

One Is the Loneliest Number: The Single Taxpayer in a Joint Return World

LILY KAHNG*

The United States is one of the few developed countries to retain the joint income tax return, available for heterosexual married couples only. Since its adoption in 1948, its underlying assumptions have been challenged on many valid grounds, and yet it remains firmly embedded in mainstream political and policy discourse. In recent years, most of the debate surrounding the joint return has focused on reducing marriage penalties, bonuses, and determining who among the universe of couples ought to be extended the benefit of the marriage bonuses. The treatment of single people has received almost no attention.

The scant attention paid to single people is striking in light of the most recent U.S. census data, which indicate that they are nearing a majority of the adult population, a trend one demographer describes as a “clear tipping point.” Moreover, awareness of singles as an overlooked demographic is starting to permeate the political and popular cultural consciousness. In addition, economists and other behavioral scientists, as well as feminist theorists, have begun to study singleness as a social identity. They have begun to gather persuasive evidence of the costs—economic, social, and psychological—that are imposed on single people, and to chart the development of a more vibrant social identity for single people.

This Article draws upon the research and insight from these other disciplines to assess the negative impact of the joint return on single people, and to challenge the fundamental assumptions underlying the joint return. It concludes that single people are unduly penalized under the joint return, and that it ought to be abolished.

* Associate Professor, Seattle University School of Law. I am grateful to Mary Louise Fellows, Wendy Gerzog, Anthony Infanti, John Kirkwood, Leo Martinez, Lawrence Zelenak, and the participants of the 2009 Critical Tax Conference at the Indiana University Maurer School of Law for their helpful comments. I also thank Seattle University law librarian Kelly Kunsch and research assistants James Beebe and Thomas Chang.

TABLE OF CONTENTS

INTRODUCTION.....	652
I. THE JOINT RETURN	653
A. HISTORICAL OVERVIEW	653
B. PENALTIES AND BONUSES DEFINED.....	656
C. QUANTIFYING PENALTIES AND BONUSES.....	657
1. <i>Unmarried Couple Penalties and Bonuses</i>	657
2. <i>Single Person's Penalties</i>	659
II. THE "MARITAL UNIT": THE PROBLEM, NOT THE SOLUTION	660
III. SINGLE PEOPLE: AN EMERGING MAJORITY	663
A. DEMOGRAPHIC DATA.....	663
B. POPULAR CONSCIOUSNESS	664
C. ACADEMIC RESEARCH AND FINDINGS.....	667
1. <i>Wage Discrimination</i>	668
2. <i>Psychological and Social Costs</i>	670
3. <i>Toward a Positive Conception of Singlehood</i>	672
IV. SINGLE PEOPLE AND THE JOINT RETURN.....	674
A. INSIGHTS AND A NEW PERSPECTIVE.....	674
B. DIRECTIONS NOT TAKEN.....	675
C. SINGLE PEOPLE IN A JOINT RETURN WORLD	676
1. <i>The Single Person's Penalty</i>	676
2. <i>Rationalizing the Single Person's Penalty</i>	677
3. <i>A Challenge to Methodology and Assumptions</i>	678
D. THE ILLUSORY COSTS OF ABOLISHING THE JOINT RETURN.....	681
E. THE UNDERESTIMATED COSTS OF KEEPING THE JOINT RETURN	683
CONCLUSION	684

INTRODUCTION

The United States is one of the few developed countries to retain the joint return, available for heterosexual married couples only. The story of how we came to adopt the joint return in 1948 is well known, and it is uncontroversial to say that the joint return was enacted not as a result of reasoned tax policy analysis, but rather out of political expediency. Since its adoption, its underlying assumptions have been challenged on many valid grounds, and yet it remains firmly embedded in mainstream political and policy discourse. In recent years, most of the debate surrounding the joint return has focused on reducing marriage penalties, bonuses, and who among the universe of couples ought to be

extended the benefit of the marriage bonuses. The treatment of single people has received almost no attention.

The scant attention paid to single people is striking in light of the most recent U.S. census data, which indicate that they are nearing a majority of the adult population, a trend one demographer describes as a “clear tipping point.”¹ Moreover, awareness of singles as an overlooked demographic is starting to permeate the political and popular cultural consciousness. In addition, economists and other behavioral scientists, as well as feminist theorists, have begun to study singleness as a social identity. They have begun to gather persuasive evidence of the costs—economic, social, and psychological—that are imposed on single people, and to chart the development of a more vibrant social identity for single people.

This Article draws upon the research and insight from these other disciplines to assess the negative impact of the joint return on single people, and to challenge the fundamental assumptions underlying the joint return. It concludes that single people are unduly penalized under the joint return, and that it ought to be abolished.

Part I provides a brief historical overview of the joint return. Part II explains the powerful conceptual framework that has contributed to the persistence of the joint return, despite the many valid challenges that have been made to it. Part III then turns to the increasing demographic presence of single people, and the heightened interest in singleness as a social identity, both from a popular cultural perspective and as a subject of social science research. Finally, Part IV draws on the social science findings and insights to reassess the joint return and the conceptual framework that supports it. The Article concludes that, because it rests on flawed assumptions and unduly penalizes single people, the joint return should be abolished.

I. THE JOINT RETURN

A. HISTORICAL OVERVIEW

The joint return was enacted in 1948 to eliminate the disparate tax treatment of married couples in community property versus common law states.² This disparity had arisen as a result of two Supreme Court

1. See Sam Roberts, *51% of Women Are Now Living Without Spouse*, N.Y. TIMES, Jan. 16, 2007, at A1 (quoting William H. Frey, a demographer with the Brookings Institution).

2. The story of how we came to adopt the joint return is well known, though it never ceases to engage and entertain tax students and scholars. See generally Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1399–1414 (1975); Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259 (1988); see also Lily Kahng, *Fiction in Tax*, in TAXING AMERICA 25, 26–32 (Karen B. Brown & Mary Louise Fellows eds., 1996).

decisions, *Poe v. Seaborn*³ and *Lucas v. Earl*.⁴ *Poe v. Seaborn* held that a husband and wife in a community property state should each be taxed on one-half the combined income of the couple, no matter who actually earned the income.⁵ The Court reasoned that community property income vested in the marital unit, not with the individual spouse who earned it, and that, therefore, half of it belonged to each spouse.⁶ The effect of this treatment, which has come to be called “income splitting,” is that each spouse’s putative half of the income received the benefit of progressing through the lower tax brackets of the tax rate structure. In contrast, married couples residing in common law states were not permitted to income-split, their attempts to do so having been disallowed in *Lucas v. Earl*.⁷ In *Earl*, a husband and wife entered into a contract under which the husband assigned half of his future income to his wife. The Court held that all the income first vested in the husband, and was therefore fully taxable to him.⁸ Thus, if a married couple had only one earner, as was typically the case at the time, his income would be allowed only one progression through the lower tax brackets.

Married couples in common law states were predictably unhappy with their disadvantageous tax treatment. In order to obtain for their residents the benefits of income splitting enjoyed by married couples in community property states, common law states began to switch to community property regimes, creating upheaval and uncertainty.⁹ In 1948, Congress put an end to the turmoil by adopting the joint return and setting the amount for each tax bracket at double the amount for individual returns.¹⁰ The effect was that all couples, whether in community property or common law states, got the benefits of income splitting.

The 1948 law achieved parity in the tax treatment of married couples across the country by reducing the tax on married couples in common law states, but it also created new concerns and complaints.¹¹

3. 282 U.S. 101 (1930).

4. 281 U.S. 111 (1930).

5. 282 U.S. at 118.

6. *Id.* at 117–18.

7. 281 U.S. at 114–15.

8. *Id.*

9. See Kahng, *supra* note 2, at 27–28.

10. See Revenue Act of 1948, Pub. L. No. 471, §§ 301–305, 62 Stat. 110, 114 (codified as amended in scattered sections of 26 U.S.C.).

11. For detailed accounts of the politics and legislative activity following the 1948 adoption of the joint return, see generally Toni Robinson & Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant*, 8 VA. TAX REV. 773, 776–87 (1989); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 33–39 (2000); and Dennis J. Ventry, Jr., *The Politics and Economics of Gender Norms and Competing Family Forms Under the U.S. Federal Income Tax, 1969–2006*, at 1–70 (unpublished manuscript, on file with the Hastings Law Journal).

Unmarried taxpayers—including sympathetic widows, widowers, and others who supported families—were left with a disproportionately heavy tax burden.¹² To address these concerns, in 1951, Congress added a new filing status—head of household—for unmarried taxpayers with dependents, with bracket amounts roughly halfway between those for single and joint return filers.¹³ This proved insufficient to address the inequity of the tax on single filers, which ranged from twenty to forty percent higher than that of an equivalent joint filing couple.¹⁴ In 1969, the bracket amounts for single filers were adjusted so that the tax paid by a single filer would not exceed by more than twenty percent the tax paid by an equivalent joint filing couple.¹⁵

Prior to 1969, married couples never paid more than a comparable unmarried couple, and sometimes paid less. However, the 1969 law, in ameliorating the tax burden on single filers, for the first time imposed a higher tax on a married couple than on an unmarried couple with the same combined income.¹⁶ Thus, after 1969, single people paid more tax than a married couple with the same income (though limited by the twenty percent cap, as described above); married couples sometimes paid less, sometimes paid more than an unmarried couple with comparable income. Since then, the tax system has lived with this uneasy distribution of tax burdens.¹⁷ Many other developed countries, who blindly followed the United States in adopting the joint return, have since abandoned it.¹⁸ Today, the United States is one of the few developed countries to retain the joint return.¹⁹

12. See Robinson & Wenig, *supra* note 11, at 781.

13. Revenue Act of 1951, Pub. L. No. 183, § 301, 65 Stat. 452, 480 (codified at 26 U.S.C. § 1(b) (2006)).

14. See Robinson & Wenig, *supra* note 11, at 783. The singles penalty is sometimes characterized as a marriage bonus, from the perspective of a married couple who pays less in tax than a single person with the same amount of income. The use of the terms “singles penalty,” “marriage bonus,” and “marriage penalty” can be confusing and imprecise. The Article attempts to clarify below. See *infra* Parts I.B, I.C.

15. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (codified as amended in scattered sections of 26 U.S.C.).

16. See Bittker, *supra* note 2, at 1429–31.

17. The relative mix of penalties and bonuses has varied over the years, but in recent years there has been a marked reduction in the marriage penalties, through a widening of the bracket amounts for married couples. See MAXIM SHVEDOV, CRS REPORT FOR CONGRESS: STATUTORY INDIVIDUAL INCOME TAX RATES AND OTHER ELEMENTS OF THE TAX SYSTEM: 1988 THROUGH 2008, at 6–7 (2008), available at http://assets.opencrs.com/rpts/RL34498_20080521.pdf.

18. See Edward J. McCaffery, *Where's the Sex in Fiscal Sociology? Taxation and Gender in Comparative Perspective* 6–7 (Univ. S. Cal. Law Sch. Law & Econ. Working Paper Series, Paper No. 70, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020360.

19. CONG. OF THE U.S., CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 59 (1997) [hereinafter CBO, FOR BETTER OR WORSE], available at <http://www.cbo.gov/ftpdocs/0xx/doc7/marriage.pdf> (indicating that in 1993, nineteen out of twenty-seven OECD countries taxed husbands and wives separately); ORG. FOR ECON. COOPERATION & DEV., FUNDAMENTAL REFORM OF THE PERSONAL INCOME TAX 54–56 (2006); Joseph A. Pechman & Gary V.

B. PENALTIES AND BONUSES DEFINED

As described above, the joint return imposes differing tax burdens depending on a person's marital status and income level. The terms "marriage bonus," "marriage penalty," and "singles penalty" are commonly used to describe these differing tax burdens, but the terms are sometimes used imprecisely. In particular, the term "singles penalty" has two distinct meanings, which leads to confusion in discussion and analysis. In one sense, it is used in the context of comparing the relative tax burdens of a married couple, on the one hand, and an unmarried couple, on the other; in another sense, it is used to describe the relative tax burdens of a married couple on the one hand, and an uncoupled person on the other. This section defines these two meanings of singles penalty precisely and, in order to avoid confusion, adopts new terms for each.

As commonly used, the terms "marriage bonus" or "marriage penalty" describe the comparative tax burdens of two couples who are similarly situated except that one is married and filing jointly, and the other is unmarried, with each person filing an individual return. In some cases, the married couple will pay less than the unmarried couple—a marriage bonus.²⁰ In other cases, the married couple will pay more than the unmarried couple—a marriage penalty.²¹

In comparing the two couples, if the referent couple is the unmarried couple, obviously the bonus and penalty will be reversed. The penalty and bonus from this perspective are sometimes called the singles penalty and bonus.²² Of course, the two people who comprise the unmarried couple are not single in the sense of being uncoupled, but rather single in the sense of being unmarried. Their penalty or bonus, as compared to the married couple, can more precisely be called the *unmarried couple's penalty or bonus*.

Englehardt, *The Income Tax Treatment of the Family: An International Perspective*, 43 NAT'L TAX J. 1, 7-10 (1990) (identifying a "world-wide trend" toward individual filing and away from joint filing).

Many countries appear to have moved to individual filing to capture the labor efficiency gains of taxing married women at lower marginal rates. See McCaffery, *supra* note 18, at 6-7. Efficiency is often a popular and forceful rationale for changing tax laws in the United States (witness recent rounds of tax cuts on high incomes and capital gains and dividends). See William G. Gale et al., *Distribution of the 2001 and 2003 Tax Cuts and Their Financing*, 103 TAX NOTES 1539, 1542-44 (2004). Given the well-documented inefficiencies engendered by the joint return, our continued embrace of it is surprising.

20. In general, marriage bonuses sometimes occur where one member of the couple earns a relatively large proportion of the couple's combined income. See *infra* notes 32-35 and accompanying text.

21. In general, marriage penalties sometimes occur where the earnings of each member of the couple are roughly equal. See *infra* notes 32-35 and accompanying text.

22. See, e.g., JANE GRAVELLE, CONG. RESEARCH SERV., FEDERAL INCOME TAX TREATMENT OF THE FAMILY 18-22 (2009).

A different meaning of the term “singles penalty” arises in considering the relative tax burdens of married couples and uncoupled, single individuals. When an uncoupled, single person pays more than a married couple with the same income, this is also called the singles penalty.²³ In addition, the reverse of this is called the marriage bonus. To be more precise, and to avoid confusion with the newly named unmarried couple bonus or penalty, it can be called the *single person’s penalty*.

C. QUANTIFYING PENALTIES AND BONUSES

I. *Unmarried Couple Penalties and Bonuses*

Quantifying unmarried couple penalties and bonuses is more difficult than initially appears.²⁴ For example, the Congressional Budget Office estimated the net amount of unmarried couple penalties (that is, total penalties minus total bonuses) for the year 1999 to be either \$10 billion or \$49 billion, depending on the assumptions used.²⁵ Using yet another set of assumptions, the Treasury Department’s Office of Tax Analysis estimated unmarried couples to have a net *bonus* of \$1.6 billion in 1999.²⁶ There does not appear to be a consensus on which assumptions are the most reasonable:

The difficulties of accurately defining and measuring marriage tax penalties and bonuses cannot be over stressed. From a theoretical perspective it is not even clear what the appropriate base line comparison should be: should it be the tax consequences if two single individuals decide to marry or, should it be the tax consequences if a married couple were allowed to file as two separate individuals? Furthermore, the basic economic characteristics of married couples, heads of households and single individuals are different. As a result, including children, unearned income, and itemized deductions into the calculations can introduce measurement errors that reflect these basic differences in the economic characteristics of the filing units rather than the marriage tax penalties and bonuses that arise because of the structural components of the tax system.²⁷

23. See, e.g., James Alm et al., *Is There a “Singles Tax”? The Relative Income Tax Treatment of Single Households*, PUB. BUDGETING & FIN., Summer 2002, at 69 (explaining that the “singles tax” is the higher tax imposed on an uncoupled single person relative to an equal-income married couple).

24. Unmarried couple bonuses and penalties are mirror images of marriage penalties and bonuses. The following discussion describes various estimates of marriage penalties and bonuses, except that the figures are recast as unmarried couple bonuses and penalties.

25. GREGG A. ESENWEIN, CONG. RESEARCH SERV., *THE FEDERAL INCOME TAX AND THE TREATMENT OF MARRIED COUPLES: BACKGROUND AND ANALYSIS 9* (2001), available at <http://stuff.mit.edu/afs/sipb.mit.edu/contrib/wikileaks-crs/wikileaks-crs-reports/RL30800.pdf>.

26. *Id.* These estimates of net bonus or penalty require the calculation of married couples’ tax liabilities assuming they are not married. This, in turn, requires assumptions about how income and deductions would be allocated between the two individuals, the filing status they would choose, and how they would report any children they have. *Id.* at 7–9.

27. *Id.* at 9–10 (footnote omitted).

There does, however, appear to be general agreement that the tax system has moved in the direction of greater unmarried couple penalties (i.e., greater marriage bonuses) since 2001, when several provisions reducing marriage penalties were enacted.²⁸ The Joint Committee on Taxation estimated that the combined cost of all of the marriage penalty relief provisions enacted in 2001 will be \$63 billion over the fiscal year period 2002 through 2011.²⁹ Researchers at the Treasury Department Office of Tax Analysis, applying the same methodology that resulted in an estimated net unmarried couple bonus in 1999,³⁰ estimated a net \$30 billion unmarried couple penalty in 2004.³¹

Another method of measuring unmarried couple bonuses and penalties compares married and unmarried couples at different income levels, with different income splits, assuming that all income is earned, assuming no dependents, and using the standard deduction in all cases. This is shown in Table 1:

TABLE 1: MARRIAGE TAX PENALTIES AND BONUSES IN 2000³²
(ASSUMING ALL EARNED INCOME AND USE OF THE STANDARD DEDUCTION)

Total Income	Income Taxes (if filing jointly)	Tax Penalties and Bonuses (Tax bonuses shown in parentheses) If income is split between the spouses:			
		50/50	60/40	70/30	100/0
		\$20,000	\$1058	\$276	\$400
\$30,000	\$2558	\$218	\$218	\$324	(\$862)
\$40,000	\$4058	\$218	\$218	\$218	(\$1714)
\$50,000	\$5558	\$218	\$218	\$16	(\$3014)
\$75,000	\$11,674	\$1530	\$1082	\$107	(\$4026)
\$100,000	\$18,674	\$1530	\$1530	\$1082	(\$4776)
\$150,000	\$33,607	\$2208	\$1885	\$1435	(\$6033)
\$250,000	\$69,314	\$6915	\$6224	\$4772	(\$7133)
\$500,000	\$167,758	\$14,864	\$14,986	\$13,590	(\$6170)

28. The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) enacted three marriage tax penalty relief provisions: (1) it increased the standard deduction for joint returns to twice the size of the standard deduction for single returns, (2) it increased the width of the fifteen percent tax bracket for joint returns to twice the width of the fifteen percent tax bracket for single returns, and (3) it increased the earned income tax credit phaseout start and end points for joint returns by \$3000. See Pub. L. No. 107-16, 115 Stat. 38 (2001) (codified in scattered sections of 26 U.S.C.). The changes were phased in over several years, and are slated to expire at the end of 2010. See *id.*

29. GREGG A. ESENWEIN, CONG. RESEARCH SERV., MARRIAGE TAX PENALTY RELIEF PROVISIONS OF THE ECONOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT OF 2001, at 5 (2003), available at <http://stuff.mit.edu/afs/sipb/contrib/wikileaks-crs/wikileaks-crs-reports/RS21000.pdf>; see also GRAVELLE, *supra* note 22, at 23.

30. See ESENWEIN, *supra* note 25, at 9.

31. Robert Gillette et al., Marriage Penalties and Bonuses: A Longer Term 468-78 (unpublished manuscript, presented at the Proceeding of the National Tax Association) (Dec. 2004).

32. ESENWEIN, *supra* note 25, at 12.

The Table above shows marriage bonuses as negative values (in parentheses) and marriage penalties as positive values. By simply switching the labels, the figures can be recast as unmarried couple penalties (the negative values in parentheses) and unmarried couple bonuses (the positive values). The chart reveals certain patterns in penalties and bonuses. Unmarried couples with relatively equal individual incomes tend to enjoy a bonus relative to that of comparable married couples.³³ Conversely, unmarried couples with relatively unequal individual incomes tend to incur a penalty relative to that of comparable married couples.³⁴ Except at the highest income levels, unmarried couple penalties are much larger than unmarried couple bonuses.³⁵

2. *Single Person's Penalties*

Like the unmarried couple bonus and penalty, the specific amount of the single person's penalty varies depending on income levels, along with the assumptions made in computing the tax. Unlike the unmarried couple bonus and penalty, however, little attention has been paid to quantifying the single person's penalty. To date, there has only been one study, by economists James Alm, Leslie Whittington, and Jason Fletcher, attempting to quantify the single person's penalty.³⁶ Using some simplifying assumptions, they found that in 2001, the single person's penalty ranged from \$0 to about \$7800.³⁷ They roughly estimate that single taxpayers, in the aggregate, paid a penalty of nearly \$47 billion in 1996.³⁸ This figure has most likely increased as a result of two factors: an increase in the number of single taxpayers since 1996,³⁹ and tax law changes enacted in 2001. The changes were intended to decrease marriage penalties, but also had the effect of increasing single person's penalties.⁴⁰

33. *Id.* at 10.

34. *Id.*

35. *Id.* at 12.

36. See Alm et al., *supra* note 23.

37. See *id.* at 76. In computing the single person's penalties, Alm and his coauthors use one personal exemption and the standard deduction for the single person's tax liability, and two personal exemptions and the standard deduction for the married couple's tax liability. See *id.* at 73.

38. See *id.* at 81.

39. Alm and his coauthors estimated 52,000,000 single taxpayers in 1996. *Id.* In 2006, there were almost 62,000,000. See IRS, STATISTIC OF INCOME—INDIVIDUAL INCOME TAX RETURNS PUBLICATION 1304 tbl.2.4 (2009), available at <http://www.irs.gov/pub/irs-soi/07in24ms.xls>.

40. The Economic Growth and Tax Relief Reconciliation Act of 2001 created a new ten percent rate, with the bracket amount for joint filers equal to two times that for single filers. See SHVEDOV, *supra* note 17, at 6. It also increased the width of the fifteen percent bracket for joint filers to twice that for single filers. *Id.* at 6–7. Finally, it increased the standard deduction for joint filers to twice that for single filers. *Id.* at 7. All of these changes were intended to decrease the married couple's penalty, and also had the effect of increasing the single person's penalty. Using assumptions similar to those of Alm and his coauthors, one commentator estimates the single person's penalty for 2007 to be as high

It is important to note that there is never a single person's bonus—that is, a single person never pays less relative to a couple, whether married or unmarried, with the same amount of income as the single person.⁴¹

To summarize, there are both unmarried couple's penalties and single person's penalties under our tax system—that is, both unmarried couples and single people sometimes pay more tax than a married couple with the same income. On the flip side, there is also sometimes an unmarried couple bonus—an unmarried couple can pay less tax than a married couple with the same income. In contrast, there is *never* a single person's bonus—a single person never pays less tax than a married couple with the same income.⁴²

II. THE “MARITAL UNIT”: THE PROBLEM, NOT THE SOLUTION

As Part I describes, the joint return was adopted not as a result of reasoned tax policy analysis, but rather out of political expediency.⁴³ It was only after its enactment that the joint return was retrofitted with a conceptual foundation—the notion of the married couple as a “single economic unit.”⁴⁴ Boris Bittker famously framed the debate as a set of “insoluble dilemmas.” He articulated three ideals that cannot be attained simultaneously: the first, horizontal equity, or couples equality—that is, taxing equal-income married couples equally; the second, a progressive

as \$9900. See James Larson, Taxes—Marriage Tax Penalty/Single's Tax Penalty (2007), <http://www.green5.org/MarriageTaxPenalty.xls>.

41. This is true as a mathematical matter, given the rate structure. Married couples have wider tax brackets than single people and so, given equal amounts of income, the tax liability of the married couple will be lower. Unmarried couples at worst will have the same tax liability as a single person with the same income, assuming all the income is attributed to one member of the couple (even then, the unmarried couple will probably have a lower tax liability by reason of an extra dependent exemption). If, on the other hand, the two members of the unmarried couple each contribute a portion of their total income, they will benefit from separate progressions through the lower tax brackets.

42. To close the loop on these comparisons, an unmarried couple can pay less than a single person if both members of the couple contribute to the couple's combined income because the income of each member of the couple will have a separate progression through the tax brackets. A single person will never pay less than the unmarried couple.

43. See, e.g., GRAVELLE, *supra* note 22, at 5 (“[The adoption of the joint return] had little to do with any theory regarding the tax treatment of the family.”); *id.* at 11 (describing the joint return as “haphazard”); HAROLD MARTIN GROVES, *FEDERAL TAX TREATMENT OF THE FAMILY* 17 (1963) (describing the joint return as the product of historical developments rather than design; effects not carefully weighed nor consciously intended); Bittker, *supra* note 2, at 1416 (stating that the joint return was adopted without considering effects on marriage neutrality); Oliver Oldman & Ralph Temple, *Comparative Analysis of the Taxation of Married Persons*, 12 STAN. L. REV. 585, 593 (1960) (positing that the joint return was probably the product of political expediency rather than conscious policy decision); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 347 (1994) (noting that the 1948 legislation was essentially a historical accident).

44. See Stanley S. Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1162 (1948).

rate structure; and the third, marriage neutrality—that is, not penalizing or rewarding the choice to marry.⁴⁵

The Bittker framework has come to be the dominant one.⁴⁶ While it has an internal logical consistency—it is true that the three articulated goals cannot be achieved at the same time—the first goal has disturbing circularity insofar as it serves as the rationale for the joint return. If one begins, as Bittker does, with the proposition that equal-income married couples ought to pay equal amounts of tax, then the assumption must be that the married couple is the appropriate unit for making the pair-by-pair comparisons required by horizontal equity, and that equal-income married couples are the same in ways that matter for tax purposes.⁴⁷

The most literal basis for this assumption derives from the *Poe v. Seaborn* concept of income splitting—that husband and wife share equally in the income produced within the marital unit, regardless of which spouse actually produces the income.⁴⁸ If they share equally, then the tax result is equivalent whether each is taxed individually on one-half the income, or whether the income is aggregated and taxed under a joint return rate schedule with tax brackets double the amount of the individual rate schedule. If, however, spouses do not share equally, the equivalence fails. Thoughtful scholars have challenged the equal-sharing claim, and found that equal-income married couples differ widely in the extent to which they pool their income and make joint decisions about consumption.⁴⁹ Conversely, people other than married couples—such as

45. See Bittker, *supra* note 2, at 1419–20. As Lawrence Zelenak points out, Bittker was not the first to explain the marriage tax dilemma in this way. See Zelenak, *supra* note 11, at 6 n.26. Professor Zelenak cites a 1972 statement as the earliest of which he is aware. *Id.* (citing *Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working, Hearings Before the H. Ways and Means Comm.*, 92d Cong. 78–79 (1972) (statement of Edwin S. Cohen, Assistant Treasury Sec’y)). Nonetheless, Bittker’s article was extremely influential, and he is the one who has become most closely identified with what I call the “Bittker framework.”

46. See, e.g., PAUL McDANIEL ET AL., *FEDERAL INCOME TAXATION CASES AND MATERIALS* 971 (5th ed. 2004); MICHAEL J. GRAETZ ET AL., *FEDERAL INCOME TAXATION PRINCIPLES AND POLICIES* 468 (6th ed. 2008); JANE G. GRAVELLE, *THE MARRIAGE TAX PENALTY* 53 (2003); see also Alm et al., *supra* note 23, at 85–86; CBO, *FOR BETTER OR WORSE*, *supra* note 19, at 2–6.

47. As scholars have pointed out, the whole enterprise of horizontal equity is disturbingly circular. Not only must one assume that the married couple is the appropriate unit of comparison, one must also assume that income is the appropriate metric by which to determine whether two units are equally situated. It seems that all the difficult judgments must be made in advance of actually applying the horizontal equity criterion. See Thomas D. Griffith, *Should “Tax Norms” Be Abandoned? Rethinking Tax Policy Analysis and the Taxation of Personal Injury Awards*, 1993 WIS. L. REV. 1115, 1155–56; Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT’L TAX J. 139 (1989) (critiquing horizontal equity as devoid of normative value). *But see* Richard A. Musgrave, *Horizontal Equity Once More*, 43 NAT’L TAX J. 113 (1990) (defending horizontal equity).

48. See *Poe v. Seaborn*, 282 U.S. 101, 110–11 (1930).

49. See Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating the Income Tax Burden*, 59 TEX. L. REV. 1, 24–27 (1980); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 80–92 (1993). *But see* Zelenak,

unmarried couples and roommates—sometimes do pool resources and make joint consumption decisions.⁵⁰ Therefore, if the joint return is premised on equal sharing, it is both overinclusive (including married couples who do not share) and underinclusive (excluding unmarried persons who do share).⁵¹

Another important challenge to the notion that equal-income married couples are equal for tax purposes focuses on the differences between single- and dual-income couples. A single-income couple benefits from the value of household and other unpaid services performed by the stay-at-home spouse (imputed income) and, as a result, is better off than a comparable dual-income couple.⁵² In addition, a dual-income couple incurs more in the way of nondeductible expenses of producing income, such as childcare, clothing, and commuting expenses, also leaving them worse off than the single-income couple.⁵³ Again, the rationale for the joint return—treating equal-income couples equally—is undermined to the extent that equal-income couples are shown to differ in these significant ways.

An even more fundamental challenge to the Bittker assumption is to question why coupled people (whether married or not) should be treated in a separate category from single people to begin with.⁵⁴ Of course, the obvious alternative is to treat all people individually, and many scholars have argued for just that.⁵⁵

Despite all of these challenges, the joint return, along with the notion that the couple (whether married or not) ought to be a fundamental unit for tax purposes, remains firmly embedded in mainstream political and policy discourse.⁵⁶ In recent years, the debate regarding the joint return has not questioned the primacy of the couple as taxpayer, focusing rather on whether and to what extent couples

supra note 43, at 348–55 (challenging the claim that many married couples do not share consumption, and concluding that most spouses do share equally in consumption).

50. See Kornhauser, *supra* note 49, at 103.

51. See Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 851–53 (2008) [hereinafter Cain, *Taxing Families*]; Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27, 54–60 (1996); Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 92 IOWA L. REV. 1509, 1540–44 (2006).

52. See generally Nancy D. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996).

53. See Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1005–10 (1993).

54. I use the descriptors “single” or “uncoupled” to mean people who are not in a committed romantic relationship; this is a different group from those who are “unmarried,” as this latter group includes both single people and coupled people who are not married.

55. See, e.g., Gann, *supra* note 49, at 32–52; Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 154–57 (1998); Kornhauser, *supra* note 49, at 108–11; Harvey S. Rosen, *Is It Time to Abandon Joint Filing?*, 30 NAT'L TAX J. 423, 427 (1977); Zelenak, *supra* note 43, at 378.

56. See generally Marjorie E. Kornhauser, *Wedded to the Joint Return: Culture and the Persistence of the Marital Unit in the American Income Tax* (June 2009) (unpublished manuscript, on file with the Hastings Law Journal); Zelenak, *supra* note 11; CBO, *FOR BETTER OR WORSE*, *supra* note 19.

should suffer marriage penalties or enjoy marriage bonuses, and who among the universe of couples ought to be eligible for the marriage bonus.⁵⁷ The treatment of single individuals has received almost no attention.

III. SINGLE PEOPLE: AN EMERGING MAJORITY

A. DEMOGRAPHIC DATA

The scant attention paid to single people is striking in light of the most recent U.S. census data, which indicate that forty-five percent of households in the United States are now headed by unmarried men or women.⁵⁸ In 2008, unmarried and single people comprised forty-three percent of all adults age eighteen and older.⁵⁹ An even more eye-catching, but less accurate, statistic is that fifty-one percent of adult women (and forty-seven percent of adult men) are now single.⁶⁰ Because the census data supporting this statement encompass females and males as young as fifteen years of age—who are highly unlikely to be married—the data are skewed in favor of the single category.⁶¹ However, even adjusting for this skewing, the trend toward being single is undeniable, with increasing numbers of people being single for a longer period of their adult lives.⁶² According to demographer William Frey, the 2006

57. See, e.g., Cain, *Taxing Families*, *supra* note 51, at 851–52 (advocating spousal treatment for same sex couples); Motro, *supra* note 51, at 1544–50 (advocating joint filing for couples, relatives, or friends, provided they share legal entitlement to all taxable income); Wendy Richards, *An Analysis of Recent Tax Reforms from a Marital Bias Perspective: It Is Time to Oust Marriage from the Tax Code*, 2008 WIS. L. REV. 611, 652–53 (advocating new filing status for dual-earner married couples); Zelenak, *supra* note 11.

58. U.S. Census Bureau, Press Release, Facts for Features: Unmarried and Single Americans Week (July 21, 2009), available at http://www.census.gov/Press-Release/www/releases/pdf/cbo9ff-18_unmarried09.pdf.

59. *Id.* Of this group, sixty-one percent had never been married, twenty-four percent were divorced, and fifteen percent were widowed. *Id.*

60. See Roberts, *supra* note 1.

61. U.S. CENSUS BUREAU, 2005–2007 AMERICAN COMMUNITY SURVEY, TABLE S1201: MARITAL STATUS (2008), available at <ftp://www2.census.gov/acs/downloads/shells/2007/subjects/S1201.xls>. This figure has crept up a bit and is now at fifty-two percent of adult women and forty-eight percent of adult men. U.S. CENSUS BUREAU, 2006–2008 AMERICAN COMMUNITY SURVEY, TABLE S1201: MARITAL STATUS, available at http://www.census.gov/acs/www/Downloads/users_guide/2006-2008/shells/subject/S1201.xls.

62. For example, in 1950, sixty-five percent of women lived with a spouse; today forty-nine percent do so. See Roberts, *supra* note 1. On average, Americans spend half their adult lives outside marriage. See *id.* (quoting Stephanie Coontz, Director of Public Education for the Council on Contemporary Families). The trend is driven by a number of factors: young adults are delaying marriage longer, more marriages are ending in divorce in a shorter period of time, and more women who divorce or are widowed are remaining unmarried longer and living longer. See *id.*; see also U.S. CENSUS BUREAU, THE POPULATION PROFILE OF THE UNITED STATES: DYNAMIC VERSION, FAMILY AND LIVING ARRANGEMENTS IN 2005, available at <http://www.census.gov/population/www/pop-profile/files/dynamic/FamiliesLA.pdf>.

census findings are a “clear tipping point.”⁶³ Marriage historian Stephanie Coontz describes them as “yet another of the inexorable signs that there is no going back to a world where we can assume that marriage is the main institution that organizes people’s lives.”⁶⁴

B. POPULAR CONSCIOUSNESS

Awareness of singles as an overlooked demographic is starting to permeate the political and popular cultural consciousness. For example, there are now organizations, such as Unmarried America⁶⁵ and the Alternatives to Marriage Project,⁶⁶ whose goals are to provide information about, and to advocate for, singles and other unmarried individuals. Marketers and advertisers are beginning to identify singles as a new and valuable demographic, as evidenced by magazines such as the Los Angeles–based *Singular*, whose goal is to “position the single lifestyle in today’s consumer marketplace, as a positive state-of-mind and fulfilling way-of-life,”⁶⁷ and websites such as Single Edition, which describes itself as a “lifestyle destination for singles.”⁶⁸ New (and unfortunate) terms such as “quirkyalone”⁶⁹ and “singlism”⁷⁰ have entered the lexicon, along with the obligatory self-confessional blogs.⁷¹

One prominent theme throughout the heightened media and marketing focus on single people is the extent to which they are socially and economically disadvantaged. Socially, single people are portrayed as pathetic, unfulfilled, selfish, immature, socially inept, or some combination thereof.⁷² For example, last winter, Ed Rendell, governor of Pennsylvania, remarked that Arizona Governor Janet Napolitano, who is

63. See Roberts, *supra* note 1 (quoting William H. Frey, a demographer with the Brookings Institution).

64. See *id.*

65. Unmarried America, An Information Service for the New Unmarried Majority, <http://www.unmarriedamerica.org/> (last visited Jan. 12, 2010).

66. Alternatives to Marriage Project, <http://www.unmarried.org/> (last visited Jan. 12, 2010).

67. PR News Online, *Singular Magazine Debuts to Celebrate the Single Lifestyle* (June 18, 2008), <http://www.prnewsonline.com/prnewswire/2753.html>.

68. Single Edition, *About Us*, <http://www.singleedition.com/about-singleeditioncom/our-story/about-us.html> (last visited Jan. 12, 2010).

69. “Quirkyalone *n./adj.* A person who enjoys being single (but is not opposed to being in a relationship) and generally prefers to be alone rather than date for the sake of being in a couple.” SASHA CAGEN, *QUIRKYALONE: A MANIFESTO FOR UNCOMPROMISING ROMANTICS* 5 (2004); see also *Quirkyalone: It’s a Mindset*, <http://quirkyalone.net/index.php/about-2/quirkyalone/> (last visited Jan. 12, 2010).

70. “Singlism” is a term coined by Bella DePaulo and Wendy Morris to describe the negative stereotyping of single people. See BELLA DEPAULO, *SINGLED OUT: HOW SINGLES ARE STEREOTYPED, STIGMATIZED, AND IGNORED, AND STILL LIVE HAPPILY EVER AFTER* 2 (2006).

71. See, e.g., *Singletude: A Positive Blog for Singles*, <http://singletude.blogspot.com/> (last visited Jan. 12, 2010); *Therapeutic Conversations for Singles*, <http://www.crystalmonae.blogspot.com/> (last visited Jan. 12, 2010).

72. See *infra* notes 113–19 and accompanying text.

unmarried and childless, was “perfect” as President Obama’s choice to be the head of homeland security “because, for that job, you have to have no life. Janet has no family. Perfect. She can devote, literally, 19–20 hours a day to it.”⁷³ Rendell came under fire, in part for his negative stereotyping of singles as having “no life.”⁷⁴ (He was also criticized for being sexist and a boor and a sore loser.)⁷⁵ He ended up apologizing “if anybody out there was offended.”⁷⁶

In terms of economic status, the popular media outlets decry the variety of ways in which consumer and labor markets discriminate (in the economic sense of price discrimination) between single persons, on the one hand, and couples or families, on the other. For example, families or couples are often offered discounts on consumption items like vacation travel and lodging, restaurant meals, and health or country club memberships.⁷⁷ Similarly, employers often provide benefits such as health and life insurance at a discounted cost to spouses and other family members of their employees, in effect paying them more than single employees.⁷⁸

Commentators also catalog the various pernicious governmental policies and programs under which single people are treated unfavorably. For example, military pay is widely disparate for single personnel and those who are married and/or have children,⁷⁹ with single personnel

73. Gail Collins, Op-Ed., *One Singular Sensation*, N.Y. TIMES, Nov. 4, 2008, at A43, available at <http://www.nytimes.com/2008/12/04/opinion/04iht-edcollins.1.18403897.html> (quoting Governor Rendell).

74. *Id.*

75. See, e.g., *id.*; Connie Schultz, *She Doesn't Have a Life? He Doesn't Have a Clue*, PLAIN DEALER (Cleveland), Dec. 7, 2008, at G4. But see Jill Porter, *Can't Blame Ed for Tellin' It Like It Is*, PHILA. DAILY NEWS, Dec. 5, 2008, at 5.

76. E.g., Angela Couloumbis & Mario F. Cattabiani, *Rendell Plays Down Remarks—He Said Homeland Security Secretary-Designate Had “No Family” and “No Life”*, PHILA. INQUIRER, Dec. 4, 2008, at B1.

77. See, e.g., Amey Stone, *The High Cost of Not Marrying*, BUSINESSWEEK ONLINE, Feb. 25, 2004, http://www.businessweek.com/bwdaily/dnflash/feb2004/nf20040225_6278_db035.htm.

78. See, e.g., Thomas F. Coleman, *The High Cost of Being Single in America or the Financial Consequences of Marital Status Discrimination* (Aug. 7, 2004), <http://www.unmarriedamerica.org/cost-discrimination.htm>; Leslie Talbot, *Stop Singlism!*, FORBES MAG., Aug. 21, 2007, http://www.forbes.com/2007/08/21/talbot-singles-discrimination-forbeslife-singles07_cx_lt_0821talbot.html.

Commentators also report that in response to the changing demographic landscape, some employers have begun to offer benefits to an expanded universe of “family members,” including unmarried domestic partners (same or opposite sex), grown children, or extended family members. See, e.g., Michelle Conlin, *Unmarried America*, BUSINESSWEEK, Oct. 20, 2003, at 109. The redefinition of family is another demographic shift that sometimes aligns, but sometimes conflicts, with the agenda of singles advocacy and awareness groups. Constituents of the “redefined family” group and the “singles” group are aligned in their opposition to the traditional married couple (preferably with children) as the sole privileged social arrangement, but they diverge in their preferred alternative. This Article focuses primarily on single people versus coupled people (most of whom are married).

79. See Leslie Talbot, *Opinion: Unmarried in the Military? Still a Long Way to Go* (June 10, 2008), <http://www.unmarried.org/unmarried-in-the-military.html>.

earning as little as fifty-two percent of their peers with families.⁸⁰ Social security benefits, as a function of the amount of taxes paid into the system, are up to eighty-five percent higher for a married couple than for some single individuals.⁸¹ Not surprisingly, the single's tax penalty under the joint return regime features prominently on this list of grievances.

Some of the popular commentary on the single's tax penalty is quite balanced. For example, the Alternatives to Marriage Project provides a lucid description of the marriage bonus and provides the following example of how it can result in unfair treatment to the single taxpayer:

To see how marriage bonuses are unfair to unmarried people, imagine two employees. Each earns the same salary. One is unmarried; the other has a spouse who is an unpaid caretaker or earns a very low income. The married employee pays lower taxes, ending up with more take-home pay than the unmarried employee.⁸²

The discussion goes on to point out that there is also a marriage penalty for relatively high-income married couples where each spouse earns a significant amount and certain low-income couples eligible for the earned income credit.⁸³

Others are more incendiary in their presentation of the issue. Unmarried America's "Human Rights Program for Unmarried America" for example, asserts that "[m]arried couples with children are getting tax breaks from Congress while single people are left out totally or get leftover table scraps."⁸⁴ A tax and financial reporter for *MSN* describes it this way: "Forget the marriage penalty. The fact is singles get a worse break from the U.S. Tax Code than married people do."⁸⁵ By way of example, he compares two individuals, each with \$100,000 of taxable income, one with a stay-at-home spouse and the other single, and determines that the single person pays about \$4150 more in taxes than the married person.⁸⁶

Many of the claims about the disparate treatment of single people are factually plausible, but whether such treatment is morally or legally

80. See Jim Garamone, *Review Panel Recommends Military Pay Changes*, U.S. DEP'T OF DEF. ARMED FORCES PRESS SERV., Mar. 13, 2008.

81. See Coleman, *supra* note 78; see also Philip J. Harmelink & Janet Furman Speyrer, *Social Security: Rates of Returns and the Fairness of Benefits*, 14 CATO J. 37, 51 (1994) (concluding that of four inequities in the social security system—marital status, gender, age, and income—marital status is the most important, with rates of return for one-earner couples "up to 40 percent higher than for two-earner couples and up to 85 percent higher than for single males").

82. See Alternatives to Marriage Project, *Federal Income Taxes*, <http://www.unmarried.org/federal-income-taxes.html> (last visited Jan. 12, 2010).

83. *Id.*

84. Unmarried America, *Support Our Human Rights Program for Unmarried America*, <http://www.unmarriedamerica.org/humanrightsagenda.html> (last visited Jan. 12, 2010).

85. See Jeff Schnepfer, *How the Tax Code Makes Singles Suffer*, MSN MONEY, June 22, 2004, <http://moneycentral.msn.com/content/Taxes/P82377.asp>.

86. *Id.* (example based on tax rates in effect for 2004).

objectionable is less clear. For example, differential pricing—that is, the pricing of goods and services to differentiate between single individuals and couples or larger families—clearly does occur for consumption items such as vacation travel or health club memberships.⁸⁷ However, basic microeconomic theory holds that price discrimination—separating out different consumers with different preferences for a particular good or service, and charging them different prices—can sometimes improve the functioning of markets, and lead to an increase in overall social welfare.⁸⁸ Even though consumers do not like it, it is generally tolerated, and absent special circumstances (implicating antitrust laws or laws forbidding discrimination on the basis of suspect groups such as racial minorities), the government will not intervene to restrict it.⁸⁹ Of course, consumers are free to engage in self-help—that is, mobilize their market power as a group and hold out for a better price.⁹⁰ To some extent, that appears to be the goal of the organizations described above.⁹¹

To evaluate all the specific claims about the treatment of single people is beyond the scope of this Article.⁹² However, these types of claims illustrate the heightened awareness of this demographic that has begun to enter our collective consciousness, and provide an entry point into more serious research about the treatment of single people.

C. ACADEMIC RESEARCH AND FINDINGS

The popular media clearly demonstrates a heightened awareness of single people as an overlooked or poorly treated demographic, but casual observations in the popular media are insufficient to establish the

87. For example, consumer discounts are offered to married people for auto and renters' insurance, health club and country club memberships, and automobile clubs. See Stone, *supra* note 77.

88. See John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 228–29 (2008); William F. Baxter & Daniel P. Kessler, *Toward a Consistent Theory of the Welfare Analysis of Agreements*, 47 STAN. L. REV. 615, 623–25 (1995). The basic intuition is that, by charging different prices to different consumers, instead of a single price to all consumers, a seller will be able to sell more units, thereby increasing profits. See Daniel A. Farber & Brett H. McDonnell, *Why (and How) Fairness Matters at the IP/Antitrust Interface*, 87 MINN. L. REV. 1817, 1865–70 (2003).

89. See generally Herbert Hovenkamp, *Market Power and Secondary-Line Differential Pricing*, 71 GEO. L.J. 1157, 1157–77 (1983) (describing conditions under which differential pricing violates antitrust laws, and other conditions in which it does not).

90. For a detailed analysis of the desirability and legality of group purchasing organizations, see Jonathan M. Jacobsen & Gary J. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1 (1991).

91. See, e.g., National Singles Association, http://www.r-u-single.com/content.aspx?page_id=0&club_id=276423 (last visited Jan. 12, 2010). The National Singles Association is an organization that appears to be modeled on the American Association of Retired People, which, in exchange for a membership fee, offers discounts on travel; hotels; restaurants; electronics; legal, accounting, and financial services; books; music; and entertainment. See *id.*

92. Of course, the specific claims about the tax treatment of single people under the joint return will be thoroughly evaluated. See *infra* Part IV.

existence of a problem. This section will examine the research of economists and other behavioral scientists, who have begun to study single people as a group.

I. Wage Discrimination

With regard to the workplace, labor economists have observed for some time that married men are paid more than unmarried men.⁹³ However, the cause of this “marital wage premium,” estimated to be from ten to forty percent,⁹⁴ has been difficult to ascertain.⁹⁵ The most common theories are that: (1) marriage allows men to specialize in nonhousehold production (the “specialization theory”),⁹⁶ (2) the characteristics that make men attractive to employers also makes them attractive as husbands (the “selection theory”),⁹⁷ and (3) employers discriminate in favor of married men (the “discrimination theory”).⁹⁸ In this context, discrimination is defined to occur when “workers do not receive pay or remuneration commensurate with their productivity—when, in short, equal productivity is not rewarded with equal pay.”⁹⁹ The employer might be interpreting marriage as a signal that the employee is stable and responsible, or might consciously or unconsciously give preference to married men in raises and promotions on the assumption that they have a family to support.¹⁰⁰

Until recently, most empirical research focused primarily on the specialization and selection theories.¹⁰¹ The discrimination theory has received less attention, in part, perhaps, because of difficulties in

93. See generally Joni Hersh & Leslie S. Stratton, *Household Specialization and the Male Marriage Wage Premium*, 54 *INDUS. & LAB. REL. REV.* 78 (2000); Lawrence W. Kenny, *The Accumulation of Human Capital During Marriage by Males*, 21 *ECON. INQUIRY* 223 (1983); Sanders Korenman & David Neumark, *Does Marriage Really Make Men More Productive?*, 26 *J. HUM. RESOURCES* 282 (1991); Eng Seng Loh, *Productivity Differences and the Marriage Wage Premium for White Males*, 31 *J. HUM. RESOURCES* 566 (1996).

94. See Jeffrey S. Gray, *The Fall in Men's Return to Marriage: Declining Productivity Effects or Changing Selection?*, 32 *J. HUM. RESOURCES* 481, 481–82 (1997).

95. See Leslie S. Stratton, *Examining the Wage Differential for Married and Cohabiting Men*, 40 *ECON. INQUIRY* 199, 199 (2002).

96. See Gary S. Becker, *A Theory of the Marriage, Part I*, 81 *J. POL. ECON.* 813, 813–15 (1973); Gary S. Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 *J. LAB. ECON.* S33, S34–36 (1985).

97. See GARY S. BECKER, *A TREATISE ON THE FAMILY* 66–77 (1981); Christopher Cornwell & Peter Rupert, *Unobservable Individual Effects, Marriage, and the Earnings of Young Men*, 35 *ECON. INQUIRY* 285, 285–86 (1997).

98. See Martha S. Hill, *The Wage Effects of Marital Status and Children*, 14 *J. HUM. RESOURCES* 579, 592 (1979).

99. Dennis J. Aigner & Glen G. Cain, *Statistical Theories of Discrimination in Labor Markets*, 30 *INDUS. & LAB. REL. REV.* 175, 177 (1977).

100. Abbigail J. Chiodo & Michael T. Owyang, *For Love or Money: Why Married Men Make More*, *REGIONAL ECONOMIST*, Apr. 2002, at 10, 10.

101. See Michael Zimmer, *Employer Discrimination and the Earnings Premium of Married Men: Evidence From Quantile Regressions*, 32 *J. ECON.* 1 (2006).

detecting and measuring discrimination.¹⁰² In the last few years, however, some evidence has emerged to support the discrimination theory. In 2004, Kate Antonovics and Robert Town devised an ingenious way to eliminate the selection theory as a possible cause of the marital wage premium: They studied pairs of monozygotic twins in which one twin married and the other did not. Because twins are genetically and (usually) environmentally identical, they should be equally productive workers, which effectively removes the possibility that any marital wage premium is attributable to the selection of more productive men into marriage.¹⁰³ Antonovics and Town found that the marital wage premium persisted (with the married twins earning on average twenty-six percent more than the single twins).¹⁰⁴ They also found little support for the specialization theory as an explanation for the premium.¹⁰⁵ However, they stop short of concluding that the discrimination theory is the most likely explanation for the marital wage premium, and instead offer an alternative theory—that married men earn more because they work harder and more assertively seek out raises and better job opportunities.¹⁰⁶

Two other recent studies, both of which examine the relative earnings of single and married men across income levels, have also found evidence of employer discrimination among men who are young or relatively uneducated, in low wage jobs.¹⁰⁷ The authors of one of the studies theorize that, in low wage labor markets, where employers lack other signaling information—such as education and prior experience—related to worker value, they rely heavily on marital status as an indicator of worker value.¹⁰⁸

The findings of wage discrimination against single people in labor markets are limited to men. This is because it is not clear whether women receive a marital wage premium to begin with.¹⁰⁹ In fact, researchers have

102. See Chiodo & Owyang, *supra* note 100, 10.

103. Kate Antonovics & Robert Town, *Are All the Good Men Married? Uncovering the Sources of the Marital Wage Premium*, 94 AM. ECON. REV. 317, 317–19 (2004).

104. *Id.* at 317–20.

105. *Id.* at 320.

106. *Id.* (“Thus, the answer to the question posed in the title of our paper, appears to be ‘no.’ Not all the good men are married.”).

107. See Zimmer, *supra* note 101; Esfandiari Maasoumi et al., *Who Benefits from Marriage?*, 71 OXFORD BULL. ECON. & STAT. 1, 29–30 (2009) (finding also that the marital wage premium is minimal or nonexistent for higher wage jobs).

108. See Maasoumi et al., *supra* note 107, at 29.

109. There is far less research on marital wage effects for women, and the findings are more ambiguous. Some researchers have found evidence of premium. See, e.g., David Neumark & Sanders Korenman, *Source of Bias in Women’s Wage Equations: Results Using Sibling Data*, 29 J. HUM. RESOURCES 379 (1994). Others have found a marital wage penalty—that married women are paid less than single women. See, e.g., Hill, *supra* note 98, at 588. Still others have found no discernible premium

found evidence of the opposite phenomenon, particularly with respect to married women with children—the so-called motherhood wage penalty.¹¹⁰ They theorize that married women may be paid less than their single counterparts because married women are more closely tied to children and household labor than married men.¹¹¹ Attempting to measure the intersecting effects of marital status and gender on wages is highly complex, and clearly more research is needed.¹¹² Nonetheless, insofar as men's wages are concerned, there is credible evidence that married men receive higher pay than single men merely because they are married, and not because they are more productive.

2. Psychological and Social Costs

Sociologists and psychologists have also begun to study negative cultural portrayals and attitudes about single people.¹¹³ They have found that unmarried people are viewed as less likeable than married people,¹¹⁴ and more shy, insecure, and inflexible.¹¹⁵ Single people are described as more selfish, immature, and less well adjusted than coupled people.¹¹⁶ They are perceived to be more promiscuous and to have riskier personality traits as compared to married people with identical profiles of sexual behavior.¹¹⁷ Middle-aged single people are seen as pathetic, lonely, and hopeless in their quest for love.¹¹⁸ In addition, middle-aged

or penalty. See, e.g., Samuel Giffin & Quinton White, *Why Not Women Too? An Analysis of the Effects of Women's Marital Status and Other Related Factors on Wages*, ISSUES POL. ECON., Aug. 2008.

110. See Deborah J. Anderson et al., *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility*, 56 INDUS. & LAB. REL. REV. 273 (2003); Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204 (2001); Hill, *supra* note 98, at 588.

111. See Hill, *supra* note 98, at 579–81.

112. See Robert K. Toutkoushian et al., *The Interaction Effects of Gender, Race, and Marital Status on Faculty Salaries*, 78 J. HIGHER EDUC. 572, 597 (2007) (noting the complex interaction of personal and other characteristics that contribute to pay inequities, and the need for more research).

113. See generally Bella M. DePaulo & Wendy L. Morris, *Singles in Society and in Science*, 16 PSYCHOL. INQUIRY 57 (2005) (examining the nature of, and possible explanations for, negative stereotypes about single people). *But see* James M. Puckett, *Rethinking Tax Priorities: Marriage Neutrality, Children, and Contemporary Families*, 78 U. CIN. L. REV. (forthcoming 2010) (arguing for elimination of the joint return, while providing support for parents and children).

114. See Joachim Krueger et al., *Perceiving Middle-Aged Adults: Effects of Stereotype-Congruent and Incongruent Information*, 50 J. GERONTOLOGY 82, 92–93 (1995).

115. See Wendy L. Morris et al., *Perceptions of People Who Are Single: A Developmental Life Tasks Model*, in *THE PSYCHOLOGY OF MODERN PREJUDICE* 165, 182 (Melanie A. Morrison & Todd G. Morrison eds., 2008). They are also described as more sociable, fun, and independent than married people. *See id.*

116. See Alan A. Davis & Philip M. Strong, *Working Without a Net: The Bachelor as a Social Problem*, 25 SOC. REV. 109 (1977); Tobias Greitemeyer, *Stereotypes of Singles: Are Singles What We Think?*, 39 EUROPEAN J. SOC. PSYCHOL. 368, 369 (2008); Morris et al., *supra* note 115, at 11.

117. Terri D. Conley & Barry E. Collins, *Gender, Relationship Status and Stereotyping About Sexual Risk*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1483 (2002).

118. See Anne Byrne, *Singular Identities: Managing Stigma, Resisting Voices*, 7 WOMEN'S STUD. REV. 13, 90–93 (2000); Krueger et al., *supra* note 114, at 15–22.

single people are often assumed to be gay, lesbian, or bisexual, which carries with it a whole additional set of biases and negative stereotypes.¹¹⁹

Negative attitudes like those relating to single people do not necessarily impact behavior—in fact, most research indicates there is only a weak link between attitudes and behavior.¹²⁰ Moreover, to the extent these negative characterizations do have behavioral effects, on either the single people themselves or those who interact with them, these effects are difficult to ascertain because they relate to complex interactions between people that involve subjective feelings and perceptions. However, social scientists have studied stigma—where, based on an attribute, a person is reduced “from a whole and usual person to a tainted and discounted one”¹²¹—and found both behavioral changes and quality of life effects on those who are stigmatized.¹²² Preliminary research indicates that single people feel stigmatized, and as a result, they adopt certain strategic behaviors to manage their stigmatization, as well as suffer emotional distress and low self esteem.¹²³ Researchers posit that those interacting with single people may unintentionally ignore or exclude them, which gives rise to their feelings of stigmatization.¹²⁴

Social scientists offer a number of explanations for why negative stereotypes about single people have developed and why they continue to persist despite the changing social landscape, in which many more people are single for longer periods of their lives. These theories—which can incorporate evolutionary, biological, religious, psychological, economic, and political strands—almost inevitably turn to the question of why marriage has been, and continues to be, so highly valued.¹²⁵ Of course, a comprehensive account of this complex and contested question is well beyond the scope of this Article. Instead, the Article will draw on

119. Tanya Koropecyj-Cox, Commentary, *Singles, Society, and Science: Sociological Perspectives*, 16 *PSYCHOL. INQUIRY* 91, 95 (2005).

120. See ALICE H. EAGLY & SHELLY CHAIKEN, *THE PSYCHOLOGY OF ATTITUDES* 155–183 (1993). Most of the research on negative attitudes towards single people uses quasi-experiments in which subjects are asked their attitudes about fictional individuals whose characteristics are manipulated. Anne Byrne & Deborah Carr, Commentary, *Caught in the Cultural Lag: The Stigma of Singlehood*, 16 *PSYCHOL. INQUIRY* 84, 85–86 (2005). Currently, there is only one experiment attempting to link negative attitudes about single people directly to behavior. See Wendy L. Morris et al., *No Shelter For Singles: The Perceived Legitimacy of Marital Status Discrimination*, 10 *GROUP PROCESSES & INTERGROUP REL.* 457, 460 (2007) (finding that subjects asked to act as landlords explicitly favored married couples over singles in selecting tenants).

121. See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 3 (1963).

122. See generally *id.*; *THE SOCIAL PSYCHOLOGY OF STIGMA* (Todd F. Heatherton et al. eds., 2003).

123. See Byrne & Carr, *supra* note 120, at 86–89; Byrne, *supra* note 118, at 13–24.

124. See Kipling D. Williams & Steve A. Nida, Commentary, *Obliviously Ostracizing Singles*, 16 *PSYCHOL. INQUIRY* 127, 127–30 (2005).

125. See, e.g., Byrne & Carr, *supra* note 120, at 87–88; DePaulo and Morris, *supra* note 113, at 72–78; Koropecyj-Cox, *supra* note 119, at 96.

certain insights from the social science literature that are especially helpful in reassessing the tax treatment of single people.

Particularly illuminating is the idea that there exists an “ideology of marriage and family” that exalts marriage and nuclear family above all other personal relationships, and that is so deeply ingrained in our society that it goes unrecognized and unchallenged.¹²⁶ The experience of romantic love and marriage is conceptualized as the attainment of a transcendent state of bliss.¹²⁷ Marriage is taken for granted as the norm and the ideal, so much that few contest it or even recognize that it is an institution of privilege.¹²⁸ Against this backdrop, it is easy to see how negative attitudes about single people can flourish and how the concerns and interests of single people can be overlooked or minimized.¹²⁹ Moreover, the ideology of marriage and family, along with negative attitudes and assumptions about single people, can be unconsciously imported into researchers’ analyses and interpretation of information.¹³⁰ Social scientists—even those who are skeptical of the idea of “singles studies”—have uniformly called for an increased awareness of the ideology of marriage and family, and a willingness to interrogate and challenge it.¹³¹

3. *Toward a Positive Conception of Singlehood*

Thus far, this Part has focused on negative aspects of life as a single person—the negative attitudes and behaviors toward single people that inflict economic, psychological, and social harms on them. Of equal importance (and also more heartening) are recent efforts to articulate a positive conception of singlehood.

126. See DePaulo & Morris, *supra* note 113, at 58, 77. DePaulo & Morris go so far to call it the “cult of the couple.” *Id.* at 75.

127. See Deborah Carr, *Well-Being of Single Women*, in *WOMEN ON THEIR OWN* 58, 62 (Rudolph M. Bell & Virginia Yans eds., 2008); ANTHONY GIDDENS, *THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE, AND EROTICISM IN MODERN SOCIETIES* 111–57 (1992).

128. See Byrne & Carr, *supra* note 120, at 88 (“[T]he privilege afforded to married persons is the most pervasive and least contested of all privileges because nearly all persons have first-hand experience with the nuclear family. Profamily attitudes are not only internalized by children and young adults but also are reified on a daily basis through language and practice.”); Anne Byrne, *Single Women in Ireland*, in *WOMEN ON THEIR OWN*, *supra* note 127, at 16, 17 [hereinafter Byrne, *Single Women in Ireland*]; see also Pierre Bourdieu, *On Family as a Realized Category*, 13 *THEORY, CULTURE & SOC.* 19, 19–24 (1996); Trevor Purvis & Alan Hunt, *Discourse, Ideology, Discourse, Ideology*, 44 *BRIT. J. SOC.* 473 (1993).

129. See Christian S. Crandall & Ruth H. Warner, Commentary, *How a Prejudice is Recognized*, 16 *PSYCHOL. INQUIRY* 137, 138 (2005) (“The kind of prejudice toward singles . . . is so smoothly integrated into the everyday ideology of Americans that most people will not notice their evaluations, their beliefs, their assumptions, and their preferences.”); Williams & Nida, *supra* note 124, at 128 (analogizing the unconscious disregard of single people’s interests to institutional discrimination).

130. See Carr, *supra* note 127, at 58–59; DePaulo & Morris, *supra* note 113, at 65–71.

131. See, e.g., Margaret S. Clark & Steven M. Graham, *Do Relationship Researchers Neglect Singles? Can We Do Better?*, 16 *PSYCHOL. INQUIRY* 131, 135 (2005); Kenneth L. Dion, *Marital Status as Stimulus Variable and Subject Variable*, 16 *PSYCHOL. INQUIRY* 104, 110 (2005).

Feminist theorists have been at the forefront of these efforts, perhaps to contest the especially negative portrayals of single women. As Anne Byrne observes, the single woman's social identity has been "variously constructed as an old maid, a spinster, an androgyne, a rebel, a marriage resister, sad, mad, or bad, embittered, sexless, surplus, celibate, virtuous, a menace, homosexual, a bachelor woman, or an independent woman."¹³² In her study of thirty single women born in the 1950s and 1960s, Byrne explores through firsthand narratives how these women have navigated their uneasy identities as single women in a society dominated by "(1) a patriarchal conception of womanhood as heterosexual, married and reproductive, and (2) a conception of single womanhood as lack, as deviant, and as a threat to the patriarchal order."¹³³ While Byrne finds much emotional and cognitive turmoil among her subjects, she also discerns in many of them the self-awareness and self-reflection that can lead to resistance and, ultimately, social transformation.¹³⁴ She perceives an emerging conception of the single woman as "independent and self-reliant, as exercising the capacity to choose and to determine one's own life path."¹³⁵

The renewed focus of feminist theorists on single women seems also to be prompted by the life experiences of a generation of women who grew up with the optimism of liberal second-wave feminism, but who are now realizing that they cannot, or do not want to, "have it all." In her engaging account of the history of feminism in the United States and the role of the single woman throughout, legal scholar Rachel Moran writes,

In sum, liberal second-wave feminists mainly have emphasized economic independence. In doing so, they have enabled many women to become financially self-sufficient and remain single. Despite new possibilities for singlehood, activists have addressed women's intimate lives mostly in conjunction with marriage and motherhood. A great deal of attention has been paid to balancing work and family life, while little effort has been made to forge strong alternative visions of life as a single woman.¹³⁶

132. BYRNE, *Single Women in Ireland*, *supra* note 128, at 19. Single men do not exactly have it easy, either. They are stereotyped as "horny, slovenly, and irresponsible," or "fastidious, frivolous and gay." DEPAULO, *supra* note 70, at 150.

133. BYRNE, *Single Women in Ireland*, *supra* note 128, at 19; see Jill Reynolds & Margaret Wetherell, *The Discursive Climate of Singleness: The Consequences for Women's Negotiation of a Single Identity*, 13 *FEMINISM & PSYCHOL.* 489, 489-510 (2003) (interview study of thirty British women using discursive psychology to develop a feminist perspective on singleness).

134. BYRNE, *Single Women in Ireland*, *supra* note 128, at 34-35.

135. *Id.* at 37.

136. Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 *HOFSTRA L. REV.* 223, 282 (2004) [hereinafter Moran, *Single Woman*]; see also Angela P. Harris, *Loving Before and After the Law*, 76 *FORDHAM L. REV.* 2821, 2842-44 (2008); Rachel F. Moran, *Loving and the Legacy of Unintended Consequences*, 2007 *WIS. L. REV.* 239, 274-76.

Moran believes that “singlehood has arrived, with or without a formal movement to recognize it.”¹³⁷ She and others, such as sociologist E. Kay Trimberger, seek to sketch out a positive conception of singlehood for women. Trimberger identifies six criteria for a fully realized single life: (1) pursuing fulfilling work, (2) forging connections to the next generation, (3) creating a home, (4) developing intimate relationships with a network of friends and extended family, (5) sustaining a community, and (6) accepting one’s sexuality.¹³⁸ Like Byrne, Trimberger emphasizes autonomy and self-actualization in her positive conception of the single woman. Trimberger further enriches this vision by examining the lives of several single women over the course of many years, providing a nuanced account of the process by which they forge a positive identity over time:

We have seen that most women do not choose a single life; they do not have a life plan for remaining single. Rather, the self-actualizing choices they make over a lifetime gradually lead them toward a sense of being a whole person with a unique identity. Thus, autonomy is not a precondition but rather an outcome of the long drama of crafting a satisfying single life. Women of many personality types—whether divorced or ever single—become more autonomous through this process.¹³⁹

IV. SINGLE PEOPLE AND THE JOINT RETURN

A. INSIGHTS AND A NEW PERSPECTIVE

Returning to the realm of tax law and the treatment of single people under the joint return, of what significance is our changing demographic landscape, and what insights can be drawn from the work of social scientists and feminist theorists?

The mere fact of the demographic shift toward single people would seem to occasion a timely opportunity to reexamine their treatment under the tax system. At the very least, this shift highlights the increasing obsolescence of the heterosexual married couple as the societal norm. The time when a majority of households consisted of such couples (with or without children)—and any concerns about the treatment of nontraditional households could be more easily dismissed as affecting only a small minority—would seem to have passed.

Obsolescence by itself, however, does not necessarily provide the impetus for change. The norm of the single-earner heterosexual married couple has been obsolete for quite some time, and the adverse impact of joint return, particularly on women in dual-earner marriages, has been

137. Moran, *Single Woman*, *supra* note 136, at 284.

138. E. KAY TRIMBERGER, *THE NEW SINGLE WOMAN* 65–83 (2008).

139. *Id.* at 116–17 (footnote omitted).

well documented, beginning with Grace Blumberg's pathbreaking 1971 article.¹⁴⁰ Nonetheless, the joint return has persisted.¹⁴¹

The research of behavioral scientists strengthens the case for reevaluating the joint return by demonstrating the ways in which continuing to privilege marriage and couples imposes real costs—economic, social, and psychological—on single people. Perhaps even more importantly, social scientists call attention to the powerful influence of the ideology of marriage and family, under which it is easy to assume that the married couple is both the ideal and the norm, and to overlook or minimize the costs to those who do not conform. They further caution us to interrogate and challenge the methodologies and assumptions of researchers, who are not immune to this influence. Finally, feminist theorists provide us with a glimpse of the way forward—and encourage us to recognize and value, rather than deny and penalize, the fully realized single person.

B. DIRECTIONS NOT TAKEN

One possibility, not adopted here, would be to position singles (possibly in combination with unmarried couples) as a distinct group that deserves equal treatment with couples. This is the approach taken by some of the organizations and commentators described above, who seek to mobilize singles as a political force.¹⁴² With respect to taxes, their message is simple: every marriage bonus has a corresponding singles penalty.¹⁴³ There is precedent for this type of organizational effort. The 1969 tax reduction for single people was aggressively lobbied for by various individuals and groups representing the interests of single people.¹⁴⁴

This approach is problematic on two fronts. First, single people are not a monolithic group, but rather a shifting and diverse constituency of individuals, some male, some female, some never married, some divorced, some widowed, some heterosexual, some gay, lesbian, or

140. Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 *BUFF. L. REV.* 49, 95 (1971).

141. One might view the adverse effects on women in the workplace as a transitional issue that will become less problematic as more women become primary earners, or we move away from the primary/secondary model generally. See Francine D. Blau & Lawrence M. Kahn, *Changes in the Labor Supply Behavior of Married Women: 1980–2000*, 25 *J. LAB. ECON.* 393, 395–411 (2007) (finding, for both decades, a new, steady, and dramatic reduction in women's own wage labor supply elasticity, and a continuing decline in their cross-wage elasticity). In this way, it is arguably a less serious problem than the demographic shift toward singlehood, which there is no reason to think will be permanent.

142. See *supra* notes 65, 66, 84.

143. See, e.g., Conlin, *supra* note 78; DEPAULO, *supra* note 70; Shari Motro, Op-Ed., *Single and Paying for It*, *N.Y. TIMES*, Jan. 25, 2004, § 4, at 15.

144. See Ventry, *supra* note 11, at 8; see also, Zelenak, *supra* note 11, at 37–39.

transgender. This is recognized by sociologists,¹⁴⁵ and reflected in the sprawling rhetoric of singles' advocacy groups.¹⁴⁶ The notion that a group of people share an important set of characteristics merely because they all possess the legal status of being unmarried is untenable and potentially offensive.¹⁴⁷

Second, framing the issue in terms of winners and losers under the tax system does not help to advance a better understanding of how we ought to be taxing differently situated people. The former "losers" may eventually gain enough in numbers and political organization to bring about changes in law under which they become "winners." However, this does not mean such changes are necessarily desirable from a policy standpoint. Indeed, the joint return, with all of the thorny issues it has engendered, resulted from just such a tyranny of the majority.

Rather, my approach is to reassess the joint return and its impacts on single people through a more refined lens, with a willingness to examine the flaws that lens reveals.

C. SINGLE PEOPLE IN A JOINT RETURN WORLD

I. The Single Person's Penalty

In examining the tax treatment of marriage, single people are necessarily implicated, because marriage bonuses or penalties are, to some extent, defined by reference to the relative tax burdens of married and single people. However, in recent years, the treatment of single people has been a tangential consideration only, as scholars and policymakers have focused almost exclusively on the treatment of married people.¹⁴⁸ My goal here is to consider the issue from the

145. See, e.g., Koropecj-Cox, *supra* note 119, at 93–95.

146. For example, The Alternatives to Marriage Project, whose explicit goal is to "advocate for the equal rights of unmarried people," invites just about everyone to participate in their efforts: "The Alternatives to Marriage Project is open to everyone, including singles, couples, married people, people in relationships with more than two people, and people of all genders and sexual orientations. We welcome our married supporters, who are among the many friends, relatives, and allies of unmarried people." About The Alternatives to Marriage Project, <http://www.unmarried.org/about-us.html> (last visited Jan. 12, 2010).

Another organization, Unmarried America, bills itself on its home page as "a service organization for the unmarried majority," and lists the following categories of constituents: solo, roommate, partner, parent, family, never married, separated, divorced, widowed, straight, gay, bi, asexual, democrat, republican, independent, employee, consumer, and voter. See Unmarried America, <http://www.unmarriedamerica.org> (last visited Jan. 12, 2010).

147. See Elisabeth Eaves, *Does the World Really Need a Magazine for Single People?*, FORBES.COM, Dec. 12, 2008, http://www.forbes.com/2008/12/11/single-magazine-marketing-oped-cx_ee_1212eaves.html ("[T]here is something wrong with the whole concept [of a magazine for single people]. . . . I know people who would smack me if I gave it to them. . . . This is not because there's something embarrassing about being single. It's just that singleness doesn't imply a set of shared interests, so it seems like a strange thing to cling to as an identity group.").

148. Two recent studies by economists, discussed in detail and critiqued below, do address the treatment of single people. See *infra* notes 154–69 and accompanying text.

reference point of the single person, rather than the married person. Toward that end, Part I defined a new term to describe the tax on a single person relative to a couple with an equal amount of income: the single person's penalty. This section further explores and critiques the only two studies to date that have attempted to quantify the single person's penalty.

As described in Part I, the single person's penalty under our tax system is substantial—estimated to range from \$0 to about \$7800 per single person in 2001, and in the aggregate, nearly \$47 billion in 1996—and certainly even more substantial today.¹⁴⁹ In addition, there is *never* a single person's bonus—a single person never pays less tax than a married couple with the same income.¹⁵⁰

2. *Rationalizing the Single Person's Penalty*

The most commonly articulated rationale for the single person's penalty—developed around the time the penalty was reduced in 1969—is grounded in an obvious distinction between a couple and a single person: a couple is comprised of two individuals while a single person is just one individual. The distinction is commonly framed in vertical equity, or ability-to-pay terms: What are the appropriate relative tax burdens for a two-person household versus a one-person household? Because two people obviously have greater needs for support than one person, the argument goes, the couple is less able to pay taxes than the single person, and their tax burden should reflect that. In theory, the couple's tax burden could take account of things like economies of scale (that is, the couple would not need twice as much to live on as the single person because the couple could share certain expenses like housing and buy food in bulk), and the enrichment of greater amounts of imputed income that at least some couples might enjoy (that is, a stay at home spouse could cook, clean, run errands, and generally make life much more pleasant for both members of the household).¹⁵¹ Many scholars are skeptical that these differences can, as a practical matter, be taken into account in determining the relative tax burdens of married couples and single people, and even more skeptical that the joint and single return would be the best way to achieve this.¹⁵² As an alternative, some have proposed eliminating the joint return, with its wider tax brackets, and simply allowing married couples a larger baseline amount of income exempt from tax by providing a larger standard deduction and an extra personal-exemption allowance.¹⁵³

149. See *supra* notes 29–32 and accompanying text.

150. See *supra* note 41 and accompanying text.

151. See Bittker, *supra* note 2, at 1422–25; Gann, *supra* note 49, at 28–31.

152. *Supra* note 151.

153. See MARVIN A. CHIRELSTEIN, FEDERAL INCOME TAXATION: A LAW STUDENT'S GUIDE TO LEADING CASES AND CONCEPTS 258 (Found. Press 2005) (1977).

Despite the difficulties of calibrating the appropriate tax treatment of couples and singles on an “ability-to-pay” basis, two recent studies have attempted to do just this. Alm and his coauthors begin by computing the single person’s penalty in the manner described above, and then use an “equivalency scale,” calibrated by reference to poverty thresholds for families of different sizes, to adjust the penalty to take account of different living needs of a single person compared to a couple.¹⁵⁴ Their equivalency scale assumes that a single person with 77.7% of a couple’s income is as well off as the couple. Therefore, at equal income levels, the single person is better off than the couple, and should pay correspondingly more in tax. Accordingly, some portion of the single’s tax penalty is recharacterized as an appropriately higher tax on a better-off taxpayer. The magnitude of the penalty is reduced, and at certain income levels, actually switches to a bonus.¹⁵⁵

Adopting a similar approach, Jane and Jennifer Gravelle use an equivalency scale based on poverty thresholds to determine the appropriate relative tax burdens.¹⁵⁶ Their study is more widely focused on the tax treatment of families of varying sizes, but they do include the treatment of single people in their analysis. Their equivalency scale assumes a single person with about sixty-two percent of the income of a couple is as well off as the couple.¹⁵⁷ After adjusting the single person’s penalty using the equivalency scale, Gravelle and Gravelle find that it persists at certain income levels, though, like Alm and his coauthors, they find the penalty switches to a bonus at other income levels.¹⁵⁸

3. *A Challenge to Methodology and Assumptions*

The rationales for the single person’s penalty rest on the assumption that a single person should pay more tax than a couple with the same income because she is better off. Scholars have debated how much better off the single person is—after taking into account economies of scale and imputed income—and have expressed doubt about implementing a tax system that would accurately reflect the single person’s higher level of

154. See Alm et al., *supra* note 23, at 74–75. They also adjust their basic computations to take account of differentials in poverty transfers at the low-income end of the spectrum. Because two-person households receive a greater amount of these transfers than one-person households, all things being equal, this has the effect of increasing the single person’s penalty. See *id.* at 74, 77–78.

155. See *id.* at 79–80.

156. Jane Gravelle & Jennifer Gravelle, *Horizontal Equity and Family Tax Treatment: The Orphan Child of Tax Policy*, 59 NAT’L TAX J. 631, 631–649 (2006) [hereinafter Gravelle & Gravelle, *Horizontal Equity*]. See generally Gravelle, *supra* note 22 (incorporating the methodology and the findings of Gravelle and Gravelle).

157. See Gravelle & Gravelle, *Horizontal Equity*, *supra* note 156, at 634–35 & tbl.1B (showing reference income levels for single people at sixty-two percent of those for a married couple).

158. See *id.* at 636 tbl.1C (showing effective tax rates for, among others, childless married couples and childless single people); see also Gravelle, *supra* note 22, at 17 (“[T]hese calculations suggest (1) that singles are taxed more heavily than childless couples in the middle income ranges but less heavily at very high and very low income levels . . .”).

well being, but the fundamental assumption, for the most part, goes unchallenged.¹⁵⁹

This Article challenges the fundamental assumption in two principal ways. The first challenge involves a conceptualization of marriage as a form of consumption. This idea has venerable roots: Henry Simons proposed it in 1938, in connection with both marriage and children.¹⁶⁰ Under this conception of marriage, an individual's decision to marry, if it entails the support of another person, is a personal choice, just as is the decision to go on an expensive vacation every year, and that consumption ought to be taxed.¹⁶¹ If instead, as occurs under the joint return, the married person's tax is reduced to take account of the added expense of supporting a spouse, the effect is to privilege one consumption choice—the decision to marry—over others. By the same token, the person who chooses other forms of consumption over marriage—the vacationer in my example—is penalized for her choice.

By preferring marriage as a consumption choice over other forms of consumption, the tax system perpetuates the ideology of marriage and family. Whether consciously or unconsciously, scholars and researchers who characterize the preference in the neutral, objective language of “ability to pay” facilitate this. Gravelle and Gravelle at least raise the possibility of marriage as consumption in their study.¹⁶² Disappointingly, though, they reject it summarily because of the measurement difficulties of using utility analysis, which a consumption theory of family and children would entail.¹⁶³ Alm and his coauthors do not explicate any

159. *But see* Gann, *supra* note 49, at 25.

160. *See* HENRY SIMONS, *PERSONAL INCOME TAXATION* 140 (1938). Simons has been described as “perhaps the leading American tax theorist of the 20th century.” Lawrence Zelenak, *Children and the Income Tax*, 49 *TAX L. REV.* 349, 359 (1994). The theory of children as consumption has received more attention than that of marriage as consumption, and is more easily put aside, no doubt because of the universally acknowledged social value of children. *See generally id.*; Donald B. Tobin, *Investing in Our Children: A Not So Radical Proposal*, 73 *U. CIN. L. REV.* 457 (2004).

161. *See* Bittker, *supra* note 2, at 1421 (“[T]he legal, emotional, and social burdens on marital income are self-imposed, since they result from the voluntary decision of the parties to get married. . . . [A] tax on income should take no more account of a marriage vow than of the taxpayer's propensity to spend his or her income on vacations, hobbies or riotous living.”); Gravelle, *supra* note 22, at 11 (“[T]he choice of a spouse could be seen as a consumption or investment choice, which should not alter the tax paid by the individual, or the combined tax of the two spouses. In this case, the individual should be the tax unit.”).

Another theoretical basis for taxing individuals separately, regardless of marital status, is the exchange model of marriage, which theorizes that individuals enter into marriage to engage in a mutually beneficial exchange of economic and noneconomic resources and services. On this theory of marriage, the joint return—with its implicit income splitting—has the effect of taxing the nonearning spouse for the services he performs in exchange for his share of his spouse's income, and allowing the earning spouse to deduct her payments to her spouse for these services, a result that is both arbitrary and inequitable. *See generally* Note, *The Case for Mandatory Separate Filing by Married Persons*, 91 *YALE L.J.* 363 (1981).

162. *See* Gravelle & Gravelle, *Horizontal Equity*, *supra* note 156, at 632.

163. *See id.*

particular normative framework for their analysis. Rather, they simply state that “it is obvious that a single household and a married household with identical AGI [adjusted gross income] are not truly equals.”¹⁶⁴ With this conclusory statement, they assume what they set out to prove: that the single person’s penalty is justifiable because it is not really a penalty. Under a consumption theory of marriage, a single household and a married household with identical income *are* equals, and the single person’s penalty is insupportable.¹⁶⁵

My second challenge to the assumption underlying the single person’s penalty is less radical than the first, marriage-as-consumption challenge, in that it accepts, as a starting point, the ability-to-pay perspective. However, it is more radical in that it proposes that a single person is actually not better off than a married couple, after taking into account the costs of being single. Thus, though a single person has fewer living expenses than a couple with the same income, and is therefore better off, he is worse off in many other ways. He (if he is a man) is paid less for his work because he is single.¹⁶⁶ He is charged a premium for many consumer goods and services.¹⁶⁷ He is stigmatized and ostracized, and subjected to a variety of negative attitudes and stereotypes.¹⁶⁸ If anything, he is worse off than the married couple, and should not have to suffer the added insult of paying a tax penalty. There are practical and theoretical difficulties with such an expansive measure of well-being for tax purposes, and with the idea of using the tax system to accomplish a sort of Pigouvian intervention.¹⁶⁹ Still, it is a plausible challenge to the single person’s penalty, and I present it in the interest of completeness.

164. Alm et al., *supra* note, 23, at 74.

165. By this, I mean the single person’s penalty is unsupportable on pure tax-policy grounds under the consumption theory of marriage. There might be other social policy reasons to provide a preference for married households, as even Henry Simons acknowledged. See SIMONS, *supra* note 160, at 140; Bittker, *supra* note 2, at 1421.

166. See *supra* notes 93–112 and accompanying text.

167. See *supra* notes 87–91 and accompanying text.

168. See *supra* notes 113–31 and accompanying text.

169. A Pigouvian tax is imposed to regulate behavior by forcing one who creates external harms to “internalize” the cost of those harms. See ARTHUR CECIL PIGOU, *THE ECONOMICS OF WELFARE* 131–37 (3d ed. 1929). Pigouvian taxes are often discussed as a means of regulating environmental polluters. See, e.g., WILLIAM J. BAUMOL & WALLACE E. OATES, *THE THEORY OF ENVIRONMENTAL POLICY* 21–47 (Cambridge Univ. Press 1988) (1975). Taxes on cigarettes and fast food are also sometimes justified as Pigouvian taxes that aim to align private interests with the social costs of such behaviors. See, e.g., W. Kip Viscusi, *The Governmental Composition of the Insurance Costs of Smoking*, 42 J.L. & ECON. 575, 581–84 (1999) (cigarette taxes); Jeff Strnad, *Conceptualizing the “Fat” Tax: The Role of Food Taxes in Developed Countries*, 78 S. CAL. L. REV. 1221, 1240–45 (2005) (taxes on junk food).

The literature on pollution taxes, cigarette tax, and junk food taxes illustrates the practical difficulties of identifying and quantifying the social harms related to polluting, smoking, and overeating. See, e.g., Douglas A. Kysar, *Law, Environment, and Vision*, 97 NW. U. L. REV. 675, 705 (2003) (“[E]cological economists believe that such Pigouvian taxes are insufficient by themselves to regulate society’s environmental impact, primarily because the informational demands of such taxes outstrip scientific knowledge of ecosystem dynamics and ethical agreement on proper valuation

D. THE ILLUSORY COSTS OF ABOLISHING THE JOINT RETURN

If, as this Article has argued, the joint return unduly penalizes single people, the clear solution would be to abolish the joint return. I want to return to Bittker's framework to consider the potential costs of such a move. Bittker put forth three "ideals": (1) equal tax treatment of equal-income couples (couples' equality); (2) progressivity; and (3) not penalizing or rewarding marriage (marriage neutrality).¹⁷⁰ Taking as a given some degree of progressivity, the Bittker framework dictates that we are faced with an inevitable tradeoff of couples equality against marriage neutrality, and that is exactly how the debate has unspooled.

The joint return has enabled couples' equality at the expense of losing marriage neutrality—taxing married couples with equal incomes equally has resulted in unmarried couples sometimes paying more or less than such married couples, in effect encouraging or discouraging marriage.¹⁷¹ The quest to restore marriage neutrality has pitted single people against dual-income married couples, in a "battle of 'neutralities,'" as Edward McCaffery calls it.¹⁷² Dual-income married couples, comparing themselves to unmarried couples, argue for reducing what they perceive to be an unfair penalty on marriage, but then, reducing taxes on married couples increases what single people perceive to be an unfair penalty on singlehood.¹⁷³ As described above, the costs to both groups are real—both in the pocketbook sense of additional taxes paid by members of these groups, and in the sense of the social costs produced by these irrationalities in the tax system.¹⁷⁴ Single people are taxed unduly heavily by reason of their status as single, and dual-income married couples are taxed unduly heavily by reason of their status as married.

In a world without a joint return, marriage neutrality would exist, and no group of individuals—whether single or coupled—would be penalized or rewarded by reason of their marital status. The Bittker framework, however, predicts a steep cost of eliminating the joint return:

methods for environmental goods and services."); Strnad, *supra*, at 1325 ("[S]cientific uncertainty and complexity may be a major obstacle to designing food taxes that make sense . . .").

Similarly, in this context, calibrating the taxation of single and nonsingle people to take account of economic, sociological, and psychological harms imposed on single people by others would be extremely difficult to accomplish.

170. See *supra* note 45 and accompanying text.

171. See *supra* notes 24–35 and accompanying text.

172. McCaffery, *supra* note 53, at 986.

173. See *supra* notes 11–19 and accompanying text.

174. The social costs to couples include the effect of taxes on decisions about whether and when to marry, and decisions about whether and how much to work, particularly as to secondary earners. See *supra* notes 45–53 and accompanying text; see also James Alm et al., *The Marriage Penalty*, 13 J. ECON. PERSPECTIVES 193, 199–201. The social costs to single people include the effect of taxes on decisions whether to marry, and the perpetuation of negative attitudes and stereotypes about single people. See *supra* notes 159–69 and accompanying text.

couples inequality.¹⁷⁵ Married couples would all file individual returns and compute their tax liability under a single rate structure. The aggregate tax liability of each couple would, then, depend on each individual spouse's tax liability, which would vary because of the progressivity of the rate structure. As a result, married couples with the same combined income would have different tax liabilities—couples inequality—violating the fundamental principle of horizontal equity.¹⁷⁶

But equal-income married couples are “equals” only if one views each couple as an essential unit, incapable of being reduced further to the two individuals that make up each couple. I believe this assumption of irreducibility is erroneous. Marriage does not transform two individuals into a different sort of entity. I contend that the persistence of our belief in couples equality results from the confluence of two powerful ideas: horizontal equity and the ideology of marriage and family.

The ideology of marriage and family explains why a married couple is viewed as an essential unit. Under this belief system, marriage is valued above all other relationships, and is both the ideal and the norm. The experience of marriage is constructed as the attainment of a state of transcendent bliss. Marriage is, indeed, transformative—husband and wife become one, never to be torn asunder.¹⁷⁷

This ideology is so deeply entrenched in our culture that it is difficult even to question this conception of the married couple, even in the face of declining marriage rates, increasing divorce rates, and the rise of alternative families.¹⁷⁸ In the tax context, this entrenchment is reinforced through the invocation of horizontal equity, which further conceals the ideology beneath its objective-sounding “likes should be treated alike” façade. Thomas Griffith provides a succinct and trenchant indictment of horizontal equity:

Horizontal equity is, perhaps, the most widespread norm underlying traditional tax policy analysis. It is also the least helpful. . . .

Horizontal equity generally is defined as the principle that “individuals who are in equal positions should bear an equal tax burden.” The problem is that all individuals are alike in some respects

175. See Bittker, *supra* note 2, at 1395

176. See *id.* at 1396

177. See Kornhauser, *supra* note 56.

178. Between 1970 and 2005, the annual number of marriages per 1000 women declined nearly fifty percent. See NAT'L MARRIAGE PROJECT, THE STATE OF OUR UNIONS 2007, at 16 (2007), <http://www.virginia.edu/marriageproject/pdfs/SOOU2007.pdf>. The percentage of adults who are currently married has declined significantly, from sixty-nine percent to fifty-six percent for men, and from sixty-six percent to fifty-three percent for women. See *id.* at 18. Meanwhile, the rate of unmarried cohabiting couples grew nearly tenfold between 1960 and 1998, divorce rates more than quadrupled between 1970 and 1996, and between 1965 and 2002, the number of births outside of marriage rose from twelve percent to thirty-three percent. See Chicagoland Marriage Resource Center, Marriage Statistics (2008), http://www.chicagolandmarriage.org/marriage_statistics.htm.

and different in others. The principle of horizontal equity cannot determine which differences justify different tax treatment.¹⁷⁹

Anthony Infanti, in his devastating critique of equity analysis, makes a persuasive case for the “subtle, yet pernicious ways in which framing our tax policy analyses in tax equity terms can shape the results of those analyses.”¹⁸⁰ According to Infanti, one of the several ways in which horizontal equity does this is through what he calls a “sanitizing effect”: “Tax equity rids [the] debate of difficult discussions about race, ethnicity, gender, sexual orientation, disability, and/or other forms of invidious discrimination by forcing those discussions to be carried out in ostensibly ‘neutral’ economic terms.”¹⁸¹

Stripped of the protective armor of horizontal equity and the ideology of marriage and family, couples equality is a fictitious ideal. It is time to give it up, by giving up the joint return.

E. THE UNDERESTIMATED COSTS OF KEEPING THE JOINT RETURN

The joint return imposes unjustifiable penalties on single people merely because they are single. Through the powerful economic and signaling effects of the tax system, the choices of single people about how to live their lives—the relationships they form, the ways in which they find meaning and fulfillment in their lives—are deemed inferior to those of “mainstream” couples. This sort of perpetuation of traditional social ordering through the tax system has been documented by tax scholars in other areas.¹⁸² The hope is that once revealed, the insidious effects of the tax system can be eradicated.

In considering the adverse consequences to single people under the joint return, it is particularly important to be aware of the negative attitudes and stereotypes about single people that are documented above. Otherwise, it is all too easy to dismiss their interests and concerns. For example, Lawrence Zelenak, in explaining why most recent attention focuses on the marriage penalty, rather than the single person’s penalty—even though in 1969 the interests of single people dominated—writes:

179. Griffith, *supra* note 47, at 1155–56 (footnote omitted) (quoting STANLEY S. SURREY ET AL., *FEDERAL INCOME TAXATION: CASES AND MATERIALS* 46 (1986)).

180. Anthony C. Infanti, *Tax Equity*, 55 *BUFF. L. REV.* 1191, 1259 (2008).

181. *Id.* at 1209.

182. See, e.g., Blumberg, *supra* note 140; Dorothy Brown, *Race and Class Matters in Tax Policy*, 107 *COLUM. L. REV.* 790 (2007); Wendy Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 *UCLA WOMEN’S L.J.* 301 (1995); Mary Louise Fellows, *Wills & Trusts: “The Kingdom of the Fathers,”* 10 *LAW & INEQ. J.* 137 (1991) (gender and the gift and estate tax); Kahng, *supra* note 2; Infanti, *supra* note 180; McCaffery, *supra* note 53; Leo P. Martinez & Jennifer M. Martinez, *The Internal Revenue Code and Latino Realities: A Critical Perspective* (Mar. 30, 2009) (unpublished manuscript, on file with the Hastings Law Journal).

[T]he complainants in 1969 (and 1972) had available to them a unique demographic argument that the victims of the singles penalty were involuntarily single. Both then and now, the social norm seems to be that people should be married most of their adult lives. Long-term singles may be looked upon as misfits, so that if the tax system penalizes those who *choose* to be single, most people may not mind, or may even approve.¹⁸³

There is no indication that Zelenak himself believes that “people should be married most of their adult lives,” or that long-term singles are “misfits,” but by articulating these views as universally held beliefs, without any challenge or interrogation, he helps to perpetuate them. In order to make any progress toward valuing and respecting the choice to be single, such unexamined articulations of negative attitudes must be challenged.

CONCLUSION

The joint return is unsupportable and should be abolished. The most important perceived cost of eliminating the joint return turns out to be illusory: the perceived “inequity” of taxing equal-income married couples differently fades away once each married couple is deconstructed into the two individuals who comprise it. At the same time, the joint return penalizes single people, just as they are beginning to forge a positive social identity. Eliminating the joint return will remove a serious obstacle from their path forward to autonomy and self-realization.

Of course, there are other, real costs to eliminating the joint return: married individuals will have to report income, deductions, and credits separately, rather than aggregating them on a single return. This presents administrative challenges that do not exist under the joint return.¹⁸⁴ It is beyond the scope of this Article to explore fully the practical challenges of abolishing the joint return and adopting separate filing for all individuals. Nevertheless, I believe these challenges are surmountable.¹⁸⁵

Beyond the joint return, questioning the orthodoxy of marriage has many other implications for the tax system. In their article recommending that marriage be abandoned as a tax determinant, mainly to reduce complexity, Toni Robinson and Mary Moers Wenig describe

183. Zelenak, *supra* note 11, at 38; see also Ventry, *supra* note 11, at 8 (describing the individuals and groups who lobbied for the 1969 tax reduction for single people as an “odd bunch”).

184. See generally Stephanie Hunter McMahon, To Have and to Hold: Rethinking Marital Property and Federal Tax Filing (Feb. 16, 2009) (unpublished manuscript, on file with the Hastings Law Journal) (discussing income shifting and other administrative problems under a separate return regime, and arguing that these concerns played a central role in the decision to adopt the joint return).

185. For a discussion of the mechanics of implementing mandatory separate filing, see Gann, *supra* note 49, at 52–65; Zelenak, *supra* note 43, at 381–401; and Note, *supra* note 161. *But see* McMahon, *supra* note 184 (arguing for retention of joint return in part due to administrative concerns with separate filing).

literally hundreds of provisions of the tax law in which marital status is implicated.¹⁸⁶ From the perspective of single people, eliminating marriage as a basis for preferential treatment under the tax law would not only reduce complexity but would also achieve greater fairness.¹⁸⁷

Moving beyond the tax system, recognizing the value of singleness can help us interrogate and critique the role of government and citizens in promoting and supporting marriage.¹⁸⁸ For example, the same-sex marriage debate might be informed by considerations of whether the legal, economic, and social privileges of marriage ought to be expanded further, or rather eliminated entirely.¹⁸⁹ Similarly, we might further question the role of the government in promoting marriage as a solution to poverty, especially for African American women.¹⁹⁰ Instead, marriage could come to be viewed as one among many alternatives.¹⁹¹

186. See generally Robinson & Wenig, *supra* note 11.

187. For example, owner-occupied residential housing preferences, including the home mortgage deduction, 26 U.S.C. § 163(h) (2006), and the exclusion from gain upon sale, *id.* § 121, provide double the amount of tax benefits to married couples. The gift and estate marital deduction completely exempts transfers between spouses from tax. See generally Bridget Crawford, *One Flesh, Two Taxpayers: A New Approach to Marriage and Wealth Transfer Taxes*, 6 FLA. TAX REV. 757 (2004) (proposing elimination of the marital deduction).

188. See Harris, *supra* note 136, at 2846 (observing that marriage is equated with citizenship through certain types of market participation, in family relations, in civil society, and in politics).

189. See generally MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999); Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361 (2005).

190. See generally Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647 (2005).

191. See generally NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2007).
