Joint Versus Separate Filing: Joint Return Tax Rates and Federal Complicity in Directing Economic Resources from Women to Men

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JOINT VERSUS SEPARATE FILING: JOINT RETURN TAX RATES AND FEDERAL COMPLICITY IN DIRECTING ECONOMIC RESOURCES FROM WOMEN TO MEN

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I. INTRODUCTION

In many respects, the economic institutions of United States society are set up to benefit men, often at women's expense. For men to benefit, they simply must be. Benefit flows to them automatically. For women to benefit within these economic structures, they must act, either through affirmative negotiation or by lobbying to reform the institution. To extract the benefits that flow to men automatically, women must do much more than simply be. The legal system is one economic institution that has, at times, exhibited this pattern. It responds to social realities in a way that often causes benefits to flow to men automatically but not to women. Social practices and legal rules tend to combine to create biases in favor of men, sometimes at women's expense. This phenomenon occurs in the current U.S. tax system with regard to the joint return filing system and the operation of joint return tax rates in comparison to the rates that apply to married taxpayers who file separately. How and why this pattern occurs is the subject of this essay. Specifically, this essay explains how joint return rates force many women to transfer wealth to their higher-

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income husbands on an annual basis and create conflicts for women that are not imposed on men.

Part II of this essay lays a technical foundation for Part III and briefly describes a few features of joint return filing that have been described in previous legal literature and that are of particular concern to women. Part III describes my own recent contribution in the same field, namely that joint filing often functions in the social setting to require wives to transfer wealth to their husbands. Furthermore, the rate structure tends to impose conflicts on women that it fails to impose on men. Part IV briefly mentions that reform proposals directed at solving the problems raised in Part II would also eliminate the problems identified in Part III. Finally, Part V concludes this essay by tying the joint return transfer-of-wealth problem back to the larger theme of how our socio-legal institutions are frequently designed to benefit men automatically but not women.

II. TECHNICAL COMPONENTS OF JOINT RETURN TAX RATES AND PREVIOUS LEGAL DISCOURSE ON THE JOINT RETURN RATE STRUCTURE

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

1. Allowing income to be shifted from the higher-earning to the lower-earning spouse for purposes of computing tax liability is a problem for women because it does not require that income be shifted from husband to wife for ownership purposes as well. See Pamela B. Gann, Abandoning Marital Status as a Factor in Allocating Income Tax Burdens, 59 Tex. L. Rev. 1, 27 (1980); Edward J. McCaffery, Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code, 40 UCLA L. Rev. 983, 990 & n.21 (1993)(noting the incongruity of shifting income for tax purposes when it is not shifted for ownership purposes); Toni Robinson & Mary Moers Wenig, Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant, 8 Va. Tax Rev. 773, 775 n.4 (1989); 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); Lawrence Zelenak, Marriage and the Income Tax, 67 S. Cal. L. Rev. 339, 380 (1994); Laura Ann Davis, Note, A Feminist Justification for the Adoption of an Individual Filing System, 62 S. Cal. L. Rev. 197, 198, 215, 236, 240-48 (1988); cf. Zelenak, supra, at 378-79, 386 (noting that by permitting income to be split only if property is actually transferred to the non-earning spouse, an incentive would arise for husbands to share legal ownership of earnings with their wives).
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. Aggregation thereby imposes 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, 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

2. Income splitting was adopted in 1948 as a response to a perceived geographic disparity. Residents of community property states were allowed to split their incomes for beneficial tax computation purposes because state law split ownership of earnings between the two spouses equally. See Poe v. Seaborn, 282 U.S. 101 (1930). Residents of common-law jurisdictions were, by contrast, denied the benefits of income splitting because state law conferred on the non-earning spouse no present property interest in the other spouse's earnings. See Lucas v. Earl, 281 U.S. 111 (1930). As a result, community property residents were favored with more beneficial tax treatment than were residents of common law states. I denote this disparity in treatment as merely a perceived disparity because similarly situated taxpayers were not being treated dissimilarly. Rather, the tax system was treating different taxpayers differently. The community property and common law residents were different with respect to the important issue of whether the non-earner spouse had a present ownership interest in the other's earnings. Congress' concern about perceived geographic disparity prompted it to equalize the treatment of these differently situated taxpayers to forestall a massive conversion by common law states to the community property system. S. REP. No. 80-1013, pt. VIII, at 18-19 (1948), reprinted in 1948-1 C.B. 285, 302. Congress did so in 1948 by incorporating income splitting into the joint return.


5. 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.
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, combine to exacerbate this privileging of single-earner couples over two-earner couples. This pattern is thought to have the powerful symbolic effect of legitimizing only traditional marital roles in which solely the husband is gainfully employed. By favoring disparate-income couples, the joint rates thereby penalize those who challenge traditional marital roles, couples in which both spouses perform paid labor.\(^6\)

Second, the favoring of single-earner couples not only sends legitimizing messages to them but is also 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.\(^7\) Essentially, the tax rate on the secondary earner's first dollar of income is determined by her

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\(^6\) These patterns have been described in Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 *Law & Hist. Rev.* 259, 261 (1988) (discussing impact of automatic income splitting on spouses' roles). *See also* Gann, *supra* note 1, 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 1, at 987, 992 & n.29 (noting that the tax laws encourage single-earner families); Robinson & Wenig, *supra* note 1, 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 1, at 340-41 (noting that the single-earner couple benefits from income splitting).

\(^7\) *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 1, at 41; McCaffery, *supra* note 1, at 993; Zelenak, *supra* note 1, at 365; Davis, *supra* note 1, at 210. Only Professor McIntyre has written in opposition to this view. He questions 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, he assumes that spouses share their resources to a large extent, and he argues that tax rates are blind as to which spouse's income is assigned to the lower versus the higher tax brackets. *See* Michael McIntyre, *Economic Mutuality and the Need for Joint Filing*, 21 *Can. Tax.* Winter 1979, at 13; Michael J. McIntyre, *Individual Filing in the Personal Income Tax: Prolegomena to Future Discussion*, 58 N.C. L. Rev. 469 (1980) [hereinafter McIntyre, *Prolegomena*]; Michael J. McIntyre, *Tax Justice for Family Members After New York State Tax Reform*, 51 *Alb. L. Rev.* 789 (1987). However, he 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.
husband’s income rather than by the lowest tax rate. I argue in a recent article that the income-splitting feature of the joint return rate structure also discourages married women from participating in the paid work force. Joint return rates probably discourage married women on the margin from entering the work force or from remaining in it upon marrying and, in that regard, are biased against women.

A third 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. The greater the income differences between husband and wife, the more valuable is the benefit from income splitting and the smaller is the harm from income aggregation, and thus, the greater is the couple’s financial benefit from filing jointly rather than separately. Writing when disparate incomes were virtually universal, Professor Boris Bittker acknowledged this incentive in the rate structure, noting that joint returns, while 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. It will later be shown that this behavioral incentive for couples to file jointly, rather than separately, essentially locks women


into damaging patterns that exist in the joint rate structure even though those patterns substantially disadvantage women.

III. THE IMPACT OF JOINT RATES AS BETWEEN THE SPOUSES

A. Coerced Annual Transfers of Wealth from Wives to Their Husbands

The very features of joint filing that cause the disincentive against wives to work and that favor disparate-income couples over equal-income couples, also combine to cause a separate and distinct problem for women who live in common law states. In common law states, income splitting and aggregation operate in conjunction with a variety of well-entrenched social forces to create a pattern of coerced annual transfers of wealth from women to men. I first exposed this pattern in a longer article that appears in the current issue of the University of Virginia’s Journal of Law and Politics. I will not repeat all the details here, but will set forth an exposition of the primary points of that argument to explain how this previously unidentified pattern occurs.

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 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.

12. This pattern does not exist for couples who live in any of the nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin. Couples in community property states compute separate return tax liability no differently than joint return liability because they are required to split their incomes even when filing separately. See Poe v. Seaborn, 282 U.S. 101 (1930); Department of the Treasury, Internal Revenue Service, Publication 555, Federal Tax Information on Community Property (1995) [hereinafter Publication 555]. Therefore, wives living in community property states would pay as much tax by filing separately as they would by filing jointly. Apart from the issue of joint and several liability, these wives would be no worse off financially by filing jointly.

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.

This pattern, present when a couple files jointly, operates in a social context in which husbands tend to earn more than their wives, and thus, tends to redound to the benefit of husbands and to the detriment of wives.

14. In 1994, 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 that of married women was only $11,859. See U.S. Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, Series P-60, Income Statistics Branch/HHES Division, Table P-11 (visited 1997) <http://www.census.gov/income/p11.txt (Table P-11 on file with Southern California Review of Law and Women's Studies). These figures 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. A recent New York Times article reports that the wage gap between men and women has begun to widen. Tamar Lewin, Wage Difference Between Women and Men Widens, N.Y. TIMES, Sept. 15, 1997, at Al. Consequently, it seems unlikely that the current pattern in which husbands earn more than their wives will cease to exist anytime soon.

In 1989, wives earned more than their husbands in only 18% of marriages. See Diane CrisPELL, More Bacon, AM. DEMOGRAPHICS, Dec. 1989, at 9 (citing U.S. Bureau of the Census, Earnings of Married-Couple Families: 1987, Current Population Reports, Series P-60, No. 165 (1989)). In 1994, 18.9% of wives earned more than their husbands. This figure was derived 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 the husband did not (2,958,000) and dividing that sum by the total number of married couples (53,865,000). See U.S. Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, Series P-60, Income Statistics Branch/HHES Division, Table P-19 (supplying 7,218,000 and 53,865,000 figures), Table F-13 (providing the 2,958,000 and 53,865,000 figures) (visited 1997) <http://www.census.gov/hhes/income/histinc/f.19.html; <http://www.census.gov/hhes/income/histinc/f.13.html (Tables on file with Southern California Review of Law and Women's Studies).
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 wife to husband. Upon filing jointly, the tax attributable to the husband’s income decreases more than the amount by which the wife’s tax increases. Thus, as a unit, the couple is better off filing jointly rather than separately. Essentially, 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. However, 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. This pattern would not be so objectionable if women could realistically avoid income splitting and aggregation by filing separately. However, separate returns are rarely a practical solution for most families because they almost uniformly increase the tax liability of the family vis-à-vis the joint return and, therefore, are rarely used. 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.

How much does the wife transfer to her husband? How much does the tax attributable to the wife’s income increase by filing jointly rather than separately? The answer to these questions depends on how the couple apportions its joint return liability. Couples who file jointly may divide their tax liability in any manner they choose. No rule exists mandating one approach over another because jointly filing

15. 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 the following statistics compiled by the Internal Revenue Service. In 1993, 48,298,687 returns in which spouses filed jointly were submitted to the IRS. Only 2,437,311 separate returns were filed by married taxpayers. See Department of the Treasury, Internal Revenue Service, Publication 1304, Statistics of Income 1993, Individual Income Tax Returns (revised Mar. 1996). 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 any return. 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%.
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spouses are jointly and severally liable for any unpaid tax. 16 A variety of approaches to apportionment of the joint return liability are defensible. One approach would be simply to divide the total tax liability in half under the theory that the spouses share all expenses equally. 17 This approach, hereafter referred to as 50-50 apportionment, is not rational in theory because the amount of tax each spouse generates should depend on the amount of income each earns. Nevertheless, many couples probably divide their tax liabilities in half in any event. 18 Under another approach, hereafter referred to as relative-net-income apportionment, the tax burden would be attributed to the

16. See I.R.C. § 6013(d)(3) (West Supp. 1997). From the perspective of the IRS, the apportionment method spouses use to divide their joint tax liability between them is irrelevant because the IRS can proceed against either or both spouses for the entire amount of any joint return tax deficiency. See, e.g., In re Richmond, 456 F.2d 458, 462 (3d Cir. 1972), aff'd 322 F. Supp. 888 (D.N.J. 1970). Because couples can divide their joint return tax in any manner they choose, the true incidence of the tax between husbands and wives is difficult to determine. Empirical research should be conducted to determine how spouses, in fact, apportion their joint return liabilities.

17. In Van Vleck v. Commissioner, 31 B.T.A. 433 (1934), aff'd, 80 F.2d 217 (2d Cir. 1935), cert. denied, 298 U.S. 656 (1936), spouses voluntarily divided their 1930 tax bill evenly between them even though only the wife had net income for the year. The husband had experienced a net loss in 1930. Van Vleck illustrates that spouses sometimes split their joint tax liability in half even when one earns more than the other.

When the Commissioner collects a joint return deficiency from one spouse under the rule of joint and several liability, that spouse may seek contribution from the other in state court. In such contribution actions, some state courts have apportioned the couple's joint tax deficiency half to each spouse even when the spouses had unequal earnings. See Rude v. Commissioner, 48 T.C. 165 (1967) (discussing whether wife could deduct as a nonbusiness bad debt the amount her husband owed her pursuant to an earlier right of contribution judgment from a California state court and finding that she could not); Rocha v. Rocha, 297 P.2d 505 (Cal. Dist. Ct. App. 1956) (apportioning joint tax deficiency half to each spouse under both law and the agreement between the parties); Bormaster v. Bormaster, 274 P.2d 757 (Kan. 1954) (husband entitled to contribution where he paid over one-half of the deficiencies); Strange v. Rubin, 456 S.W.2d 416 (Tex. Civ. App. 1970) (wife entitled to contribution from husband's estate of one-half of the interest assessed for deficiencies); Hanson v. Hanson, 350 P.2d 859 (Wash. 1960) (wife was entitled to contribution from husband for deficiencies on community income and could deduct that amount from agreed-upon property settlement). Some spouses have been reported to divide other living expenses evenly even when one earned more than the other. See Beck, supra note 11, at 380 (discussing findings of a survey by SHERRI HITE, WOMEN AND LOVE: A CULTURAL REVOLUTION IN PROGRESS 445-47 (1987)); Marjorie E. Kornhauser, Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return, 45 HASTINGS L.J. 63, 82 n.54 (1993). Consequently, it is not inconceivable that spouses might divide their joint tax liability evenly although one has more income than the other.

18. See Edward J. McCaffery, Cognitive Theory and Tax, 41 UCLA L. REV. 1861 (1994) (proposing that errors of cognition often influence people to make "irrational" decisions in all areas of life, including tax). Cognitive errors may also impact how husbands and wives apportion their joint tax liabilities.
spouses in proportion to their relative net incomes. Thus, the tax attributable to the husband would bear the same proportion to the total tax bill which his income bears to total income. A third approach, hereafter referred to as secondary-earner apportionment, would be to attribute tax first to the husband under the theory that, earning more, he is the primary breadwinner. The tax attributable to him would be the tax liability computed as if he were the only working spouse. The additional tax under joint filing would not have arisen had the wife chosen not to work and, therefore, would be attributable to her.

An example using these methods for apportioning joint return liability illustrates how joint return rates, relative to separate rates, result in a transfer of wealth from the lower-earning spouse, usually the wife, to the higher-earning spouse, usually the husband. Consider a case in which a husband earns $80,000 and his wife earns $40,000. Joint return liability would amount to $29,729. Under 50-50 apportionment, $14,864 would be attributed to each spouse. Under relative net income apportionment, the tax attributable to the husband would be two-thirds of the total since his income comprises two-thirds of the couple's total income. The portion of the joint return tax attributable to the husband would be $19,819, and that attributable to the wife would be $9,910. Under secondary-earner apportionment, $17,603 would be attributable to the husband and $12,126 would be attributable to the wife. Contrast these amounts with the tax liabilities resulting from separate filing: $21,564 for the husband and $8,802 for the wife. Regardless of which apportionment method is the most appropriate, the husband benefits financially from the decision to file jointly. He pays $14,864, $19,819 or $17,603, by filing jointly versus the greater amount of $21,564 by filing separately. Conversely, the

19. Before Congress adopted the rule of joint and several liability, when federal courts had occasion to apportion joint return liability to determine which spouse should pay a tax deficiency, they consistently used this second method, ruling that joint tax liability should be divided between the spouses on the basis of their respective net incomes. See Commissioner v. Rabe­nold, 108 F.2d 639, 640 (2d Cir. 1940); Cole v. Commissioner, 81 F.2d 485, 487, 489 (9th Cir. 1935); Seder v. Commissioner, 38 B.T.A. 874, 877 (1938); see also Miller v. Miller, 310 N.Y.S.2d 18, 21 (Civ. Ct. 1970) (state contribution action in which state court divided a federal tax liability between the spouses on the basis of their respective net incomes).

20. Given the average earnings of husbands and wives from the census data enumerated in note 14, supra, the assumption that a husband earns twice as much as his wife is not unrealistic.

21. All tax computations utilize the rate schedules in I.R.C. §§ 1(a) and (d), unadjusted for inflation, for married individuals filing joint returns and for married individuals filing separate returns, respectively. See Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 416, 458. All computations are rounded to the nearest dollar or percentage point.
wife is harmed from the decision to file jointly regardless of the method used to apportion the joint tax liability between the spouses. Her tax liability would have been only $8,802 had she filed separately in contrast to liability attributable to her of either $14,864, $9,910, or $12,126 by filing jointly. This decrease in the husband’s tax liability and the increase in the wife’s tax liability result from the combined operation of income splitting and aggregation. By filing jointly, rather than separately, the husband has benefitted. Under the relative-net-income approach, the apportionment method least harmful to the wife, he has benefitted by $1,745. While a portion of his gain comes at the expense of the U.S. Treasury, the other $1,108 comes at the expense of his lower-earning wife. Accordingly, the wife has essentially transferred $1,108 to her higher-earning husband by agreeing to file jointly. This pattern is objectionable not only on vertical equity grounds because it applies to force a lower-earning spouse to transfer wealth to a higher-earning spouse, but also on feminist grounds because it generally applies to require transfers from women to men.

A number of points concerning this pattern in which the wife pays more and the husband pays less by filing jointly are noteworthy. First, under this pattern, the increase in the wife’s tax is very severe for her on a percentage basis because of her lower income while the reduction in tax to the husband provides a relatively modest benefit to him on a percentage basis because of his greater income. Under relative-net-income apportionment, the percentage increase in the wife’s tax as a result of filing jointly rather than separately is 13%, 22 while the percentage decrease in the husband’s tax from joint filing is only 8%. 23 The harm to the wife is more exacting from her perspective than the benefit to the husband is helpful from his point of view. Under secondary-earner apportionment, the percentage increase in the wife’s tax as a result of joint filing is 38% 24 while the percentage decrease in the husband’s tax is only 18%. 25 Alternatively, under 50-50 apportionment, the percentage increase in the wife’s tax as a result

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22. The percentage increase in the wife's tax from filing jointly is computed by subtracting her separate tax liability from her portion of the joint tax liability and then by dividing by her separate tax liability: \((\$9,910 - \$8,802) + \$8,802 = 13\%\).

23. The percentage decrease in the husband’s tax from filing jointly is computed by subtracting his portion of the joint tax liability from his separate liability and then by dividing by his separate liability: \((\$21,564 - \$19,819) + \$21,564 = 8\%\).

24. \((\$12,126 - \$8,802) + \$8,802\).

25. \((\$21,564 - \$17,603) + \$21,564\).
of joint filing is a staggering 69%\(^{26}\) while the percentage decrease in the husband’s tax is only 31%\(^{27}\).

Even more alarming, the dollar amount of the transfer of wealth from the wife to her husband generally increases the less she earns in relation to him. In general, the greater the disparity in spousal incomes, the more benefit the lower-earning wife transfers to her higher-earning husband by filing jointly rather than separately. For example, assuming the husband and wife had respective earnings of $100,000 and $20,000, rather than the $80,000 and $40,000 described above, total earnings would remain the same but relative earnings would diverge even more. Under this scenario, the total joint return liability would remain $29,729. Under relative-net-income apportionment, the husband’s share of this joint return liability would be $24,774 and that of his wife would be $4,955. By contrast, had these spouses filed separately, the husband’s separate tax liability would have been $28,764 while the wife’s would have been only $3,202. Under relative-net-income apportionment, this wife has lost $1,753 by filing jointly rather than separately while her husband has gained $3,991. Although a portion of his gain comes at the expense of the U.S. Treasury, the other $1,753 comes at the expense of his lower-earning wife. In this case, the wife has essentially transferred $1,753 to her higher-earning husband. Note that the spouses’ incomes are much more disparate in this case, $100,000/$20,000, than in the $80,000/$40,000 example discussed previously. In the $80,000/$40,000 example, relative-net-income apportionment resulted in a transfer of only $1,108 from the lower-earning wife to her husband. The greater the disparity in spousal incomes, that is, the less the wife earns in relation to her husband, the more she transfers to him by agreeing to file jointly.

The fact that tax rates are structured to encourage joint filing when one spouse earns more than the other, and the fact that joint rates then effectively cause a transfer from the lower-income to the higher-income spouse result in transfers of wealth from the “poorer” to the “richer” spouse precisely because of the disparity in spousal incomes. This incentive structure is contrary to notions of ability to pay. It is even more ironic and regressive that the amount of the transfer should increase in severity for the lower-earning spouse in absolute dollar terms the less she earns in relation to her husband.

\(26\). ($14,864 - $8,802) + $8,802.

\(27\). ($21,564 - $14,864) + $21,564.
Some critics might argue that the wife has not been forced to transfer any wealth to her husband by filing jointly. They would note that, as a unit, the couple is better off filing jointly than separately because, as a unit, less tax must be paid. Consequently, more resources remain available for the benefit of all the family members, including the wife.\(^{28}\) While it is true that couples usually pay less tax when filing jointly rather than separately, it does not necessarily follow that more resources remain available for the benefit of all family members. The observation by critics does not alter the fact that the savings from joint filing is due entirely to the reduction in tax attributable to the husband's income, a reduction that exceeds the increase in tax attributable to the wife's income. While the couple, as a unit, is better off by filing jointly, the only way the wife can be viewed as having benefitted individually from the decision to file jointly is if she has equal access to her husband's substantial tax savings.\(^{29}\) The assumption that any extra resources from filing jointly would, in fact, be available to the wife is far from certain. Spouses are required neither to share nor to pool their resources, nor even to live together to be eligible to file jointly.\(^{30}\)

Whether or not the wife has access to the tax her husband saves by filing jointly depends on whether or not she has access to his post-tax earnings since his tax savings is one component of those post-tax earnings. Many factors coalesce to suggest that in general a wife does not have real access to her husband's post-tax earnings. First, the property laws of common law states fail to guarantee a wife access to her husband's earnings during the marriage.\(^{31}\) Federal tax law reflects

\(^{28}\) See McIntyre, Prolegomena, supra note 7, at 483 n.31.

\(^{29}\) See Beck, supra note 11, at 376 (noting that wives may receive no benefit from the tax savings due to income splitting unless tax reductions their husbands obtain are assumed to benefit the wives); cf. Anne L. Alstott, Tax Policy and Feminism: Competing Goals and Institutional Choices, 96 COLUM. L. REV. 2001, 2029-30, 2050-51 (1996) (acknowledging in other contexts that women may not benefit individually from tax savings accorded to the family).

\(^{30}\) See Beck, supra note 11, at 378. See also I.R.C. § 6013(a) (West Supp. 1997) (listing situations in which husbands and wives are barred from filing jointly, but failing to mention living apart or keeping assets and earnings segregated).

\(^{31}\) See, e.g., 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"). The non-earning spouse may obtain rights in the other's saved earnings only when the marriage terminates, either by death or upon divorce. See 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, 87, 110-11 (1979); Elizabeth A. Cheadle, Comment, The Development of Sharing Principles in Common Law Marital Property States, 28 UCLA L. REV. 1269, 1269 n.2, 1312 (1981); Emily Osborn, Comment, The Treatment of
that fact by precluding income splitting for separately filing couples who live in common law jurisdictions.\textsuperscript{32} In the forty-two common law jurisdictions\textsuperscript{33} where wives are worse off filing jointly than separately,\textsuperscript{34} federal law does not permit income splitting to separately filing spouses because state law does not give one spouse a present ownership interest in the other’s earnings. This very lack of a present property interest in her husband’s earnings precludes a wife in these states from enjoying the right to share in her husband’s joint return tax savings during the marriage.

Second, although the wife would have access to her husband’s tax savings if they were to pool their resources voluntarily, empirical data suggest that a significant percentage of couples do not pool resources\textsuperscript{35} and that the practice of sharing seems to be diminishing in frequency.\textsuperscript{36} As a result, a substantial number of wives do not have access to their husbands’ tax savings through voluntary sharing.

Third, while spouses may report that they share their earnings, sociological data indicate that spouses who do “share” resources do

\textit{Unearned Separate Property at Divorce in Common Law Property Jurisdictions}, 1990 Wis. L. Rev. 903, 907; Keith D. Ross, Note, \textit{Sharing Debts: Creditors and Debtors Under the Uniform Marital Property Act}, 69 Minn. L. Rev. 111, 117 (1984). Even in the context of divorce where common law property states sometimes give a wife access to her “husband’s property,” discretion is often left to a judge to divide the property fairly between the spouses. However, the “uncertainty of this method is unsatisfactory to the economically dependent spouse, who has no automatic right to a part of the property.” Gann, supra note 1, at 48 (emphasis added).


\textsuperscript{33} The forty-two common law jurisdictions consist of the forty-one non-community property states and the District of Columbia. The District of Columbia is a common law jurisdiction. See Osborn, supra note 31, at 903 n.1.

\textsuperscript{34} An examination of whether wives living in community property states have access to their husbands’ tax savings under state law is unnecessary for purposes of this analysis. Wives in those states are normally no worse off by filing jointly than they would be by filing separately because of the income splitting that is required of separately filing spouses who reside in community property jurisdictions. See supra notes 2 through 12, and accompanying text.

\textsuperscript{35} See, e.g., \textsc{Phillip Blumstein & Pepper Schwartz}, \textit{American Couples} 101, Figure 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 of the couples surveyed believed in pooling); \textsc{Rosanna Hertz}, \textit{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 money); \textsc{SHERE HITE}, \textit{Women and Love: A Cultural Revolution in Progress} 431-49 (1987); \textsc{Jan Pahl}, \textit{Money and Marriage} 78, 186 (1989) (only 56\% of couples claimed to share); Kornhauser, \textit{supra} note 17, 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).

\textsuperscript{36} See \textsc{Blumstein & Schwartz}, supra note 35, at 109; Beck, \textit{supra} note 11, at 380; Kornhauser, \textit{supra} note 17, at 81, 91; Ross, \textit{supra} note 31, at 134.
not do so in a meaningful way. Each spouse's relative freedom to use the resources for his or her own benefit may differ substantially, indicating that control and, therefore, money is not really shared. The higher-earning spouse generally controls how such resources will be used. Therefore, even when couples do pool nominally, the power, status and freedom to decide how money is used tend to be allocated to the higher earner, usually the husband. This pattern is reflected in the findings of numerous sociological studies that nominal pooling of income does not mean that control over that income is shared. "If one person dominates the decision-making process, true sharing cannot exist." The lack of sharing may be subtle, discernable for example only through a pattern of deference by the wife to the husband's decisions. Consequently, even when a couple claims to

37. See, e.g., PAHL, supra note 35, at 57; Kornhauser, supra note 17, at 81-82, 81 n.53, 83 & n.55; Viviana A. Zelizer, The Social Meaning of Money: "Special Montes," 95 Am. J. Soc. 342, 352-77 (1989) (families operate as hierarchical groups—one person controls the allocation and use of money); cf. Ross, supra note 31, at 134-35 (noting that even when spouses have the legal obligation to pay the other's liabilities, they do not necessarily believe they must do so or that they must share resources in other ways).

38. See, e.g., Beck, supra note 11, at 380-81 (women report having to ask permission from their husbands to make purchases unless they earn significant amounts themselves); id. at 381 n.296 (owner controls use of earnings); Elizabeth De Armond, It Takes Two: Remodeling the Management and Control Provisions of Community Property Law, 30 GONZ. L. REV. 235, 251-55 (1995); Jones, supra note 6, at 274 (noting that the earner generally controls how earnings will be used); Zelenak, supra note 1, at 355.

39. See, e.g., BARBARA BERGMANN, THE ECONOMIC EMERGENCE OF WOMEN 211-12 (1986) (men as primary wage earners have retained control over consumption patterns); BLUMSTEIN & SCHWARTZ, supra note 35, at 53-56; PAHL, supra note 35, at 146-51 (women married to wealthy men often lack resources for leisure activities although their husbands do not); id. at 143 (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 57-73 (Rosemary Crompton & Michael Mann eds., 1986) (unequal food distribution within the family undermines the assumption of equal sharing of resources and power; there is a "marked hierarchy of consumption within families"); Heidi I. Hartmann, The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework, 6 SIGNS 366-76 (1981) (arguing that men more often than women control how income will be used and for whose benefit); 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); Michael Young, Distribution of Income within the Family, 3 BRIT. J. SOC. 305, 305 (1952) (historically men disproportionately benefit from family resources: "the bread-winners are often the meat-eaters"); id. at 313-14 (describing the practice whereby husbands provide only limited access to their resources through an allowance system rather than by providing indiscriminate access).

40. Kornhauser, supra note 17, at 88; see also Beck, supra note 11, at 380 (noting that the determination of which spouse has control over spending decisions is relevant to knowing whether those spouses share resources).

41. Kornhauser, supra note 17, at 106.
share resources, if the lower-earning wife lacks meaningful access to her husband's tax savings, she will, indeed, be worse off by filing jointly than separately.

The confluence of this social reality of control over resources by the higher-earning spouse and the structure of joint return rates poses a particularly striking irony. A couple in which the husband's earnings substantially exceed those of his wife is less likely to practice true sharing than other couples with closer incomes. As described above, joint, rather than separate, filing produces the largest transfer of wealth from wives to husbands for precisely the same couples—those in which spouses have the most disparate incomes. Ironically, this joint filing pattern is most harmful to wives in the very cases in which the wives would be least likely to have meaningful access to their husbands’ joint return tax savings. For couples in which spouses’ incomes differ, not only must wives pay significantly more by filing jointly than they would by filing separately, but their husbands are also less likely to practice true sharing, so the harm to the wives is not mitigated because they do not acquire meaningful access to their husbands’ tax savings.

If women do not have meaningful access to their husbands’ tax savings from joint filing, then joint filing, in fact, leaves those wives poorer than would separate filing. Even when wives do have access to their husbands’ tax savings through voluntary sharing, the tax savings still belong to the husbands. Sharing men’s resources through men’s generosity is second best to women owning resources on their own as a matter of right. 42 Husbands who voluntarily share their resources with their wives still enjoy the power and control that accompanies the concentration of assets in their hands. “[S]uperior earnings are rewarded with dominant control.” 43 Consequently, even if spouses share resources in a meaningful way, so that the wife may avoid economic harm upon filing jointly and so that she may effectively share in

42. Cf. SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 30-31 (1989) (suggesting that one spouse's generosity is inadequate to ensure justice within the family); Gillian K. Hadfield, Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap, 82 GEO. L.J. 89, 107 (1993) (arguing that the gender wage gap should be eliminated “to secure women's ability to ensure their own well-being rather than being dependent on transfers from a spouse or the government”); Davis, supra note 1, at 218 (noting that assumed sharing should not be the standard assumption which is incorporated into the law: “as a justification for refusing to accord women equal advantages in the economic or legal spheres, spousal interdependence . . . should not be accepted”).

43. De Armond, supra note 38, at 253.
her husband's tax savings, the fact that wives must rely on their husbands' generosity to enjoy the tax savings has a harmful pedagogical effect.\textsuperscript{44} The effect of the law is to convey messages to society that reinforce traditional male and female gender roles. The tax law teaches harmful messages about men's and women's identities by allowing women to benefit only through their husbands' benevolence. The tax law establishes a pattern whereby wives must consistently request money from their husbands, money to which they should have had access by right. In doing so, the law portrays the husband as a provider, a generous contributor, a chief financial officer and an authority figure, while it portrays the wife as a beggar, a burden, a consumer and a dependent. This pattern in the tax law perpetuates marriage as an institution in which men economically dominate women. The fact that men are granted dominance in relationships because they are regarded as the owners of economic resources is further exacerbated by the fact that joint filing relative to separate filing directs even more money to husbands and even less to wives. Tax law arguably should not be allowed to perpetuate or contribute to such stereotypes.

The Tax Code relies on the marital sharing of assets in an effort to achieve a just result, in an effort to allow both spouses to benefit economically from the financial incentive to file jointly. Voluntary resource sharing within the marital unit, however, is not a sufficient solution to the pattern whereby husbands are made better off and wives are made worse off by filing jointly rather than separately. First, as noted above, many spouses do not practice sharing. Second, even for those couples who do purport to share, the government's reliance on sharing to correct an inequity in the tax system perpetuates the view of wives as drains on their "husbands'" resources. The tax law should neither rely on spousal sharing nor be structured to require

\textsuperscript{44} Cf. Susan H. Bitensky, \textit{Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis}, 86 Nw. U. L. Rev. 550, 635 (1992) ("[l]aw . . . disseminates [values and priorities] . . . back to the populace to become part of conscious conventional wisdom"); De Armond, \textit{supra} note 38, at 257 (suggesting that the messages in law have some power to transform society and arguing that "law is a belief system that helps define the role of the individual in society and relations with others, [and that] it can promote fulfilling, healthy roles for people and encourage them to relate in particular ways, and not in others"); Edward J. McCaffery, \textit{Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change}, 103 \textit{Yale L.J.} 595, 656 (1993) (recognizing a potential symbolic danger of taxing men more than women, thereby implying both that the symbolic function of law is important and that law sends messages to society); Zelenak, \textit{supra} note 1, at 365 & n.121 (implying that law, specifically the joint return, may be objectionable on the basis of inappropriate messages that it sends to the public).
that spouses share resources to enable wives to enjoy some of the financial benefit from filing jointly.

In the absence of sharing, the joint return rate structure operates to force wives to transfer funds to their higher-earning husbands. If wives had meaningful access to their husbands’ tax savings, joint filing would still effect a transfer of wealth from them to their husbands, but the practice of sharing would permit a subsequent reversal of that earlier wealth transfer. As noted earlier, however, both legal rules regarding ownership rights and sociological data suggest that wives lack access to their husbands’ savings. Without such access, each year when most lower-earning wives file jointly, the joint return rates cause them to transfer money to their higher-earning husbands. The joint return rate structure, analyzed in the context of social patterns in which husbands tend to earn more than their wives and in which spouses tend not to share their resources in a meaningful way, effects a significant wealth transfer from the lower-earning wife to her higher-income husband.

This pattern in which the tax system participates in annual transfers of wealth from wives to their husbands is especially troublesome given the incentive in the Code for most couples to file jointly rather than separately. As described in Part II, a divergence in spousal incomes triggers an incentive to file jointly. Joint filing, in turn, lowers the tax of the higher-earning husband and increases that of his lower-earning wife relative to separate filing, thereby resulting in a transfer of wealth from the lower-income to the higher-income spouse. Through the operation of the joint return rates and the incentive those rates create to file jointly, the fact that a husband earns more than his wife essentially leads to a transfer of wealth from that poorer wife to her richer husband. Moreover, the greater the disparity in incomes, the larger the transfer from the wife to her husband. Such systematic transfers operate to keep money out of women's hands and perpetuate the economic superiority of men over women. Through the operation of the joint return rates, a disparity in incomes functions to perpetuate economic inequality. The incentive to file jointly when one spouse earns more than the other essentially locks women into the harmful patterns that arise under the joint return.

Admittedly, spouses could divide their joint return tax liability in a manner that would allow both to share in the joint return tax savings. For example, one equitable method for apportioning the joint tax liability between the husband and wife, one that differs from the
apportionment methods described above, would be to split that liability in proportion to the spouses' respective liabilities had they filed separately. Using the example in which the husband and wife earn $80,000 and $40,000 respectively, this approach would allocate $21,112 of the $29,729 joint tax to the husband and $8,617 to his wife. Under this apportionment method both spouses benefit financially from filing jointly. Consequently, this apportionment method is the most desirable. Nevertheless, apportioning joint return tax liability in this manner is inappropriate when analyzing which spouse benefits by filing jointly rather than separately because when a couple pays its joint return tax liability, it is unlikely that each spouse contributes to the payment based on relative separate return liabilities. First, no tax rules apply in this context to instruct the couple to apportion its joint return tax in this manner. Second, the vast majority of the population is unlikely to consider apportioning joint tax liability in this manner.47

45. These amounts are computed as follows:

\[
\frac{\$21,564}{\$30,566} \times \$29,729 = \$21,112
\]

\[
\frac{\$8,802}{\$30,366} \times \$29,729 = \$8,617
\]

46. In fact, the government has adopted this apportionment method for use in a variety of contexts but notably not to instruct joint filers how to divide their joint tax liabilities fairly. See Rev. Rul. 80-6, 1980-1 C.B. 296; Rev. Rul. 80-7, 1980-1 C.B. 296; Rev. Rul. 80-8, 1980-1 C.B. 298; Treas. Reg. § 20.2053-6(f) (1958); Treas. Reg. § 1.6654-2(e) (as amended 1985); Treas. Reg. § 1.6015(b)-1(b) (as amended 1976). If Congress ever repeals the rule of joint and several liability, it should adopt in its place an apportionment method which divides the joint tax liability on the basis of the spouses' respective tax liabilities had they filed separately, and it should instruct taxpayers that this method is the fairest manner for dividing their joint return tax liability. See Beck, supra note 11, at 389 & n.341, 393-95. Apportioning joint return liabilities on the basis of respective separate return liabilities is more appropriate than doing so on the basis of respective net incomes because the former method permits the lower-earning spouse to share in the financial benefit of joint filing.

47. In an informal survey of attorneys conducted by this author, sixty-three percent of respondents reported that the fairest way to divide joint return tax would be according to the spouses' respective net incomes. Twelve percent thought that it would be fairest to apportion the joint tax either according to the spouses' respective net incomes or on a fifty-fifty basis. Only twenty-five percent thought of splitting the liability in proportion to the respective separate return tax liabilities. If three-quarters of attorneys, individuals who tend to be educated in general tax principles, do not think to split the joint return tax in proportion to separate tax liabilities, then the average couple is very unlikely to think of splitting the joint tax in that manner. Of course, limitations on the usefulness of such a survey include the fact that respondents were simply asked their opinion. Had respondents actually been preparing their own tax returns and deciding whether to file jointly or separately, they might have discovered that apportionment on the basis of separate return liabilities rendered a different result than apportionment on the basis of respective net incomes. Most spouses probably do bear the joint return liability using a 50-50 split or in proportion to their respective net incomes.

It should be noted that some individuals, probably only tax accountants, apportion joint return liability between spouses in a manner that approximates the correct method, according to
Thus, spouses who segregate their resources and divide each expenditure, including the joint return tax bill, most likely contribute equally or in proportion to their respective net incomes, rather than in proportion to what their respective separate tax liabilities would have been if computed.

When given the opportunity to apportion joint return liability, even courts have consistently failed to do so on the basis of respective separate return liabilities. In state contribution actions where federal joint return tax liabilities were apportioned between spouses, not one reported state court decision stated that the joint return tax should be divided according to the spouses’ respective separate return tax liabilities. Rather, state courts apportioned joint return liability between respective separate return liabilities. They have been reported to divide that liability on the basis of the spouses’ respective liabilities had they been single. Under this method, both spouses benefit economically from filing jointly rather than separately. See Ellen E. Schultz, *How to Split the Tax Bill with Your Spouse*, WALL ST. J., Mar. 31, 1993, at C1 (noting that some couples are more frequently asking their return preparers to determine how to divide underpayments between the spouses, indicating both that most individuals do not know how to do this fairly on their own and that many do not share resources). Empirical research should be conducted to determine on a more formal basis how most spouses divide their joint return tax liabilities in practice.

48. When, under the rule of joint and several liability, the Commissioner collects a joint return tax deficiency from one spouse even though his or her income or deductions did not contribute to the deficiency, then that spouse may bring a right-of-contribution action in state court against the other spouse. In the context of joint return tax liability, state courts have determined fair-share apportionment using a variety of methods, but no decision has reported apportioning the joint return tax on the basis of respective separate return liabilities. Rather, state courts have apportioned joint return tax liability in the following manners: (1) according to the spouses’ respective net incomes, see Chappell v. Chappell, 253 So.2d 281 (Fla. Dist. Ct. App. 1971) (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 v. Miller, 310 N.Y.S.2d 18 (Civ. Ct. 1970) (wife required to contribute her share of tax assessment paid by her husband based on the ratio of her taxable income to total taxable income); (2) half to the husband and half to the wife, see Rude v. Commissioner, 48 T.C. 165 (1967) (discussing whether wife could deduct as a nonbusiness bad debt the amount her husband owed her pursuant to an earlier right of contribution judgement from a California state court and finding that she could not); Rocha v. Rocha, 297 P.2d 505 (Cal. Dist. Ct. App. 1956) (under both law and an agreement between the parties); Bormaster v. Bormaster, 274 P.2d 757 (Kan. 1954) (husband not barred due to divorce from recovering contribution from wife where he had paid over one-half of deficiency); Hanson v. Hanson, 350 P.2d 859 (Wash. 1960) (where wife was ordered to pay one-half of value of community property to husband, she could deduct husband’s one-half share of tax liability from property settlement); and (3) according to a property settlement agreement or stipulation between the ex-spouses, see Gillman v. O’Connell, 574 N.Y.S.2d 573 (App. Div. 1991) (agreement provided that any tax deficiency arising from the marriage would be apportioned to the spouse whose income or deductions generated the deficiencies); Gooden v. Wright, No. 14823, 1991 WL 57230 (Ohio Ct. App. Unrep. Apr. 18, 1991) (agreement provided that any common debts which included tax deficiencies would be paid entirely by the
the spouses by dividing it in half, by dividing it on the basis of respective net incomes, or in accordance with a property settlement agreement between the ex-spouses. Moreover, prior to Congress' enactment of joint and several liability, federal courts sometimes had occasion to apportion joint tax liability between spouses. None of the federal courts addressing that issue apportioned the joint tax on the basis of the spouses' individual tax liabilities had they filed separately. Rather, those courts also ruled that joint tax liability should be apportioned on the basis of the spouses' respective net incomes. 49 If courts have apportioned joint return liabilities in a manner that prejudices the lower-earning spouse, usually the wife, then it should be expected that taxpayers will make the same errors. 50 Without instruction, few couples would be likely to divide their joint return liabilities in a manner that benefits both spouses. Until spouses are instructed that the

ex-husband); Strange v. Rubin, 456 S.W.2d 416 (Tex. Civ. App. 1970) (pursuant to a stipulation between the parties that half of the deficiency was attributable to each spouse).

It should be noted that Rocha, Hanson, and Rude, three of the four decisions in which liability was attributed to the spouses on a fifty-fifty basis, involved couples who had been living in community property jurisdictions. Dividing the joint return liability in half would have corresponded with apportionment on the basis of respective separate return liabilities if the deficiencies in those cases resulted from unreported community income. However, had a deficiency resulted from one spouse's improper deduction or an understated gain on the sale of separate property, then that deficiency should not be borne half by each separately filing spouse. In that instance, a fifty-fifty allocation would not correspond to apportionment on the basis of respective separate return liabilities. Given the absence of information documenting the reason for the deficiencies in Rocha, Hanson, and Rude, it is impossible to know whether or not the fifty-fifty allocation corresponds to apportionment on the basis of respective separate tax liabilities. None of these courts provided any indication in their opinions that they had thought about the apportionment issue sufficiently. Furthermore, none of the decisions ever referred to apportionment on the basis of respective separate return liabilities. Had courts intended to apportion on that basis it seems reasonable to expect that they would have said so. It, therefore, seems unlikely that the three courts had intended to apportion the deficiencies on that basis.

In general, state courts have not apportioned joint return liabilities in a manner that permits both spouses to share in the financial benefits of joint filing. Instead, they seem to apportion those liabilities in manners that benefit the higher-earning spouse and that harm the lower-earning spouse.

49. See Commissioner v. Rabenold, 108 F.2d 639, 640-41 (2d Cir. 1940); Cole v. Commissioner, 81 F.2d 485, 487, 489 (9th Cir. 1935); Seder v. Commissioner, 38 B.T.A. 874, 877 (1938). By choosing to apportion joint return liability on the basis of respective net incomes rather than according to the spouses' respective liabilities had they chosen not to file jointly, the Ninth and Second Circuits as well as the court known for its expertise in tax matters, the Board of Tax Appeals, all failed to spread the burdens of joint filing fairly between the spouses. This error had the same effect of favoring the higher-earning spouse and harming the lower earner. Even federal courts have apportioned joint return liability improperly.

50. Husbands prepare the joint tax return more often than wives. See 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). Thus, spouses may be unlikely to divide joint return liability in a manner that would benefit wives.
fairest manner of dividing their joint tax liability is on the basis of their respective separate return liabilities, couples are unlikely to divide their liabilities on that basis. Consequently, apportioning joint return tax on that basis is inappropriate for purposes of analyzing which spouse benefits and which is harmed from joint filing as opposed to separate filing.

Because spouses are unlikely to divide the joint return tax liability in a manner that provides a tax savings to each spouse, joint rather than separate filing is likely to inure to the benefit of the higher earner and to harm the lower earner. In this area, lack of explicit instructions from the IRS and taxpayers' imperfect understanding regarding apportionment appear to combine, permitting couples to apportion their joint return liabilities improperly and in a manner which tends to benefit husbands and to harm wives. Thus, by filing jointly rather than separately, the tax the wife bears most likely increases.

Economists have not adequately addressed the incidence of joint return tax as between spouses. Empirical studies are needed, not only on the question of how much tax each spouse pays upon submitting the joint return, but also on the patterns throughout the year of tax withholding for husbands versus wives. The issue of the incidence of income tax as between spouses is complicated further because of often unknown and varying practices regarding spousal sharing or non-sharing of resources. As further empirical research addressing these issues is undertaken, a clearer picture should emerge concerning inter-spousal transfers of wealth and the participation of the tax system in such transfers.

Nevertheless, even if spouses divide their joint return liability in a manner that allows both to benefit vis-à-vis separate filing, the joint return rate structure remains problematic. Even before the incidence of joint return tax between the spouses is verified, even before empirical evidence demonstrates that spouses split their joint return liability in a manner that actually causes wives to pay more and husbands to pay less than under separate filing, the joint return rate structure remains subject to criticism as a formal matter because the formal components of joint rates, income splitting and aggregation, operate together to increase the tax attributable to the lower earner and to reduce the tax attributable to the higher earner. For the lower-earning wife, income splitting first reduces her income by half but then

51. The 1996 1040 Forms and Instructions contain no guidance to taxpayers as to how to divide their joint return liabilities fairly when they owe additional tax upon filing.
aggregation adds back a larger amount, half of her husband’s larger income. The operation of these two components of joint rates increases the tax attributable to the lower earner as a formal matter. Whether or not spouses actually divide their joint tax liability in a manner that causes the wife to pay more than she would by filing separately, the formal design of joint rates increases the tax attributable to the lower-earning wife. Joint rates are designed to cause lower-earning wives to transfer wealth to their higher-earning husbands.

In this regard, joint rates are objectionable as a policy matter regardless of the actual empirical incidence of tax between spouses. If the incidence of joint tax between spouses is such that a wife does not transfer wealth to her higher-earning husband, then that is true despite the formal structure of joint rates. The tax structure would, in that case, be objectionable itself and would be relying on spousal sharing to avoid the result it was designed to create. Plainly, the tax system should not rely on the dubious likelihood of spousal sharing to correct inequities that are formally built into the system. Rather, the inequities should be removed.

B. Women Cannot Realistically File Separately to Avoid the Problems the Joint Rate Structure Imposes: One More Conflict for Women

Although women can avoid the problems of joint filing by filing separately, doing so is not a realistic option in most situations because of the financial incentive most couples experience to file jointly. The only way a wife can avoid being taxed at higher rates and thereby avoid transferring some of her wealth to her higher-income husband, as well as avoid being discouraged from working altogether, is to insist on filing separately. However, if she does so, the couple’s total tax bill will be higher. A woman who earns less than her husband, therefore, faces a conflict: she may either (1) file jointly to minimize the family’s tax liability and bear a larger individual tax burden, thereby facing financial pressure not to work, or (2) file separately to

52. See supra note 42 and accompanying text.

53. I.R.C. § 6013(d)(3) (West Supp. 1997), requiring income aggregation, applies only when a joint return is filed. No analogous provision exists regarding separate returns. See Johnson v. United States, 422 F. Supp. 958, 968 (N.D. Ind. 1976). Similarly, in the forty-one common law states and in the District of Columbia, income splitting is available only to joint filers. Compare the brackets in I.R.C. §§ 1(a) and (d) (West Supp. 1997).
minimize the tax liability attributable to her own income while increasing the family's tax burden overall.\textsuperscript{54}

With regard to this conflict, a number of points are worthy of note. The interests of the primary breadwinner, usually the husband, tend to be aligned, giving him an obvious choice. He serves himself and his family by filing jointly, minimizing both his own tax burden and the family's total tax bill. By contrast, women face a conflict that men rarely face. Women may do either what is better for themselves, file separately, or do what is worse for themselves but better for the marital unit as a whole, file jointly.\textsuperscript{55} By filing separately, a wife may

\textsuperscript{54} It should be noted that a husband would face the same conflict between individual versus family interests if he earned less than his wife. However, in most situations, husbands earn more than their wives and, therefore, tend not to face this conflict.

\textsuperscript{55} Some critics might argue that women do not experience a conflict in choosing a filing status. In response to this observation, it should be noted that many wives who do not experience such a conflict simply do not understand the costs of filing jointly. They do not realize that by filing jointly rather than separately, the tax attributable to the lower-earning spouse increases, and they do not know that filing jointly exposes them to joint and several liability for their spouse's tax. Finally, they may not know about the aggregation effect or realize that it is one reason why their post-tax disposable earnings are so low. \textit{See generally} McCaffery, \textit{supra} note 18 (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 view themselves as 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 as presenting any conflict at all. Such wives would prefer to file jointly to make more total resources available to their children. In response to this observation, one school of feminist legal scholars would argue that women's perceived alliance with children is really a method utilized by patriarchy to ensure the continued subjugation of women. \textit{See, e.g.,} Joan C. Williams, \textit{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). While this argument is subject to dispute, it does reinforce the notion that the wife's individual interests are often not aligned with those of the 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 provide more resources 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 does not alter the fact that filing jointly benefits the family unit by benefitting the husband and that it tends to be harmful to the wife as an individual. Any given wife may decide that the harm to herself from filing jointly is worth undergoing because of the offsetting benefit her family may experience. In making this determination, however, she has balanced the harm to herself from filing jointly with the benefits to her family and has implicitly faced the very conflict between self interest and group interest that was described above. 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 be in conflict with intimate, harmonious family ties. \textit{See} Okin, \textit{supra} note 42, at 32.
experience resentment or, in some cases, physical harm from her husband who prefers to file jointly.  

Through the mechanisms of income splitting and aggregation, the tax system tends to create a situation in which women consistently face conflict, one in which their own individual interests are at odds with those of the family as a whole. Because the vast majority of married couples file jointly, it is clear that many women are choosing others' interests over their own. Society already presents many serious dilemmas to women that men tend to escape, such as the conflict of whether to work for their own independence or to stay at home with their children, a decision that men may choose to consider but generally are not expected to face. These conflicts facing women could pose psychic costs to the extent that women are aware of them. The tax system should not impose additional psychic costs on women by presenting them with yet another conflict.

56. See, e.g., Estate of Aylesworth v. Commissioner, 24 T.C. 134 (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 11, at 332.

57. Cf. Williams, supra note 55, at 823-24 (discussing generally how the dominant culture teaches women to “choos[e] to marginalize themselves”). Choosing to file jointly would be one example of that phenomenon.

58. See Nancy C. Staudt, Taxing Housework, 84 GEO. L.J. 1571, 1616 (1996) (“Women at every income level report that they experience extreme stress and fatigue when they struggle to balance waged work with household responsibilities.”); Lucie E. White, On the “Consensus” to End Welfare: Where are the Women’s Voices?, 26 CONN. L. REV. 843, 846-47 (1994) (discussing the dilemma that women face of whether to work or to stay at home with their children); see also 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: Crisis in Liberal America (1984)) (discussing conflict women face between achieving in the public world and nurturing in the domestic sphere).

59. Cf. Kornhauser, supra note 17, at 64 & n.2 (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).

60. To the extent women and the public generally are not aware of the conflict, then the features of the joint return tax that cause this conflict, income splitting and aggregation, are problematic for another reason. The gendered nature of the joint filing system is generally unknown to the public. Any laws which 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. See 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."); see also JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 51 n.9 (1979); THOMAS P. STEPHENS, ORDER AND DISCIPLINE IN CHINA: THE SHANGHAI MIXED COURT 1911-27, at 78-82 (1992).
IV. REFORM

The system ought to be reformed. In addressing other problems caused by income splitting and aggregation, such as the fact that they discourage wives from working in the paid labor force, scholars have proposed eliminating the joint return altogether. Such a reform would eliminate both income splitting and aggregation and, therefore, would also have the beneficial impact of eliminating conflicts facing women as well as the pattern in which wives are forced to transfer wealth to their husbands every year at tax time.

V. CONCLUSION

Under normal circumstances, many U.S. socio-legal institutions operate to direct economic benefit to men automatically but not to women. In fact in some instances, those institutions operate to direct benefit away from women. The pattern I have described in which joint return filing operates in the social context to effect a transfer of wealth from wives to their husbands is one example of this theme. The tax rate structure is designed to induce the vast majority of married couples to file jointly rather than separately. Upon filing jointly a tax savings inures to the husband. His taxes are lower than they would have been had he filed separately. In this manner, economic benefit from the incentive to file jointly flows to men automatically. By contrast, relative to separate filing, joint filing most likely increases the tax that the wife will bear. Not only does the economic benefit from joint filing not flow to women automatically, but economic resources are most likely automatically directed away from them. Wives, therefore, face a conflict between acting in their own interests and acting in the interest of the family as a whole. Husbands experience no such conflict. In the absence of some sort of affirmative corrective action by the spouses, such as increased sharing or careful and correct apportionment of the joint return tax liability, the default system provides economic benefit to men but imposes both economic detriment and conflict on women.

The only means by which this harmful result for women can be avoided is for women to take corrective action. The burden falls on the wife to negotiate with her husband to convince him to share joint return tax savings. Under the current system, wives are required to act in some way, to do more than merely exist to acquire a benefit. By contrast, husbands need not take any affirmative action, husbands
need not undertake any burden, to benefit under the current system. Economic benefit flows to men automatically.

A more neutral tax system would be one in which both spouses benefit automatically from the incentives built into the tax structure. The spouses’ interests would be aligned with each other and with those of the family unit. Not only would both spouses derive economic benefit from filing jointly, but they would each obtain that benefit without having to take any affirmative corrective action. The current rate structure is unjust not only because it tends to direct economic benefit away from wives and towards husbands, but also because women must act to share in the economic benefit. Given current social and legal realities, men may benefit merely by existing. For women to benefit, however, they must do more than simply be.

This essay has described a neglected feature of joint versus separate tax rates, a feature that exemplifies a broader pattern in which economic institutions are designed in the social context to benefit men automatically but not women. In the case of joint versus separate tax rates, the incentive to file jointly operates in the social context to transfer money from wives to their husbands. Men need not do anything to benefit under the current socio-tax structure. Women, by contrast, must act if they hope to benefit or even to avoid harm under this system. Scholars should work to identify other areas, both within the tax system and outside of it, in which economic institutions are designed to benefit men automatically and to harm women.