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Taxation of Households: A Comparative Study

Wake Forest University Research Paper Series in Legal Studies

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May 6, 2010

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Forthcoming Vol. 55 St. Louis University Law Journal

I. Introduction

Some of us live alone, but most live in groups. Those of us who live in groups usually pool our income and expenses, somehow.[1] In crafting an income tax, one must determine whether to take such pooling into account, or not.[2] Either way, some living arrangements will be tax-advantaged, and others will be penalized.[3]

Neither taking pooling into account, nor not taking it into account, is necessarily fair. Furthermore, neither choice is simple. If pooling is taken into account, one must determine which groups should be recognized, and when.[4] Also, should there be one aggregate group tax return, or should income and expenses be reallocated to group members?

If pooling is not taken into account, then different groups will be taxed differently on the same aggregate income, depending upon who earns the income within the group.[5] Also, one must determine which "intra-group" transfers will be recognized, and which will be finessed. For example, do we tax Junior on the cost of his breakfast?

Different countries have made different choices, at different times.[6] Structurally, the choices fall into two categories: Individual Taxation and Group Taxation. Within the category

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[1] . "We believe firmly that the family is today, as it has been for many centuries, the basic economic unit in society." 3 Report of the Royal Commission on Taxation, 123 (1966).

> When it is asked whether one taxpayer is in the same situation as another, is the taxpayer an individual or a family? The sharing of both consumption and wealth within families supports continuation of present law in regarding the family as the unit of comparison. David Bradford, U.S. Treasury Dept., Blueprints for Basic Tax Reform 26 (1975).

See Marjorie Kornhauser, "Love, Money and the IRS," 45 Hastings L.J. 63 (1993); and Philip Blumstein & Pepper Schwartz, American Couples: Money, Work, Sex, figures 2-7 (N.Y. 1983); Michael Young, Distribution of Income within the Family, 3 Br. J. Soc. 305 (1952) for data on how family income is shared in the United States and the United Kingdom.

[2] . These issues transcend tax policy; they also impact upon welfare (especially relating to subsidies for child care), retirement, and health care policies. This essay, however, will stick to tax.

[3] . Many of us would begin with a presumption that taxation should be neutral as among varied lifestyle choices. Some of us would stop there. Others would go on and consider rebutting that presumption if a strong enough case could be made in societal terms for encouraging one lifestyle choice or another. Unfortunately, it is impossible for taxation to be totally neutral among lifestyle choices. Therefore, realistically, the issue becomes whether we should try to minimize the influence of taxation on lifestyle choices, or whether we should determine which lifestyle choice we favor, and then use taxation to encourage it.

[4] . See Notes 29-41 and accompanying text.

[5] . See Notes 18-20 and accompanying text.

[6] . The comparative literature on the income taxation of households includes: Henry Ordower, "Comparative Law Observations on Taxation of Same-Sex Couples," Tax Notes, April 10, 2006, at 229; Hugh Ault and Brian Arnold,

of Individual Taxation, some countries rigorously tax individuals.[7] Others tax individuals on earned income, but tax other income differently.[8]

Within the category of Group Taxation, some countries aggregate all household income to be taxed to one family member.[9] Others aggregate household income, but actually tax it as if a percentage was deemed earned by various family members.[10] Still others allow the taxpayers to elect either aggregate or separate taxation.[11]

There are other permutations of Group Taxation. Some countries split income among more than one wife.[12] Also, one can tax larger groups. There is the Hindu Undivided Family, which is recognized for tax purposes in India, Malaysia, Myanmar, Singapore, Pakistan, Nepal, Bangladesh, and Sri Lanka.[13] Conceivably, one could tax the aggregate income of a hippie commune[14] or some other group living arrangement.[15]

II. Two Numerical Examples

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eds., Comparative Income Taxation: A Structural Analysis (3[d] ed. 2010) 317-326; Janet Stotsky, "Gender Bias in Tax Systems," Tax Notes, June 9, 1997; Ken Messere, Tax Policy in OECD Countries (1993) 254-262; Joseph Pechman and Gary Engelhardt, "The Income Tax Treatment of the Family: An International Perspective," 43 Nat'l Tax J. 1 (1990); Norma Briggs, "Individual Income Taxation and Social Benefits in Sweden, the United Kingdom, and the U.S.A." IBFD Bulletin, June 1985; International Tax Congress, The Income, fortune, and estate tax treatment of household units, International Fiscal Association Cahiers de Droit Fiscal International LVIIa (1972); Grace Blumberg, "Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers," 21 Buff. L. Rev. 49 (1971); Oliver Oldman and Ralph Temple, "Comparative Analysis of the Taxation of Married Persons," 12 Stan. L. Rev. 585 (1960). For a broader perspective, see Goran Therborn, Between Sex and Power: Family in the World 1900-2000 (Routledge 2005); Ann Orloff, Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States, 58 Am. Soc. Rev. 303 (1993); Nancy Dowd, "Envisioning Work and Family: A Critical Perspective on International Models," 26 Harv. J. Legis. 311 (1989).

7. See Appendix, Table 3.

8. See Appendix, Table 4.

9. See Appendix, Table 5. The Royal Commission on the Status of Women in Canada recommended in 1970 that a husband and wife form a taxation unit with aggregated incomes. Report of the Royal Commission, Recommendation 55, p. 304 (1970).

10. See Appendix, Table 6.

11. See Appendix, Table 7

12. Nigeria and other Muslim countries have recognized multiple wives. Nigeria, in fact, grants a tax preference to the first wife, as opposed to succeeding wives. Janet Stotsky, Gender Bias in Tax Systems, Tax Notes, June 9, 1997. Iraq grants an additional allowance for each of the taxpayer's wives. Income Tax Law (2003) Article 12.

13. Acharya Shuklendra, Hindu Undivided Family: Taxation and Tax Planning (Allahabad 2000). See especially Chapter 10, which explains that the Hindu Undivided Family has some tax advantages over a partnership. See also, How One Can Create HUF (Hindu Unidivided Family), http://www.simpletaxindia.org/2008/05/how-one-can-create-hufhindu-undivided.html (last harvested May 21, 2009); Aurobindo Ponniah, "The Hindu Unidivided Family" talk given at IBFD, Amsterdam, July 2004.

14. Penelope Green, A Modern Answer to the Commune, N.Y. Times, Oct. 1, 2009, at D1.

15. Israel allows kibbutzim to file a single tax return. Israel section 54. However, the kibbutz itself functions as a government, taxing its members, often progressively, to equalize incomes and to pay for community services. Jo-Ann Mort, Gary Brenner, Our Hearts Invented a Place: Can Kibbutzim Survive in Today's Israel? Ithaca, N.Y. 2003.

Set forth below are two numerical examples, one comparing individual taxation, aggregate taxation, and the American joint return, and the other describing the French foyer fiscal. These examples show what is at stake, in terms of fairness and simplicity. Also, they demonstrate which lifestyle choices are tax-advantaged, and which lifestyle choices are tax-penalized, by the various tax structure options.

A. Individual Taxation, Aggregate Taxation, and the Joint Return

Imagine a tax regime in which the first $10,000 of income is taxed at 10%, income in excess of $10,000 but not over $20,000 is taxed at 20%, and income in excess of $20,000 is taxed at 30%.[16] Under such a regime, the following individual taxpayers would pay tax as set forth in Table 1:[17]

Table 1.

Taxpayer	Income	Tax as Individual
Alex	$15,000	$2,000
Becky	$15,000	$2,000
Charles	$0	$0
Deborah	$30,000	$6,000
Edward	$30,000	$6,000

Now, imagine that Alex and Becky establish a joint household, and Charles and Deborah establish a joint household. Edward remains single. If all five continue to be taxed as

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[16] . This example is inspired by Boris Bittker's seminal article, Federal Income Taxation and the Family, 27 Stan. L. Rev. 1389 (1975). The other classic article in the field is McIntyre and Oldman, Taxation of the Family in a Comprehensive and Simplified Income Tax, 90 Harv. L. Rev. 1573 (1977). For other general treatments, see Edward McCaffery, Taxing Women (1997); U.S. Dept. of Educ., Working Group on the Family, The Family: Preserving America's Future (1986); McIntyre and Steuerle, The Finance Project, Federal Tax Reform: A Family Perspective (1996); GAO Report, Tax Administration Income Tax Treatment of Married and Single Individuals (1996); Cong. Budget Office Study, For Better of Worse: Marriage and the Federal Income Tax (1997). Chancellor of the Exchequer, The Taxation of Husband and Wife (U.K. 1980).

[17] . The computation of both Alex's and Becky's tax is:

10% of the first $10,000 of income = $1,000
+
<u>20% of the last $5,000 of income = $1,000</u>
Total Tax = $2,000

The computation of both Deborah's and Edward's tax is:

10% of the 1st $10,000 of income = $1,000
+
20% of the 2nd $10,000 of income = $2,000
+
<u>30% of the 3rd $10,000 of income = $3,000</u>
Total Tax = $6,000

individuals,[18] then Alex and Becky will pay an aggregate tax of $4,000 on their aggregate income of $30,000[19], while Charles and Deborah will pay an aggregate tax of $6,000 on the same aggregate income of $30,000.[20] Edward, of course, continues to pay $6,000.

Why should Charles and Deborah pay more tax than Alex and Becky? If households with the same aggregate income should pay the same aggregate tax, then either both couples should pay tax of $4,000, or both couples should pay tax of $6,000. The simplest thing is for both households to pay $6,000. This result is achieved by consolidating the household income into one return, and applying the rates.[21]

This solution, however, penalizes Alex and Becky. When they were single, each paid taxes of $2,000, for a total of $4,000. However, when they become a household, they pay total taxes of $6,000. Why should the mere status of "household" cause them to pay $2,000 more in tax? Moreover, consider that both couples—Alex & Becky and Charles & Deborah—have $30,000 to maintain the lifestyles of two people, while Edward has $30,000 to maintain the lifestyle of just one person. Surely, Edward has more ability to pay taxes than either couple. Shouldn't he pay more?

The alternative is to levy a tax of $4,000 on both couples. This solution is achieved by the American joint return.[22] In each case, half of the aggregate household income of $30,000 is taxed to each spouse, regardless of how it was in fact earned. Clearly, this solution is unfair to Edward.[23] Why is his $30,000 of income taxed at $6,000, while the income of the two couples is taxed at $4,000? Further, as to Edward's purported higher ability to pay, he will point out that he lacks the economies of scale enjoyed by the two couples. Therefore, his ability to pay is not that much higher after all.

As Boris Bittker pointed out decades ago, one can have three goals:

1) Progressive rates
2) Fairness as between couples and single taxpayers; and
3) Fairness as to couples with the same aggregate income.

One can achieve two of the three goals, but never all three.[24]

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18 . See Appendix, Table 3 for countries which take this approach.
19 . $2,000 tax on Alex + $2,000 tax on Becky = $4,000.
20 . $6,000 tax on Deborah + 0 tax on Charles = $6,000.
21 . See Appendix, Table 5 for countries which take this approach.
22 . See Appendix, Table 6 for countries which take this approach. For the impact of this approach on reporting and liability issues, see Lily Kahng, Innocent Spouses: A Critique of the New Tax Laws Governing Joint and Several Tax Liability, 49 Vill. L. Rev. 261 (2004).
23 . For more on the unfairness to singles, see Mary K. Black and Julie M. Black, The Bias Against Single Parents in the Internal Revenue Code, Tax Notes, March 15, 2010, at 1397.
24 . One obvious solution is to abolish progressive rates. However, that debate goes beyond the bounds of this inquiry. Bittker, Stan. L. Rev. See also, Lawrence Zelenak, "Doing Something About Marriage Penalties: A Guide for the Perplexed," 54 Tax L. Rev. 1 (2000). For the marriage penalty on the earned income tax credit, see Ann Alstott, Oliver Oldman and Ralph Temple, Comparative Analysis of the Taxation of Married Persons, 12Stan. L.

So far, it would appear that the simplest solution would be to tax only individuals, no matter what. This solution is the most popular.[25] The next simplest solution would be to aggregate the income of husband and wife, and apply the rates.[26] However, both have fairness issues, as shown above.

Anything which reallocates income to those who did not in fact earn it seems more complex. The American joint return was discussed above. The French foyer fiscal might be viewed as the American joint return on steroids.

B. The French Foyer Fiscal

In the foyer fiscal, each household member receives a share, or a fraction of a share. All household shares are totaled to derive the family coefficient. Then, aggregate household income is divided by the family coefficient to determine how much income is allocated to each share. Finally, each household member is taxed accordingly.[27] Note that, in this system, it does not matter which family member actually earned the income.

Consider the following possibilities:

Bachelor

Childless couple

Couple with one or two children

Single or divorced parent with one or two children.[28]

Rev. 585 (1960); Pamela Gann, The Earned Income Deduction: Congress's 1981 Response to the 'Marriage Penalty' Tax," 68 Corn. L. Rev. 468 (1983). For the particular impact of the marriage penalty on minorities, see Dorothy Brown, "Race, Class and Gender Essentialism in Tax Literature: The Joint Return," 54 W & L L. Rev. 1469 (1997); Beverly Moran and William Whitford, "A Black Critique of the Internal Revenue Code," 1996 Wisc. L. Rev. 751 (1996); Mylinh Uy, "Tax and Race: The Impact on Asian Americans," 11 Asian L. J. 117 (2004).

25 . See Appendix, Table 3.

26 . See Appendix, Table 5.

27 . French General Tax Code, §194. See also, IBFD European Tax Handbook 251; French Taxation: http://www.impots.gouv.fr.portal/deploiement/p1/fichedescriptive_1006/fichedescriptive_1006.pdf, at 28-29; http://doc.impots.gouv.fr/aida/Apw.fcgi?FILE=Index.html. Ayla Lari, Sharing Alike: French Family Taxation as a Model for Reform, 37 Duquesne L. Rev. 207 (1999); Nancy Dowd, "Envisioning Work and Family," 26 Harv. J. Leg. 311 (1989). See generally, Louis Kaplow, "Optimal Distribution and the Family," 98 Scand. J. Econ. 75 (1996). There are caps expressed in Euros for tax advantages for larger families. A similar taxation scheme was considered in the United Kingdom in 1920. Colwyn Committee, Presented to Parliament by Command of His Majesty, Report of the Royal Commission on the Income Tax (1920) Cmd. 615, at VIII, 59.

Michael McIntyre and Oliver Oldman, Taxation of the Family in a Comprehensive and Simplified Income Tax, 90 Harv. L. Rev. 1573, 1605, Table I, also suggested a scheme similar to the foyer fiscal.

28 . Divorced ex-spouses are treated differently from widowed ex-spouses. French General Tax Code, §194.

In each case, assume that the aggregate household income is $30,000, and that the tax rates are as before.

The bachelor would have one share, leading to a family coefficient of one. The entire $30,000 of household income would be allocated to his one share. Thus, he would pay tax of $6,000.

For the childless couple, each would receive one share. Therefore, the family coefficient would be two. The household income of $30,000 divided by two would yield $15,000 allocated to each share. Accordingly, husband would pay tax on $15,000, or $2,000 tax, and wife would pay the same. The aggregate household tax would be $4,000, just like a joint return.

With a father, mother, and one child, the father would receive one share, the mother would receive one share, and the child would receive one-half share. Therefore, the family coefficient would be 2 ½. Dividing household income of $30,000 by 2 ½ , each full share would be allocated $12,000 of income, and a half share would be allocated $6,000. Accordingly, father would pay $1,400 tax on $12,000 of income, mother would pay the same, and child would pay $600 tax on $6,000 of income, for an aggregate tax of $3,400.

With a father, mother and two children, father receives one share, mother receives one share, and each child receives a half share. The family coefficient is three. Father pays $1,000 tax on $10,000 of income, mother pays the same, and each child pays $500 tax on $5,000 of income, for an aggregate tax of $3,000. For reasons that escape me, the shares of the third and subsequent children go up to full shares.

For a single or divorced parent with one child, each receives a full share. Thus, the total tax is $4,000—just like a joint return.

For a single or divorced parent with two children, the parent and the first child receive a full share and the second child receives a half share. Thus, parent would pay $1,400 tax on $12,000 of income. Child #1 would pay the same. Child #2 would pay $600 tax on $6,000 of income, for an aggregate tax of $3,400. The third and subsequent children would receive a full share.

All of these results are summarized in the Table 2:

	Single	Couple No Children	Couple 1 Child	Couple 2 Children	Single 1 Child	Single 2 Children
Members	**Bachelor**	**Man** **Woman**	**Man** **Woman** **Child**	**Man**, **Woman** **Child #1**, **Child #2**	**Adult**, **Child**	**Adult**, **Child #1**, **Child #2**
Coefficient for each Member	**Bachelor** 1	**Man** 1	**Man** 1 **Woman** 1	**Man** 1 **Woman** 1	**Adult** 1 **Child 1**	**Adult** 1 **Child #1** 1

		Woman 1	**Child** ½	**Child #1** ½ **Child #2** ½		**Child #2** ½
Family Coefficient	1	2	2 ½	3	2	2 ½
Income/Coefficient	$30,000	$15,000	$12,000	$10,000	$15,000	$12,000
Income for each Member	**Bachelor** $30,000	**Man** $15,000 **Woman** $15,000	**Man** $12,000 **Woman** $12,000 **Child** $6,000	**Man** $10,000 **Woman** $10,000 **Child #1** $5,000 **Child #2** $5,000	**Adult** $15,000 **Child** $15,000	**Adult** $12,000 **Child #1** $12,000 **Child #2** $6,000
Tax for each Member	**Bachelor** $6,000	**Man** $2,000 **Woman** $2,000	**Man** $1,400 **Woman** $1,400 **Child** $600	**Man** $1,000 **Woman** $1,000 **Child #1** $500 **Child #2** $500	**Adult** $2,000 **Child** $2,000	**Adult** $1,400 **Child #1** $1,400 **Child #2** $600
Total Tax	$6,000	$4,000	$3,400	$3,000	$4,000	$3,400

Note that households with the same aggregate income of $30,000 pay taxes that range from $3,000 to $6,000, depending upon the size and nature of the household. Clearly, single, childless taxpayers bear the heaviest burden. Partners and children lower the taxes, sometimes in surprising ways.

III. Component Factors

An initial decision must be made whether to tax individuals or groups. If groups are to be taxed, then one must also decide which groups. Moreover, one must decide whether or not income should be allocated to those who did not earn it, or expenses should be allocated to those who did not pay them. There is no obviously fair way to do it, and a multitude of factors come into play. Each of these factors will be addressed in turn.

A. Which Groups Should Be Recognized?

Should taxes reflect the way people actually live, or not? Some would address the issue of recognizing groups in those broad terms. However, all of us would have some level of concern as to the consequences of our decisions. Would recognizing groups help them, or hurt them, in tax terms?

As shown by the numerical examples above, there is no easy answer. If there is only one rate schedule, then aggregating the income of a group will usually lead to increased taxation of that group. On the other hand, reallocating income within a group, as is done in the American joint return and the Foyer Fiscal, would usually lead to lower aggregate taxation of the group. If, however, there is more than one tax rate—perhaps one for singles and one for marrieds, then all bets are off. One would have to know more about the different rate schedules to know who is tax-favored and who is not.

1. Heterosexual Couples

a. Married.

Does marriage deserve special tax treatment? Arguably, marriage is a time-honored institution which strengthens the stability of society. Therefore, it should be encouraged.[29]

As to administrability, it is easier to define and determine the existence of the formal marriage relationship than it is to determine some other group arrangements.[30] Therefore, formal marriage has certain advantages from an administrative point of view.

b. Unmarried

Unmarried heterosexual couples presumably pool income and expenses in the same variety of ways that married couples do. Therefore, if taxation should follow the money, the two relationships should be treated the same.[31] Some, however, would argue that unmarried heterosexual relationships are immoral and should be discouraged. Alternatively, some might argue that such relationships are inherently unstable, and therefore detrimental to society. Yet,

[29] . See Amy Braverman, Healthy Wealthy, & Wed, 96 University of Chicago Magazine (Oct. 2003) for statistical arguments that married people are better off. David Cameron, the leader of the Conservative Party in the United Kingdom, agrees, and feels that marriage should be recognized in the tax system. "David Cameron reflects," BBC Sunday AM interview, July 8, 2007.

[30] . Formal marriage may be easier to define than some relationships; that does not make it easy to define. See Mary Wenig and Toni Robinson, Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant, 8 Va. Tax Rev. 773 (1989). Even in the United States, notions of family have changed over time. Courtney G. Joslin, The Evolution of the American Family, US Davis Legal Studies Res. Paper no. 200 (2009).For an odd marriage relationship, see Ann Garrels, NPR News Bagdad, Short Term Marriages Gain Popularity in Iraq, Morning Edition, March 7, 2006.

[31] . For data on how they are treated differently, see Elaine Maag, Taxes and Marriage for Cohabiting Parents, Tax Notes, May 23, 2005, at 1031.

how much can the institution of marriage do to strengthen society when 50% of marriages fail in the United States?[32]

Administration of a civil union regime should not be too difficult, in light of recent experiences.[33] Presumably, it would entail the same problems as marriage, which, of course, is defined differently in different states and countries.[34] Accordingly, considering both general and administrability concerns, the case for separate treatment of married couples is neither better nor worse than the case for separate treatment of unmarried heterosexual couples.

2. Homosexual Relationships

Those who favor traditional marriage as a bulwark of society would oppose tax advantages for homosexual marriage. Also, there are those who oppose homosexual marriage on moral, religious, and legal grounds.[35] However, in certain situations, homosexual couples are tax-favored over heterosexual couples. For example, in the United States, in those situations in which the couple, if legally married, would have experienced a tax penalty, homosexual couples do better.[36]

Children, however, are another matter. The relevance of children and population policy will be addressed in their own right below. However, assuming that encouraging children is a

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32 . Statistical Abstract of the United States 2009. Table 1292, Marriage and Divorce Rates by Country: 1980 to 2006. Divorce rates, of course, vary. The United States is on the high end, and Japan, Ireland, Italy and Spain are on the low end.

33 . See generally, Frank Berall, "Tax Consequences of Unmarried Cohabitation," 23 Quinnipiac L. Rev. 395 (2004). Mozambique Article 18 allows de facto unions to elect to be taxed as households. See also the Vermont Civil Union statute, Title 15 Chapter 23, and the Canadian statutory definition of "common law partner, in subsection 248(1) of the Canadian Income Tax Act. Australia, France, Iceland, the Netherlands, and the United Kingdom also recognize unmarried couples for tax purposes. Australia: Ault p. 320; France: http://www.impots.gouv.fr.portal/deploiement/p1/fichedescriptive_1006/fichedescriptive_1006.pdf. Iceland: IBFD Global Tax Handbook 2009 ¶1.1, p. 281; Netherlands, IBFD Global Tax Handbook 2009, ¶1.1, p. 459, Ault p. 321; United Kingdom, IBFD Global Tax Handbook 2009, ¶1.1, p. 669, Ault p. 321.

34 . For an example of the difficulties of determining the tax consequences of the creation and dissolution of unmarried cohabitation, see Reynolds v. Commissioner, T.C. Memo. 1999-62.

35 . There is a rich literature on tax issues related to homosexual couples, especially relating to the Defense of Marriage Act in the United States. See, Patricia Cain, "Unmarried Couples and the Mortgage Interest Deduction," Tax Notes, April 27, 2009; Patricia Cain, "Taxing Families Fairly," Santa Clara U. School of Law, Legal Studies Research Paper Series, Working Paper No 08-53 (2008); Patricia Cain, "Relitigating Seaborn: Taxing the Community Income of California Registered Domestic Partners," Tax Notes, May 1, 2006; Henry Ordower, "Comparative Law Observations on Taxation of Same-Sex Couples," Tax Notes, April 10, 2006; William Kratzke, "The Defense of Marriage Act is Bad Income Tax Policy," 35 U. Mem. L. Rev. 399 (2005); Anthony Infanti, "Prying Open the Closet Door: The Defense of Marriage Act and Tax Treaties," Tax Notes, Oct. 25, 2004; Patricia Cain, "Dependency, Taxes, and Alternative Families," 5 J. Gender Race & Just. 267 (2002); Dennis Ventry, "No Income Splitting for Domestic Partners: How the IRS Erred," Tax Notes, Mar. 13, 2006; James Alm, M. Badgett, Leslie Whittington, "Wedding Bell Blues: The Income Tax Consequences of Legalizing Same-Sex Marriage," 53 Nat. Tax J. 201 (2000).

36 . In the United States, there are homosexual couples, each of whom earns more or less half of the household income. In many cases, these couples pay less aggregate tax than they would have if they had been allowed to marry.

legitimate interest of the state, one might argue that benefiting heterosexual relationships encourages children, while benefiting homosexual relationships does not.

This position can be attacked as well. Homosexual couples can, and do, adopt. Moreover, it seems unlikely that homosexual parents are less capable parents, or manage less stable households, than heterosexual couples. However, there are those who believe that heterosexual couples, married or unmarried, are fitter parents.[37]

Whether or not homosexual relationships should be recognized, and possibly tax-favored, depends upon a number of factors. First, the income pooling and expense sharing is probably no different from heterosexual relationships. Second, one would have to sort out one's views on homosexual relationships on non-tax grounds. Finally, administrability would be problematic now, in most jurisdictions. However, if the country or state were willing to provide a statutory definition for recognized homosexual relationships, they would be no more difficult to administer than heterosexual relationships.

3. What's Love Got to Do With It?

So far, the couples considered have all, presumably, enjoyed some sort of romantic attachment. What about couples (and, presumably, larger groups) who are together for reasons other than affection? What about two room-mates, of whatever gender, who share an apartment and other expenses because neither one alone could afford Manhattan rentals? What about a niece who lives with, and cares for, her disabled aunt? A Canadian Report has proposed that, if other groups are to be recognized by the government, these groups should be recognized as well.[38] Once again, as one strays further from traditional family groupings, difficulties of documenting the arrangement multiply. And yet, the pooling of income and sharing of expenses might well be identical.

4. Larger Groups

Should larger groups be recognized? Recall that simply aggregating the taxable income of a larger group of adults, without providing a separate rate schedule, would probably result in higher taxes on the group. Adding in the children, however, is another matter. Presumably, adding children to the taxable mix is usually irrelevant on the income side, since children earn

[37] . One might also argue that couples of whatever gender, married or unmarried, are better at child-rearing than are single parents. However, "…the effects of single-parent family status on children's well-being is not fully conclusive." OECD, Doing Better for Children (2009) at 141.

[38] . Law Commission of Canada, Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships, 2001. http://www.samesexmarriage.ca/docs/beyond_conjugality.pdf. See Lisa Philipps, Cracking the Conjugal Myths: What Does it Mean for the Attribution Rules? 50 can. Tax J. 1031 (2002); Shari Motro, A New I Do: Towards a Marriage Neutral Income Tax, 91 Iowa L. Rev. 1509 (2006), [proposing that only couples legally committed to sharing their income, regardless of marital status, be permitted to file jointly]; Neil Brooks, "The Irrelevance of Conjugal Relationships in Assessing Tax Liability," in John Head and Richer Krever, eds., Tax Units and the Tax Rate Scale, Australian Tax Research Foundation Conference Series No. 16. For further thoughts on the difficulties of defining the relevant groups, see Wendy Gerzog, "Families for Tax Purposes: What about the Steps?" http://ssrn.com/abstract=1115043.

negligible taxable income. However, if the medical and other expenses of children are added in, certain floors on deductions might be more easily achieved.[39]

Administrability, however, is a problem. We know what a married couple is. Presumably, we would have little trouble documenting a civil union. The Hindu Undivided Family (HUF), similarly, is probably easy to define, since it flows from a long tradition in Hindu law.[40] However, when it comes to larger entities, such as the nuclear family plus a few in-laws, or the hippie commune, one does wonder how the groups will be defined and documented, or whether society would be comfortable with the invasions of privacy necessary to apply the definitions in real-life situations.[41]

B. Children

As a general matter, personal expenditures are nondeductible. One's tax bill should not depend upon whether one lives extravagantly or frugally. Moreover, if one were to compare two taxpayers with equal personal expenditures, it should make no difference to their taxes if one spends her money on opera tickets while the other spends her money on a yacht. But are the expenses of children in the same category as opera and boating?[42]

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39 . See Notes 66-70, infra, and accompanying text.

40 . . The Hindu Undivided Family (HUF) is all persons who are lineal descendants of a common ancestor, their wives, and unmarried daughters. However, to achieve the special tax treatments of HUFs, the property must be owned by the "coparcenary," which is only the male members of the family, who hold property interests due to their birth. Aurobindo Ponniah, The Hindu Undivided Family, July 2004, talk given at IBFD, Amsterdam.

41 . David Duff, Kim Brooks, Benjamin Alarie, Lisa Philipps, Canadian Income Tax Law 2d ed. 2007, at 25.

42 . I have argued elsewhere that discretionary personal expenses should be nondeductible, while nondiscretionary expenses should be deductible. In this light, the expenses of child-rearing are nondiscretionary. One might argue that, even though child care expenses are nondiscretionary once the babies are born, they are the product of an initial personal choice to have children. However, one might also argue that the nondiscretionary expenses of treating lung cancer were initially caused by the personal decision to smoke, etc. Therefore, if child care expenses should be deemed nondeductible due to the personal choice involved, then so should many medical expenses. See Joel Newman, "The Deductibility of Nondiscretionary Personal Expenses," 6 Am. J. Tax Policy 211 (1987). See also Symes v. Canada, [1993] 4 S.C.R.695 (Supreme Ct. of Canada), dissenting opinion of L'Heureux-Dube, J:

> The decision to have children is not like any other "consumption" decision. To describe the raising of children in comparable terms to "choosing" to purchase a certain kind of automobile or live in a certain dwelling is simply untenable. As well, the many complexities surrounding child care make it inappropriate to adopt the language of voluntary assumption of costs, where those costs may, in fact, be allocated in a discriminatory fashion—the burden falling primarily on women.

As household income rises, the welfare arguments for tax breaks for children subside. Therefore, I supported the temporary phaseout of the dependency exemption for higher incomes in U.S. law, IRC §151(d)(3), and wished that it had been made permanent.

See generally, "Female Power," Economist, Jan. 2, 2010; Tsilly Dagan, "Ordinary People, Necessary Choices: A Comparative Study of Childcare Expenses;" Audrey Macklin, "Symes v. M.N.R.: Where Sex Meets Class," 5 Can. J. Women & L. 498 (1992); Dorothy E. Smith, "A Peculiar Eclipsing: Women's Exclusion from Man's Culture," 1 Women's Studies Int. Quart. 281 (1978).

Somehow, it just doesn't seem right to categorizing child-rearing as just another hobby. Admittedly, there are some who take their hobbies very seriously—perhaps even more seriously than others take their child-rearing responsibilities.[43] And yet, at the very least, there is the dimension of population policy. If everyone decided not to have children, then, assuming no immigration, the nation would cease to exist. No such stakes are at play when we decide whether to go sailing, or to attend the opera.

Also, children are citizens, whom the state is obligated to nurture and protect. If the parents do not pay for child care, then the state must pay.[44] As yet, the state has no similar obligations toward neglected pleasure boats or opera houses. These differences suggest that the state already subsidizes child-rearing far more than other personal lifestyle choices. Are these subsidies sufficient, or should there be tax benefits as well?[45]

Population policy should be addressed in its own right. Most developed countries are now facing declining birth rates. As a result, there are questions as to whether the birth rate is sufficient to keep the population constant. Further, as birth rates decline and life spans increase, populations age, with serious consequences for retirement and health care policies, among others. Depending on one's perspective, these trends could be good news,[46] or bad news.[47]

Population policy has always been deemed a legitimate area for state intervention. To give a few examples, bachelors were penalized in ancient Rome.[48] In Germany during the Third Reich, mothers with four or more children were given Mother's Honour Crosses—bronze for four children, silver for six, and gold for eight or more. Holders of the Cross were entitled to go to the head of the line in grocery stores, and be saluted by Hitler Youth. Hitler personally pinned

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[43] . Consider H.R. 3501, 111th Cong., 1st Sess. (2009), which would provide a tax deduction for pet care expenses.

[44] . For low-income families, the welfare dimensions of child expenditures are paramount, for it is in these cases that the government is more likely to step in. In contrast, for high-income families, the welfare dimension is far less important. Perhaps it makes sense, then, that, in the American system, the dependency exemption temporarily phased out for higher incomes. IRC §151(d)(3).

[45] . An unstated premise of this discussion is that children do better if they come from households with more money. Tax subsidies are one way of providing more money to those households. There is a correlation between household income and child well-being, but it is not as strong as some might think. OECD, Doing Better for Children, 2009, Table 2.3, p. 31.

[46] . See, Go forth and multiply a lot less, Economist, Oct. 31, 2009, at 29, on the environmental benefits of a declining population.

[47] . See Special Report on Ageing Population: A Slow-Burning Fuse, The Economist, June 27, 2009. Israel has its own population dilemma, as it wishes to replace those who were killed in the Holocaust. Lourdes Gardcia-Navarro, No Small Family Gatherings for 99-Year-Old Rabbi, NPR Morning Edition, October 13, 2009. Sadly, Israel is not the only nation with such genocide concerns.

Of course, this discussion becomes silly unless it can be shown that government policy, and especially fiscal policy, is effective in manipulating the birth rate. There is some evidence that it is indeed effective. Alma Cohen, Rajeev Dehejia, Dmitri Romanov, Do Financial Incentives Affect Fertility? Harvard Law School John Olin Discussion Paper Series, No. 605 (2007).

[48] . Acta Divi Augusti; Dio Cassius, Roman History 54.16.1-2; Tactius, Annals, 3.25.

on the gold cross. For mothers who had ten children, Hitler himself would be godfather, provided that the tenth child was a boy, and the mother named him Adolf.[49]

Tax incentives and penalties are also common.[50] The U.S.S.R and many former satellite nations enacted bachelor taxes to increase population.[51] Some American territories and states, when they were underpopulated, also contemplated bachelor taxes.[52] Also, the French foyer fiscal, the Hindu Undivided family, and even the American dependency exemption, can be seen as tax devices which encourage large families.

In terms of personal allowances for children, there is a great variety in approach. Some countries give the same allowance per child, no matter how many children.[53] Some cap the allowances after a stated number of children.[54] In some, the per-child allowances get larger as the number of children increases.[55] In others, the allowances get smaller.[56] In Myanmar, the allowance goes up as the child gets older.[57] In two, one gets no tax relief unless one has the requisite number of children.[58] Finally, many countries give no tax relief at all.[59]

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49 . Richard Evans, The Third Reich in Power, 1933-1939 (N.Y. 2005) 516-517. For similar, more recent example in Russia, see C. Chivers, Putin Urges Plan to Reverse Slide in the Birthrate, N.Y. Times, May 11, 2006, at A1.

50 . There is a rich literature on children and tax and fiscal policy, especially in the U.S., including: Katherine Pratt, Deducting the Costs of Fertility Treatment, Loyola-LA Legal Studies Research Paper No. 2009-33; Nina Olson, Uniform Qualifying Child Definition: Uniformity for Most Taxpayers, Tax Notes, April 10, 2006; Len Burman and Laura Wheaton, Who Gets the Child Tax Credit? Tax Policy Center and Urban Institute (2005); William Gale and Laurence Kotlikoff, Effects of Recent Fiscal Policies on Children, Tax Notes, June 7, 2004; C. Garrison Lepow, The Flim-Flam Father: Deconstructing Parent-Child Stereotypes in Federal Tax Subsidies, 5 N.Y.U. J. Legis. 129 (2001); White House Council of Economic Advisors, The Economics of Child Care (1997).
Not all birthrates are created equal. Dorothy Brown, in Race and Class Matters (cite) reports that the Senate Finance Committee did not want to increase the earned income tax credit for additional children for fear that it would create an “economic incentive for having more [low-income] children.” S. Rep. No. 1230, at 425-6 (1972).
More recently, some Christian conservatives have fretted about low European birthrates for fear that the Christian population will be outnumbered by the Muslim population. Kathryn Joyce, “Missing: The ‘Right’ Babies,” That Nation, March 3, 2008.

51 . Oldman and Temple, Comparative Analysis, 12 Stan. L. Rev. 585, at note 33, 42; Oldman and Temple, Tax Legislation Applicable to Women (U.N. Doc. No. E/CN.6/344)(1959). Current Digest of the Soviet Press, June 6, 1990 Vol. 42, NO. 18, p. 24 Abolishing Bachelors Tax Adopted; BBC Summary of World Broadcasts, April 2, 1990, Part 2, Eastern Europe; C. Special Supplement: Meeting of Bulgarian Nat’l Assembly (“The amendment removes the so-called bachelor’s tax levied on family and non-family citizens who have no children.”). For more recent analysis, see C.J.Chivers, Putin Urges Plan to Reverse Slide in the Birthrate,” N.Y.Times, May 11, 2006, at A1.

52 . Missouri session Laws 1920, 1st Session Chap. L. [one dollar tax on free white bachelors between the ages of 21 and 50]; An earlier Missouri tax was repealed on January 12, 1822. Indiana attempted to tax bachelors over the age of 25 in 1907. UPI May 19, 1985, Sunday BC cycle *Statehouse Quirks.* On quite a different theory, H.L. Mencken proposed a one dollar a day bachelors’ tax, because, he claimed, it was worth at least that much to be free. John Chalberg, Review of Marion Rodgers, Mencken and Sara: A Life in Letters. 34 National Review 67, Oct. 9, 1987.

53 . See Appendix, Table 8.

54 . See Appendix, Table 9. Caps on households can perform other functions. See the New York City Housing and Maintenance Code §27-2075, setting maximum permitted occupancy rates for city dwellings.

55 . See Appendix, Table 10.

56 . See Appendix, Table 11.

57 . 1946 Burma Finance Act Section 2.

58 . See Appendix, Table 12.

These various approaches suggest different ways of thinking. Does each additional child have the same marginal cost? If not, do expenses go up disproportionately as the family grows? Alternatively, are there economies of scale, so that costs go down as the number of children goes up? Do older children cost more than younger children? Surely, older children eat more, but younger children require more constant attention.[60]

Can government justifiably require that a household have at least a certain number of children before granting tax relief? Perhaps having children below the requisite number poses no hardship. Perhaps, alternatively, for purposes of population policy, having more children needs to be encouraged. On the other hand, can government justifiably cap the tax relief after a stated number of children? Could they, perhaps, believe that families above a certain size are inappropriate or unhealthy?

Surely, at least some of these concerns, if not all of them, cause discomfort. Why should it be the business of government to inquire so closely into the economics of our child-rearing decisions? Perhaps, if we could sort out the discomfort, we would be well on the way to a coherent view on what the tax policy should be.

C. Economies of Scale and Imputed Income

"While two cannot live as cheaply as one, economies are possible when two people share bed and board."[61] It is far more efficient to provide housing space for two or more, as compared to a single person. A quick look at any grocery store will prove that food portions are generally designed for households of two or more.[62] Anyone who has booked a vacation trip can tell you about the premium prices paid if one goes alone. If the income tax is to be based upon ability to pay, then shouldn't groups be taxed more heavily, to reflect these advantages? Arguably, that is what group taxation does.

Moreover, in some groups, some of the adults do not work outside the home. In such cases, those adults (or older children) typically provide services to the household, such as

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59 . See Appendix Table 13 Of course, it is quite possible that these countries grant subsidies for children outside of the income tax. In the UK, for example, child allowances were abolished in 1979-80 when the child benefit scheme was introduced. John Tiley, Revenue Law, 3d ed. 1981 at 6.24.

60 . For data on the relationship between expenditures for children and the age of the children, see OECD, Doing Better For Children, 2009, Chapter 3. Would it, perhaps, make even more sense to key the children's allowances to the weight of the children?

61 . Report of the Royal Commission on Taxation (Ottawa 1966) v. 3 at 117. See also, David Duff, Kim Brooks, Benjamin Alarie and Lisa Philipps, Canadian Income Tax 2d ed. (2007) at 24.

62 . Okay, so you can save the excess for leftovers, but who wants to? In my experience, some foods, such as lasagna, are better the second night, while others, such as string beans, are assuredly not.

The Royal Canadian Commission suggests that there might be diseconomies to married couples for low-income groups (who could otherwise live in larger communities), and economies of scale for middle-income couples. 3 Royal Commission on Taxation 15-16 (1966). McIntyre and Oldman suggested that the actual arrangements of married couples were far too various for any to make blanket assumptions about the presence or absence of economies of scale for the entire category. Michael McIntyre and Oliver Oldman, Taxation of the Family in a Comprehensive and Simplified Income Tax, 90 Harv. L. Rev. 1573, at note 80 (1977).

housekeeping and child care. Typically, there is neither money paid nor income taxes levied on the value of this imputed income.[63] Imagine, for example, Couple AB and single person C. A works outside the home, earning $90,000. B does not work outside the home, but does take care of the house. C works outside the home, and earns $100,000. However, C pays a cleaning service $10,000 to take care of the house.

The cash flow is set forth below:

	A + B		C
Income	$90,000 + 0	= $90,000	$100,000
Housekeeping expense		--0	--$10,000
Net cash flow		$90,000	$90,000

Both Couple AB and single person C have net cash flow of $90,000 and a clean house. Yet, without taxing imputed income, Couple AB will be taxed on $90,000, while single person C will be taxed on $100,000. Given the problems with taxing imputed income, can higher taxation of groups be defended as a viable substitute?[64]

The possible unfairness, however, is not caused by A and B's decision to live together. Admittedly, that decision probably made it possible for one of them to stay at home. The presence of one of them in the home made their housekeeping options greater, and perhaps more pleasant. However, C is not without options. There is nothing to prevent C from doing the housework himself or herself. Presumably, C could either stay up later, or forego other leisure activities. Similarly, there is nothing to prevent Couple AB from hiring out the housework and freeing up B to do something else with his or her time. Seen in this light, it would appear that the possible unfairness arising from the failure to tax imputed income from housekeeping services has less to do with group living and more to do with various decisions as to the balancing of leisure and chores.

What if the $10,000 expense incurred by single person C was for child care instead of housekeeping?[65] The numbers would be the same, but the analysis is somewhat different. One can clean the house early in the morning or late at night, or instead of reading a book. However, child care is a 24 hour responsibility. One cannot, therefore, blame any unfairness on different choices about how to spend leisure time, or how many hours to sleep. However, here, the issue is raised less by the decision to live in a group, and more by the decision to have children. There

[63]. See Nancy Staudt, "Taxing Housework," 84 Geo. L.J. 1571 (1996). The failure to tax the imputed income derived from housework and child care denies the dignity and value of the work. Also, it can have negative implications on social security benefits. The 1939 opinion of the Board of Tax Appeals in Wright Smith v Commissioner, 40 B.T.A. 1038, aff'd, 113 F. 2d 114 (2nd Cir. 1940), gives some insight into how little respect was given to child care and housework in an earlier generation.

[64]. See David Duff, Kim Brooks, Benjamin Alarie and Lisa Philipps, Canadian Income Tax Law 2d ed., (2007) 28. The Royal Canadian Commission rejected this approach, arguing that it is inconsistent to tax imputed income only when it is convenient to do so. 3 Royal Commission on Taxation 118-119 (1966).

[65]. C could adopt. Alternatively, C could have been previously married.

are, of course, issues on the appropriateness of tax subsidies for having children, but they are treated separately above.

D. Floors and Ceilings

Tax attributes often phase in and out, as a function of income. Tax attributes targeted to poor people properly phase out as income rises. The U.S. earned income tax credit, for example, phases out for higher incomes.[66] Whose income--the individual's income or the household's income?[67] Similarly, medical expenses are only deductible to the extent that they exceed 7 ½% of adjusted gross income.[68] Whose adjusted gross income? If these tax attributes are designed to reflect ability to pay, then should it be the ability to pay of the individual, or the ability to pay of the household?

For the purposes of the medical expense deduction threshold, adjusted gross incomes the AGI of both parents is aggregated, if they file a joint return. The medical expenses themselves are aggregated even more, for they can be the medical expenses of the parents, and the children. In allowing the aggregation of children's medical expenses, it is far more likely that a family's medical expenses will exceed the 7 ½% than it is for a single person's medical expenses. This fact is a further tax advantage for families. Can it be justified? Of course it can. When considering a family's ability to pay, it makes no sense at all to consider the costs of the father's prostate cancer but not the son's appendectomy.[69]

In fact, there are floors and ceilings throughout the Internal Revenue Code. Sometimes, they take groups into account; sometimes not. There does not appear to be any rhyme or reason.[70]

E. Intra-Group Transfers

If the household were a single taxable unit, then payments from one household member to another would not be taken into account. They would be treated as a transfer from one's left pocket to one's right. However, if each member of the household were deemed to be a separate taxpayer, then these intra-group transfers would have to be addressed.

Spouses routinely share their expenses. Should a payment by one spouse of groceries consumed by the other be taxable to the other? Presumably not. The United States addresses the

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66 . Code §32.

67 . See Ann Alstott, "The EITC and the Limitations of Tax-Based Welfare Reform," 108 Harv. L. Rev. 533 (1995). A number of tax systems, including Canada, Australia and the United Kingdom, while generally taxing individuals, aggregate household income for the purposes of granting personal allowances. See Ault pp. 320-321.

68 . Code section 213.

69 . These concerns are relevant if the group is recognized to some extent. If the group is not recognized, then there are different problems with medical expenses, addressed in the next section on intra-group transfers.

70 . GAO Report, Tax Administration Income Tax Treatment of Married and Single Individuals (1996); Mary Wenig and Toni Robinson, Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant, 8 Va. Tax Rev. 773 (1989).

problem in part in Section 1041. Most of these payments would be taxfree gifts. Any other result would lead to an enormous recordkeeping burden, a burden which most taxpayers would probably ignore.

Similarly, parents pay for the food, clothing and shelter of their minor children. In a world of rigorous taxation of individuals, would these amounts be taxable to the children? One would think not. Again, such payments, in discharge of the parents' legal obligation, would normally be taxfree gifts. Of course, there could be questions at the margin, with difficult issues of valuation and recordkeeping. Generally, however, the income side is not a problem.[71]

What about the deduction side? When one spouse incurs a deductible expense for the benefit of the entire household, who should get the deduction? One easy answer is to follow the money. In the United States, for example, when married couples file separate returns, deductions are usually taken by the one who actually pays the money, even if the liability for the payment was joint.[72] Charitable contributions of property are taken by whoever owned the property, and casualty losses are taken by the one whose property was damaged.[73] But not all countries follow suit. In Greece, for example, deductible home mortgage expenses are apportioned to the spouses on the basis of the income earned by each.[74] In the Netherlands, the mortgage interest deduction goes to whomever is taxed on the rental value of the home.[75] Some have proposed a similar scheme for the United States.[76]

Would anyone ever argue that children should receive the deductions for medical payments, or even housing payments made on their behalf? Since the income of most children if nominal, such a scheme would be tantamount to a denial of the deduction. In effect, then, such a scheme would effectively be a tax penalty on having children.[77]

F. Incentives to Work

If individuals are taxed, then each one will pay tax on the first dollar of income at the lowest marginal rates. However, if larger groups are taxed, then, conceptually, the income of one group member will be taxed first, at the lowest marginal rates. Then, the income of subsequent group members will be piled on top, and taxed at higher marginal rates.[78]

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71 . The Royal Canadian Commission recommends that all intra-family transactions be ignored. 3 Royal Canadian Commission on Taxation 13 (1966).

72 . John Viator, What You Earn is Yours, But You are Jointly and Severally Liable for His: A Proportionate Liability Proposal for Federal Income Taxes, 58 La. L. Rev. 309, 335 (1997). Finney v. Commissioner, T.C. Memo 1976-329.

73 . Id.

74 . IBFD European Tax Handbook, 330.

75 . Ault p. 321.

76 . John Viator, What You Earn is Yours, But You are Jointly and Severally Liable for His: A Proportionate Liability Proposal for Federal Income Taxes, 58 La. L. Rev. 309 (1997); Lawrence Zelenak, Marriage and the Income Tax, 67 S. Cal. L. Rev. 339 (1994).

77 . These questions do not merely impact on the allocation of the deductions per se; they would also have an impact on the various floors and ceilings that might apply to the deductions. See the previous section.

78 . See generally, Margaret Ryznar, "To Work, or Not to Work? The Immortal Tax Disincentives for Married Women," 13 Lewis & Clark L. Rev. 921 (2009). This argument, has been used unsuccessfully to argue that the

When a couple marries, will the man's income be taxed first, at lower rates, and will the woman's income be piled on top, and taxed at higher rates? This argument is silly; it makes just as much sense to consider that the woman's income is taxed first, and the man's income is taxed last. At least, this argument is silly if one imagines the case of a man and woman, both working outside the home, who decide to get married. Surely, neither one's income is taxed first, or last.

If, however, one considers an alternative scenario, the argument might make sense. Consider a married couple with one spouse working outside the home, and the other not. Assume that the spouse who was not working outside the home decides to enter the labor market. From the perspective of this spouse, his or her new income will be piled on top of the income previously earned by the other spouse. Therefore, for such a couple, the aggregation of incomes in group taxation does function as a disincentive to the second spouse's entry into the labor market outside the home.

In the traditional family, if only one spouse is working outside the home, that spouse will be the man. First, even if both spouses entered the marriage gainfully employed outside the home, when the children come, the woman is far more likely to give up her job to stay home and care for them. Second, if one spouse leaves the labor market, it is likely to be the woman, because she is likely to earn less than the man.[79] Therefore, it will be the woman whose later decision to enter or reenter the labor market will be penalized.[80] For this reason, among others, the traditional feminist position has been for individual, and not group taxation.[81]

Does aggregation of incomes truly deter the second spouse from entering the labor market? There is some evidence that it does. In a 1997 study, the Congressional Budget Office estimated that second spouses would work from four to seven per cent less than they would in a regime of individual taxation.[82] If so, then this aspect of the taxable aggregation of income creates both fairness and efficiency concerns.

G. Control vs. Benefit

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marriage penalty which results from the aggregation of incomes violates the constitution. See Richard Elbert, "Love, God and Country: Religious Freedom and the Marriage Penalty Tax," 5 Seton Hall Const. L. J. 1171 (1995).

[79] . Grace Blumberg, "Sexism in the Code: A Comparative Study of the Income Taxation of Working Wives and Mothers," 21 Buff. L. Rev. 49, 89-90 (1971).

[80] . See Laura Davis, "A Feminist Justification for the Adoption of an Individual Filing System," 62 S.Cal. L. Rev. 197, 210-213 (1988)

[81] . Miranda Stewart, Gender Equity in Australia's Tax System, Melbourne Law School Legal Studies Research Paper No. 443; Ann Alstott, "Tax Policy and Feminism: Competing Goals and Institutional Choices," 96 Colum. L. Rev. 2001 (1996); Laura Davis, "A Feminist Justification for the Adoption of an Individual Filing System," 62 S.Cal. L. Rev. 197 (1988); Grace Blumberg, "Sexism in the Code: A Comparative Study of the Income Taxation of Working Wives and Mothers," 21 Buff. L. Rev. 49 (1971).

[82] . Cong. Budget Office, For Better or for Worse: Marriage and the Federal Income Tax, at 12 (1997). See also, Siv Gustafsson, "Separate Taxation and Married Women's Labor Supply: A Comparison of West Germany and Sweden," 5 J. Pop. Econ. 61 (1992). See generally, Lawrence Zelenak, Marriage and the Income Tax, 67 S. Calif. L. Rev. 339, 365-378 (1994).

Some have argued, as a theoretical matter, that one should determine at the outset whether it is more important who controls the income, or who benefits from the income.[83] Generally speaking, focusing on control is likely to lead to individual taxation, for income is more often than not controlled by the one who earns it. On the other hand, focusing on benefit is more likely to lead to group taxation, and reallocation of income from those who earn it to those who use it. The American approach to assignment of income would probably favor the control approach.[84] Also, notions of control fit more comfortably with an income tax base, while notions of benefit fit better with a consumption tax base.[85] However, given the paramount importance of ability to pay to a discussion of households, perhaps benefit, and not control, should be more important.

IV. Conclusion

Any way of taxing households that you can think of, and some that you couldn't possibly have thought of, is being done, or has been done, by some country, somewhere. Some of the choices made can be explained in part by the special circumstances of particular countries. Some countries have more serious population problems than others. Some countries have longstanding traditions of polygamy and communal living; some do not. Some countries in the developing world have difficulties with detailed recordkeeping requirements; some do not. Nation-states, however, are far too complex for any easy determinations of why a particular choice was made, or whether or not it has worked out as intended.

Many of the factors described here can cancel each other out.[86] For example, one might establish a regime of group taxation, with reallocation of income within the group, in order to encourage larger families. However, that regime would be unfair to single taxpayers, and might deter the second spouse from entering the workforce. For another example, taxing married couples more heavily, to recognize their economies of scale and untaxed imputed income, discourages marriage. Name your poison.

Moreover, it is not necessary to change the entire structure of the taxation system in order to achieve some of the goals described here. For example, if one wanted to encourage group living arrangements, one could devise a system of tax credits or allowances for children or other

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83 . David Duff, Kim Brooks, Benjamin Alarie, Lisa Philipps, Canadian Income Tax Law, 2nd Ed. (2007) at 24-25.

84. In Lucas v. Earl, 281 U.S. 111 (1930), the Supreme Court rejected a test based upon income "beneficially received." The famous fruit and tree analogy is a test based upon control, not benefit. In Geiger v. Commissioner, 352 F. 2d 221 (8th Cir. 1965), the taxpayer was an embezzler who diverted the embezzled funds to other objects of her bounty. She claimed that those objects of her bounty should have been taxed on the income. Judge Blackmun wrote:

> The taxpayer's position is that, technically, these funds flowed direct from the bank to the outside beneficiaries and did not pass through Geiger hands. That may be one way to describe it. Another, equally valid, is that the funds came to Mrs. Geiger and were passed out or made available by her to the beneficiaries. The beneficiaries were the objects of her bounty, not the bank's. She was the force and the fulcrum which made those benefits possible. She assumed unto herself actual command over the funds. That is enough. Id. at 231.

85 . Ault suggests that the French foyer fiscal can be justified by an emphasis on consumption (benefit) over control. Ault at p. 322.

86 . Ault makes a similar point at pp. 317-318.

dependents, or even narrower tax allowances for the expenses of caring for group members, without departing from an individual taxation scheme. What is more, most of these goals could be achieved by means totally extraneous to the tax laws, by welfare subsidies or tuition vouchers. Such non-tax mechanisms would be a far more effective, fair, and transparent way to address population policy concerns.[87]

No structural solution will satisfy everyone, or even achieve fairness. Some goals even cancel out other goals. Accordingly, given the absence of a clear best-case, one size fits all solution, the structural choice should be the simplest choice. The taxpayer should be the individual, period, and there should be only one rate.

Taxation should be about money, not relationships. Either all pooling of income and expenses should be recognized for tax purposes, or none. Recognizing none is far simpler.

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[87]. France offers paid leave of up to 1,000 Euros per month to women who have a third child. Katha Pollitt, Europeans Do It Better, The Nation, April 2, 2007.

Appendix

Table 3

Countries/Regimes Which Tax Individuals Only

[Paragraph and page citations are from IBFD Global Tax Handbook 2009; Statutory citations are from RIA Checkpoint]; Ault citations are to the page number in Hugh Ault and Brian Arnold, Comparative Income Taxation: A Structural Analysis, 3d ed. (2010).

Algeria	¶ 1.10.2	p. 16
Australia	Ault	
Austria	¶1.1	p. 37
Barbados	¶1.1	p. 51
Belarus	¶1.1	p. 59
Bhutan		
Income Tax of the Kingdom of Bhutan (2001) §2.1		
Bolivia	¶1.1	p. 73
Canada	¶1.1	p. 93
	Ault	p. 320
China		
Conversation with Wake Forest LL.M. student from PR China		
Colombia	¶1.1	p. 117
Costa Rica		
Income Tax Law (2005) Ch. VII, Art. 15		
Croatia	¶1.1	p. 129
Egypt	¶1.1.1	p. 171
Finland	¶1.1.	p. 189
Guatemala		
Income Tax Law (decree No. 26-92)		

Ghana

Revenue Act of 2000 §38

Japan	¶1.1.	p. 331
	Ault	p. 321

Kiribati

Income Tax Act (2001) §46

Korea	¶1.1.	p. 349
Lebanon	¶1.1.	p. 363
Moldova	¶1.1.	p. 437
Montenegro	¶1.1.	p. 447
Netherlands	¶1.1.	p. 459
Nicaragua	¶1.1.	p. 473

Pakistan

Income Tax Ordinance (2001) §86

Russia	¶1.1.	p. 547

Singapore

Income Tax Act (2008) §51

	¶1.1.	p. 559
Slovenia	¶1.1.	p. 571
Sweden	¶1.1.	p. 597
	Ault	p. 321
Turkey	¶1.1.	p. 655
Ukraine	¶1.1.	p. 663

United Kingdom

	¶1.1.	p. 669
	Ault	p. 321

Table 4

Countries Which Tax Individuals on Earned Income, But Tax Other Income Differently

A. Earned Income Taxed to Individuals; Community Property Income Taxed 50% to Each Spouse

Ecuador	¶1.1	165	
Italy	¶1.1	323	
Mauritius	¶1.1	423	[“income derived jointly”]
Paraguay	¶1.1	505	
Perus	¶1.1	509	
South Africa	¶1.10.2	581	

B. Earned Income Taxed to Individuals; Other Income Taxed to Husband

Argentina	¶1.1	21
Chile	¶1.1	103

C. Earned Income Taxed to Individuals; Other Income Taxed to Higher Earning Spouse

Belgium	¶1.1	63
Iceland	¶1.1	281

Table 5.

Countries Which Aggregate Household Income

Cameroon
Income Tax Law (1988) Article 31

Gambia
Income Tax Ordinance (1990) §31

Liechtenstein	¶1.1	375
Luxembourg	¶1.1	391
Malta	¶1.1	417

Mozambique
Personal Income Tax Code (2003) Art. 17

Switzerland	¶1.1	605

Table 6

Countries Which Aggregate Household Income, But Tax As If A Percentage Was Deemed Earned By Various Family Members
[Not Necessarily Mandatory]

Belize	Income and Business Tax Act Ch. 46 (2008) §19	
Estonia	¶1.1	183
France	See description of foyer fiscal at Notes___ and accompanying text	
Gabon	See description of foyer fiscal at Notes___ and accompanying text	
Germany	¶1.1	221
Ireland	¶1.10.2	305
Portugal	¶1.1	531
United States	§1(a)	

Table 7

Countries Which Allow Taxpayers to Elect Either Aggregate or Separate

Brazil	¶1.1	61
Estonia	¶1.1	183
Germany	¶1.1 Ault	221 319
Guernsey	¶1.2.1	254
Hong Kong	Inland Revenue Ordinance 2008 §10 ¶1.1	 263
Indonesia	¶1.1	293
Ireland	¶1.1	299
Israel	Income Tax Law (1989) §§65, 66	

Malaysia	¶1.1	411
Nepal	Income Tax Act 2058 (2001) §50	
Norway	¶1.1	483
Panama	Decree No 170 Income Tax Decree (2006) §68 ¶1.1	 499
Poland	¶1.1 [spouses in a community property marriage may elect an aggregate return]	523
Spain	¶1.10.2	591
Taiwan	Taiwan Income Tax Act Art. 15 E-mail from Kuo-Hung Jesse Chen, ASUStek Computer Inc., Taiwan Sep. 21, 2009	
Thailand	¶1.1	641
United States	See §§1(a), 1(d)	
Uruguay	¶1.1	695
Venezuela	¶1.1 Consolidated Income Tax Law (2007) §54	701

Table 8
Countries Which Give Allowances for Each Child, No Matter How Many Children

Austria	¶1.7.3	39
Belarus	¶1.7.2	60
Brazil	¶1.7.	81
Czech Republic	¶1.7.3	44
Germany	¶1.7.2 ¶¶1.9, 1.2	226
Iraq	Income Tax Law (2003) Art. 12	
Israel	¶1.7.2	319
Japan	¶1.7.2	334
Jordan	Income Tax Law (2002) Art. 13	
Korea	Ministry of Finance and Economy, 2005 Korean Taxation, at 63.	
Latvia	¶1.7.2	359
Liechtenstein	¶1.7.2	377
Lithuania	¶1.7.2	386
Malaysia	¶1.7.2	413
Moldova	¶1.7.2	439
Panama	¶1.7	500-501
Portugal	¶1.7.3.1	535
Romania	¶1.7.2 [but capped at a monetary amount]	543
Singapore	¶1.7.3	561
Slovak Republic	¶1.7.3	567

Slovenia	¶1.7.2	573
Switzerland	¶1.7.2	607
Venezuela	¶1.7.2	702-703

Table 9

Countries Which Cap Allowances for Children, After a Stated Number of Children

1 Child		
Gibraltar	¶1.7.2	234
2 Children		
Barbados	¶1.7.2	53
3 Children		
Indonesia	¶1.7.3	294
Mauritius	¶1.7.1	424-425
Thailand	¶1.7.2	641
	Revenue Code (1989) §47	
4 Children		
Nigeria	¶1.7.2	479
Philippines	¶1.7.2	517
	National Internal Revenue Code (2007) §35	
9 Children		
Hong Kong	¶1.7.2	265
11 Children		
Croatia	¶1.7.2	131

Table 10

Countries in Which the Per Child Allowances Increase As the Number of Children Increases

Belgium	¶1.7.2.2	65
Croatia	¶1.7.2	131
Lithuania	¶1.7.2	386
Singapore	¶1.7.3	561
Slovenia	¶1.7.2	573
Spain	¶1.7.2	590

Table 11

Countries in Which the Per Child Allowances Decrease as the Number of Children Increases

Brunei	Income Tax Act (2003) §32	
Fiji	Income Tax Act (2007) Art. 25	
Seychelles	Income tax Assessment Decree 1978) §69	
Tunisia	¶1.7.2	649

Table 12

Countries Which Grant Allowances for Children Only if There Are a Stated Number of Children

Ghana 2 children. Income Revenue Act of 2000, §39.

Kyrgyz 4 children. Tax Code of the Kygyz Republic (1996) Art. 76.

Table 13

Countries Which Grant No Tax Allowances for Children

Australia	¶1.7.2	31
Chile	¶1.72	106
Costa Rica	¶1.7.1, 1.7.2	124
Cyprus	¶1.7.2	136
Greece	¶1.7.2	241
Honduras	¶1.6.2	260
Hungary	¶1.7.2	275
Iceland	¶1.7.2	282
India	¶1.7.2	289
Malta	¶1.7.2	419
Montenegro	¶1.7.2	448
Netherlands	¶1.7.2	462
New Zealand	¶1.7.2	468
Nicaragua	¶1.7	474
Peru	¶1.7	511
Turkey	¶1.7.2	658