

TO WORK, OR NOT TO WORK? THE IMMORTAL TAX  
DISINCENTIVES FOR MARRIED WOMEN

by  
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*Among the most fundamental barriers to the aggressive participation of many married women in the work force are the disincentives for secondary income earners embedded in the federal tax code. Specifically, the current code contains a marriage penalty, which is aggravated by the progressive nature of taxation and any potential increases in income taxation. Meanwhile, child-care expenses, a prerequisite for entry into the labor market, are treated inadequately. Although these immortal problems persist despite political pushes for relief, new attention to this topic is warranted given the Obama Administration's pledge for tax law reform. If the principle to be prioritized is that married women should not face tax disincentives to pursue paid work, then the tax code must finally deal with these issues effectively.*

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*People who complain about taxes can be divided into two classes:  
men and women.*<sup>oo</sup>

## I. INTRODUCTION

Throughout the ages, people have lauded the importance of paid work, praised the fulfillment it brings, and shuddered at high unemployment rates.<sup>1</sup> Despite this general social encouragement of gainful employment, the federal tax code disincentivizes a substantial group of people in the United States from pursuing paid work—secondary income earners, mostly composed of married women.<sup>2</sup> These tax disincentives take the form of the marriage penalty and bonus, as well as the inadequate treatment of child-care expenses.

The actual numbers reveal the depth of the marriage penalty: 21 million married couples paid an average of \$1,400 in additional taxes in 1996 by virtue of filing jointly.<sup>3</sup> That year, the total marriage penalties amounted to \$29 billion.<sup>4</sup> A 2001 change to the tax law slightly reduced marriage penalties, but only for the lowest income tax brackets.<sup>5</sup> Today, marriage penalties are difficult to circumvent as well. They result from the progressive nature of the tax code, which not only taxes the secondary income at the couple's highest marginal tax rates, but also lacks marriage tax brackets that are exactly double those of single filers.<sup>6</sup> The tax code's inadequate treatment of child-care expenses further

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<sup>oo</sup> Internal Revenue Service, Tax Quotes, <http://www.irs.gov/newsroom/article/0,,id=110483,00.html>.

<sup>1</sup> See, e.g., RALPH WALDO EMERSON, *Self-Reliance*, in *ESSAYS* 37, 47 (Boston, James Munroe & Co. 1847) ("But do your work, and I shall know you. Do your work, and you shall reinforce yourself."); Jonathan Barry Forman, *Making America Work: Alfred P. Murrah Professorship Inaugural Lecture*, 60 OKLA. L. REV. 53, 54 (2007) (noting that the greatness of the United States has been rooted in hard work); John Paul II, Pope of the Catholic Church, Address to French Ambassador to the Holy See (Oct. 24, 1998), available at <http://www.catholicculture.org/culture/library/view.cfm?recnum=700> (recognizing the societal problems caused by unemployment in European countries).

<sup>2</sup> See *infra* notes 15–18 and accompanying text.

<sup>3</sup> CONG. BUDGET OFFICE, FOR BETTER OR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 27–36 (1997) [hereinafter FOR BETTER OR WORSE], available at <http://www.cbo.gov/ftpdocs/0xx/doc7/marriage.pdf>. These penalties impact women disproportionately as explained *infra* notes 15–18 and accompanying text.

<sup>4</sup> FOR BETTER OR WORSE, *supra* note 3, at 27–36. On the other hand, 25 million married couples benefitted from \$33 billion worth of reductions by virtue of being married—an average of approximately \$1,300 per couple. *Id.* at 27–36. This results from the interconnectedness of the marriage penalty and bonus, which, in essence produces a wealth transfer from two-income, and relatively equal, earner households, to one or two-income, but significantly unequal, earner households. See *infra* notes 33–35 and accompanying text.

<sup>5</sup> The Economic Growth and Tax Relief Reconciliation Act of 2001 added Section 1(f)(8) to the Internal Revenue Code, which expanded some of the lower tax brackets of married filers to double those of single filers. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat 38, 54 (2001).

<sup>6</sup> See *infra* Part II.B.

increases the disincentive for the secondary income earner to enter the labor force.

Recognizing the inordinate power of the tax code as a policy tool, President Barack Obama has recently pledged to restructure it.<sup>7</sup> One of his goals is to increase the code's fairness.<sup>8</sup> Although it is difficult to determine fairness in a context so dependent on ideology,<sup>9</sup> one principle seems to be universal: to create tax disincentives for married women to pursue paid work is counterproductive and unfair. This is particularly true when the marriage penalty is viewed as a wealth transfer from two-income earner households to one-income and to significantly unequal two-income earner households.<sup>10</sup> It is unsurprising, then, that both Democrats and Republicans support marriage penalty relief, although the details of an exact solution have been elusive.<sup>11</sup> Proposed bills in the late 1990s and early 2000s would have offered such relief, but were vetoed by the executive for other reasons.<sup>12</sup>

This Article argues that the next revision of the tax code should neutralize the tax disincentives facing the secondary income earner, setting forth economic and public policy support for the desirability of this goal. Part II therefore begins by reviewing the federal income taxation laws that are most unfavorable to the secondary income earner, such as the marriage penalty. Part III considers the implications of such laws, concluding that more neutral laws should replace the current system. This Part also evaluates the costs of such a replacement, underscores the important results of the natural bifurcation between married women with minor children and those without, and concludes that any child-oriented reason for unfavorably taxing the secondary

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<sup>7</sup> See, e.g., Roger Runningen & Ryan J. Donmoyer, *Obama Asks Volcker to Lead Panel on Tax-Code Overhaul*, BLOOMBERG.COM, Mar. 25, 2009, <http://www.bloomberg.com/apps/news?sid=a8yCQsJfjb24&pid=20601087>.

<sup>8</sup> BarackObama.com, Barack Obama's Comprehensive Tax Plan, [http://www.barackobama.com/pdf/taxes/Factsheet\\_Tax\\_Plan\\_FINAL.pdf](http://www.barackobama.com/pdf/taxes/Factsheet_Tax_Plan_FINAL.pdf) ("Barack Obama's tax plan delivers broad-based tax relief to middle class families and cuts taxes for small businesses and companies that create jobs in America, while restoring fairness to our tax code and returning to fiscal responsibility.") (emphasis added).

<sup>9</sup> For example, fiscal liberals may prefer higher tax rates to fund broader government programming, while fiscal conservatives may prefer the economic benefits of lower taxation. See also Brian Galle, *Tax Fairness*, 65 WASH. & LEE L. REV. 1323, 1324 (2008) ("[M]ost scholars would say that there is no distinctive principle of tax fairness."). However, Galle suggests that tax fairness should consider horizontal equity—the same treatment of similarly situated individuals—as well as vertical equity—fair treatment of differently-situated persons. Galle, *supra*, at 1324–25. Fairness may also entail neutrality, which, in this context, would not alter tax liability upon marriage. Nonetheless, this Article assumes that marriage is desirable, as is paid work. See, e.g., *infra* note 116.

<sup>10</sup> See *infra* notes 33–35 and accompanying text.

<sup>11</sup> For example, liberals prioritize the advancement of women in the workforce as a cause in itself, while conservatives value the various benefits gained by decreasing taxation.

<sup>12</sup> Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 2 (2000).

income earner is flawed. Finally, Part IV recommends ways to neutralize the tax code so as to not disincentivize married women, whether childless or not, from pursuing paid work. If the principle to be prioritized is that married women should not face tax penalties when choosing to pursue paid work, then the tax code must finally deal with the current disincentives effectively.

## II. REVIEW OF THE CURRENT TAX CODE FRAMEWORK

The federal tax code, as currently conceived, holds certain disadvantages for all secondary income earners. These disadvantages, however, disproportionately impact married women. Most important among them are the marriage penalty and the inadequate treatment of child-care expenses.<sup>13</sup>

### A. *Married Women as Secondary Income Earners*

It is important to note at the outset that although this Article focuses on married women, it applies equally to the households wherein the secondary income earner or non-wage-earning spouse is the husband. In fact, the wife out-earns the husband in about a quarter of married households.<sup>14</sup> Notably, however, it is the secondary income earner that is of utmost importance here, whether male or female, because this wage-earner is most affected by the tax code. This is because the typical household tends to consider the bigger income, or the primary income, as more indispensable than the secondary one, which is smaller by definition. Therefore, the secondary income is more flexible and

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<sup>13</sup> Although this Article restricts itself to the federal tax code, there are also many state law disincentives for married women to work. These include alimony guidelines and the case law of various states, the latter illustrated by *Bonjour v. Bonjour*, in which a trial court found against the biological working mother in favor of a homemaking stepmother. 566 P.2d 667 (Alaska 1977), *rev'd*, 592 P.2d 1233 (Alaska 1979). Specifically, the trial court judge found that “[i]n a family sense the social needs of Joseph can best be met at this time by Randall [the biological father], who is able to provide in his family unit a surrogate mother in Susan who is a full-time homemaker. . . . In the custody of Lindsey [the biological mother], Joseph is placed in a day care center for a good portion of a day while Lindsey is working. While I give preference to the family unit in child care, I am not implying that child care institutions are unfit places.” *Bonjour*, 592 P.2d at 1237. *See also* SANFORD N. KATZ, FAMILY LAW IN AMERICA 104–06 (2003) (noting that in many custody cases the court prefers the primary caretaker, which will likely be the parent who works less, if at all).

<sup>14</sup> Among married-couple families where both the wife and husband earn income, 26% of wives earned more than their husbands in 2005. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CHARTING THE U.S. LABOR MARKET IN 2006, chart 6-5 (2007) [hereinafter LABOR MARKET], <http://www.bls.gov/cps/labor2006/chartbook.pdf>; *see also* Debra DiMaggio, *The “Prodigious Spouse”: Equitable Distribution and Wealthy Wage Earner*, 91 ILL. B.J. 460, 464 (2003) (“The stereotype of the nonwage-earning spouse is a woman who does not work outside the home. However, increasing numbers of women are the heads of household and even more women work outside the home.”).

dispensable, and its earner may be particularly susceptible to the behavior-driving policies embedded in the tax code.

Nonetheless, married women are disproportionately secondary income earners for several reasons.<sup>15</sup> Most importantly, women take part-time and flexible jobs more frequently than men, mostly to accommodate their children.<sup>16</sup> Furthermore, maternity programs are often far more popular, in addition to being lengthier and having more benefits, than paternity ones.<sup>17</sup> Women's decisions to temporarily leave the workforce, however, are reflected in their wages, which have historically been lower than men's.<sup>18</sup> As a result, married women are usually the secondary income earner in their households and are thus disproportionately affected by tax policies such as the marriage penalty.

Much ink has been spilled on this gender bias in the tax code,<sup>19</sup> which results from the tax provisions concerning, for example, limited

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<sup>15</sup> By 2005, only 35¢ of every dollar of married-couple family income were earned by the wife. See LABOR MARKET, *supra* note 14. Furthermore, the average male joint filer reported earnings of \$47,293 in 1998, while the average female joint filer reported earnings of \$22,628. Peter Sailer et al., *Income by Gender and Age from Information Returns, 1998*, STAT. INCOME BULL., Winter 2001–2002, at 83, 97 tbl.3, available at <http://www.irs.gov/pub/irs-soi/98ingdag.pdf>.

<sup>16</sup> See, e.g., Marianne Bertrand et al., *Dynamics of the Gender Gap for Young Professionals in the Corporate and Financial Sectors 2–4* (Nat'l Bureau of Econ. Research, Working Paper No. 14681, 2009), available at <http://www.nber.org/papers/w14681.pdf> (finding that many women curtail their work after having children); Alex M. David, *New York City Bar, Law Firm Diversity Benchmarking Report: 2006 Report to Signatories of the Statement of Diversity Principles*, in BEYOND DIVERSITY 101, at 213, 235 (2008), available at <http://www.abanet.org/minorities/docs/FirmBenchmarking06.pdf> (determining that over nine percent of New York City women attorneys work flexibly compared to about one percent of men); Marin Clarkberg & Phyllis Moen, *Understanding the Time Squeeze: Married Couples' Preferred and Actual Work-Hour Strategies*, 44 AM. BEHAV. SCIENTIST 1115, 1133 (2001) (noting that women, not men, typically prefer part-time work); see also *infra* note 64 and accompanying text.

<sup>17</sup> See, e.g., Nevada Dept. of Human Res. v. Hibbs, 538 U.S. 721, 730–31 (2003) (summarizing the workplace expectation that women bear the burden of caring for the family); Johnson v. Univ. of Iowa, 408 F. Supp. 2d 728, 743–44 (S.D. Iowa 2004), *aff'd*, 431 F.3d 325 (8th Cir. 2005) (determining that an employer's differential treatment of biological fathers and mothers was justified when work leave was characterized as being for disability related to pregnancy, not for care-giving).

<sup>18</sup> In a recent study on the earnings of MBA graduates, researchers found that the major difference in earnings between males and females was caused by several factors, including career interruptions and the difference in hours per week worked between the two groups, with women curtailing their work contributions after having children. Bertrand et al., *supra* note 16, at 2–4. Specifically, in 2007, women earned 77.8¢ for every \$1 men earned. U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, HISTORICAL INCOME TABLES—PEOPLE, tbl.P-40, <http://www.census.gov/hhes/www/income/histinc/incpertoc.html>. Of course, this does not mean that men out-earn their wives in every household, just in most. See also *supra* note 14 and accompanying text.

<sup>19</sup> See, e.g., Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787 (1997) (considering the marriage penalty for African American families); Lora Cicconi, Comment, *Competing Goals Amidst the "Opt-Out" Revolution: An Examination of Gender-Based Tax Reform in Light of New Data on Female Labor Supply*, 42

child-care assistance and the lack of social security provisions for homemakers. Nonetheless, renewing this discourse is particularly important given President Barack Obama's apparent determination to overhaul the federal income tax code.<sup>20</sup>

Admittedly, a singular tax disincentive may not cause a mass exodus of married women from the work force. However, the current tax disincentives collectively place a notable burden on the secondary income earner. Furthermore, while these tax disincentives may be only one factor that a married woman considers before seeking employment, it is a consequential factor in altering the costs of the various choices, particularly for people at the margin. If the principle to be prioritized is that married women should not face tax disincentives to pursue paid work, then the tax code must finally eradicate these disincentives.<sup>21</sup>

### B. *The Marriage Penalty and the Marriage Bonus*

The marriage penalty is one of the most important distortions for married women in the labor force. The crux of the marriage penalty lies in the joint return and the progressive tax-rate structure: each income bracket is taxed at a higher percentage than the previous one.<sup>22</sup> However, the marginal dollar triggering each successive tax bracket on the married schedule is not exactly double the single schedule, a discrepancy that

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GONZ. L. REV. 257 (2006/07) (discussing the impact of the marriage penalty on women's issues); Richard L. Elbert, Comment, *Love, God, and Country: Religious Freedom and the Marriage Penalty Tax*, 5 SETON HALL CONST. L.J. 1171, 1174–85 (1995) (outlining the background of the penalty); Edward J. McCaffery, *Where's the Sex in Fiscal Sociology? Taxation and Gender in Comparative Perspective* (Univ. S. Cal. Ctr. in Law, Econ. and Org., Paper No. C07-12, 2008), available at <http://ssrn.com/abstract=1020360> (considering taxation's impact on women from a comparative perspective); and Robert S. McIntyre & Michael J. McIntyre, *Fixing the "Marriage Penalty" Problem*, 33 VAL. U. L. REV. 907 (1999) (suggesting ways to alleviate the penalty).

<sup>20</sup> See *supra* notes 7–8 and accompanying text.

<sup>21</sup> This Article limits its analysis to the federal tax code's disincentives for working women. Other penalties on marriage not considered include, for example, the disability laws. See Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1390 (2009). The private sector may also strongly influence women's decisions to enter the work force. A recent *Wall Street Journal* story reported that licensing regulations have increased dramatically, raising the costs of entering a particular field, "Overall, the level of licensing regulation in the workplace is rising precipitously, with more than 20% of the workforce now required to get a permit to do their jobs—up from 4.5% in the 1950s." *Licensed to Kill*, WALL ST. J., Sept. 10, 2007, at A14. This increasing private regulation of certain industries may contribute to deterring women from pursuing careers in those fields because of family demands on their time. See *supra* notes 15–18 and accompanying text. To take the example of lawyers: American attorneys typically undergo seven years of higher education, as opposed to three or four in European countries, such as England and Poland, where the law degree is completed during the undergraduate years. The comparative cost of entering the legal market in the United States is thus higher. See also *supra* note 13.

<sup>22</sup> See I.R.C. § 1 (2006); *infra* note 29.

starts at the 25% rate.<sup>23</sup> It is important to note that the marriage penalty technically results from the size of the tax brackets of the various tax schedules, whereas the higher tax rates for the secondary income due to its addition onto the primary income instead results from income stacking. Accordingly, not only is the secondary wage-earner's income taxed at higher rates than the primary wage-earner's income by virtue of being appended, but each spouse has a smaller tax bracket than he would have if he were single.<sup>24</sup>

In the most extreme case, therefore, if a married woman's after-tax income falls below minimum wage, she may elect to remain at home. This situation is plausible if she makes approximately the minimum wage and is taxed at the highest tax bracket because of her husband's more substantial income. In addition, due to the lack of marriage tax brackets that are double those of single filers, the marriage penalty requires more tax payments from these two-earner spouses than the sum of the tax payments they would make if they were single individuals.

If a woman makes an amount of money equal to her husband, she suffers the marriage penalty the most.<sup>25</sup> Specifically, equal-earning couples double their income upon marriage and, therefore, only double tax brackets would make their decision to marry tax neutral. For instance, if both spouses earn \$75,000 annually, they pay \$30,264 in taxes in 2009. If they were single, on the other hand, they would pay a total of \$29,876 in taxes in 2009.<sup>26</sup> This difference grows substantially as each spouse earns more money.<sup>27</sup> The end result is that many married couples

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<sup>23</sup> The 2009 marginal dollar triggering amounts for each successive tax bracket can be found in the notes following I.R.C. § 1 (Supp. 2009). Rev. Proc. 2008-66, 2008-46 I.R.B. 1107, 1109-10; *infra* note 29.

<sup>24</sup> However, this is true only after the 15% tax bracket; the marriage penalty begins at the 25% tax bracket. I.R.C. § 1 (2006); *infra* note 29.

<sup>25</sup> Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1479 (1997) ("The marriage penalty is greatest when the household income is divided evenly."). This significantly impacts professional couples, wherein the spouses earn equally high salaries. See *infra* note 29. For the argument that the marriage penalty also significantly affects African American couples, see Brown, *supra* at 1501.

<sup>26</sup> Although this may seem like an insignificant penalty, it not only increases with income, but it also inherently implicates the meaning of fairness. See *infra* notes 29 and 78; Galle, *supra* note 9.

<sup>27</sup> For married couples, filing separately during the duration of the marriage is not usually advantageous when compared to filing jointly—each spouse must nonetheless use the rates for married individuals filing separately, as opposed to the more favorable single person rates. Furthermore, spouses who file separately must necessarily forego many helpful tax-cutting credits and deductions. Therefore, filing separately while married is a relatively limited tool in decreasing tax liability that is used most frequently in special circumstances, such as, for example, when one spouse has high medical expenses and a low income, thereby meeting the 7.5% threshold necessary to itemize medical costs. Many married couples would therefore not benefit by filing separately when they could file jointly, so they choose to file jointly.

pay higher taxes than their unmarried counterparts in the same economic position.<sup>28</sup>

There is a marriage bonus in the current tax code as well, which benefits only one-income and significantly unequal two-income earner couples. This bonus also results from the larger tax brackets on the married schedule, which are not necessarily double the brackets of the single schedule.<sup>29</sup> Specifically, when there is only one income measured against the larger tax brackets on the married schedule, it becomes more difficult to reach each higher bracket. In other words, the larger the tax brackets for married couples, the higher the amount of household income that is taxed at lower brackets. In one-income or significantly unequal two-income earner households, therefore, the sole or greater income earner has the benefit of larger marriage brackets that are intended to accommodate two incomes. This results in a marriage bonus for certain households.

For example, if a single man earns \$85,000, he is in the 28% tax bracket. As the table in footnote 29 illustrates, however, once he marries someone with little or no income, his income drops safely into the 25% tax bracket.<sup>30</sup> This encourages the secondary wage earner, usually the wife, to earn less so as to qualify for a lower income tax bracket for the

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This table contains the exact tax liability for a married couple versus the tax liabilities of two financially similarly-situated single people in 2009:

|                             | Income    | 10%<br>marginal<br>\$ trigger | 15%<br>marginal<br>\$ trigger | 25%<br>marginal<br>\$ trigger | 28%<br>marginal<br>\$ trigger | Tax<br>Liability |
|-----------------------------|-----------|-------------------------------|-------------------------------|-------------------------------|-------------------------------|------------------|
| Bob<br>(Single)             | \$75,000  | \$0                           | \$8,350                       | \$33,950                      | \$82,250                      | \$14,938         |
| Cindy<br>(Single)           | \$75,000  | \$0                           | \$8,350                       | \$33,950                      | \$82,250                      | \$14,938         |
|                             |           |                               |                               |                               |                               | = \$29,876       |
| Bob &<br>Cindy<br>(Married) | \$150,000 | \$0                           | \$16,700                      | \$67,900                      | \$137,050                     | \$30,264         |

Based on Lloyd H. Mayer, Federal Income Taxation Lecture (November 2007) (with permission) (original on file with author).

<sup>28</sup> *Id.* For the argument that tax fairness must include horizontal equity, or the same treatment of similarly situated individuals, see Galle, *supra* note 9.

<sup>29</sup> This table shows the marginal dollar amounts that trigger each successive tax bracket for married couples filing jointly and single individuals in 2009:

|         | 10% | 15%      | 25%      | 28%       | 33%       | 35%       |
|---------|-----|----------|----------|-----------|-----------|-----------|
| Single  | \$0 | \$8,350  | \$33,950 | \$82,250  | \$171,550 | \$372,950 |
| Married | \$0 | \$16,700 | \$67,900 | \$137,050 | \$208,850 | \$372,950 |

Rev. Proc. 2008-66, 2008-45 I.R.B. 1107, 1109-10. At higher tax rates, the marriage penalty becomes increasingly steeper.

<sup>30</sup> See *supra* note 29.



combined income.<sup>31</sup> Nonetheless, the marriage bonus has been widely considered a benefit of marriage, with these attendant disincentives for the secondary income earner largely overlooked.<sup>32</sup>

In essence, this marriage bonus is funded by the marriage penalty. In 1996, for example, 21 million married couples paid marriage penalties that amounted to \$29 billion.<sup>33</sup> Meanwhile, 25 million married couples benefited from \$33 billion worth of tax reductions by virtue of being married—an average of approximately \$1,300 per couple.<sup>34</sup> This resembles a transfer of wealth by method of tax law. The households that benefit from such a transfer consist of one-income or significantly unequal two-income earner households who receive the marriage bonus. Meanwhile, relatively equal two-income earner households often pay extra taxes due to the marriage penalty.<sup>35</sup>

Any such interconnectedness between the marriage penalty and the marriage bonus inevitably results from the progressive tax structure. If Congress attempts to reduce the marriage penalty, the marriage bonus only worsens. Specifically, if the taxation rates on the married schedule were exactly double those of the single schedule, then the marriage penalty would be eliminated but the bonus would increase—a one-income earner couple would reap the maximum benefit by falling into a lower tax bracket by virtue of the larger brackets available to married couples.

Because the alleviation of the marriage penalty aggravates the marriage bonus and vice versa, and both have their disadvantages, the question becomes which phenomenon is better to eliminate from the current tax structure. On the one hand, the marriage penalty disincentivizes married women from pursuing paid work. On the other, the marriage bonus incentivizes one-income or significantly unequal two-income earner marriages, although it does not place an increased tax burden on secondary income earners who choose to work. The marriage bonus is therefore preferable to the marriage penalty, so that people's pursuit of paid labor is not proactively penalized. Any policy decision aiming to eliminate the tax disincentives for married women to work would therefore advocate eliminating the marriage penalty, at the risk of simultaneously incentivizing one-income and significantly unequal two-income earner households.<sup>36</sup>

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<sup>31</sup> See *supra* notes 15–18 and accompanying text.

<sup>32</sup> Same-sex marriage advocates therefore seek to gain this tax code advantage for same-sex couples. However, the secondary income earner in such unions would face the same work disincentives as many married women. See generally Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008).

<sup>33</sup> FOR BETTER OR WORSE, *supra* note 3, at 29–30.

<sup>34</sup> *Id.*

<sup>35</sup> See *supra* text accompanying notes 22–28.

<sup>36</sup> See *supra* notes 29–32 and accompanying text. However, the resulting windfall to one-income and significantly unequal two-income earner households could be alleviated by, for example, widening tax brackets only for roughly equal two-income

In sum, both the marriage penalty and marriage bonus provide tax disincentives for secondary income earners, usually married women,<sup>37</sup> to work. As alleviating one aggravates the other in the current progressive tax framework, the marriage bonus is preferable in that it does not penalize married women for participating in the labor force. When there are children involved, however, the tax disincentives for a secondary income earner to pursue paid work only strengthen.

### C. *The Child-Care Credit*

For those married, working women with children, the tax situation is even more disadvantageous. With no deduction and only a slight tax credit for child-care expenses, married mothers must consider not only the increased taxation of their earnings and the worsening of their labor market prospects, but also the cost of childcare.<sup>38</sup> These impediments are sufficient to create a noteworthy barrier between potential secondary income earners and the labor force.

In *Smith v. Commissioner*, which remains the controlling case on the deductibility of child-care expenses, the tax court rejected the taxpayer's appeal for a deduction of child-care expenses.<sup>39</sup> The court reasoned, "The wife's services as custodian of the home and protector of its children are ordinarily rendered without monetary compensation. There results no taxable income from the performance of this service and the correlative expenditure is personal and not susceptible of deduction."<sup>40</sup> Meanwhile, the court ignored the argument that child-care expenses

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married couples, or by benefiting only these couples with offsets to the tax marriage penalty. See *infra* notes 117–19 and accompanying text.

<sup>37</sup> See *supra* notes 15–18 and accompanying text.

<sup>38</sup> For a summary of the labor market challenges mothers face, including lower wages, see Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359 (2008). On the other hand, abstaining from paid work often diminishes human capital. See Joyce P. Jacobsen & Laurence M. Levin, *Effects of Intermittent Labor Force Attachment on Women's Earnings*, 118 MONTHLY LAB. REV. 14, 14 (1995) ("First, women who leave the labor force and later re-enter do not build up seniority, which, by itself, often leads to higher wages. Second, women who return to the labor force are less likely to receive on-the-job training to increase their productivity and thereby raise their pay. Third, when women are not in the work force, their job skills may depreciate. Finally, employers may view gaps in work history as a signal that women who leave may do so again.").

<sup>39</sup> 40 B.T.A. 1038 (1939), *aff'd*, 113 F.2d 114 (2d Cir. 1940).

<sup>40</sup> *Id.* at 1039. See also I.R.C. § 262(a) (2006) (noting that "no deduction shall be allowed for personal, living, or family expenses"). The non-taxability of a homemaker's work has led some scholars to argue that the value of a homemaker's work should be taxed, which would increase respect and security for those women remaining in the domestic sphere. See, e.g., Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1647 (1996) ("Congress should value and tax household activities to ensure women have access to social welfare benefits typically tied to waged labor, such as social security, disability, and [M]edicare benefits. Taxation would mark an important step toward the formal recognition of women as important economic and political actors.").

constitute a condition to entering the paid workforce. Nonetheless, no deduction is currently permitted for child-care expenses, even though the cost to the U.S. Treasury would mostly be restricted to a couple's marginal top tax rate multiplied by the cost of the childcare, and perhaps would even be entirely offset by increased tax revenues generated by increased employment rates among secondary income earners.<sup>41</sup>

Although there is some relief for working mothers through the child-care credit, it has some practical limitations.<sup>42</sup> The child-care credit, embedded in Internal Revenue Code Section 21, is for taxpayers who incur employment-related expenses to be gainfully employed.<sup>43</sup> The credit amount is determined by the amount of employment-related child-care expenses, the number of children, and the taxpayer's adjusted gross income. However, child-care expenses cannot exceed the earned income of the spouse with the lower income.<sup>44</sup> Thus, if a married woman, as a secondary income earner, cannot earn enough to pay for childcare, she loses the full benefit of the child-care credit, even though her spouse would be contributing to child-care costs as well.<sup>45</sup> This limitation therefore favors those married women with children who earn more than child-care costs because it offsets such costs.<sup>46</sup> However, these women are also disproportionately affected by the marriage penalty and bonus, which heighten with each higher income bracket.<sup>47</sup>

Even more perversely, the child-care tax credit, by requiring that child-care expenses not exceed the earned income of the spouse with the lower income, creates incentives for working parents to buy the cheapest childcare, decreasing the parents' choice of where to place their children during work hours. Imposing such limits seems particularly unfair when both working parents contribute to the costs of childcare, yet only the lower of the two parents' incomes determines whether the household gains the tax benefit.

Another limitation of the child-care credit is that it does not apply against the Federal Insurance Contributions Act (FICA), social security,

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<sup>41</sup> See also *infra* text accompanying notes 126–27.

<sup>42</sup> I.R.C. § 21 (2006).

<sup>43</sup> *Id.* § 21(b)(2)(A). The amount of employment-related child-care expenses cannot exceed \$3,000 for one child and \$6,000 for two or more children. *Id.* § 21(c). Several years ago, for example, “[in] a household with a wife and husband, both employed, with a total income of \$30,000, two children, and expenses of \$4,800 or more, the credit (which reduces the amount of tax payable dollar-for-dollar) would be \$960.” WILLIAM A. KLEIN ET AL., FEDERAL INCOME TAXATION 479 (2009).

<sup>44</sup> I.R.C. § 21(d)(1)(B).

<sup>45</sup> There is an exemption for student or disabled spouses, who are treated as if they earn \$250 or \$500 monthly, depending on their number of children. *Id.* § 21(d)(2).

<sup>46</sup> There are, however, additional but less obvious costs to abstaining from the labor force, such as diminished human capital. See Jacobsen & Levin, *supra* note 38, at 14.

<sup>47</sup> See *supra* note 29.

or Medicare taxes.<sup>48</sup> Instead, it applies only against a secondary income earner's income tax. This limitation of the credit therefore requires married women to earn enough income not only to exceed child-care expenses, but also to offset social security and Medicare costs. These additional costs to working, which must be considered by any secondary income earner, are only worsened by child-care costs.

Finally, the child-care tax credit disappears through phase-outs based on household income.<sup>49</sup> Accordingly, a married woman whose husband earns a more substantial income has the least incentive to work under the tax code; she is taxed at a much higher income tax rate than if she were single and cannot offset child-care costs through a meaningful deduction or tax credit, even when the main cost to her employment is childcare. In any case, wealthier couples might be helped more by a child-care deduction, rather than a small tax credit that phases out based on income.<sup>50</sup> Specifically, a deduction reduces people's taxable income in addition to having the potential to lower their marginal top tax rate.

Obviously, the child-care tax credit aids only married women with children. Married women without children remain penalized by the marriage penalty, without any offsets through deductions or tax credits. Single working mothers fare best under this framework not only because they circumvent the marriage penalty, but also because they can collect the child-care tax credit, assuming their child-care costs do not exceed their income. While single mothers may certainly need the tax break given their households' subsistence on a single income, there is no reason to intentionally incentivize households to have a single income earner through the tax code's structure.<sup>51</sup>

Finally, it is worth noting that Section 129 of the Internal Revenue Code also aims to assist working parents.<sup>52</sup> This tax provision excludes from an employee's gross income the amounts paid or incurred by the employer, up to \$5,000, for dependent care assistance provided to the employee if the assistance is furnished pursuant to a dependent care assistance program.<sup>53</sup> In other words, a working parent, if taking advantage of her employer's dependent care assistance program, has up to \$5,000 less in taxable income. However, this provision is not necessarily helpful for many women because child-care costs may exceed

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<sup>48</sup> I.R.C. § 21(a)(1) (delineating that the child-care credit only applies to the income tax imposed by chapter one of the Internal Revenue Code).

<sup>49</sup> *Id.* § 21(a)(2).

<sup>50</sup> Wealthier couples would benefit from a deduction because their taxable income, and perhaps their marginal tax rate, would be reduced. If high enough, this reduction could outweigh the credit—assuming no phase-outs.

<sup>51</sup> Some commentators may argue that one-income earner households free the other parent to spend more time with children. See *infra* Parts III.A & III.B for rebuttal to this argument.

<sup>52</sup> I.R.C. § 129 (2006).

<sup>53</sup> *Id.* § 129(a). However, parents may have a tax-planning choice between this dependent care assistance program and the child-care credit under I.R.C. § 21 (2006). See KLEIN ET AL., *supra* note 43, at 480.

this amount and there is no requirement that an employer offer this benefit.

In sum, married working women pay more in taxes than they would if they were single in most circumstances. This is caused by the marriage penalty and income stacking. Additionally, the marriage bonus incentivizes the secondary income earner to forego income in order to fall within a lower tax bracket in terms of household income. Furthermore, if they have children, married women experience additional disincentives to work due to child-care costs that do not generate any meaningful tax break, even though child-care expenses are a condition to entering the workforce.

Importantly, these disincentives for married women to work do not automatically result from the bigger pool of taxable income that is formed when two working people marry. Instead, they result from tax policies that treat a married couple as a single economic unit for income tax purposes, which under the current tax code generates a higher tax bill for the secondary income earner than if she were single. Specifically, many of the tax brackets for married couples are not double those of single filers. This disincentivizes married women not only from working, but also from aggressively pursuing upwardly-mobile careers.<sup>54</sup> In some cases, it may disincentivize marriage.<sup>55</sup>

It cannot be denied, however, that the incentives for married women to pursue paid work change with their income bracket, as well as with their husband's fortunes.<sup>56</sup> In many households, financial need may

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<sup>54</sup> See *Should You Go Back to Work?*, SMARTMONEY.COM, Jan. 23, 2009, <http://www.smartmoney.com/Personal-Finance/Taxes/Should-You-Go-Back-to-Work-9559>. Furthermore, in a controversial article, one female Yale college student was quoted, on the topic of resigning from a professional career in favor of becoming a homemaker, "I accept things how they are . . . I don't mind the status quo. I don't see why I have to go against it." Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, at A1, available at <http://www.nytimes.com/2005/09/20/national/20women.html>. But see Katha Pollitt, *Desperate Housewives of the Ivy League?*, THE NATION, Oct 17, 2005, at 14, available at <http://www.thenation.com/doc/20051017/pollitt>.

<sup>55</sup> EDWARD J. MCCAFFERY, NAT'L CTR. FOR POLICY ANALYSIS, MARRIAGE PENALTY RELIEF IN THE NEW TAX LAW 2 (2003), available at <http://www.ncpa.org/pub/ba445> ("A marriage penalty may well affect the decision of poor people to marry. They cannot afford to marry and, by and large, don't—one of the reasons why approximately one out of four American children live in single-parent households. In the middle- and upper-income classes, people do marry. The tax-influenced decision for them is whether to have one or two wage earners.").

<sup>56</sup> Nonetheless, the influence of household earnings on a woman's decision to work may not be overly strong. Approximately 22.4% of all married couples have only the husband participate in the labor force. U.S. CENSUS BUREAU, U.S. DEP'T. OF COMMERCE, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2006, at tbl.FG2 (2006), available at <http://www.census.gov/population/www/socdemo/hh-fam/cps2006.html>. However, 19% of couples with an annual income of \$100,000 or greater have only the husband in the labor force. *Id.* In comparison, 28.4% of couples reporting earnings of \$30,000 to \$39,000 have only the husband in the labor force. *Id.* But see *infra* note 84 and accompanying text.

compel women to ignore the after-tax return on their labor. Often times, these women juggle significant domestic responsibilities with their shared role as economic providers.<sup>57</sup> Other women's entry to the labor force may be more discretionary. While this subset of women encompasses those of extremely comfortable means, it also includes those who can afford preferring leisure time with their families over increasing the net economic wealth of their households or maintaining the value of their human capital.<sup>58</sup> An unfair tax code, however, impacts all of these categories of women.

### III. PROBLEMS AND IMPLICATIONS

The power of the tax code is partially fueled by its dual effects: it categorizes people and impacts their behavior, whether intentionally or not. People are categorized as primary or secondary earners,<sup>59</sup> high tax bracket earners or low ones, homemakers or wage-earners.<sup>60</sup> The consequences of such categorizations drive people's behavior.<sup>61</sup> The

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<sup>57</sup> See, e.g., Allen M. Parkman, *Why are Married Women Working So Hard?*, 18 INT'L REV. L. & ECON. 41, 41 (1998) ("[O]ne disconcerting development has been the increase in the total number of hours worked by married women at home and on a job."). Parkman suggests that one of the reasons for the increased hours has been the advent of the no-fault divorce regime, which reduced married women's financial security and compelled them to undertake paid work in addition to maintaining the household. *Id.* at 42. See also *infra* Part III.B.

<sup>58</sup> For a brief discussion of the diminishing value of human capital, see *infra* note 87 and accompanying text.

<sup>59</sup> This categorization is gender-neutral. If a woman earns more than her husband, by definition she is the primary income earner, and it is her husband who faces the tax disincentives to engage in paid work. See *supra* note 14 and accompanying text.

<sup>60</sup> One female lawyer shared her reaction to being categorized as a homemaker after leaving the practice of law to raise her children, "Tim and I shared a good laugh the first time I saw myself identified as a 'Homemaker' on our tax returns. Not because Homemaker is not as noble a profession as the law is. But as it applied to me—one who hates to cook, clean, sew, is not particularly talented in home design, and one who is thoroughly flummoxed by a new sport called 'scrapbooking'—the title 'Homemaker' is a misnomer." Susan Chapin Stubson, *From Negotiating Clients to Negotiating Toddlers*, WYO. LAW., June 2006, at 22, available at <http://wyomingbar.org/pdf/barjournal/barjournal/articles/Toddlers.pdf>.

<sup>61</sup> For the argument that economic incentives drive women's behavior, see Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1033, 1040–41 (1993) (arguing that Congress should lower married women's tax rates to encourage both marriage and married women's participation in the labor force). See also EDWARD J. MCCAFFERY, *TAXING WOMEN* 19–23 (1997) (noting that because married couples often view the wife's income as supplemental, which is taxed at higher marginal rates, the tax code provides a disincentive for married women to work), and Jennifer L. Venghaus, Comment, *Tax Incentives: A Means of Encouraging Research and Development for Homeland Security?*, 37 U. RICH. L. REV. 1213, 1220 (2003) (suggesting that the tax code can change society's behavior). However, other scholars have suggested that the tax code does not influence people's behavior, but that people's behavior influences the tax code. See,

federal income taxation system is thus an important factor shaping economic incentives for people, aiming for fairness, neutrality, and efficiency.<sup>62</sup> The code's current treatment of married working women, however, does not maximize these aims.

Although there are many reasons for the current tax policies,<sup>63</sup> one major justification offered for disincentivizing the secondary income earner from pursuing paid work is her role in child-bearing and rearing.<sup>64</sup> In other words, one spouse should be encouraged to remain at home to care for children. However, this argument is tempered by the existence of a significant number of married women without minor children, as well as the added benefits of a more neutral legal regime.

With the guiding principle that married women should not be discouraged from the labor force, there are several possible resolutions to the current tax disincentives they encounter. The most tenable ones include making the taxation brackets of married couples, particularly equal-earning couples, double those of single filers or offering offsets to the marriage penalty. Any such discussion, of course, also applies to couples where the secondary earner is the husband. Nonetheless, this Part continues to focus mainly on women because, as detailed before, men remain the primary income earners.<sup>65</sup>

#### A. *Women with Minor Children and Those Without*

One of the most natural and relevant bifurcations in the population of married women arises from whether they have minor children. The presence of children in a household inspires much of the relevant debate, and perhaps justifiably. There are the age-old efficiency benefits of having one spouse focus on a career while the other cares for the

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*e.g.*, Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1392 (1975) (arguing that the tax code codifies social mores); Erik M. Jensen, *Jonathan Barry Forman, Making America Work*, 5 PITT. TAX REV. 165, 170 n.16 (2008) (book review) (suggesting that the tax code is indifferent to whether the husband or wife is the primary wage-earner, but that social expectations may be more sexist).

<sup>62</sup> Reginald Mombrun, *Let's Protect Our Economy and Democracy from Paris Hilton: The Case for Keeping the Estate Tax*, 33 OHIO N.U. L. REV. 61, 83–84 (2007).

<sup>63</sup> For an excellent review of Congress's rationale for certain tax policy decisions, see Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 806–21 (2008).

<sup>64</sup> *See, e.g.*, Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL'Y J. 1, 40 (2005) (“[There exists a] societal view that it would be best for women to remain home with their children.”); Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 3 (2007) (“This catchphrase [the opt-out revolution] is used to describe highly educated professional women who have chosen to leave their jobs to care for their children or to arrange reduced work hours to have more time at home.”); *see also* Jacobsen & Levin, *supra* note 38, at 16 (“Women who leave the work force are more likely to be married and to have children than are their counterparts who remain in the work force.”).

<sup>65</sup> *See supra* notes 15–18 and accompanying text.

household. Furthermore, hands-on and full-time parenting is desirable for children.

Put in a more favorable light, therefore, the flip side of the tax code's disincentives for the secondary earner to work is that it incentivizes her to remain at home with children by lowering her spouse's tax bill if she abstains from paid work. In this way, the current tax code offers a subsidy for one parent to remain at home.

However, the problem is that current tax disincentives for married women to enter the workforce generally remain the same whether or not they are also the parents of minor children. In fact, the number of married women without minor children slightly exceeds those with such children: there are currently 33,059,000 married couples without children under 18, as opposed to 26,469,000 married couples with minor children.<sup>66</sup> Therefore, if the law provides strong incentives for a secondary income earner to become a full-time caregiver at home, the half of all women without children are penalized if they dedicate themselves to paid work while being the secondary income earner.

For the purposes of any relevant debate, therefore, women should be divided into two groups: those with minor children and those without minor children. Society may choose to view each group of women differently. Specifically, society may want to encourage, support, and subsidize a woman with children to spend more time with those children—particularly when her husband can earn more by himself than if they were both working and having to pay child-care costs. No such societal aims exist for women without minor children. Therefore, there is no legitimate—and particularly child-oriented—reason for the law's *uniform* discouragement of all married women's entry into the labor force. The law should remain neutral, particularly when married women without minor children exceed in number those with such children.

The current tax policy, which does not distinguish between married mothers and married women generally, may be the reason that both groups abstain from paid work at approximately the same rate. In other words, there is only a small difference in the number of married mothers working and the number of married women without minor children working. Specifically, out of 26,469,000 married couple family units with their own children under the age of eighteen, 7,923,000 couples belong to a household wherein only the husband is in the labor force (29.9%).<sup>67</sup> However, of the 33,059,000 couples without their own children under eighteen, 5,421,000 couples have only the husband in the labor force (16.4%).<sup>68</sup> The difference between the participation of married women

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<sup>66</sup> U.S. CENSUS BUREAU, *supra* note 56, at tbl.FG2.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*



in the labor force between these two groups of family units—those with minor children and those without—is only 13.5%.<sup>69</sup>

Thinking of married women as composed of two groups—those with children and those without—therefore highlights the problem with applying a uniform law to all of them, particularly when it is unfavorable to the pursuit of paid work. Instead of distinguishing between these two groups, however, the tax code fundamentally distinguishes between one-income earner couples, two-income earner couples, and single taxpayers—transferring wealth among them.<sup>70</sup> As one commentator suggests, it would be difficult to completely eliminate the complaints of every taxpayer in these three groups, particularly given the progressive nature of the taxation system.<sup>71</sup> However, a more marriage-neutral tax code, one that does not penalize the secondary income earner, would facilitate the desirable policy goals considered next, which result from the encouragement of people to engage in paid work.

### B. *The Benefits of a Marriage-Neutral Income Tax*

Although the current tax framework provides married women with certain disincentives to work, the most desirable goal of the system may be neutrality in regards to these tax disincentives.<sup>72</sup> Most notably, there is simply insufficient justification for either an encouragement or discouragement of all married women to participate in the workforce. Given that there are two roughly equal groups of married women, those with minor children and those without, it is difficult to reach fair results with non-neutral laws.<sup>73</sup> Furthermore, not all married women, in either group, have the same work-life balance preferences, making it difficult to achieve a universally fair tax law that is not neutral.

This issue of fairness also arose in the deductibility of child-care expenses in *Smith v. Commissioner*.<sup>74</sup> The tax court implicitly compared the two-income earner couple with children to the two-income earner couple without children, finding it unfair to favor those households with children. However, there are many possible comparisons the court could

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<sup>69</sup> One additional factor possibly influencing these statistics is that older spouses with children over eighteen may be of a more traditional generation, where the wife is usually a homemaker regardless of whether minor children are also present in the household. Furthermore, women who spend most of their adult lives in the home may experience such diminished human capital that it is not worthwhile for them to enter the workplace even once they complete raising their children. See *infra* note 87.

<sup>70</sup> See *supra* notes 33–35; *infra* text accompanying note 103.

<sup>71</sup> Zelenak, *supra* note 12, at 3. See also *supra* Part II.B.

<sup>72</sup> “Jean-Baptiste Colbert, Louis XIV’s finance minister, famously said that the art of taxation was like plucking a goose; the aim was to get the most feathers with the least hissing. But tax policy should aim to do more than smother protest: it should also seek to raise the most money with the least distortion to economic activity.” A *Nasty Brown Mess*, *ECONOMIST*, May 2, 2009, at 14.

<sup>73</sup> See *supra* Part III.A.

<sup>74</sup> 40 B.T.A. 1038 (1939), *aff’d*, 113 F.2d 114 (2d Cir. 1940); see also *supra* text accompanying notes 39–41.

have made that would have produced different results, including a comparison of the two-income earner couple with children to the one-income earner couple with children.<sup>75</sup> In this sort of comparison, it is unfair that the one-income earner household has imputed income that is not taxable because of the stay-at-home wife's services.<sup>76</sup> The starkest comparison, however, is that of a two-income earner couple with children to a single-parent household that almost always incurs child-care costs as a result of employment—which is essentially a requirement for the deductibility of expenses. Yet, these expenses are not deductible because they are considered by the courts to be personal expenses.<sup>77</sup> Thus, the concept of fairness<sup>78</sup> changes depending on the comparisons drawn among the various households.<sup>79</sup> Unfortunately, courts have often chosen to draw those comparisons that disfavor married women's paid work. Congress's failure to override this view of the courts suggests that it belongs not only to the courts, but also to Congress.

Furthermore, although one perceived goal of the taxation system may be to strengthen the family unit by keeping one spouse at home with the children, in reality the laws that create incentives for women to stay home may weaken the family. First, one commentator has noted that, in fact, equally financially dependent spouses are more likely to be equally committed spouses.<sup>80</sup> Second, by perverting a woman's choices simply because of her marital status,<sup>81</sup> a marriage penalty may deter or delay working women from entering into marriage.<sup>82</sup> This is particularly true of lower income families where both partners are working at approximately the same low wage. They are negatively impacted by the marriage penalty

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<sup>75</sup> KLEIN ET AL., *supra* note 43, at 478 n.1.

<sup>76</sup> An argument has been made in favor of taxing the imputed income of a homemaker to validate her decision, recognize the economic value of her contribution, and provide social security benefits. See Staudt, *supra* note 40.

<sup>77</sup> *Smith*, 40 B.T.A. at 1039; I.R.C. § 262(a) (2006).

<sup>78</sup> There are at least two aspects of fairness in this context. First, there is the idea of horizontal equity, or the notion that similarly situated individuals should be treated the same. Second, there is the idea of vertical equity, or that the tax treatment of differently-situated persons should be fair. Vertical equity is a form of distributive justice. Galle, *supra* note 9, at 1324–25.

<sup>79</sup> There is no longer a typical household either. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality opinion) (“The demographic changes of the past century make it difficult to speak of an average American family.”); *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2001 (2003) (“The ‘nuclear family’—still the archetype in American law and politics—for the first time describes less than one-quarter of all U.S. households.”).

<sup>80</sup> Steven L. Nock, *The Marriages of Equally Dependent Spouses*, 22 J. FAM. ISSUES 755, 764 (2001).

<sup>81</sup> In fact, some commentators completely disapprove of the traditional gender roles in marriage as a trap for many women. See, e.g., CARL E. SCHNEIDER & MARGARET F. BRINING, AN INVITATION TO FAMILY LAW 1391 (2006) (“In the nineteenth century the family was assailed as a prison by the Romantics and as an instrument of oppression by the Marxists. Today, it is similarly assailed . . .”).

<sup>82</sup> See, e.g., Leah Ward Sears, Foreword, *The Frontiers of Law, Religion, and Marriage*, 58 EMORY L.J. 1, 5–6 (2008); see also MCCAFFERY, *supra* note 55.

by virtue of earning equal incomes in a tax structure wherein the married filers' tax brackets are not exactly double the single filers' brackets, starting at the 25% tax bracket.<sup>83</sup> Professional couples who are married also disproportionately suffer a higher tax bill—in such cases, one spouse must also pay the couple's top marginal rate on most, if not all, of her income.<sup>84</sup> Therefore, even if the tax system were trying to preserve the familial unit, it has certain tendencies to undermine marriage. On the contrary, a neutral legal framework would allow married women to allot their time such that their households' utility would be maximized.

Furthermore, it is counterproductive to penalize working women who desire the added income for the welfare of their families. As one commentator notes, more American marriages today depend on two incomes.<sup>85</sup> It is therefore not necessarily wise to assume, as the tax code does, that married women with children need more time with their children than money. No stretch of the imagination is necessary to picture the varied and many scenarios in which the economic value of a mother's paid work positively impacts her children. For example, many mothers work to be able to afford private or religious schooling for their children, or to fund their children's various extracurricular activities. Other mothers need to work just to provide the basic necessities for their families.<sup>86</sup> These observations suggest that to disincentivize married mothers from pursuing paid work is against their families' interests.

Also counterproductive is erecting disincentives for married women to work when their human capital swiftly diminishes. Women who return to the labor market often encounter a difficult transition with fewer rewards from their work than if they had stayed in the workforce.<sup>87</sup> Thus, any incentive to quit the labor market provides an even greater disincentive to return, given rapidly diminishing human capital.

However, it is increasingly important for women to maintain their human capital. First, in the current economic recession, men are losing their jobs at a higher rate than women, meaning that an increased

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<sup>83</sup> See *supra* note 23 and accompanying text.

<sup>84</sup> This may be reflected in one study's findings that women with MBA degrees, upon having children, reduce their labor supply much more if they have higher-earning husbands. See Bertrand et al., *supra* note 16, at 4.

<sup>85</sup> Nock, *supra* note 80, at 755. ("I propose . . . the emerging form of American marriage [is] a relationship in which couples are equally dependent on one another's earnings."). Nock defines equally dependent spouses "as those who earn no less than 40% of total family earnings." *Id.* at 759.

<sup>86</sup> O'Leary, *supra* note 64, at 3 ("Women living in poverty, who could once 'opt out' of work to care for their young children, are now required to work while receiving welfare. . .").

<sup>87</sup> Jacobsen & Levin, *supra* note 38, at 14 ("First, women who leave the labor force and later re-enter do not build up seniority, which, by itself, often leads to higher wages. Second, women who return to the labor force are less likely to receive on-the-job training to increase their productivity and thereby raise their pay. Third, when women are not in the work force, their job skills may depreciate. Finally, employers may view gaps in work history as a signal that women who leave may do so again.").

number of households subsist only on the woman's income.<sup>88</sup> Second, the odds do not clearly favor lifelong marriages,<sup>89</sup> notwithstanding people's optimism regarding their unions.<sup>90</sup> And following divorce, many women struggle to maintain their households on a significantly reduced income.<sup>91</sup> Therefore, married women may choose to work in order to protect themselves and their children from any financial difficulties in the event of a divorce.<sup>92</sup> In such situations, reducing the incentives for a mother to work goes against the interests of her children.

In addition to benefiting married women who find paid work fulfilling, particularly when justified by attendant economic benefits, laws that remain neutral on the question of a woman's decision to participate in the labor force may benefit society. For example, one major problem in the United States today is the lack of quality education for elementary and high school students.<sup>93</sup> One writer has predicted that California will experience a shortage of tens of thousands of credentialed teachers by

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<sup>88</sup> HEATHER BOUSHEY, CTR. FOR AM. PROGRESS, EQUAL PAY FOR BREADWINNERS 1 (2009), available at [http://www.americanprogress.org/issues/2009/01/gender\\_economy\\_report.html/issues/2009/01/pdf/gender\\_paper.pdf](http://www.americanprogress.org/issues/2009/01/gender_economy_report.html/issues/2009/01/pdf/gender_paper.pdf).

<sup>89</sup> Americans for Divorce Reform, Inc., Divorce Rates, [http://www.divorce\\_reform.org/rates.html](http://www.divorce_reform.org/rates.html). "[T]he marriage rate in 2003 was 7.5 per 1,000 total population, but at the same time, the divorce rate was 3.8 per 1,000 total population. Thus, in 2003, for every two marriages, there was a divorce." Margaret Berger Strickland, Comment, *What's Mine Is Mine: Reserving the Fruits of Separate Property Without Notice to the Unsuspecting Spouse*, 51 LOY. L. REV. 989, 990 (2005) (citing CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., NATIONAL VITAL STATISTICS REPORTS: BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2003 (2004), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52\\_22.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_22.pdf)).

<sup>90</sup> See Margaret F. Brinig, *Contracting Around No-Fault Divorce*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 275, 276 (F.H. Buckley ed., 1999); Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 757-61 (2009).

<sup>91</sup> In 1993, the mean income for divorced American mothers was \$17,859, while for divorced fathers it was \$31,034. Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 6 (1995). But see Kelly Bedard & Olivier Deschênes, *Sex Preferences, Marital Dissolution, and the Economic Status of Women*, 40 J. HUM. RESOURCES 411, 413 (2005) (arguing that divorced women live in households with more income per person than never-divorced women). See also Brinig, *supra* note 90, at 277 ("A great deal of research suggests that children of parents who divorce will be worse off in the vast majority of cases. Children may lose out for a number of reasons. They will be poorer than those of intact families . . .").

<sup>92</sup> Parkman, *supra* note 57, at 44 ("The likelihood increased that decisions by married women to become employed outside the home were based on the women's desire to protect themselves from the potentially adverse effects of no-fault divorce rather than to improve their family's welfare.").

<sup>93</sup> This is particularly true in the most problematic school districts around the country. See, e.g., Brian W. Ludeke, *Malibu Locals Only: "Boys Will Be Boys," or Dangerous Street Gang? Why the Criminal Justice System's Failure to Properly Identify Suburban Gangs Hurts Efforts to Fight Gangs*, 43 CAL. W. L. REV. 309, 337 (2007) (suggesting that a shortage of teachers may force students to use their peers as role models instead of healthy adults, particularly when the students lack a stable family).

2014.<sup>94</sup> Perhaps if the legal and economic frameworks were more neutral for secondary income earners, they would occupy more of these family-friendly roles in the workforce. However, when child-care costs and high tax rates become factors, many secondary income earners may prefer to remain at home rather than enter the labor force.

Finally, perhaps an argument can be made for the law's neutrality toward married women in the form of the Equal Protection Clause. The United States Constitution, mainly through the Fourteenth Amendment, has increasingly been used in state family law cases.<sup>95</sup> Equal protection has been a particularly popular argument in gendered family law disputes.<sup>96</sup> Although the Supreme Court permits family members' rights to vary according to law, such distinctions must "serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>97</sup> For this reason, courts have rejected, for example, the presumption that mothers should win custody of their young children in the case of divorce.<sup>98</sup> Applying this logic to the legal

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<sup>94</sup> Benjamin Michael Superfine, *Using the Courts to Influence the Implementation of No Child Left Behind*, 28 CARDOZO L. REV. 779, 819 n.243 (2006). The current economic recession, however, has produced state deficits that may reduce the public school systems' ability to hire new teachers.

<sup>95</sup> For an insightful article on the federalization of family law, see Jerome A. Barron, *The Constitutionalization of American Family Law: The Case of the Right to Marry*, in CROSS CURRENTS 257 (Sanford N. Katz et al. eds., 2000).

<sup>96</sup> Compare *Caban v. Mohammed*, 441 U.S. 380, 391 (1979) (holding that equal protection was violated by the New York Domestic Relations Law provision that allowed an unmarried mother, but not an unmarried father, to block her child's adoption because the sex-based discrimination advanced no important state interest), with *Lehr v. Robertson*, 463 U.S. 248, 267–68 (1983) ("If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights."), and *Stanley v. Illinois*, 405 U.S. 645, 665 (1972) (Burger, C.J., dissenting) ("The Illinois Supreme Court correctly held that the State may constitutionally distinguish between unwed fathers and unwed mothers. Here, Illinois' different treatment of the two is part of that State's statutory scheme for protecting the welfare of illegitimate children.").

<sup>97</sup> *Caban*, 441 U.S. at 388 (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

<sup>98</sup> For a discussion of the rejection of the tender years presumption, see Suzanne Reynolds et al., *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1649 (2007); see also SCHNEIDER & BRINING, *supra* note 81, at 876 ("The doctrine [of the tender years presumption] has been attacked in recent years, in significant part because it is thought to offend principles of gender equality and to be an inadequate surrogate for the best-interests principle. The doctrine has in some jurisdictions been abolished legislatively. In other jurisdictions, it has been abolished by judicial decisions that find the presumption unsatisfactory on policy grounds. In yet other jurisdictions, the presumption has been found to conflict with the fourteenth amendment's equal protection clause as it has been interpreted in cases like *Orr v. Orr*, 440 US 268 (1979). Finally, in some jurisdictions the presumption has fallen before state equal-rights amendments."). However, in practice more women still receive custody of their young children than men. *Id.* For a comparison of the disfavored tender years presumption and the favored primary caretaker preference, see KATZ, *supra* note 13, at 106 & 106 n.92.

disincentives for married women to work may be difficult, but certainly warrants some attention.<sup>99</sup> Most problematically, jurisprudence on the tax code's treatment of parents would only apply the rational basis analysis, which would likely be insufficient to attack the marriage penalty and similar tax disincentives.<sup>100</sup> Ultimately, however, it is not the law's place to dictate how married women should allocate their time. Although some may argue for a more feminist tax code, the tax code should be neither feminist nor anti-feminist.

In conclusion, the law necessarily impacts people's behavior in certain areas. Most illustratively, criminal law influences people's actions for the benefit of society's safety. In regard to the decision of a married woman to enter the workforce or a professional woman to enter marriage, however, the law has less cause to be a major influence. There is simply no support for either discouraging or encouraging all working married women—neutral laws are the remaining option.

### C. *Recommendations to Achieve a More Neutral Tax Code for Married Women*

Federal law therefore provides one of the most significant disincentives for married women to work: the tax code. Indeed, both the marriage penalty and the limitations on the child-care credit reveal a unique philosophy regarding married women—it is more important to treat them as part of a household than as individuals. Any unfairness they incur by virtue of being primary child-care providers, their lower wages, and their higher income tax brackets as secondary earners all become fairer so long as the household is considered as a whole. This philosophy inherently results from the tax code's treatment of the married couple as an economic unit.<sup>101</sup> The married *household* benefits from slightly wider income tax brackets, the married *household* benefits from a larger number of personal exemptions, and the married *household* benefits from the marriage bonus in one-income earner households. However, married *women* face disincentives to engage in paid work because most of the significant marriage tax benefits peak in one-income earner households.

There are several resolutions to these tax disincentives.<sup>102</sup> Of course, it is insufficient to simply reduce the tax bill, in absolute terms, for any particular subset of Americans suffering tax disadvantages under the current system. Instead, the aim of any reform must be to eliminate the discriminatory nature of the current tax code, which in essence transfers

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<sup>99</sup> For a similar discussion of the equal opportunities that must be afforded to both married and unmarried women, see SCHNEIDER & BRINING, *supra* note 81, at 1416.

<sup>100</sup> Jessica C. Kornberg, Comment, *Jumping on the Mommy Track: A Tax for Working Mothers*, 17 UCLA WOMEN'S L.J. 187, 213 (2008).

<sup>101</sup> For an excellent analysis of this concept, see Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509 (2006).

<sup>102</sup> For a summary of some potential resolutions, see Zelenak, *supra* note 12, at 3. See also KLEIN ET AL., *supra* note 43, at 633–36.

money from relatively equal two-income earning married couples through the tax penalty to one-income or to significantly unequal two-income earning married couples through the marriage bonus.<sup>103</sup> Such a transfer is not justified and its elimination would eradicate the most significant tax disincentives for the secondary income earner to enter the workforce.

Most importantly, the married tax schedule could have taxation brackets that are exactly double those of the single schedules. To avoid favoring a one-income earner household by increasing the attendant marriage bonus,<sup>104</sup> these double brackets could be limited to couples that have two-income spouses. However, the household's two incomes would have to be similar in amount, or else the marriage bonus would continue for significantly unequal earners. In other words, if one spouse earns \$75,000 and the other earns \$900, and if their tax brackets are double those of single filers, they benefit from a sizeable marriage bonus.<sup>105</sup> Therefore, double tax brackets could be limited to not only two-income earning spouses, but also to similarly earning spouses.<sup>106</sup> Here, Professor Nock's definition of equally dependent spouses "as those who earn no less than 40% of total family earnings" can be helpful in determining which two-income earner households should benefit from tax brackets double those of single filers.<sup>107</sup>

Nonetheless, even if *all* married households were to enjoy tax brackets double those of single filers' brackets—notwithstanding the attendant marriage bonus—the resulting system would be a mere return to the tax structure in 1948, which was undone in 1969 in response to single filers who resented the attendant windfall to one-income earner, married households.<sup>108</sup> This criticism has eased, however, by virtue of the fact that there are many more households with two-income earners today that are hurt by the marriage penalty than in the 1960s, due to a steep increase of women's participation in the labor force.<sup>109</sup> The flip side, of course, is that there are fewer households with one-income earner married couples that benefit from the marriage bonus than in the 1960s.<sup>110</sup> This helps alleviate the historical complaint that most households, by virtue of consisting of one-income earner married

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<sup>103</sup> See *supra* notes 33–35, 70 and accompanying text.

<sup>104</sup> See *supra* Part II.B.

<sup>105</sup> See *id.*

<sup>106</sup> This could be achieved through, for example, a separate filing schedule or separate taxation rates for these married couples.

<sup>107</sup> Nock, *supra* note 80, at 759.

<sup>108</sup> Zelenak, *supra* note 12, at 5–6.

<sup>109</sup> In 1967, there were 34,391,000 women with some kind of earnings, compared with 74,295,000 women in 2007. U.S. CENSUS BUREAU, *supra* note 18, at tbl.P-41. See also Ellen Yau et al., *Comparing Salaries and Wages of Women Shown on Forms W-2 to Those of Men, 1969–1999*, STAT. INCOME BULL., Fall 2003, at 274, 278–79 tbl.1, available at <http://www.irs.gov/pub/irs-soi/99inw2wm.pdf>.

<sup>110</sup> Nonetheless, it is true that the amount and reach of the marriage bonus is currently very large. See *supra* text accompanying note 34.

couples, would unfairly benefit from the marriage bonus as a result of tax brackets that were double those of single taxpayers.<sup>111</sup>

Moreover, not only do more women work today, but they also earn more than they did in 1969.<sup>112</sup> This justifies increasing the taxation brackets for married filers in order to avoid marriage penalties that were rarer in 1969, when married women's smaller or nonexistent income did not necessitate significantly larger marriage tax brackets to accommodate their added income.

Such a failure of the tax code to reflect changing reality is also illustrated by the Alternative Minimum Tax (AMT).<sup>113</sup> The AMT, a separate taxation plan created in the 1960s, aimed to remedy the previously frequent situation wherein ultra high-income households owed little or no income tax because of various tax benefits. As the AMT was not indexed to inflation and because of subsequent tax cuts, more middle-class households have become subject to the AMT over time—to their great disadvantage.<sup>114</sup> Furthermore, the AMT imposes significant marriage penalties because its exemption for couples is less than double the exemption for singles and, unlike the regular tax system, the AMT lacks a separate set of tax brackets for married households.<sup>115</sup>

Of course, to avoid the marriage penalty in the tax code, there could be no separate marriage filing at all. However, marriage would then lose its special status in the tax code despite the potential public policy benefits of: (1) supporting marriage and (2) treating the marital couple as one economic unit.<sup>116</sup> Therefore, in the alternative, each spouse could be progressively taxed as an individual to avoid small marital tax brackets and income stacking, while simultaneously keeping the various current benefits of filing jointly as a married couple, such as favorable deductions. This would maintain the significance of the marriage status under the tax code without counterproductively penalizing it.

Alternatively, tax reform measures might include expanding deductions to offset the marriage penalty, again focused on two-income earner households. Furthermore, as already noted in this Part, roughly equal two-income earner couples could have taxation schedules or rates different from one-income and significantly unequal two-income earner

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<sup>111</sup> See *supra* Part II.B.

<sup>112</sup> In 1969, women earned only 59¢ for every \$1 men made, versus the 77¢ to the \$1 they earned in 2007. U.S. CENSUS BUREAU, *supra* note 18, at tbl.P-40. Furthermore, in 1969, the average female joint filer reported earnings of \$3,429, as opposed to \$24,110 in 1999. Yau et al., *supra* note 109, at 278–79 tbl.1.

<sup>113</sup> For background on the AMT, see Michael D. Kim, Comment, *The Downward Creep: An Overview of the AMT and Its Expansion to the Middle Class*, 6 DEPAUL BUS. & COM. L.J. 451, 461 (2008).

<sup>114</sup> *Id.*

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

<sup>116</sup> Debating the public policy benefits of marriage and the treatment of spouses as one economic unit is beyond the scope of this Article, which, in suggesting reform measures within the current tax framework, assumes such benefits occur.



married couples.<sup>117</sup> Of course, legislation benefiting two-income earner married couples must avoid disadvantaging one-income earner married couples or single taxpayers.<sup>118</sup> However, any policy decision aiming to eliminate the tax disincentives for working married women requires eliminating the marriage penalty, at the risk of simultaneously aggravating the marriage bonus that disadvantages single taxpayers.<sup>119</sup>

As for the tax code's lack of distinction between married mothers and married women without children,<sup>120</sup> one potential compromise might be to change the tax law so as to incentivize one-income earner married households, and therefore to incentivize homemaking, but only when there are dependents in the household. In other words, families with minor children in the household could be supported by the tax laws through more substantial deductions, tax credits, or an entirely separate tax rate schedule. This way, not all married women would be so significantly disincentivized from seeking paid work.

The problem with this approach, however, is that it may be difficult to justify favoring only those households with children, as the tax court noted in *Smith v. Commissioner*.<sup>121</sup> One justification can certainly be the higher expense of maintaining such households and the public policy goal of encouraging high birth rates, which thereby may warrant tax relief on public policy grounds.<sup>122</sup> Still, subsidizing only households with children would further be complicated by the fact that not all households desire the same ratio of labor to leisure time and not all married women, or mothers, have uniform utility curves, meaning that any specifically formulated tax advantage or disadvantage for married women does not equally apply to everybody similarly situated.<sup>123</sup>

Nonetheless, any of these recommended tax changes would help neutralize the law toward working women who are married. The problem with implementing such recommendations, however, is the resulting cost to the federal treasury. To be politically viable, therefore, any solution may require an adjustment of the marginal tax rate brackets to sufficiently offset the cost of such reform. Furthermore, any tax code

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<sup>117</sup> See *supra* notes 106–07 and accompanying text.

<sup>118</sup> For an excellent discussion of the legislation benefiting only two-income earner married couples, see Zelenak, *supra* note 12, at 14–17.

<sup>119</sup> See *supra* Part II.B.

<sup>120</sup> See *supra* Part III.A.

<sup>121</sup> *Smith v. Comm'r*, 40 B.T.A. 1038 (1939), *aff'd*, 113 F.2d 114 (2d Cir. 1940). See also *supra* text accompanying notes 74–79.

<sup>122</sup> The Japanese government, for example, has been aiming to combat relatively low birth rates, and “[t]he government’s proposals are meant to counter a variety of Japanese policies and cultural issues believed to discourage parenthood. On the policy front, Japanese tax laws encourage single-income families with a tax deduction that keeps many mothers at home.” Daisuke Wakabayashi & Miho Inada, *Baby Bundle: Japan’s Cash Incentive for Parenthood*, WALL ST. J., Oct. 8, 2009, at A13, available at <http://online.wsj.com/article/SB125495746062571927.html>.

<sup>123</sup> See *supra* notes 56–58 and accompanying text. See also *supra* Part III.B.

reform may necessitate significant political maneuvering<sup>124</sup> because any solution, despite aiming for fairness, may inherently worsen the financial situation for some taxpayers while improving it for others.<sup>125</sup>

Importantly, however, the recommended changes would not necessarily cost the U.S. Treasury inordinately—by eliminating the incentives for married women to abstain from the work force, more taxable income is generated, thereby increasing the taxes collected. Specifically, the average two-income earner household would see a decrease in taxes, but it would not be overly dramatic.<sup>126</sup> Yet, the prospect of extra income, not taxed at the higher rates for secondary income earners, would translate to increased incentive for the secondary income earner to pursue paid work.<sup>127</sup> Moreover, the current tax revenues generated from the marriage penalty are simply transferred to fund the marriage bonus of one-income and significantly unequal two-income earner couples.<sup>128</sup> Eliminating this transfer would therefore have little net effect on the Treasury.

These recommendations are particularly important to implement if federal taxation rates lapse to the higher, pre-2001 levels. As the marriage penalty and bonus both result from the progressive nature of income taxation, any tax increase will exacerbate them.<sup>129</sup> For example, two single people each earning \$105,000 would each pay at the 28% rate.<sup>130</sup> Once married, they move into the 33% bracket.<sup>131</sup> Under pre-2001 rates, their bracket increases to 36%.<sup>132</sup> However, if the wife drops out of the labor market, they would be taxed at the 25% rate in 2009 or at the 28% rate pre-2001.<sup>133</sup> Any proposed increases in social security and Medicare payments further disincentivize the secondary income earner's decision to join the labor force. Therefore, to achieve the goal of advancing women's issues in the labor market,<sup>134</sup> any increase of income taxes must

<sup>124</sup> The details of which fall beyond the scope of this Article.

<sup>125</sup> See *supra* Part II.B.

<sup>126</sup> However, it is true that collectively these household savings would more substantially cost the U.S. Treasury in tax revenue. See *supra* note 33 and accompanying text. Nonetheless, these costs should at least partially be offset by the increased creation of taxable income resulting from the elimination of many people's tax disincentives to work.

<sup>127</sup> See *supra* Part II.B.

<sup>128</sup> See *supra* notes 33–35 and accompanying text.

<sup>129</sup> See *supra* Part II.B.

<sup>130</sup> The 2009 marginal dollar triggering amounts for each successive tax bracket can be found in the notes following I.R.C. § 1 (Supp. 2009). Rev. Proc. 2008-66, 2008-46 I.R.B. 1107, 1109–10; *supra* note 29.

<sup>131</sup> I.R.C. § 1; *supra* note 29.

<sup>132</sup> I.R.C. § 1 (2000) (current version at I.R.C. § 1 (2006)). See Diana Furchtgott-Roth, Editorial, *Obama Wife Penalty*, N.Y. SUN, Aug. 28, 2008, available at <http://www.nysun.com/opinion/obama-wife-penalty/84829>.

<sup>133</sup> See *supra* note 29; I.R.C. § 1 (2000) (current version at I.R.C. § 1 (2006)); Furchtgott-Roth, *supra* note 132.

<sup>134</sup> To advance such issues, President Obama signed, as his first law, the Lilly Ledbetter Fair Pay Act Law. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2,

be offset by a corresponding reduction of the tax code's disincentives for married women to work. In the meantime, the tax code remains highly unfavorable for married women in the workforce.

#### IV. CONCLUSION

Among the most fundamental barriers to the aggressive participation of many married women in the work force are economic disincentives. Perhaps one of the most significant culprits is the federal income tax code's treatment of secondary income earners, mostly composed of married women. Enacted by Congress to apply to everybody equally, the code instead significantly disadvantages married working women.

Specifically, the tax code currently contains a marriage penalty, which is aggravated by the progressive nature of taxation and is sensitive to increases in taxation. Meanwhile, the relatively small child-care credit requires that child-care expenses not exceed the secondary income, and disappears through income phase-outs. A better approach would be to craft more significant offsets to the marriage penalty for all working women, and more generous child-care tax credits that do not pervert incentives. Otherwise, the tax code continues to distort married women's choices and behavior, constituting a factor that impacts their presence and advancement in the workforce.

Without a doubt, it would be an oversimplification to mandate a simple reduction of the tax bill, in absolute terms, for a subset of Americans in an effort to redress these problems. Instead, the aim of any reform must be to eliminate the discriminatory nature of the current tax code, which in essence transfers money from two-income earner married couples through the tax penalty to one-earner and to substantially unequal two-income earner married couples through the marriage bonus. Such a transfer is unjustified and its elimination would eradicate the most significant tax disincentives for the secondary income earner to work.

Married women today encounter more obligations than ever before. Many of them share the role of economic provider with their husbands while maintaining a high proportion of the domestic work and child-rearing. To penalize them by decreasing their take home pay or by erecting disincentive barriers is simply counterproductive in most situations. They should neither be punished nor rewarded for the simple act of accepting paid work, but should instead labor under more neutral laws. After all, whether to pursue paid work should be a simpler question than most.

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123 Stat. 5 (codified at 42 U.S.C. § 2000a (2009)). He also signed an executive order forming the White House Council on Women and Girls. Exec. Order No. 13,506, 74 Fed. Reg. 11,271 (Mar. 11, 2009). These initiatives focus on promoting women in the workforce, but, as this Article argues, one of the most effective ways to do so is to increase their take home pay by neutralizing the tax penalties that burden working married women.

