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[Figures are attached as a separate PDF]

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

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Marriage is no longer what it once was. Since the 1970s, and accelerating since 1990, the ties between formal marriage and family life have attenuated. Nearly half of American adults are now unmarried at any given time, and two of five children are born to unmarried parents.² At the same time, delayed marriage, divorce and remarriage, and changing gender roles have transformed marriage itself.

Despite these changes, the federal income tax and the Social Security system continue to define family based on formal marriage, and our casebooks teach students that the economic vulnerability of the married woman is the central problem of gender in welfare-state design. In this article, I argue that the growing gap between legal fiction and social reality undermines the ability of the tax and transfer systems to achieve any of a range of objectives -- whether fostering individual freedom, aiding the poor, or shoring up the traditional family.

In the mid-twentieth century, the legal convention that marriage denotes family was rooted in social practice. The overwhelming majority of adults married, and their marriages shared relatively fixed and predictable terms: couples married early, had children quickly, and adopted a gendered division of labor (mostly) till death did them part. In sociologists' terms, marriage was a social institution that transformed individuals into couples with shared lives and shared luck. In the mid-twentieth century, moreover, marriage *was* family life: it was the primary home for sexual activity, child-bearing and -rearing, and adult work and identity formation.³ In that era, income tax and

¹ Jacquin D. Bierman Professor in Taxation, Yale Law School. I am grateful to Vicki Schultz and to the students in our Spring 2012 course, Family, State, and Market, where we examined the new realm of American family life. Joanna Zhang, Shruti Hazra, and Jonathan Choi provided first-rate research assistance.

² See U.S. Census Bureau, America's Families and Living Arrangements, Table A1, found at <http://www.census.gov/hhes/families/data/cps2011.html> (52% of adults were married in 2011); Hamilton et al., Births: Preliminary Data for 2010, National Vital Statistics Reports, Centers for Disease Control, p. 4, available at http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_02.pdf (41% of births in 2009 were to unmarried women).

³ Of course, it would be inaccurate to claim that every individual endorsed these norms; inaccurate to deny class and cultural differences; and wrong to ignore the reprehensible legal and social exclusion of gay men and lesbians during that era. Still, in the mid-twentieth century, the identification of the married couple as the basic unit of family life corresponded reasonably well to social life as lived by many.

transfer rules that treated the married couple as the basic unit of family life (and, indeed, social life) made sense. But recent decades of social change have destroyed that policy equilibrium and require legal innovation.

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

Second, even among the married population, the content of marriage has become heterogeneous and contested. The institution of marriage no longer necessarily implies shared resources, shared expectations, shared children (or any children at all) or defined roles in day-to-day life. Childless couples, blended families, late-in-life marriages, and two-career couples are no longer the exception: they are the new norm.⁴

Third, patterns of marriage and role specialization within marriage have become stratified by class to an unprecedented degree. Lasting marriage and continuous child-rearing of shared biological children by two parents have become more than ever before the nearly-exclusive preserve of the upper class. Even these marriages, however, reflect new behavior and expectations: couples marry later, often with substantial education and career experience, and engage in much less role specialization:

Sociologists have a succinct and dramatic way of expressing these changes: marriage has become de-institutionalized. Marriage today is no longer the primary and normal state for adult Americans: it is no longer the expected route to maturity or the exclusive site for sex, romance, or child-rearing.⁵ Andrew Cherlin has coined the term the “new individualism” to describe the experience of family formation and dissolution today. More than ever before, Cherlin notes, Americans see marriage as one among many options for personal growth and fulfillment, and they form and exit marriages along with other relationships as a normal part of the life course.⁶

⁴ Cherlin (2004), *supra* note ___, at 853.

⁵ Andrew J. Cherlin, *The De-Institutionalization of American Marriage*, 66 *J. Marriage and Fam.* 848, 848 (2004); see also Hannah Bruckner and Karl Ulrich Mayer, *De-Standardization of the Life Course: What Might it Mean? And If it Means Anything, Whether it Actually Took Place?* 9 *Advances in Life Course Research* 27 (2005) (documenting the growing de-standardization of family life in Germany).

⁶ Andrew J. Cherlin, *The Marriage-Go-Round* (2009).

Some critics, including the conservative Charles Murray, worry that the new individualism heralds social breakdown.⁷ Others applaud the de-institutionalization of marriage as social progress.⁸ Here, I do not attack or defend the new individualism: instead, I aim to demonstrate the implications of the change in social context for the design of the welfare state. To keep the analysis manageable, I initially focus on one central feature of the income tax: joint filing. Later, I consider broader implications of the new individualism for a second key component of the welfare state: Social Security.

My thesis is that the new individualism has rendered obsolete legal doctrines and policy analyses that adopt formal marriage as the proxy for family life. Joint filing, for example, has been the centerpiece of debates over the taxation of the family since the 1930s. Today, however, joint filing is largely beside the point: it is no longer well-tailored to serve important social objectives, and this point holds whether one endorses the new individualism or, like many social conservatives, wishes to combat it. Similarly, the spousal benefit in Social Security once addressed the central gender injustice of American society: the economic vulnerability of housewives. Today, however, the spousal benefit no longer protects the most vulnerable citizens, or even the most vulnerable women, once we look past current retirees to future cohorts.

The obsolescence of formal marriage as a legal category extends to conventional policy equations. Consider the co-called “trilemma,” which most casebooks and law teachers use to structure classes on the taxation of the family. The trilemma holds that an income tax cannot simultaneously maintain progressive marginal rates, impose equal taxes on equal-earning couples, and insist on marriage neutrality.⁹ In recent decades, the casebooks have added the feminist point that joint filing tends to perpetuate a traditional division of labor by penalizing two-worker couples and to imposing a high marginal tax rate on working wives.¹⁰

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

⁷ Charles Murray, *Coming Apart* (2012).

⁸ See, e.g., Claudia Card, *Against Marriage and Motherhood*, 11 *Hypatia* 1 (1996). Card’s article is staking out a normative position rather than reacting to data on the de-institutionalization of marriage, but the thrust of her argument is to reject many of the norms of traditional marriage and motherhood.

⁹ See Michael Graetz and Deborah Schenk, *Federal Income Taxation* 468-469 (6th ed. 2009). See also Lawrence Zelenak, *Marriage and the Income Tax*, 67 *S. Cal. L. Rev.* 339, 342 (1994).

¹⁰ See Graetz and Schenk, *supra* note __ at 465-476.

vulnerable player is no longer the nonworking wife but the working (but low-earning) single mother.

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

It may seem that I overstate the case when I claim that even social conservatives should abandon joint filing and the spousal benefit. Surely those who -- like Murray -- detest the new individualism should insist on rules that restrict "family" treatment to the formally married. But the policy problem for social conservatives is that neither joint filing nor the spousal benefit is well-designed to counter or reverse the de-institutionalization of marriage. An effective social-conservative agenda would replace the ad hoc pattern of rewards and penalties with incentives and rewards tailored to desired behaviors. While this agenda is not one that I endorse, I consider it in order to show how badly outdated joint filing really is -- by any lights.

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

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

I do not suppose that mainstream politicians will endorse a marriage tax in this election cycle. Still, it is worth pausing to see the merits of the proposal. Welfarists

have long endorsed ability taxation, which imposes a non-distorting but progressive tax on high-ability individuals. Liberals have championed taxes on undeserved social privilege. Marriage today is arguably a marker or “tag” for both ability (meaning eventual high earnings) and social privilege. Analytically, if not politically, a marriage tax is worth adding to our repertoire of policy options in the age of the new individualism.

This article owes much to two strands of the scholarly literature. First, a number of scholars in taxation and family law have questioned the law’s reliance on outdated categories, including formal marriage and the nuclear family.¹¹ This article, too, calls for the law to take notice of the new realities of family life.

Second, although this article aims to update the social context for feminist reform, it remains very much a feminist project, and it builds on a conversation bravely begun and thoughtfully continued over the years by scholars including Grace Ganz Blumberg, Alicia Munnell, Lawrence Zelenak, Marjorie Kornhauser, Pamela Gann, and Edward McCaffery.¹² My work here extends their view that the income tax and Social Security should pay attention to the family and to changing social reality.

I. Joint Filing and the Rise and Fall of Mid-Twentieth-Century Marriage

In the mid-twentieth century, the prevalence and homogeneity of marriage made it plausible for law to use formal marriage as a proxy for family. In this Part I use the example of joint filing in the federal income tax to illustrate how the welfare state’s rules for identifying the family mirrored social context in the mid-twentieth century. It is no coincidence, I suggest, that the Congress adopted joint filing in 1948: when marriage represented a homogenous social institution and the near-exclusive site for family life, legal rules based on marriage represented a reasonable compromise among the policy

¹¹ See, e.g., Marjorie Kornhauser, *Love, Money, and the IRS: Family, Income Sharing, and the Joint Income Tax Return*, 45 *Hastings L.J.* 63 (1993) (pointing out the obsolescence of the one-earner, heterosexual couple as the primary model of family); Patricia A. Cain, *Taxing Families Fairly*, 48 *Santa Clara L. Rev.* 805 (2008) (analyzing options for the taxation of same-sex couples); Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 3 *Utah L. Rev.* 605 (2010) (advocating individual filing in order to capture the diversity of economically interdependent relationships); Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There is No Standard Family*, 2 *Ill. L. Rev.* 319 (2012) (arguing that the standardization of family law has administrative and privacy virtues, despite its misapprehension of the realities of family life).

¹² Grace Ganz Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 *Buffalo Law Review* 49-98 (1971) (pointing out the gendered impact of the joint return); Pamela Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 *Tex. L. Rev.* 1 (1980) (advocating individual filing on equity and efficiency grounds); Lawrence A. Zelenak, *Marriage and the Income Tax*, 67 *S. Cal. L. Rev.* 339 (1994) (criticizing “the uneasy case” for joint returns and proposing individual filing); Marjorie Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 *Temple L. Rev.* 1413 (1996) (documenting the inequality of intrahousehold resource allocations and the lack of unity of interests); Edward J. McCaffery, *Taxing Women* (1999). See also, e.g., Alicia H. Munnell et al., *Women and a Two-Tier Social Security System, in A Challenge to Social Security: The Changing Roles of Women and Men in American Society* 101 (Richard V. Burkhauser & Karen C Holden eds., 1982).

goals enshrined in the trilemma: progressive rates, accurate measurement of income, and marriage neutrality.

But the convenient overlap between marriage and family life did not last. Waves of social change that formed in the 1970s and surged through the 1990s and 2000s have largely erased the connection between formal marriage, on the one hand, and family life, on the other. In this Part, I document the social upheaval in the meaning and content of marriage. In Part II, I turn to a policy analysis and show that the trilemma no longer captures important social objectives.

A. Mid-Twentieth-Century Marriage and Joint Filing

To set the stage, recall what joint filing accomplishes and how it arose. Functionally speaking, joint filing is a contingent feature of the income tax: we can, and indeed the United States historically has, run an income tax both with it and without it. Joint filing permits couples to report their total income on a single tax return; while married individuals may file separately, the present tax rate system penalizes that choice.

From a policy perspective, joint filing accomplishes three different (if related) tasks. First, joint filing aggregates the income of the married couple and imposes an equal tax burden on couples with equal incomes. Second, joint filing may raise a married couple's taxes (relative to the taxes paid if the couple were unmarried) or reduce them. In a progressive rate system, joint filing will do one or both, depending on the rate brackets for married couples compared to single people and on the relative incomes of the husband and wife. Third, joint filing makes it unnecessary to divide earnings or property income between spouses, with the consequence that the tax system need not police tax avoidance schemes that (before the adoption of joint filing) involved income and property transfers between spouses.

The history of the adoption of joint filing has been ably recounted by others.¹³ Here, I retell the story briefly in order to highlight how social context in the mid-twentieth century made it plausible for policymakers to make assumptions about the nature of marriage. The standard story emphasizes the interaction of state property law with federal tax law: the existence of community property states and tax-avoidance contracts helped nudge Congress toward joint filing. But my argument is that all three bodies of law (state family law, state contract law, and federal tax law) could operate as they did because marriage at that time functioned as a social institution with predictable features.

Sociologists have noted that the mid-twentieth century marked an unusual period in the history of marriage. Andrew Cherlin, for example, describes the rise of

¹³ Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 *Law and Hist. Rev.* 259 (1988);

companionate marriage between 1900 and 1960.¹⁴ “Although husbands and wives in the companionate marriage usually adhered to a sharp division of labor, they were supposed to be each other’s companions—friends, lovers—to an extent not imagined by the spouses in the institutional marriages of the previous era.” Peter Berger and Hansfried Kellner describe the middle-class marriage circa 1965. They argue that marriage “occupie[d] a privileged status among the significant validating relationships for adults in our society...Marriage [was] a crucial nomic instrumentality in our society.”¹⁵

Thus, in the mid-twentieth century -- in contrast to earlier and later periods -- couples married for love, married young, had children soon after marriage, and remained married, typically for life. Marriage in this period marked the dominant mode of adult life, and it had a relatively homogeneous content for most of its participants, regardless of their religion or socioeconomic class.

We can extract from the sociological literature four features of mid-twentieth-century marriage that are especially relevant to the question of joint income taxation. First, individuals married early in life and expected marriage to endure for a lifetime (as their parents’ marriages mostly did).¹⁶ Divorce was not unknown, but it was uncommon until the 1970s.¹⁷

Second, marriage marked the dominant pattern of adult life across a variety of demographic categories: whatever one’s age, race, social class, or economic class, one expected to marry young and remain married.¹⁸ Third, couples tended to divide labor along traditional gender lines, with wives leaving the workforce to care for children and the home.¹⁹

Fourth, mid-twentieth-century marriage had a shared set of psychological and social features. In Berger and Kellner’s classic description, husbands and wives experienced the meaning of the world together: in an important sense, they grew up together, sharing the growth of young adulthood and filtering their experiences through a joint perspective. The married couple, in Berger and Kellner’s account, developed a shared point of view, excluding others. Even old friends might come under new scrutiny as a husband evaluated his wife’s friends (and vice versa) and the couple adopted new standards for continuing friendship. “From the beginning of the marriage each partner

¹⁴ Andrew Cherlin, *The Marriage Go-Round* 63-86 (2009).

¹⁵ Peter Berger and Hansfried Kellner, *Marriage and the Construction of Reality*, 46 *DIOGENES* 1-24, 5 (1964).

¹⁶ U.S. Census Bureau, *Estimated Median Age at First Marriage*, Table MS-2, available at <http://www.census.gov/population/socdemo/hh-fam/ms2.pdf>;

¹⁷ U.S. Census Bureau, *Statistical Abstract of the United States* (2012), Table 78, available at <http://www.census.gov/prod/2011pubs/12statab/vitstat.pdf>

¹⁸ Berger and Kellner, *supra* note __, at __; Cherlin, *supra* note __, at __.

¹⁹ Berger and Kellner, *supra* note __, at __; Cherlin, *supra* note __, at __.

has new modes in his meaningful experience of the world in general, of other people, and of himself.”²⁰

The mid-twentieth-century marriage constituted what sociologists term an institution: marriage defined social roles, social status, self-perceptions and daily occupations for a wide swath of American adults. In Berger’s era, married people didn’t simply share a demographic label: married people truly *were* in many ways different from unmarried individuals.

Tax law, like other bodies of law, reflects its social context, and many of the arguments made about joint filing during this period took for granted the pervasiveness, homogeneity, and psychological unity of the mid-twentieth century marriage.

During the first half of the twentieth century (from 1913 to 1948), the federal income tax adopted individual filing: every person filed his or her own tax return. But, beginning in the 1930s, a series of cases set in motion a legal chain of events that would ultimately replace individual filing with the joint return.

Taxpayers initially sought joint filing for pecuniary reasons -- this was the income tax after all. Tax rates skyrocketed during World War I and remained high, by historic standards, throughout the 1920s and into the 1930s.²¹ Many wealthy married men thus shouldered a considerable tax burden. It wasn’t difficult to figure out that if men could split their incomes with their wives, they could reduce the total tax bill, because the wife could take advantage of the lower tax brackets. “Income-splitting,” then, became the Holy Grail for many married couples at mid-century.

The profile of mid-twentieth-century marriage was critical to the financial gambit. In a regime of individual filing with progressive rates, splitting two individuals’ incomes results in a substantial tax reduction only if incomes are substantially unequal. The middle- and upper-class push for income splitting, then, reflected cultural conditions as well as legal design. With most women marrying young, having children early, and working²² primarily in the home thereafter, the stage was set for income-splitting as a device that would reduce taxes for a wide swath of American families.

The first major attempt at income-splitting, Lucas v. Earl, ended in a victory for the IRS, but a short-lived one.²³ Mr. and Mrs. Earl had signed a contract, presumptively valid under California law, that split between them all property acquired by either during the marriage. Justice Holmes, writing for the majority, declined to recognize the effects of the contract for federal income tax purposes. He opined that a salary should be

²⁰ Berger and Kellner, *supra* note ___, at 11.

²¹ See Anne Alstott and Benjamin Novick, War, Taxes, and Income Redistribution in the Twenties: The 1924 Veterans’ Bonus and the Defeat of the Mellon Plan, 59 Tax L. Rev. 373 (2006).

²² *Helvering v. Horst*, 311 U.S. 112 (1940).

²³ *Lucas v. Earl*, 281 U.S. 111 (1930).

taxed to the earner and that taxpayers should not be able to escape taxation by “anticipatory arrangements and contracts however skillful.”

But the tax system could not extend the line drawn in Earl to prevent the shifting of *unearned* income (income from property). Salary and other income from services can often be traced to the efforts of an identifiable individual. By contrast, income from property is easily and uncontroversially shifted when ownership of the property changes. Thus, any married couple (or any other pair of taxpayers) wishing to shift property income had only to shift property ownership. A complicated jurisprudence evolved in the 1930s, beginning with Earl and extending to later cases like Blair v. Commissioner²⁴ and Helvering v. Horst. But while these cases ruled out efforts to transfer income without property, the tax system had no defense against married couples when husbands were willing to make outright legal transfers of property to their wives.

State law also assisted married couples seeking to split income. Just months after Lucas v. Earl, the Supreme Court held that the federal income tax would respect income-splitting accomplished by state community property laws. Under Poe v. Seaborn, married individuals in community-property states would report half of marital income as their own, thus achieving in effect the income split denied to the Earls.²⁵

Poe unleashed a wave of legislation, as states vied to respond to the political popularity of income-splitting. Eager to grant to their citizens the benefits of income-splitting, states enacted elective community-property laws, preserving the option of common-law property regimes for those preferring them. In 1944, the Supreme Court denied income-splitting to couples in such states in Commissioner v. Harmon.²⁶ Still, that decision “slowed but did not halt” the search for income-splitting options.²⁷ In 1948, the Congress adopted joint filing, permitting married taxpayers to file jointly and automatically achieve the benefits of income-splitting.

The contours of mid-twentieth-century marriage not only created the financial payoff to income splitting but also fostered the social, political, and psychological conditions that supported it. We have already seen that the traditional division of labor within the household created a financial opportunity. The prevalence of marriage among the adult population helped create a large constituency for income-splitting: there were, by later standards, relatively few unmarried adults, and even fewer adults who saw themselves as likely to remain unmarried.

²⁴ Blair v. Commissioner, 300 U.S. 5 (1937).

²⁵ Poe v. Seaborn, 282 U.S. 101 (1930).

²⁶ 323 U.S. 44 (1944).

²⁷ Druker v. Commissioner, 697 F. 2d 46 (1983).

The expected longevity and psychological unity of mid-twentieth-century marriage also helped foster the dynamics that led to joint filing. Consider the rush to adopt state community property laws. Community property laws typically did not alter the husband's control over property during the marriage but did accord significant property rights to the wife in the event of divorce. Still, in an era when divorce seemed remote, and when husbands would retain management rights, not only by law but by cultural custom, the property innovation seemed minimally intrusive, and it produced notable tax savings. Couples' sense of themselves as units also seems to be play a role. Without romanticizing the institution, we can nevertheless acknowledge that the closeness depicted by Berger, the sense of joint decision-making, likely made joint taxation feel familiar and uncontroversial.

Similarly, the tax gambit of putting property in wives' names in common-law states reflected the social and psychological unity of the married couple. With traditional gender roles, including male property management, and with divorce only a remote possibility, the formal ownership of property became of relatively little practical significance.

From a historical perspective, joint filing marked a happy confluence of social life with tax politics, tax policy, and tax administration. But this equilibrium was shorter-lived than we sometimes realize.

B. From the Divorce Revolution to the New Individualism

The mid-twentieth-century marriage was not destined to last. In the late 1960s and early 1970s, the divorce rate and age at first marriage began to climb upward, and wives began to enter the workplace in record numbers.

These early changes in marriage are well-known to scholars, policy analysts, and legislators. Indeed, the tax system reacted promptly to the changing culture, and the Congress's response nicely illustrates the trilemma in action. The first version of joint filing split income between married individuals, creating a "marriage bonus" for most married couples. In 1969, the Congress, besieged by single adults complaining that the marriage bonus was unfair, adjusted the rate schedules so that the marginal-rate brackets for married couples were no longer twice as wide as those for single taxpayers.²⁸ The result was the compromise that has persisted, with only slight variations, until today: husbands and wives with divergent earnings still claim a marriage bonus, but those with similar earnings pay a marriage penalty.

Criticism of the 1969 compromise also reflects an awareness of the changes in marriage that took place in the 1970s. First, scholars have pointed out, the 1969 system redistributes income toward couples with traditional gender roles: the largest

²⁸ See the discussion of 1969 in *Druker v. Commissioner*, supra note ____.

marriage bonuses are claimed by couples with one working and one nonworking spouse.²⁹ Second, compounding the gender inequity, joint filing tends to discourage wives' employment, because the first dollar of wives' wages is taxed at the (higher) marginal rate established by the husband's earnings. Importantly, this point is independent of the rate structure adopted in 1969; it is true in any system of joint filing when, culturally, the wife is understood to be what economists bluntly term the "secondary worker."

These concerns reflect the broader feminist struggle to open the workplace to wives in the 1970s and 1980s. Grace Ganz Blumberg's pathbreaking article dates from 1971,³⁰ and other legal scholars writing through the 1980s and mid-1990s include Pamela Gann, Lawrence Zelenak, and Marjorie Kornhauser. Edward McCaffery's book, published in 1999, finished the decade and indeed the century with a call for continued attention to the disadvantaged tax status of working wives. (We shall see that these criticisms retain vitality but require adaptation to a new context: given current social realities, the extension of joint filing to the household (rather than to the married couple) ought to be a serious proposal, and yet it would extend to new households the distributional biases and disincentives these scholars criticized.)

The debate over joint filing has not shifted to consider the full array of social changes in marriage and family life that have accelerated since the 1970s. (A notable exception is the growing body of scholarship on the tax situation of same-sex couples.) The acceleration of social change since 1990 may help explain our situation: data often become available with a significant time lag. In addition, the concentration of demographic change in social classes below those of the typical academic researcher or policymaker may also have obscured our scholarly vision.

To see the stunning depth and breadth of change, it is useful to look at data spanning the entire period from 1970 to today. During that period three major changes have transformed marriage and family life: the rising percentage of unmarried adults, the growing heterogeneity of marriage, and the tightening link between social class, on the one hand, and marriage and the rearing of a couple's own children, on the other. All of these changes are arguably rooted in the 1970s' divorce revolution and the influx of wives into the workplace. But we shall see that a number of striking changes in family life, notably the rise in cohabitation and in nonmarital births, have accelerated since 1990.

1. *The Growing Prevalence of Nonmarriage.* In mid-twentieth-century America, the great majority of adults were married or expected to be married shortly. The

²⁹ Dorothy Brown has also pointed out that the marriage penalty has a disproportionate impact on black taxpayers. Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. Cin. L. Rev. 787 (1996-1997).

³⁰ Grace Ganz Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 Buffalo Law Review 49-98 (1971). See also Edward J. McCaffery, *Taxing Women* (1999).

unmarried felt -- and were -- socially excluded. By contrast, many adults in America today are unmarried, and many are unpartnered.

Taking a snapshot in 2009, the Census Bureau found that 33% of men age 15 and older had never married, while 67% had been married at least once. But only 42% of men had been married just once and remained in that first marriage. Twenty percent of men had experienced at least one divorce, and fifteen percent of men had been married at least twice.³¹

In 2011, a scant majority (52%) of adult Americans (age 18 and older) were married, while 48% were unmarried.³² The trendline is sharp: in 2010, 51% of Americans ages 20-54 were married, compared to more than 80% in the 1960s.³³ But the one-year snapshot obscures the rapid historical change that has led us to this point. The era of mid-twentieth-century marriage appears quite clearly in Figure 1, where the percentage of currently married men rises and stays high (historically) between 1940 and 1980, before dropping. At the same time, the percentage of never-married men drops noticeably in the 1940-1980 period before rising again. Interestingly, the percentage of never-married men is still lower than in 1900.³⁴

The decline of marriage and the rise in alternative family arrangements also appears clearly in Figure 2, which shows the steep decline in the percentage of married-couple households. That figure also shows the sharp rise in what the Census Bureau calls “non-family households,” which include single people, with or without roommates, and cohabiting couples.³⁵ As the figure shows, the most rapid changes, in both cases, occurred between 1970 and 1980, but the decline in married-couple households and increase in non-family households continued (i.e., they did not stabilize) in the 1990s.

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

³¹ U.S. Bureau of the Census, Number, Timing, and Duration of Marriages and Divorces: 2009, supra note __, at Table 6 (14.7 percent reported marrying twice or three times).

³² U.S. Census Bureau, America’s Families and Living Arrangements, Table A1, found at <http://www.census.gov/hhes/families/data/cps2011.html>

³³ The 2010 figure represents the author’s calculations based on U.S. Bureau of the Census, Statistical Abstract of the United States, Table 57, available at http://www.census.gov/compendia/statab/cats/population/marital_status_and_living_arrangements.html. The 1960s figure is reported in Yamaguchi and Wang, supra note __, at __.

³⁴ U.S. Bureau of the Census, Statistical Abstract of the United States (2012), available at http://www.census.gov/compendia/statab/hist_stats.html (Table HS 11).

³⁵ U.S. Bureau of the Census, Statistical Abstract of the United States, Table HS12.

Figure 3 and Table 1 document a striking decline in marriage and increase in cohabitation just since 1982, among women ages 15-44. From 1982 to 2010, the fraction of women who reported being married dropped *ten percentage points* (taking into account first and second marriages). In the same period, cohabitation increased from 3% to 11% -- an increase of nearly 400%.³⁶

Table 1. Current relationship status, women aged 15-44.³⁷

	1982	1995	2002	2006-2010
First marriage	44.1%	39.9%	37.5%	36.4%
Second or higher marriage	8.1%	9.3%	8.5%	5.1%
Cohabiting	3%	7%	9%	11.2%
Never married	33.5%	33.4%	35%	38.2%
Formerly married	11.3%	10.3%	9.9%	9.2%

The surge in cohabitation in recent decades has caught researchers by surprise. Cherlin, for example, once “thought that, except among the poor, cohabitation would remain a short-term arrangement among childless young adults who would quickly break up or marry. But it has become a more prevalent and more complex phenomenon.”³⁸

Data confirm that the rise in cohabitation in recent decades has been notable. Cohabitation has become a familiar prelude to marriage. Between 1965 and 1974, only 10% of first marriages were preceded by cohabitation, compared to more than 50% for the early 1990s, with remarriages even more likely to be preceded by cohabitation.³⁹ A 2004 study established that 50 percent of individuals in the United States will cohabit by

³⁶ Source: Casey E. Copen, et al., First Marriages in the United States: Data from the 2006-2010 National Survey of Family Growth, National Health Statistics Report No. 49 (2012), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf> (Figure 1).

³⁷ CDC data on marriage from the National Survey of Family Growth, available at http://www.cdc.gov/nchs/nsfg/abc_list_m.htm#current (citing Casey E. Copen, et al., First Marriages in the United States: Data from the 2006-2010 National Survey of Family Growth, National Health Statistics Report No. 49 (2012), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf> (Figure 1)).

³⁸ Cherlin (2004), *supra* note __, at 849.

³⁹ Pamela Smock, Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications, 26 Ann. Rev. Soc. 1, 3 (2000) (citing research by Bumpass and Sweet and Bumpass and Lu).

age 40.⁴⁰ It is notable that although rates of marriage now differ among young white, black, and Hispanic women, rates of cohabitation hover around 50% for young women in all groups.⁴¹

The prevalence of cohabitation appears to have accelerated in the 1990s: “the proportion of all first unions (including both marriages and cohabitations) that begin as cohabitations rose from 46% for unions formed between 1980 and 1984 to almost 60% for those formed between 1990 and 1994.”⁴² Between 25 and 40 percent of children live with a cohabiting parent at some point, and in a stepfamily than with their two biological parents.⁴³

The meaning of cohabitation -- what is it for? why do people do it? -- has been contested.⁴⁴ Couples cohabit for a variety of reasons, engage in a variety of behaviors, and exit in a variety of ways.⁴⁵ Some couples cohabit as a prelude to marriage, but others cohabit for reasons of convenience or to save money or as an alternative to marriage.⁴⁶ Still, one clear finding is that cohabitation often occurs in households with children: “about one half of previously married cohabiters and 35% of never-married cohabiters have children in the household. In most cases (70%), these are the children of only one partner, making the arrangement somewhat akin to step-families, and the rest of the children involved are the biological offspring of the couple.”⁴⁷

Figure 4 also captures the growing heterogeneity of relationships among younger women, showing the decline in the percentage of women in a first marriage and a sharp rise in the percentage never married and cohabiting.⁴⁸

The decline in marriage has transformed children’s family arrangements as well: a strong trend, accelerating since 1990, is the rise in child-bearing and -rearing among the unmarried. In 2011, 65% of children lived with their married parents, but 35% did

⁴⁰ Heuveline and Timberlake, *supra* note __ (Figure 1).

⁴¹ CDC/NCHS, National Survey of Family Growth, Cycle 6 (2002), Tables 9 and 11.

⁴² Smock, *supra* note __, at 3 (citing Bumpass and Sweet and Bumpass and Lu).

⁴³ Heuveline and Timberlake, *supra* note __ (finding that about one-third of children will experience maternal cohabitation by age 16 (Figure 2) and discussing and citing research by Graefe and Lichter in 1999 and Bumpass and Lu in 2000).

⁴⁴ Cherlin (2004), *supra* note __, at 848.

⁴⁵ For additional evidence, see Pamela J. Smock et al., *Heterosexual Cohabitation in the United States: Motives for Living Together Among Young Men and Women*, Population Studies Center Research Report (2006).

⁴⁶ Manning and Smock, *supra* note __, at 1000.

⁴⁷ Smock, *supra* note __, at 3, citing Bumpass et al.

⁴⁸ CDC, data from the National Survey of Family Growth, available at http://www.cdc.gov/nchs/nsfg/abc_list_m.htm#current.

not, with 24% living with their mothers only.⁴⁹ Trends over time are striking: from 1970 to 2002, the percentage of children “living in two-parent families fell from 85 percent to 69 percent, while the share living in single-parent families more than doubled, from 11 percent to 27 percent.”⁵⁰

Among children born in 2009, 41 percent had unmarried mothers,⁵¹ up from 10.7 percent in 1970, 18.4 percent in 1980, 28 percent in 1990, and 33.2 percent in 2000.⁵²

2. *The Growing Heterogeneity of Marriage.* The de-institutionalization of marriage has weakened the social norms that define and regulate marriage, with the result that people no longer share a standard set of expectations about behavior, roles, and outcomes in marriage. Andrew Cherlin puts the matter this way:

[W]hen social change produces situations outside the reach of established norms, individuals can no longer rely on shared understandings of how to act. Rather, they must negotiate new ways of acting, a process that is a potential source of conflict and opportunity.⁵³

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

By contrast, today’s married couples make up the rules against the backdrop of the new individualism: is this marriage good for me? A 2001 survey of young adults provides striking evidence that attitudes which would have been unthinkable in mid-twentieth-century America have become the new norm:

Sixty-two percent agreed that “Living together with someone before marriage is a good way to avoid an eventual divorce.”

Eighty-two percent endorsed the idea that “It is extremely important to [me] to be economically set before you get married.”

⁴⁹ U.S. Census Bureau, America’s Families and Living Arrangements, Table C3, found at <http://www.census.gov/population/www/socdemo/hh-fam/cps2011.html>

⁵⁰ Thomas and Sawhill, *supra* note ___, at 58.

⁵¹ U.S. Bureau of the Census, Statistical Abstract of the United States, Table 89, available at <http://www.census.gov/prod/2011pubs/12statab/vitstat.pdf>.

⁵² U.S. Bureau of the Census, Statistical Abstract of the United States, Table HS-14, available at <http://www.census.gov/statab/hist/HS-14.pdf>.

⁵³ Cherlin (2004), *supra* note ___, at 848.

More than 80% of the women agreed that it is more important “to have a husband who can communicate about his deepest feelings than to have a husband who makes a good living.”⁵⁴

Data confirm that marriage today differs significantly from its mid-twentieth-century predecessor. One striking change is that marriage typically occurs much later in the life course, after the careers of both individuals are well underway. In 2011, the median age at first marriage in the United States was 29 for men and 27 for women.⁵⁵ By contrast, in 1955, the typical man married at age 23 and the typical woman at age 20. As late as 1990, the figures were 26 and 24, respectively. Figure 5 illustrates the rise and fall of mid-twentieth-century marriage. From 1940 to 1990, individuals actually married at younger ages than in the late nineteenth century and early twentieth. In 1990, the age of marriage catches up to and then quickly exceeds the nineteenth-century baseline.⁵⁶

Marriage has simultaneously become more transient, as Americans marry, divorce, and remarry (or cohabit) more frequently than before. Family law now permits easy divorce: “no-fault” divorce of some kind is available in every state.⁵⁷

The raw divorce rate (divorces per 1,000 population) conveys some, but only some, of the change in marital behavior. Starting from a low 2.2 percent in 1960, the raw divorce rate rose to or above 5 percent from the mid-1970s to mid-1980s.⁵⁸ The raw divorce rate declined thereafter and as of 2008 stood at just 3.5 percent.⁵⁹ But the raw marriage rate (marriages per 1,000 population) has continued its long-term decline, from 10.6 percent in 1970 to 7.1 percent today, with the result that the divorce rate affects fewer married people. As a rough cut, the raw divorce rate relative to (divided by) the raw marriage rate has risen, from .26 in 1960 and .33 in 1970 to .49 today.

A clearer picture emerges from studies of the percentage of marriages lasting to the fifth, tenth, fifteenth, and later anniversaries. Among marriages entered into by men in the 1960-1964 period, for example, 94.6 percent of marriages lasted at least until the fifth anniversary and 74.7 percent lasted at least until the 15th anniversary. By contrast, when we look at marriages entered into by men in 1985 to 1989, we see that only 67

⁵⁴ Research reported in Cherlin (2004), *supra* note ___, at 856.

⁵⁵ U.S. Bureau of the Census, Table MS-2, Estimated Median Age at First Marriage, available at www.census.gov/population/socdemo/hh-fam/ms2.xls (28.7 and 26.5, respectively).

⁵⁶ Source: U.S. Bureau of the Census, Table MS-2, Estimated Median Age at First Marriage, available at www.census.gov/population/socdemo/hh-fam/ms2.xls.

⁵⁷ Judith Areen, Marc Spindelman, and Philomela Tsoukala, *Family Law* 719 (6th ed., 2012).

⁵⁸ U.S. Bureau of the Census, *Statistical Abstract of the United States* (2012), Table 78, available at <http://www.census.gov/prod/2011pubs/12statab/vitstat.pdf>.

⁵⁹ *Id.*

percent lasted at least until the 15th anniversary. (We do not yet have data on later marriage cohorts.)⁶⁰

As recently as 1990, the percentage of Americans who were divorced was 8.3 percent, while in 2010, it was 10.4 percent.⁶¹ Taking a 2009 snapshot, the Census Bureau found that 21 percent of marriages involved men married twice or more, while 20 percent of marriages involved women married twice or more.⁶² First marriages ending in divorce lasted a median 8 years. Divorced men and women who married a second time did so, on average, within 4 years after their first marriage ended.⁶³

Many individuals are separated, divorced, and remarried at young ages: in 2009, men who terminated first marriages had a median age at divorce of 32, while women had a median age of 30.⁶⁴ The typical man entering a second marriage was 36, and the typical woman was 33.⁶⁵ Remarriage after divorce is common: the 1995 CDC study found that a divorced woman had a 75% chance of remarrying within 10 years.⁶⁶ Remarriage probabilities varied among groups but were relatively high among younger women and women in households earning more than \$50,000.⁶⁷

Gender roles within continuing marriages have shifted noticeably. Married women today typically hold paid jobs, even during child-rearing years, and wives tend to hold jobs at roughly the same level of pay and status as their husbands.⁶⁸ Figure 6 shows the well-known increase in wives' labor-force participation beginning in the mid-twentieth-century.⁶⁹ As the figure illustrates, the influx of women did not begin and end in the 1970s. Instead, the upward trend continued through the 1990s. By 2010, the

⁶⁰ U.S. Bureau of the Census, Number, Timing, and Duration of Marriages and Divorces: 2009, supra note ___, at Table 4.

⁶¹ U.S. Bureau of the Census, Statistical Abstract of the United States (2012), Table 56, available at <http://www.census.gov/compendia/statab/2012/tables/12s0056.pdf>.

⁶² U.S. Bureau of the Census, Number, Timing, and Duration of Marriages and Divorces: 2009, Table 10 p. 19, available at <http://www.census.gov/prod/2011pubs/p70-125.pdf>.

⁶³ U.S. Bureau of the Census, Number, Timing, and Duration of Marriages and Divorces: 2009, supra note ___, at Table 8.

⁶⁴ U.S. Bureau of the Census, Number, Timing, and Duration of Marriages and Divorces: 2009, supra note ___, at Table 7.

⁶⁵ U.S. Bureau of the Census, Number, Timing, and Duration of Marriages and Divorces: 2009, supra note ___, at Table 7.

⁶⁶ Bramlett and Mosher, supra note ___, Table 37, p. 78.

⁶⁷ Id.

⁶⁸ See Christine R. Schwartz, Earnings Inequality and the Changing Association between Spouses' Earnings, 115 Am. J. Soc. 1524 (2010).

⁶⁹ BLS, Employment status of the civilian noninstitutional population 16 years and over by sex, 1971 to date, available at <http://www.bls.gov/cps/cpsaat02.htm>.

difference in participation for single and married women was only two percentage points apart (63.3 % vs. 61%)⁷⁰ compared with 23 percentage points in 1950 (46.3% vs. 23%).⁷¹ See Figure 7.

Trends among couples with both spouses under age 55 are even starker. In 1969, 54.2% of couples had a working wife, while in 1998, 82.2% did.⁷²

Wives now contribute 37.1% of family income, compared to 26.6% in 1970.⁷³ Wives now earn more than husbands in nearly a quarter of marriages, compared with less than 5% in 1970.⁷⁴ The dynamics of marriage search have changed as well: no longer does a (typical) high-earning man seek to marry a low-earner destined to be a stay-at-home mother: today, one high-earner is increasingly likely to marry another. Today, all else equal, high earning women are actually more likely to marry than lower-earning peers.⁷⁵

It would be a mistake to reach the happy conclusion that gender has been eliminated in American family life. True, married couples are more gender-egalitarian than before. From 1975 to 2000, married mothers decreased their hours of housework as they increased their time spent in paid employment, while married fathers increased their hours of child care and housework and decreased their hours of paid work and personal time.⁷⁶ Counting time spent in both market work and unpaid work, mothers and fathers now work equally long weeks (and longer total weeks than in 1975).⁷⁷ Even so, the division of labor is not perfectly equal: In 2000, married fathers did 64% of paid work and 34% of unpaid work.⁷⁸

⁷⁰ U.S. Bureau of the Census, Statistical Abstract of the United States, Table 597, available at <http://www.census.gov/compendia/statab/2012/tables/12s0597.pdf>.

⁷¹ U.S. Bureau of the Census, Statistical Abstract (2012), Table 598, available at <http://www.census.gov/compendia/statab/2012/tables/12s0598.pdf>; U.S. Bureau of the Census, Statistical Abstract of the United States, Table HS 30, available at <http://www.census.gov/statab/hist/HS-30.pdf>.

⁷² Katharine Bradbury and Jane Katz, Wives' Work and Family Income Mobility, Federal Reserve Bank of Boston, Public Policy Discussion Paper No. 04-3, p. 27 (Table 1), available at <http://www.bos.frb.org/economic/ppdp/2004/ppdp0403.pdf>.

⁷³ BLS, Table 24, available at <http://www.bls.gov/cps/wlf-table24-2011.pdf>.

⁷⁴ Richard Fry and D'Vera Cohan, New Economics of Marriage: The Rise of Wives, Pew Research Center, Jan. 19, 2010, available at <http://pewresearch.org/pubs/1466/economics-marriage-rise-of-wives>. See also BLS Table 25, available at <http://www.bls.gov/cps/wlf-table25-2011.pdf> (showing the percentage of wives earning more among two-earner couples).

⁷⁵ Megan M Sweeney. Two Decades of Family Change: The Shifting Economic Foundations of Marriage, 67 Am. Soc. Rev. 132 (2002) (comparing marital formation in a cohort born in the early 1950s with that of a cohort born in the early to mid-1960s) .

⁷⁶ Suzanne M. Bianchi, et al., Changing Rhythms of American Family Life 64-67, 111 (2006).

⁷⁷ Id., p. 170.

⁷⁸ Id., p. 116-117 (Table 6.1).

At the same time, the gendered division of labor falls heavily on the rising proportion of single mothers, who bear a heavy burden of care work along with paid employment. When romantic relationships end, whether by divorce or by the end of cohabitation, mothers are overwhelmingly left with primary responsibility for the day-to-day care of children.⁷⁹ In 2010, for example, 7.2% of all households were headed by single mothers, while only 2.4% were headed by single fathers.⁸⁰ A supermajority of single mothers combine care work with paid work: even during the present recession, two-thirds of single mothers work outside the home as well.⁸¹

Property and family law rules dovetail with and reinforce the new individualism. Cohabiting couples operate under ordinary state property law: when they break up, each person takes only what is his or her own, and, absent extraordinary circumstances, neither party owes support to the other. Family law may appear to alter these default rules for married couples, who -- in theory -- face court-supervised division of property and may owe spousal support (i.e., alimony). But in the vast majority of cases, divorced couples part ways in much the same way as cohabiting couples: each takes his or her own property, and neither owes much, if any, spousal support (alimony) to the other.⁸² According to the American Bar Association, only 15% of all divorce cases include alimony payments.⁸³

Property division and alimony are *de facto* irrelevant for most couples for two reasons. First, a substantial majority of Americans has little or no wealth other than their human capital (economists' term for earning power). Property division at divorce may be mildly painful, especially if the couple has debts, but other than modest pension rights and a little equity in a home and car, many couples have very modest assets to divide. In 2010, for example, the median income of U.S. families was \$49,800, and the

⁷⁹ *Id.*, p. 67-68, 170.

⁸⁰ U.S. Bureau of the Census, Households and Families: 2010, Table 3, p. 8, available at <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

⁸¹ U.S. Bureau of Labor Statistics, Tab. 4. Families with Own Children: Employment Status of Parents, 2010-2011 annual averages, available at <http://www.bls.gov/news.release/famee.t04.htm>.

⁸² See Judith G. McMullen, Debra Oswald, "Why Do We Need A Lawyer?: An Empirical Study of Divorce Cases," 12 *J. Law and Fam. Studies* 57 (2010) (finding that alimony was awarded in only 9% of cases in a county in Wisconsin in 2005, and that most of these awards were temporary or would terminate upon specified events (e.g., the sale of a house or car). For discussion of the limited duration and amount of alimony awards, see Carolyn Frantz and Hanoach Dagan, *Properties of Marriage*, 104 *Colum. L. Rev.* 75, 119 (2004).

⁸³ Alicia B. Kelly, *Actualizing Intimate Partnership Theory*, 50 *Fam. Ct. Rev.* 258 (2012), citing Jeff Atkinson, *Alimony/Divorce*, in *The ABA Guide to Family Law* (2011). The U.S. Census Bureau finds basically the same result, with alimony awards in 14.6% of divorces. See U.S. Census Bureau, *Child Support and Alimony: 1985-14* (1987).

median net worth was \$77,300.⁸⁴ But that figure, modest as it is, overstates the financial position of many Americans. Among families headed by an individual under 35 or 35-44, for example (two groups heavily represented in divorce), median net worth was \$9,300 and \$42,100, respectively.⁸⁵ Nonfinancial assets accounted for 62 percent of wealth in 2010.⁸⁶ Twenty-five percent of Americans in 2010 had *negative* net worth.⁸⁷

Second, the law of alimony by its terms applies primarily in a factual setting that is increasingly rare: long-term marriage between partners with very unequal earnings, high income, and specialized gender roles.⁸⁸ Critics charge that alimony is increasingly unfair, as women have greater options outside the home.⁸⁹ And several states have moved to limit alimony, including liberal Massachusetts.⁹⁰

Property division tends to follow a 50-50 split, whether in common-law or community property states, and only in the case of marital property (typically, property purchased with earnings during the marriage). Even in the nine community property states,⁹¹ the law often defaults to an individualist pattern.⁹²

Thus, the new individualism in marriage likely shapes and is shaped by the individualism of the law. The law might, of course, take a different direction. The ALI has proposed to extend to some cohabiting couples the property and support rights

⁸⁴ Jesse Bricker, Arthur B. Kennickell, Kevin B. Moore, and John Sabelhaus, Changes in U.S. Family Finances from 2007-2010: Evidence from the Survey of Consumer Finances, 98 Federal Reserve Bulletin 1, 17 (2012) (Table 1, Table 4).

⁸⁵ *Id.* (Table 4).

⁸⁶ *Id.*, at 42 (Table 8).

⁸⁷ *Id.*, (Table 4, p. 18).

⁸⁸ See HORNBOOK; see also Judith G. McMullen, Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce (2011) (noting that alimony is typically payable only by long-term spouses who have the ability to pay and are divorcing a needy spouse); Alicia Brokars Kelly, Actualizing Intimate Partnership Theory, p. 260 (reporting that “alimony is more myth than reality” and citing data showing “that alimony awards are declining and are granted in only about 15% of divorces, and even when awarded, are typically low in amount and short in duration.”)

⁸⁹ Lizette Alvarez, In Age of Dual Incomes, Alimony Payers Prod States to Update Laws, N.Y. Times, March 4, 2012, available at <http://www.nytimes.com/2012/03/05/us/alimony-payers-prod-states-to-update-divorce-laws.html?pagewanted=all>.

⁹⁰ Jess Bidgood, Alimony in Massachusetts Gets Overhaul, With Limits, NY Times, Sept. 26, 2011, available at <http://www.nytimes.com/2011/09/27/us/massachusetts-curbs-lifetime-alimony-payments.html>.

⁹¹ ABRAMS, CAHN, ROSS & MEYER, CONTEMPORARY FAMILY LAW 417 (2nd ed. 2009) (listing Arizona, California, Louisiana, New Mexico, Nevada, Texas, Washington, and Wisconsin).

⁹² Alicia Brokars Kelly, Actualizing Intimate Partnership Theory, 50 Fam. Ct. Rev. 258, 261 (2012).

accorded to married couples.⁹³ Canada permits courts to award alimony to cohabiting couples who dissolve their relationship.⁹⁴ And scholars have proposed re-introducing common-law marriage in order to extend family-law protections for marriage to long-term cohabitation.⁹⁵

3. *The Tightening Link Between Marriage and Class*

Lasting marriage and child-rearing within marriage have one last bastion in America: the upper class. To a far greater degree than in the twentieth century, lasting marriage that involves living with one's own biological children (and no others) has become a form of social privilege, correlated with other forms of social privilege.⁹⁶ "The culture is shifting, and marriage has almost become a luxury item, one that only the well educated and well paid are interested in," according to a leading researcher on inequality.⁹⁷

To be sure, the American upper class does not follow the patterns of mid-twentieth-century marriage. As a group, better-educated and higher-income individuals marry later than those in lower socioeconomic classes; over a lifetime, however, they marry at higher rates.⁹⁸ Divorce rates also correlate with class: while 46% of marriages end in divorce (or permanent separation) within 10 years among high-school dropouts, and 37% end within 10 years for high-school graduates, only 16% end in that period for those with a B.A. or more.⁹⁹

Figure 8, created by Robert Groves of the Census Bureau, illustrates the association of cohabitation with lower-income groups and marriage with higher-income status. Divorce rates fall with income and with educational attainment.¹⁰⁰ In 2011, 62 percent of all American men age 35-39 were married, but only 51% of men (in that age group) with earnings from \$15,000-\$25,000, and only 41% of men with earnings from

⁹³ American Law Institute, *Principles of the Law of Family Dissolution* (2002). For criticism of this proposal, see, e.g., Marsha Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal?* (April 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086768.

⁹⁴ See Jeanne Lafortune, et al., *Changing the Rules Midway: The Impact of Granting Alimony Rights on Existing and Newly-Formed Partnerships* (2011).

⁹⁵ Cynthia G. Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 *Or. L. Rev.* 709 (1996).

⁹⁶ Blaine Harden, *Numbers Drop for the Married With Children: Institution Becoming The Choice of the Educated, Affluent*, *Wash. Post*, Sunday, March 4, 2007.

⁹⁷ Isabel Sawhill is a researcher at the Brookings Institution. She is quoted in Harden, *supra* note __.

⁹⁸ Andrew J. Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 *J. Marriage and Fam.* 403, 404 (2010).

⁹⁹ Cherlin, *Demographic Trends*, *supra* note __, at 405.

¹⁰⁰ See Bramlett and Mosher, *supra* note __, at Table 21, p. 55.

\$5,000 to \$15,000. By comparison, 76% of men age 35-39 with earnings over \$100,000 were married.¹⁰¹

The longevity of marriage now varies strikingly by social class, as Figure 9 shows. Based on 2010 data, demographers estimate that 90% of the marriages of women attaining a B.A. will last at least five years, compared to only 75% for women attaining only a high-school diploma. By the 20-year mark, the gap in lasting marriages is nearly *forty percentage points* between the more-educated group (78%) and the less-educated (39%).¹⁰²

Children's family status also varies by income and social class. Figure 10 shows the relationship between income level and parental marriage: 34% of children in poverty live with their married parents, while 81% of those living at 200% of poverty or above do so. Figure 11 presents similar statistics based on parents' educational attainment: while less than half of children of high-school dropouts live with married parents, a stunning 91% of children with a parent with a graduate degree do so.¹⁰³

The data on new births is even more striking. In 2009, only 8% of births among educated women (holding a B.A. or more) occurred outside marriage, compared to 38% for those with some college and 55% of those with a high-school diploma.¹⁰⁴ As Figure 12 shows, the percentage of nonmarital births among women with a high-school diploma or some college has increased enormously since 1990.¹⁰⁵

Even so, gender roles in these upper class marriages differ significantly from mid-twentieth century marriage. Educated wives are more likely than less-educated wives to work outside the home and to earn more than their husbands.¹⁰⁶

What causes the correlation between marriage and class? One theory holds that lasting marriage boosts economic achievement: married people have greater support at

¹⁰¹ Census Bureau, America's Families and Living Arrangements, Table A1, found at <http://www.census.gov/hhes/families/data/cps2011.html>.

¹⁰² Source: Casey E. Copen, et al., First Marriages in the United States: Data from the 2006-2010 National Survey of Family Growth, National Health Statistics Report No. 49 (2012), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf> (Table 5).

¹⁰³ Author's calculations based on Source: U.S. Bureau of the Census, Living Arrangements of Children, 2011 (Table C3), found at <http://www.census.gov/population/www/socdemo/hh-fam/cps2011.html>.

¹⁰⁴ Data collected and presented by Child Trends, available at <http://www.childtrends.org/index.cfm>.

¹⁰⁵ Id.

¹⁰⁶ BLS, Table 8, available at <http://www.bls.gov/cps/wlf-table8-2011.pdf> (showing that 66.4% of all women were employed in 2010, including 48.7% of high-school dropouts, 67.4% of those with a high-school diploma but no college, and 80% of those with a B.A. or more. A whopping 88.6% of women with a doctoral degree were employed).

home and can take greater risks (and reap bigger rewards) in the marketplace.¹⁰⁷ Alternatively, perhaps money and class position make lasting marriage possible, because well-off couples can avoid financial distress and can buy their way out of squabbles over household tasks by hiring help.¹⁰⁸ A third line of thinking posits that some personal characteristic, like patience, insight, persistence, long-range thinking, or even personal charm, might assist some people attain *both* both lasting marriage and economic success.¹⁰⁹

Mid-twentieth century marriage is gone. Even though some couples still marry early, adopt traditional gender roles, and persist in marriage for the long-term, their marriages no longer exist in the world Berger described, because the marriages and their participants are unusual rather than the norm. The result, we shall see, is that the presumed social context for joint filing simply no longer exists. Reform is imperative, but the direction for reform depends critically on one's ideals for income taxation and social insurance.

II. Updating the Income Tax: Beyond Joint Filing

When legal debates go stale, we should pay attention. Legal controversies, important ones at least, ought to have a gut-wrenching quality: they should pit critical values against each other. When central disputes in a field of law lose that edge, the debate has likely disconnected from social reality.

The trilemma, in my classroom at least, has come to have precisely this disconnected quality. Recall that the trilemma holds that:

An income tax cannot simultaneously:

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

¹⁰⁷ See Robert I. Lerman, Marriage and the Economic Well-Being of Families with Children, Urban Institute (2002), available at <http://www.urban.org/url.cfm?ID=410541>; Robert I. Lerman, Married and Unmarried Parenthood and Economic Well-Being: A Dynamic Analysis of a Recent Cohort, available at <http://aspe.hhs.gov/hsp/marriage-well-being03/parenthood.pdf>.

¹⁰⁸ See Andrew J. Cherlin, Demographic Trends in the United States: A Review of Research in the 2000s, 72 J. Marriage and Family 403, 404 (2010) (noting that it “remains unclear” why class patterns in family formation are diverging, but that “it is tempting” to associate that divergence with labor market trends).

¹⁰⁹ For a review of a variety of theories, see Adam Thomas and Isabel Sawhill, For Love and Money? The Impact of Family Structure on Family Income, 15 Future of Children 57 (2005), available at <http://www.eric.ed.gov/PDFS/EJ795851.pdf>

I used to look forward to teaching the trilemma, because it illustrates the social tragedy that confronts policy makers: one important value must give way if we are to achieve the other two. But in recent years, the once-lively debate has petered out, and I now understand (after writing this article and integrating insights from my family law teaching into my understanding of tax) that the culprit is the new individualism.

To be sure, I still have good success with principles (1) and (3). Progressive-leaning students typically endorse progressive rates, and many students feel strongly about state neutrality toward marriage. Participants on the other side of the political aisle are ready to state the case for flat rates and policies that deliberately reward (or penalize) marriage.

But puzzled looks have greeted principle (2) in recent years. Oh, I try to generate some excitement in the classroom, some sense that principle (2) is worth fighting for. Surely, I say, we must measure couples' income in order to impose the same rate of tax on equal-earning couples; otherwise, the tax system would tax as "poor" a low-income man married to a rich woman -- an obviously inaccurate conclusion. No poverty researcher, I argue, would measure the population's income individual-by-individual, counting a non-working socialite married to a high-earner as living under the poverty line.

The new individualism makes it clear why my classroom antics have failed and, more importantly, why we should adapt the trilemma to reflect the new social reality. When marriage is no longer an institution, it no longer is obvious that *equality across married couples* is an important social goal. Family life now occurs outside marriage as often as in it, and when marriage itself no longer has standard content.

But if we revise principle (2) to assert the importance of *equal-earning households* or of *families with equal resources*, the trilemma springs back into the realm of social relevance. My own poverty-research analogy betrays both the problem and the solution: no self-respecting poverty research would treat a low-earning man *living with* a high-earning woman as poor either! Instead, she would adopt some metric for household composition and would look at the resources available to that unit.

Restated, then, the new trilemma looks like this.

An income tax cannot simultaneously:

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

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

The restated trilemma begins to illustrate the obsolescence of joint filing based on formal marriage. The trilemma’s principle (2) reflects the idea that resources are shared and used in socially-meaningful groupings of people. In the mid-twentieth century, marriage was not only one such grouping, it was *the* principal grouping for Americans of all ages. The new individualism has, as we have seen, destroyed the easy elision of “marriage” with “family,” with the result that formal marriage no longer can suffice to implement principle (2).

Still, the trilemma, as elegant as it is, represents only a first cut at the problem of taxing the family. Before we can conclude that the new individualism has vitiated joint filing, we need to take a closer look at the rationales for aggregating income and at the administrative considerations that helped give rise to joint filing in the first place.

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

My thesis, of course, is that *joint filing* and not *marriage* is outdated as a matter of concern for the income tax. In Part III, I show that the new individualism potentially supports explicit taxes on or subsidies to formal marriage, but that none of these options best adopts the the ad hoc pattern of penalties and/or bonuses produced by joint filing, which depend on the rate structure, the level of income, and the distribution of earnings between husband and wife.

A. Liberal Individualism and Individual Filing

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

The liberal ideal of income taxation aims to capture differentials in *individual* fortune produced by undeserved good and bad luck.¹¹⁰ Taking this view, individuals

¹¹⁰ Ronald Dworkin, for example, proposes an income tax as a second-best approach to income insurance, which would pay benefits to those who could only earn low incomes and would tax those who had the capacity to earn high incomes. Ronald Dworkin, *Sovereign Virtue* 99-109 (2000). Philippe Van Parijs justifies an income tax as a tax on undeserved rents from holding jobs, particularly good jobs. Philippe Van Parijs, *Real Freedom for All* 108-124 (1998).

should choose the family lives that seem best to them, and the state should take no notice of family ties. Concretely, then, the state should assess taxes based on individual, not joint, filing, and tax liability should not vary based on formal marriage or other family activities, including support owed to or received from marital partners.¹¹¹

These principles seem to harmonize with the new individualism, which leaves family relationships very much to individual choice and revision. Liberalism famously -- and infamously¹¹² -- treats each individual as a separate human being, capable of making decisions, including decisions to form and leave relationships. On this view, two individuals with the same incomes properly pay the same tax, even if one is married to a billionaire and the other to an unemployed surfer. The billionaire's spouse is likely better off in terms of material comforts while the relationship lasts, but the upside and downside risks are properly borne by the individual, who chose to enter the relationship and chooses to continue it.

Joint filing, then, has little to recommend it from a liberal point of view. To be sure, liberal theories, notably Rawls' *A Theory of Justice*,¹¹³ reflected the backdrop of mid-twentieth-century marriage. Rawls assumed that the family constituted the primary social unit, and that the family head would altruistically advance his family's interests. His assumption about altruism surely strains credulity in any period. But the assumption that the married couple is a social, psychological, and economic unit, was correct in its time.

As the 1970s passed into the 1980s, however, it became clear (to feminist scholars, at least) that the notion of the married couple as a unit fit uneasily with liberal commitments to individual autonomy.¹¹⁴ Liberal scholars in the early 2000s have tended to endorse an individualist perspective, taking the position that individuals should determine for themselves the family obligations (if any) they wish to endorse.¹¹⁵ The demise of mid-twentieth-century marriage endorses the point that liberalism should -- and can -- treat the individual, rather than the family, as the social unit whose rights and obligations should be set by the welfare state.

A traditional argument for joint filing is that because married couples "pool" assets, their incomes cannot be measured separately. But the pooling argument rests on shaky empirical and normative ground from a liberal perspective. First, the empirical problem: the extent of pooling now varies enormously among married couples and cohabitants.

¹¹¹ I leave to another occasion the state's proper stance toward children and child-rearing. See, e.g., Anne L. Alstott, *No Exit* (2004) (arguing that a liberal state ought to transfer additional resources to parents who meet their obligations to children).

¹¹² Sandel, Minow.

¹¹³ John Rawls, *A Theory of Justice* (1971).

¹¹⁴ Susan M. Okin, *Justice, Gender, and the Family* (1991).

¹¹⁵ See, e.g., Elizabeth Brake, *Minimizing Marriage* (2012).

Some cohabitants treat all resources in common, while many married couples do not, and the trend is toward greater individualism.¹¹⁶ Thus, the ready assertion that married couples “pool income,” which might have been apt enough in the mid-twentieth century, does not fit easily the contours of twenty-first-century marriage.

Next, the normative problem: it is not clear that “pooling” justifies aggregation of income in a liberal income tax. Liberalism famously -- and infamously¹¹⁷ -- treats each individual as a separate human being, capable of making decisions, including decisions to form and leave relationships. A good relationship might (perhaps) increase her taxes or a bad one decrease them (a possibility that I shall consider in Part III), but the individual remains the basic unit for assessing the benefits and burdens of equality.

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

Today, by contrast, most women work, including most wives and most cohabiting women, and the degree of role specialization in couples has declined. The shorter average duration of marriage, the high probability of marital disruption, and the new patterns of separate accounting and spending all make it far more acceptable to attribute each individual’s earnings and savings income to her and her alone. Following family law, the tax system might adopt a 50-50 presumption for joint savings accounts and other jointly-held assets.

Put another way, a central problem for past proposals for individual filing has been the treatment of the earned income of the married couple. Logically, the law must adopt one of just three options. The first is to return to pre-1948 law, in which Poe and Earl co-existed, at the cost of large tax disparities between common-law and community-property states. A second option would overrule Poe and follow the Earl rule in all states, disregarding community property. A third option would overrule Earl and split earnings (but not necessarily property income) even in common-law states, at the cost of steep tax differences between the married and the unmarried. Pamela Gann and Lawrence Zelenak, among others, have thoroughly canvassed these options.¹¹⁸

¹¹⁶ See, e.g., Fenabra R. Addo and Sharon Sassler, Financial Arrangements and Relationship Quality in Low-Income Couples, 59 *Fam. Relations* 408, 409 (2010) (noting evidence that “separate fiscal systems” have become more prevalent among married couples); Jan Pahl, Family Finances, Individualisation, Spending Patterns, and Access to Credit, 27 *J. Socio-Economics* 577, 577 (2008), reviewing data suggesting that “fewer couples are pooling their incomes and more are keeping all or part of their incomes in individual accounts to which their partner does not have access.”

¹¹⁷ Sandel, Minow.

¹¹⁸ See Gann, *supra* note ___, at 52-61; Zelenak, *supra* note ___, at 383-394.

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

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

Continuing the analysis from a liberal perspective, we should distinguish two cases, one of which constitutes tax avoidance, and one of which does not. A *true* transfer of assets from one individual to another (regardless of their relationship) does not amount to tax avoidance. If Alice gives \$1,000 or \$1 million to Bertha, and the transfer is genuine, meaning that Alice no longer controls the money or expects its return, then the tax system should view the money as Bertha's, regardless of the nature of the relationship. Going forward, Bertha is richer, and her tax liability should capture her greater income.¹¹⁹

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

Formal marriage today is a poor conceptual fit for the problem of sham transfers. Mid-twentieth-century marriage created such lasting unity in the married couple that formal title transfer was rather meaningless. Today, the situation is quite different: the new individualism in marriage makes marital partners more independent in their financial lives and far warier than in the past about formal asset transfers. No longer is marriage a lifelong commitment, begun in youth and expected to endure, with a psychological sense of unity. Marriage today more often involves older partners with separate careers and financial experience. More marriages today continue during a period of likely breakup. Blended families, too, can change the financial dynamics of

¹¹⁹ For analogous arguments, see Gann, *supra* note ___, at 52-61 (considering the positive gender impact of elective income-shifting premised on legal property transfers); Shari Motro, A New "I Do": Towards a Marriage-Neutral Income Tax, 91 Iowa L. Rev. 1509 (2006) (proposing elective joint filing based on "enforcable legal entitlements" to income-splitting).

family life. Not too surprisingly, then, the last generation has witnessed a revolution in the internal finances of married couples: many couples now maintain separate checking and retirement accounts and pay separately for household expenses.

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

A number of legal rules might be adopted to curb sham transfers in individual filing. Canada, for instance, disregards many transfers of income between spouses and common-law partners.¹²⁰ Anthony Infanti proposes to permit elective nonrecognition on outright transfers of property but to disregard only property transfers in which the transferor retains control or title.¹²¹

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

First, the tax law might adopt a lookback rule, an idea that is used to combat sham transfers in other tax contexts.¹²² Under this approach, a gift transfer to anyone -- spouse or unmarried partner, parent or child or stranger -- would be deemed effective for purposes of the income tax only if formally recorded with the IRS. The notice of transfer would be provided to the transferee and would state that the transferor had given up day-to-day control and the power of disposition. The transfer would immediately be effective for income tax purposes, but would be disregarded *ex post* if that property (or other property up to the same amount)¹²³ reverted to the original owner or his entity alter ego within a specified period. In that case, the transfer would be deemed void for tax purposes, and the original owner would owe taxes for the intervening period. The transferee probably should be allowed a refund of the taxes

¹²⁰ See Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 3 Utah L. Rev. 605, 630-31 (2010) (describing Canadian assignment-of-income and property attribution rules).

¹²¹ *Id.*, at 656-661.

¹²² See, e.g., section 1014(e) (one-year lookback for property acquired by decedent by gift); section 2035(a) (three-year-lookback to gifts made within three years of death);

¹²³ To avoid obvious problems of tracing, the lookback rule would apply to any transfer of any property flowing the other direction during the lookback period.

paid, but perhaps not, as a deliberate penalty for boomerang transfers and to avoid gaming by retransfer.

For example, suppose that at T1, high-bracket H transfers \$100,000 in cash to his low-bracket W. She would pay tax on the income at her rate thereafter, except that if she made a retransfer to H within some period (e.g., ten years), H would owe taxes (in the year of the retransfer and with interest) on all income during the intervening period. The lookback rule would apply even if W transferred, say, real estate or a stock portfolio instead of cash; and a partial lookback would apply even if only, say, \$25,000 flowed from W to H.

A key advantage of the lookback rule is that it could apply to any gift transfer, with no distinctions needed based on family status: transfers would be equally subject to the rule whether between spouses, cohabitants, or strangers. Still, the attribution rules upon retransfer would require some attention: the lookback tax should be owed whether H or his corporation or partnership or trust made the repurchase.

The proposal raises many design issues, including the treatment of partial transfers and transfers in trust. I do not attempt to address those issue here, except to note that they properly flag the general nature of the sham transfer problem, which operates well beyond the married couple and minor children (whose situation is addressed by the kiddie tax of section 1(g)). The new individualism has strengthened lineal ties while weakening horizontal (marriage) ties, and so attention to sham transfers to adult children may be increasingly important.

Another general design issue involves the attribution rules. An open design issue is whether the lookback rule would apply if W transferred the funds to an individual related to H -- say, H's brother or second wife or live-in partner. An individualist might be inclined not to worry too much about such transfers. After all, a retransfer to anyone other than the original transferor (H in my example) would not fit the transactional profile of a sham transaction between individuals willing to disregard the consequences of formal title transfer.

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

A second reform would coordinate state law with federal tax law to give greater effect to formal legal transfers. State law already enforces formal transfers for

cohabitants, who (except in rare cases of palimony, a claim very difficult to sustain) have no rights to property in which the other holds formal title. States might agree to give full effect, even within marriage, to formal title transfers disclosed to the IRS. The aim would be to override equitable-division or community-property rules in order to make it even less likely that H would transfer title to most of his assets to W, risking the loss of \$100,000 for the sake of tax avoidance.

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

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

B. Welfarism and Household Aggregation

Like liberals, welfarists differ in their commitments and yet share a common core set of values. Very generally, welfarists seek to maximize aggregate utility or welfare.¹²⁴ Debates center on what counts as welfare and how to weight the welfare of each individual, but the consensus view is that welfare (and not rights, or freedom, or some other feature of society) should be the metric for judging among alternative legal systems, social arrangements, and so on.

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

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

¹²⁴ See Louis Kaplow, *The Theory of Taxation and Public Economics* ___-___ (2010).

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

Second, however, income taxation can reduce utility by distorting relative prices. The background assumption here is that individuals would, in the absence of taxation, maximize their welfare by consuming according to market prices set in the absence of taxation. If the tax system alters the relative prices of, say, work and leisure time, the new pricing will lead individuals to alter their perceptions and behavior. The new equilibrium will be narrowly optimal (that is, individuals will have maximized utility *given* the existence of the tax). But the total utility achieved is, by hypothesis, less than before.

This tradeoff is, of course, the classic dilemma of redistribution, and the welfarist ideally would respond by weighing the two effects against each other. A large, mathematical literature in economics attempts to prescribe an optimal income tax structure by quantifying the magnitude of the tradeoff under various assumptions.¹²⁵

The welfarist prescription for taxation of the family follows the same recipe: the income tax should adjust tax liability by taking notice of the family if family relationships either (a) alter the marginal utility of money for family members or (b) affect individuals' the perceived relative prices of goods or activities. As we shall see, family relationships potentially affect both, but formal marriage is no longer a good proxy for the activities that a welfarist income tax should aim to notice.

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

1. The Traditional Debate over Joint Filing

Begin with the problem of targeting welfarist redistribution. In principle, the tax system should redistribute based on the marginal utility of money: the ideal would be to take money from those individuals whose marginal utility is low and redirect it to those whose marginal utility is high. But because marginal utility is unobservable, real-world programs adopt proxies for marginal utility: the convention is that taxes should target the rich and transfers should target the poor, with "poverty" understood to mean command over money (and other tangible resources that contribute to material well-

¹²⁵ Cite Mirrlees and a recent chapter from the Handbook of Public Economics.

being). (This discussion elides many interesting and important controversies, of course, about the proper way to target redistribution in a welfarist system, but my aim for the moment is just to convey the standard view.)

Family ties affect wealth and poverty in at least three ways. First, if an individual shares resources with another, she may be better or worse off than she first appears. If Rich shares with Poor, then Rich is somewhat less rich than her money income alone makes her seem, because she is not consuming all her income herself. But Poor is not at poor as he seems, because he has access to Rich's resources as well. Family ties may, thus, increase or decrease one's resources and, thereby, alter one's assumed marginal utility of money.

Family adjustments (in both directions) are common in poverty research and in anti-poverty programs. In 2011, for instance, a two-parent family with \$30,000 in income was not considered poor in 2011 with two children but was considered poor with four.¹²⁶

Second, families produce economies of scale that improve individuals' resource position. Dollars stretch further when the living room, fridge, and cars (for example) are shared. Linda, who lives alone on \$50,000, has fewer resources than Frank, who shares an apartment with family (or friends) and earns the same cash income. A redistributive system should therefore adjust Linda's income downward or Frank's upward in order to make judgments about their marginal utility of money. Poverty research and welfare programs typically adjust for economies of scale. In 2011, for example, the poverty threshold for a four-person family is less than twice the threshold for the two-person family.¹²⁷

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

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

¹²⁶ Census Bureau, Poverty Thresholds 2011, available at <http://www.census.gov/hhes/www/poverty/data/threshld/>

¹²⁷ Census Bureau, Poverty Thresholds 2011, available at <http://www.census.gov/hhes/www/poverty/data/threshld/>

Still, joint filing does, however imperfectly, capture the insight that redistribution requires the aggregation of family income in order to reflect an individual's true command over resources. While the tax burden now assigned to the married compared to the unmarried may be arbitrary, the argument runs, joint filing still permits more accurate targeting of redistribution. The Rich-Rich couple surely is better off than the Rich-Poor couple. And judging Poor's status without regard to his marriage to Rich would badly mistarget tax liability and welfare payments.

A similar logic links joint filing to economies of scale and home production: marriage is traditionally a site for shared living, dining, and transportation, and marriage often involves significant home production. Joint filing may not perfectly redistribute, but it is superior to a system that ignores family ties altogether.

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

Herein, of course, lies the conventional critique of joint filing. To the extent wives are perceived as secondary workers, the couple evaluates the payoff to wives' (but not husbands') work at the couple's marginal tax rate. When the husband earns more than a small amount, the marginal tax rate is higher for the wife than if she were unmarried. The high marginal tax rate, in turn, discourages the wife from working. The "elasticity" or responsiveness of wives' work to taxes is high, probably because the working wife must continue her home duties and may experience role conflict (because paid work is not valorized so highly for wives as for husbands).¹²⁸

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

2. Welfarism and the New Individualism

But the law's focus on formal marriage no longer well-serves welfarist ends. The welfarist treatment of the family is functionalist: the "family" is the social unit that engages in the functions of family life, which might include altruism, role specialization,

¹²⁸ See, e.g., Nada Eissa and Hilary W. Hoynes, Taxes and the Labor Market Participation of Married Couple: The Earned Income Tax Credit, 88 J. Pub. Econ. 1931 (2004) (documenting the response of married men's and women's labor supply to expansion of the EITC).

and nonmarket exchange. The new individualism, as we have seen, has spread these functions well beyond the traditional married couple.

Louis Kaplow, notably, does not make the mistake of equating “family” and “formal marriage.” Kaplow’s analysis of the taxation of the family is exceptionally clear, and it illustrates well the mis-fit between joint filing and welfarist income taxation¹²⁹ Kaplow points out that families might affect marginal utility or perceived prices in several ways. Altruism, for example, can alter the allocation of income and consumption goods within the family. Assuming that the altruism is genuine and well-informed, the result will be that families are rather good vehicles for increasing aggregate utility. For that reason, society might subsidize individuals living in families (or, equivalently) tax them less than individuals living on their own. Family altruism represents a form of “redistribution” that needn’t be expressly mandated by the state. As a bonus, altruism serves family preferences and so makes everyone feel better off: parents love seeing their children prosper, and so on. For this reason, altruism may multiply utility.

Still, as Kaplow points out, there is a catch. Altruistic redistribution within the family can alter the marginal-utility position of the family members.¹³⁰ Consider Althea and Brenda, who both have zero earnings. Without further information, both would seem to be likely beneficiaries of progressive redistribution, since their marginal utility of money is likely very high. But if Althea lives with her parents, while Brenda has no relatives, Althea merits less state support: altruistic transfers from her parents have moved her farther along the declining-marginal-utility-of-money curve than her earnings alone would indicate.

This kind of tradeoff, Kaplow notes, makes it complicated to know whether, in the end, families of size n should pay n times the tax they’d pay as individuals, or more or less than that. Kaplow shows that the optimal result depends on the shape of the social welfare function and other factors.¹³¹

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

Notably, Kaplow’s analysis avoids the shorthand principles that have traditionally been used to guide the taxation of the family. “Income pooling, for example, is an

¹²⁹ Kaplow, *supra* note __, at __-__.

¹³⁰ Kaplow, *supra* note __, at __.

¹³¹ Kaplow, *supra* note __, at __-__.

imprecise concept, because it might denote altruism, exchange, or economies of scale. Kaplow also does not endorse “equivalence scales,” which welfare programs and poverty measures use to equilibrate the consumption possibilities of families of different sizes.¹³² Instead, Kaplow shows, a full analysis should identify with some care the effects of family life on allocation, production, and exchange and should (ideally) measure their impact on the redistributive upside and deadweight-loss downside of income taxation.

He concludes that there is no obvious direction for tax policy *a priori*: whether society should tax families more heavily or more lightly than comparable individuals depends on the content of family life (e.g., the degree of altruism, the nature of intrafamily exchanges, and individual preferences) and the shape of the social welfare function.¹³³

I have spent some time summarizing Kaplow’s work because it illustrates so clearly that the utilitarian concept of the “family” is functional and variable. The family is defined by its behaviors and attitudes, not its formal label, and which groups count as “families” depends on the dynamic being examined. If the utilitarian analyst is interested in altruism, she should look for social units that engage in altruism. In the age of the new individualism, this notion of family will include some married couples (but not all) but certainly would also include some cohabiting couples, and many parents and adult children. If the analyst wishes to identify economies of scale, she similarly should look at the day-to-day realities of shared living quarters and will count roommates and anyone else to the extent they share living quarters and durable goods, including cohabiting and married couples, single parents and their children, and so on. Home production, as we have seen, has declined in the last generation within marriage and now takes place both inside and outside marriage to varying degrees.

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

One interesting implication of a welfarist theory is that society may properly offer tax subsidies to or impose tax penalties on families. But that insight does not resurrect the welfarist rationale for joint filing based on formal marriage. Joint filing is, after all, one (and only one) vehicle for imposing tax subsidize or penalties, and from a utilitarian point of view, it will likely distribute taxes and penalties according to the wrong criteria.

¹³² James C. Ohls and Harold Beebout, *The Food Stamp Program* (1993), pp. 21-22 (defining the unit as those who pool resources and make joint spending decisions), Patricia Ruggles, *Drawing the Line* (1990), pp. 63-87 (adjusting for family needs).

¹³³ Kaplow, *supra* note __, at __-__.

Subsidies or penalties for altruism, economies of scale, or home production, for example, might map poorly onto the distributional and behavioral patterns of joint filing based on formal marriage.

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

To be sure, the matter of policy design is, for the welfarist, ultimately an empirical one. We cannot absolutely rule out joint filing, but only in a probabilistic sense. Just as a rhesus monkey tapping at a computer *could* write a great American novel, so too might joint filing based on formal marriage maximize social welfare compared to subsidies and penalties targeted to the family life of twenty-first-century individuals. But a welfarist analysis offers no reason to suppose, *a priori*, that joint filing is attractive, let alone optimal. It would be pure coincidence if the right degree of taxation of altruism or economies of scale or home production were captured by penalties and bonuses imposed on formally-married people according to the accidents of the rate structure and the pattern of earnings within the couple.

3. The Challenge of Household Aggregation

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

Pooling received considerable attention in the 1980s and 1990s from legal scholars debating joint filing. For instance, Lawrence Zelenak distinguished between pooling as shared control and pooling as shared consumption; he noted that the income tax typically taxes the party who has control over income rather than all parties who benefit from it.¹³⁴ But, however we choose to interpret “pooling”, it is vulnerable to my repeated point: in the mid-twentieth century, all these features of family life were once

¹³⁴ Zelenak, *supra* note __, at 354-355. Pamela Gann’s 1980 article also discusses pooling and distinguishes between the source of income (the earner) and the beneficiaries of it. See Gann, *supra* note __, at 24-25. See also Michael J. McIntyre, Individual Filing in the Personal Income Tax: Prolegomena to Future Discussion, 58 N.C. L. Rev. 469, 469 (1979-1980) (defending joint filing on the ground that “[m]any married persons, probably most, pool some or all of their individual income sources with their spouses”).

closely associated with formal marriage, but today the elision of “marriage” and “family” is no longer tenable.

Shared consumption, as we have seen, occurs a wide variety of relationships, including cohabitants, ordinary roommates, and children (minor or adult) living with their parents. Some married couples (long-distance couples, commuting couples, and estranged couples) share very little. Even in day-to-day life, married couples may not share resources as extensively as they once did. As early as 1980, Pamela Gann pointed out that data do “not generally substantiate the assumption that married persons equally share their income.”¹³⁵ In 1996, Marjorie Kornhauser reviewed the evidence and conducted an independent study, finding that the extent of consumption pooling in marital households is often overstated. These scholars caught an early glimpse of the new individualism, and new evidence confirms that the trends toward separate earnings, spending, and accounting have continued.¹³⁶

Similarly, role specialization, nonmarket exchange, and insurance also exist outside marriage -- and, decreasingly, within it. Cohabiting couples often report planning for a joint future. Even though many couples break up before that future materializes, the same is true of many marriages.¹³⁷ Many cohabiting couples, and many parents care for (minor and adult) children when illness or unemployment strike. By contrast, marriages are increasingly heterogeneous in the degree of joint planning and insurance they provide: as the divorce rate indicates, many couples do not weather emotional or economic hardship. And, as the sociological research shows, individuals find it increasingly acceptable to break up when relationships and lives do not meet expectations.

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

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

¹³⁵ Gann (1980), *supra* note ___, at 25-26.

¹³⁶ Kornhauser (1996), *supra* note ___.

¹³⁷ See Sara McLanahan and Audrey N. Beck, Parental Relationships in Fragile Families, 20 *Future of Children* 17 (2010), available at <http://www.futureofchildren.org/futureofchildren/publications/journals/article/index.xml?journalid=73&articleid=529> (documenting “high hopes” among unmarried couples at the birth of a child but also the dissolution of cohabiting relationships among this economically disadvantaged urban sample).

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

Household aggregation is, in fact, already used in transfer programs and in some forms of college financial aid. The federal SNAP (food stamps) program, for example, defines a household to include “a group of individuals who live together and customarily purchase food and prepare meals together for home consumption,” regardless of relationships. Yale Law School’s COAP program, by contrast, requires repayment based on “household” income, with no distinction drawn between “spouses” and “partners.”¹³⁸

Still, formal marriage still remains significant in some transfer and financial aid provisions. The SNAP statute does favor formally-married couples in some regards, treating them as a household even if they cannot meet the joint-food-preparation standard.¹³⁹ Federal student loans look to the formal marital status of students and their parents when determining how to aggregate “family” income.¹⁴⁰

The practical tasks involved in monitoring the household, once defined, range from relatively easy to devilishly hard. Conceptually, there are two problems of administration. The first is verifying the existence of household members. Before 1986, the IRS did not require TINs for dependents, and taxpayers fabricated several million children, who “disappeared” from the system when TINs were required.¹⁴¹ Requiring TINs for all household members claimed on a return represents a relatively easy extension of that approach.

The second task, monitoring household composition, is quite difficult, at least at present, because the IRS has very little information about household composition.¹⁴² (Indeed, the IRS today does not routinely verify even marital status, which is tracked only in local vital statistics offices.) The IRS could, of course, increase the information it gathers. Self-reporting could provide an initial screen. Taxpayers could be asked whether they share their living quarters with other adults or children, for instance. But auditing such claims would be difficult, because there is -- today -- no source of information on household composition.

¹³⁸ See http://www.law.yale.edu/documents/pdf/Financial_Aid/COAP_incoming_description.pdf.

¹³⁹ 7 U.S.C. Section 2012(n).

¹⁴⁰ The Department of Education explains the rules here: <http://studentaid.ed.gov/node/64#which-parents-information-should-i-report-on-my-fafsa>.

¹⁴¹ Graetz and Schenk, *supra* note __, at __.

¹⁴² For a review of the evidentiary requirements for documenting “family” in different sense in the Code, see Anthony C. Infanti, *Inequitable Administration: Documenting Family for Tax Purposes* (2010), available at <http://ssrn.com/abstract=1649627>.

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

If additional household members would increase tax liability (because the system sets rates that produce a “household penalty”) then of course the dynamics would shift: people would claim to live apart when in fact they live together. Documentary evidence and landlord/land registry reporting might assist the IRS, but very wealthy households might maintain cheap apartments as tax-reduction devices -- so that a high-earner could plausibly claim to live separately.

A more comprehensive, if creepier, solution, already exists in the marketplace. Consumer companies collect a wealth of data on purchasing habits, financial status, and Internet use:¹⁴³ these data might be shared with the IRS, with the result that the Service could pretty easily monitor household composition.

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

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

(Personally, of course, I find all this outlandish; my own preference would be for individual filing on liberal grounds. But ability to pay implies some sacrifice of personal privacy for the sake of collective assessment of one's well-being, and so I aim to take the ideal seriously.)

¹⁴³ Natasha Singer, Consumer Data, but Not for Consumers, NY Times, July 21, 2012, available at http://www.nytimes.com/2012/07/22/business/acxiom-consumer-data-often-unavailable-to-consumers.html?_r=1&pagewanted=all.

As a final point, we should bear in mind the reformulated trilemma: one major and unavoidable drawback of household income aggregation is that it would extend to a broader array of couples the gender biases critics have identified in joint filing for married couples. It is unclear how significant these biases would be for behavior, but the trilemma suggests that welfarists should consider possible effects on the employment of cohabiting women and adult children living at home with parents.

C. Social Conservatism and Incentives for Traditional Roles

Social conservatives have taken notice of the new individualism, and they dislike it. Charles Murray, for instance, notes that many aspects of family life now take place outside formal marriage, and he equates the change with social breakdown -- "coming apart."¹⁴⁴

Taking this perspective, the tax system becomes an instrument for resisting and reversing social change: what might the tax system do to bolster marriage as an institution, encourage child-bearing and -rearing within marriage, and discourage divorce? Social conservatives might differ on the proper agenda, and there are a number of contentious questions that should be answered. For instance, studies indicate that parental marriage improves outcomes for children, but only when the child is the biological child of both parents. Children's outcomes in step-families are no better than those in single-parent households.¹⁴⁵ Should this evidence modify the pro-marriage agenda? Should the message be to marry, no matter what, or to marry only if your spouse is also the parent of your children?

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

Begin with the easy conclusion: joint filing is an exceptionally poor tool for encouraging people to marry and stay married. After all, joint filing doesn't necessarily favor marriage: its system of penalties and bonuses are a complex function of rate brackets and the division of income in the couple. Some couples face marriage penalties, including couples in the EITC income range who have, at different times, faced enormous marriage penalties. Even a couple with excruciatingly traditional gender roles could face a marriage penalty if the wife has substantial property income. And the marriage bonus is equally arbitrary. A nontraditional couple can obtain a marriage bonus if their incomes are disparate and fall in the proper range: imagine a couple in

¹⁴⁴ Murray, *supra* note __ (book title).

¹⁴⁵ Pollak.

their forties, each marrying for the third time, and both working full time (one as a private-school teacher earning and one as a lawyer).

A better policy agenda, from the social conservative perspective, would track more closely the desired behavior. If, for instance, the aim is to encourage early marriage, the tax system might offer a refundable credit keyed to the parties' ages (no credit for those over-30 yuppie marriages!). If the agenda is to subsidize stay-at-home mothers, the tax credit might go to couples with children and one nonworking parent who attests that she cares for the children on a daily basis. Tax penalties could target divorce: perhaps alimony should be made nondeductible or property settlements should attract an excise tax.

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

III. Updating the Welfare State: Taking Individualism Seriously

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

A. Marriage, Endowment, and Privilege

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

Indeed, Philippe Van Parijs explicitly considers a tax on marriage by analogy to an income tax. Van Parijs argues that an income tax properly taxes the rents, or excess returns, to jobs and to property holdings. He suggests that, in principle, marriages might be subject to taxation on similar grounds: the married have an opportunity or asset (a spouse) that others might wish to have. Van Parijs ultimately rejects a

marriage tax as impractical and intrusive, but the analogy illustrates the liberal search for indicators of (unearned) social privilege that the state might tax.¹⁴⁶

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

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

Put another way, the ambiguity of causation (which I discuss in Part I.B), poses problems for the liberal. If it is simply the case that the same people who choose to work hard and to achieve market success are also those most willing to work hard to hold marriages together, then a marriage tax would unfairly tax desert. But if money and privilege can indeed buy love, or at least modes of life that permit love to flourish, then marriage-as-privilege seems sensible.

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

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

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

¹⁴⁶ Van Parijs, *Real Freedom for All*, supra note ___, at ___-___.

A tax on marriage is not, of course, a perfect endowment tax. Most obviously, it conditions higher taxes on behavior -- marriage -- and so could reduce welfare by distorting marriage decisions. Instead, the marriage tax is a variant on what George Akerlof terms “tagging” -- the strategy of directing taxes or welfare payments at some characteristic that correlates with what the system really wishes to tax (or support).¹⁴⁷

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

How elastic is marriage? Some older studies suggest that marriage penalties in the income tax have a small but noticeable effect on the probability of marriage.¹⁴⁸ The rise of the new individualism might suggest that marriage has become more elastic -- more optional in a social sense. Even so, marriage seems to retain value as a marker of social status, particularly for the well-off.¹⁴⁹

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

Still, my purpose here is intellectual rather than political, and my agenda is broader than a marriage tax per se: The new individualism has changed our society in ways that ought to attract new attention from scholars and policy makers. The values of equality and well-being that animate liberalism and welfarism should move us to examine current social arrangements and ask whether they fairly distribute opportunities for family life.

B. Gender Inequality and Social Security

¹⁴⁷ George A. Akerlof, The Economics of “Tagging” as Applied to the Optimal Income Tax, Welfare Programs, and Manpower Planning, 68 Am. Econ. Rev. 8 (1978).

¹⁴⁸ James Alm and Leslie Whittington, For Love or Money? The Impact of Income Taxes on Marriage, 66 *Economica* 297 (1999).

¹⁴⁹ Vicki Schultz and Michael Yarbrough, Will Marriage Make Gay and Lesbian Couples Less Egalitarian? (draft of 2012) (reviewing sociological evidence on the value of marriage and developing a social status model of marriage and gender).

There is a fine literature on gender and Social Security, but much of it predates the recent acceleration of the new individualism, and much of it treats the situation of married (or formerly-married) women as the critical social problem that ought to animate U.S. social insurance. In this brief discussion, I reconsider the spousal benefit in order to illustrate how we might begin to think about gender equality and Social Security in light of the new individualism.

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

The spousal benefit represents a considerable and deliberate expenditure on behalf of dependent wives: like other provisions (including survivors' insurance and widows' benefits), it aims to insure the traditional couple against the loss of the breadwinner's wage. The spousal benefit protects some divorced women as well: a woman married for at least ten years can claim a spousal benefit based on her ex-husband's earnings record, provided she has not remarried.

The present benefits structure offers substantial benefits to women, who represent 55 percent of adult OASDI recipients, and who receive 49 percent of benefits but pay only 41 percent of taxes.¹⁵⁰ Because women earn (on average) less than men, they benefit from the progressive benefits formula, which awards higher benefits relative to wages to lower earners, also benefits women, who on average earn less than men. Women's longer lives also garner greater benefits, because Social Security incorporates a life annuity. And the spousal benefit provides a floor on benefits for married women (or women divorced after 10 years of marriage or more), while also "topping up" benefits for wives earning significantly less than their husbands.

But the spousal benefit has a darker side. As critics began to point out in the 1970s and 1980s, the spousal benefit combines with the payroll tax to disadvantage working wives. All working wives pay full Social Security payroll taxes; the tax applies to the first dollar of earnings. But many working wives have lower wages than their husbands or do not work as many years, with the result that the Social Security benefit based on their own earnings record is less than their spousal benefit. Those wives end up collecting only the spousal benefit -- the same benefit they would receive if they had not worked at all. The result is a tax-benefit schedule that is distinctly unfavorable to many working wives, with full taxation and zero payoff.

¹⁵⁰ National Academy of Social Insurance, Women's Stake in Social Security, available at <http://www.nasi.org/learn/socialsecurity/womens-stake>.

The spousal benefit, then, tends both to protect wives with traditional gender roles and to impose high marginal taxes on working wives. The policy dilemma, then, has seemed to be the tradeoff between protecting vulnerable women (read: wives) and gender equality (for wives). Concretely, repealing the spousal benefit would remove the benefits penalty on working wives, who would then claim the full benefit of their incremental payroll taxes. But doing so would leave many wives worse off, in terms of the total benefit received. Worst off of all would be homemakers and homemaker-breadwinner couples.

But this policy dilemma, much like the outdated “trilemma” in the income tax, is badly outdated. Traditional wives are increasingly rare, and working wives are the new norm. Figure 13 shows the clear trends. The percentage of women claiming solely as workers (i.e., with no marital claim) is now nearly 50%. The percentage of elderly women claiming Social Security as wives only has plummeted since 1960, from about 1/3 to less than 10 percent. As of 2011, only 3 million of 36 million retirees claim Social Security as wives and husbands rather than as retired workers.¹⁵¹

Projections indicate that these trends will continue: by 2080, only a small fraction of female Social Security recipients will claim as wives only. The great majority will claim as workers only, while a significant (but, over the 2025-2080 period, declining) percentage will claim as dually-entitled (i.e., on the basis on their own earnings record, “topped up” for the spousal benefit).¹⁵² See Figure ___.

The demise of mid-twentieth-century marriage has left Social Security ill-suited to address the needs of the vulnerable. Care work remains gendered, and it remains a source of economic disadvantage, but single mothers, more than wives, are the new face of distress. The spousal benefit is available to women married ten years or more, but as we have seen, many marriages do not last that long. Further, the never-married represent a vulnerable -- and growing -- group. Single mothers occupy an expanding demographic and are especially hard-pressed by the combination of work (often at low wages) and care responsibilities.

The new individualism has altered the shape of gender inequality and economic vulnerability. In the mid-twentieth century, almost all women were wives and almost all men were husbands, and both groups mostly occupied prescribed roles. In that world, gender inequality burdened wives and benefitted husbands, and abandoned wives and widows were the object of great (and deserved) social concern. Today, by contrast, the new individualism locates the sources of gender inequality elsewhere. Women continue to earn lower wages than men, due in part to discriminatory employment structures. Mothers earn lower wages than childless women, due to the structure of child care.

¹⁵¹ Social Security Administration, Annual Statistical Supplement (2012), Table 5C1, available at <http://www.ssa.gov/policy/docs/statcomps/supplement/2012/5c.html> (data for 2011).

¹⁵² U.S. Social Security Administration, Women and Dual Entitlement, 2025-2080, available at <http://www.socialsecurity.gov/retirementpolicy/projections/women-dual-2025.html>.

Single mothers often live in poverty, due to low wages, child care responsibilities, and the absence of financial and hands-on support from absent fathers.

In this new world, the spousal benefit has more than a whiff of “Mad Men” about it: it is a set piece from another time. So, too, do familiar reforms seem outdated. For instance, some have proposed repealing the spousal benefit in order to increase the survivor’s benefit, which would primarily assist widows.¹⁵³ That kind of reform might be appropriate as a transitional matter, because many of today’s elderly women came of age during the era of mid-twentieth-century marriage. But, looking forward, that agenda still focuses on formal marriage as a source of economic security and, thus, will become increasingly out of touch with social reality.

Another familiar reform, discussed seriously in the 1980s and 1990s, would create Social Security entitlements based on child-rearing responsibilities. Options might include additional drop-out years (which increase a worker’s benefit) or wage “credit” for child-rearing. These proposals might aid middle-class women who have stayed at home with children. But, today, the stay-at-home mother is no longer the only, or even the major, caretaker who is economically vulnerable. Far more numerous are women who work full-time, or close to full-time, but at low wages, with little child support and high child-care costs. Unless credits for child care benefit those who are also full-time workers, such proposals would not address the situation of many single mothers.

As we think about true innovation in Social Security, three issues (at least) should be pressing:

First, the issue of generational transition should be in the forefront of our thinking. Today’s elderly cohort includes many people who abided by and relied on the commitments of mid-twentieth-century marriage, and their work and social histories differ from those of later generations. Phaseouts and other transitional mechanisms will be essential if we are to tailor programs to changing social reality.

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

Third, there are policy opportunities as well as pitfalls here. Taking the new individualism seriously puts on the policy table some innovations that might’ve seemed outlandish even twenty years ago. Consider two examples.

¹⁵³ Urban Institute, Spouse and Survivor Benefits, available at http://www.urban.org/retirement_policy/ssspousesurvivor.cfm.

First, in 1999, Bruce Ackerman and I proposed to convert Social Security into a flat old-age benefit, which would pay the same benefit to each aged individual, regardless of his or her work and marital history. In 2011, the U.S. government spent \$596 billion on OASI for 44 million retired workers, spouses, and children.¹⁵⁴ A back-of-the-envelope calculation (ignoring the likelihood that children should receive a smaller benefit reflecting economies of scale in family life) suggests that, *without a tax increase*, the system could pay a flat benefit of \$14,000 annually to every beneficiary. Including individuals now shut out of Social Security would reduce the benefit somewhat.¹⁵⁵ A more progressive benefits formula could increase insurance to low-paid workers without as thoroughly disrupting the relationship between wage record and benefit levels.

A second proposal worth considering is an optional joint-and-survivor annuity. At retirement, each insured worker might be entitled to claim either a solo benefit or a lower joint benefit, payable to any survivor of her choice. One's beneficiary might be a spouse, a romantic partner, a sibling, or an adult child. The key is that the survivor annuity would not be free: the retiree would receive an actuarially fair payout, so that (for instance), an elderly couple would receive a different monthly benefit than an elderly woman who wished to provide for an adult child. The details would require actuarial work but would, in effect, permit individuals to decide for themselves how to split their Social Security wealth between their own life and the life of a loved one.

IV. Conclusion

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

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

Joint filing represents a poor policy choice even for social conservatives devoted to bolstering formal marriage. Politics -- including the logjam that blocks redistributing tax burdens in any way -- may explain why joint filing persists. But a serious social

¹⁵⁴ President's 2013 Budget, Table 11.3, available at <http://www.whitehouse.gov/omb/budget/Historicals>; Social Security Administration, Annual Statistical Supplement, Table 5.A5, available at <http://www.ssa.gov/policy/docs/statcomps/supplement/2012/5a.html#table5.a4>.

¹⁵⁵ In 2010, there were just 40 million Americans age 65 and older. Another 17 million were ages 60-64. Thus, much would depend on the treatment of early retirement. U.S. Census Bureau, Statistical Abstract of the United States (2012), Table 7, available at <http://www.census.gov/compendia/statab/2012/tables/12s0007.pdf>.

conservative should reject the arbitrary set of penalties and bonuses in the current system in favor of a more deliberate effort to identify and reward socially-productive behavior. Instead of rewarding *some* formally-married couples -- or some married couples with traditional gender roles -- why not reward them all? Tax incentives for formal marriage could be increased for, say, early marriage or lasting marriage.

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

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

Second, household filing might best accord with welfarist norms but would require new rules and technology for defining the household and monitoring entry and exits. But a tax system capable of aggregating income at the household level (even reasonably well) would mark a major advance in the ability to administer the EITC and other tax-based transfer programs, to which Congress has traditionally attempted to apply expansive, welfare-type measures of economic well-being. Aggregating income at the household level -- across the board or only for purposes of certain rules -- would provide Congress with a new tool for social policy. But the costs include a loss of privacy and the extension of the work disincentives now found in joint filing to a whole new set of unmarried couples.

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

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

We might -- and should -- go farther in examining the implications of the new individualism for tax policy and the welfare state. References to marriage and family occur frequently throughout the Code, and a thorough review would revisit them to ask whether formal marriage represents a sound distinction in light of the purposes of the

provision.¹⁵⁶ For example, divorced spouses (but not a separating cohabiting couple or co-parents who cooperate but live separately) can structure property settlement, alimony, and child support in tax advantageous ways. Attribution rules operate for married couples but not cohabiting couples, unmarried co-parents, step-parents, step-children or siblings. The diversity of family life may defy generalizations. In one family, a parent's unmarried partner is a transient figure, while in another, he is closer to the children than their biological father. One adult child will include her step-grandmother but not her biological mother in her family circle, while another child from another family (or even the same family!) may have a very different experience of family.

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

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

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

¹⁵⁶ See Theodore P. Seto, *The Assumption of Selfishness in the Internal Revenue Code: Reframing the Unintended Tax Advantages of Gay Marriage* (2005), available at <http://ssrn.com/abstract=850645> (documenting the many provisions of the Code that mention family life and considering whether related-party rules should apply to same-sex spouses).