

# Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism

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## I. INTRODUCTION

Marriage is no longer what it once was. Since the 1970's, and accelerating in recent decades, the link between formal marriage and family life has weakened dramatically. Nearly one-half of U.S. adults are now single at any given time, and two of five children are born to unmarried parents.<sup>1</sup> At the same time, delayed marriage, divorce, remarriage, and changing gender roles have transformed the content of marriage itself.

Despite these changes, the federal income tax and the Social Security system continue to define "family" based on formal marriage, and our textbooks treat the economic vulnerability of the married woman as the central problem of gender in tax policy design.<sup>2</sup> In this Article, I argue that the growing gap between legal fiction and social reality undermines the ability of the tax-and-transfer system to achieve any of a range of objectives—whether fostering individual freedom, aiding the poor, or shoring up the traditional family.

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<sup>1</sup> U.S. Census Bureau, *America's Families and Living Arrangements: 2012*, tbl.A1, <http://www.census.gov/hhes/families/data/cps2012.html> (50.7% of adults were married in 2012); Brady E. Hamilton, Joyce A. Martin & Stephanie J. Ventura, Ctrs. for Disease Control, *Births: Preliminary Data for 2010*, National Vital Statistics Reports 4 (Nov. 17, 2011), [http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60\\_02.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_02.pdf) (41% of births in 2009 were to unmarried women).

<sup>2</sup> See, e.g., Joseph Bankman, Daniel N. Shaviro & Kirk J. Stark, *Federal Income Taxation* 21-24, 566-69 (17th ed. 2012); (discussing the taxation of marriage and joint filing); Michael J. Graetz & Deborah H. Schenk, *Federal Income Taxation: Principles and Policies* 451-66 (7th ed. 2013) (discussing the taxation of marriage and divorce). In focusing on the situation of married women, the casebooks reflect the tenor of leading scholarship. See sources cited in note 23.

In the mid-twentieth century, the legal convention that marriage equals family was rooted in social practice. The overwhelming majority of adults married, and their marriages shared relatively fixed and predictable terms: Couples married early, had children quickly, and adopted a gendered division of labor till death did them part.<sup>3</sup> In sociologists' terms, marriage was a social institution that transformed individuals into couples with shared lives and shared luck.<sup>4</sup> In the mid-twentieth century, moreover, marriage was family life: It was the primary home for sexual activity, child-bearing and -rearing, and adult work and identity formation.<sup>5</sup> In that era, income tax and transfer rules that treated the married couple as the basic unit of family life (and, indeed, social life) made sense. But recent decades of social change have destroyed that policy equilibrium.

Since 1970, with a notable acceleration since 1990, three trends have reconfigured American family life. First, marriage is no longer the dominant institution for adult development or child-bearing and -rearing. The growing social acceptability of nonmarriage has combined with delayed marriage, divorce, and a striking rise in cohabitation to decimate what was once the expected life pattern for adults: lifelong marriage. The unmarried still have children, however, and a rising percentage of children are born to unmarried mothers and live for a significant portion of their childhood in a single- or cohabiting-parent household.<sup>6</sup>

Second, even among the married population, the content of marriage has become heterogeneous and contested. The institution of marriage no longer necessarily implies shared resources, shared expectations, shared children (or any children at all), or defined roles in day-to-day life.<sup>7</sup> Childless couples, blended families, late-in-life marriages, and two-career couples are no longer the exception: They are the new norm.<sup>8</sup>

Third, marital behavior has become stratified by class to an unprecedented degree. Lasting marriage and continuous child-rearing of shared biological children by two parents have become more than

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<sup>3</sup> See Andrew J. Cherlin, *The Marriage-Go-Round* 63-86 (2009).

<sup>4</sup> See, e.g., Peter Berger & Hansfried Kellner, *Marriage and the Construction of Reality*, 96 *Diogenes* 1, 1 (1964) (describing marriage as a social institution).

<sup>5</sup> Of course, it would be inaccurate to claim that every individual endorsed these norms, inaccurate to deny class and cultural differences, and wrong to ignore the reprehensible legal and social exclusion of gay men and lesbians during that era. Still, in the mid-twentieth century, the identification of the married couple as the basic unit of family life corresponded reasonably well to the social life of many.

<sup>6</sup> See note 1.

<sup>7</sup> See Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 *J. Marriage & Fam.* 848, 852 (2004).

<sup>8</sup> *Id.* at 853.

ever before the nearly-exclusive preserve of the upper class.<sup>9</sup> Even these marriages, however, reflect new behavior and expectations: Couples marry later, often with substantial education and career experience, and engage in much less role specialization.<sup>10</sup>

Sociologists have a succinct and dramatic way of expressing these changes: marriage, they say, has become “de-institutionalized.”<sup>11</sup> Marriage today is no longer the primary and normal state for adult Americans: It is no longer the expected route to maturity or the exclusive site for sex, romance, and child-rearing.<sup>12</sup> Instead sociologists describe a new individualism in family formation and dissolution.<sup>13</sup> More than ever before, Americans see marriage as one among many options for personal growth and fulfillment, and they form and exit marriages along with other relationships as a normal part of the life course.<sup>14</sup>

Critics worry that the new individualism in family life heralds social breakdown.<sup>15</sup> Others applaud the de-institutionalization of marriage as social progress.<sup>16</sup> In this Article, I neither attack nor defend the new individualism. Instead, I aim to demonstrate its implications for the design of the welfare state. To keep the analysis manageable, I initially focus on a central feature of the income tax: joint filing. Later, I consider implications of the new individualism for a second key component of the welfare state: the spousal benefit in Social Security.

My thesis is that the new individualism has rendered obsolete legal doctrines and policy analyses that treat formal marriage as the proxy for family life. Joint filing, for example, has been the centerpiece of debates over the taxation of the family since the 1930's. Today, however, joint filing is no longer well-tailored to serve important social

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<sup>9</sup> See *id.* at 855.

<sup>10</sup> See Michele Hoffnung, *Wanting It All: Career, Marriage, and Motherhood During College-Educated Women's 20's*, 50 *Sex Roles* 711, 711 (2001).

<sup>11</sup> Cherlin, note 7, at 848.

<sup>12</sup> *Id.*; cf. Hannah Bruckner & Karl Ulrich Mayer, *De-Standardization of the Life Course: What Might it Mean? And If it Means Anything, Whether it Actually Took Place?*, 9 *Advances Life Course Res.* 27, 28 (2005) (documenting the growing de-standardization of family life in Germany).

<sup>13</sup> See, e.g., Cherlin, note 3, at 90-103 (describing the growing role of expressive individualism in marriage). Cherlin draws on the work of Robert Bellah and others who have documented the rise of expressive individualism in American life generally. See *id.* at 28-30; Robert N. Bellah, Richard Madsen, William M. Sullivan, Ann Swidler & Steven M. Tipton, *Habits of the Heart* (1985).

<sup>14</sup> Cherlin, note 7, at 853.

<sup>15</sup> See, e.g., Charles Murray, *Coming Apart* (2012).

<sup>16</sup> See, e.g., Claudia Card, *Against Marriage and Motherhood*, 11 *Hypatia* 1, 5 (1996). Card's article is staking out a normative position rather than reacting to data on the de-institutionalization of marriage. The thrust of her argument is to reject many of the norms of traditional marriage and motherhood.

objectives, and this point holds whether one endorses the new individualism or, like many social conservatives, deplore it. Similarly, the spousal benefit in Social Security once addressed the central gender injustice of U.S. society, the economic vulnerability of housewives. Today, however, the spousal benefit no longer protects the most vulnerable citizens, or even the most vulnerable women, once we look past current retirees to future cohorts.

The obsolescence of formal marriage as a legal category extends to conventional policy equations. Consider the so-called "trilemma," which most casebooks and law teachers use to structure classes on the taxation of the family. The trilemma holds that an income tax cannot simultaneously maintain progressive marginal rates, impose equal taxes on equal-earning couples, and insist on marriage neutrality.<sup>17</sup> In recent decades, some casebooks have added the feminist point that joint filing tends to perpetuate a traditional division of labor by penalizing two-worker couples and imposing a high marginal tax rate on working wives.<sup>18</sup>

But both the trilemma and the feminist critique assume, implicitly, that family life occurs (mostly) within marriage and that the economic vulnerability of the homemaker wife is a major social problem. Once we recognize that marriage is no longer the organizing institution for work and family life, and once we understand that marriage has become heterogeneous, the principle of "equal taxation of equal-earning married couples" no longer packs the same normative punch. Similarly, once we recognize that gender equality in married couples has increased, that most wives work outside the home, and that single mothers bear the greatest burden of gendered roles, the most vulnerable player is no longer the nonworking wife but the working (but low-earning) single mother.

Much like joint filing, the spousal benefit in Social Security tracks a social reality that no longer exists. The spousal benefit, along with other provisions, protects wives in traditional marriages when husbands/breadwinners retire, die, or become disabled. At the same time, the spousal benefit, combined with the payroll tax, penalizes working wives and rewards traditional gender roles. But the framing of the social problem has gone askew here as well. Two-earner marriages are the norm rather than the exception. And while women today are economically vulnerable by virtue of their lower wages and care responsibilities, they are often divorced or never-married single mothers rather than widows or dependent wives.

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<sup>17</sup> See Graetz & Schenk, note 2, at 451-52; see also Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. Cal. L. Rev. 339, 342 (1994).

<sup>18</sup> See Graetz & Schenk, note 2, at 453.

It may seem that I overstate the case when I claim that even social conservatives should abandon joint filing and the spousal benefit. Surely those who valorize marriage should insist on linking income taxation and Social Security to formal marriage—precisely in order to reward the (shrinking) group of the formally-married! But, in fact, neither joint filing nor the spousal benefit is well-designed to reward marriage or to combat the de-institutionalization of marriage. Social conservatives, I suggest, should instead advocate effective pro-marriage policies that would replace today's ad hoc pattern of rewards and penalties with incentives tailored to desired behaviors. While the social conservative agenda is not one that I endorse, I consider it in order to show how badly outdated joint filing is—by any lights.

My thesis implies that the income tax and Social Security both stand in need of major reform. The proper legal response to the new individualism varies, of course, depending on one's view of the ideals that motivate the income tax and the Social Security system. Liberal individualism militates in favor of individual filing in the income tax and individual benefits, with optional joint-and-survivor annuities, in Social Security. By contrast, welfarist traditions endorse the aggregation of income at the household level in order to measure well-being. What is notable is that the new contours of family life render some policies (notably, individual filing) more administratively feasible, while rendering other policies difficult but critically important (notably, the identification of household members).

The new social context also creates new options for the welfare state: Once we recognize that joint filing is obsolete, we can see more clearly the range of possibilities for tailoring taxes and benefits to reward certain family configurations or capture some of the economic rents to unearned privilege. Today, it is primarily the denizens of the upper- and upper-middle classes who marry, remain married, and rear joint children within marriage.<sup>19</sup> The causes of the class correlation are hotly debated: Does marriage make people richer, or do richer people have the wherewithal to stay married? But the fact of the correlation raises the possibility of raising taxes or lowering benefits based on marital status, and particularly marital longevity.

I do not suppose that mainstream politicians will endorse a marriage tax any time soon, and I note empirical and administrative drawbacks to the idea. Still, it is worth pausing to see the intellectual merits of the proposal. Welfarists have long endorsed ability taxation, which imposes a nondistorting but redistributive tax on high-ability

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<sup>19</sup> See Andrew J. Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 *J. Marriage & Fam.* 403, 403-04 (2010).

individuals.<sup>20</sup> Liberals have championed taxes on undeserved social privilege.<sup>21</sup> Marriage today is arguably a marker or “tag” for both ability (meaning eventual high earnings) and social privilege. Analytically, if not politically, a marriage tax may be worth adding to our repertoire of policy options in the age of the new individualism.

This Article owes much to two strands of the scholarly literature. First, a number of scholars in taxation and family law have questioned the law’s reliance on outdated categories, including formal marriage and the nuclear family.<sup>22</sup> This Article, too, calls for the law to take notice of the new realities of family life. Second, although this Article aims to update the social context for feminist reform, it remains a feminist project, and it builds on a conversation bravely begun and thoughtfully continued over the years by tax scholars including Grace Ganz Blumberg, Lawrence Zelenak, Marjorie Kornhauser, Pamela Gann, and Edward McCaffery.<sup>23</sup> My work here extends their view that the income tax and Social Security should pay attention to social reality.

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<sup>20</sup> See Louis Kaplow, *The Theory of Taxation and Public Economics* 54-57 (2010).

<sup>21</sup> Bruce Ackerman & Anne Alstott, *The Stakeholder Society* 94-112, 155-77 (1999)(proposing taxes on wealth and childhood social privilege); Philippe Van Parijs, *Real Freedom for All: What (If Anything) Can Justify Capitalism?* 102-18 (1997)(proposing taxes on inheritance and rents from jobs).

<sup>22</sup> See, e.g., *Marriage at the Crossroads* (Marsha Garrison & Elizabeth S. Scott eds., 2012); Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. Ill. L. Rev. 319 (arguing that the standardization of family law has administrative and privacy virtues, despite its misapprehension of the realities of family life); Patricia A. Cain, *Taxing Families Fairly*, 48 Santa Clara L. Rev. 805 (2008) (analyzing options for the taxation of same-sex couples); Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 Utah L. Rev. 605 (advocating individual filing in order to capture the diversity of economically interdependent relationships); Marjorie Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 Hastings L.J. 63 (1993) (pointing out the obsolescence of the one-earner, heterosexual couple as the primary model of family).

<sup>23</sup> See, e.g., Edward J. McCaffery, *Taxing Women* (1999)(discussing biases in the Code affecting women); Alicia H. Munnell & Laura E. Stiglin, *Women and a Two-Tier Social Security System*, in *A Challenge to Social Security: The Changing Roles of Women and Men in American Society* 101 (Richard V. Burkhauser & Karen C. Holden eds., 1982); Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 Buff. L. Rev. 49 (1971) (pointing out the gendered impact of the joint return); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 Tex. L. Rev. 1 (1980) (advocating individual filing on equity and efficiency grounds); Zelenak, note 17 (criticizing “the uneasy case” for joint returns and proposing individual filing); Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 Temp. L. Rev. 1413 (1996) (documenting the inequality of intrahousehold resource allocations and the lack of unity of interests).

## II. TAXATION AND SOCIAL SECURITY IN THE ERA OF MID-TWENTIETH-CENTURY MARRIAGE

Sociologists have noted that the mid-twentieth century marked an unusual period in the history of marriage. In that era—in contrast to earlier and later periods—couples married young, had children soon after marriage, and remained married, typically for life. Marriage in this period marked the dominant mode of adult life, and it had a relatively homogeneous content for most of its participants, regardless of their religion or socioeconomic class.<sup>24</sup>

The mid-twentieth-century marriage constituted what sociologists term an institution: Marriage defined social roles, social status, self-perceptions, and daily occupations for a wide swath of American adults. Peter Berger and Hansfried Kellner's classic 1964 study pointed out that married people did not simply share a demographic label: They truly were different from unmarried individuals.<sup>25</sup> Consider two defining features of this mid-twentieth-century institution.

First, marriage marked the dominant pattern of adult life across a variety of demographic categories: Whatever one's age, race, social class, or economic class, one expected to marry young and stay married.<sup>26</sup>

Second, the content of marriage was (by modern standards) homogeneous across different groups. Couples married early in life<sup>27</sup> and stayed married for a lifetime. Divorce was not unknown, but it was uncommon until the 1970's.<sup>28</sup> Married couples tended to divide labor along traditional gender lines, with wives leaving the workforce to care for children and the home.<sup>29</sup> Marriages in this era also shared psychological and social features. In Berger and Kellner's classic description, husbands and wives in essence grew up together, filtering the experiences of life from young adulthood on through a shared perspective.<sup>30</sup>

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<sup>24</sup> Cherlin, for example, describes the rise of companionate marriage between 1900 and 1960: "Although husbands and wives in the companionate marriage usually adhered to a sharp division of labor, they were supposed to be each other's companions—friends, lovers—to an extent not imagined by the spouses in the institutional marriages of the previous era." Cherlin, note 7, at 851; see also Berger & Kellner, note 4, at 5 (discussing the social construction of the concept of marriage).

<sup>25</sup> Berger & Kellner, note 4, at 5.

<sup>26</sup> Cherlin, note 3, at 63-86.

<sup>27</sup> U.S. Census Bureau, Estimated Median Age at First Marriage tbl.MS-2 (Sept. 21, 2006), <http://www.census.gov/population/socdemo/hh-fam/ms2.pdf>.

<sup>28</sup> U.S. Census Bureau, Statistical Abstract of the United States: 2012, at 65 tbl.78, <http://www.census.gov/compendia/statab/2012/tables/12s0078.pdf> (last visited Aug. 6, 2013).

<sup>29</sup> Cherlin, note 3, at 80-85.

<sup>30</sup> Berger & Kellner, note 4, at 11 ("[F]rom the beginning of the marriage each partner has new modes in his meaningful experience of the world in general, of other people, and of himself.").

Mid-twentieth-century marriage had its critics, including many feminists, who castigated the gendered division of labor and the lifelong consignment of women to the home.<sup>31</sup> But, from a policymaker's perspective, mid-twentieth-century marriage was a gift. Both the tax system and Social Security aim to measure the well-being of individuals: The income tax aims to tax the relatively well-off, while Social Security attempts to cushion the situation of the unfortunate. In the mid-twentieth-century United States, marriage was so prevalent and so homogeneous that it offered a convenient and relatively sound metric for judging the extent of individuals' ties to others. One simple, formal status determination—married or unmarried—solved some thorny problems for both the income tax and the Social Security system.

#### *A. The Federal Income Tax and the Joint Return*

Begin with the federal income tax. Policymakers must take notice of family relationships if they intend to impose progressive taxation based on well-being or access to resources. Consider an individual with zero income. He might be truly destitute. But if he has a tight-knit, wealthy family that provides him with ample resources, he is not poor in a meaningful sense.

Indeed, an income tax that does not take notice of family ties is vulnerable to abuse. A high-earning man, for instance, might draw up contracts showing that he has transferred his income to others, with the result that he seems to have only a modest income left to tax. But suppose the transferees are his wife of fifty years and his twelve children and grandchildren, and the "transferred" funds remain under his sole control. In that case, the tax law should view the purported transfers with a skeptical eye, because they do not meaningfully alter the wealthy man's well-being and control over economic resources.

The federal income tax enacted in 1913 adopted individual filing. Each individual paid income taxes on his or her own income, without regard to family relationships.<sup>32</sup> By 1948, however, a series of milestone cases had revealed the weaknesses of individual filing in the era of mid-twentieth-century marriage.

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<sup>31</sup> See, e.g., Betty Friedan, *The Feminine Mystique* (1963) (arguing that the gendered division of labor excluded women from productive life and denied them the ability to realize their talents).

<sup>32</sup> Starting in 1918, married couples were permitted to file joint returns, but because there was no separate rate schedule for such joint filings, it was usually disadvantageous. The Revenue Act of 1918, Pub. L. No. 65-254, § 223, 40 Stat. 1057, 1074; see Boris I. Bittker, *Federal Income Taxation and the Family*, 27 *Stan. L. Rev.* 1389, 1400 (1975).



Between 1913 and 1948, the federal income tax transformed from a small tax on the very wealthy to a mass tax imposing high and progressive tax rates.<sup>33</sup> In this era, many wealthy married men owed a considerable tax bill. It did not take long for taxpayers to figure out that if a man earning, say, \$10,000, could split that income with his wife, they could reduce the total tax bill. With steeply progressive rates, taxes on two incomes of \$5000 were lower than on one income of \$10,000. "Income-splitting" of this type became an attractive tax shelter for many married couples at mid-century.<sup>34</sup>

The middle- and upper-class push for income-splitting reflected cultural conditions as well as legal design. Most women had little income of their own: They married young, had children early, and worked primarily in the home thereafter.<sup>35</sup> Marriage typically lasted for life, and couples expected to share in their good or bad fortune together, making it irrelevant, in practical terms, whether the couple called it "his money" or "her money." Thus, the stage was set for income-splitting as a device that would reduce taxes for a wide swath of American families.

The first major attempt at income-splitting, *Lucas v. Earl*, ended in a victory for the IRS but a short-lived one.<sup>36</sup> Mr. and Mrs. Earl signed a contract, presumptively valid under California law, that split between them all property acquired by either during the marriage. Justice Holmes, writing for the majority, declined to recognize the effects of the contract for federal income tax purposes. He opined that a salary should be taxed to the earner and that taxpayers should not be able to escape taxation by "anticipatory arrangements and contracts however skillful devised . . . ."<sup>37</sup>

But the tax system could not extend the line drawn in *Earl* to prevent the shifting of unearned income (income from property). Salary and other income from services can typically be traced to the efforts of an identifiable individual. By contrast, income from property follows ownership of the property. Thus, any married couple (or any other pair of taxpayers) wishing to shift property income had only to shift property ownership. A complicated jurisprudence evolved in the 1930's, beginning with *Earl* and extending to later cases like *Blair v.*

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<sup>33</sup> Tax rates skyrocketed during World War I and remained high, by historic standards, throughout the 1920's and into the 1930's. See Anne Alstott & Ben Novick, War, Taxes, and Income Redistribution in the Twenties: The 1924 Veterans' Bonus and the Defeat of the Mellon Plan, 59 Tax L. Rev. 373 (2006).

<sup>34</sup> Carolyn C. Jones, Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s, 6 Law & Hist. Rev. 259, 259 (1988).

<sup>35</sup> See Cherlin, note 3, at 67-72.

<sup>36</sup> *Lucas v. Earl*, 281 U.S. 111 (1930).

<sup>37</sup> *Id.* at 115.

*Commissioner*<sup>38</sup> and *Helvering v. Horst*.<sup>39</sup> But while these cases ruled out efforts to transfer income without property, the tax system had no defense against married couples when husbands were willing to make outright legal transfers of property to their wives.

State law also assisted married couples seeking to split income. Just months after *Lucas v. Earl*, the Supreme Court held that the federal income tax would respect income-splitting accomplished by state community property laws.<sup>40</sup> Under *Poe v. Seaborn*, married individuals in community-property states reported half of marital income as their own, thus achieving in effect the income split denied to the Earls.

*Poe* unleashed a wave of legislation, as states vied to respond to the political popularity of income-splitting. The dynamics of mid-twentieth-century marriage likely bolstered this trend. Community property laws typically did not alter the husband's control over property during the marriage but did accord significant property rights to the wife in the event of divorce. Still, in an era when divorce seemed remote, the property innovation worked by community property probably seemed minimally intrusive, and it produced notable tax savings. A number of states enacted elective community-property laws, preserving the option of common-law property regimes for those preferring them. In 1944, the Supreme Court denied income-splitting to couples in such states in *Commissioner v. Harmon*.<sup>41</sup> Still, that decision "slowed but did not halt" the search for income-splitting options.<sup>42</sup>

In 1948, Congress solved the problem by extending income-splitting to couples in all states.<sup>43</sup> The vehicle for income-splitting was the joint rate schedule, which adopted tax brackets for married couples filing jointly that were twice as wide as those for single individuals. The new joint filing system equalized the tax burden on married couples with equal incomes: Under the new regime, a couple with \$10,000 of total income would owe the same tax, regardless of how the income was divided between spouses and whether the couple lived in a community property state. The 1948 move to joint returns with income-splitting also forestalled intramarital income and asset transfers: Spouses no longer could reduce their taxes via formal title transfers.

The prevalence of mid-twentieth-century marriage made joint filing with income-splitting politically attractive. Couples in community property states suffered no tax increase, and couples in common law states often received a tax cut, thanks to the gendered division of la-

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<sup>38</sup> *Blair v. Commissioner*, 300 U.S. 5 (1937).

<sup>39</sup> *Helvering v. Horst*, 311 U.S. 112 (1940).

<sup>40</sup> *Poe v. Seaborn*, 282 U.S. 101, 117-18 (1930).

<sup>41</sup> *Commissioner v. Harmon*, 323 U.S. 44, 48-49 (1944).

<sup>42</sup> See *Druker v. Commissioner*, 697 F.2d 46, 48 (1982).

<sup>43</sup> Revenue Act of 1948, § 301, Pub. L. No. 80-471, 62 Stat. 110, 114.

bor. And the prevalence of marriage among the adult population created a large constituency for income-splitting. In that era, most adults were married or saw themselves as likely to marry, leaving very few long-term single adults to object to the new marriage bonus.

But the near-universal popularity of income-splitting was not to last. By 1969, the first inklings of demographic change had appeared: The divorce rate and age at first marriage began to climb upward, and wives began to enter the workplace in record numbers.<sup>44</sup> Feeling the political winds shift, Congress reacted to complaints that income-splitting favored the married couple over the single man by adjusting the rate schedules so that the marginal-rate brackets for married couples were no longer twice as wide as those for single taxpayers.<sup>45</sup>

The unmarried were appeased, but at a cost. The 1969 legislation created the first “marriage penalty” for some couples. The 1969 compromise persists to this day: Husbands and wives with divergent earnings still claim a marriage bonus, but two-earner couples with similar earnings pay a marriage penalty.

The marriage penalty/bonus problem is, of course, insoluble. The well-known “trilemma” holds that an income tax cannot simultaneously impose progressive marginal tax rates, assess equal taxes on married couples with equal earnings, and maintain marriage neutrality (so that the total income taxes paid by two unmarried individuals neither increase nor decrease when the couple marries).<sup>46</sup>

Individual filing permits a progressive income tax to be marriage neutral but imposes unequal tax burdens on equal-earning couples. By contrast, income-splitting sacrifices marriage neutrality in order to impose progressive rates and keep tax burdens even across couples. The result is that any system of joint filing inevitably creates a marriage bonus, a marriage penalty, or both, as our income tax has done since 1969.

Feminist scholars have pointed out that joint filing with progressive marginal rates tends to reward traditional gender roles while penalizing two-earner couples, because the largest marriage bonuses are claimed by couples with one working and one nonworking spouse.<sup>47</sup> Compounding the gender inequity, joint filing tends to discourage wives’ employment, because the first dollar of wives’ wages is taxed at the (higher) marginal rate established by the husband’s earnings. (Importantly, this pathology of joint filing is independent of the rate structure adopted in 1969; it is true in any system of joint filing when,

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<sup>44</sup> See Cherlin, note 3, at 90-97.

<sup>45</sup> See Tax Reform Act of 1969, Pub. L. No. 91-172, § 803, 83 Stat. 487, 678-79; see also *Druker*, 697 F.2d at 48-50 (discussing 1969 provisions).

<sup>46</sup> See Graetz & Schenk, note 2, at 451-52.

<sup>47</sup> See sources cited in note 23.

culturally, the wife is understood to be what economists bluntly term the “secondary worker.”<sup>48</sup>)

In recent years, Congress has attempted to reduce marriage penalties—but inevitably, thanks to the trilemma, at the price of enlarging marriage bonuses. The 2001 Bush tax cuts, for instance, eliminated the marriage penalty in the lowest tax bracket and in the standard deduction but created hefty marriage bonuses.<sup>49</sup> By contrast, the 2012 “fiscal cliff” legislation created big marriage penalties: The top tax bracket for married couples lies just \$50,000 above the top tax bracket for individual filers.<sup>50</sup>

The shortcomings of joint filing run even deeper today, due to the profound shifts in marriage and family behavior that have occurred since 1970 (and especially since 1990).<sup>51</sup> But first, it is instructive to see that the treatment of marriage followed a similar path in the Social Security system.

### *B. The Social Security System and the Spousal Benefit*

Mid-twentieth-century marriage was also a gift to the designers of the Social Security system. As originally enacted in 1935,<sup>52</sup> Social Security provided only for benefits for workers, but an amendment in 1939 added supplementary benefits for wives and surviving widows.<sup>53</sup>

The spousal benefit persists today. Husbands now are eligible as well as wives, although the great majority of claimants are women,<sup>54</sup> due to women’s generally lower earnings and fewer years in the workforce. In 2011, the Social Security system paid about \$761 per month to two million wives and husbands solely because they were (or had been) married to a qualifying retired worker.<sup>55</sup>

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<sup>48</sup> For an example of the use of the term secondary workers, see, e.g., Michelle J. White, *Sex Differences in Urban Commuting Patterns*, 76 *Am. Econ. Rev.* 368, 370 (1986).

<sup>49</sup> See IRC § 1(f) (eliminating marriage penalty for taxpayers in the 15% bracket), § 63(c)(2)(A) (setting the standard deduction for married couples at 200% of the deduction for single taxpayers).

<sup>50</sup> American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, §101(b), 126 Stat. 2313, 2316-17 (setting the 39.6% bracket at \$450,000 for married couples and \$400,000 for single taxpayers).

<sup>51</sup> See Part III.

<sup>52</sup> Social Security Act of 1935, Pub. L. No. 74-271, § 210(c), 49 Stat. 620, 625.

<sup>53</sup> Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 201, 53 Stat. 1360, 1364-65.

<sup>54</sup> Of the 2.3 million spouses of retired workers receiving benefits as spouses in 2011, only 63,000 were men. U.S. Soc. Sec. Admin., *Annual Statistical Supplement, Old-Age, Survivors, and Disability Insurance tbl.5.C1* (2012), <http://www.ssa.gov/policy/docs/statcomps/supplement/2012/5c.html>.

<sup>55</sup> *Id.* tbl.5.C1.

A spouse is eligible for a spousal benefit if she is married to a retired worker entitled to a Social Security retirement benefit.<sup>56</sup> Divorced spouses are entitled to the benefit if the marriage lasted ten years. The spousal benefit equals 50% of the retired worker's benefit.<sup>57</sup>

For example, suppose that *Abner* retires at age 66 and is entitled to an average Social Security monthly benefit of \$1300.<sup>58</sup> His wife, *Betty*, would be entitled to claim a spousal benefit equal to one-half that amount, or \$650, even if she had never worked for wages. Spouses who can also claim benefits as workers, based on their own work records, receive the higher of their own benefit or the spousal benefit. Thus, if *Betty's* own earnings record entitled her to \$800 per month, Social Security would pay her that amount. But if *Betty's* earnings were low enough that her benefit was below \$650, she would still receive the \$650 entitlement based on her marital status.<sup>59</sup>

Spousal benefits linked to formal marriage made eminent good sense in the era of mid-twentieth-century marriage. The aim of Social Security, like most national programs of social insurance, is to protect workers and their dependents against major income shocks. Just as in the case of the income tax, Congress did not need to burden the Social Security Administration with making individualized determinations of workers' dependents. Formal marriage was both widespread and homogeneous in its gender roles, making it both easy and accurate for the law to identify wives as workers' principal dependents. The formal rules, in that era, were functional: It was indeed wives who were particularly vulnerable to a husband's retirement, death, or disability.

But the spousal benefit, like joint filing, rewards some couples at the expense of others. Social Security provides retirement, disability, and survivors' benefits, but beneficiaries must pay a payroll tax to participate in the system. The combined tax-benefit "deal" is particularly good for couples with traditional gender roles: They receive 150% of the worker's retirement benefit after paying taxes on 100% of the hus-

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<sup>56</sup> In *United States v. Windsor*, 570 U.S. \_\_\_\_ (2013), the Supreme Court held unconstitutional the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419. As of September 2013, the Social Security Administration had announced that it would award spousal benefits to married couples of the same sex if they were married in a state that permits same-sex marriage and are domiciled in a state that recognizes same-sex marriage. Other situations remain uncertain pending legal interpretation of *Windsor*. See U.S. Soc. Sec. Admin., POMs Recent Change, GN00210 BASIC, at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210100>.

<sup>57</sup> U.S. Soc. Sec. Admin., Annual Statistical Supplement, Social Security (Old-Age, Survivors, and Disability Insurance) Program Description and Legislative History, <http://www.ssa.gov/policy/docs/statcomps/supplement/2012/oasdi.html> (last visited Aug. 6, 2013).

<sup>58</sup> The average primary insurance amount in 2011 was \$1283.49. U.S. Soc. Sec. Admin., note 55.

<sup>59</sup> See U.S. Soc. Sec. Admin., note 57.

band's salary. By contrast, two-earner couples pay a higher price (taxes on two salaries) and may not, in the end, collect more than 150% of the higher earner's retirement benefit.

Many two-earner couples thus pay incremental taxes for no incremental benefit. To see why, return to *Abner* and *Betty*. If *Betty* has a record of low wages relative to *Abner's*, she may well be entitled to a retired worker's benefit of less than 50% of *Abner's* benefit. In that case, she will take the spousal benefit. The spousal benefit raises the total payment to the couple (compared to their earned benefits alone). But the two-earner couple has paid taxes on *Betty's* earnings without, in the end, earning any incremental coverage at retirement.

The spousal benefit also puts divorced individuals at a potential disadvantage. Until the late 1970's, only spouses married at least twenty years before divorce were entitled to spousal benefits at retirement.<sup>60</sup> The divorce revolution, however, created a growing pool of divorced women with limited earnings records who would be destitute without a spousal benefit. Congress responded in 1977 by lowering the marriage duration to ten years.<sup>61</sup>

Today, continuing demographic change has further challenged the Social Security system.<sup>62</sup> The decline in marriage, continued high divorce rates, and nonmarital child-bearing and rearing have created new vulnerabilities not captured by rules that presume that formally- and long-married wives are the principal dependents whose needs should be served.

### III. THE DEMISE OF MID-TWENTIETH CENTURY MARRIAGE

The mid-twentieth-century marriage was not destined to last. In the late 1960's and early 1970's, the divorce rate and age at first marriage began to climb upward, and wives began to enter the workplace in unprecedented numbers.<sup>63</sup> But the divorce revolution and the advent of the working wife were just the beginning of forty years of accelerating change in American family structures. In this Part, I document the rise of the new individualism; in Part IV, I show that these demographic changes pose fundamental policy challenges for the income tax and for Social Security.

To see the stunning depth and breadth of change, it is useful to look at data spanning the entire period from 1970 to today. During that

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<sup>60</sup> See Richard V. Burkhauser & Karen C. Holden, Introduction, in *A Challenge to Social Security*, note 23, at 1, 11.

<sup>61</sup> *Id.*; Social Security Amendments of 1977, Pub. L. No. 95-216, § 337, 91 Stat. 1509, 1548.

<sup>62</sup> See Part III.

<sup>63</sup> See Cherlin, note 3, at 90-97.

time, three major changes have transformed marriage and family life: the rising percentage of unmarried adults, the growing heterogeneity of marriage, and the tightening link between social class, on the one hand, and marriage and the rearing of a couple's own children, on the other.

The divorce revolution of the 1970's and the influx of wives into the workplace initiated the first round of major changes in American family life. But a number of striking trends in family life, notably the rise in cohabitation and in nonmarital births, have accelerated since 1990.<sup>64</sup>

### A. *The Growing Prevalence of Nonmarriage*

In mid-twentieth-century America, the great majority of adults were married or expected to be married shortly.<sup>65</sup> The unmarried felt—and were—socially excluded. By contrast, many adults in America today are unmarried, and many are unpartnered.

Taking a snapshot in 2009, the Census Bureau found that 33% of men age fifteen and older had never married, while 67% had been married at least once. But only 42% of men had been married just once and remained in that first marriage. Twenty percent of men had experienced at least one divorce, and 15% of men had been married at least twice.<sup>66</sup>

In 2012, a scant majority (50.7%) of adult Americans (age fifteen and older) were married, while 49.3% were unmarried.<sup>67</sup> The down-

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<sup>64</sup> In the discussion below, I synthesize data from a variety of secondary sources to illustrate several uncontroversial findings by demographers and sociologists: the decline in marriage, the heterogeneity of marital behavior, and the tightening link between social class and marriage. At times, the data I cite do not adjust for cohort effects—that is, the data compare, say, the percentage of people married now to the percentage married in 1965, without adjusting for the fact that the number of people in different age groups can vary. In theory, the failure to adjust for cohort size could support false inferences. Imagine a case in which a population in Year 1 contains 10% children, while in Year 50 it contains 50% children: In such a society, marriage rates per capita would fall without any change in norms. In the following presentation, I cite data that limit cohort effects when possible: For instance, I cite data on the percentage of women, aged 15-44, in different relationships.

But even unadjusted data probably, if anything, understate the trends identified, because of the large baby boom cohort of older people engaged in relatively traditional behavior (compared to younger cohorts). At my request, my research assistant, Jonathan Choi, performed additional analysis to see whether the trends presented here reflect cohort effects. He found, and I concur, that adjusting for cohort size would not materially change the data cited here.

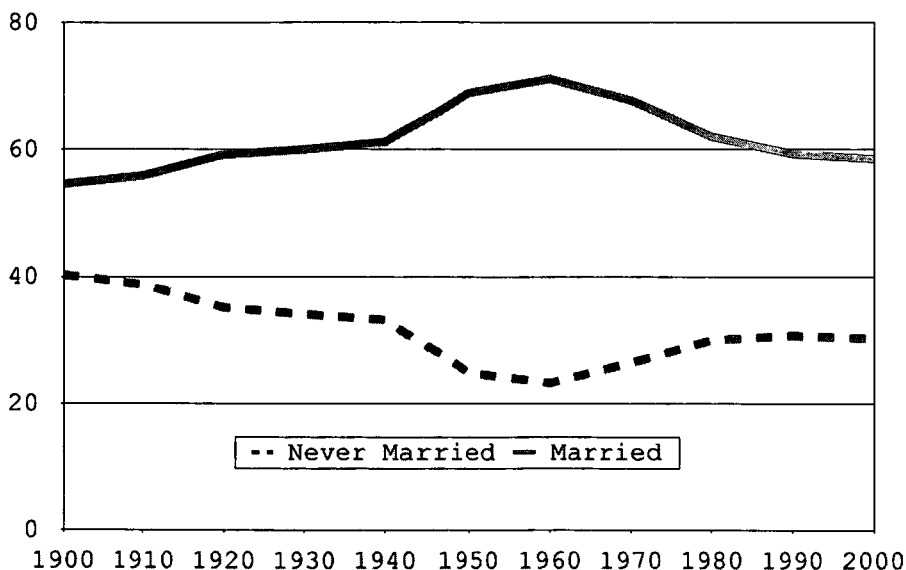
<sup>65</sup> See Cherlin, note 3, at 63-86.

<sup>66</sup> U.S. Census Bureau, Number, Timing, and Duration of Marriages and Divorces: 2009, at 16 tbl.6 (May 2011), <http://www.census.gov/prod/2011pubsp70-125.pdf> (14.7% reported marrying twice or three times).

<sup>67</sup> U.S. Census Bureau, note 1.

ward trend line is sharp: In 2010, 51% of Americans ages 20-54 were married, compared to more than 80% in the 1960's.<sup>68</sup> But the one-year snapshot obscures the rapid historical change that led to this point. The era of mid-twentieth-century marriage appears quite clearly in Figure 1, where the percentage of currently married men rises and stays high between 1940 and 1980, before dropping. At the same time, the percentage of never-married men drops noticeably in the 1940-1980 period before rising again. Interestingly, the percentage of never-married men is still lower than in 1900.

**FIGURE 1**  
**Percentage of Men Married and Never-Married,**  
**1900-2000<sup>69</sup>**



The decline of marriage and the rise in alternative family arrangements also appears clearly in Figure 2, which shows the steep decline in the percentage of married-couple households. That figure also shows the sharp rise in what the Census Bureau calls “non-family households,” which include single people and cohabiting couples.

<sup>68</sup> The 2010 figure represents the author’s calculations based on U.S. Census Bureau, note 28, at 53 tbl.57 (2012), [http://www.census.gov/compendia/statab/cats/population/marital\\_status\\_and\\_living\\_arrangements.html](http://www.census.gov/compendia/statab/cats/population/marital_status_and_living_arrangements.html). The 1960’s figure is reported in Kazuo Yamaguchi & Yantao Wang, *Class Identification of Married Employed Women and Men in America*, 108 Am. J. Soc. 440, 441 (2002).

<sup>69</sup> U.S. Census Bureau, *Statistical Abstract of the United States: 2003, Mini-Historical Statistics* 18 tbl.HS-11, *Marital Status of the Population by Sex: 1900 to 2002*, <http://www.census.gov/statab/hist/HS-11.pdf>.



FIGURE 2  
Families as a Percentage of U.S. Households, 1947-2002<sup>70</sup>

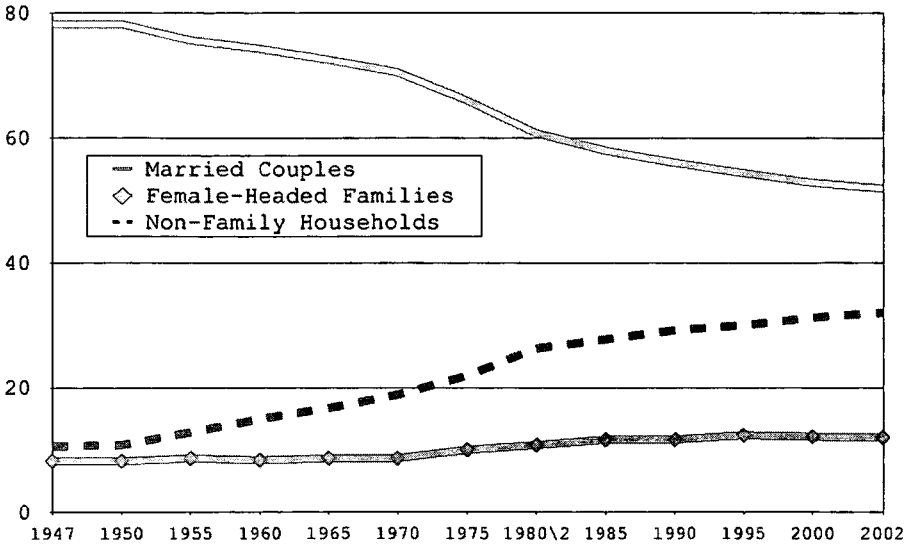


Figure 2 shows, the most rapid changes, in both cases, occurred between 1970 and 1980, but the decline in married-couple households and the increase in nonfamily households continued in the 1990's.

One can, of course, look at the glass as half-full rather than half-empty: A majority of adult Americans are married at any given time, and two-thirds of children live with married parents. But the degree of social change in marriage and child-rearing in the last generation is astonishing, and it is the rapidity of change, as much as the levels, that has led sociologists to view marriage as on its way to de-institutionalization.

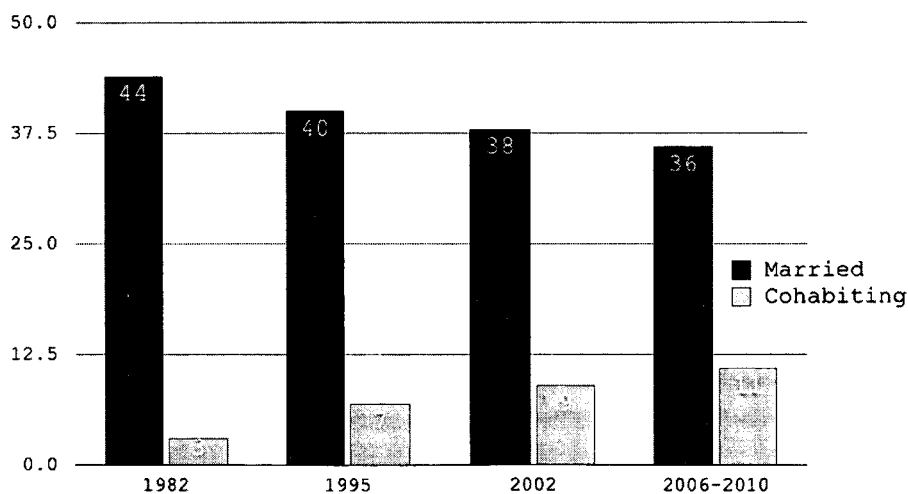
Figure 3 and Table 1 document a striking decline in marriage and increase in cohabitation since 1982 among women ages fifteen to forty-four.

<sup>70</sup> Id. at 19 tbl.HS-12, Households by Type and Size: 1900 to 2002 (2003), <http://www.census.gov/statab/hist/HS-12.pdf>.

TABLE 1  
Current Relationship Status, Percent of Women  
Aged 15-44<sup>71</sup>

	1982	1995	2002	2006-2010
First marriage	44.1	39.9	37.5	36.4
Second or higher marriage	8.1	9.3	8.5	5.1
Cohabiting	3.0	7.0	9.0	11.2
Never married	33.5	33.4	35.0	38.2
Formerly married	11.3	10.3	9.9	9.2

FIGURE 3  
Marriage and Cohabitation Among Women Aged 15-44,  
1982-2010<sup>72</sup>



From 1982 to 2010, the fraction of women who reported being married dropped ten percentage points (taking into account first and second marriages).<sup>73</sup> In the same period, cohabitation increased from 3% to 11%—an increase of nearly 400%.<sup>74</sup>

The surge in cohabitation in recent decades has caught sociologists by surprise. Andrew Cherlin, for example, once “thought that, except among the poor, cohabitation would remain a short-term arrangement

<sup>71</sup> Ctr. for Disease Control & Prevention, Key Statistics from the National Survey of Family Growth, [http://www.cdc.gov/nchs/nsfg/abc\\_list\\_m.htm#current](http://www.cdc.gov/nchs/nsfg/abc_list_m.htm#current) (last visited May 1, 2012).

<sup>72</sup> Casey E. Copen, Kimberly Daniels, Jonathan Vespa & William D. Mosher, First Marriages in the United States: Data from the 2006-2010 National Survey of Family Growth, Nat'l Health Statistics Rep. 5 fig.1 (Mar. 22, 2012), available at [www.cdc.gov/nchs/data/nhsr/nhsr049.pdf](http://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf).

<sup>73</sup> Ctr. for Disease Control & Prevention, note 71.

<sup>74</sup> Id.

among childless young adults who would quickly break up or marry.”<sup>75</sup> But Americans of all ages now cohabit, and for a range of reasons.

Cohabitation has become a familiar prelude to marriage. Between 1965 and 1974, only 10% of first marriages were preceded by cohabitation, compared to more than 50% for the early 1990’s, with remarriages even more likely to be preceded by cohabitation.<sup>76</sup> A 2004 study established that 50% of individuals in the United States will cohabit by age forty.<sup>77</sup> Although rates of marriage now differ among young white, black, and Hispanic women, rates of cohabitation hover around 50% for young women in all groups.<sup>78</sup>

But cohabitation is not limited to the very young or the childless. Between 25% and 40% of children live with a cohabiting parent at some point.<sup>79</sup> Couples cohabit for a variety of reasons and exit in a variety of ways.<sup>80</sup> Some cohabit as a prelude to marriage, but others cohabit for reasons of convenience or to save money or as an alternative to marriage.<sup>81</sup>

Figure 4 captures the growing heterogeneity of relationships, showing the decline in the percentage of younger women in a first marriage and a sharp rise in the percentage never married and cohabiting.

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<sup>75</sup> Cherlin, note 7, at 849.

<sup>76</sup> See Pamela J. Smock, *Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications*, 26 *Ann. Rev. Soc.* 1, 3 (2000) (citing Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children’s Family Contexts in the U.S.* (Ctr. for Demography & Ecology, U. Wisc.-Madison, Working Paper No. 98-15, 1999)); Larry L. Bumpass & James A. Sweet, *National Estimates of Cohabitation*, 26 *Demography* 615 (1989). Rates of cohabitation appear to have accelerated in the 1990’s: “[T]he proportion of all first unions (including both marriages and cohabitations) that begin as cohabitations rose from 46% for unions formed between 1980 and 1984 to almost 60% for those formed between 1990 and 1994. Smock, *supra*, at 3.

<sup>77</sup> Patrick Heuveline & Jeffrey M. Timberlake, *The Role of Cohabitation in Family Formation: The United States in Comparative Perspective*, 66 *J. Marriage & Fam.* 1214, 1222 fig.1 (2004).

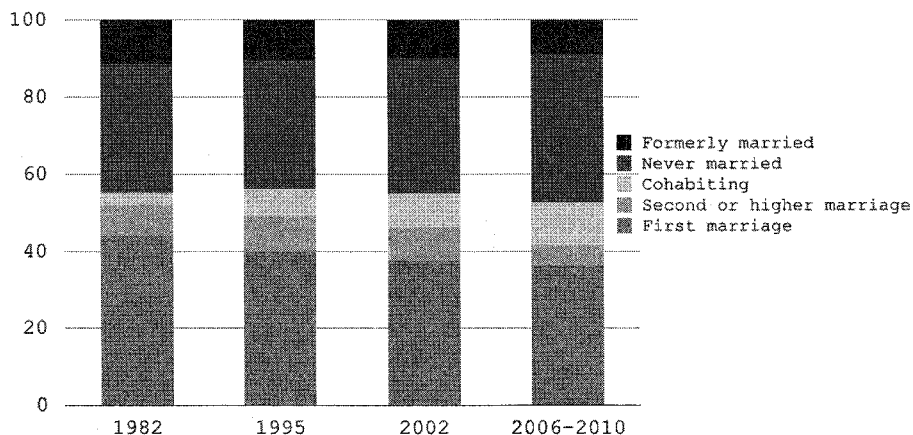
<sup>78</sup> Ctr. for Disease Control, note 71.

<sup>79</sup> Heuveline & Timberlake, note 77, at 1224 (finding that about one-third of children will experience maternal cohabitation by age sixteen (fig. 2)); Smock, note 76, at 3.

<sup>80</sup> For additional evidence, see Pamela J. Smock, Penelope Huang, Wendy D. Manning & Cara A. Bergstrom, *Heterosexual Cohabitation in the United States: Motives for Living Together Among Young Men and Women* 4 (U. Mich. Population Stud. Ctr., Working Paper No. 06-606, 2006), available at [www.psc.isr.umich.edu/pubs/pdf/rr06-606.pdf](http://www.psc.isr.umich.edu/pubs/pdf/rr06-606.pdf).

<sup>81</sup> *Id.* at 13-19.

FIGURE 4<sup>82</sup>  
Current Relationship Status, Women Aged 15-44, 1982-2010



The decline in marriage has transformed children's family arrangements as well: A strong trend, accelerating since 1990, is the rise in child-bearing and child-rearing among the unmarried. Among children born in 2009, 41% had unmarried mothers,<sup>83</sup> up from 10.7% in 1970, 18.4% in 1980, 28% in 1990, and 33.2% in 2000.<sup>84</sup> Trends over time are striking. From 1970 to 2002, the percentage of children living in two-parent families fell from 85% to 69%, and those living in single-parent families more than doubled, from 11% to 27%.<sup>85</sup> In 2012, 64% of children lived with their married parents, but 36% did not, with 24% living with their mothers only.<sup>86</sup>

### B. The Growing Heterogeneity of Marriage

The de-institutionalization of marriage has altered the social norms that define and regulate marriage, with the result that people no longer share a standard set of expectations about behavior, roles, and outcomes in marriage.<sup>87</sup>

<sup>82</sup> See Ctr. for Disease Control, note 71.

<sup>83</sup> U.S. Census Bureau, note 28, at 70 tbl.89, available at <http://www.census.gov/compendia/statab/2012/tables/12s0089.pdf>.

<sup>84</sup> U.S. Census Bureau, note 69, at 23 tbl.HS-14, available at <http://www.census.gov/statab/hist/HS-14.pdf>.

<sup>85</sup> Adam Thomas & Isabel Sawhill, For Love and Money? The Impact of Family Structure on Family Income, 15 *Marriage & Child Wellbeing* 57, 58 (2005).

<sup>86</sup> U.S. Census Bureau, note 1, at tbl.C3.

<sup>87</sup> Cherlin puts the matter this way: "[W]hen social change produces situations outside the reach of established norms, individuals can no longer rely on shared understandings of how to act. Rather, they must negotiate new ways of acting, a process that is a potential source of conflict and opportunity." Cherlin, note 7, at 848.

Mid-twentieth-century marriages typically featured early child-bearing, gendered roles in the marital household, and sharp differences in the employment trajectories of husbands and wives. In the typical pattern, husbands worked outside the home, while wives did not.<sup>88</sup> Wives who did work typically held jobs with lower status and significantly lower pay.<sup>89</sup>

By contrast, today's married couples make up the rules against the backdrop of the new individualism. A 2001 survey of young adults provides striking evidence of attitudes that would have been unthinkable in mid-twentieth-century America:

- 62% agreed that “[l]iving together with someone before marriage is a good way to avoid an eventual divorce.”<sup>90</sup>
- 82% endorsed the idea that “[i]t is extremely important to [me] to be economically set before [I] get married.”<sup>91</sup>
- More than “80% of the women agreed that it is more important ‘to have a husband who can communicate about his deepest feelings than to have a husband who makes a good living.’”<sup>92</sup>

Data confirm that marriage today differs significantly from its mid-twentieth-century predecessor. One striking change is that marriage typically occurs much later in the life course, after the careers of both individuals are well underway. In 2011, the median age at first marriage in the United States was twenty-nine for men and twenty-seven for women.<sup>93</sup> By contrast, in 1955, the typical man married at age twenty-three and the typical woman at age twenty.<sup>94</sup> As late as 1990, the figures were twenty-six and twenty-four, respectively.<sup>95</sup> Figure 5 illustrates the rise and fall of mid-twentieth-century marriage.

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<sup>88</sup> *Id.* at 854.

<sup>89</sup> See Richard Fry & D’Vera Cohn, Pew Research Ctr., *Women, Men and the New Economics of Marriage* (Jan. 19, 2010), available at <http://pewresearch.org/pubs/1466/economics-marriage-rise-of-wives>.

<sup>90</sup> *Id.* at 856.

<sup>91</sup> *Id.*

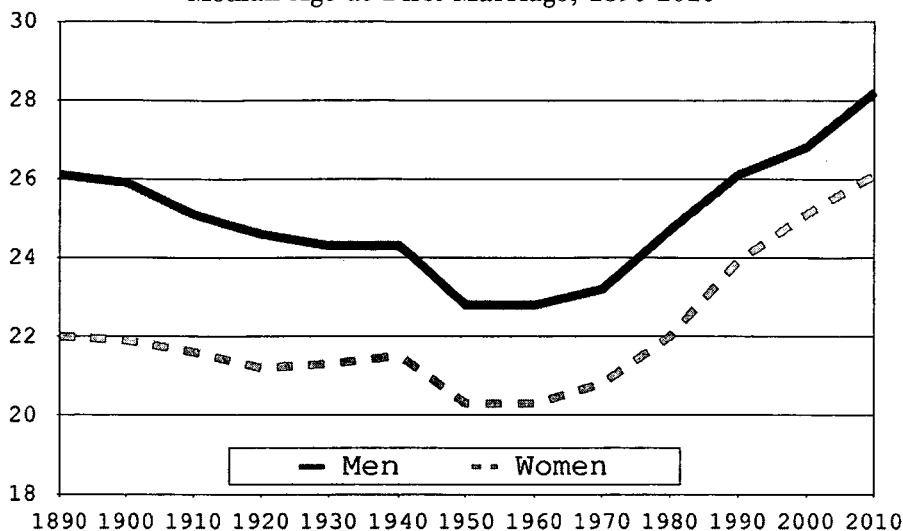
<sup>92</sup> *Id.*

<sup>93</sup> U.S. Census Bureau, note 27 (28.7 and 26.5, respectively).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

FIGURE 5<sup>96</sup>  
Median Age at First Marriage, 1890-2010



From 1940 to 1990, individuals actually married at younger ages than in the late nineteenth century and early twentieth. By 1990, the age of marriage caught up to and then quickly exceeded the nineteenth-century baseline.

Marriage has simultaneously become more transient, as Americans marry, divorce, and remarry (or cohabit) more frequently than before. Family law now permits ready divorce: “No-fault” divorce of some kind is available in every state.<sup>97</sup>

The raw divorce rate (divorces per year per 1000 population) conveys some, but only some, of the change in marital behavior. Starting from a low 2.2% in 1960, the raw divorce rate rose to or above 5% from the mid-1970’s to mid-1980’s.<sup>98</sup> The raw divorce rate declined thereafter and as of 2008 stood at just 3.5%.<sup>99</sup> But the raw marriage rate (marriages per 1000 population) has continued its long-term decline, from 10.6% in 1970 to 7.1% today, with the result that the divorce rate affects fewer married people. As a rough cut, the raw divorce rate relative to (divided by) the raw marriage rate has risen, from .26 in 1960 and .33 in 1970 to .49 today.<sup>100</sup>

A clearer picture of divorce trends emerges from studies of the percentage of marriages lasting to the fifth, tenth, fifteenth, and later an-

<sup>96</sup> Id.

<sup>97</sup> Judith C. Areen, Marc Spindelman & Philomela Tsoukala, *Family Law* 719 (6th ed. 2012).

<sup>98</sup> U.S. Census Bureau, note 28.

<sup>99</sup> Id.

<sup>100</sup> Author’s calculations from U.S. Census Bureau, note 28.

niversaries. Among marriages entered into by men in the 1960-1964 period, for example, 94.6% of marriages lasted at least until the fifth anniversary and 74.7% lasted at least until the 15th anniversary.<sup>101</sup> By contrast, of marriages entered into by men in 1985 to 1989, 87.7% lasted until the fifth anniversary and only 66.6% lasted until the fifteenth anniversary. (We do not yet have comparable data on later marriage cohorts.)<sup>102</sup>

As recently as 1990, the percentage of Americans who were divorced was 8.3%, while in 2010 it was 10.4%.<sup>103</sup> Taking a 2009 snapshot, the Census Bureau found that 21% of marriages involved men married twice or more, while 20% of marriages involved women married twice or more.<sup>104</sup> First marriages ending in divorce lasted a median eight years.<sup>105</sup> Divorced men and women who married a second time did so, on average, within four years after their first marriage ended.<sup>106</sup>

Many individuals are separated, divorced, and remarried early on: In 2009, men who terminated first marriages had a median age at divorce of thirty-two, while women had a median age of thirty.<sup>107</sup> The typical man entering a second marriage was thirty-six, and the typical woman was thirty-three.<sup>108</sup> Remarriage after divorce is common: The 1995 CDC study found that a divorced woman had a 75% chance of remarrying within ten years.<sup>109</sup> Remarriage probabilities varied among groups but were relatively high among younger women and women in households earning more than \$50,000.<sup>110</sup>

Amidst these changes gender roles within marriage have shifted noticeably. Married women today typically hold paid jobs, even during child-rearing years, and wives tend to hold jobs at roughly the same level of pay and status as their husbands.<sup>111</sup> Figure 6 shows the well-known increase in wives' labor-force participation beginning in the mid-twentieth-century.<sup>112</sup>

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<sup>101</sup> U.S. Census Bureau, note 66, at tbl.4.

<sup>102</sup> *Id.*

<sup>103</sup> U.S. Census Bureau, note 28, at 52 tbl.56.

<sup>104</sup> U.S. Census Bureau, note 66, at 19 tbl.10.

<sup>105</sup> *Id.* at 15.

<sup>106</sup> *Id.* at 18 tbl.8.

<sup>107</sup> *Id.* at 17 tbl.7.

<sup>108</sup> *Id.*

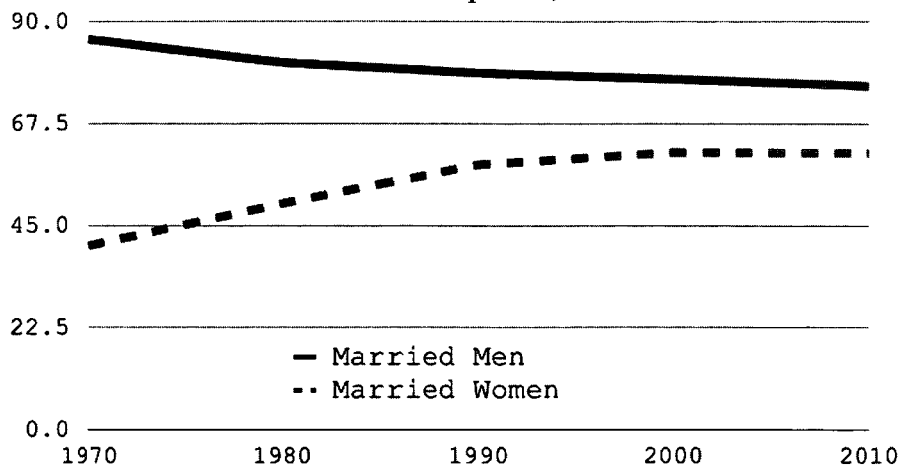
<sup>109</sup> Matthew D. Bramlett & William D. Mosher, *Cohabitation, Marriage, Divorce, and Remarriage in the United States*, 23 *Vital & Health Statistics* 78 tbl.37 (2002).

<sup>110</sup> *Id.*

<sup>111</sup> See Christine R. Schwartz, *Earnings Inequality and the Changing Association Between Spouses' Earnings*, 115 *Am. J. Soc.* 1524, 1524-25 (2010).

<sup>112</sup> See U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey* tbl.2 (Employment Status of the Civilian Noninstitutional Population 16 Years and Over by Sex, 1972 to Date) (Feb. 1913), <http://www.bls.gov/cps/cpsaat02.htm>.

FIGURE 6<sup>113</sup>  
Labor Force Participation, 1970-2010



As the figure illustrates, the influx of women into the workforce did not begin and end in the 1970's. Instead, the upward trend continued through the 1990's. By 2010, the difference in participation for single and married women was only two percentage points apart (63.3% vs. 61%)<sup>114</sup> compared with twenty-three percentage points in 1950 (46.3% vs. 23%).<sup>115</sup> See Figure 7 below.

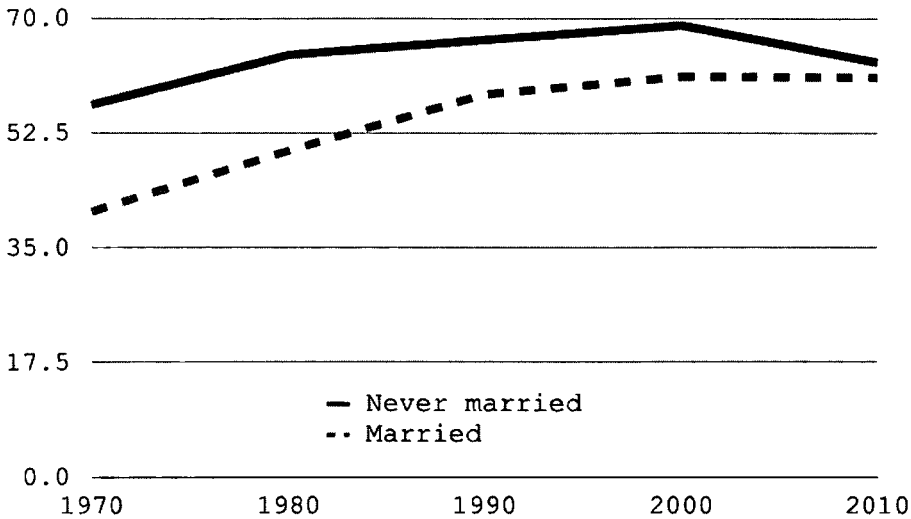
<sup>113</sup> U.S. Census Bureau, note 28, at 384 tbl.597.

<sup>114</sup> Id.

<sup>115</sup> Id. at 384 tbl.598; U.S. Census Bureau, note 69, at 53 tbl.HS30, <http://www.census.gov/statab/hist/HS-30.pdf>.



FIGURE 7<sup>116</sup>  
 Labor Force Participation of Women, by Marital Status,  
 1970-2010



Trends among couples with both spouses under age fifty-five are even starker. In 1969, 54.2% of couples had a working wife, while in 1998, 82.2% did.<sup>117</sup>

In 2010 wives contributed 37.6% of family income, compared to 26.6% in 1970.<sup>118</sup> Wives earn more than husbands in nearly a quarter of marriages, compared with less than 5% in 1970.<sup>119</sup> The dynamics of the marriage search have changed as well: No longer does a (typical) high-earning man seek to marry a low-earner destined to be a stay-at-home mother. Today, one high-earner is increasingly likely to marry another. All else equal, high-earning women are actually more likely to marry than lower-earning peers.<sup>120</sup>

Still, it would be a mistake to reach the happy conclusion that gender has disappeared in American family life. True, married couples are more gender-egalitarian in their division of household work.

<sup>116</sup> U.S. Census Bureau, note 28, at 384 tbl.598.

<sup>117</sup> See Katharine Bradbury & Jane Katz, *Wives' Work and Family Income Mobility* 27 tbl.1 (Federal Res. Bank of Boston, Public Pol'y Discussion Paper No. 04-3, 2005), available at <http://www.bos.frb.org/economic/ppdp/2004/ppdp0403.pdf>.

<sup>118</sup> See U.S. Bureau of Labor Statistics, *Women in the Labor Force: A Databook* 80 tbl.24 (Feb. 2013), available at <http://www.bls.gov/cps/wlf-databook-2012.pdf>.

<sup>119</sup> Fry & Cohn, note 89; see also U.S. Bureau of Labor Statistics, note 118, at 84 tbl.25, <http://www.bls.gov/cps/wlf-table25-2011.pdf> (showing the percentage of wives earning more among two-earner couples).

<sup>120</sup> Megan M. Sweeney, *Two Decades of Family Change: The Shifting Economic Foundations of Marriage*, 67 *Am. Soc. Rev.* 132, 132 (2002) (comparing marital formation in a cohort born in the early 1950's with that of a cohort born in the early to mid-1960's).

From 1975 to 2000, married mothers reduced their hours of housework as they increased their time spent in paid employment, while married fathers increased their hours of child care and housework and decreased their hours of paid work and personal time.<sup>121</sup> Counting time spent in both market work and unpaid work, mothers and fathers now work equally long weeks (and longer total weeks than in 1975).<sup>122</sup> Even so, the division of labor is not perfectly equal: In 2000, married fathers did 64% of paid work and 34% of unpaid work.<sup>123</sup>

Today, the gendered division of labor falls heavily on the rising proportion of single mothers, who bear a heavy burden of care work along with paid employment. When romantic relationships end, whether by divorce or by the end of cohabitation, mothers are overwhelmingly left with primary responsibility for the day-to-day care of children.<sup>124</sup> In 2010, for example, 7.2% of all households were headed by single mothers, while only 2.4% were headed by single fathers.<sup>125</sup> A supermajority of single mothers combine care work with paid work: Even during the current recession, two-thirds of single mothers work outside the home.<sup>126</sup>

### *C. The Tightening Link Between Marriage and Class*

Despite these changes, lasting marriage and child-bearing and child-rearing within marriage have one last bastion in the United States: the upper class. To a far greater degree than in the twentieth century, lasting marriage that involves living with one's own biological children (and no others) has become a form of social privilege, correlated with other forms of social privilege.<sup>127</sup> "The culture is shifting, and marriage has almost become a luxury item, one that only the well-educated and well paid are interested in," according to Isabel Sawhill, a leading researcher on inequality.<sup>128</sup>

To be sure, the American upper class does not follow the patterns of mid-twentieth-century marriage. As a group, better-educated and

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<sup>121</sup> Suzanne M. Bianchi, John P. Robinson & Melissa A. Milkie, *Changing Rhythms of American Family Life* 64-67, 111 (2006).

<sup>122</sup> *Id.* at 170.

<sup>123</sup> *Id.* at 116-17 tbl.6.1.

<sup>124</sup> *Id.* at 67-68, 170.

<sup>125</sup> U.S. Census Bureau, *Households and Families: 2010*, at 8 tbl.3, <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

<sup>126</sup> U.S. Bureau of Labor Statistics, *Economic News Releases, Employment Characteristics of Families* tbl.4 (Families with Own Children: Employment Status of Parents by Age of Youngest Child and Family Type, 2011-2012 Annual Averages) (Apr. 26, 2013), available at <http://www.bls.gov/news.release/famee.t04.htm>.

<sup>127</sup> See Blaine Harden, *Numbers Drop for the Married with Children: Institution Becoming the Choice of the Educated, Affluent*, *Wash. Post*, Mar. 4, 2007, at A3.

<sup>128</sup> *Id.* (quoting Isabel V. Sawhill, Senior Fellow, Brookings Inst.).

higher-income individuals marry later than those in lower socioeconomic classes; over a lifetime, however, they marry at higher rates.<sup>129</sup> Divorce rates also correlate with class: While 46% of marriages end in divorce (or permanent separation) within ten years among high-school dropouts, and 37% end within ten years for high-school graduates, only 16% end in that period for those with a B.A. or more.<sup>130</sup>

Data from the Census Bureau illustrate the close association of cohabitation with lower-income groups and marriage with higher-income status. In 2011, more than half of unmarried-couple households had incomes at or below the fortieth percentile of the income distribution.<sup>131</sup> In neat symmetry, more than 50% of married couples had incomes at or above the sixtieth income percentile, and more than 30% had incomes at or above the eightieth percentile.<sup>132</sup>

Bolstering the association between lasting marriage and higher income, divorce rates fall with income and with educational attainment.<sup>133</sup> In 2012, 63.7% of all American men age thirty-five to thirty-nine were married, but only 52% of men (in that age group) with earnings from \$15,000-\$25,000, and only 50.1% of men with earnings from \$5,000 to \$15,000.<sup>134</sup> By comparison, 80.1% of men age thirty-five and thirty-nine with earnings over \$100,000 were married.<sup>135</sup>

The longevity of marriage now varies strikingly by social class, as Figure 8 shows.

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<sup>129</sup> See Cherlin, note 19, at 403-04.

<sup>130</sup> See *id.* at 405 fig.1.

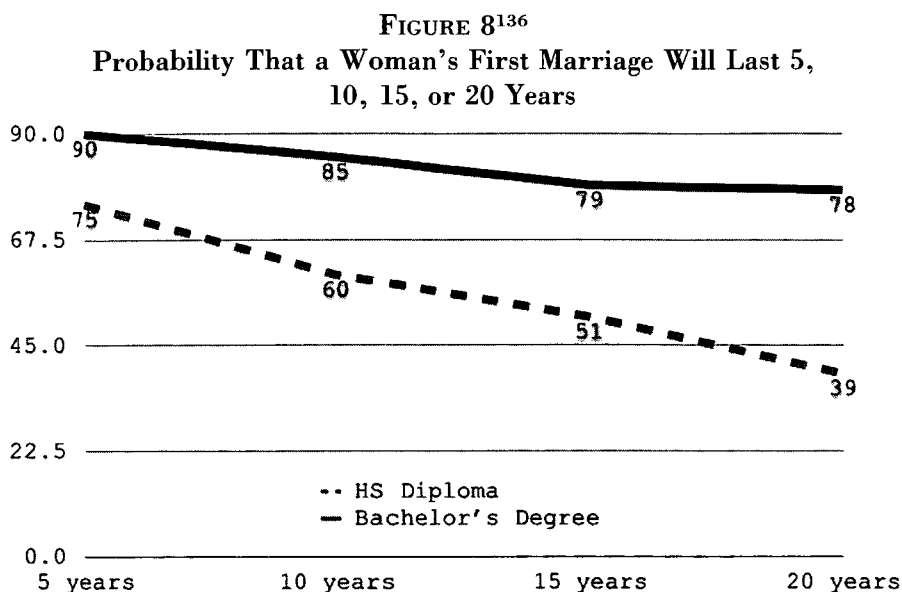
<sup>131</sup> Robert Groves, Dir., U.S. Census Bureau, Changing American Households 16, available at [http://www.census.gov/newsroom/pdf/cah\\_slides.pdf](http://www.census.gov/newsroom/pdf/cah_slides.pdf).

<sup>132</sup> *Id.*

<sup>133</sup> See Bramlett & Mosher, note 109, at 55 tbl.21.

<sup>134</sup> U.S. Census Bureau, note 1.

<sup>135</sup> *Id.*



Based on 2010 data, demographers estimate that 90% of the marriages of women attaining a B.A. will last at least five years, compared to only 75% for women attaining only a high school diploma.<sup>137</sup> By the twenty-year mark, the gap in lasting marriages is nearly forty percentage points between the more-educated group (78%) and the less-educated (41%).<sup>138</sup>

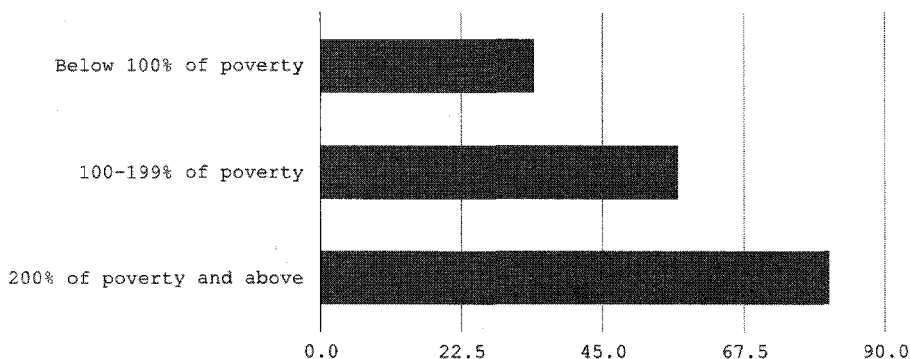
Children's family status also varies by income and social class. Figure 9 shows the relationship between income level and parental marriage.

<sup>136</sup> Copen et al., note 72, at 16 tbl.5.

<sup>137</sup> Id.

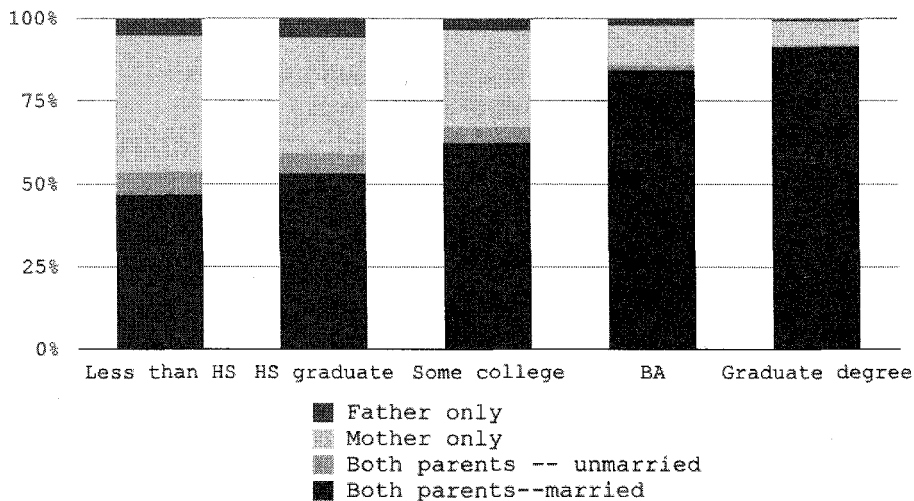
<sup>138</sup> Id.

**FIGURE 9<sup>139</sup>**  
**Percentage of Children Living with Both (Married) Parents**  
**by Income Level, 2011**



Of children in poverty, 34% live with their married parents, while 81% of those living at 200% of poverty or above do so.<sup>140</sup> Figure 10 presents similar statistics based on parents' educational attainment. While less than one-half of children of high-school dropouts live with married parents, a stunning 91% of children with at least one parent with a graduate degree live with married parents.<sup>141</sup>

**FIGURE 10<sup>142</sup>**  
**Family Status and Parental Educational Attainment**



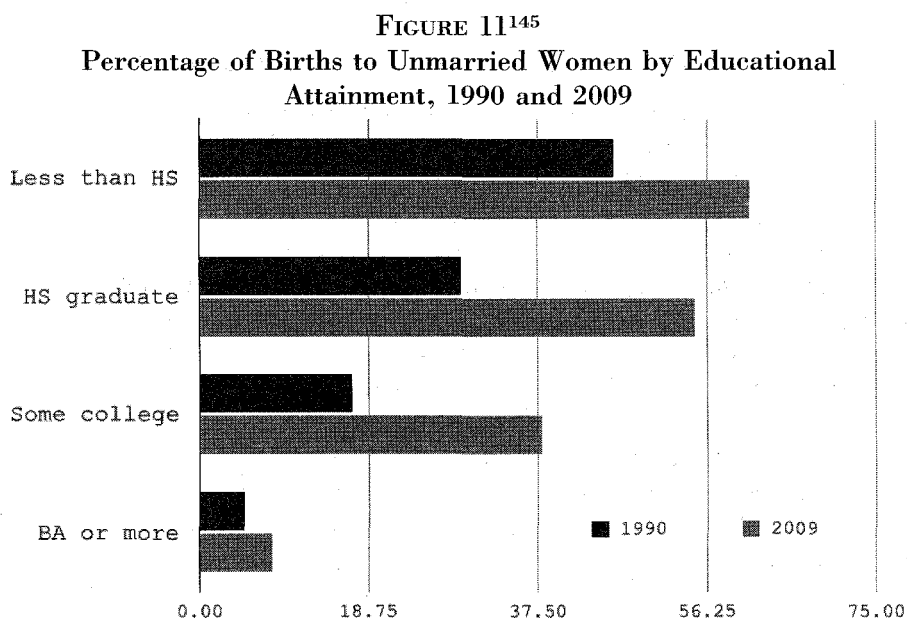
<sup>139</sup> U.S. Census Bureau, note 1, at tbl.C3.

<sup>140</sup> Id.

<sup>141</sup> Id.

<sup>142</sup> Id.

The data on new births is even more striking. In 2010, only 7% of births among women holding a B.A. or more occurred outside marriage, compared to 36% for those with some college and 40% of those with a high school diploma.<sup>143</sup> As Figure 11 shows, the percentage of nonmarital births among women with a high school diploma or some college has increased enormously since 1990.<sup>144</sup>



Even so, gender roles in these upper-class marriages differ significantly from mid-twentieth-century marriage. Educated wives are more likely than less-educated wives to work outside the home and to earn more than their husbands.<sup>146</sup>

What causes the correlation between marriage and class? One theory holds that lasting marriage boosts economic achievement: Married people have greater support at home and can take greater risks (and reap bigger rewards) in the marketplace.<sup>147</sup> Alternatively,

<sup>143</sup> See U.S. Census Bureau, *Fertility of American Women: 2010—Detailed Tables* tbl.8, available at [www.census.gov/hhes/fertility/data/cps/2010.html](http://www.census.gov/hhes/fertility/data/cps/2010.html).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> U.S. Bureau of Labor Statistics, note 118, at 24 tbl.8 (showing that 65.9% of all women were employed in 2011, including 40.6% of high school dropouts, 60.2% of those with a high school diploma but no college, and 76.2% of those with a B.A. or more). A whopping 86.1% of women with a doctoral degree were employed. *Id.*

<sup>147</sup> See Robert I. Lerman, *Marriage and the Economic Well-Being of Families with Children: A Review of the Literature 4-7* (2002), available at <http://www.urban.org/url.cfm?ID=410541>; Robert I. Lerman, *Married and Unmarried Parenthood and Economic Well-Be-*

money and class position may make lasting marriage possible, because well-off couples can avoid financial distress and can buy their way out of squabbles over household tasks by hiring help.<sup>148</sup> A third line of thinking posits that some personal characteristic, like patience, insight, persistence, long-range thinking, or even personal charm, might assist some people in attaining both lasting marriage and economic success.<sup>149</sup>

#### *D. Family Law and the New Individualism*

Property and family law rules have evolved to accommodate individualism. Cohabiting couples operate under ordinary state property law: When they break up, each person takes only what is his or her own, and, absent extraordinary circumstances, neither party owes support to the other.<sup>150</sup> Family law may appear to alter these default rules for married couples, who—in theory—face court-supervised division of property and may owe spousal support (that is, alimony). But in the vast majority of cases, divorced couples part ways in much the same way as cohabiting couples: Each takes his or her own property, and neither owes much, if any, spousal support (alimony) to the other.<sup>151</sup> According to the American Bar Association, only 15% of all divorce cases include alimony payments.<sup>152</sup>

Property division and alimony are *de facto* irrelevant for most couples for two reasons. First, a substantial majority of Americans have little or no wealth other than their human capital (economists' term for earning power). Property division at divorce may be mildly

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ing: A Dynamic Analysis of a Recent Cohort 7 (2002), available at <http://aspe.hhs.gov/hsp/marriage-well-being03/parenthood.pdf>.

<sup>148</sup> See Cherlin, note 19, at 404 (noting that it “remains unclear” why class patterns in family formation are diverging, but that “it is tempting” to associate that divergence with labor market trends).

<sup>149</sup> For a review of a variety of theories, see Thomas & Sawhill, note 85.

<sup>150</sup> The famous “palimony” case of *Marvin v. Marvin*, 176 Cal. Rptr. 555, 558-59 (Cal. Ct. App. 1981) (overturning a lower court award to Michelle Marvin) requires payments between separating cohabitants only on the showing of an explicit contract, a standard rarely met in such cases.

<sup>151</sup> See Judith G. McMullen & Debra Oswald, *Why Do We Need A Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & Fam. Stud. 57, 75 (2010) (finding that alimony was awarded in only 9% of cases in a county in Wisconsin in 2005, and that most of these awards were temporary or would terminate upon specified events (for example, the sale of a house or car)). For discussion of the limited duration and amount of alimony awards, see Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 Colum. L. Rev. 75, 119 (2004).

<sup>152</sup> Alicia B. Kelly, *Actualizing Intimate Partnership Theory*, 50 Fam. Ct. Rev. 258, 260 (2012) (citing Jeff Atkinson, *The American Bar Association Guide to Family Law* (2011)). The U.S. Census Bureau finds basically the same result, with alimony awards in 15.5% of divorces. See Gordon H. Lester, *U.S. Census Bureau, Child Support and Alimony: 1989, at 12* (1990), available at [www2.census.gov/prod2/popscan/p60-173.pdf](http://www2.census.gov/prod2/popscan/p60-173.pdf).

painful, but other than modest pension rights and a little equity in a home and car, many couples have nominal assets to divide. In 2010, for example, the median income of U.S. families was \$49,800, and the median net worth was \$77,300.<sup>153</sup> But that figure, modest as it is, overstates the financial position of many Americans. Among families headed by an individual aged thirty-five to forty-four, for example (a group heavily represented in divorce), median net worth was \$9300. Twenty-five percent of Americans in 2010 had negative net worth.<sup>154</sup>

Second, the law of alimony by its terms applies primarily in a factual setting that is increasingly rare: long-term marriage between spouses with very unequal earnings, high family income, and specialized gender roles.<sup>155</sup> Critics charge that alimony is increasingly unfair to men, because women have greater options outside the home.<sup>156</sup> And several states have moved to limit alimony, including liberal Massachusetts.<sup>157</sup>

Property division tends to follow a fifty-fifty split, whether in common law or community property states, and only marital property (typically, property purchased with earnings during the marriage) is subject to division. Even in the nine community property states,<sup>158</sup> the law often defaults to an individualist pattern.<sup>159</sup>

Thus, family and property law mirrors the new individualism in marriage. The law might, of course, take a different direction. The American Law Institute, for example, has proposed to extend to some cohabiting couples the property and support rights accorded to married couples.<sup>160</sup> Canada permits courts to award alimony to cohab-

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<sup>153</sup> Jesse Bricker, Arthur B. Kennickell, Kevin B. Moore & John Sabelhaus, *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances*, 98 Fed. Res. Bull. 1, 7 tbl.1, 17 tbl.4 (2012).

<sup>154</sup> *Id.* at 18 tbl.4.

<sup>155</sup> See Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce* 45-47 (2011) (noting that alimony is typically payable only by long-term spouses who have the ability to pay and are divorcing a needy spouse); Kelly, note 152, at 260 (reporting that "alimony is more myth than reality" and citing data showing "that alimony awards are declining and are granted in only about 15% of divorces, and even when awarded, are typically low in amount and short in duration").

<sup>156</sup> Lizette Alvarez, *In an Age of Dual Incomes, Alimony Payers Prod States to Update Divorce Laws*, N.Y. Times, Mar. 4, 2012, at All.

<sup>157</sup> Jess Bidgood, *Alimony in Massachusetts Gets Overhaul, With Limits*, N.Y. Times, Sept. 27, 2011, at All. See Am. Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations* 895-97 (2002) [hereinafter ALI].

<sup>158</sup> Douglas E. Abrams, Naomi R. Cahn, Catherine J. Ross & David D. Meyer, *Contemporary Family Law* 473(3d. ed. 2012) (listing Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin).

<sup>159</sup> Kelly, note 152, at 261.

<sup>160</sup> ALI, note 157, at 974-77. For criticism of this proposal, see, e.g., Marsha Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal?*, in



iting couples who dissolve their relationship.<sup>161</sup> And scholars have proposed re-introducing common law marriage in order to extend family-law protections for marriage to long-term cohabitation.<sup>162</sup>

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In their classic study of marriage in 1965, Peter Berger and Hansfried Kellner found that marriage “occupies a privileged status among the significant validating relationships for adults in our society . . . . Marriage is a crucial nomic instrumentality in our society.”<sup>163</sup> Marriage in this sense no longer exists. Certainly, some couples still marry early, adopt traditional gender roles, and persist in marriage for the long-term, but their marriages no longer resemble those Berger and Kellner described, because they are unusual rather than the norm. The result, as explained further in the next Part, is that the presumed social context for joint filing and the spousal benefit simply no longer exists. Reform is imperative, but the direction for reform depends critically on one’s ideals for income taxation and social insurance.

#### IV. UPDATING THE INCOME TAX: JOINT FILING AND THE NEW INDIVIDUALISM

The new individualism poses serious policy challenges for the income tax. The decline in marriage, the rise in cohabitation, and the growing ranks of the never-married mean that formal marriage no longer demarcates family life. Many people form and dissolve relationships outside marriage—and they bear and rear children outside marriage as well. The growing heterogeneity of marriage means that even among married couples, the law cannot infer that traditional activities are taking place: Married couples today may or may not rear children, conform to traditional gender roles, expect to remain married for the long-term, or expect to share their economic fortune “for better or worse.”

The result is that tax policy now faces, once more, the two challenges that confronted the income tax before the adoption of income-splitting in 1948. First, should the tax system attempt to take notice of family ties in assessing individuals’ well-being? Second, how impor-

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Reconceiving the Family: Critique on the American Law Institute’s Principles of the Law of Family Dissolution 305, 306-27 (2006).

<sup>161</sup> See Jeanne Lafortune, Pierre-Andre Chiappori, Murat Iyigun & Yoram Weiss, *Changing the Rules Midway: The Impact of Granting Alimony Rights on Existing and Newly-Formed Partnerships* (Mar. 2012) (unpublished article), available at <http://www.columbia.edu/~pc2167/CILWCommonlaw031912.pdf>.

<sup>162</sup> Cynthia G. Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 *Or. L. Rev.* 709, 710-11, 779-80 (1996).

<sup>163</sup> Berger & Kellner, note 4, at 5.

tant is the problem of income-shifting via intrafamily transfers of assets, and how, if at all, can the tax system combat the loss of progressivity that accompanies them?

In this Part, I argue that the new demographics of the family render joint filing obsolete—whatever one's views about the sanctity and desirability of marriage.

To see how the new individualism undermines joint filing, recall the two major problems that income-splitting solved in 1948. First, the income-splitting joint return provided a reasonably accurate assessment of individuals' family status and, thus, a reasonable measure of well-being derived from shared income and relational commitments from others.<sup>164</sup> Second, joint filing prevented tax-motivated transfers of assets and income between husbands and wives.<sup>165</sup>

The problem is that joint filing no longer serves either purpose particularly well. There are two principal alternatives to joint filing: household filing (which aggregates income across a "household," which is more expansive than the formally-married couple) or individual filing.

The United States might glean some guidance from the other countries in the OECD, which face similar (though not identical) demographic shifts and have increasingly turned to individual filing. In 2011, among thirty-four countries studied by the OECD in 2010-2011, only eleven had joint filing of any type.<sup>166</sup> Even among countries with some form of joint filing, several permit spouses to elect separate filing, and two include unmarried partners in addition to formal spouses.<sup>167</sup>

In the following discussion, I do not advocate either individual filing or expanded joint filing. My point is not that one is clearly superior, and indeed, both have drawbacks. My point, instead, is that joint filing is, today, insupportable on any of a range of normative views about what the income tax ought to accomplish.

### *A. Updating the Trilemma*

To frame the policy problem now facing the income tax, return to the trilemma: An income tax cannot simultaneously:

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<sup>164</sup> See, e.g., Joint Comm. on Tax'n, *Present Law and Background Relating to Proposals to Reduce the Marriage Tax Penalty*, Scheduled for a Public Hearing Before the House Committee on Ways and Means § I.B. (1998).

<sup>165</sup> See *id.*

<sup>166</sup> OECD, *Taxing Wages: 2011*, at 220, 288, 300, 310, 340, 392, 434, 444, 486, 506, 536, available at [http://www.oecd-ilibrary.org/taxation/taxing-wages-2011\\_tax\\_wages-2011-en](http://www.oecd-ilibrary.org/taxation/taxing-wages-2011_tax_wages-2011-en) (Belgium, France, Germany, Greece, Ireland, Luxembourg, Norway, Poland, Spain, Switzerland, and the United States).

<sup>167</sup> *Id.* (France, Luxembourg).

- (1) impose progressive marginal tax rates;
- (2) assess equal taxes on married couples with equal earnings; and
- (3) maintain marriage neutrality (meaning that the total income tax paid by two unmarried individuals neither increases nor decreases when the couple marries).

The rise of the new individualism requires us to adapt the trilemma to reflect the new social reality. When marriage is no longer an institution, it is no longer obvious that equality across married couples is an important social goal. Family life now occurs outside marriage as often as in it, and marriage itself no longer has standard content.

But if we revise principle (2) to assert the importance of equal-earning households or families, the trilemma springs back into the realm of social relevance. This is precisely what poverty researchers do: They attempt to assess family or household situations, not individual earnings.

Restated, then, the new trilemma looks like this. An income tax cannot simultaneously:

- (1) impose progressive marginal tax rates;
- (2) assess equal taxes on households with equal earnings; and
- (3) maintain household neutrality (meaning that the total income taxes paid by individuals residing separately will neither increase nor decrease when they form a household).

Restating the trilemma helps revitalize our sense of the policy stakes. Assuming policymakers wish to preserve progressive rates, then either the income tax must opt for individual filing or it must tackle the task of defining (and monitoring) a new unit, the household, which represents a social grouping with normative significance for taxation.

The restated trilemma begins to illustrate the obsolescence of joint filing based on formal marriage. The trilemma's principle (2) reflects the idea that resources are shared and used in socially-meaningful groupings of people. In the mid-twentieth century, marriage was not just one such grouping; it was the primary grouping for Americans of all ages.<sup>168</sup> The new individualism has destroyed the easy elision of "marriage" with "family," with the result that formal marriage no longer can suffice to implement principle (2).

Still, the trilemma, as elegant as it is, represents only a first cut at the problem of taxing the family. Before we can conclude that the new individualism has vitiated joint filing, we need to take a closer

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<sup>168</sup> Pew Research Ctr., *The Decline of Marriage and Rise of New Families* 1-3 (2010), available at <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> (finding that in 1960, 72% of all American adults were married, while in 2008 that figure had fallen to 52%; among adults ages twenty to twenty-nine, the marriage rate has declined from 68% in 1960 to 26% in 2008).

look at the rationales for aggregating income and at the administrative considerations that helped give rise to joint filing in the first place.

Accordingly, in the remainder of this Part, I pursue two aims. First, I examine three ideals of income taxation (liberal, welfarist, and social conservative), and I demonstrate that joint filing might have been plausible according to any of them in the mid-twentieth century—but no longer can claim a normative grounding in any of them. Second, I consider the administrative challenges of implementing either individual filing or household filing in the age of the new individualism.

An important corollary of the analysis here is that we should not mistake allegiance to joint filing with allegiance to marriage. We sometimes equate joint filing with tradition and with the valorization of marriage (or, at least, I did so, until I thought it through). But, in fact, joint filing poorly serves the goal of rewarding or encouraging marriage, compared to alternative policies.

### *B. Liberal Individualism and Individual Filing*

Liberalism encompasses a variety of theories, but all share commitments to individual freedom and equality, pluralism, state neutrality, and individual responsibility. These values dovetail with the new individualism and endorse individual filing as the best policy response.

The liberal ideal of income taxation aims to capture differentials in individual fortune produced by undeserved good and bad luck.<sup>169</sup> Taking this view, individuals should choose the family lives that seem best to them, and the state should take no notice of family ties. Concretely, then, the state should assess taxes based on individual, not joint, filing, and tax liability should not vary based on formal marriage or other family activities, including support owed to or received from marital partners.<sup>170</sup>

These principles seem to harmonize with the new individualism, which leaves family relationships to individual choice and revision. Liberalism famously—and infamously<sup>171</sup>—treats each individual as a

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<sup>169</sup> Ronald Dworkin, for example, proposes an income tax as a second-best approach to income insurance, which would pay benefits to those who could only earn low incomes and would tax those who had the capacity to earn high incomes. Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* 99-109 (2000). Philippe Van Parijs justifies an income tax as a tax on undeserved rents from holding jobs, particularly good jobs. Van Parijs, note 21, at 108-24.

<sup>170</sup> I leave to another occasion the state's proper stance toward children and child-rearing. See, e.g., Anne L. Alstott, *No Exit: What Parents Owe Their Children and What Society Owes Parents* 205-11 (2004) (arguing that a liberal state ought to transfer additional resources to parents who meet their obligations to children).

<sup>171</sup> *Liberalism and Its Critics* (Michael J. Sandel ed., 1984); see Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. Colo. L. Rev. 269, 282 (1991); Martha

separate human being, capable of making decisions, including decisions to form and leave relationships. On this view, two individuals with the same incomes properly pay the same tax, even if one is married to a billionaire and the other to an unemployed surfer. The billionaire's spouse is likely better off in terms of material comforts while the relationship lasts, but the upside and downside risks are properly borne by the individual, who chose to enter the relationship and chooses to continue it.

Joint filing, then, has little to recommend it from a liberal point of view—today. In fact, earlier liberal theories, notably John Rawls' *A Theory of Justice*,<sup>172</sup> reflected the backdrop of mid-twentieth-century marriage and the primacy of formal marriage to family life. Rawls assumed that the nuclear family constituted the primary social unit, and that the family head (read: husband) would altruistically advance his family's interests.<sup>173</sup> His assumption about altruism surely strains credulity in any period. But the assumption that the married couple is a social, psychological, and economic unit was correct in its time.

As the 1970's passed into the 1980's, however, it became clear (to feminist scholars, at least) that the notion of the married couple as a unit fit uneasily with liberal commitments to individual autonomy.<sup>174</sup> Liberal scholars in the early 2000's have tended to endorse an individualist perspective, taking the position that individuals should determine for themselves the family obligations (if any) they wish to endorse.<sup>175</sup>

A traditional argument for joint filing is that because married couples "pool" assets, their incomes cannot be measured separately. But the pooling argument rests on shaky empirical and normative ground from a liberal perspective. First, the empirical problem: The extent of pooling now varies enormously among married couples and cohabitants. Some cohabitants treat all resources in common, while many married couples do not, and the trend is toward greater individualism.<sup>176</sup> Thus, the ready assertion that married couples "pool in-

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Minow & Mary Lyndon Shanley, *Relational Right and Responsibility: Revisioning The Family in Liberal Political Theory and Law*, *Hypatia*, no. 1, 1996, at 1, 6-12.

<sup>172</sup> John Rawls, *A Theory of Justice* 467 (1999).

<sup>173</sup> *Id.* at 111.

<sup>174</sup> See, e.g., Susan M. Okin, *Justice, Gender, and the Family* 8-10, 99-109 (2008).

<sup>175</sup> See, e.g., Elizabeth Brake, *Minimal Marriage* 156-88 (2012).

<sup>176</sup> See, e.g., Fenabra R. Addo & Sharon Sassler, *Financial Arrangements and Relationship Quality in Low-Income Couples*, 59 *Fam. Rel.* 408, 409 (2010) (noting evidence that "separate fiscal systems" have become more prevalent among married couples); Jan Pahl, *Family Finances, Individualisation, Spending Patterns, and Access to Credit*, 27 *J. Socio-Economics* 577, 577 (2008) (reviewing data suggesting that "fewer couples are pooling their incomes and more are keeping all or part of their incomes in individual accounts to which their partner does not have access").

come,” which might have been apt enough in the mid-twentieth century, does not fit easily the contours of twenty-first-century marriage.

Next, the normative problem: It is not clear that “pooling” justifies aggregation of income in a liberal income tax. Liberalism treats each individual as a separate human being, capable of making decisions, including decisions to form and leave relationships. A good relationship might (perhaps) increase one’s taxes or a bad one decrease them (a possibility that I consider in Part V), but the individual remains the basic unit for assessing the benefits and burdens of equality.

The new individualism has also changed the context for evaluating two administrative objections to individual filing. The first is that the tax system cannot accurately apportion earnings between spouses. This objection was weighty indeed in the era of mid-twentieth-century marriage. Even when income (say, the husband’s earnings) nominally belonged to one individual, the social reality of joint accounts, extensive home production, and long-term mutual dependency based on role specialization made it difficult to assess the economic value accruing to each partner.<sup>177</sup>

Today, by contrast, most women work, including most wives and most cohabiting women, and the degree of role specialization in couples has declined.<sup>178</sup> The shorter average duration of marriage, the high probability of marital disruption, and the new patterns of separate accounting and spending all make it more accurate to attribute each individual’s earnings and savings income to her and her alone. Following family law, the tax system might adopt a fifty-fifty presumption for joint savings accounts and other jointly-held assets.

Put another way, a central problem for past proposals for individual filing has been the treatment of the earned income of the married couple. Logically, the law must adopt one of just three options. The first is to return to pre-1948 law, in which *Poe* and *Earl* co-existed, at the cost of large tax disparities between common law and community property states. A second option would overrule *Poe* and follow the *Earl* rule in all states, disregarding community property. A third option would overrule *Earl* and split earnings (but not necessarily property income) even in common law states, at the cost of steep tax differences between the married and the unmarried. Pamela Gann

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<sup>177</sup> Richard S. Posner, *Economic Analysis of Law* 157 (5th ed. 1998); Naomi Cahn, *Looking At Marriage*, 98 Mich. L. Rev. 1766, 1774-78 (2000) (reviewing Milton C. Regan Jr., *Alone Together: Law and the Meanings of Marriage* (1999)); see also Deborah A. Widiss, 89 Wash. U.L. Rev. 721, 748-57 (2012) (discussing how Social Security, tax, marriage, and employee benefits laws incentivize specialization).

<sup>178</sup> See Kristin McCue & Manuelita Ureta, *Women in the Workplace: Recent Economic Trends*, 4 Tex. J. Women & L. 125, 127-129, 133-37, 155 (1995).

and Lawrence Zelenak, among others, have thoroughly canvassed these options.<sup>179</sup>

The rise of the new individualism suggests that large disparities between the formally-married and unmarried are probably undesirable. Why go to the trouble of repealing joint returns only to re-enact income-splitting in another form? When the great majority of adults were married for the long term in traditional marriages, these problems of income-splitting were acute, but the new individualism makes the marital unit less compelling as the exclusive focus for income allocation issues.

A second administrative issue surfaces, however, even if the law retains *Earl* (and especially if the law overrules *Poe*). Recall that, in the pre-1948 period, married individuals could improperly shift earned income by transferring assets: When *H* had high earnings and *W* had low earnings, the *H-W* couple could reduce their total taxes by transferring property (and, thus, property income) to *W*. As a couple, *H-W* were no worse off, but their federal income tax bill was considerably lower.

Continuing the analysis from a liberal perspective, it is important to distinguish two cases, one of which constitutes tax avoidance, and one of which does not. A true transfer of assets from one individual to another (regardless of their relationship) does not amount to tax avoidance. If *Alice* gives \$1000 or \$1 million to *Bertha*, and the transfer is genuine, meaning that *Alice* no longer controls the money or expects its return, then the tax system should view the money as *Bertha's*, regardless of the nature of the relationship. Going forward, *Bertha* is richer, and her tax liability should capture her greater income.<sup>180</sup>

Sham transfers, by contrast, represent a problem even for a liberal income tax, precisely because the tax system is supposed to measure the income of each person. Imagine that *A* formally transfers property to *B*, but both *A* and *B* know that the transfer changes nothing—*A* will continue to manage the property and will take it back in an instant if she needs money for her business. That sham transfer, which changes nothing but income tax liabilities, should concern even the most die-hard liberal individualist. And, importantly, the sham transfer should be equally objectionable whether *A* and *B* are married, a parent and child, or formally unrelated.

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<sup>179</sup> See Gann, note 23, at 52-61; Zelenak, note 23, at 383-94.

<sup>180</sup> For analogous arguments, see Gann, note 23, at 52-61 (considering the positive gender impact of elective income-shifting premised on legal property transfers); Shari Motro, A New "I Do": Towards a Marriage-Neutral Income Tax, 91 Iowa L. Rev. 1509, 1553 (2006) (proposing elective joint filing based on "enforceable legal entitlements" to income-splitting).

Formal marriage today is a poor conceptual fit for the problem of sham transfers. Mid-twentieth-century marriage created such lasting unity in the married couple that formal title transfer was rather meaningless. Today, the situation is quite different: The new individualism in marriage makes marital partners more independent in their financial lives and far warier than in the past about formal asset transfers. No longer is marriage a lifelong commitment, begun in youth and expected to endure, with a psychological sense of unity. Marriage today more often involves older partners with separate careers and financial experience. Married couples witness the frequent break-up of peers' marriages. Blended families, too, can change the financial dynamics of family life. Not too surprisingly, then, the last generation has witnessed a revolution in the internal finances of married couples. Many couples now maintain separate checking and retirement accounts and pay separately for household expenses.<sup>181</sup>

Joint filing, then, prevents only a subset of sham transfers (those occurring during formal marriage), and it does so at the considerable cost of ignoring individuals' separate identities and financial wherewithal. Once we give up—as liberal individualism insists we should—the idea that the married couple is a social unit, we can begin to craft administrable solutions that can prevent sham transactions without relying on formal marriage and while respecting individual identity.

A number of legal rules might be adopted to curb sham transfers in individual filing. Canada, for instance, disregards many transfers of income between spouses and common law partners.<sup>182</sup> Anthony Infanti proposes to permit elective nonrecognition on outright transfers of property but to disregard only property transfers in which the transferor retains control or title.<sup>183</sup>

To illustrate the many additional options for combatting sham transfers of property, I sketch two more here. Both approaches take advantage of three features that characterize a sham transfer. To reduce an individual's tax liability, the property transfer must appear to (1) reduce the high-bracket taxpayer's assets for some period, without depriving her of (2) day-to-day control and (3) the power of disposition. To prevent sham transfers, then, the tax law needs to disrupt one or more of these planning features.

First, the tax law might adopt a look-back rule, an idea that is used to combat sham transfers in other tax contexts.<sup>184</sup> Under this ap-

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<sup>181</sup> See note 176.

<sup>182</sup> See Infanti, note 22, at 630-31 (describing Canadian assignment-of-income and property attribution rules).

<sup>183</sup> *Id.* at 656-61.

<sup>184</sup> See, e.g., IRC § 1014(e) (one-year-look-back for property acquired by decedent by gift); § 2035(a) (three-year-look-back to gifts made within three years of death).



proach, a gift transfer to anyone—spouse or unmarried partner, parent or child or stranger—would be deemed effective for purposes of the income tax only if formally recorded with the IRS. The notice of transfer would be provided to the transferee and would state that the transferor had given up day-to-day control and the power of disposition. The transfer would immediately be effective for income tax purposes but would be disregarded *ex post* if that property (or other property up to the same amount)<sup>185</sup> reverted to the original owner or his entity alter ego within a specified period. In that case, the transfer would be deemed void for tax purposes, and the original owner would owe taxes for the intervening period. The transferee probably should be allowed a refund of the taxes paid, but perhaps not, as a deliberate penalty for boomerang transfers and to avoid gaming by re-transfer.

For example, suppose that at Time 1, high-bracket *H* transfers \$100,000 in cash to low-bracket *W*. *W* would pay tax on the income at her rate thereafter, except that if she made a retransfer to *H* within some period (for example, ten years), *H* would owe taxes (payable in the year of the re-transfer and with interest) on all income during the intervening period. The look-back rule would apply even if *W* retransferred, say, real estate or a stock portfolio instead of cash; and a partial look-back would apply even if only, say, \$25,000 flowed from *W* to *H*.

A key advantage of the look-back rule is that it could apply to any gift transfer, with no distinctions needed based on family status. Transfers would be equally subject to the rule whether between spouses, cohabitants, or strangers. Still, the attribution rules upon re-transfer would require some attention. The look-back tax should be owed whether *H* or his corporation or partnership or trust received the retransfer.

The proposal raises many design issues, including the treatment of partial transfers and transfers in trust. I do not attempt to address those issues here, except to note that they properly flag the nature of the sham transfer problem, which operates well beyond the married couple and minor children (whose situation is addressed by the kiddie tax).<sup>186</sup> The new individualism has strengthened lineal ties while weakening horizontal (marriage) ties, and so attention to sham transfers to adult children may be increasingly important.

Another general design issue involves the attribution rules. An open design issue is whether the look-back rule would apply if *W* transferred the funds to an individual related to *H*—say, *H*'s brother

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<sup>185</sup> To avoid obvious problems of tracing, the look-back rule would apply to any transfer of any property flowing the other direction during the look-back period.

<sup>186</sup> IRC § 1(g).

or second wife or live-in partner. An individualist might be inclined not to worry too much about such transfers. After all, a re-transfer to anyone other than the original transferor (*H* in my example) would not fit the transactional profile of a sham transaction between individuals willing to disregard the consequences of formal title transfer.

Still, the issue highlights the importance of redesigning attribution rules in light of the new individualism. I do not attempt an extended treatment here, but it is interesting to note that the realities of twenty-first-century marriage do have policy implications for attribution, which is critical in corporate and partnership tax. For example, § 318 now attributes ownership between husbands and wives and between parents and children.<sup>187</sup> Individualist attribution might drop the marital category altogether. By contrast, a strong and suspicious approach to attribution would have to draw a wider net to detect the household extending beyond the marital couple: One's live-in partner and perhaps his or her children might be just as appropriate for attribution as, say, one's husband.

A second reform would coordinate state law with federal tax law to give greater effect to formal legal transfers. State law already enforces formal transfers for cohabitants, who (except in rare cases of palimony, a claim very difficult to sustain) have no rights to property in which the other holds formal title.<sup>188</sup> States might agree to give full effect, even within marriage, to formal title transfers disclosed to the IRS. The aim would be to override equitable-division or community-property rules in order to make it even less likely that *H* would transfer title to most of his assets to *W*, risking the loss of \$100,000 for the sake of tax avoidance.

This second rule would apply only to title transfers disclosed to the IRS, and procedures would be designed to ensure that both spouses were aware of the transfer. Disclosure of the rights of the recipient as part of the process could also strengthen the "stickiness" of the transfer. To give some protection against duress, the rule might be made a default, so that spouses could prove out of it on equitable grounds at divorce.

These rules require further scrutiny to ensure that they could not be abused, say, to cheat a dependent spouse out of joint assets. Disclosure to the IRS, perhaps a public recording of the title transfer, and the opportunity to prove duress or disadvantage might discourage abuse.

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<sup>187</sup> IRC § 318(a)(1)(A).

<sup>188</sup> See, e.g., Conn. Gen. Stat. § 46b-1 (2011).

### C. *Welfarism and Household Aggregation*

Welfarists too differ in their commitments and yet share a common set of values. Very generally, welfarists seek to maximize aggregate utility or welfare.<sup>189</sup> Debates center on what counts as welfare and how to weight the welfare of each individual, but the consensus view is that welfare (and not rights, or freedom, or some other feature of society) should be the metric for judging among alternative legal systems, social arrangements, and so on.

For simplicity, in the following discussion I adopt the commitment of classical utilitarianism to equal weighting of all individual utilities, but that assumption does relatively little work toward my key conclusion, which is that joint filing based on formal marriage no longer serves any plausible welfarist purpose. The new individualism has a direct impact on a welfarist income tax, which aims to redistribute resources and channel behavior based on functional categories—what people do—rather than formal ones.

A few words of background explain why. A welfarist tax system, like any other social institution, would ideally maximize aggregate utility. In principle, then, aggregate welfare achieved in all possible states of the world should be evaluated holistically and comparatively. The tax system, for instance, should be evaluated in all its possible forms (for example, income taxation, consumption taxation, and gift taxation in various combinations), and each possibility in turn should be evaluated in combination with all possible forms of other institutions (for example, market economies, feudal systems, and so on).

But the impossibility of a comprehensive analysis has led to the adoption of conventions to make welfarism tractable. One of these is that the tax system, and indeed the income tax itself, can be analyzed separately from other institutions.<sup>190</sup> On this narrower (but still empirically-demanding model), the income tax has two principal effects on utility. First, progressive income taxation can increase aggregate welfare by redistributing from individuals with low marginal utility of money to those with high marginal utility. (This proposition reflects the standard convention that individuals have identical preference structures and that the marginal utility of money declines as wealth increases.)

Second, however, income taxation can reduce utility by distorting relative prices. The background assumption here is that individuals, in the absence of taxation, would maximize their welfare by consuming according to market prices set in the absence of taxation. If the tax system alters the relative prices of, say, work and leisure time, the new

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<sup>189</sup> See Kaplow, note 20, at 53-80.

<sup>190</sup> See *id.* at 13-21 (noting the use and misuse of incomplete analysis.)

pricing will lead individuals to alter their perceptions and behavior. The new equilibrium will be narrowly optimal (that is, individuals will have maximized utility given the existence of the tax). But the total utility achieved is, by hypothesis, less than before.

This trade-off represents the classic dilemma of redistribution, and the welfarist ideally would respond by weighing the two effects against each other. A large, mathematical literature in economics attempts to prescribe an optimal income tax structure by quantifying the magnitude of the trade-off under various assumptions.<sup>191</sup>

The welfarist prescription for taxation of the family follows the same recipe. The income tax should adjust tax liability by taking notice of the family if family relationships either (1) alter the marginal utility of money for family members or (2) affect individuals' perceived relative prices of goods or activities. In this standard analysis, family relationships potentially affect both. Here I suggest that the standard analysis should take note that marriage is no longer a good proxy for the activities that a welfarist income tax should aim to notice.

In the remainder of this Section, I begin with the traditional arguments for and against joint filing in a welfarist framework. I then show how the de-institutionalization of marriage explodes the old trade-offs and requires new policy directions.

### *1. The Traditional Debate over Joint Filing*

Begin with the problem of targeting welfarist redistribution. In principle, the tax system should redistribute based on the marginal utility of money. The ideal would be to take money from individuals whose marginal utility is low and redirect it to those whose marginal utility is high. But because marginal utility is unobservable, real-world programs adopt proxies for marginal utility. The convention is that taxes should target the rich and transfers should target the poor, with "poverty" understood to mean a lack of command over money (and other tangible resources that contribute to material well-being). (This discussion elides many interesting and important controversies, of course, about the proper way to target redistribution in a welfarist system, but my aim for the moment is just to convey the standard view.)

Family ties affect wealth and poverty in at least three ways. First, if an individual shares resources with another, she may be better or

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<sup>191</sup> See J.A. Mirrlees, *An Exploration in the Theory of Optimal Income Taxation*, 38 *Rev. Econ. Stud.* 175 (1971); Thomas Piketty & Emmanuel Saez, *Optimal Labor Income Taxation*, in 5 *Handbook of Public Economics* (Alan Auerbach, Raj Chetty, Martin Feldstein & Emmanuel Saez eds., 2013).

worse off than she first appears. If *Rich* shares with *Poor*, then *Rich* is somewhat less rich than her money income alone makes her seem, because she is not consuming all her income herself. But *Poor* is not as poor as he seems, because he has access to *Rich*'s resources as well. Family ties may, thus, increase or decrease one's resources and, thereby, alter one's marginal utility of money.

Family adjustments along these lines are common in poverty research and in anti-poverty programs. In 2011, for instance, a two-parent family with \$30,000 in income was not considered poor with two children but was considered poor with four.<sup>192</sup>

Second, families produce economies of scale that improve individuals' resource position. Dollars stretch further when the living room, fridge, and cars (for example) are shared. *Linda*, who lives alone on \$50,000, has fewer resources than *Frank*, who shares an apartment with family (or friends) and earns the same cash income. A redistributive system should therefore adjust *Linda*'s income downward or *Frank*'s upward in order to make judgments about their marginal utility of money. Poverty research and welfare programs typically adjust for economies of scale. In 2011, for example, the poverty threshold for a four-person family is less than twice the threshold for the two-person family.<sup>193</sup>

Third, home production and the exchange of nonmarket services for consumption goods can also produce extra welfare. A family with a homemaker and a large garden is likely better off, in terms of total material resources, than a family with similar cash income that lacks those productive resources.

Joint filing has been justified on all three grounds: resource sharing, economies of scale, and home production. As Part II recounts, the joint return originated as income-splitting, or the equal division of marital income between the spouses. Today, the joint return has more complicated effects, raising or lowering the tax burden on couples depending on the pattern of their earnings and their position in the rate structure. The arbitrariness of marriage bonuses and penalties makes it difficult to justify joint filing under current rates as responding in any systematic way to the sharing of income in the couple.

Still, joint filing does, however imperfectly, capture the insight that redistribution requires the aggregation of family income in order to reflect an individual's true command over resources. While the tax burden now assigned to the married compared to the unmarried may be arbitrary, the argument runs, joint filing still permits more accurate

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<sup>192</sup> See U.S. Census Bureau, Poverty Thresholds (2011), <http://www.census.gov/hhes/www/poverty/data/threshld/>.

<sup>193</sup> *Id.*

targeting of redistribution. The *Rich-Rich* couple surely is better off than the *Rich-Poor* couple. And judging *Poor's* status without regard to his marriage to *Rich* would badly mistarget tax liability and welfare payments.

A similar logic links joint filing to economies of scale and home production. Marriage is traditionally an institution for shared living, dining, and transportation, and marriage often involves significant home production. Joint filing may not be perfectly accurate, the argument runs, but it is superior to a system that ignores family ties altogether.

Family relationships also potentially affect the welfare cost of redistribution, because family relationships can alter behavioral responses to taxation. For instance, family roles and opportunities for home production can alter the effective wage schedule that individuals face for different activities. For instance, in the married couple, the social role of the husband as breadwinner and the wife as homemaker and caretaker lead the couple to see the wife as the “secondary” worker—the worker who will quit her job if the net payoff to the family is lacking.

Herein, of course, lies the conventional critique of joint filing. To the extent wives are perceived as secondary workers, the couple evaluates the payoff to wives’ (but not husbands’) work at the couple’s marginal tax rate.<sup>194</sup> When the husband earns more than a small amount, the marginal tax rate is higher for the wife than if she were unmarried. The high marginal tax rate, in turn, discourages the wife from working. The “elasticity” or responsiveness of wives’ work to taxes is high, probably because the working wife must continue her home duties and may experience role conflict (because paid work is not valorized so highly for wives as for husbands).<sup>195</sup>

Joint filing, then, tends to discourage wives’ work, strengthening the grip of traditional gender roles against the social forces that have liberated women’s choices. Scholars including Grace Ganz Blumberg, Pamela Gann, Marjorie Kornhauser, Lawrence Zelenak, Edward McCaffery and others have pointed out the socially retrograde impact of the joint return.<sup>196</sup>

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<sup>194</sup> See Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 *Colum. L. Rev.* 2001, 2008-14 (1996).

<sup>195</sup> See, e.g., Nada Eissa & Hilary Williamson Hoynes, *Taxes and the Labor Market Participation of Married Couples: The Earned Income Tax Credit*, 88 *J. Pub. Econ.* 1931, 1951 (2004) (documenting the response of married men’s and women’s labor supply to expansion of the EITC).

<sup>196</sup> See Blumberg, note 23; Gann, note 23; Kornhauser, note 22; Edward McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 *Yale L.J.* 595 (1993); Zelenak, note 17.

## 2. *Welfarism and the New Individualism*

But once we recognize how thoroughly the de-institutionalization of marriage has altered American family life, the good-enough arguments for joint filing become weak. The key point is that welfarist treatment of the family is functionalist: The “family” is the social unit that engages in the functions of family life, which might include altruism, role specialization, and nonmarket exchange. The new individualism has distributed these functions well beyond the traditional married couple.

Louis Kaplow, notably, does not make the mistake of equating family and formal marriage. Kaplow’s analysis of the taxation of the family is exceptionally clear, and it illustrates well the disconnect between joint filing and welfarist income taxation.<sup>197</sup> Kaplow points out that families might affect marginal utility or perceived prices in several ways. Altruism, for example, can alter the allocation of income and consumption goods within the family. Assuming that the altruism is genuine and well-informed, the result will be that families are rather good vehicles for increasing aggregate utility. For that reason, society might subsidize individuals living in families (or, equivalently) tax them less than individuals living on their own. Family altruism represents a form of “redistribution” that need not be expressly mandated by the state. As a bonus, altruism serves family preferences and so makes everyone feel better off: Parents love seeing their children prosper, and so on. For this reason, altruism may multiply utility.

Still, as Kaplow points out, there is a catch. Altruistic redistribution within the family can alter the marginal-utility position of the family members.<sup>198</sup> Consider *Althea* and *Brenda*, who both have zero earnings. Without further information, both would seem to be likely beneficiaries of progressive redistribution, since their marginal utility of money is likely very high. But if *Althea* lives with her parents, while *Brenda* has no relatives, *Althea* merits less state support. Altruistic transfers from her parents have moved her farther along the declining-marginal-utility-of-money curve than her earnings alone would indicate.

This kind of trade-off, Kaplow notes, makes it complicated to know whether, in the end, families of size  $n$  should pay  $n$  times the tax they would pay as individuals, or more or less than that. Kaplow shows that the optimal result depends on the shape of the social welfare function and other factors.<sup>199</sup>

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<sup>197</sup> Kaplow, note 189, at 315-43.

<sup>198</sup> *Id.* at 326.

<sup>199</sup> *Id.* at 357-406.

In addition to altruism, other features of family life may, in principle, affect the income tax burden on family members compared to unrelated individuals. Economies of scale can make the family a relatively efficient generator of utility: Family dollars stretch further when the living room, fridge, and cars are shared. But, once again, there is a countervailing effect because economies of scale alter the marginal utility of money for family members. They may have a lower marginal utility of money (because their consumption is higher) than comparable unrelated individuals, and so society should tax the family more.

Kaplow's analysis also avoids the shorthand principles that have traditionally been used to guide the taxation of the family. "Income pooling," for example, is an imprecise concept, because it might denote altruism, exchange, or economies of scale. Kaplow also does not endorse "equivalence scales,"<sup>200</sup> which welfare programs and poverty measures use to equilibrate the consumption possibilities of families of different sizes.<sup>201</sup> Instead, Kaplow shows, a full analysis should identify with some care the effects of family life on allocation, production, and exchange and should (ideally) measure their impact on the redistributive upside and deadweight-loss downside of income taxation.<sup>202</sup>

Kaplow concludes that there is no obvious direction for tax policy a priori: Whether society should tax families more heavily or more lightly than comparable individuals depends on the content of family life (for example, the degree of altruism, the nature of intrafamily exchanges, and individual preferences) and the shape of the social welfare function.<sup>203</sup>

I have spent some time summarizing Kaplow's work because it illustrates that the utilitarian concept of the "family" is functional and variable. The family is defined by its behaviors and attitudes, not its formal label, and which groups count as "families" depends on the dynamic being examined. If the utilitarian analyst is interested in altruism, she should look for social units that engage in altruism. In the age of the new individualism, this notion of family will include some married couples (but not all) but certainly would also include some cohabiting couples, and many parents and adult children. If the analyst wishes to identify economies of scale, she similarly should look at

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<sup>200</sup> See Kaplow, note 189, at 370-87.

<sup>201</sup> James C. Ohls & Harold Beebout, *The Food Stamp Program* 21-22 (1993) (defining the unit as those who pool resources and make joint spending decisions); Patricia Ruggles, *Drawing the Line: Alternative Poverty Measures and Their Implication for Public Policy* 63-87 (1990).

<sup>202</sup> Kaplow, note 189, at 370-87.

<sup>203</sup> See *id.*



the day-to-day realities of shared living quarters and will count roommates and anyone else to the extent they share living quarters and durable goods, including cohabiting and married couples, single parents and their children, and so on. Home production has declined in the last generation within marriage and now takes place both inside and outside marriage to varying degrees.

The demise of mid-twentieth-century marriage is inconvenient for welfarism, because it increases the empirical demands of a welfarist analysis. No longer does formal marriage represent a neat package containing altruism, home production, economies of scale, and nonmarket exchange. Now that family life has migrated outside marriage, and marriage has grown heterogeneous, the utilitarian should abandon categories linked to formal marriage and should focus on behavior.

One interesting implication of a welfarist theory is that society may properly offer tax subsidies to or impose tax penalties on families. But that insight cannot resurrect the welfarist rationale for joint filing based on formal marriage. Joint filing is, after all, one (and only one) vehicle for imposing tax subsidies or penalties, and from a welfarist point of view, it will likely distribute taxes and penalties according to the wrong criteria. Subsidies or penalties for altruism, economies of scale, or home production, for example, might map poorly onto the distributional and behavioral patterns of joint filing based on formal marriage.

A serious welfarist effort to translate theory into tax policy would have to tackle the practical difficulties of identifying a range of “family” units. The altruistic family, for example, may today be more lineal than horizontal, as single parents care for minor children and turn to their own parents for support. Shared consumption groups include cohabitants and many married couples but also many platonic roommates. Role specialization and the prospect of long-term exchange now characterize only a fraction of marriages (and a smaller segment of cohabitants) and would best be detected by behavior and relative earnings, not marital status.

To be sure, the matter of policy design is, for the welfarist, ultimately an empirical one. We cannot absolutely rule out joint filing but only note its implausibility in a probabilistic sense. Just as a rhesus monkey tapping at a computer could in theory produce a great American novel, so too might joint filing based on formal marriage maximize social welfare compared to subsidies and penalties targeted to the family life of twenty-first-century individuals. But a welfarist analysis offers no reason to suppose, *a priori*, that joint filing is optimal. It would be pure coincidence if the right degree of taxation of

altruism or economies of scale or home production were captured by penalties and bonuses imposed on formally-married people according to the accidents of the rate structure and the pattern of earnings within the couple.

### 3. *The Challenge of Household Aggregation*

Still, it is worth trying one final lens to capture the welfarist perspective. Kaplow's comprehensive approach, while principled and clear, roils the policy waters by supporting a range of highly contingent predictions, based on empirical matters unlikely to be measurable. But even if we set aside a complex analysis to return to simpler constructs like "pooling," joint filing based on formal marriage no longer plausibly serves welfarist ends.

Pooling received considerable attention in the 1980's and 1990's from legal scholars debating joint filing. For instance, Zelenak distinguished between pooling as shared control and pooling as shared consumption; he noted that the income tax typically taxes the party who has control over income rather than all parties who benefit from it.<sup>204</sup> But, however we choose to interpret "pooling," it is vulnerable to my repeated point: In the mid-twentieth century, all these features of family life were once closely associated with formal marriage, but today the elision of "marriage" and "family" is no longer tenable.

Shared consumption occurs in a wide variety of relationships, including cohabitants, ordinary roommates, and children (minor or adult) living with their parents. Some married couples (long-distance couples, commuting couples, and estranged couples) share very little. Even in day-to-day life, married couples may not share resources as extensively as they once did. As early as 1980, Gann pointed out that data do "not generally substantiate the assumption that married persons equally share their income."<sup>205</sup> In 1996, Marjorie Kornhauser reviewed the evidence and conducted an independent study, finding that the extent of consumption pooling in marital households is often overstated.<sup>206</sup> These scholars caught an early glimpse of the new individu-

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<sup>204</sup> Zelenak, note 17, at 354-55. Gann's 1980 article also discusses pooling and distinguishes between the source of income (the earner) and the beneficiaries of it. Gann, note 23, at 24-25; see also Michael J. McIntyre, *Individual Filing in the Personal Income Tax: Prolegomena to Future Discussion*, 58 N.C. L. Rev. 469, 469 (1979-1980) (defending joint filing on the ground that "[m]any married persons, probably most, pool some or all of their individual income sources with their spouses").

<sup>205</sup> Gann, note 23, at 25-26.

<sup>206</sup> See Kornhauser, note 23, at 1449-50.

alism, and new evidence confirms that the trends toward separate earnings, spending, and accounting have continued.<sup>207</sup>

Similarly, role specialization, nonmarket exchange, and insurance also exist outside marriage—and, decreasingly, within it. Cohabiting couples often report planning for a joint future. Even though many couples break up before that future materializes, the same is true of many marriages.<sup>208</sup> Many cohabiting couples, and many parents care for (minor and adult) children when illness or unemployment strike. By contrast, marriages are increasingly heterogeneous in the degree of joint planning and insurance they provide. As the divorce rate indicates, many couples do not weather emotional or economic hardship. And, as the sociological research shows, individuals find it increasingly acceptable to break up when relationships and lives do not meet expectations.

Notions of pooling had intuitive resonance in the era of mid-twentieth-century marriage, when marriage implied a shared social, economic, and psychological status. But in the twenty-first century, we can no longer assert with much confidence that the married differ from the unmarried in their degree of “pooling” or that the married resemble one another in that dimension.

The larger point, then, is that a welfarist income tax can no longer rely on formal marriage as an indicator of shared resources, economies of scale, or household production. Instead, a welfarist income tax should take notice of the social units to which individuals belong and the terms of those units.

Phrased that way, the task seems daunting if not impossible. How on earth could the income tax take note of the variety of human relationships, from cohabiting-as-dating to covenant marriage to friends with and without benefits? The answer, of course, is that—as we always do in law—we must adopt some simplified understanding of the household.

Household aggregation is, in fact, already used in transfer programs and in some forms of college financial aid. The federal SNAP (food stamps) program, for example, defines a household to include “a group of individuals who live together and customarily purchase food and prepare meals together for home consumption,” regardless of re-

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<sup>207</sup> Charlotte K. Goldberg, *The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriages*, 13 *Wm. & Mary J. Women & L.* 483, 532 (2007).

<sup>208</sup> See Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, 20 *Future of Children* 17 (2010), available at <http://www.futureofchildren.org/publications/journals/article/index.xml?journalid=73&articleid=529> (documenting “high hopes” among unmarried couples at the birth of a child but also the dissolution of cohabiting relationships among this economically disadvantaged urban sample).

lationships.<sup>209</sup> Yale Law School's COAP program requires repayment based on "household" income, with no distinction drawn between "spouses" and "partners."<sup>210</sup>

Still, formal marriage remains significant in some transfer and financial aid provisions. The SNAP statute does recognize formally-married couples in some regards, treating them as a household even if they do not meet the joint-food-preparation standard.<sup>211</sup> Federal student loans look to the formal marital status of students and their parents when determining how to aggregate "family" income.<sup>212</sup>

The practical tasks involved in monitoring the household, once defined, range from relatively easy to devilishly hard. Conceptually, there are two problems of administration. The first is verifying the existence of household members. Before 1986, the IRS did not require Taxpayer Identification Numbers for dependents, and taxpayers fabricated several million children, who "disappeared" from the system when TINs were required.<sup>213</sup> Requiring TINs for all household members claimed on a return represents a relatively easy extension of that approach.

The second task, monitoring household composition, is quite difficult, at least at present, because the IRS has very little information about living arrangements.<sup>214</sup> (Indeed, the IRS today does not routinely verify even marital status, which is tracked only in local vital statistics offices.) The IRS, of course, could gather more information. Self-reporting could provide an initial screen. Taxpayers could be asked whether they share their living quarters with other adults or children, for instance. But auditing such claims would be difficult.

The administrative dynamics of the system would depend critically on whether additional household members would increase or decrease tax liability. If extra household members reduced tax liability (via income-splitting), then taxpayers would be likely to exaggerate the extent of cohabitation. The IRS could require documentary evidence (signed leases or joint deeds, for instance), and it might require information reporting by landlords and land registries.

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<sup>209</sup> 7. U.S.C. § 2012(n)(1)(B).

<sup>210</sup> See Yale Law School, Career Options Assistance Program, (Apr. 28, 2013, 8:04 PM) [http://www.law.yale.edu/documents/pdf/Financial\\_Aid/COAP\\_incoming\\_description.pdf](http://www.law.yale.edu/documents/pdf/Financial_Aid/COAP_incoming_description.pdf).

<sup>211</sup> 7 U.S.C. § 2012(n).

<sup>212</sup> See U.S. Education Dep't, Filling Out the FAFSA (Apr. 28, 2013, 7:54PM), <http://studentaid.ed.gov/fafsa/filling-out/dependency>.

<sup>213</sup> L.A. Times, The IRS' Case of Missing Children, Dec. 11 1989, available at [articles.latimes.com/1989-12-11/local/me\\_33\\_1\\_exemptions](http://articles.latimes.com/1989-12-11/local/me_33_1_exemptions).

<sup>214</sup> For a review of the evidentiary requirements for documenting "family" in a different sense in the Code, see Anthony C. Infanti, Inequitable Administration: Documenting Family for Tax Purposes, 22 Colum. J. Gender & L. 329, 334 (2011).

If additional household members increased tax liability (because the system imposed a “household penalty”) then the dynamics would shift: People would claim to live apart when in fact they lived together. Documentary evidence and landlord/land registry reporting might assist the IRS, but not all co-habitants appear on the lease or title. Very wealthy households might maintain cheap apartments as tax-reduction devices—so that a high-earner could plausibly claim to live separately.

A more comprehensive, if creepier, solution, already exists in the marketplace. Consumer companies collect a wealth of data on purchasing habits, financial status, and internet use.<sup>215</sup> These data might be shared with the IRS, with the result that the Service could monitor household composition.

The Big Brother aspect of household monitoring may rouse our liberal instincts: It’s none of the government’s business who lives in my house! But the status of privacy objections in welfarist systems is uncertain. Perhaps privacy is simply one value to be traded off against accuracy in a total-welfare calculus. A variety of compromises are possible: For instance, perhaps only marriages and cohabiting relationships that last more than two years would be subject to reporting. Perhaps the same time limit might apply before an adult child living with her parents is aggregated. And so on.

Household monitoring is already underway in the Code, where the EITC and child credit require the IRS to verify children’s residency. The administration of these provisions tends to burden lower-income people, and these provisions have engendered litigation. If the IRS were to adopt rules and procedures for verifying household composition, the new regime might bring some order and predictability to existing provisions. Information reporting might also be useful for welfare programs, SNAP, and financial aid, creating a wider constituency for predictable rules—and a political constituency for dignified administration with privacy safeguards.

(Personally, of course, I find all this outlandish; my own preference would be for individual filing on liberal grounds. But welfarism may imply some sacrifice of personal privacy for the sake of accurate assessment of well-being, and so I aim to take the ideal seriously.)

As a final point, we should bear in mind the reformulated trilemma: One major and unavoidable drawback of household income aggregation is that it would extend to a broader array of couples the gender biases critics have identified in joint filing for married couples. It is unclear how significant these biases would be for behavior, but the

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<sup>215</sup> Natasha Singer, *Consumer Data, But Not for Consumers*, N.Y. Times, July 21, 2012, at BU3.

trilemma suggests that welfarists should consider possible effects on the employment of cohabiting women and adult children living at home with parents.

#### *D. Social Conservatism and Incentives for Marriage*

Social conservatives have taken notice of the new individualism, and they dislike it. Charles Murray, for instance, notes that many aspects of family life now take place outside formal marriage, and he equates the change with social breakdown—"coming apart."<sup>216</sup> Analysts far less conservative than Murray also worry about the decline in marriage. Many centrist economists, for example, have expressed the concern that single parenthood worsens family and child poverty.<sup>217</sup>

Taking this perspective, the tax system becomes an instrument for resisting and reversing social change: What might the tax system do to bolster marriage as an institution, encourage child-bearing and child-rearing within marriage, and discourage divorce? Social conservatives might differ on the proper agenda, and there are a number of contentious questions that should be answered. For instance, studies indicate that parental marriage improves outcomes for children, but only when the child is the biological child of both parents. Children's outcomes in step-families are no better than those in single-parent households.<sup>218</sup> Should this evidence modify the pro-marriage agenda? Should the message be to marry, no matter what, or to marry only if your spouse is also the parent of your children?

But, for present purposes, abstract from these questions and suppose that the agenda is simply to encourage Americans, as much as possible, to re-create marriage as the institution it once was, with early marriage, lasting marriage, early child-bearing, and possibly even traditional gender roles. (This agenda is very much not my own, but it is interesting to think about, in any event, and certainly is widely professed in Washington.) What kind of tax policy would make the most sense?

Begin with the easy conclusion: Joint filing is an exceptionally poor tool for encouraging people to marry and stay married. After all, joint filing does not necessarily favor marriage. Its penalties and bonuses are a complex function of rate brackets and the division of income in

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<sup>216</sup> Murray, note 15, at 240-42.

<sup>217</sup> See Isabel V. Sawhill & Ron Haskins, *Work and Marriage: The Way to End Poverty and Welfare* (Brookings Inst., Policy Brief No. 28, 2003), available at <http://www.brookings.edu/research/papers/2003/09/childrenfamilies-haskins>.

<sup>218</sup> Donna K. Ginther & Robert A. Pollack, *Family Structure and Children's Educational Outcomes: Blended Families, Stylized Facts, and Descriptive Regressions*, 41 *Demography* 671, 671-72 (2004).

the couple. Some couples face marriage penalties, including couples in the EITC income range who, at different times, have faced enormous marriage penalties.<sup>219</sup> Even a couple with excruciatingly traditional gender roles could face a marriage penalty if the wife has substantial property income. And the marriage bonus is equally arbitrary. A nontraditional couple can obtain a marriage bonus if their incomes are disparate and fall in the proper range. Imagine a couple in their forties, each marrying for the third time, and both working full time (one as a freelance writer and one as a lawyer).

A better policy agenda, from the social conservative perspective, would track more closely the desired behavior. If, for instance, the aim is to encourage early marriage, the tax system might offer a refundable credit keyed to the parties' ages (no credit for those over-thirty yuppie marriages!). If the agenda is to subsidize stay-at-home mothers, the tax credit might go to married couples with children and one nonworking parent who attests that she cares for the children on a daily basis. Tax penalties could target divorce: Perhaps alimony should be made nondeductible or property settlements should attract an excise tax.

All of these policies, of course, would take notice of formal marriage in some way, but they would not make use of joint filing. These ideas raise administrative issues, to be sure. The IRS might wish to verify formal marriage, the parties' ages, division of labor, and so on. But, my point made, I will leave it to others to tackle the task of filling out a social conservative tax agenda for supporting the family. Instead, I want to look beyond joint filing and consider some further implications of the new individualism for the income tax and the welfare state.

## V. UPDATING THE WELFARE STATE: TAXING MARRIAGE AND THE CASE OF SOCIAL SECURITY

Having laid joint filing to rest, intellectually at least, one can begin to glimpse the new policy possibilities opened up by the new individualism. In this Part, I consider two: an explicit tax on marriage (emphatically not a marriage penalty of the existing type) and possible reforms of Social Security intended to address the obsolescence of the spousal benefit and the rise of new gender inequalities in wages and care work. These options do not, by any means, exhaust potential and useful reforms in the welfare state, but they do illustrate new ways of thinking about family ties and social policy.

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<sup>219</sup> Brown, note 47, at 789.

### A. *Marriage, Endowment, and Privilege*

The new individualism suggests a marriage tax grounded in two very different ideals of taxation. The first is liberalism, which aims to tax unearned good luck and cushion unearned bad luck. Ronald Dworkin and Philippe Van Parijs, for instance, justify the income tax itself on just these grounds.<sup>220</sup> But there are other modes of luck that fall outside the financial realm. Being married, for example, might represent brute luck: Perhaps the ability to attract a spouse reflects one's physical attractiveness, intelligence, and personality traits like loyalty and sensitivity. In that case, being married or unmarried might properly increase or decrease one's tax payment to the state.

Indeed, Van Parijs explicitly considers a tax on marriage by analogy to an income tax.<sup>221</sup> He argues that an income tax properly taxes the rents, or excess returns, to jobs and to property holdings. He suggests that, in principle, marriages might be subject to taxation on similar grounds. The married have an opportunity or asset (a spouse) that others might wish to have.<sup>222</sup> Van Parijs ultimately rejects a marriage tax as impractical and intrusive, but the analogy illustrates the liberal search for indicators of (unearned) social privilege that the state might tax.

But Van Parijs' analysis, written in the mid-1990's, predates (or coincides with) recent trends. In light of the close link between marriage and class today, the liberal case for taxing marriage is probably stronger. Lasting marriage is, today, a marker of class privilege, a resource available differentially to the rich.

This remains, of course, a controversial claim. The more we see marriage as a payoff to choice, the less appealing a liberal marriage tax should be. When we talk about how hard married couples have to work to preserve their relationship, we are attributing the marriage to choice, and the liberal case for taxing it seems weaker. But the more we see marriage as a marker of unearned social privilege, the stronger is the liberal case for taxing it. The close link between social class and lasting marriage seems to bolster this side of the argument.

Put another way, the ambiguity of causation<sup>223</sup> poses problems for the liberal. If it is simply the case that the same people who choose to work hard and to achieve market success are also those most willing to work hard to hold marriages together, then a marriage tax would unfairly tax desert. But if money and privilege can indeed buy love, or

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<sup>220</sup> See Dworkin, note 169, at 128; Van Parijs, note 21, at 104.

<sup>221</sup> See Van Parijs, note 21, at 130.

<sup>222</sup> See *id.*

<sup>223</sup> See Section III.C.



at least modes of life that permit love to flourish, then marriage-as-privilege seems sensible.

A welfarist should also find a marriage tax worth further thought. Recall that the ideal tax, from a welfarist perspective, would accomplish progressive redistribution without any distortion at all. An endowment tax—sometimes called an ability tax—tantalizingly holds out just that possibility.

An endowment tax would impose a fixed tax on each individual based on her capacity to earn income—her abilities—and not her actual income.<sup>224</sup> For the welfarist, the difficulties with endowment taxation are mostly practical, and they are thought to be insurmountable. We cannot observe people's abilities, and once we start to use particular activities as an indicator of ability (college education, actual high income), then the tax system distorts the prices of those activities. Thus, the first-best endowment tax collapses into the second-best income tax, which probably has distortionary effects on labor and leisure.

The link between class and marriage suggests that the state might improve the targeting of taxation to ability by tagging marriage—especially long-lasting marriage—as a trigger for higher taxation independent of actual income. Thus, *Chris*, married for twenty years with two children with her husband, would pay a higher (fixed) tax than the unmarried *Dana*, even if *Chris* and *Dana* have the same money income.

A tax on marriage is not, of course, a perfect endowment tax. Most obviously, it conditions higher taxes on behavior—marriage—and so could reduce welfare by distorting marriage decisions. Instead, the marriage tax is a variant on what George Akerlof terms “tagging”—the strategy of directing taxes or welfare payments at some characteristic that correlates with what the system really wishes to tax (or support).<sup>225</sup>

The key question, on the welfarist view, is empirical. An income tax that raises and redistributes  $\$X$  would reduce social welfare by distorting labor and leisure decisions in some amount (call it  $L$ ). A tax on enduring marriages that would redistribute the same amount would reduce social welfare by  $M$ , the distortion in marital decisions. Logically, the welfarist should choose the mix of income and marriage taxes that produces the highest total utility.

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<sup>224</sup> See Ilan Benshalom & Kendre Stead, Values and (Market) Valuations: A Critique of the Endowment Tax Consensus, 104 Nw. U.L. Rev. 1511, 1514-15 (2010).

<sup>225</sup> George A. Akerlof, The Economics of “Tagging” as Applied to the Optimal Income Tax, Welfare Programs, and Manpower Planning, 68 Am. Econ. Rev. 8, 8 (1978).

How costly are distortions in marital behavior? Some older studies suggest that marriage penalties in the income tax have a small but noticeable effect on the probability of marriage.<sup>226</sup> The rise of the new individualism might suggest that marriage has become more elastic—more optional in a social sense. Even so, marriage seems to retain value as a marker of social status, particularly for the well-off.<sup>227</sup>

Turning a marriage tax from concept into reality would be challenging, of course. How long is a “long” marriage? Should the tax kick in only after a certain number of years, or should it be graduated? Are there other tags that could better tailor the tax to ability or social privilege? A marriage tax also would have to confront the realities of twenty-first-century family life. Why not tax successful cohabitation? How about a tax on high-performing children—or children who are self-supporting by age 25? And it is difficult, to put it mildly, to imagine U.S. politicians signing on to tax marriage.

There are also countervailing normative considerations. As I noted,<sup>228</sup> social science has been unable to determine whether marriage reflects economic privilege—or causes it. If the latter, then taxing marriage would amount to a tax on opportunity, making it more costly for individuals to gain access to an institution that can help them climb the social and economic ladder.

In light of these empirical and administrative barriers, my purpose in proposing a marriage tax is intellectual rather than practical. Indeed, I hope that the controversial idea of taxing marriage will prompt broader attention to the ways that the new individualism has changed our society. The values of equality and well-being that animate liberalism and welfarism should move us to examine current social arrangements and ask whether they fairly distribute opportunities for family life.

### *B. Gender Inequality and Social Security*

There is a fine literature on gender and Social Security, but much of it predates the recent acceleration of the new individualism, and much of it treats the situation of married (or formerly-married) women as the critical social problem that ought to animate U.S. social insurance.

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<sup>226</sup> See James Alm & Leslie Whittington, *For Love or Money? The Impact of Income Taxes on Marriage*, 66 *Economica* 297, 299 (1999); James Alm & Leslie Whittington, ‘Til Death or Taxes Do Us Part, 32 *J. Hum. Res.* 388 (1997) (finding small effects of tax incentives on divorce decisions).

<sup>227</sup> See Vicki Schultz & Michael Yarbrough, *Will Marriage Make Gay and Lesbian Couples Less Egalitarian? A Cautionary Tale* (unpublished manuscript on file with the author) (reviewing sociological evidence on the value of marriage and developing a social status model of marriage and gender).

<sup>228</sup> See Section III.C.

In this brief discussion, I reconsider the spousal benefit in order to illustrate how we might begin to think about gender equality and Social Security in light of the new individualism.

As noted, the spousal benefit in Social Security reflects the terms of mid-twentieth-century marriage. The system awards benefits based on formal marriage, and it takes as its model the breadwinner-housewife division of labor. Recall that the breadwinner receives a benefit based on his (long) work history, while the homemaker receives a benefit (half as large) based on marriage. Together, the traditional couple receives a retirement benefit equal to 150% of the benefit the breadwinner would collect were he single.

The current structure offers substantial benefits to women, who represent 55% of adult OASDI recipients, and who receive 49% of benefits but pay only 41% of taxes.<sup>229</sup> Because women earn (on average) less than men, they benefit from the progressive benefits formula, which awards higher benefits relative to wages to lower earners. Women's longer lives also garner greater benefits, because Social Security incorporates a life annuity.<sup>230</sup> And the spousal benefit provides a floor on benefits for married women (or women divorced after ten years of marriage or more), while also "topping up" benefits for wives earning significantly less than their husbands.<sup>231</sup>

But the spousal benefit has a darker side. As critics began to point out in the 1970's and 1980's, the spousal benefit combines with the payroll tax to disadvantage working wives, who pay full payroll taxes but, given their low wages, often receive zero payoff over the spousal benefit.<sup>232</sup>

As traditionally understood, then, Social Security faces a policy dilemma: The program can only protect economically-vulnerable wives if it sacrifices gender equity for working wives. Repealing the spousal benefit would remove the penalty on working wives, who would then claim the full benefit of their incremental payroll taxes. But doing so would leave many wives worse off, in terms of the total benefit received. Worst off would be homemakers and homemaker-breadwinner couples.

But this policy dilemma, much like the trilemma in the income tax, is outdated. Traditional wives are increasingly rare, and working wives are the new norm. Figure 12 shows the clear trends.

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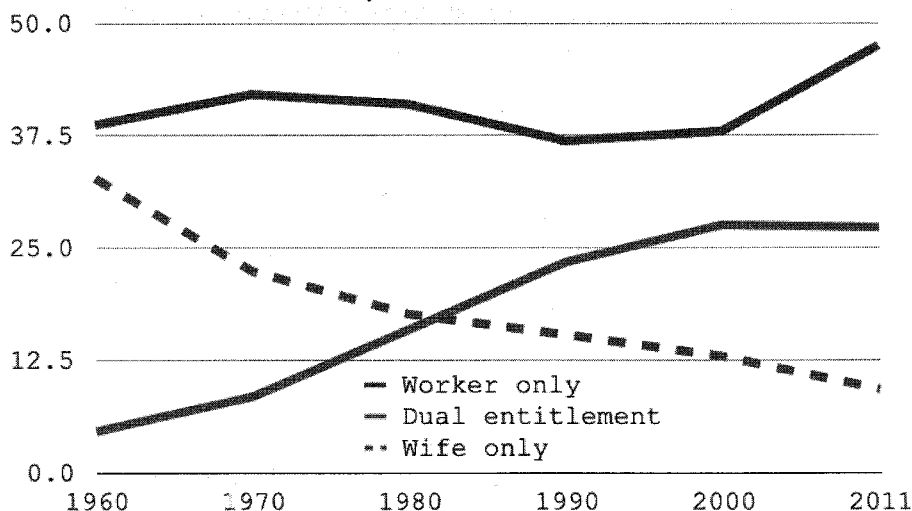
<sup>229</sup> Nat'l Acad. of Soc. Ins., *Women's Stake in Social Security* (Apr. 28, 2013, 6:34 PM), <http://www.nasi.org/learn/socialsecurity/womens-stake>.

<sup>230</sup> U.S. Soc. Sec. Admin., note 57.

<sup>231</sup> See *id.*

<sup>232</sup> See David L. Kirp, Mark G. Yudoff & Marlene S. Frank, 76 *Calif. L. Rev.* 1377, 1382 (1986).

FIGURE 12<sup>233</sup>  
 Percentage of Women, Aged 62 and Over, Claiming Social  
 Security Benefits, 1960-2011



The percentage of women claiming benefits solely as workers (that is, with no marital claim) is now nearly 50%.<sup>234</sup> The percentage of elderly women claiming Social Security only as wives has plummeted since 1960, from about a third to less than 10%.<sup>235</sup> As of 2011, only three million of thirty-six million retirees claim Social Security as wives and husbands rather than as retired workers.<sup>236</sup>

Projections indicate that these trends will continue. By 2080, only a small fraction of female Social Security recipients will claim solely as wives. The great majority will claim as workers only, while a significant (but, over the 2025-2080 period, declining) percentage will claim as dually-entitled (that is, on the basis on their own earnings record, “topped up” for the spousal benefit).<sup>237</sup>

The demise of mid-twentieth-century marriage has left Social Security ill-suited to address the needs of the vulnerable. Care work remains gendered, and it remains a source of economic disadvantage, but single mothers, more than wives, are the new face of distress. The spousal benefit is available to women married ten years or more, but many marriages do not last that long. Further, the never-married re-

<sup>233</sup> U.S. Soc. Sec. Admin., note 54, at tbl.5A.14.

<sup>234</sup> See Nat'l Acad. of Soc. Ins., note 229.

<sup>235</sup> See *id.*

<sup>236</sup> U.S. Soc. Sec. Admin., note 54, tbl.5C1 (data for 2011).

<sup>237</sup> U.S. Soc. Sec. Admin., Women and Dual Entitlement, 2025-2080 (Apr. 28, 2013), <http://www.socialsecurity.gov/retirementpolicy/projections/women-dual-2025.html>; see Figure 1, at text accompanying note 69.

present a vulnerable—and growing—group. Single mothers occupy an expanding demographic and are especially hard-pressed by the combination of work (often at low wages) and care responsibilities.

The new individualism has altered the shape of gender inequality and economic vulnerability. In the mid-twentieth century, almost all women were wives and almost all men were husbands, and both groups mostly occupied prescribed roles. In that world, gender inequality burdened wives and benefitted husbands, and abandoned wives and widows were the object of great (and deserved) social concern. Today, by contrast, the new individualism situates gender inequality elsewhere. Women continue to earn lower wages than men, due in part to discriminatory employment structures. Mothers earn lower wages than childless women, due to the structure of child care. Single mothers often live in poverty, due to low wages, child care responsibilities, and the absence of financial and hands-on support from absent fathers.

In this new world, the spousal benefit has more than a whiff of “*Mad Men*” about it: It is a set piece from another time. So, too, do familiar reforms seem outdated. For instance, some have proposed repealing the spousal benefit in order to increase the survivor’s benefit, which would primarily assist widows.<sup>238</sup> That kind of reform might be appropriate as a transitional matter, because many of today’s elderly women came of age during the era of mid-twentieth-century marriage. But, looking forward, that agenda still focuses on formal marriage as a source of economic security and, thus, will become increasingly out of touch with social reality.

Another familiar reform, discussed seriously in the 1980’s and 1990’s, would create Social Security entitlements based on child-rearing responsibilities. Options might include additional drop-out years (which increase a worker’s benefit) or wage “credit” for child-rearing.<sup>239</sup> These proposals might aid middle-class women who have stayed at home with children. But, today, the stay-at-home mother is no longer the only, or even the major, caretaker who is economically vulnerable. Far more numerous are women who work full-time, or close to full-time, but at low wages, with little child support and high child-care costs. Unless credits for child care benefit those who are

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<sup>238</sup> See Urban Inst., Spouse and Survivor Benefits, [www.urban.org/retirement\\_policy/ss\\_spousesurvivor.cfm](http://www.urban.org/retirement_policy/ss_spousesurvivor.cfm) (last visited Aug. 6, 2013).

<sup>239</sup> See Pamela Herd, Crediting Care in Social Security: A Proposal for an Income Tested Care Supplement (Jan. 2009), at [www.nasi.org/research/2009/crediting-care-social-security-proposal-income-tested-care](http://www.nasi.org/research/2009/crediting-care-social-security-proposal-income-tested-care); Howard M. Iams & Steven H. Sandell, Changing Social Security Benefits to Reflect Child-Care Years: A Policy Proposal Whose Time Has Passed?, 57 Soc. Sec. Bull. 10 (1994).

also full-time workers, such proposals would not address the situation of many single mothers.

As we think about true innovation in Social Security, three issues (at least) should be pressing. First, the issue of generational transition should be in the forefront of our thinking. Today's elderly cohort includes many people who abided by and relied on the commitments of mid-twentieth-century marriage, and their work and social histories differ from those of later generations. Phase-outs and other transitional mechanisms will be essential if we are to tailor programs to changing social reality.

Second, the de-institutionalization of marriage invites a deeper rethinking of the mission of Social Security (and social insurance more generally). As formal marriage wanes in importance as a social category, we need new ways of thinking about the life course and the catastrophes against which the state should insure individuals. What are the major events that can leave an individual economically and socially vulnerable today? Divorce, low wages, a childhood in poverty, nonmarital births?

Third, there are policy opportunities as well as pitfalls here. Taking the new individualism seriously puts on the policy table some innovations that might have seemed outlandish even twenty years ago. Consider two examples. First, in 1999, Bruce Ackerman and I proposed to convert Social Security into a flat old-age benefit, which would pay the same benefit to each aged individual, regardless of his or her work and marital history.<sup>240</sup> In 2011, the U.S. government spent \$596 billion on OASI for 44 million retired workers, spouses, and children.<sup>241</sup> A back-of-the-envelope calculation (ignoring the likelihood that children should receive a smaller benefit reflecting economies of scale in family life) suggests that, without a tax increase, the system could pay a flat benefit of \$14,000 annually to every beneficiary. Including individuals now shut out of Social Security would reduce the benefit somewhat.<sup>242</sup> A more progressive benefits formula could increase insurance to low-paid workers without as thoroughly disrupting the relationship between wage record and benefit levels.

A second proposal worth considering is an optional joint-and-survivor annuity. At retirement, each insured worker might be entitled to claim either a solo benefit or a lower joint benefit, payable to any survivor of her choice. One's beneficiary might be a spouse, a roman-

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<sup>240</sup> Ackerman & Alstott, note 21, at 130-31.

<sup>241</sup> Office of Mgmt. & Budget, Historical Tables, tbl.11.3, <http://www.whitehouse.gov/omb/budget/Historicals> (last visited Aug. 6, 2013); Soc. Sec. Admin., note 55, tbls.5, A5.

<sup>242</sup> In 2010, there were just forty million Americans age sixty-five and older. Another seventeen million were ages sixty to sixty-four. Thus, much would depend on the treatment of early retirement. U.S. Census Bureau, note 28, at 11 tbl.7.

tic partner, a sibling, or an adult child. The key is that the survivor annuity would not be free: The retiree would receive an actuarially fair payout, so that (for instance), an elderly couple would receive a different monthly benefit than an elderly woman who wished to provide for an adult child. The details would require actuarial work but, in effect, would permit individuals to decide for themselves how to split their Social Security wealth between their own life and the life of a loved one.

## VI. CONCLUSION

Depending on one's normative perspective, the new individualism may mark a new era of personal freedom or a sign of cultural decay. But, whatever one's stance, the new individualism should be integrated into tax policy design. The new shape of American family life renders some existing policies obsolete and requires reforms that pose new challenges for law and administration.

Joint filing based on formal marriage is particularly ill-suited to the new patterns of marriage and child-rearing. In the mid-twentieth century, the prevalence, homogeneity, and exclusivity of formal marriage made it a convenient and perfectly sound proxy for family. Today, however, joint filing is not a plausible way of attempting to protect freedom or promote collective welfare.

Joint filing represents a poor policy choice even for social conservatives devoted to bolstering formal marriage. Politics—including the logjam that blocks redistributing tax burdens in any way—may explain why joint filing persists. But a serious social conservative should reject the arbitrary set of penalties and bonuses in the current system in favor of a more deliberate effort to identify and reward socially-productive behavior. Instead of rewarding some formally-married couples—or some married couples with traditional gender roles—why not reward them all? Tax incentives for formal marriage could be increased for, say, early marriage or lasting marriage.

Once we abandon the fiction that joint filing represents a sound (or even tenable) approach to taxing the family, new challenges and opportunities arise. In this Article, I have outlined four:

First, individual filing might fit best with liberal commitments but would require new policies to curb income-shifting via property transfers. These rules, in turn, could reduce tax avoidance in the family beyond the married couple.

Second, household filing might best accord with welfarist norms but would require new rules and technology for defining the household and monitoring entry and exits. But a tax system capable of aggregating income at the household level (even reasonably well) would mark

a major advance in the ability to administer the EITC and other tax-based transfer programs, to which Congress has traditionally attempted to apply expansive, welfare-type measures of economic well-being. Aggregating income at the household level—across the board or only for purposes of certain rules—would provide Congress with a new tool for social policy. But the costs include a loss of privacy and the extension of the work disincentives now found in joint filing to a whole new set of unmarried couples.

Third, both liberal and welfarist ideals might support the use of marriage as a “tag” for class privilege or ability (respectively) in order to redistribute income fairly and with less deadweight loss. While a marriage tax seems unlikely to be a political centerpiece for either party, policymakers could at a minimum remove tax advantages to marriage, which—in light of the new individualism—map rather closely onto tax advantages for the social elite.

Finally, the new individualism has implications for the welfare state well beyond the income tax. The demise of mid-twentieth-century marriage and the changing burden of gender inequality should prompt the repeal of the spousal benefit in Social Security and the redesign of the system to address the situation of single parents and the diversity of modern families.

We might—and should—go further in examining the implications of the new individualism for tax policy and the welfare state. References to marriage and family occur frequently throughout the Code, and a thorough review would revisit them to ask whether formal marriage represents a sound distinction in light of the purposes of the provision.<sup>243</sup> For example, divorced spouses (but not a separating cohabiting couple or co-parents who cooperate but live separately) can structure property settlement, alimony, and child support in tax advantageous ways. Attribution rules operate for married couples but not cohabiting couples, unmarried co-parents, step-parents, step-children or siblings. The diversity of family life may defy generalizations. In one family, a parent’s unmarried partner is a transient figure, while in another, he is closer to the children than their biological father. One adult child will include her step-grandmother but not her biological mother in her family circle, while another child from another family (or even the same family!) may have a very different experience of family.

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<sup>243</sup> See Theodore P. Seto, *The Assumption of Selfishness in the Internal Revenue Code: Reframing the Unintended Tax Advantages of Gay Marriage* 1-14 (Loyola Law Sch. Legal Studies, Paper No. 2005-33, 2005), available at <http://ssrn.com/abstract=850645> (documenting the many provisions of the Code that mention family life and considering whether related-party rules should apply to same-sex spouses).



Looking beyond marriage to child-rearing opens up a host of issues. Blended families and joint custody, for instance, pose fascinating issues. Today, the tax law permits only one exemption per dependent.<sup>244</sup> The logic is that each child requires only so much support from someone—an idea that is sound enough when children live with their own two parents in a single household. But now consider a child who lives half-time with each parent in a separate household: The diseconomies of scale (two bedrooms, two sets of clothes, uneaten food) make this child's support more costly for the family than the two-parent, one-home model recognizes.

Once we realize that the model of two married and co-resident parents is no longer standard, the issues for the tax system multiply. A number of adults may support a child, pay for her health care, contribute to the cost of college, and so on. While the difficulty of obtaining information on family configurations may seem daunting, we should not overstate the problem. It may be possible to centralize data from vital statistics offices, court records, and school records to document family structure. Household aggregation of income would assist in the task of documenting co-residence.

The policy stakes here are high. The federal income tax system administers major protectors for family life, including the EITC, the child credit, and tuition and health-care subsidies. And, depending on one's normative perspective, adjusting income in light of family ties is a critical task for any income tax, quite apart from these social policy measures. The new individualism, happily or unhappily, requires a wholesale revision of the nexus between the tax system and family life.

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<sup>244</sup> See IRC § 151(b)(1).

