To Work, or Not to Work? The Immortal Tax Disincentives for Married Women

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

By Margaret Ryznar *

People who complain about taxes can be divided into two classes:
men and women.¹

I. INTRODUCTION

Throughout the ages, people have lauded the importance of
paid work, praised the fulfillment it brings, and shuddered at high
unemployment rates.² Despite this general social encouragement of
gainful employment, the federal tax code disincentivizes a
substantial group of people in the United States from pursuing paid
work—secondary income earners, mostly composed of married
women.³ These tax disincentives take the form of the marriage
penalty and bonus, as well as the inadequate treatment of child care
expenses.

The actual numbers reveal the depth of the marriage penalty:
twenty-one million married couples paid an average of $1,400 in

¹Internal Revenue Service, Tax Quotes, available at
²See, e.g., RALPH WALDO EMERSON, SELF-RELIANCE, ESSAYS, First Series (1847)
(“But do your work, and I shall know you. Do your work, and you shall reinforce
yourself.”); Jonathan Barry Forman, Making America Work: Alfred P. Murrah
Professorship Inaugural Lecture, 60 OKLA. L. REV. 53, 54 (2007) (noting that the
greatness of the United States has been rooted in hard work); John Paul II,
Address to French Ambassador to the Holy See, available at
http://www.catholicculture.org/docs/doc_view.cfm?recnum=700 (recognizing the
societal problems caused by unemployment in European countries).
³See infra notes 14-17 and accompanying text.
additional taxes in 1996 by virtue of filing jointly.\(^4\) That year, the
total marriage penalties amounted to $29 billion.\(^5\) A 2001 change to
the tax law slightly reduced marriage penalties, but only for the
lowest income tax brackets.\(^6\) Today marriage penalties are difficult
to circumvent as well. They result from the progressive nature of the
tax code, which not only taxes the secondary income at the couple’s
highest marginal tax rates, but also lacks marriage tax brackets that
are exactly double those of single filers.\(^7\) The tax code’s treatment of
child care expenses further increases the disincentive for the
secondary income earner to enter the labor force.

Recognizing the inordinate power of the tax code as a policy
tool, President Barack Obama has recently pledged to restructure the
tax code.\(^8\) One of his goals is to increase the code’s fairness.\(^9\)
Although it is difficult to determine fairness in a context so
dependent on ideology,\(^10\) one principle seems to be universal: to


\(^5\) Id. These penalties impact women disproportionately as explained in infra notes 14-17 and accompanying text. On the other hand, 25 million married couples benefitted from $33 billion worth of reductions by virtue of being married—an average of approximately $1,300 per couple. Congressional Budget Office, **FOR BETTER OR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 1, 27-36** (1997), available at http://www.cbo.gov/doc.cfm?index=7. This results from the interconnectedness of the marriage penalty and bonus. However, the marriage bonus, rather than penalty, is preferable because it does not proactively penalize people’s pursuit of paid labor. See infra Part II.A.

\(^6\) The Economic Growth and Tax Relief Reconciliation Act of 2001 added §1(f)(8) to the Internal Revenue Code, which expanded some of the lower tax brackets for married filers to double those for single filers.

\(^7\) See infra Part II.A.


\(^9\) Available at http://www.barackobama.com/pdf/taxes/Factsheet_Tax_Plan_FINAL.pdf (“Barack Obama’s tax plan delivers broad-based tax relief to middle class families and cuts taxes for small businesses and companies that create jobs in America, while restoring fairness to our tax code and returning to fiscal responsibility.”) (Emphasis added).

\(^10\) For example, fiscal liberals may prefer higher tax rates to fund government programming, while fiscal conservatives may prefer lower tax rates. See also
create tax disincentives for married women to pursue paid work is counterproductive and unfair. Both Democrats and Republicans support marriage penalty relief,\textsuperscript{11} although the details of an exact solution have been elusive. Proposed bills in the late 1990’s and early 2000’s would have offered such relief, but were vetoed by the executive for other reasons.\textsuperscript{12}

This Article argues that the next revision of the tax code should neutralize the tax disincentives facing the secondary income earner, setting forth economic and public policy support for the desirability of this goal. Part II therefore begins by reviewing the federal income taxation laws that are most unfavorable to the secondary income earner, such as the marriage penalty. Part III evaluates the implications of such laws, concluding that more neutral laws should replace the current system. This Part also underscores the important results of the natural bifurcation between married women with minor children and those without, concluding that any child-oriented reason for unfavorably taxing the secondary income earner is flawed. Finally, Part III recommends ways to neutralize the tax code so as to not disincentivize married women, whether childless or not, from pursuing paid work. If the principle to be prioritized is that married women should not face tax penalties when choosing to pursue paid work, then the tax code must finally deal with the current disincentives effectively.

\textbf{II. A REVIEW OF THE CURRENT TAX CODE FRAMEWORK}

Although this Article focuses on married women, it applies equally to the households wherein the secondary income earner or nonwage-earning spouse is the husband. In fact, the wife out-earns the husband in about a quarter of married households.\textsuperscript{13} Notably,

\textsuperscript{11} After all, liberals prioritize the advancement of women in the workforce as a cause in itself, while conservatives value the various benefits to be gained by decreasing taxation.
\textsuperscript{13} Among married-couple families where both the wife and husband earn income, 26% of wives earned more than their husbands in 2005. U.S. Bureau of Labor Statistics, available at http://www.bls.gov cps/labor2006/chart6-5.pdf.; see also Debra DiMaggio, \textit{The “Prodigious Spouse”: Equitable Distribution and Wealthy}
however, it is the secondary income earner that is of utmost importance here, whether male or female, because this wage-earner is most affected by the tax code. This is because the typical household tends to consider the bigger income, or the primary income, as more indispensable than the secondary one, which is smaller by definition. Therefore, the secondary income is more flexible and dispensable, and its earner may be particularly susceptible to the behavior-driving policies embodied in the tax code.

Nonetheless, married women are disproportionately the secondary income earner for several reasons.14 Most importantly, women take part-time and flexible jobs more frequently than men, mostly to accommodate their children.15 Furthermore, maternity programs are often far more popular, in addition to being lengthier and with more benefits, than paternity ones.16 Women’s decision to temporarily leave the workforce is reflected in their wages, which have historically been lower than men’s.17 As a result, married women are usually the secondary income earner in their households.

Wage Earner, 91 ILL. B.J. 460, 470 (2003) (“The stereotype of the nonwage-earning spouse is a woman who does not work outside the home. However, increasing numbers of women are the heads of household and even more women work outside the home.”).


15 See, e.g., Marin Clarkberg & Phyllis Moen, Understanding the Time Squeeze: Married Couples’ Preferred and Actual Work-Hour Strategies, 44 AM. BEHAV. SCIENTIST 1115, 1133 (2001) (noting that it is women who typically prefer part-time work).

16 See, e.g., Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 730-31 (2003) (summarizing workplace expectations that women bear the burden of caring for the family); Johnson v. University of Iowa, 408 F. Supp. 2d 728 (S.D. Iowa 2004), aff’d, 431 F.3d 325 (8th Cir. 2005) (determining that differential treatment between biological fathers and mothers was justified when work leave was characterized as being for disability relating to pregnancy, not for care-giving).

17 Specifically, women currently earn 72¢ for every $1 men earn. U.S. Census Bureau, Historical Income Tables – People, available at http://www.census.gov/hhes/www/income/histinc/p40.html. Of course, this does not mean than men out-earn their wives in every household, just in most. See supra note 13.
and are thus disproportionately affected by tax policies such as the marriage penalty.

Much ink has been spilled on this gender bias in the tax code, ranging from limited child care assistance to the lack of social security provisions for homemakers. Nonetheless, renewing this discourse is particularly important given President Barack Obama’s determination to overhaul the federal income tax code.  

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


19 See supra notes 8-9 and accompanying text.

20 This Article limits its analysis to the federal tax code’s disincentives for working women. Other marriage penalties not considered here include the disability laws. See Elizabeth F. Emens, Intimate Discrimination: The State’s Role in the Accidents of Sex and Love, 122 HARV. L. REV. 1307, 1390 (2009). The private sector may also strongly influence women’s decisions to enter the work force. A recent Wall Street Journal story reported that licensing regulations have increased dramatically, raising the costs of entering a particular field, “Overall, the level of licensing regulation in the workplace is rising precipitously, with more than 20% of the workforce now required to get a permit to do their jobs -- up from 4.5% in the 1950s.” WALL STREET JOURNAL, September 10, 2007, at A14. This increasing private regulation of certain industries may discourage women from pursuing careers in these fields because of the family demands on their time. To take the example of lawyers: American attorneys typically undergo seven years of higher education, as opposed to three or four in European countries such as England and
A. The Marriage Penalty and the Marriage Bonus

Many criticisms of the tax code focus on its treatment of homemakers and mothers. However, there are additional gender biases in the code, such as the marriage penalty and the marriage bonus, that equally impact all married women who are secondary wage earners. As the federal tax code strives for fairness and equal treatment, these now characteristic features of the tax law must be redressed.\textsuperscript{21}

The marriage penalty is one of the most important distortions for married women in the labor force. The crux of the marriage penalty lies in the joint return and the progressive tax-rate structure: each income bracket is taxed at a higher percentage than the previous one. However, the marginal dollar triggering each successive tax bracket on the married schedule is not exactly double the single schedule, a discrepancy that starts at the 25\% rate. It is important to note that the marriage penalty technically results from the size of the tax brackets of the various tax schedules, whereas the higher tax rates for the secondary income, due to its addition onto the primary income, instead results from income stacking. Thus, not only is the secondary wage earner’s income taxed at higher rates than the primary wage earner’s by virtue of being appended to the primary one, but each spouse has a smaller tax bracket\textsuperscript{22} than he would have if he were single.

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{A graphical representation of the marriage penalty and bonus.}
\end{figure}

\textsuperscript{21} Although this Article restrict itself to the federal tax code, there are also many state law disincentives for married women to work. These include alimony guidelines and state case law, the latter exemplified by \textit{Bonjour v. Bonjour}, 566 P.2d 667 (D. Alaska 1977), \textit{rev’d}, 592 P2d 1233 (Alaska 1979), in which a trial court found against the biological working mother in favor of a homemaking stepmother. Specifically, the trial court judge found that “[i]n a family sense the social needs of Joseph can best be met at this time by Randall [the biological father], who is able to provide in his family unit a surrogate mother in Susan who is a full-time homemaker. . . . In the custody of Lindsey [the biological mother], Joseph is placed in a day care center for a good portion of a day while Lindsey is working. While I give preference to the family unit in child care, I am not implying that child care institutions are unfit places.” \textit{Bonjour}, at 592 P2d 1237.

\textsuperscript{22} However, this is true only after the 15\% tax bracket; the marriage penalty begins at the 25\% tax bracket.
In the most extreme case, therefore, if a married woman’s after-tax income falls below minimum wage, she may elect to remain at home. This situation is plausible if she makes approximately the minimum wage, and is taxed at the highest tax bracket because of her husband’s more substantial income. The marriage penalty aggravates this result by requiring more tax payments from two-earner spouses than the sum of the payments they would make if they were single individuals, due to the lack of marriage tax brackets that are double those of single filers.

If a woman makes an amount of money equal to her husband, she suffers the marriage penalty the most. For example, if both spouses earn $75,000 annually, they pay $30,993 in taxes. If they were single, on the other hand, they would pay a total of $30,348 in taxes. This difference grows substantially as each spouse earns more money. The end result is that many married couples pay higher 

23 Dorothy A. Brown, Race, Class, and Gender Essentialism in Tax Literature: The Joint Return, 54 WASH. & LEE L. REV. 1469, 1479 (“The marriage penalty is greatest when the household income is divided evenly.”). This significantly impacts professional couples, wherein the spouses make equally high salaries. See infra note 26. For the argument that the marriage penalty also significantly affects African American couples, see id.

24 Filing separately is not usually advantageous—each spouse must use the married, filing separately rates, as opposed to the more favorable single person rates. Furthermore, spouses who file separately forego many tax-cutting credits and deductions. Therefore, filing separately is a limited tool in decreasing the tax bill, mostly used in special circumstances, such as when one spouse has high medical expenses and a low income, therefore meeting the 7.5% threshold needed to itemize medical costs.

This table contains the exact tax calculations for a married couple versus two financially similarly-situated single people:

<table>
<thead>
<tr>
<th></th>
<th>Income</th>
<th>10%</th>
<th>15%</th>
<th>25%</th>
<th>28%</th>
<th>Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bob (Single)</td>
<td>$75,000</td>
<td>7,825</td>
<td>31,850</td>
<td>77,100</td>
<td>160,850</td>
<td>$15,174</td>
</tr>
<tr>
<td>Cindy (Single)</td>
<td>$75,000</td>
<td>7,825</td>
<td>31,850</td>
<td>77,100</td>
<td>160,850</td>
<td>$15,174</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>=30,348</td>
</tr>
<tr>
<td>Bob &amp; Cindy (Married)</td>
<td>$150,000</td>
<td>15,650</td>
<td>63,700</td>
<td>128,500</td>
<td>195,850</td>
<td>$30,993</td>
</tr>
</tbody>
</table>

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23 Dorothy A. Brown, Race, Class, and Gender Essentialism in Tax Literature: The Joint Return, 54 WASH. & LEE L. REV. 1469, 1479 (“The marriage penalty is greatest when the household income is divided evenly.”). This significantly impacts professional couples, wherein the spouses make equally high salaries. See infra note 26. For the argument that the marriage penalty also significantly affects African American couples, see id.

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taxes than their unmarried counterparts in the same economic position.25

There is a marriage bonus in the current tax code as well, which benefits only one-earner and significantly unequal-earner couples. This bonus also results from the larger tax brackets on the married schedule, which are not necessarily double the brackets of the single schedule.26 When there is only one income measured against the larger tax brackets on the married schedule, it becomes more difficult to reach each higher bracket. In other words, the larger the tax brackets for married couples, the higher the amount of household income that is taxed at lower brackets. In one-earner or significantly unequal earners’ households, therefore, the larger or only income earner has the benefit of larger marriage brackets that are intended to accommodate two incomes. This results in a marriage bonus for certain households.

For example, if a single man earns $80,000, he is in the 28% tax bracket. As the table in footnote 26 illustrates, however, once he marries someone with little or no income, his combined income drops safely into the 25% tax bracket.27 This encourages the secondary wage earner, usually the wife,28 to earn less so as to qualify for a lower income tax bracket for the combined income. Nonetheless, the marriage bonus has been widely considered as a benefit of marriage,29 with its attendant disincentives for the secondary income earner to work largely overlooked.

25 For the argument that tax fairness must include horizontal equity, or the same treatment of similarly situated individuals, see Galle, supra note 10.
26 This table shows the marginal dollar amounts that trigger each successive tax bracket for married couples and single individuals, illustrating the steepness of the marriage penalty at the higher tax rates:

<table>
<thead>
<tr>
<th></th>
<th>10%</th>
<th>15%</th>
<th>25%</th>
<th>28%</th>
<th>33%</th>
<th>35%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single</td>
<td>$0</td>
<td>$7,825</td>
<td>$31,850</td>
<td>$77,100</td>
<td>$160,850</td>
<td>$349,700</td>
</tr>
<tr>
<td>Married</td>
<td>$0</td>
<td>$15,650</td>
<td>$63,700</td>
<td>$128,500</td>
<td>$195,850</td>
<td>$349,700</td>
</tr>
</tbody>
</table>

27 See id.
28 See supra notes 14-17 and accompanying text.
29 Gay marriage advocates therefore seek to gain this tax code advantage for gay couples. However, the secondary income earner in such unions would face the same disadvantages as many married women. See generally Theodore P. Seto, The Unintended Tax Advantages of Gay Marriage, 65 WASH. & LEE L. REV. 1529 (2008).
The marriage penalty and the marriage bonus are closely related. This interconnectedness results from the progressive tax structure. Therefore, when Congress attempted to reduce the marriage penalty, the marriage bonus worsened. Specifically, if the taxation rates on the married schedule were exactly double those of the single schedule, then the marriage penalty would be eliminated but the bonus would increase—a one-earner couple would reap the maximum benefits by falling into a lower tax rate by virtue of the larger brackets available to married couples.

Because the alleviation of the marriage penalty aggravates the marriage bonus and vice versa, the question becomes which disincentive is better to eliminate. On the one hand, the marriage penalty disincentivizes married women from pursuing paid work. On the other, the marriage bonus does not tax people for working, although it does reward married couples with one-earner or significantly unequal income earning spouses. The marriage bonus is therefore preferable to the marriage penalty, so as to not proactively penalize people’s pursuit of paid labor. Any policy decision aiming to eliminate the tax disincentives for married women to work would therefore advocate eliminating the marriage penalty, at the risk of simultaneously incentivizing one-earner and significantly unequal income earning couples to marry.\(^{30}\)

In sum, both the marriage penalty and marriage bonus provide tax disincentives for the secondary income earner, usually married women,\(^{31}\) to work. As alleviating one aggravates the other, the marriage bonus is preferable in that it does not penalize married women for participating in the labor force. When there are children involved, however, the tax disincentives for pursuing paid work only strengthen.

**B. The Child Care Credit**

For those married working women with children, the tax situation is even more disadvantageous. With no deduction and only a slight tax credit for child-care expenses, married mothers must consider not only the increased taxation of their earnings and the

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\(^{30}\) *See supra* Part II.A.

\(^{31}\) *See supra* notes 14-17 and accompanying text.
worsening of their labor market prospects,\textsuperscript{32} but also the cost of childcare. These impediments are sufficient to create a noteworthy barrier between potential secondary income earners and the labor force.

In \textit{Smith v. Commissioner},\textsuperscript{33} which remains the controlling case on the deductibility of child-care expenses, the tax court rejected the taxpayer’s appeal for a deduction for child care expenses. The court reasoned, “The wife’s services as custodian of the home and protector of its children are ordinarily rendered without monetary compensation. There results no taxable income from the performance of this service and the correlative expenditure is personal and not susceptible of deduction.”\textsuperscript{34} Meanwhile, the court ignored the argument that child care expenses are a condition to entering the paid workforce. Nonetheless, no deduction is currently permitted for child-care expenses, even though the savings to the household—and therefore the cost to the United States Treasury—would only amount to the marginal top rate multiplied by the cost of the childcare.

Although there is some relief for working mothers through the child care credit, it has some practical limitations. The child care credit is embedded in I.R.C. § 21,\textsuperscript{35} which allows a credit of approximately $1,000 per child to those taxpayers who incur employment-related expenses to be gainfully employed.\textsuperscript{36} However, child care expenses cannot exceed the earned income of the spouse with the lower income.\textsuperscript{37} Thus, if a married woman, as a secondary

\textsuperscript{32} For a summary of labor market challenges mothers face, including lower wages, see Stephen Benard, In Paik, & Shelley J. Correll, \textit{Cognitive Bias and the Motherhood Penalty}, 59 HASTINGS L.J. 1359 (2008).
\textsuperscript{33} 40 B.T.A. 1038 (1939), aff’d, 113 F.2d 114 (2d Cir. 1940).
\textsuperscript{34} Id. The nontaxability of a homemaker’s work has led some scholars to argue that the doctrine of imputed income should not apply to the homemaker. In other words, the value of a homemaker’s work should be taxed, which, according to some, would increase respect for those women remaining in the domestic sphere. See, e.g., Nancy C. Staudt, \textit{Taxing Housework}, 84 GEO. L.J. 1571, 1647 (1996) (“Congress should value and tax household activities to ensure women have access to social welfare benefits typically tied to waged labor, such as social security, disability, and Medicare benefits. Taxation would mark an important step toward the formal recognition of women as important economic and political actors.”).
\textsuperscript{36} Id.
\textsuperscript{37} Id. at § 21(d)(B).
earner, cannot earn enough to pay for childcare, she loses the full benefit of the child care credit even though her spouse would be contributing to childcare costs as well. 38 This limitation favors those married women with children who earn more than childcare costs. However, these women, if married, are also disproportionately affected by the marriage penalty and bonus, which heighten with each higher income bracket. 39

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

Another limitation of the child care credit is that it does not apply to the Federal Insurance Contributions Act (FICA) tax. Instead, it applies only against a woman’s income tax, not against social security or Medicare costs. This limitation of the credit therefore requires married women to earn enough income not only to exceed child care expenses, but also to offset social security costs and Medicare costs. Notably, these additional costs to working in themselves are factors for the secondary income earner to consider, and are only worsened by child care costs.

Finally, the child tax care credit disappears through phase-outs based on household income. 40 Accordingly, a married woman whose husband earns a more substantial income has the least incentive to work under the tax code: she is taxed at a much higher income tax rate than if she were single and cannot offset childcare costs through a meaningful deduction or tax credit, even when the main cost to her employment is child care. In any case, wealthier couples would be helped most by a child care deduction, rather than a small credit that phases out based on income. 41 Specifically, a

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38 There is an exemption for students or disabled spouses, who are treated as if they earn $250 monthly. Id. at § 21(d)(2).
39 See supra note 26.
41 Wealthier couples would benefit from the deduction because they would retain up to 28% of their marginal income, which, if high enough, would outweigh the approximate $1,000 credit per child—assuming no phase-out.
deduction reduces their taxable income, in addition to having the potential to lower their marginal top tax rate.

Obviously, the child care tax credit aids only married women with children. Married women without children remain penalized by the marriage penalty, without any offsets through deductions or tax credits. Single mothers fare best under this framework not only because they circumvent the marriage penalty and bonus, but also because they can collect the child tax care credit. While single mothers may certainly need the tax break given their households subsist on a single income, there is no reason to intentionally incentivize single-income households through the tax code’s structure.42

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

Importantly, these disincentives for married women to work do not automatically result from the bigger pool of taxable income that is formed when two working people marry. Instead, they result from tax policies that treat a married couple as a single economic unit for income tax purposes, which, under the current tax code, creates a higher tax bill for the secondary income earner than if she were single. This disincentivizes married women not only from working, but also from aggressively pursuing upwardly-mobile careers.43 In some cases, it disincentivizes marriage.44

42 Some commentators may argue that one-income households free the other parent to spend more time with children. See infra Parts III.A & III.B for rebuttal to this argument.
43 One Yale female college student noted in a controversial article, “I accept things how they are, I don’t mind the status quo. I don’t see why I have to go against it.” Louise Story, Many Women at Elite Colleges Set Career Path to Motherhood, THE NEW YORK TIMES, available at http://www.nytimes.com/2005/09/20/national/20women.html?incamp=article_popular_2&pagewanted=print. But see Katha Pollitt, Desperate Housewives of the Ivy
It cannot be denied, however, that the incentives for married women to pursue paid work change with their income bracket, as well as with their husband’s fortunes. In many households, financial need may compel women to ignore the after-tax return on their labor. Often times, these women juggle significant domestic responsibilities with their shared role as economic providers. Other women’s entry to the labor force may be more discretionary. While this subset of women encompasses those of extremely comfortable means, it also includes those who can afford preferring leisure time with their families over increasing the net economic wealth of their households or maintaining the value of their human capital. An unfair tax code impacts all of these categories of women.

III. PROBLEMS AND IMPLICATIONS

The power of the tax code is partially fueled by the dual effects of the code: it categorizes people and impacts their behavior.


44 Edward J. McCaffery, NATIONAL CENTER FOR POLICY ANALYSIS, Marriage Penalty Relief in the New Tax Law, June 26, 2003, available at http://www.ncpa.org/pub/ba445/ (“A marriage penalty may well affect the decision of poor people to marry. They cannot afford to marry and, by and large, don’t—one out of four American children live in single-parent households. In the middle- and upper-income classes, people do marry. The tax-influenced decision for them is whether to have one or two wage earners.”). However, the influence of wealth on a woman’s decision to work does not seem overly strong. 22.4% of all married couples have only the husband participate in the labor force. Specifically, 19% of couples with an annual income of $100,000 or greater have only the husband in the labor force. In comparison, 28.4% of couples earning $30,000-$39,000 have only the husband in the labor force. U.S. Census Bureau 2006, Table FG2, “Married Couple Family Groups, by Family Income, Labor Force Status of Both Spouses, and Race and Hispanic Origin of the Reference Person: 2006,” available at http://www.census.gov/population/www/socdemo/hh-fam/cps2006.html.

46 See, e.g., Allen M. Parkman, Why are Married Women Working So Hard?, 18 INT’L REV. OF LAW AND ECON. 41 (1998) (“[O]ne disconcerting development has been the increase in the total number of hours worked by married women at home and on a job.”). Parkman suggests that one of the reasons for the increased hours has been the advent of the no-fault divorce regime, which reduced married women’s financial security and compelled them to undertake paid work, in addition to maintaining the household. Id. at 42. See also infra notes 71-74.

47 For a brief discussion of the diminishing value of human capital, see infra note 70 and accompanying text.
whether intentionally or not. People are categorized as primary or secondary earners, high tax bracket earners or low ones, homemakers or wage-earners. The consequences of such categorizations drive people’s behavior. The federal income tax is thus an important factor shaping economic incentives for people, aiming for fairness, neutrality, and efficiency. The code’s current treatment of married working women, however, does not maximize these aims.

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48 This categorization is gender-neutral. If a woman earns more than her husband, by definition she is the primary income earner and it is her husband who faces the tax disincentives to engage in paid work. See supra notes 13-14 and accompanying text.

49 One female lawyer shared her reaction to being categorized as a homemaker after leaving the practice of law to raise her children, “Tim and I shared a good laugh the first time I saw myself identified as a “Homemaker” on our tax returns. Not because Homemaker is not as noble a profession as the law is. But as it applied to me -- one who hates to cook, clean, sew, is not particularly talented in home design, and one who is thoroughly flummoxed by a new sport called ‘scrapbooking’ -- the title ‘Homemaker’ is a misnomer.” Susan Chapin Stubson, From Negotiating Clients to Negotiating Toddlers, WYOMING LAWYER, June, 2006.

50 For the argument that economic incentives drive women’s behavior, see Edward J. McCaffery, Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code, 40 UCLA L. REV. 983, 1033, 1040-41 (1993) (arguing that Congress should lower married women’s tax rates to encourage both marriage and married women’s participation in the labor force). See also Edward J. McCaffery, TAXING WOMEN, 19-23 (1997) (noting that because married couples often view the wife’s income as supplemental, which is taxed at higher marginal rates, the tax code provides a disincentive for married women to work) and Jennifer L. Venghaus, Comment, Tax Incentives: A Means of Encouraging Research and Development for Homeland Security?, 37 U. RICH. L. REV. 1213, 1220 (2003) (suggesting that the tax code can change society’s behavior).

However, some scholars have suggested that the tax code does not influence people’s behavior, but that people’s behavior influences the tax code. See, e.g., Boris I. Bittker, Federal Income Taxation and the Family, 27 STAN. L. REV. 1389, 1392 (1975) (arguing that the tax code codifies social mores); Erik M. Jensen, Jonathan Barry Forman, Making America Work, 5 PITT. TAX REV. 165, 170 n.16 (2008) (book review) (suggesting that the tax code is indifferent to whether the husband or wife is the primary wage-earner, but that social expectations may be sexist).

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

With the guiding principle that married women should not be discouraged from the labor force, there are several possible resolutions to the current tax disincentives they encounter. The most tenable ones include making the married couples’ taxation brackets double those of single filers and offering offsets to the marriage penalty.

A. Women With Minor Children Versus Those Without

One of the most natural and relevant bifurcations in the married woman population arises from whether they have minor children or not. The presence of children in a household inspires much of the relevant debate, and perhaps justifiably. There are the age-old efficiency benefits of having one spouse focus on a career, while the other takes care of the household. Furthermore, hands-on and full-time parenting is desirable for children.

Put in a more favorable light, therefore, the flipside of the tax code’s disincentives for the secondary earner to work is that it incentivizes her to remain at home by lowering her spouse’s tax bill.

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52 For an excellent review of Congress’s rationale for certain tax policy decisions, see Patricia A. Cain, Taxing Families Fairly, 48 SANTA CLARA L. REV. 805, 806-21 (2008).

53 See, e.g., Michael Selmi, Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms, 9 EMP. RTS. & EMP. POL’Y J. 1, 42 (2005) (“[T]here exists a] societal view that it would be best for women to remain home with their children”); Ann O’Leary, How Family Leave Laws Left Out Low-Income Workers, 28 BERKELEY J. EMP. & LAB. L. 1, 3 (2007) (“This catchphrase [the opt-out revolution] is used to describe highly educated professional women who have chosen to leave their jobs to care for their children or to arrange reduced work hours to have more time at home.”); see also Joyce P. Jacobsen & Laurence M. Levin, Effects of Intermittent Labor Force Attachment on Women’s Earnings, 118 MONTHLY LAB. REV. 14 (1995) (“Women who leave the work force are more likely to be married and to have children than are their counterparts who remain in the work force.”).
if she abstains from paid work. In this way, the current tax code offers a subsidy for one parent to remain at home.

However, the problem is that current tax disincentives for married women to enter the workforce generally remain the same whether or not they are also the parents of minor children. In fact, the number of married women without minor children slightly exceeds those with such children: there are currently 26,469,000 married couples with children under 18, as opposed to 33,059,000 married couples without.\(^{54}\) Therefore, if the law provides strong disincentives for a secondary income earner to work, the half of all women without children are penalized if they dedicate themselves to paid work while being the secondary income earner.

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

The current tax policy, which does not distinguish between married mothers and married women generally, may be the reason that both groups abstain from paid work at approximately the same rate. In other words, there is only a small difference in the number of married mothers working and the number of married women without minor children working. Specifically, out of 26,469,000 married couple family units with their own children under the age of 18; 7,923,000 couples belong to a household wherein only the husband is in the labor force (29.9%).\(^{55}\) However, of the 33,059,000 couples


\(^{55}\) Id.
without their own children under 18, 5,421,000 couples have only
the husband in the labor force (16.4%).\textsuperscript{56} The difference between the
two groups of family units—those with minor children and those
without—is 13.5%.\textsuperscript{57}

Thinking of married women as composed of two groups—
those without children and those with children—therefore highlights
the problem with applying a uniform law to all of them, particularly
when it is unfavorable to the pursuit of paid work. Instead of
distinguishing between these two groups, however, the tax code
fundamentally distinguishes between one-earner couples, two-earner
couples, and single taxpayers. As one commentator suggests, it
would be difficult to completely eliminate the complaints of every
taxpayer in these three groups, particularly given the progressive
nature of the taxation system.\textsuperscript{58} However, a more neutral tax code,
one that does not penalize the secondary income earner, would
facilitate the desirable policy goals considered next, which result
from the encouragement of people to engage in paid work.

\textbf{B. The Desirability of Neutral Law}

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

This issue of fairness also arose in the deductibility of child
care expenses in \textit{Smith v. Commissioner}.\textsuperscript{59} The tax court implicitly
compared the two-earner couple with children to the two-earner
couple without children, finding it unfair to favor those households

\textsuperscript{56} Id.
\textsuperscript{57} One additional factor possibly influencing these statistics is that older spouses
with children over 18 may be of a more traditional generation, where the wife is
usually a homemaker regardless of whether minor children are present in the
household.
\textsuperscript{58} Zelanek, \textit{supra} note 12, at 3. \textit{See also supra} Part II.A.
\textsuperscript{59} 40 B.T.A. 1038 (1939), \textit{aff'd}, 113 F.2d 114 (2d Cir. 1940).
with children. However, there are many possible comparisons the court could have made that would have produced different results, including a comparison to the single-income married household with children.\(^{60}\) In such a comparison, it is unfair that the one-earner household has imputed income that is not taxable because of the stay-at-home wife’s services.\(^{61}\) The starkest comparison is that to a single-parent household that almost always incurs child care costs as a result of employment—which is essentially a requirement for the deductibility of expenses. Yet, these expenses are not deductible because they are considered by the courts to be personal expenses.\(^{62}\) Thus, the concept of fairness changes depending on the comparisons drawn among the various households.\(^{64}\) Unfortunately, courts have often chosen to draw those comparisons that disfavor married women’s paid work.

Furthermore, although one perceived goal of the tax system may be to strengthen the family unit by keeping one spouse at home with the children, in reality the laws that create incentives for women to stay home weaken the unit by perverting her choices simply by virtue of her marital status.\(^{65}\) For example, one commentator


\(^{61}\) In fact, some feminist argument has been made in favor of taxing the imputed income of a homemaker to validate her job choice, recognize the economic value of the contribution, and provide social security benefits. See supra note 34.

\(^{62}\) Smith, 40 B.T.A. at 1038; 5 I.R.C. §262(a).

\(^{64}\) There are at least two aspects of fairness in this context. First, there is the idea of horizontal equity, or the notion that similarly situated individuals should be treated the same. Second, there is the idea of vertical equity, or that tax treatment of differently-situated persons should be fair. Vertical equity is a form of distributive justice. Galle, supra note 10.


\(^{65}\) In fact, a certain subset of commentators completely disapproves of the traditional gender roles in marriage as a trap for women. This has even led opponents to same-sex marriage to argue that marriage simply entraps one spouse in an unfulfilling arrangement. See, e.g., Carl E. Schneider & Margaret F. Brining, An Invitation to Family Law 1391 (2006) (“In the nineteenth century the family was assailed as a prison by the Romantics and as an instrument of
suggests that equally dependent spouses are more likely to be equally committed spouses.\textsuperscript{66} Moreover, a marriage penalty may deter or delay working women from entering marriage.\textsuperscript{67} This is particularly true of lower income families, where both partners are working at approximately the same low wage. They are negatively impacted by the marriage penalty by virtue of earning equal incomes in a tax structure wherein the married filers’ tax brackets are not exactly double the single filers’ brackets. Professional couples who are married also disproportionately suffer a higher tax bill—in such cases, one spouse must also pay the couple’s top marginal rate on most, if not all, of her income. Therefore, even if the tax system were trying to preserve the familial unit, it undermines marriage. On the contrary, a neutral legal framework would allow married women to allot their time such that their household’s utility were maximized.

Furthermore, it is counterproductive to penalize working women who desire the added income for the welfare of their families. It is not necessarily wise to assume, as the tax code does, that married women with children need more time with their children than money. No stretch of the imagination is necessary to picture the varied and many scenarios in which the economic value of a mother’s paid work positively impacts her children. For example, many mothers work to be able to afford private or religious schooling for their children, or to support their children’s various extracurricular activities. Other mothers need to work just to provide the basic necessities for their families.\textsuperscript{68} As one commentator notes, more American marriages today are dependent on two-income earners.\textsuperscript{69} These observations suggest that to disincentivize married mothers from pursuing paid work is against their families’ interests.

\textsuperscript{67} See e.g., Leah Ward Sears, \textit{Foreword: The Frontiers of Law, Religion, and Marriage}, 58 \textit{Emory L.J.} 1, 5-6 (2008).
\textsuperscript{68} O’Leary, \textit{supra} note 53, at 3 (“Women living in poverty, who could once ‘opt out’ of work to care for their young children, are now required to work while receiving welfare. . . .”).
\textsuperscript{69} Nock, \textit{supra} note 66, at 755. (“I propose. . .the emerging form of American marriage \[is\] a relationship in which couples are equally dependent on one another’s earnings.”). Nock defines equally dependent spouses “as those who earn no less than 40% of total family earnings.” \textit{Id.} at 759.
Also counterproductive is erecting disincentives for married women to work when their human capital swiftly diminishes. Women who return to the labor market often encounter a difficult transition, with fewer rewards from their work than if they had stayed. Thus, any incentive to quit the labor market provides an even greater disincentive to return, given rapidly diminishing human capital.

However, it is increasingly important for women to maintain their human capital because the odds do not favor lifelong marriages, notwithstanding people’s optimism regarding their unions. And following divorce, most women struggle maintaining their households on a significantly reduced income. Therefore, married women may choose to work in order to protect themselves and their children from any financial difficulties in the event of a divorce. In such situations, reducing the incentives for a mother to

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70 Jacobsen & Levin, supra note 53, at 14 (“First, women who leave the labor force and later re-enter do not build up seniority, which, by itself, often leads to higher wages. Second, women who return to the labor force are less likely to receive on-the-job training to increase their productivity and thereby raise their pay. Third, when women are not in the work force, their job skills may depreciate. Finally, employers may view gaps in work history as a signal that women who leave may do it again.”).


73 In 1993, the mean income for divorced American mothers was $17,859, while for divorced fathers it was $31,034. Arthur B. LaFrance, Child Custody and Relocation: A Constitutional Perspective, 34 U. LOUISVILLE J. FAM. L. 1, 6 (1996). But see Kelly Bedard & Olivier Deschénes, Sex Preferences, Marital Dissolution, and the Economic Status of Women, XL THE JOURNAL OF HUMAN RESOURCES 411 (2004) (arguing that divorced women live in households with more income per person than never-divorced women). As for the children of fragmented families, “[a] great deal of research suggests that children of parents who divorce will be worse off in the vast majority of cases. Children may lose out for a number of reasons. They will be poorer than those of intact families . . .” Margaret Brining, Contracting Around No-Fault Divorce, in FALL AND RISE OF CONTRACT, supra note 72, at 277.

74 Parkman, supra note 46, at 45 (“The likelihood increased that decisions by married women to become employed outside the home were based on the women’s
work goes against the best interests of her children in case of divorce.

In addition to the benefit for the women who find paid work fulfilling, particularly when justified by attendant economic benefits, laws that remain neutral on the question of a woman’s decision to participate in the labor force may benefit society. For example, one major problem in the United States today is the lack of quality education for elementary and high school students. Many commentators have suggested that a compelling solution is to increase the supply of quality teachers. One writer has predicted that California will experience a shortage of tens of thousands of credentialed teachers by 2014. Perhaps if the legal and economic frameworks were more neutral for secondary income earners, they would occupy more of these family-friendly roles in the workforce. However, when child care costs and high tax rates become factors, many secondary income earners prefer to remain at home than to explore career options.

Finally, perhaps an argument can be made for the law’s neutrality towards married women in the form of the equal protection clause. The United States Constitution, mainly through the Fourteenth Amendment, has increasingly been used in state family law cases. Equal protection has been a particularly popular argument in gendered family law disputes. Although the Supreme

desire to protect themselves from the potentially adverse effects of no-fault divorce rather than to improve their family’s welfare.”).

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


Compare *Caban v. Mohammed*, 441 U.S. 380, 391 (1979) (holding that equal protection was violated by the New York Domestic Relations Law provision that allowed an unmarried mother, but not an unmarried father, to block her child’s adoption because the sex-based discrimination advanced no important state
Court permits family members’ rights to vary according to law, such
distinctions must “serve important governmental objectives and must
be substantially related to achievement of those objectives.” For
this reason, courts have rejected, for example, the presumption that
mothers should win custody of their young children in the case of
divorce. Applying this logic to the legal disincentives for married
women to work may be difficult, but certainly warrants some
attention. Most problematically, jurisprudence on the treatment of
parents by the tax code would only apply the rational basis analysis,
which would likely be insufficient to attack the marriage penalty and
similar tax disincentives. Ultimately, however, it is not the law’s
place to dictate how married women should allocate their time.
Although some may argue for a more feminist tax code, the tax code
should be neither feminist nor anti-feminist.

interest), with Lehr v. Robertson, 463 U.S. 248, 267–268 (1983) (“If one parent
has an established custodial relationship with the child and the other parent has
either abandoned or never established a relationship, the Equal Protection Clause
does not prevent a state from according the two parents different legal rights.”),
Illinois Supreme Court correctly held that the State may constitutionally
distinguish between unwed fathers and unwed mothers. Here, Illinois’ different
treatment of the two is part of that State’s statutory scheme for protecting the
welfare of illegitimate children.”).

79 Caban, 441 U.S. 380 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).
80 For a discussion of the rejection of the tender years’ presumption, see Suzanne
Reynolds, Catherine T. Harris, & Ralph A. Peeples, Back to the Future: An
Empirical Study of Child Custody Outcomes, 85 N.C. L. REV. 1629, 1649 (2007);
see also SCHNEIDER & BRINING, supra note 65, at 876 (“The doctrine [of the tender
years presumption] has been attacked in recent years, in significant part because it
is thought to offend principles of gender equality and to be an inadequate surrogate
for the best-interests principle. The doctrine has in some jurisdictions been
abolished legislatively. In other jurisdictions, it has been abolished by judicial
decisions that find the presumption unsatisfactory on policy grounds. In yet other
jurisdictions, the presumption has been found to conflict with the fourteenth
amendment’s equal protection clause as it has been interpreted in cases like Orr v.
Orr, 440 US 268 (1979). Finally, in some jurisdictions the presumption has fallen
before state equal-rights amendments.”). However, in practice more women still
receive custody of their young children than men. SCHNEIDER & BRINING, supra
note 65, at 876.
81 Jessica C. Kornberg, Comment, Jumping on the Mommy Track: A Tax for
The law necessarily impacts people’s behavior in certain areas. Most illustratively, criminal law influences people’s actions for the benefit of society’s safety. In regards to the decision of a married woman to enter the workforce or a professional woman to enter marriage, however, the law has less cause to be a major influence. There is simply no support for either discouraging or encouraging all working married women—neutral laws are the remaining option.

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

In sum, federal law provides one of the most significant disincentives for married women to work: the tax code. Both the marriage penalty and the limitations on the child care credit reveal a unique philosophy regarding married women—it is more important to treat them as part of the household than as individuals. Any unfairness they incur because of their status as primary child care providers, their lower wages, or their higher income tax brackets as secondary earners becomes fairer so long as the household is considered as a whole. This philosophy inherently results from the tax code’s treatment of the married couple as an economic unit. The married household benefits from slightly wider income tax brackets, the married household benefits from a larger number of personal exemptions, the married household benefits from the marriage bonus in one-earner households. However, married women face disincentives to engage in paid work because most of the significant marriage tax benefits peak in one-earner households.

There are several resolutions to these tax disincentives. Most importantly, the married tax schedule could have taxation brackets that are exactly double those of the single schedules. As this would increase the marriage bonus and therefore favor a one-earner household, it could be limited to couples that have two-income spouses. Furthermore, there could be deductions added to the tax system to offset the marriage penalty, again focused on two-income households. Of course, legislation benefiting two-income

84 For a summary of some potential resolutions, see Zelanek, supra note 12. See also KLEIN, BANKMAN, & SHAVIRO, supra note 60, at 609.
married couples must avoid hurting one-income married couples or single taxpayers. However, any policy decision aiming to eliminate the tax disincentives for working married women requires eliminating the marriage penalty, at the risk of simultaneously aggravating the marriage bonus that disadvantages single taxpayers.

In some ways, having marriage tax brackets that are double those of the single filers’ tax brackets would be a return to the tax structure in 1948, which was undone in 1969 in response to single filers who resented the marriage bonus benefiting those married households wherein there was only one income earner. However, today there are many more households with two-income earners that are hurt by the marriage penalty than in the 1960’s because of the steep increase of women’s participation in the labor force. The flipside, of course, is that there are fewer households with one-income married couples that greatly benefit from the marriage bonus than in the 1960’s. This helps alleviate the historical complaint that most households, by virtue of consisting of single-income earning couples, would unfairly benefit from tax brackets that were double single taxpayers’ brackets.

Moreover, women not only work more today, but also earn more than in 1969. This justifies increasing the taxation brackets in order to avoid marriage penalties that were rarer in 1969, when

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85 For an excellent discussion of the legislation benefitting only two-income married couples, see Zelanek, supra note 12, at 14-17.
86 See supra Part II.A.
87 Zelanek, supra note 12, at 5-6.
88 In 1967, there were 34,391,000 women with some kind of earnings, compared with 74,295,000 women in 2007. U.S. Census Bureau, Table P-41, “Historical Income Tables – People,” available at http://www.census.gov/hhes/www/income/histinc/p41AR.html. See also Internal Revenue Service, Table 1, “Comparing Salaries and Wages of Women Shown on Forms W-2 to Those of Men,” available at http://www.irs.gov/taxstats/indtaxstats/article/0,,id=96978,00.html.
89 See supra Part II.A.
married women’s smaller or non-existent income did not necessitate increasing the marriage tax brackets in order to avoid a substantial marriage penalty.

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

Of course, to avoid such marriage penalties, there could be no separate marriage filing at all. However, marriage would then lose its special status in the tax code even though it may be appropriate to treat the married couple as one economic unit and there may be public policy benefits to supporting marriage. Therefore, in the alternative, each spouse could be progressively taxed as an individual to avoid taxing the secondary income earner’s income at the highest rate, while simultaneously keeping the various current benefits of filing jointly as a married couple, such as favorable deductions. This would maintain the significance of the marriage status under the tax code, without counterproductively penalizing it.

As for the lack of a distinction between married mothers and married women without minor children in the current tax code, one potential compromise may be to change the tax law so as to incentivize one-income married households, and therefore to incentivize homemaking, only when there are dependents in the household. In other words, families with minor children in the

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91 For background on the AMT, see Michael D. Kim, Comment, The Downward Creep: An Overview of the AMT and Its Expansion to the Middle Class, 6 DEPAUL BUS. & COM. L.J. 451, 461 (2008).
92 Id.
93 Id.
94 See supra Part II.A.
household could be supported by the tax laws through more substantial deductions, tax credits, or an entirely separate tax rate schedule. This way, not all married women would be disincetivized from seeking paid work. However, as the tax court noted in *Smith v. Commission*, it may be difficult to justify favoring only those households with children, although one justification can certainly be the higher expense of maintaining such households, which thereby may warrant tax relief. Nonetheless, supporting only households with children would further be complicated by the fact that not all households desire the same ratio of labor to leisure time and not all married women have uniform utility curves, meaning that any specifically formulated tax advantage or disadvantage for married women to work does not equally apply to all of the members in the group.

Nonetheless, any of these recommended tax changes would help neutralize the law towards working women who are married. Moreover, these changes would not necessarily cost the United States treasury inordinately—by eliminating the incentives for married women to abstain from the work force, more taxable income is generated, thereby increasing the taxes collected. In any case, the average two-income household would see a decrease in taxes, but it would not be overly dramatic. Yet, any extra income would translate to increased incentive for the secondary income earner to pursue paid work.

These recommendations are particularly important to implement if federal taxation rates lapse to pre-2001 levels. As the marriage penalty and bonus both result from the progressive nature of income taxation, any tax increase exasperates them. For example, two single people making $104,000 would pay at the 28% rate. Once married, they fall into the 33% rate. Under pre-2001 rates, their bracket increases to 36%. However, if the wife drops out

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95 *Smith v. Commission*, 40 B.T.A. 1039 (1939), aff’d 113 F.2d 114 (2d Cir. 1940).
96 See supra notes 45-47 and accompanying text.
97 However, it is true that, collectively, these household savings would more substantially cost the United States Treasury in tax revenue. See supra note 5 and accompanying text. Nonetheless, these costs should be, at least partially, offset by the increased creation of taxable income by virtue of increased participation of married women in the workforce resulting from the elimination of their tax disincentives to work.
98 See supra Part II.A.
of the labor market or works part-time, they would be taxed at the 28% rate.  Any proposed increases in social security and Medicare payments further disincintivize the secondary income earner’s decision to join the labor force.  Therefore, to achieve the goal of advancing women’s issues in the labor market, any increase of income taxes must be offset by a corresponding reduction of the tax code’s disincentives for married women to work. In the meantime, the tax code remains highly unfavorable for those married women in the workforce.

IV. CONCLUSION

Among the most fundamental barriers to the aggressive participation of many married women in the work force are the disincentives embedded in both state and federal law. Perhaps one of the most significant culprits is the federal income tax code’s treatment of secondary income earners in married households. Enacted by Congress to apply to everybody equally, the code instead significantly disadvantages married women.

The tax code currently contains a marriage penalty, which is aggravated by the progressive nature of taxation and sensitive to increases in taxation. Meanwhile, the current child care credit requires that child care expenses not exceed the secondary income, amounts to a maximum of only about $1,000 per child, and disappears through income phase-outs. A better approach would be to craft more significant offsets to the marriage penalty for all working women, and more generous child care tax credits that do not provide perverted incentives. Otherwise, the tax code continues to distort married women’s choices and behavior, constituting a factor that impacts their presence and advancement in the workforce.

Married women today encounter more obligations than ever before. Many of them share the role of economic provider with their husbands while maintaining a high proportion of the domestic work

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100 To advance such issues, President Obama signed, as his first law, the Lilly Ledbetter Fair Pay Act Law and signed an executive order forming the White House Council on Women and Girls. These initiatives focus on promoting women in the workforce, but, as this Article argues, one of the most effective ways to do so is to increase their take home pay by neutralizing the tax penalties on working married women.
and child-rearing. To penalize them by decreasing their take home pay or by erecting disincentive barriers is simply counterproductive in most situations. They should neither be punished nor rewarded for the simple act of accepting paid work, but should instead labor under more neutral laws. After all, whether or not to pursue paid work should be a simpler question than most.