incomes diverge, predictably causes the ranks of joint filers to be highly populated by couples in which one spouse earns significantly more than the other.

311. See I.R.C. §§ 1(a), (d).
312. See supra notes 305-07 and accompanying text.
313. See supra note 307 and accompanying text; see also Christian, Joint Rate Structure, supra note 20, at 269-70; Christian, Complicity, supra note 20, at 447.
314. See Christian, Joint Rate Structure, supra note 20, at 269, tbl.2.
Of course, when a couple files jointly, it triggers the joint and several liability regime. The incentive in the rate structure that causes disparate-income spouses to be those most likely to file jointly results in those same couples being the ones most likely to be subjected to joint and several liability. Joint and several liability is least fair in instances in which one spouse earns substantially more than the other. Couples in which spouses' incomes differ significantly are precisely those couples for whom making the lower-earning spouse potentially responsible for deficiencies caused by the higher-earning spouse is least fair. Yet, because spouses are induced to file jointly when their incomes differ substantially, those are the very couples most likely to face joint and several liability.

This systemic problem is of particular concern to women because in U.S. society, the husband is usually the higher-earning spouse and the wife is usually the lower-earning spouse whenever spouses' incomes diverge. Therefore, joint and several liability applies most frequently in situations in which the husband earns more than his wife, often when he earns substantially more than his wife. This situation allows tax liability to be shifted from a husband to his wife precisely when her earnings are significantly lower than his and her consequent ability to pay his deficiency is most impaired.

Because joint and several liability applies only when couples file jointly, and because couples have the most incentive to file jointly when spousal incomes are disparate, joint and several liability is designed to apply with the greatest frequency when one spouse, usually the husband, earns significantly more than the other, usually the wife. This situation of unequal resources is precisely when it is least fair to impose a joint and several liability regime, a liability system which shifts one spouse's liability to the other. It is, in fact, quite common for joint and several liability to be asserted against wives whose earnings are significantly lower than those of the husband or ex-husband who generated the deficiency. For these reasons, joint and several liability, both in its

315. See I.R.C. § 6013(d)(3). No analog to I.R.C. § 6013(d)(3), which imposes joint and several liability on joint filers, exists with regard to separate returns. See Beck, supra note 157, at 32; Borison, supra note 3, at 823.
316. See supra note 289 and accompanying text.
317. See id.
318. While joint and several liability is also likely to apply when wives earn more than their husbands, it is extremely unusual for wives to out-earn their husbands. See supra note 289 and accompanying text.
319. See, e.g., Beck, supra note 3, at 323-24 (discussing facts of a case in which ex-wife was assessed more than $12,000 in back taxes attributable to her ex-husband. The assessment exceeded her annual income. The husband, by contrast, had significant earnings and a savings account); LaBelle v. Commissioner, 47 T.C.M. (CCH) 1078 (1984), remanded by an unpublished order, (9th Cir. 1984), rev’d by 52 T.C.M. (CCH) 1256 (1986).
application and with regard to the systemic incentives that lead to its application, harms women more often than men.

Because of the economic incentive for spouses with disparate incomes to file jointly rather than separately, joint and several liability applies most often to those couples for whom that liability system is least fair. By imposing joint and several tax liability on such spouses, society has approved of a transfer of wealth from women to men. Because of how joint and several liability operates in society, when wealth is transferred, that is, when one spouse pays a deficiency caused by the other spouse, that wealth is most often transferred from the lower-earning wife to her higher-earning husband. Joint and several liability effectively operates in a biased fashion to promote transfers of wealth from women to men.

That joint and several liability is designed to apply precisely when spouses' incomes are disparate is reminiscent of the notion that gender bias is often self-reinforcing. Disparate incomes tend to induce joint

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320. See Beck, supra note 3, at 330.

321. This is but one example of wealth transfer from women to men. Others have described the cultural traditions that perpetuate wealth transfers occurring in other contexts. For example, large numbers of women provide uncompensated house-cleaning and child-rearing services to their families. This practice also transfers economic value from women to their families because of the unpaid nature of the work. See EVELYN NAKANO GLENN, ISSEI, NISEI, WAR BRIDE: THREE GENERATIONS OF JAPANESE AMERICAN WOMEN IN DOMESTIC SERVICE 192 (1986) (stating that women "perform a disproportionate share of work in the household, while men receive disproportionate advantages in the form of services and access to income"); Staudt, supra note 107, at 1584 n.54 (arguing that women's responsibility for housework has the effect of transferring wealth from women to men). Staudt argues: "It is not the ethic of care . . . that is problematic. Rather it is the assumption that goes along with it—that women should provide free caretaking services for the family, enabling independence for the family while remaining dependent, herself." Id. see also Christian, Joint Rate Structure, supra note 20, at 328 ("The domestic services that a wife renders often make it more difficult for her to contribute financially, and furthermore, her services 'contribute[] indirectly to the [family's economic] acquisitions by making it possible for the . . . [husband] to be employed.") (footnotes omitted) (quoting Greene, supra note 75, at 85); De Armond, supra note 75, at 240-41; Cheadle, supra note 75, at 1271 & n.11, 1310-11; Greene, supra note 75, at 83 ("Even if she did not contribute directly to the acquisition of property, her services enabled or hastened her husband's ability to acquire property.") (footnote omitted); id. at 85; Throne, supra note 75, at 196-97; Acker, supra note 75, at 474 (arguing that, without women's unpaid labor, the capitalist system could not function as beneficially for men); Law, supra note 75, at 1771 (reviewing ZILLAH R. EISENSTEIN, FEMINISM AND SEXUAL EQUALITY (1984)) ([O]ur liberal society depends upon the unpaid work performed by women in the home."); cf. Gann, supra note 26, at 42 n.137 (asserting that wives stay out of the labor force becoming, in effect, secondary earners in part because husbands are paid more). In addition, women often receive less compensation than men do for equivalent work. See RUTH SIDEL, WOMEN AND CHILDREN LAST: THE PLETH OF POOR WOMEN IN AFFLUENT AMERICA 66 (1986); Sylvia A. Law, Women, Work, Welfare, and the Preservation of Patriarchy, 131 U. Pa. L. Rev. 1249, 1249-310 (1983); McCaffery, Slouching Towards Equality, supra note 277, at 600. See generally CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 83-118 (1990). This pattern could be said to transfer additional wealth from women to men.

322. See McCaffery, supra note 26, at 1000 (demonstrating how taxes contribute to the self-perpetuation of single-earner families in the context of the social security system); Davis, supra note 107, at 233 (arguing generally that the tax system helps perpetuate women's inferiority in society by "subsidiz[ing] patriarchy"); McCaffery, supra note 26, at 988 (arguing in other contexts that aspects of the
filing. Under current social reality, when disparate incomes exist, the husband is usually the higher-income spouse and the wife is usually the lower-income spouse. The result of joint filing, in turn, triggers joint and several liability which, as described above, applies to cause wives to pay their husbands' tax deficiencies more often than the other way around. Thus, the very fact that husbands tend to earn more than their wives operates through the tax system frequently to require those lower-earning wives to transfer wealth to their higher-earning husbands by requiring them to pay tax deficiencies attributable to those husbands. Consequently, the disparity of spousal incomes, through the operation of the tax code, tends to reinforce and exacerbate a gender-based inequality of financial resources. In this manner, a disparity in spousal incomes is the very condition that creates the opportunity for the higher-earning spouse to benefit financially from the lower-earning spouse by making her liable for his deficiency through the rule of joint and several liability. The very fact that the wife earns less than her husband potentially results in her having to pay his tax bill and compromises her economic viability even further.

rate structure serve to perpetuate traditional family patterns); id. at 1029-30 (arguing in other contexts that tax laws contribute to the self-perpetuation of certain gender biases); id. at 1030-32 (illustrating how employer expectations of women employees can become self-fulfilling prophesies due to the lower remuneration the expectations prompted); NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978) (making the point that in non-tax, psychoanalytic, sociological, and philosophical contexts, such as family dynamics, gender inequalities tend to be perpetuated automatically and are self-reinforcing); GOLDIN, supra note 321, at 214; ARLIE HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 254 (1989) (same as Chodorow); Mary E. Becker, Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel and Lazarus, 59 U. CHI. L. REV. 934 (1986); Stephen Coate & Glenn C. Loury, Will Affirmative-Action Policies Eliminate Negative Stereotypes?, 83 AM. ECON. REV. 1200, 1221 (1993) (modeling self-fulfilling prophesies); Mayer G. Freed & Daniel D. Polsby, Privacy, Efficiency, and the Equality of Men and Women: A Racismist View of Sex Discrimination in Employment, 1981 AM. B. FOUND. RES. J. 585, 634-35 (discussing "national" statistical discrimination that leads to self-fulfilling prophesies, using female job persistence as an example); Reuben Gronau, Sex-related Wage Differentials and Women's Interrupted Labor Careers-The Chicken or the Egg, 6 J. LAB. ECON. 277, 294 (1988); McCaffery, Slouching Towards Equality, supra note 277, at 615-16, 624 (describing tendency of wage discrimination to be self-perpetuating along gender lines in part because of income aggregation); id. at 602-03 (presenting a model illustrating how the tax system as a whole contributes to and compounds preexisting discrimination); Carol M. Rose, Women and Property: Gaining and Losing Ground, 79 VA. L. REV. 421, 443-54 (1992) (asserting that gender discrimination is perpetuated through self-fulfilling prophesies); McCaffery, supra note 26, at 1035-46 (arguing that structural "aspects [of the tax laws] persist to this day, serving as an anchor against the emergence of more modern and flexible family models"); id. at 968; Christian, Joint Role Structure, supra note 20, at 250-51 & nn.36-40, 347-48; McCaffery, Slouching Towards Equality, supra note 277, at 615-24 (describing how women's shorter average job persistence than men's induces firms to lower women's wages, rendering women secondary earners, and that income aggregation found in the tax code compounds this problem, giving women further reason to flee the work force, thereby shortening their persistence on the job); McCaffery, supra note 26, at 1013 (describing the tendency of the pension and social security systems to protect and, therefore, to encourage non-working wives).
Not only does joint and several liability function to harm women more often than men, causing wives to transfer wealth to their husbands more frequently than in the other direction, but joint and several liability is also responsible for harming women more severely than it harms men. This problem also results from the internal design of the tax code. As explained above, the tax code is designed to impose joint and several liability most frequently on spouses whose incomes differ. 323 Given the social context that husbands tend to earn more than their wives, 324 the tax code usually imposes joint and several liability when husbands have relatively large earnings and when wives have relatively low earnings. Simply stated, the tax code is designed, operating in the social context, to hold husbands responsible for their wives’ tax deficiencies precisely when the husbands most likely earn relatively large amounts while at the same time it holds wives responsible for their husbands’ tax deficiencies precisely when the wives probably have relatively low earnings. The tax code is designed to operate in the social context in a way that predictably causes joint and several liability to cause relatively minor financial burdens for men, while at the same time, it tends to impose relative financial peril on women.

When joint and several liability applies to make a husband responsible for his wife’s tax deficiency, because of the § 1 incentive for disparate-earning spouses to file jointly, he will usually have relatively large earnings and will generally be well situated to absorb additional liability. Although this shifting of liability to the non-delinquent spouse is similarly unfair, it is less likely to place the husband at serious financial risk because he is likely to have comparatively greater resources. By contrast, when joint and several liability applies to make a wife responsible for her husband’s tax deficiency, because of the § 1 incentive for disparate-earning spouses to file jointly, she will generally have to pay that liability out of comparatively meager resources. This instance of liability shifting is not only unfair, but will predictably and frequently place the lower-earning woman in relative economic distress. 325 While it is not always the case that joint and several liability applies when husbands’ earnings are comparatively large or when wives’ earnings are relatively meager, the fact that it applies most frequently when spouses’ incomes diverge and the social fact that husbands tend to earn more than their wives indicate that when joint and several liability does apply, it is likely to harm wives more severely than husbands. The tax code creates systemic bias by causing joint and several liability to apply for

323. See I.R.C. §§ 1(a), 1(d), 6013(d)(3) (1994); see also supra notes 311-19 and accompanying text.
324. See supra note 289.
325. See Beck, supra note 3, at 320, 323-25.
precisely those cases in which one spouse, usually the husband, earns more than the other, usually the wife.

b. The Joint Return is Designed to Benefit the Higher-Earning Spouse, Usually the Husband, through Income Splitting but to Impose the Cost for that Benefit, Joint and Several Liability, on the Wife

The second manner in which joint and several liability relates with other tax code provisions to create systemic bias also occurs through its interaction with the joint return rate structure. After 1948, both income splitting and joint and several liability were statutory consequences of joint filing. As discussed above, the IRS and the courts have often claimed that joint and several liability is the cost for the benefit of income splitting.326 As a policy matter, however, making joint and several liability the price charged for income splitting effects a distributional injustice.

When one spouse earns more than the other, as is usually the case among married couples, then joint filing does not allocate the benefit of income splitting and the burden of joint and several liability equitably between the two spouses.327 Under the rate structure for joint and separate returns that is contained in I.R.C. §§ 1(a) and 1(d), respectively, joint filing triggers rates in which both income splitting and income aggregation are incorporated. That is, by filing jointly, a couple is taxed under married filing separately rates as if each spouse had earned half of the two spouses' combined net incomes. The total joint return tax would be computed by doubling the tax that a separate filer would pay on half of the couple's combined net taxable income.328 The availability of income splitting and the presence of income aggregation in the joint return rates tend to benefit husbands and to harm wives in two primary respects. As explained above,329 income splitting and aggregation both tend to harm wives first by discouraging them from participating in the

326. See supra note 148 and accompanying text.
327. See Beck, supra note 157, at 30, 32 (stating that divorcing wives should be cautious in filing jointly because any tax savings tends to benefit the higher-earning husbands more than their wives).
329. See supra notes 300-04 and accompanying text.
paid labor force whenever they are the secondary earner in the family. Wives tend to be the secondary earner both because they tend to earn less than their husbands and because of ingrained cultural traditions. Second, income splitting and aggregation also tend to harm wives and to benefit their husbands by operating together to effect a transfer of

330. See Christian, Joint Rate Structure, supra note 20, at 266-69, 279-82, 287-300; Christian, Complicity, supra note 20, at 446-47; Gann, supra note 26, at 35 (stating that the split-income structure is designed to benefit the group of taxpaying couples in which only one spouse works); Jones, supra note 23, at 261 (discussing impact of automatic income splitting on spouses' roles); Zelenak, supra note 75, at 340-41 (noting that the one-earner couple benefits from income splitting); McCaffery, supra note 26, at 987, 992 & n.29 (noting that the tax laws encourage one-earner families); Robinson & Wenig, supra note 23, at 793 n.92 (noting that the tax laws, as reflections of social judgments about lifestyles, reward conformity to traditional roles and penalize departures from them); Contract with America Hearings, supra note 302, at 85, reprinted in 66 TAX NOTES at 1344 (statement of Professor Alstott); Jones, supra note 23, at 296; Leuthold, supra note 301, at 103 (using data from the 1979 MICHIGAN SURVEY OF INCOME DYNAMICS); McCaffery, supra note 26, at 989-96, 1018; McCaffery, Slouching Towards Equality, supra note 277, at 617-18 (arguing that the combined impact on wives of the aggregation effect, social security taxes, and other costs of working is so great that it must affect behavior and discourage paid work); Rosen, supra note 305, at 426; Zelenak, supra note 75, at 343, 365-66, 371; Davis, supra note 107, at 210-14; Note, supra note 107, at 368-70; H.R. REP. NO. 104-84, at 13 (1995); Kornhauser, supra note 73, at 64; Alicia H. Munnell, The Couple Versus the Individual Under the Federal Personal Income Tax, in THE ECONOMICS OF TAXATION 247, 263-64 (Henry J. Aaron & Michael J. Boskin eds., 1980); Gann, supra note 26, at 41, 42 n.137 (noting that the wife would be more likely to work outside of the home if she could file separately to avoid the aggregation effect); Dateline NBC: Two for the Money (NBC television broadcast, May 1, 1996), available in 1996 WL 6704217.

In an interview, Linda Kelley, home economist stated:

Most second incomes do clear a profit, but usually it's not nearly as much as expected. And there are some people who even go in the hole because of a second income. They lose money. It's when both partners work full time that the costs just explode. Uncle Sam is very fond of second incomers because his take on their paychecks is so large.

Id. (quoted from original broadcast); McCaffery, supra note 26, at 1041 n.219; cf: Mapes v. United States, 576 F.2d 896, 898 (Ct. Cl. 1978) ("[T]he Code adds to the attractiveness of a prospective spouse without taxable income, and detracts from one with it.")

331. Christian, Joint Rate Structure, supra note 20, at 288-89. Women are considered to be "secondary" wage earners much more frequently than men. See JESSIE BERNARD, WOMEN AND THE PUBLIC INTEREST: AN ESSAY ON POLICY AND PROTEST 191 (1971) ("In one study of 33 such two-career families, the wife's career was viewed as merely a kind of hobby, an avocation rather than a vocation, in a substantial proportion with a traditional orientation."); Carole Pateman, The Patriarchal Welfare State, in DEMOCRACY AND THE WELFARE STATE 231, 244 (Amy Gutmann ed., 1988).

Women in the workplace are still perceived primarily as wives and mothers, not workers. The view is also widespread that women's wages are a "supplement" to those of the breadwinner. Women, it is held, do not need wages in the same way that men do—so they may legitimately be paid less than men.

Id. (footnote omitted); see also JANE C. HOOD, BECOMING A TWO-JOB FAMILY 188 (1983) (wives in middle- and upper-income families often perceive their work as unnecessary to the family's survival, thus treating themselves as "junior partner[s]"); McCaffery, supra note 26, at 994 (describing married women as historically having been the marginal or secondary earners in the family).

Wives are considered secondary earners because they usually earn less than their husbands. See supra note 289. Because wives tend to earn less than their husbands, when one spouse leaves the labor force to care for a child or elder relative, it is usually the wife rather than the husband who does so. Wives are, therefore, properly viewed as secondary earners. This characterization is not intended to express a goal or a desired norm, but rather simply describes the current social reality.
wealth from the lower-earning to the higher-earning spouse. 332 Consequently, joint filing, through the phenomena of income splitting and aggregation, tends to operate in the social context in which husbands usually earn more than their wives to effect a transfer of wealth from wives to their husbands. In these ways, the so-called benefit of joint filing, that is, the availability of income splitting, is really a benefit for husbands only, not a benefit for both spouses who file jointly. Indeed, the "benefit" of joint filing is usually a detriment for wives.

Filing jointly triggers not only the joint return rates along with their concomitant elements of income splitting and income aggregation, but also the regime of joint and several liability. On its face, joint and several liability is gender neutral. It applies to both spouses, so either spouse may have to bear the taxes arising from the other's net income. As an empirical matter, however, it has been demonstrated that joint and several liability usually harms wives more often and more severely than husbands. 333 Under joint and several liability, wives pay the tax liabilities of their husbands more often, and in greater amounts, than husbands pay the taxes attributable to their wives.

While joint and several liability generally harms wives, joint return rates, through income splitting and aggregation as discussed above, generally benefit husbands. 334 Because part of the rationale behind joint and several liability is that it is the cost imposed for the benefit of income splitting, it is especially ironic that the burden tends to fall on one spouse, usually the lower-earning wife, while the benefit tends to fall on the other spouse, usually the higher-earning husband. The burden of joint and several liability tends to fall predictably and systemically on wives while the benefits from income splitting tend to inure regularly to husbands. Both the benefit and the cost of filing jointly tend to burden wives and to benefit husbands. The wife essentially pays the cost to get a benefit that inures to her husband, not to her. That joint and several liability tends to fall predictably and systemically on wives while the benefits from income splitting tend to inure regularly to husbands. The wife essentially pays the cost to get a benefit that inures to her husband, not to her. That joint and several liability tends to fall predictably and systemically on wives while the benefits from income splitting tend to inure regularly to husbands. The wife essentially pays the cost to get a benefit that inures to her husband, not to her.

332. For a complete explanation of this recently exposed phenomenon, see Christian, Joint Rate Structure, supra note 20, at 305-48; Christian, Complicity, supra note 20, at 448-65; see also supra notes 309-10 and accompanying text.

333. See supra notes 277-95 and accompanying text. See generally Beck, supra note 3, at 320 n.4 (1990); Durst, supra note 284, at 716-21; Kinsey, supra note 285, at 29 (suggesting that, psychologically, men are more likely to take aggressive reporting positions than are women and that, in fact, they do so); Edison-Smith, supra note 4, at 119.

334. See supra notes 300-04, 309-10 and accompanying text. See also Christian, Joint Rate Structure, supra note 20, at 279-348; Christian, Complicity, supra note 20, at 448-50; Edison-Smith, supra note 4, at 120, 125. Cf. Beck, supra note 157, at 30, 32 (stating that divorcing wives should be cautious in filing jointly because any tax savings tends to benefit the higher-earning husbands more than their wives); Beck, supra note 3, at 322, 376 (noting that, while joint and several liability is generally borne by the wife, the benefit of joint filing is generally enjoyed by the husband—that benefit consisting of the savings he obtains by shifting his income into his wife's lower tax bracket).
liability is viewed as the cost for the benefit of income splitting, therefore, effects a distributional gender-correlated injustice.

If there is to be a cost imposed for the benefit of income splitting, that cost should be designed to fall on the party who enjoys the benefit, not on the party that tends to be harmed from joint return rates.\textsuperscript{335} Under the current joint return tax system, husbands tend to enjoy the benefits of both having their tax liabilities shifted to their wives under joint and several liability and enjoying a further transfer of wealth from their wives through the operation of income splitting and aggregation. Wives tend to be burdened by these same provisions by being discouraged from undertaking paid labor, by being forced through joint and several liability to pay their husbands' tax deficiencies, and by being coerced into transferring additional wealth to their husbands each year through the operation of the joint return rate structure. In short, the husband tends to benefit from income splitting, but the wife tends to pay the cost for that benefit through joint and several liability.\textsuperscript{336} Under this analysis, it is distributionally and systemically unjust for joint and several liability to be the cost imposed for the so-called benefit of income splitting. That joint and several liability is justified as the price to be paid for the benefit of income splitting, therefore, must fail. Both aspects of joint filing tend to harm women and to benefit men. As applied to real-world conditions in which men earn more than their wives, these elements of joint filing do not operate in a neutral fashion.

c. The Internal Revenue Code's Rate Structure is Designed to Induce Most Couples to File Jointly, Thereby Making Application of the Joint and Several Liability Regime Likely and Endangering Marital Harmony

A third manner in which joint and several liability interacts with other features of joint filing to create systemic bias relates to the incentive most couples face to file jointly rather than separately.\textsuperscript{337} For most couples, joint tax liability is generally significantly less than what the combined separate return liabilities would be if computed. Therefore, most couples are presented with a compelling financial incentive to file jointly

\textsuperscript{335} As described, supra, income splitting harms wives who earn less than their husbands in two ways: first, by discouraging them from participating in the paid workforce; and second, by coercing them to transfer wealth each year to their higher-income husbands. See supra notes 300-04, 309-10 and accompanying text.

\textsuperscript{336} See Beck, supra note 3, at 322, 376; Beck, supra note 157, at 32; Edison-Smith, supra note 4, at 119-20, 125.

\textsuperscript{337} This incentive arises because the tax rates applicable to joint filers incorporate income splitting while those applicable to separate filers do not. Compare I.R.C. § 1(a) (1994) with I.R.C. § 1(d). See supra notes 305-08 and accompanying text.
rather than separately. As a result, the existence of joint and several liability causes most married women to face a conflict between acting in their own best interests and acting in the best interests of the marital unit as a whole.

A wife may do either what is in her own best interest and avoid joint and several liability by filing separately, or she may choose to serve the best interest of the couple as a unit and file jointly to minimize the unit's tax liability. Whenever spouses' incomes differ, the couple as a unit has an incentive to file jointly to enjoy the economic benefits of income splitting. However, for the couple to obtain this benefit, not only must the wife bear the harm of income aggregation, which discourages her labor-force participation, and not only must she transfer wealth to her wealthier husband, but she must also expose herself to joint and several liability, a regime in which she could be held liable for tax on another's income, earnings to which she may have no legal rights. Under joint and several liability, she could find herself liable for taxes far beyond her ability to pay. As a result, women face a conflict. They

338. In fact, close to 100% of married couples choose to file jointly because of this incentive. See supra note 236.
339. It should be noted that a husband could face the same conflict between self-interest and the family interests if he earned less than his wife. However, in most situations, husbands are not secondary earners. They are, by and large, still the primary breadwinners. Cf. Kornhauser, supra note 73, at 64 (suggesting in the context of whether or not the second earner will enter or remain in the labor force that the joint return subjects the secondary earner, usually the wife, to psychological stress); id. at 90 (noting that the interdependence of spouses is usually achieved at the wife's expense).
340. See Christian, Joint Rate Structure, supra note 20, at 288-303; McCaffery, supra note 26, at 989-96, 1018; McCaffery, Slouching Towards Equality, supra note 277, at 617-18 (arguing that the combined impact on wives of the aggregation effect, social security taxes, and other costs of working is so great that it must affect behavior and discount paid work); Rosen, supra note 305, at 426; Zelenak, supra note 75, at 343, 365-66, 371; Davis, supra note 107, at 210-14; Note, supra note 107, at 368-70; see also Contract with America Hearings, supra note 302, at 85, reprinted in 66 TAX NOTES at 1344 (statement of Professor Alstott); H.R. REP. NO. 104-84, at 13 (1995); Gann, supra note 26, at 41; Kornhauser, supra note 73, at 64; Munnell, supra note 330, at 263-64. Tax scholars have also identified other aspects of taxation in addition to the joint return rate structure that discourage women from working: the social security system, see, e.g., McCaffery, supra note 26, at 996-1001; Jonathan Barry Forman, Promoting Fairness in the Social Security Retirement Program: Partial Integration and a Credit for Dual-Earner Couples, 45 TAX L. 915, 933, 944-47 (1992), the non-taxation of services performed by one family member for another, that is, the non-taxation of imputed income, see, e.g., McCaffery, supra note 26, at 1001-05, the non-deductibility of expenses related to having both spouses work, see, e.g., id. at 1005-10, and the tax treatment of fringe benefits. See, e.g., id. at 1010-14.
341. See Christian, Complicity, supra note 20, at 448-65; Christian, Joint Rate Structure, supra note 20, at 305-48; see also supra notes 309-10 and accompanying text.
342. See, e.g., Beck, supra note 3, at 323-24 (discussing case of Robert and Anna in which the IRS assessed liability against Anna for taxes attributable to her ex-husband of $12,000, or more than her annual income); LaBelle v. Commissioner, 47 T.C.M. (CCH) 1078 (1984), remanded by an unpublished order, (9th Cir. 1984), rev'd by 52 T.C.M. (CCH) 1256 (1986); Kathy M. Kristof, Your Money: Taxpayer Stuck in IRS' Narrow Escape Clause, L.A. TIMES, Oct. 20, 1996, at D2, available in 1996 WL 12747967 (describing situation in which IRS is pursuing an elderly, sick woman, living on social security, for a joint return tax deficiency caused by her former husband).
must choose between endangering their marriages\textsuperscript{343} by acting in their own best financial interests and filing separately, or endangering their own economic well-being and acting in the best financial interest of the couple by filing jointly to reduce the combined total tax.\textsuperscript{344}

This conflict falls on women much more frequently than on men because wives typically earn less than their husbands.\textsuperscript{345} In theory, a higher-earning husband who files jointly faces this same conflict: joint filing lowers the husband's tax bill while separate filing insulates him from deficiencies caused by his wife. However, the harm to a higher-earning husband from a wife's deficiency is likely to be much less

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343. By filing separately, a wife may experience resentment or even physical abuse from her husband who prefers to file jointly. See, e.g., Estate of Aylesworth v. Commissioner, 24 T.C. 134, 141 (1955); Osborn v. Commissioner, 66 T.C.M. (CCH) 130 (1993) (illustrating instances in which wives filed jointly against their wishes, rather than separately, because of the threat of physical abuse); Beck, supra note 3, at 332.

344. See Beck, supra note 3, at 332. Some critics might argue that women do not experience a conflict in choosing a filing status. In response to this observation, one must recognize that many who do not experience such a conflict simply do not understand the costs of filing jointly. They do not realize that filing jointly exposes them to joint and several liability for their spouse's tax. See generally Edward J. McCaffery, Cognitive Theory and Tax, 41 UCLA L. Rev. 1861 (1994) (asserting that cognitive error often induces incorrect decisions with regard to tax).

Other critics might observe that even women who understand the costs of joint filing may not feel they are experiencing a conflict because they may view their interests as aligned with those of their children. Consequently, women might not see themselves in conflict with their families in the context of choosing a filing status. In fact, if women bond with and feel responsible for their children, then they might not view their choice to file jointly and to benefit the marital unit by lowering the total tax liability as presenting any conflict at all. Such wives would prefer to file jointly to increase the total resources available to their children. One school of feminist legal scholars would respond to this observation by arguing that women's perceived alliance with children is really a method utilized by patriarchy to ensure women's continued subjugation. See, e.g., Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 828-36, 841 (1989) (raising the argument concerning women's perceived alignment with children in non-tax contexts); T.J. Jackson Lears, The Concept of Cultural Hegemony: Problems and Possibilities, 90 AM. HIST. REV. 567, 569-70 (1985) (discussing how Antonio Gramsci has described a concept of cultural hegemony, a picture of how the dominant culture rules with the consent of the subjugated groups by shaping a "hegemony" of values, norms, perceptions, and beliefs that "helps mark the boundaries of permissible discourse, discourages the clarification of social alternatives, and makes it difficult for the dispossessed to locate the source of their unease, let alone remedy it"). Although this argument is subject to dispute, it does tend to reinforce the notion that the wife's individual interests may not always be aligned with those of her family.

Even if a wife views her interests as consistent with those of her children, it should be noted that her decision to file jointly does not necessarily make more resources available to those children. It makes more resources available to her husband who may or may not use them to benefit the couple's children.

Finally, the fact that many women view themselves as aligned with their children's interests does not alter the fact that filing jointly benefits the family unit by benefiting the husband and that it tends to be harmful to the wife as an individual. See generally, Christian, Joint Role Structure, supra note 20; Christian, Complicity, supra note 20. Any given wife may decide that the harm to herself from filing jointly is justified because of the offsetting benefit her family experiences. In making this determination, however, she has balanced the harm to herself against the benefits to her family and has implicitly faced this very conflict between self-interest and family interest. Wives, like husbands, should be able to align themselves with their families in choosing a filing status without harming their own financial interests. Justice within the family should not be set up to conflict with intimate, harmonious family ties. See OKIN, supra note 107, at 32.

345. See supra note 289.
\end{quote}
significant than the harm to a wife from a deficiency caused by her husband because the higher-earning husband is generally better situated to handle the typically small tax deficiency generated by the lower-income taxpayer. 346 The wife, by contrast, may find it difficult, perhaps impossible, to pay the relatively large tax deficiency arising from her husband. 347 Although men also theoretically face conflict between obtaining the benefit of income splitting and avoiding the risks inherent in joint and several liability, their conflict is likely to be much less problematic than that faced by women. Furthermore, because wives are less likely to create deficiencies than their husbands, 348 the conflict will arise less frequently for men than for women. To the extent women are aware that joint and several liability accompanies joint filing, women, more than men, bear the psychic costs of this conflict. 349

V. CONCLUSION

Joint and several liability is problematic for a variety of reasons. It shifts liability from one taxpayer to another. The arguments frequently used to support it do not, in fact, persuade. Perhaps more importantly, as applied in the social setting, it functions to harm women more often and more severely than it does men. It also interacts systemically with other elements of the joint return system to create a variety of injustices—all of which tend most frequently to burden women and to benefit men. The doctrine of joint and several liability assumes that spouses form one permanent economic unit. 350 Although this

346. See Beck, supra note 3, at 320 n.4; cf. Kornhauser, supra note 73, at 90 (noting generally that the interdependence of spouses is usually achieved at the expense of the wife).
348. See supra notes 282-88 and accompanying text.
349. Cf. Kornhauser, supra note 73, at 64. To the extent the public is not aware of the conflict, the features of the joint return tax that cause this conflict, income splitting and aggregation, are problematic for another reason: any laws that are hidden from those subject to them are suspect as "secret" laws and, therefore, ought to have questionable authority. Georg Hegel has argued that law does not have authority unless it is known. GEORG HEGEL, PHILOSOPHY OF RIGHT 135 (T.M. Knox trans., Oxford Univ. Press 1967) (1952).
Hence making a law is not to be represented as merely the expression of a rule of behaviour valid for everyone, though that is one moment in legislation; the more important moment, the inner essence of the matter, is knowledge of the content of the law in its determinate universality.
Id.; see also JOSSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 51 n.9 (1979); THOMAS B. STEPHENS, ORDER AND DISCIPLINE IN CHINA: THE SHANGHAI MIXED COURT 1911-27, at 78-82 (1992) (discussing the basis for the authority of the laws of China). The gendered nature of the joint filing system is generally unknown to the public. To the extent joint returns create unknown conflict and bias, they are objectionable as are "secret laws."
350. See Edison-Smith, supra note 4, at 107, 122; Quick & DuCanto, supra note 111, at 67; ABA
assumption may have been justified in 1938 when Congress enacted this liability rule, that assumption is no longer warranted. Given spouses' relatively greater economic independence and the high divorce rate in contemporary society, marriage can no longer be presumed to create a permanent economic unit. For all these reasons, joint and several tax liability should, in 1998, no longer be accepted as appropriate.

Relief is available for joint and several liability in a limited variety of narrowly drawn circumstances. Some common-law defenses exist, and Congress has enacted an "innocent spouse" exception to joint and several liability. These exceptions, however, are woefully inadequate both because they are narrowly drawn, and because they make technical distinctions often unrelated to the equities of holding the non-delinquent spouse liable. These exceptions apply to grant relief far too infrequently. As established above, joint and several liability tends to harm wives more than husbands. Therefore, any inadequacies in the exceptions allow the gender-correlated problems of joint and several liability to persist.

Because the exceptions to joint and several liability are inadequate and because the rule of joint and several liability, itself, operates unfairly, Congress should repeal joint and several liability, or perhaps

\[\text{Report, supra note 121, at 2; Beck, supra note 3, at 348.}\]

351. Beck, supra note 3, at 320 n.4, 329, 383; Quick & DuCanto, supra note 111, at 67 (noting that the tax savings from joint filing must be weighed against the risk from joint and several liability when divorce is on the horizon); Edison-Smith, supra note 4, at 122-23 & n.161; ABA Report, supra note 121, at 2.

352. See Edison-Smith, supra note 4, at 107, 122-23, 130; Keller, supra note 148, at 1096.

While married couples generally file joint returns and may view the resulting tax liability as a joint liability of the marriage, it is believed that imposition of joint and several liability on every married person who files a joint return with his or her spouse does not reflect current societal conditions under which both spouses frequently have their own sources of income and deduction. Regrettably, the incidence of divorce, and sometimes the death of one spouse, all too often results in unexpected and inappropriate imposition of liability for tax owed on income of the absent spouse. Relief provisions are unduly complex and in many instances ineffective. Finally, in actual operation, imposition of joint and several liability is simply unfair. It is believed that the changes proposed here would simplify the law and eliminate a significant source of unfairness and in this way contribute to the goal of supporting voluntary compliance which is essential to our tax system.

ABA Report, supra note 121, at 8.

353. See Philipps & Braford, supra note 109, at 43, 55; Beck, supra note 3, at 321, 348-64. I am currently writing another article in which I will examine the inadequacies of these exceptions to joint and several liability and will demonstrate how the exceptions, themselves, operate to create further gender biases.

354. See Part IV, supra.

355. See Beck, supra note 3, at 319; Zorn, supra note 21, at 488, 491-92; Edison-Smith, supra note 4, at 104, 127 (arguing that Congress should repeal joint and several liability); Murray, supra note 21, at 58, 64 ( recommending that Congress repeal joint and several liability); Comments on Liability of Divorced Spouses, supra note 21, at 395 (quoting ABA resolution recommending the repeal of joint and several liability.
eliminate it by abolishing the joint return altogether. Both the American Bar Association and the American Institute of Certified Public Accountants have taken the position that Congress should eliminate the regime of joint and several liability. Given the often devastating effects this rule has on taxpayers and given that both as applied and systemically this rule concentrates burdens most frequently on women, the repeal of joint and several liability is long overdue.

adopted by the ABA House of Delegates in February of 1995; Rankin, supra note 21, at 8 (reporting that the AICPA submitted comments to the IRS recommending the repeal of joint and several liability).

356. In addition to disposing of joint and several liability, eliminating the joint return would also address other problems that arise under the joint return filing system, including its probable work disincentive effect on married women and the problematic transfer of wealth from wives to husbands that it probably induces. Abolition of joint return filing has been proposed by Christian, Joint Rate Structure, supra note 20, at 357-62 (describing various effects of eliminating the joint return and proposing a system of mandatory individual filing); Gann, supra note 26, at 39; Zelenak, supra note 75, at 343 & n.16, 365-69; Davis, supra note 107, at 236-38; Economic Problems of Women, supra note 159, at 608-09 (statement of Carolyn McCaffery, Assistant Professor, New York University Law School); Harvey E. Brazer, Income Tax Treatment of the Family, in THE ECONOMICS OF TAXATION 244-45 (Henry J. Aaron & Michael J. Boskin eds., 1980); Harvey E. Brazer, Comment to McIntyre & Oldman, Treatment of the Family, in COMPREHENSIVE INCOME TAXATION 237 (Joseph A. Pechman ed., 1977); Dulude, supra note 204, at 128; Kornhauser, supra note 73, at 65, 110-11; James Edward Maule, Tax and Marriage: Unhitching the Horse and Carriage: "But Let There Be Spaces in Your Togetherness," 67 TAX NOTES 539 (1995); Munnell, supra note 330, at 247-78; Robinson & Wenig, supra note 23, at 787, 852; Rosen, supra note 305, at 427-28; Winn & Winn, supra note 75, at 869-70; Rankin, supra note 21 (reporting that the AICPA recommends the elimination of joint returns and the institution of mandatory individual filing). The following commentators have expressed opposition to the idea of abolishing joint returns: Bittker, supra note 25, at 1437-42; Contract with America Hearings, supra note 302, at 87, 88, reprinted in 66 TAX NOTES at 1345, 1345-46 (statement of Professor Alstott); McIntyre, supra note 107, at 480.

357. See supra note 355.