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Grace Blumberg
*Appellate Division, Supreme Court of New York, Fourth Department*

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# SEXISM IN THE CODE: A COMPARATIVE STUDY OF INCOME TAXATION OF WORKING WIVES AND MOTHERS

GRACE BLUMBERG*

## I. INTRODUCTION

Close scrutiny of the Internal Revenue Code reveals a strong pattern of work disincentive for married women and inequitable treatment of the two-earner family. The nature and scope of discriminatory treatment cannot be fully appreciated without consideration of alternative systems of income taxation: those in effect in other countries and those that have been proposed here and abroad. This paper will consider the nature of American taxation of working wives and mothers in the comparative context of other national systems; the propriety of work disincentive as an instrument of social control; and the social and political desirability of neutral taxation for married women.

The Code will be examined in its current social context. Thus, the observation that American working wives are predominantly secondary family earners is not intended to express a social ideal. It merely reflects a contemporary social reality. Women workers generally earn substantially less than their male counterparts.[1] Working wives earn less than their employed husbands.[2] The American wife's working career is likely to be broken by child-bearing and rearing.[3] Unless prompted by economic necessity, her return to work is generally considered discretionary. Even when she is earning a substantial salary, her husband is unlikely to view his employment as discretionary. Thus, the American working wife should properly be understood as a secondary family earner for the purpose of determining the work disincentive effect of various Code provisions.

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* Law Assistant, Appellate Division, Supreme Court of New York, Fourth Department. B.A., University of Colorado, 1960; J.D., State University of New York at Buffalo, 1971.

1. 1969 HANDBOOK ON WOMEN WORKERS 133-34 (Women's Bureau Bulletin No. 294).

2. *Id.* at 34-36.

3. *Id.* at 17-19

## II. United States Taxation of Working Wives and Mothers

### A. *Aggregation of Income and Income Splitting; Tax Treatment of Married Couples from 1948 to 1970*

From 1948 to 1970, American income taxation of married persons was based on the dual principles of aggregation and income splitting. The latter principle has been silently but effectively repudiated by the 1969 Tax Reform Act[4] reduced rate schedule for unmarried individuals. Consideration of the background, theory and nature of spousal taxation during the 1948-1970 period is, however, a necessary foundation for assessment of the 1969 revision as well as a prerequisite to full understanding of the inequitable and disincentive aspects of American family taxation.

Prior to 1948, taxation was individual.[5] Joint returns were authorized but seldom used because the aggregate family income was taxed as though it were the income of a single taxpayer.[6] Since each individual taxpayer was taxed at progressive rates, a tax benefit would result from shifting earned and unearned income among family members. (Earned income is the fruit of personal effort and labor, for example, salary; unearned income arises from the ownership of property, for example, rent and dividends.) Thus, a husband with taxable earned income of $8,000 would secure a tax advantage by shifting $4,000 to his wife. Because of the progressive nature of income tax rates, each would pay less than one-half of the tax that the husband would have paid on the entire amount. The Supreme Court initially disapproved such shifting of earned income,[7] but later created a serious problem when it allowed shifting in community property states where each spouse has a vested right in all property

4. Pub. L. No. 91-172, 83 Stat. 487, *codified at* 26 U.S.C.A. § 1c (1969).

5. *See generally Hearings on the Tax Treatment of Family Income Before House Comm. on Ways and Means,* 80th Cong., 1st Sess. 846-74 (1947).

6. Joint filing was only advantageous when one spouse had large losses or expenses and wished to apply them against the income of the other spouse. *See, e.g.,* Shelmerdine v. Commissioner, 24 B.T.A. 833 (1931).

7. Lucas v. Earl, 281 U.S. 111 (1930). The Court construed the Code to:

> tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. . . . [A]nd we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew.

*Id.* at 114-15.

and income acquired during the marriage. In *Poe v. Seaborn*,[8] the Court construed the Code provision levying income tax on "the net income of every individual"[9] to allow each spouse to file a separate return and pay tax on one-half of all community income. Since spouses in common law states do not have a vested interest in all property acquired by the other during marriage, they were denied the benefit of income splitting of earned income.[10]

While *Seaborn* was clearly an improvident decision which could have been remedied by a legislative enactment requiring that earned income be taxable to the earner,[11] all countries employing individual rather than aggregate taxation have had to contend with the persistent problem of *unearned* income shifting.[12] A husband who owns two properties yielding $8,000 annual income can always transfer one of them to his wife; each spouse is then taxable on $4,000.[13]

Pre-1948 law, therefore, tended to impose higher taxes on earned family income in common law states than in community property states and to generally tax earned family income more heavily than unearned family income when the family receiving unearned income distributed the income producing property among its members.[14]

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8. 282 U.S. 101 (1930).

9. INT. REV. CODE of 1954, § 1(a) (originally enacted as Revenue Act of 1926 §§ 210(a) & 211(a), ch. 27, 44 Stat. 21).

10. Under the rule of *Lucas v. Earl, supra* note 7.

11. *Seaborn* involved construction of the Code; the decision was not constitutionally based.

> The case requires us to construe sections 210(a) and 211(a) of the Revenue Act of 1926, and apply them, as construed, to the interests of husband and wife in community property under the law of Washington. These sections lay a tax upon the net income of every individual. The Act goes no further, and furnishes no other standard or definition of what constitutes an individual's income. The use of the word "of" denotes ownership. It would be a strained construction, which, in the absence of further definition by Congress, should impute a broader significance to the phrase.

282 U.S. at 109.

12. *See, e.g.*, 3 REPORT OF THE ROYAL COMMISSION ON TAXATION 118 (Canada, 1966). Israel, Japan, Venezuela and Argentina handle this problem in an effective manner. Each spouse's earned income is taxed separately but unearned income is aggregated and taxed at higher rates than earned income. *See* Oldman & Temple, *Comparative Analysis of the Taxation of Married Persons*, 12 STAN. L. REV. 585, 599 (1960).

13. Blair v. Commissioner, 300 U.S. 5 (1937). For general discussion, see Teschner v. Commissioner, 38 T.C. 1003 (1962).

14. Subsequent reform cured only inter-spousal shifting of income-producing property. Aggregation does not reach property held by children or other relatives. *See* B. BITTKER, FEDERAL INCOME ESTATE AND GIFT TAXATION 342 (1964).

In 1948, Congress faced the choice of legislatively repealing the community property-common law distinction created by *Seaborn* or enacting the benefit of *Seaborn* for residents of common law states. It chose the latter course[15] and in so doing created a serious disincentive for married women who wish to work as well as a disproportionately high tax liability for single people.

The new system was based on two separable elements, aggregation and income splitting.[16] Under present law spouses may[17] file a joint return in which they aggregate income, exemptions and deductions. Total taxable income is split in half; from 1948 to 1970, the half figure was taxed at the individual rate and then multiplied by two.[18] If a husband was the sole family earner with $20,000 taxable income, his income was taxed as though he were two individuals each earning $10,000. A couple in which each spouse earned $10,000 thus received the same tax treatment as a couple in which the sole family earner made $20,000 and theoretically (but not effectively[19]) received the same tax treatment as two unrelated individuals each earning $10,000.

1. *Aggregation.* Aggregation of spousal income, as opposed to individual taxation of each spouse's income, is based on the indisputable economic unity of the family. Since resources are generally pooled by spouses, their ability to pay taxes is best measured in terms of family rather than individual income.[20] Aggregation creates, however, a strong work disincentive for potential or actual secondary family earners. The secondary earner's first dollar of income is effectively taxed at the primary earner's highest or "marginal" rate. Assume that a husband earns $12,000

15. Presently codified at INT.REV. CODE of 1954, § 2(a).

16. *See* text following note 30, *infra*.

17. "May" is misleading; since no advantage is obtained by filing separately and since it is generally to a family's disadvantage to file separately, there is effectively no choice.

18. INT. REV. CODE of 1954, § 2(a). The Joint Return Tax Rate Table did this automatically.

19. Upon marriage, the working couple loses one of their two optional standard deductions (INT. REV. CODE of 1954, § 141(a)) and the woman's eligibility to deduct expenses for the care of children and incapacitated dependents. *Id.* § 214(b) (2). Thus, while the tax rate tables suggest parity of treatment on taxable income, the taxable income of each $10,000 earner would be higher after marriage. The sole family earner's indolent wife also loses her optional standard deduction, but it was valueless to her since she had no income. *See* discussion in note 35, *infra*.

20. *See* J. PECHMAN, FEDERAL TAX POLICY 83 (1966); Oldman & Temple, *Comparative Analysis of the Taxation of Married Persons*, 12 STAN. L. REV. 585 (1960).

taxable income. At 1970 rates, he is taxed 14% of his first thousand dollars of taxable income, 15% of the second thousand, 16% of the third thousand, etc. His final or twelfth thousand is taxed at 22%. Any dollar that he earns in excess of $12,000 will be taxed at 25%, his marginal rate.[21] If his wife decides to work, her very first dollar will be taxed at her husband's marginal rate. As the husband's income increases, so will his marginal rate and the wife's work disincentive. Filing separate returns is not an economically practical solution. While the wife's effective rate would be lower, the family would pay a larger total tax[22] unless both spouses have equivalent individual incomes, in which case filing separate returns would yield no benefit or loss.

Aggregation is not a universally accepted principle of income taxation,[23] and even though it is employed by most nations,[24]

21. The term "marginal" is used to describe the tax rate applied to the taxpayer's very last dollar of income. It is his highest rate and that used to calculate the minimum tax that would be assessed on any additional income.

22. If the wife earns $8,000 taxable income, the family's tax liability under the joint table is $4,380; under the separate table it is $4,460 ($2,830 + $1,630).

23. The following countries individually tax the income of each spouse: Argentina, Australia, Brazil, Canada, Dominican Republic, India, Israel, Japan, Mexico, Pakistan, Sweden, U.S.S.R., Venezuela, and Yugoslavia. But Israel, Japan and Venezuela aggregate the unearned income of the spouses. *See* Oldman & Temple, *Comparative Analysis of the Taxation of Married Persons,* 12 STAN. L. REV. 585-86 (1960); 1969 HANDBOOK ON WOMEN'S WORKERS, *supra* note 1, at 17-19.

SWEDEN

In frank acknowledgment of the sexist nature of aggregation and as an effort to provide work incentive for married women, Sweden abandoned compulsory aggregate taxation in favor of individual taxation of all taxpayers. For a more complete treatment of Swedish taxation of working wives and mothers, see text following note 152, *infra.*

CANADA

The Royal Commission on Taxation, while recommending that Canada abandon its system of individual taxation, recognized the

> incentive problem, which would arise from the effect of higher marginal rates upon the after-tax compensation received by working wives.

3 REPORT ON THE ROYAL COMMISSION OF TAXATION 189 (Canada, 1966).

To counterbalance the disincentive, the Commission recommended a tax credit for working mothers and an additional tax credit for working mothers with young children. *Id.* at 194. For an extended treatment of Canadian taxation of working wives, see text following note 124, *infra.*

Joseph Pechman suggests that aggregation of spousal income is so "deeply rooted and accepted" that it is not subject to serious re-evaluation. J. PECHMAN, FEDERAL TAX POLICY 83 (1966). His assertion seems unfounded in light of other national tax systems and the relatively short 22 year life of aggregation in the United States.

24. The following countries require aggregation of earned and unearned income of spouses for application of progressive income taxes: Belgium, Ceylon, China, Columbia, Denmark, Finland, France, Germany, Ghana, Greece, Italy, Lebanon, Malta, Netherlands, Netherlands Antilles, New Zealand, Norway, Peru, Philippines, Switzerland, Thailand, Turkey, Union of South Africa, United Kingdom and United States. Except for Germany and the United States, such aggregation is mandatory.

the disincentive feature is generally offset by incentive provisions such as earned income exemptions for all earners,[25] additional exemptions for working wives,[26] further exemptions for working wives with young children,[27] and housekeeper[28] and child care deductions.[29] Aggregation is not necessary to avoid the discrimination wrought by *Seaborn* since that case was subject to legislative repeal. Nor is it necessary, nor does it in fact, avoid unearned income shifting. Narrow provision for the aggregation of unearned, as opposed to earned, income would adequately solve that problem.[30] Aggregation does, however, give a broadly accurate reflection of the family's ability to pay taxes, an equitable feature which may outweigh its tendency to discourage married women from remaining in or entering the labor force. If the disincentive effect is mitigated by incentive provisions, it might be reduced to tolerable proportions.

2. *Income Splitting*. Income splitting is generally believed to transform marriage into a tax advantage. Prior to 1971, the tax advantage was calculated by reference to the rate paid by single taxpayers, a reference point embodied in the Code provision on income splitting: spousal income was split in two, the individual tax rate was applied and the tax liability was then doubled.[31] Marriage of a sole earner to a non-earner effected the greatest reduction of tax liability. The advantage diminished as the individual incomes of both spouses approached equality

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All of these countries have some provisions which effect a reduction of the tax burden on married couples. Oldman & Temple, *supra* note 20, at 585-86.

25. *See, e.g.,* United Kingdom Income and Corporation Taxes Act 1970, S. 530. *See* text following note 137, *infra.*

26. *E.g.,* Denmark, Finland, Norway and Switzerland (as reported in Oldman & Temple, *supra* note 20, at 585-86); United Kingdom (Finance Bill 1970 cl. 14(1) (a)); and Sweden (as reported in C. UHR, SWEDEN'S SOCIAL SECURITY SYSTEM 18 (HEW Research Report No. 14, 1966)).

27. *E.g.,* Sweden (as reported in UHR, *supra* note 26, at 18). *See* text at note 152, *infra.*

28. *E.g.,* United Kingdom Income Tax Act of 1952, S. 212 as amended. *See* text at note 142, *infra.*

29. See the extensive discussion of section 214 of the Internal Revenue Code of 1954 (limited child care deductions) in text following note 77, *infra.*

30. *See supra* note 12.

31. INT. REV. CODE of 1954, § 2(a).

and disappeared when both were identical.[32] In the latter case, other provisions of the Code created an absolute tax loss in comparison with the tax liability of two single persons cohabiting out of wedlock. While commentators have indicated that the British system of compulsory aggregation without income splitting has created a tax upon virtue and given rise to conventionally regular but unsanctified relationships,[33] the American Code also made marriage costly for middle income couples with equivalent individual incomes. Even before the 1969 Reform Act made marriage a patently expensive proposition,[34] the cost of marriage for such a couple was the loss of one optional standard deduction and the woman's eligibility for section 214 child care deductions.[35]

In relation to individual unmarried earners, aggregation and income splitting tended to give the greatest tax benefit to couples in which there is only one earner, reflecting and reinforcing

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32. *See* text at *supra* notes 16-19. The progressive nature of the tax tables controlled the results of income splitting. Marriage of a single male earner to a non-earner reduced his taxes because total family income was split in half and each half was subjected to lower rates than those previously levied on his total earnings. The marriage of two equal earners, however, effected no change in the applicable tax rates. As single earners, each spouse's salary was subjected to the progressive tables; marriage and income splitting did not improve their tax situation.

33. *See, e.g.,* A.P. HERBERT, *Rex v. Pratt & Merry: The Tax on Virtue* in UNCOMMON LAW 397 (1964).

34. *See* text following note 47, *infra.*

35. Surprisingly, in the course of her research the author discovered no reference to the pre-1970 cost of marriage. Apart from changes in the amount of the optional standard deduction, the 1969 Reform Act has not affected this aspect of the tax cost of marriage.

Assume a couple with individual taxable incomes of $14,000. If the couple chooses to remain unmarried, each is entitled to an optional standard deduction, whereas a married couple receives only one deduction. INT. REV. CODE of 1954, § 141 (a). For the year 1971, the deduction is 13% of the taxable income up to a $1,500 maximum. *Id.* § 141 (b). Thus, marriage would result, in this instance, in the loss of one $1,500 deduction.

Let us further suppose two children and child care costs in excess of $900. The child care deduction disappears for a married working couple when the couple's income exceeds $6,900. There is, however, no income ceiling for an unmarried working woman. *Id.* § 214 (b) (2). Our hypothetical unmarried couple will probably have over $1,500 in other itemizable deductions, for example, taxes, mortgage interest, medical expenses and charitable deductions. The man will take his optional standard deduction and the woman will itemize deductions in order to benefit from the maximum $900 deduction for day care. Therefore, as an unmarried couple they can deduct $2,400 more than they could as a married couple. At their marginal rate of 36%, these deductions represent an annual tax savings of $864. This amount does not represent the total tax savings enjoyed by our hypothetical unmarried couple. The 1969 Act further increased the tax differential between married and unmarried couples. *See* text at note 47, *infra.*

a traditional and, arguably, outmoded family pattern;[36] it gave a diminishing advantage to two-earner couples in which one earner is dominant, a fairly widespread pattern of family earning;[37] and it effected a relative and absolute[38] discrimination against spouses earning equivalent income, the emergent pattern now sedulously fostered by title VII of the 1964 Civil Rights Act.[39] Although the percentage differential between individual and joint rates has been reduced by the 1969 Act, the general scheme remains the same.

While aggregation is reasonable because a couple's total income is a broadly accurate measure of their ability to pay taxes, income splitting, absent other differentiating provisions, fails to distinguish between disparate situations. A couple's capacity to pay taxes is a function of the cost of earning income. "Cost" includes the value of imputed income lost by gainful employment, for example, housekeeping services, as well as money expended for clearly necessary expenses incident to employment. Let us delineate the basic situations and arrange them in order of declining ability to pay taxes:

(1) A, unmarried, receives $8,000 annually from income-producing property (unearned income). A is not gainfully employed. A enjoys the value of his own services and full time leisure.

(2) B, unmarried, earns $8,000 annually and incurs employment expenses.

(3) H and W,[40] a couple, receive $8,000 annually from income-producing property. Neither is gainfully employed. They enjoy the economies of marriage and the value of each others' full time services and leisure.

36. This pattern is, however, still prevalent. One out of three married women work. REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, AMERICAN WOMEN 27 (1963).

37. *See* U.S. DEP'T OF LABOR, SPECIAL LABOR FORCE REPORT NO. 80, MARITAL AND FAMILY CHARACTERISTICS OF WORKERS, table V (1966), *reprinted in* REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES TO THE CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN 138 (1968).

38. "Relative" because marriage does not bring about favorable tax consequences; "absolute" because of the aspects discussed in note 35.

39. 78 Stat. 265, 42 U.S.C. § 2000(e) (1964). *See also* the Equal Pay Act, 80 Stat. 838-41, 29 U.S.C. § 206(d) (1) (1966); Executive Order #11375, U.S. CONG. AND AD. NEWS, at 3519 (1967); New York Equal Pay Act, N.Y. LABOR LAW § 199-a (McKinney 1970); New York Human Rights Law, N.Y. EXEC. LAW art. 15 (McKinney Supp. 1970).

40. Even though H and W do not incur any employment expenses, their ability to pay taxes is rated below that of a single employed earner, B, on the theory that two cannot live as cheaply as one. Stated otherwise, B's employment related expenditures are likely to be lower than the additional expenses H incurs by having a wife.

(4) H, sole family earner, makes $8,000 and supports W. H alone incurs employment expenses and receives the value of W's services as a housekeeper as well as enjoying the economies of marriage.

(5) H and W each earn $4,000. Both incur employment expenses and lose the value of W's services as a housekeeper. The economies of marriage tend to diminish because of the loss of W's services but are still measurable, for example, one residence.

(6) M and F, single unacquainted earners, make $4,000 each and do not enjoy the economies of marriage or the imputed income of services and leisure.

Pre-1970 law effectively drew only one line—it distinguished single persons from married couples. Under income splitting, a single person's taxes were from 3 to 41% higher[41] than those paid by a married couple. A single male earning $24,000 taxable income was assessed $8,030. Marriage to an unemployed woman reduced his taxes to $5,660.[42] Thus, with one minor variation,[43] (1) and (2) paid the same tax which was substantially higher than the equal tax paid by (3), (4), (5) and (6).[44]

Such tax treatment was objectionable on two grounds. In the middle brackets, it imposed an excessive tax burden on unmarried taxpayers.[45] The inequity was not absolute; it arose solely in reference to the married couple's substantially lighter tax burden. Absent confiscation or interference with other fundamental rights, income taxation should not be considered inequitable merely because rates are high. Inequity exists, however, when one group bears an unreasonably disproportionate part of the burden. More importantly for our considerations, the tax scheme failed to distinguish between disparate situations. It made no allowance for the cost of earning income. No distinction was made between unemployed couples enjoying independent income, one-earner families and two-earner families.

41. U.S. CONG. AND AD. NEWS, Tax Reform Act of 1969, Senate Report 2297.

42. INT. REV. CODE of 1954, 1969 & 1970 tax tables.

43. In situation (6), the unmarried couple has an additional optional standard deduction. Under pre-1970 law, it would not, however, have given them any tax benefit over (3), (4) or (5). The deduction was 10% with a ceiling of $1,000. Thus, an additional deduction would only benefit a couple with an income in excess of $10,000. INT. REV. CODE of 1954, § 141.

44. Under the 1969 Amendment (1) and (2) still pay equal taxes which are higher than those paid by (3), (4) and (5). The differential has, however, been reduced. The total tax bill for the two individuals described in (6) is now lower than that paid by (3), (4) and (5). See text at notes 47-48, *infra*.

45. *See* SENATE REPORT, *supra* note 41; PECHMAN, *supra* note 20, at 81-84.

A major impediment to the enactment of earned income allowances is their revenue cost.[46] Both inequities of the pre-1970 scheme could have been remedied by maintaining the unmarried taxpayer rate and raising the married taxpayer rates so that the maximum differential would not be in excess of 20%. The resultant increase in revenue would have been available to offset the cost of earned income allowances designed to effect differentiation between the disparate situations described above. This approach would tend to mitigate the work disincentive for married women. It is true that a wife would pay a higher rate on her taxable income because the joint schedule would more closely approximate the higher individual schedule. Her taxable income would, however, be lower because it would be reduced by earned income allowances, including child care deductions. Stated otherwise, a wife would pay a higher rate on that part of her earnings that represent net profit to her family but would not pay any tax on that portion of her income consumed by the cost of assuming gainful employment.

B. *The Tax Reform Act of 1969*

Congress did not, however, address its attention to the entire problem. The 1969 Tax Reform Act cures the inequitably excessive differential between the joint and individual schedules by reducing the individual rates. As of January 1, 1971, the maximum differential is 20% at an estimated tax revenue loss of $445 million annually.[47] Enactment of the new individual schedule effectively abolishes the principle of income splitting, while maintaining the concept of spousal aggregation. There are now four tax tables instead of three. In order of increasing progressivity, they are: married persons filing jointly, heads of households, individuals, and married persons filing separate returns (the old individual schedule).

The new provision has the incidental effect of making marriage a very costly affair. We have already seen that even under ostensibly neutral pre-1970 law, marriage occasions the

46. *See generally,* PECHMAN, *supra* note 20; R. GOODE, THE INDIVIDUAL INCOME TAX (1964); articles prepared by White, Pechman, Kahn & Atlas in 1 COMPENDIUM OF PAPERS ON BROADENING THE TAX BASE, Submitted to the Comm. on Ways & Means (1959) at 365, 473, 391, 525 respectively.

47. *See* SENATE REPORT, *supra* note 41, at 2299.

loss of one spouse's optional standard deduction and generally terminates the woman's eligibility for child care deductions. The loss of such deductions results in greater net taxable income. Under post-1970 schedules, marriage also increases the tax rate applied to net taxable income. Marriage of two employed individuals each earning $14,000 taxable income additionally increases their total tax burden from $6,420 to $7,100.[48] While it would be ingenuous to suggest that a tax on marriage would undermine the moral fiber of the nation,[49] the new schedules, in the absence of any earned income relief for married women, do have the undesirable effect of inducing women to give up gainful employment when they marry. While the new provision does cure one long-standing inequity, the resultant revenue loss will probably dampen the prospect of much needed earned income allowances.

### C. *Employee's Cost of Earning Income and Earned Income Allowances*

Congress has the "power to lay and collect taxes on income, from whatever source derived."[50] In relation to income taxation, the least contested definition of income is "the money value of the net accretion to one's economic power between two points of time."[51] Taxable income is, thus, generally understood as net rather than gross income.[52] Allowance for the cost of earning in-

48. Tax Reform Act of 1969, Pub. L. No. 91-172, tit. VIII, § 803 (a), 83 Stat. 678, *codified at* 26 U.S.C.A. § 1 (a) (Supp. 1971).

49. Because, alternatively or cumulatively:
(1) The morality of marriage is questionable.
(2) The ethical backbone of the nation is already irreparably broken.
(3) The institution of marriage is so deeply implanted that a tax could hardly uproot it.
(4) People contemplating marriage do not generally turn to the Internal Revenue Code for guidance.

50. U.S. CONST. amend. XVI.

51. Seligman, *Income Tax*, 7 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 628 (1932).

52. Stanton v. Baltic Mining Co., 240 U.S. 103 (1916) has been cited in support of the proposition that gross, as opposed to net, receipts may be taxed under the sixteenth amendment. That case merely held that Congress could place a ceiling on mining depreciation deductions because the value and the longevity of a mine are not known until the deposits are exhausted. Doyle v. Mitchell Bros. Co., 247 U.S. 179, 184-88 (1918). *See generally* R. MAGILL, TAXABLE INCOME 347-68 (rev. ed. 1945) and the discussion of *Stanton* at 351.

come may even be constitutionally required.[53] Although the Code presently contains some provision for an employee's cost of earning income and the special expenses incurred by working women, the deductions are narrowly drawn and of little general applicability.

The Code draws a sharp distinction between businessmen and employees. A businessman deducts all his "ordinary and necessary business expenses" from gross receipts in order to determine his adjusted gross income;[54] he then deducts personal exemptions and the optional standard deduction[55] (or itemized deductions) to reach his taxable income. An employee, on the other hand, can deduct only four types of expenses from gross income: expenses reimbursed by his employer, expenses for business travel away from home, transportation expenses incurred in the course of employment, and expenses incurred as an outside salesman.[56] With regard to other deductible employment expenses, the employee must choose between itemizing them or taking the optional standard deduction.

The optional standard deduction should not be understood as a substitute for an earned income allowance: it is available to all taxpayers regardless of whether they have earned income; it is effectively taken away from a working woman when she marries even though she continues to work; and it is available to a businessman after he has deducted all his deductible costs of earning income. The items that can be itemized in lieu of taking the optional standard deduction are largely personal expenses unrelated to the cost of earning income, for example, alimony, interest payments, casualty losses on nonbusiness property, charitable contributions, extraordinary medical expenses, and state and local taxes.[57] Deductible employee expenses are relatively few: limited child care deductions, educational expenses neces-

53. [Section 162] makes no provision for the cost of goods sold, but the Commissioner has always recognized, as indeed he must to stay within the Constitution, that the cost of goods sold must be deducted from gross receipts in order to arrive at gross income.

Sullenger v. Commissioner, 11 T.C. 1076, 1077 (1948).

54. INT. REV. CODE of 1954, § 62(1).

55. *Id.* § 141.

56. *Id.* § 62(2).

57. *Id.* §§ 71, 215 & 682 (alimony); § 163 (interest); § 165 (casualty losses); § 170 (charitable contributions); § 213 (extraordinary medical expenses); § 164 (state and local taxes).

sary to maintain present employment, employment agency fees, labor union dues, employee's short-life tools, and uniforms so long as they are not suitable for general wear. Non-deductible items include commuting expenses, the cost of an employee's lunches, clothing necessary for work but suitable for general wear, and all housekeeping and most child care costs incurred by working wives.[58] An employee who does not incur large deductible expenses which are strictly personal in nature, that is, unrelated to the fact of his employment, is likely to be better off with the optional standard deduction which can, thus, best be understood as a compensatory exemption for taxpayers who do not incur certain personal expenses (the deductibility of which is open to serious question).[59]

Since the ability to pay taxes is a primary factor in distribution of the tax burden, it would seem that an employee's cost of earning income should be excluded from his taxable income in order to put him on a par with recipients of unearned income. Other nations have come to this conclusion[60] and allow an earned income credit or deduction[61] for wage earners. During

58. *See generally* Treas. Reg. § 1.262-1 (1958).

59. In view of the discretionary nature of expenditures for interest and charitable contributions, the taxpayer's ability to pay taxes is clearly not the basis for allowing these deductions. Such provisions are generally justified as inducements to spend money in socially useful ways.

60. *E.g.*, England discussed in text following note 135, *infra*. *See generally*, text following note 122, *infra*.

61. Exclusion from taxable income can be achieved in three different ways. Documented itemization is generally regarded as administratively unfeasible. A fixed amount can be established as a deduction from taxable income or a credit against tax due.

The amount of a credit is determined by establishing an amount by which taxable income ought to be reduced and multiplying it by the lowest tax rate. Assume that $600 is determined adequate to cover the average primary earner's cost of earning income. At the lowest tax rate, 14%, each income earning taxpayer will receive a tax credit of $84.

A deduction is fixed at the amount by which the taxpayer's income ought to be reduced, that is, $600. The value of the deduction depends upon the taxpayer's marginal rate of tax. Thus, a taxpayer in the 50% bracket would have a tax savings of $300.

A credit involves less revenue loss and treats all taxpayers alike (so long as their tax liability exceeds their credits). A deduction tends to reflect actual expenses because a taxpayer's level of expenditure is generally a function of his income. Whether the nation should subsidize a wealthy taxpayer's high standard of living is, of course, questionable. In the balance, a credit seems preferable.

The Code currently makes varied use of the credit concept. The entire amount of tax withheld from an employee's wages is, of course, credited against his tax liability. INT. REV. CODE of 1954, § 31 (a). Fifteen percent of the amount received as retirement income by a person over 65 is credited against his tax bill. *Id.* § 37 (a). An investment credit reduces the taxpayer's bill by 7% of the amount of qualified investment. *Id.*

two periods of its history, the United States also had a system of earned income credits.[62]

There is an additional fourfold argument in favor of an earned income allowance for working wives and mothers. First, since most families have at least one earner, failure to provide an earned income allowance for the first family earner distributes a burden, albeit inequitable, equally among families. Since, however, most families do not have two earners, such families bear an extra burden. Secondly, the working wife is likely to incur more employment-related expenses than the primary earner. In addition to normal commuting, clothing and lunch costs, she is also likely to incur housekeeping and child care expenses.[63] Thirdly, since the wife's first dollar is effectively taxed at her husband's marginal rate, she has less disposable income with which to defray her cost of earning income. Finally, providing the wife with an earned income allowance would tend to mitigate the work disincentive of income aggregation. Thus, if the revenue cost of an earned income allowance for all workers is judged to be excessive, consideration should still be given to earned income allowances for working wives and mothers.[64]

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§ 46 (a). There is a foreign credit to mitigate the effects of the double taxation (§ 901 (a)); a credit for tax withheld at the source on tax free bonds (§ 32 (2)); and for certain gasoline taxes (§ 39 (a)).

62. The United States had "earned income credits" from 1924 to 1931 and 1934 to 1943. From 10% to 25% of earned net income was exempt from taxation. A certain minimum amount was presumed to be earned ($3,000 to $5,000) and income beyond a certain amount ($10,000 to $30,000) was presumed to be unearned, that is, nonexempt. The maximum tax value of the credit for a family of two was $496 (1928-31). R. GOODE, THE INDIVIDUAL INCOME TAX 255 (1964); J. PECKMAN, FEDERAL TAX POLICY 87-88 (1966). The only special allowance for working wives was a tax credit of up to $15 in 1944-45. PECKMAN at 89.

63. One study of family budget costs concluded that the annual cost of goods and services for an employed wife was $1,092, compared with $546 for a non-working wife. J.N. MORGAN, INCOME AND WELFARE IN THE UNITED STATES 189 (1962), quoting figures from the COMMUNITY COUNCIL OF GREATER NEW YORK, BUDGET SERVICE, ANNUAL PRICE SURVEY AND FAMILY BUDGET COSTS (Oct. 1959).

64. PECHMAN, *supra* note 62, estimated in 1966, that a 10% rate reduction, that is, a 10% earned income exemption for every taxpayer, would result in an annual revenue cost of $5 billion. However, a relatively small deduction for working wives, 10% of earned income with a limit of $2,000, would cost about $500 million a year. *Id.* at 88-90. That is approximately the amount of revenue loss resulting from the 1969 single person's rate reform. *See* discussion in text at *supra* note 47. Had the excessive differential between the joint and the individual tables been resolved by raising the joint rates rather than lowering the individual rates, the resulting revenue profit would have covered the cost of a modest working wives' allowance.

*D. Deduction of Child Care Expenses*

1. *Smith v. Commissioner*. Deductibility of child care expenses incurred for the purpose of enabling a taxpayer to work was initially considered in the context of two Code provisions:

> There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . .[65]
>
> Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.[66]

In her 1937 tax return, Mrs. Smith deducted the cost of wages paid to nursemaids who cared for her child while she was gainfully employed. The Commissioner disallowed the deduction and assessed a deficiency of $23.62, giving rise to *Smith v. Commissioner*,[67] a case frequently cited to support disallowance of certain employment-related expenses.[68] The Board of Tax Appeals refused to allow the deduction for two reasons: the expenditure was essentially "personal," and a deduction could not be made for an expense that was a substitute for imputed nontaxable income, the value of a housewife's services. The opinion is eloquent but unpersuasive:

> Petitioners would have us apply the "but for" test. They propose that but for the nurses the wife could not leave her child; but for the freedom so secured she could not pursue her gainful labors; and but for them there would be no income and no

The generally disappointing (*see* text discussion following *supra* note 107) *Report of the Task Force on Social Insurance and Taxes to the Citizen's Advisory Council on the Status of Women* (1968) ran true to form in its treatment of earned income allowances. Although ostensibly directing itself to the problems of working wives and mothers, the Task Force was unable to recommend anything short of an earned income allowance for all income earners because an allowance exclusively for working wives or mothers would be unfair to other taxpayers. Since the Task Force estimated that a meaningful allowance for all income earners would involve an $11 to $16 billion revenue loss, and since it did not recommend any method of recoupment (for example, abandoning aggregation and income splitting in favor of individual taxation or reducing differentials between individual and joint rates by raising joint rates), it is not surprising that the Council did not adopt the Task Force proposal for a universal allowance. REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES TO THE CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN 109-17 (1968).

65. INT. REV. CODE of 1954, § 162(a).

66. *Id.* § 262.

67. 40 B.T.A. 1038 (1939), *aff'd mem.*, 113 F.2d 114 (2d Cir. 1940).

68. *E.g.*, Commissioner v. Moran, 236 F.2d 595, 597 (8th Cir. 1956); International Artists, Ltd. v. Commissioner, 55 T.C. 94, 104 (1970); Wendell v. Commissioner, 12 T.C. 161, 162 (1949); Seese v. Commissioner, 7 T.C. 925, 927 (1946); Hubbart v. Commissioner, 4 T.C. 121, 124 (1944).

> tax. This thought evokes an array of interesting possibilities. The fee to the doctor, but for whose healing service the earner of the family income could not leave his sickbed; the cost of the laborer's raiment, for how can the world proceed about its business unclothed; the very home which gives us shelter and rest and the food which provides energy, might all by an extension of the same proposition be construed as necessary to the operation of business and to the creation of income. Yet these are the very essence of those "personal" expenses the deductibility of which is expressly denied.[69]

The cost of child care necessary to enable a parent to pursue gainful employment is not analogous to the cost of medical care, food and shelter. One does not seek medical care, food or shelter in order to be gainfully employed, but rather to sustain one's corporal existence.[70] Child care, on the other hand, is an expense that Mrs. Smith need not have incurred had she not been employed. It is not a *sine qua non* of human survival or comfort but an expense which necessarily arises only when both parents are employed. Nor is expenditure for child care analogous, as the Board suggests, to expenditure for personal servants. Employment of household servants generally represents a discretionary expense unrelated to (or at least not required by) the fact of the taxpayer's employment. A working mother's provision for child care is a nondiscretionary expense directly related to the fact of her employment.

The Board's second argument is somewhat abstruse. A wife's housekeeping services do not give rise to income, or rather give rise to nontaxable, that is, imputed, income. If the services are not taxable, a deduction for them is not allowable. Pursuing the Board's analysis to its logical end leads to a different conclusion. If a wife's housekeeping services do give rise to nontaxable income and the two-earner family thus loses a windfall, the effective substitute, a wife's earned income from employment, should not be taxable either, at least not to the extent that it replaces lost imputed income. Indeed, this is one argument for a special earned income allowance for working wives. It would give them

69. 40 B.T.A. at 1038-39.

70. That is, you have to eat anyway. The Board's logical error seems to have consisted of beginning at the wrong end. Had the Board started with "But for her job Mrs. Smith would not have had to hire a nursemaid," the inapplicability of such a statement to food, shelter or medical care would have been obvious. ("But for her job, Mrs. Smith would not have to eat.")

parity with housewives who stay at home and provide the family with nontaxable service income.

Additionally, while it is true that Mrs. Smith's performance of child care duties would not have given rise to taxable income, she hired nursemaids to perform those services for her. The nursemaids have taxable income and Mrs. Smith is deducting the nursemaids' income rather than her own loss of imputed income. The Board's imputed income argument would thus seem to lead to the conclusion that either the nursemaids' income is nontaxable because it is a substitute for Mrs. Smith's lost imputed income, or that all or part of Mrs. Smith's employment income is nontaxable because it has replaced her nontaxable imputed income.

The Board's injection of the imputed income argument is regrettable on two grounds. It was clearly not dispositive of the issue and drew the Board away from the functional approach it should have taken. A proper analysis of borderline expenses that might be characterized as either business or personal should entail a careful inquiry into the nature of the expense. Would it have been incurred absent gainful employment? If so, it is not deductible. This criterion would eliminate food, shelter and medical expenses.

Was it a discretionary expense? Discretionary expenditures which are not incurred in the actual course of the taxpayer's work[71] should not be deductible. Under this criterion most commuting expenses would be nondeductible. While the ordinary wage earner must incur some commuting expenses, substantial expenditure usually represents a discretionary choice of housing location.[72]

To be deductible, expenses must be readily and accurately ascertainable. Some necessary nondiscretionary employment-related expenses are not. For example, many employees are implicitly required to purchase a larger and more expensive wardrobe than they would acquire if left to follow their own taste and

71. If the expense is actually incurred by the taxpayer in the exercise of his trade or business, even discretionary expenses are deductible. "Ordinary" means common (that is, given the same situation would most people have made the expenditure?). *See, e.g.,* Welch v. Helvering, 290 U.S. 111 (1933). "Necessary" merely means "useful." Coughlin v. Commissioner, 203 F.2d 307 (2d Cir. 1953)).

72. At page 79, Richard Goode in his book, *The Individual Income Tax* makes a highly persuasive argument against allowing a deduction for commuting expenses.

inclination. But the differential between what they have purchased and what they would have purchased cannot be determined with certainty or accuracy. Child care expenses can, however, be ascertained and itemized with absolute accuracy.

A final possible, although questionable, criterion, expressing general policy rather than individual equity considerations, might require frequent incidence of the employment expense. Do many people incur this type of employment-related nondiscretionary expense? Highly particularized expenses might be disallowed because they arise from the taxpayer's unusual or unique circumstances rather than from any common socially predictable pattern of living. For example, nondeductible particularized expenses might include lawyer's fees incurred to get a taxpayer out of the Navy and back to his work,[73] or the cost of unusually frequent haircuts required by a fastidious employer.[74] But the 10.6 million women workers with children under eighteen[75] should be allowed to deduct their child care expenses.

A reargument of *Smith* would also include reference to the existence, in 1937, of an earned income allowance[76] which could reasonably have been understood to absorb many employment-related expenses. Furthermore, when *Smith* was decided, taxation was individual rather than aggregate. In the absence of any general work disincentive for Mrs. Smith, policy considerations did not dictate that she be allowed child care deductions. Now, however, absent an earned income allowance and in light of the aggregation disincentive, a working woman ought to be allowed to deduct the cost of necessary child care.

Unfortunately, *Smith* is no longer subject to reargument. Congress, in 1954, provided for extremely limited child care deductions. By creating a limited exception to the rule of *Smith*, Congress appears to have expressed its approval of the Board's general disallowance of child care deductions.

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73. Seese v. Commissioner, 7 T.C. 924 (1946).
74. Drake v. Commissioner, 52 T.C. 842 (1969).
75. "In March of 1967 there were 10.6 million women workers with children under 18 years of age, and 4.1 million of these had children under 6." REPORT OF THE INTERDEPARTMENTAL COMMITTEE ON THE STATUS OF WOMEN, AMERICAN WOMEN 1963-1968, at 5 (1968).
76. For a discussion of United States earned income credits, see *supra* note 62.

2. *Section 214: History.* In 1954, the House Ways and Means Committee recommended that a deduction be allowed to widows and widowers with young children for child care expenses incurred for the purpose of enabling the parent to pursue gainful employment.[77] The Senate Finance Committee liberalized the bill to include expenses paid by working women and widowers for the care of any dependent physically or mentally incapable of caring for himself.[78]

As passed, the Act allowed gainfully employed widows, widowers and women to deduct up to $600 for expenses actually incurred for the care of children under the age of twelve and other dependents incapable of caring for themselves. The Act contained no general maximum income limitation beyond which the deduction could not be claimed. But married women with husbands capable of self-support were subject to a special provision allowing a deduction only if the couple filed a joint return and if the total adjusted gross family income did not exceed $5,100.[79]

In 1963, the Committee on Social Insurance and Taxes recommended that the family income limitation be commensurate with the median income of two-earner couples, then estimated at $7,500.[80] President Kennedy, in his 1963 Tax Message, asked Congress to raise the income limitation to $7,000 and to allow a maximum $900 deduction for two children and $1,000 for three or more.[81] In 1964, Congress raised the income limitation to $6,000 and increased the maximum deduction to $900 for families in which there are two or more children under the age of 13.[82]

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77. U.S. CONG. & AD. NEWS 4055 (1954).
78. *Id.* at 4666.
79. The amount otherwise deductible was reduced one dollar for every family income dollar in excess of $4,500. INT. REV. CODE of 1954, § 214(b)(2). *See* Treas. Reg. § 1.214-1(b) (2) (1956).
80. Median income of families in which both husband and wife work: 1961-$7,188; 1964-$8,170; 1966-$9,246. BUREAU OF CENSUS, CURRENT POPULATION REPORTS (Series P-60). *See* REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES TO THE CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN 100 (1968).
81. President's 1963 Tax Message, U.S. CONG. & AD. NEWS 1429, 1437 (1963).
82. The House wished to retain the $4,500 limitation and allow most taxpayers no more than the $600 maximum deduction. A maximum $900 deduction was to be allowed in certain cases. The Senate wished to increase the income limitation to $7,000 and to allow a $600 maximum for one child, $900 for two children and $1,000 for three or more. The bill emerged from conference with a $6,000 income limitation, a $600 maximum deduction for one child and $900 for two. The maximum age for children was raised one year, from 12 to 13 and coverage was extended to working husbands with

3. *Section 214: The current provision.* Section 214 allows a deduction for expenses paid during the taxable year for the care of certain dependents (a son, stepson, daughter or stepdaughter of a taxpayer under the age of thirteen *and* any dependent not physically or mentally capable of caring for himself)[83] while the taxpayer is gainfully[84] employed or seeking gainful employment.[85]

Deduction for the care of one child may not exceed $600; deduction for the care of two or more children may not exceed $900. Persons eligible to claim the deduction are all women, widowers, divorced or legally separated husbands,[86] and husbands with incapacitated or institutionalized wives. Single men are not eligible.[87]

In the case of working wives, and husbands with incapacitated wives, the spouses must file a joint return and the amount of deductible expense is reduced by the amount that adjusted gross income exceeds $6,000. This limitation does not apply to a working wife whose husband is incapable of self-support because of a mental or physical defect or to a working husband with an incapacitated wife who has been institutionalized for 90 days or more.[88] A woman is not married, that is, not subject to the income limitation, if she is legally separated or divorced, or has been deserted by her husband and has secured a judicial support order against him.[89]

incapacitated wives, subject to the $6,000 family income limitation. *See* text following note 85, *infra,* H.R. 8363, 1964-1 CUM. BULL. pt. 2 at 300; S.R. 830, 1964-1 CUM. BULL. at 572; Statement of the Managers on the Part of the House, 1964-1 CUM. BULL. at 802.

83. INT. REV. CODE of 1954, § 214(d) (1). But a child under the age of 13 is deemed "not physically or mentally able to care for himself" and is thus a dependent even if he is not a child or stepchild so long as he would qualify under sections 151 and 152 as a dependent. Treas. Regs. § 1.214-1 (d) (2) (ii) & (iii) (1956).

84. Expenditure must be for the purpose of permitting the taxpayer to be *gainfully* employed. Thus, if the cost of care exceeds the amount anticipated or received from employment, the deduction may be disallowed. Treas. Reg. § 1.214-1 (f) (4) (1956).

85. Treas. Reg. § 1.214-1 (a) (1956).

86. INT. REV. CODE of 1954, § 214(d) (2).

87. The exclusion of single men is currently being challenged in Moritz v. Commissioner, Civil No. 71-127 (10th Cir. 1971) appealing a Tax Court decision (55 T.C. 113 (1970)) that petitioner, a single man who has never married, as a matter of law is not entitled to a section 214 deduction for expenses paid for the care of his dependent invalid mother even though the deduction would be available were petitioner an unmarried woman or a widowed or divorced person of either sex. Petitioner argues that the exclusion of single men who have never married is violative of fifth amendment due process and equal protection. Petitioner's brief.

88. INT. REV. CODE of 1954, § 214(b) (2).

89. *Id.* § 214(d) (5).

While the provision was not intended to cover all costs of maintaining a child (for example, food, clothing, education), when those costs are an inseparable part of child care, they are deductible. Therefore, the full amount paid to a nursery school is deductible even though the fee effectively covers lunch, education and recreation as well as care, that is, babysitting. There is no requirement that care be the least expensive available. When a maid is hired to perform housework as well as child care, a reasonable allocation should be made.[90]

4. *The value of a section 214 deduction.* For an unmarried woman, a widow or widower, a husband with an institutionalized wife, a divorced or legally separated husband or wife, or a deserted wife, the maximum tax savings value of the deduction is $600 or $900 multiplied by the taxpayer's marginal tax rate. At the maximum rate of 70%,[91] the tax savings is $420 with one child or $630 with two or more. At the 25% marginal rate,[92] the tax savings is $150 or $225. For working wives whose husbands are capable of self-support and husbands whose wives are incapacitated but not institutionalized, maximum value is obtained when the adjusted gross family income is precisely $6,000. Maximum value for a couple with one child is $102; for a couple with two children it is $144.[93]

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90. Treas. Reg. § 1.214-1 (f) (2) (1956).

91. $200,000 taxable income on joint returns; $180,000 taxable income on single head of household returns; $100,000 on individual returns (from 1970 tax tables).

92. $12,000 joint taxable income; $8,000 single head taxable income; $6,000 individual taxable income (from 1970 tax tables).

93. Since itemization is necessary to claim a child care deduction and since itemization replaces the optional standard deduction, maximum value can be obtained only if the taxpayer has other deductions equivalent to his optional standard deduction. We must, therefore, suppose additional deductions equivalent to the taxpayer's optional standard deduction. In the case of a family with $6,000 adjusted gross income, other deductions must total $600.

| A COUPLE WITH ONE CHILD | A COUPLE WITH TWO CHILDREN |
|---|---|
| $6,000 adj. gross inc. | $6,000 adj. gross inc. |
| -1,200 itemized deductions | -1,500 ($900 child care; $600 other) |
| $4,800 | $4,500 |
| -1,800 3 exemptions at $600 | -2,400 4 exemptions at $600 (1969 rates) |
| $3,000 taxable income | $2,100 taxable income |
| The marginal rate on $3,000 is 17%. | The marginal rate on $2,100 is 16%. |
| The tax savings is thus $600 x .17 or $102. | The tax savings is thus $900 x .16 or $144. |

Families with income below $6,900 are, however, unlikely to obtain any benefit from section 214. The child care deduction, like most other itemized personal deductions, is allowable only when the taxpayer does not take the optional standard deduction. Low-income families do not generally itemize deductions because it is a relatively complicated procedure and because they are unlikely to spend their limited income on deductible personal items. Deductible expenditure for mortgage interest presupposes home ownership as charitable contributions presuppose substantial discretionarily disposable income. Low income benefit from itemization and, hence, from section 214 is likely only where the family also incurs heavy deductible medical expenses.

5. *The conceptual basis for section 214 and the family income limitation for working mothers.* The House Ways and Means Committee initially reported:

> Your committee has added this deduction to the code because it recognizes that a widow or widower [not yet liberalized by the Senate to include working wives] with young children must incur these expenses in order to earn a livelihood and that they, therefore, are comparable to an employee's business expenses.[94]

The Committee's explanation leads to two different conclusions depending on the meaning one gives to "livelihood." If it is understood to signify the pursuit of income through gainful employment, all persons who necessarily incur such expenses ought to be allowed this deduction as a cost of earning income. If, on the other hand, "livelihood" is intended to mean the pursuit of income for the purpose of basic family subsistence, then it is arguable that a family in which one parent can earn and the other parent can stay home to care for children should not be eligible for the deduction unless the earned income of both is absolutely necessary for family survival. The latter interpretation would seem to be the operative one in view of the Senate's subsequent expansion of coverage to low-income, two-earner couples.

> [I]t is recognized that in many low-income families, the earnings of the mother are essential for the maintenance of minimum living standards, even where the father is also employed, and that

94. U.S. CONG. & AD. NEWS 4055 (1954).

in such situations the requirement of providing child care may be just as pressing as in the case of a widowed or divorced mother.[95]

Such a reading is not, however, consonant with the economic policy expressed in other Code provisions or the American spirit of wealth acquisition. The Code does not require that a businessman show that he is economically constrained to pursue his business as a prerequisite for deduction of business expenses. Our society does not encourage individuals or families to view mere subsistence as an ultimate economic goal. While the low-income, two-earner provision might be understood as an exercise of congressional grace for the benefit of low-income families, the entire section does not lend support to such a reading. There is no income limitation on single parent earners. Thus, the widowed business executive with $10,000 unearned income from securities and $25,000 earned income from employment is eligible for the deduction as is the divorcée with $10,000 in alimony and $10,000 in salary.[96] The deduction is, therefore, granted not because they need it but because it is expected that they will work and because child care is effectively a "business expense."

The basis for the distinction between single parents and couples[97] thus emerges: a single parent will or should work;[98] a married mother with a husband capable of support will not or should not work unless her income is absolutely necessary to provide for basic family needs. While this consideration was

95. *Id.* at 4666.

96. Logically, the deduction should only be chargeable against earned income since it cannot be claimed unless child care expenses are incurred for the purpose of permitting the taxpayer to pursue gainful employment. *See* discussion in *supra* note 84. There is, however, no provision for separating earned income from unearned income for the purpose of a section 214 deduction. Such a separation would negatively (and properly) affect the amount of tax savings by reducing the applicable marginal rate.

97. The application of the maximum income limitation to husbands with incapacitated wives who are not institutionalized is puzzling. It may reflect congressional feeling that a wife in the home will care for children regardless of her disability and that help is thus hired for housekeeping rather than child care. *But see* Treas. Reg. § 1.214-1 (b) (5) (iii) (1957).

Since household help is, however, clearly a luxury for low income families, they may be allowed the deduction on the theory that the husband would do the housekeeping himself if that were all that were necessary. Thus, if he does hire help, it must be for the purpose of child care.

98. Compare with the rationale for WIN (Pub. L. No. 90-248, § 204(a), 81 Stat. 884, 42 U.S.C. § 630 (Supp. V, 1970)), President Nixon's program to compel welfare mothers to work. All children should be able to emulate a working parent. Even if there is only one female parent, it is better for the children that she work and leave them in a day care center than stay home and take care of them. *See* discussion in text following note 175, *infra.*

not articulated in the congressional reports, it is frequently mentioned by tax policy writers.

Melvin White discusses the discrimination against working wives arising from the Code's failure to impute housekeeping income to unemployed wives but notes that section 214 is a hardship subsidy rather than an equalizer for that discrimination. He observes that failure to compensate for the discrimination may be an expression of social values, a reflection of community ambivalence towards the working mother.[99]

Another commentator makes a far less neutral observation:

> The limitations on the deduction as it was finally adopted are a fine example of the consensus of opinion which can be developed under the democratic process. Congressional discussion reflected differences of opinion based on urban and rural attitudes and occupations and on religious and philosophical approaches to *the role and proper places of mothers.* The final result gave relief where it was felt to be needed, but the intent was to prevent giving any tax inducement to a mother 'to leave her children at home while she went out to earn money for a fur coat.' . . .
>
> It is to be hoped that . . . it [section 214] will not be brought into disrepute by unreasonable broadening to the point of giving tax relief where both parents work simply because the wife prefers to be out of the home.[100]

6. *The section 214 income limitation on working couples arguably exceeds congressional power to tax income and violates the equal protection guarantee.* The family income limitation may exceed the congressional power to tax income. While the hardship provision alone might be considered to confer an "advantage" on low income couples (a matter of congressional grace), the Committee explanation[101] of the unlimited income

99. White, *Proper Income Tax Treatment of Deductions for Personal Expenses,* in COMPENDIUM OF PAPERS, *supra* note 46, at 365.

100. D.T. SMITH, FEDERAL TAX REFORM 111-12 (1961) (emphasis added).

Note Smith's denomination of possible liberalization of section 214 as "tax inducement." In another passage he suggests that it would create a "tax advantage." Consider this characterization in light of the Code's cumulative work disincentive for wives and mothers, the Code's failure to impute income to unemployed wives, and the argument that section 214 is essentially a legislative repeal of *Smith* that merely denies deduction of a business expense to one class of taxpayers, married working mothers, in violation of the equal protection guarantee implicit in fifth amendment due process. *See* text following note 101, *infra.*

101. *See* text at *supra* note 94.

provision for single heads of households seems to suggest legislative repeal of *Smith,* at least for one class of taxpayers. Child care expenses are "comparable to an employee's business expenses." If such costs are effectively "business expenses," can deduction for them be denied to any taxpayer who necessarily incurs them for the purpose of pursuing gainful employment? The congressional power to tax income is generally understood as the power to tax net, as opposed to gross, income.[102] Taxation of dollars spent for necessary child care when Congress has itself determined that such expenditure is "comparable to an employee's business expenses," effectively constitutes taxation of the working couple's gross income.

Whether section 214 (a) is understood to confer a benefit on certain taxpayers or to register congressional recognition of child care as a "business expense," the equal protection guarantee requires that it be made available to all gainfully employed persons who incur child care expenses unless a rational distinction related to the furtherance of legitimate legislative concerns can be made between the benefitted group, sole household heads, and the denied group, working couples.[103] Since there is no income limitation on single heads, the distinction is not based on ability to pay taxes. Nor is it based on the taxpayer's demonstrated need to seek employment.[104] The distinction appears to be merely a reflection of congressional feeling that mothers should generally stay at home. Since infringement of the right to work is not a legitimate legislative goal, there would appear to be no constitutionally valid basis for the distinction between sole heads and married women.

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102. *See supra* notes 50-53 and accompanying text.

103. Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Golden Rule Church Ass'n, 41 T.C. 719, 729 (1964).

104. Whether section 214 (a) is interpreted to confer a benefit on certain taxpayers or construed instead to register congressional recognition of child care as a "business expense" might, however, be determinative of the provision's constitutionality. A judicial finding that section 214 does recognize child care as "business expenses" would preclude any distinction based on the necessity of work since a taxpayer need never show that he is constrained to work as a prerequisite for deducting business expenses. But if section 214 were understood to allow a deduction for a "personal" expense as an exercise of congressional grace, then "necessity of work" might provide the Commissioner with a rational basis for the distinction. While the Code does not require a showing that single heads must work, it is arguable that they are more likely to have to work than non-low income wives and the legislature may, for administrative reasons, make class rather than individual distinctions.

The section 214 income limitation can profitably be contrasted with spousal aggregation. Aggregation, while tending to act as a work deterrent for secondary earners, is supported by the clearly legitimate legislative goal of taxing each economic unit according to its ability to pay. The disincentive effect of aggregation can thus be regarded as a permissible, though unfortunate, incidental effect; or, if the infringement is serious enough, as a basis for invalidating the provision unless the Government can show that it is strictly necessary.[105]

This discussion treats only one aspect of section 214, its discrimination against two-earner families. It is also a work disincentive provision; it tends to keep wives at home. Thus, while the disallowance effects an absolute dollar discrimination against the two-earner family, it also operates as a work disincentive for married women. The second aspect of the statute opens a new range of constitutional argument, raising issues of sex based discrimination and infringement of a fundamental right, the right to work.[106]

7. *Recommendations of the 1968 Task Force on Social Insurance and Taxes on the deduction of child care expenses.*[107] The Task Force, once again, took the wrong tack. Its approach to earned income allowances is too broad;[108] its approach to child

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105. The courts have developed two distinct standards of review for determining whether a statute violates the equal protection guarantee. The first and most frequently applied standard requires only that the classification bear a reasonable relationship to a permissible legislative objective. If so, the statute does not violate the equal protection guarantee. *See, e.g.,* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). A more demanding test is applied, however, when the statute affects "fundamental rights or interests" or when the basis of the statutory classification is "inherently suspect." In such cases the statute satisfies the equal protection guarantee only if it is supported by compelling affirmative justification. *See, e.g.,* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965); McLaughlin v. Florida, 379 U.S. 184 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Skinner v. Oklahoma, 316 U.S. 535 (1942); Truax v. Raich, 239 U.S. 33 (1915). It is arguable that the classification is effectively sex-based and therefore "inherently suspect," and that it affects a fundamental right, the right to work.

106. A detailed examination of the constitutionality of the entire statutory scheme is beyond the scope of this paper. Since the Code effectively creates a sex-based classification which tends to infringe upon the married woman's right to work, the provisions discussed in this paper may be individually or cumulatively susceptible to constitutional attack.

107. REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES TO THE CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN 95-108, 118-29 (1968).

108. *See* discussion in *supra* note 64.

care deductions is too narrow. The Task Force understood section 214 solely as a hardship provision and as such correctly saw that it was not alleviating hardship. It recommended phasing out section 214 and spending federal funds to stimulate the development of day care programs for which parents would pay according to their means. The Task Force neglected the plight of middle income working mothers because it focused entirely on the hardship aspect of section 214 and failed to consider the provision's "business expense" facet. Even if the Government does decide to legislate a day care program and does appropriate the necessary funds, middle class working mothers will, under the Task Force proposal, pay for that care and will not be able to deduct the expense as a cost of earning income.[109]

The Task Force found that 44.6% of all working mothers have family incomes of less than $6,000 and reasonably inferred that they do not have adequate income to pay for day care.[110] But the Task Force did not consider the need for equitable treatment of the 56.4% of working mothers whose family income does exceed $6,000. The Task Force also found that many two-earner families incur few, or no child care expenses and drew the unavoidable inference that a deduction for non-expenditures could not possibly help such families. But the Task Force's statistics show that while approximately one-half of the surveyed two-earner families probably do not incur child care expenses, the other half do spend money for child care.[111] The Task Force

109. The Swedish Government has stimulated the growth of an effective national day care system for which participating parents pay according to their means but does not consider such an effort to be a replacement for special earned income allowances for working mothers. C. UHR, SWEDEN'S SOCIAL SECURITY SYSTEM 15-18 (1968); *see* notes 151-52, *infra* and accompanying text.

110. REPORT, *supra* note 107, at 126. Stated otherwise, section 214 allows the low income two-earner family a deduction for expenses that it cannot afford to incur.

111. CHILDREN AGES 0 TO 13

| TYPE OF CHILD CARE | GENERALLY FREE CARE | GENERALLY PAID CARE |
|---|---|---|
| Care in the child's home: | | |
| by father | 15% | ........ |
| other relatives | ........ | 21% |
| non-relatives | ........ | 10% |
| Care in someone else's home | ........ | 16% |
| Group care | ........ | 2% |
| Child took care of self | 8% | ........ |
| Mother took child to work | 13% | ........ |
| Mother only worked during school hours | 15% | ........ |
| | 51% | 49% |

assertion that all taxpayers ought to be denied a deduction because one-half of their number do not incur the expense relies on a premise unsupported by any principle of American tax policy. A businessman can deduct a cost of doing business even though all his colleagues may not incur that particular expense. Mortgage interest is deductible even though all taxpayers do not own homes and charitable contributions are deductible even though all taxpayers cannot or do not contribute to charities.

The Task Force correctly assesses the valuelessness of section 214 for large low-income families[112] and its negligible value to small low-income families who must necessarily be close to financial ruin if they have sufficient deductions to warrant itemization rather than election of the optional standard deduction.[113] The first group, large low-income families whose exemptions and deductions exceed taxable income, clearly cannot be assisted by any provision for the deduction of child care costs. Direct subsidy is necessary. At the very minimum, they should receive a "refund" to the extent that they are unable to benefit from the deduction.[114]

For the second group, small low-income families who generally do not or cannot profitably itemize deductions, the deduction should be taken from gross income rather than adjusted

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REPORT, *supra* note 107, at 122.
Inclusion of children over the age of 9 or 10 tended to unbalance the survey since they frequently take care of themselves. Consideration of child care arrangements for children under the age of 6 showed that 68% involved expense while 32% were probably costless.

112. There is often no benefit for large, low-income families because their exemptions and deductions exceed their adjusted gross income. For a married couple, there is no tax until income exceeds:

| | |
|---|---|
| with 2 children | $3,000 |
| with 3 children | $3,700 |
| with 4 children | $4,400 |
| with 5 children | $5,100 |
| with 6 children | $5,800 |
| with 7 children | $6,400 |

REPORT, *supra* note 107, at 99.

113. *See* text following *supra* note 93.

114. Assume that a working couple with 6 children has an aggregate adjusted gross income of $4,800 and child care expenses of $900. Exemptions alone reduce their taxable income to zero. If they had had any taxable income, the deduction would have given rise to a tax savings at the marginal rate on the first $1,000 of income, 14%. They should thus receive a "refund" of $126 ($900 x .14).

gross income, thus obviating the necessity of itemizing all deductions and losing the optional standard deduction in order to secure any benefit from section 214.[115] Alternatively, and preferably, a tax credit set at a fixed standard percentage of expenses incurred would benefit all taxpayers in the same amount and end the present inequity of allowing the greatest tax saving to those most able to afford the expense and the least saving to those least able to afford it, an inequity inherent in all deductions but particularly objectionable in a provision partially aimed at alleviating hardship.

The Task Force considered the possibility of increasing the maximum income limitation for two-earner couples and considered the eleven liberalizing bills introduced in the 90th Congress. It understood them as incentive measures designed to lure professionally trained women back to work and disapproved such efforts on the ground that it is difficult to justify a benefit for professional women when poor women will not profit from it. While the Task Force's consideration for the poor is commendable, it is beside the point. Section 214 involves two discrete problems: the cost of earning income (and, implicitly, the work disincentive arising from disallowance of a deduction for a necessary expense), and hardship for low-income two-earner families.

A proper analysis of child care deductions should not focus on hardship; it should not even refer to it. The Task Force has permitted congressional introduction of an irrelevant factor to determine the Task Force's appraisal of child care deductions. Congress passed a child care deduction and improperly limited its application to two-earner families in accordance with a policy to disapprove all but low-income working mothers. The Task Force, not sharing the congressional purpose, nevertheless took the hardship provision (strictly speaking not a hardship provision at all but merely an improper limitation) as the very essence of the provision, observed that the provision does not and cannot effectively alleviate hardship and rejected the entire concept of child care deductions.

115. That all section 214 deductions should be treated in this manner is, of course, consonant with the view that child care costs are properly understood as "business expenses" and should be included within section 62 as expenses which are deducted from gross income in order to determine adjusted gross income. The President's Task Force on Women's Rights and Responsibilities has recently adopted this position. *See* text following note 118, *infra*.

An alternative approach would have been to determine that child care costs are indeed a cost of earning income, to discard the limitation and see the provision as providing equity[116] for those having some taxable income. Substitution of a credit for the deduction would equalize tax relief for all families having a tax liability in excess of the credit.

The problem of the poor is an entirely separate problem. It is not a valid objection to a provision designed to allow deduction of business-related expenses that the poor will not benefit from it. Clearly, tax deductions can never answer the needs of those who have no taxable income. The problem of the poor is that they do not have enough money to buy necessary goods and services. The only solution to their problem is a transfer of money to them. Just as a tax deduction will not help the poor, transfer of money to the poor will not help middle-income working wives. The two problems are discrete and the Task Force ought to have separated them and carefully considered each one.

The Task Force's unitary approach might have been valid if it had believed that the problems of the poor are so compelling and the intellectual and material resources of the nation are so scarce that all efforts must be directed toward the problems of the poor; or that child care expenses are not a legitimately deductible cost of earning income unless accompanied by hardship. But the Task Force did not espouse either premise. It merely made the error of following a false congressional lead, the $6,000 family income limitation, and then asking, properly, what section 214 does for the poor. Since it does nothing for the poor, the Task Force recommended its disposal.[117] The proper subject for inquiry is, however: What could section 214, properly amended, do for working wives who are not poor?

8. *Report of the President's Task Force on Women's Rights and Responsibilities.*[118] This Task Force recommends that the $6,000 limitation be removed and that the child care deduction

116. It can hardly be called a benefit because it only brings two-earner couples into parity with one-earner families who receive imputed child care income. *See supra* note 100.

117. The Citizens' Advisory Council on the Status of Women, for whom the Report was prepared, rejected the Task Force's recommendation for ultimate elimination of the deduction.

118. THE REPORT OF THE PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE 15 (1970).

be taken from gross income as a section 62 business expense in order to make the deduction available to those who do not elect to itemize or do not have sufficient personal deductions to make itemization worthwhile. It also recommends that the $600 and $900 deduction ceilings be increased in accordance with a proposed study of the actual cost of child care.

9. *An alternative to elimination of the maximum income limitation.* If Congress wishes to retain a maximum income level beyond which a working wife's child care deductions are disallowed, the maximum should relate to the wife's income rather than the family income. Since there would be no expense if the wife stayed at home, it is her salary alone which is effectively subject to child care expenses. Her decision to work depends on her disposable income after she pays the cost of child care as well as other additional housekeeping costs. If she will not have a substantial surplus, her employment is not gainful.

But disallowance on the basis of the family's total income effectively conditions eligibility for the deduction on the amount of the husband's income. A wife's work disincentive is thus, as with aggregation,[119] a function of her husband's income. (That is, the deductibility of child care expenses for two mothers earning the same income and incurring the same expenses is dependent on their husbands' incomes.) The family's capacity to pay for child care should not therefore be the determinative factor. Since child care expenditure is effectively drawn from the wife's income, any income limitation should only take into account her income. And, logically, the deduction should only be chargeable against her income.[120] A tax credit instead of a deduction would eliminate this problem.

This point is best illustrated by reference to an analogous provision that reflects the same considerations but works against rather than for the working mother taxpayer. Swedish law allows a working mother an earned income allowance of 25% of *her* earned income up to a fixed kronor maximum.[121] Since the

119. *See* text following *supra* note 19.

120. If the wife's income alone is the basis for an income limitation, the family should not profit from a windfall tax saving determined by the aggregate marginal rate.

121. *See* text following note 150, *infra*. England has a similar system. *See* text following note 140, *infra*.

maximum amount of affected income is rather high,[122] many Swedish working mothers probably cannot take advantage of the maximum possible allowance. They might argue that the allowance ought to be calculated on the basis of aggregate family income since it is the family that pays the cost of child care. The answer is that it is the wife's decision to work that necessitates the expense and it is the wife's decision to work that entitles her to the allowance. Any allowance, deduction or credit intended to cover the cost of child care expenses must necessarily focus on her income.

## III. A Comparative Survey of Other National Systems of Taxation

So far we have examined three different aspects of American taxation of working wives: aggregation of spousal income, the absence of any earned income exemption, and the disallowance of child care deductions for most working mothers. Each factor creates a work disincentive; the cumulative effect is substantial.

Consideration of other national systems has been postponed because an accurate picture of the cumulative effect of a tax system cannot be obtained by isolating any one aspect. Systems which do not aggregate spousal income contain no inherent disincentive. Equitable provisions such as earned income allowances and child care deductions, while desirable, are not necessary to counterbalance disincentives. Systems which do aggregate spousal income require equalizing provisions to offset their inherent disincentive bias. One system that we shall consider has, in spite of generous earned income and child care allowances, found it necessary to abandon aggregate taxation in favor of individual taxation.

### A. *Canada*

Canada does not aggregate spousal income. Each taxpayer is treated individually;[123] he files an individual return and is

122. Skr 12,000 (equivalent United States $3,003).

123. There is only one provision that treats the couple as an economic unit, CAN. REV. STAT. c. 148, § 26 (1) (a), (b) (1952). While it is based on the theoretically sound principle that taxpayers should not receive double exemptions, the principle has been imperfectly executed, creating an unnecessary and easily avoidable work disincentive for wives. A Canadian husband receives an additional $1,000 exemption for his wife. When she works that exemption is reduced by the amount the wife's income

taxed according to one progressive rate schedule. Thus, a family in which the husband earns $8,000 and the wife stays at home is taxed more heavily than a family in which each spouse earns $4,000.[124]

A Royal Commission was appointed in 1962 to make a thorough study of Canadian taxation. It issued a comprehensive report in 1966[125] and recommended that the family, rather than the individual or couple, be considered the basic taxation unit. The proposal was not adopted. The Minister of Finance, in his recent *White Paper on Tax Reform,* dismissed the proposal as a "tax on marriage."[126] Consequently, individual taxation seems firmly entrenched in Canada.

Currently, Canada has no earned income allowance and does not allow deductions for child care.[127] The Royal Commission recommended a tax credit for working mothers and an additional credit for working mothers with young children.[128] The *White Paper* substantially adopted the Commission's proposals in the form of an earned income exemption for all employees (3% of all earned income up to a maximum exemption

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exceeds $250. It is eliminated when her income reaches $1,250. While the husband's exemption for his wife is replaced by the wife's personal $1,000 exemption as an income earner, the method of disallowing what would otherwise be a double exemption is likely to create a strong disincentive for wives who wish to enter the labor market. Reduction or elimination of the husband's special exemption means that the family's tax burden is increased at his marginal rate. One thousand dollars of the wife's first $1,250 is, thus, effectively taxed at her husband's marginal rate. While the wife does not actually pay any tax on her first $1,000 because she has a $1,000 personal exemption, the family's tax bill is increased as though she were paying at her husband's marginal rate.

The result is, therefore, that the effective tax on a wife's first $1,000 is higher than the tax on her subsequent earnings. It does not pay for a wife to accept a low paying or part-time job. She must earn a substantial income to offset the initial heavy tax burden that her husband will sustain.

An alternative solution to the double exemption problem would allow the family the option of keeping the wife as a deduction on the husband's return and foregoing her personal exemption. Her first earned dollars would then be taxed at the lowest tax rate rather than the husband's marginal rate.

124. Canadian $976 and $765 respectively at 1965 exchange rates. While the Royal Commission characterized this result as "ludicrous," such a differential could well be justified by the two-earner couple's loss of imputed housewife income as well as the additional employment-related expenses incurred by the second earner. 3 REPORT OF THE ROYAL COMMISSION ON TAXATION 118 (Canada, 1966).

125. *Id.*

126. CCH CAN. TAX REP., No. 1220 (1969).

127. G. MCGREGOR, PERSONAL EXEMPTIONS AND DEDUCTIONS UNDER THE INCOME TAX 14, 25 (1962) with special reference to Canada, the United States and the United Kingdom; WHITE PAPER ON TAX REFORM, CCH CAN. TAX Rep., No. 1220, § 2.10 (1969).

128. *See* text of *supra* note 23.

of United States value $240),[129] and an itemized child care deduction for working mothers (up to $800 per child with a maximum of $3,200).[130]

Enactment of these provisions would render income taxation a virtually neutral factor in the Canadian woman's decision to work. Aside from a misconceived exemption replacement,[131] individual taxation affords each citizen the same opportunity to bring home disposable income. Marriage does not cause an employed woman to lose her standard deduction.[132] Combined with an additional earned income allowance, it should tend to compensate for the working wife's loss of imputed housekeeping income. The standard deduction, earned income allowance and

129. There are several ways to indicate the equivalent United States dollar value of foreign exemptions and deductions. The simplest method, translation into United States dollars at the current rate of exchange, does not give an accurate representation of true tax savings value, that is, an exemption's capacity to proportionally reduce taxable income, because there are marked differences in the per capita income of the countries under consideration: the United States, Canada, England and Sweden. In order to accurately reflect tax savings value, foreign exemptions will be translated into United States dollars and then multiplied by a fraction that represents the ratio between foreign per capita income and United States per capita income.

Although the Canadian and United States dollars are virtually equivalent on the international exchange (Canadian $1 = U.S. $.98), the 1968 Canadian per capita income was $2,247 compared with United States $3,578. 1969 U.N. STATISTISTICAL YEARBOOK 558. Thus, Canadian dollar figures have been multiplied by 1.6 $\left(\frac{\$3,578}{\$2,247}\right)$, to achieve equivalent United States taxable income reduction value.

In 1968, English per capita income was $1,451. 1969 U.N. STATISTICAL YEARBOOK 561. Pound figures have, therefore, been translated into United States dollars at current exchange rates and multiplied by 2.5 $\left(\frac{\$3,578}{\$1,451}\right)$.

Swedish per capita income figures are not reported. Per capita gross national product has been used instead. In 1969, Swedish per capita GNP was $3,315 compared to United States GNP $4,379. 1970 U.N. STATISTICAL YEARBOOK. Swedish kronor figures have thus been translated into United States dollars at the current exchange rate and multiplied by 1.3 $\left(\frac{\$4,379}{\$3,315}\right)$.

This approach does not, of course, reflect any nation's standard or cost of living. Nor does it reflect an exemption or deduction's capacity to cover the taxpayer's actual cost. It does, however, give some indication of the size of the deduction in relation to the taxpayer's total income.

Actual exchange rates are: 1£ = $2.40
1 Skr = $.1925

130. WHITE PAPER, *supra* note 127, at §§ 2.08, 2.10. Canadian dollar figures are $150, $500 and $2000, respectively.

131. *See* discussion in *supra* note 123.

132. *Compare* INT. REV. CODE of 1954, §§ 141, 142. *See supra* note 35.

child care deductions should cover most of the working wife's cost of earning income.

The Canadian system is also more capable than the American system[133] of levying taxes according to the economic unit's ability to pay. The American system only differentiates between individuals and couples. Assume an $8,000 annual income. In Canada, a single person is taxed at the individual rate. A married sole family earner is also assessed at the individual rate but his taxable income is reduced by an additional $1,600 exemption for his wife.[134] Two married earners who each earn $4,000 are individually taxed at lower rates and thus have a lower combined tax bill. The husband loses the extra exemption, but his wife, as an earner, acquires a personal exemption in the same amount.

B. *England*[135]

Although English spouses may elect separate assessment,[136] tax is computed on the couple's aggregate income. Income splitting is not employed; joint rates are slightly lower than individual rates. The rate schedule, before computation of allowances and deductions, appears to impose a greater burden on a married couple than on two individuals with a combined equivalent income. Hence, the frequent assertion that England imposes a tax on marriage.[137] Personal allowances for married people and a special earned income allowance for working wives

133. *See* text following *supra* note 39.

134. Canadian $1,000. It is important to remember that marriage to an unemployed person gives rise to nontaxable service income as well as additional expense. Marriage is also economical; two cannot generally live as cheaply as one but a couple lives more cheaply than two single persons. A $1,000 exemption may, therefore, more accurately reflect the married man's reduced ability to pay taxes than the former munificent American income-splitting adjustment and the new, still generous 20% maximum differential. *See* text at *supra* notes 41-47.

135. *See generally* HARVARD LAW SCHOOL INTERNATIONAL PROGRAM IN TAXATION, WORLD TAX SERIES: TAXATION IN THE UNITED KINGDOM (1957); JEBS, PERSONAL TAXATION (Fabian Research Series 255, 1966); G. MCGREGOR, PERSONAL EXEMPTIONS AND DEDUCTIONS UNDER THE INCOME TAX (1962); Edwards, *Child Allowances; Children–Investment Income; Housekeeper and Other Allowances; Personal Allowances and Reliefs; Earned Income Relief*, 120 New L.J. 216, 265, 311, 448, 519 (1970) (series of articles on tax and the family); Oldman & Temple, *Comparative Analysis of the Taxation of Married Persons*, 12 STAN. L. REV. 585, 588 (1960).

136. A provision for taxpayers who wish to keep their spouses ignorant of the amount of their personal income.

137. *See* text at *supra* note 33. Consider the response of the Canadian Minister of Finance to the Royal Commission's recommendation that Canada adopt aggregation. *See* text at *supra* note 126.

tend, however, to offset any additional burden. Most working couples do not pay a greater tax than they would if they had remained unmarried.[138] A married couple is entitled to a personal allowance (exemption) of United States value $2,790.[139] The couple receives an earned income allowance of two-ninths of all earned income up to $24,030 and one-ninth on the next $35,640, representing a maximum exemption from taxable income of $9,300 on an earned income of $59,670.[140]

If the wife works, the family is entitled to an additional earned income allowance of seven-ninths of her earned income or $1,950, whichever is lower.[141] The wife's gross income is thus reduced by both the general earned income allowance and the special working wife's allowance.

There is no generally applicable child care provision. Widows and widowers may qualify for a $450 deduction for the services of a housekeeper who performs necessary child care services. This deduction is not available to divorced persons whose spouses are still alive.[142]

The English system does not seem to create a work disincentive for married women. A wife's taxable income is, of course, effectively taxed at her husband's marginal rate. But a sizeable portion of her gross income is exempt from taxation. A wife's gross income is reduced by a substantial general earned income allowance greatly in excess of the normal cost of earning income.[143] A wife's additional cost of earning income, loss of imputed housewife income and expenditure for household and child

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138. Oldman & Temple, *supra* note 135, at 588.

139. £465. The couple's exemption is larger than but not double a single person's exemption, which is £325. A couple (£465) can live more cheaply than two individuals (£650) but not as cheaply as one (£325). Marriage effectively reduces a working couple's total exemption from £650 to £465. Sched. 16, Income and Corporation Tax Act of 1970, and Finance Bill of 1970, cl. 14 (1) as reported by Edwards, *supra* note 135, at 488.

140. Edwards, *supra* note 135, at 519. The sterling equivalents are £4005, £5940, £1550 and £9945, respectively.

141. £325. Income and Corporation Tax Act of 1970, S. 8 (2), as amended by Finance Bill of 1970, cl. 14 (1)(a) as reported in Edwards, *supra* note 135, at 449.

142. £75. Income Tax Act of 1952, S. 212 as amended; Kliman v. Winksworth, 17 T.C. 569 (1933) as reported in Edwards, *supra* note 135, at 311.

143. The magnitude of the earned income allowance indicates a legislative intent to tax unearned income more heavily than earned income. The maximum allowance of £1,550 ($9,300) cannot possibly have been designed to merely cover the cost of earning income.

care services, is taken into account by the very generous[144] wives' extra earned income allowance. If a wife earns less than $2,407 her income is not taxed at all if the total family income is less than $24,030; if the total family income is between $24,030 and $59,670, she effectively pays tax on only one-ninth of the first $2,407; and if the family income exceeds $59,670, she pays tax on two-ninths of the first $2,407. If her earned income exceeds $2,407, she takes the maximum allowance of $1,950[145] which should be ample to cover the extra costs of earning income incurred by a working wife. Indeed, if the couple has no young children, the allowance is probably excessive.[146]

In addition to mitigating the work disincentive inherent in aggregation, the English system of allowances adequately differentiates between taxpaying units according to their ability to pay taxes. The American system distinguishes only between individuals and couples; it does not differentiate between recipients of earned and unearned income, and between one and two-earner couples.[147] Application of the English earned income allowance effectively taxes recipients of equivalent unearned income at a higher rate. A single earner is taxed at slightly higher rates than a married sole earner. Furthermore, due to the latter's larger marital exemption, the lower joint rates are applied against a reduced taxable income. Because of the wife's special earned income allowance, a two-earner couple is taxed less heavily than a single-earner couple having the same total earned income.

C. *Sweden*

Under a system of compulsory aggregation, Sweden developed compensatory and work incentive provisions for married wom-

144. The extra allowance is generous in relation to the tax situation of a family in which the wife is unemployed. When compared with the tax situation of an unmarried couple sharing the same domicile, the result is not so favorable. Marriage reduces the two earners' personal exemption by £185 and subjects them to an unfavorable aggregate rate. The maximum working wife's allowance of £325 will probably, at best, only return them to their antenuptial position.

145. The respective sterling figures are: £418, £4,005; £4,005 and £9,945, £418; £9,945, £418. £418 and £325.

146. The allowance originated as an incentive as well as an equitable provision. England wished to encourage wives to enter the labor market to cure labor shortages and stimulate national economic growth. For background and criticism of this provision, see JEBS, PERSONAL TAXATION (Fabian Research Series 255, 1966).

147. *See* text discussion following *supra* note 39.

en.[148] Sweden does not have a substantial general earned income allowance. It does, however, allow itemized deductions for many costs of earning income, including, for example, daily commuting expenses. If an employee does not elect to itemize, he is entitled to a "standard expense deduction" of United States value $25 from his employment income.[149] Deductions for the cost of earning income are not effectively absorbed or cheapened by the existence of an omnibus optional standard deduction.[150]

Sweden provides a special earned income allowance for married women and an additional allowance for mothers. All married women who earn income receive an exemption of $75.[151] Married women who have at least one child under sixteen receive an additional exemption of 25% of their first $3,003[152] of earned income or a maximum exemption of $750.

All spousal income was aggregated until 1965. The technique of income splitting was not employed but joint tables taxed spousal income at lower rates than individual income. The practical effect of the rate differential was that two-earner couples with combined incomes below $8,758 bore no increased tax burden because of marriage, while couples with combined incomes above this amount did bear a heavier burden.[153] To avoid a disincentive tax penalty on working wives, Sweden amended its tax law in 1965 to allow separate taxation of each spouse's earned income.[154] Election of separate taxation became beneficial when the couple attained a combined earned income of $8,008 if it was distributed evenly between each spouse, that is, each earned $4,004. No benefit was possible if the spouse with the lower income did not earn at least $3,003.[155]

In 1970, the Swedish Ministry of Finance recommended that all spousal earned income aggregation be abolished in favor of individual taxation.

148. *See generally* SWEDISH MINISTRY OF FINANCE, THE SWEDISH BUDGET 1970/71; M. NORR, C. SANDELS & N. HORNHAMMAR, THE TAX SYSTEM IN SWEDEN (1969); TAXES IN SWEDEN (SKATTEBETALARNAS FORENIG, 1969); C. UHR, SWEDEN'S SOCIAL SECURITY SYSTEM (HEW Research Report No. 14, 1966); Oldman & Temple, *supra* note 135, at 590.

149. Skr 100. NORR, *supra* note 148, at 76.

150. *See* text at *supra* notes 54-59.

151. Skr 300.

152. Skr 12,000. NORR, *supra* note 148, at 74-77. Note that the mother receives this exemption whether or not she actually incurs any child care expense.

153. Skr 35,000. NORR, *supra* note 148, at 73.

154. *Id.* at 74.

155. Skr 32,000; Skr 16,000; and Skr 12,000. TAXES IN SWEDEN, *supra* note 148, at 18.

> [T]here are aspects of labour market policy and *The principle of equality between the sexes* that argue strongly in favour of individual taxation. The [1965] bill concerning voluntary taxation for married couples was to be regarded as an interim measure pending further examination of the problems associated with a switch to a general system of individual taxation.
>
> *A fundamental feature of individual taxation is that tax should be levied without regard to sex or marital status. . . . [T]he present tax regulations stem from a time when working conditions afforded very limited opportunities for married women to earn an income, with definite sex roles as a result. The reform involves adjusting the tax system to the changed conditions in society.*
>
> Particular attention should be paid to the relationship between labour market policy and the taxation of income. At present approximately one married woman in three is gainfully employed. It is essential that married women are enabled to make a contribution to work outside the home. This is facilitated by measures of labour market policy and the community's efforts for child supervision. The revision of the tax system should also be designed to promote such a trend. . . .
>
> The proposed revision of income tax means, for instance, that the different rates for married and unmarried persons will be abolished and replaced by a single (intermediate rate) tax scale. Another important feature is that the basic deduction (exemption) is to be determined individually without regard to marital status.[156]

The Ministry's recommendations were enacted into law. On January 1, 1971, spousal earned income aggregation was replaced by individual taxation of all persons regardless of marital status.[157]

In light of the other Swedish tax provisions, passage of the reform bill represents a total solution to the problem of tax disincentive for working wives. Individual taxation affords the wife neutral tax treatment. Working wives' deductions cover her loss of imputed housewife income as well as additional household and nondeductible employment-related expenses. The child care allowance effectively removes child care expenditures from her taxable income. For many families, the automatic $750 child care exemption is probably in excess of actual ex-

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156. SWEDISH MINISTRY OF FINANCE, THE SWEDISH BUDGET 1970/71, at 26-27 (emphasis added).

157. O. Palme, Emanicipation of Man 10 (mimeo, 1970) (an address delivered on June 8, 1970 by Olaf Palme, Swedish Prime Minister).

penditure[158] and thus effectively subsidizes actual cost. Swedish tax law may thus be understood to do more than create a context in which a married woman is treated as neutrally as a single person; it attempts to establish work incentive for married wives and mothers.

The Swedish system, like the Canadian and English, is more capable than the American system of assessing economic units according to their ability to pay. Under the new law, unearned income is still aggregated and thus taxed at higher rates, effecting differentiation between married recipients of earned and unearned income. Assume total earned income of $8,000. An individual will incur a greater tax liability than a married sole earner who, although taxed at individual rates, will receive a special married earner's allowance if his wife does not work.[159] A two-earner couple each earning $4,000 will be individually taxed. Because of the steeply progressive nature of Swedish rates [160] and working wives' exemptions, the two-earner couple will incur the lowest tax liability.

## IV. General Considerations

### A. *Does Unfavorable Taxation of Working Wives Actually Create a Work Disincentive?*

The argument that unfavorable taxation of working wives is likely to create a work disincentive is not equivalent to the assertion that taxation does, in fact, deter wives from seeking gainful employment. Commentators often conclude that taxation of working wives, while inequitable, does not deter them from working.[161] Reference to the increased proportion of married women in

158. Sweden has a highly developed day care program heavily supported by national and local government funds. Parents thus pay only part of the actual cost of day care. UHR, *supra* note 148, at 15.

159. *See* SWEDISH MINISTRY OF FINANCE, THE SWEDISH BUDGET 1970/71, at 27.

160. Swedish tax rates are, of course, strong work disincentives. National and local income taxes together with old age pension fees consume over one-half an individual's gross income at Skr 11,450 ($2,865), and over one-third of a couple's gross income at Skr 10,000 ($2,502). TAXES IN SWEDEN, *supra* note 148, at 41. But neutral taxation, no matter how heavy, is not subject to the objection that it works a special disincentive for any one class.

161. *E.g.,* R. GOODE, THE INDIVIDUAL INCOME TAX, 80-81 (1964); *Contra,* WHITE PAPER ON TAX REFORM, *supra* note 127, at § 2.9.

the labor force would seem to support their position.[162] The statistics do not show, however, what the rate of increase might have been in a more neutral tax context.

Commentators gather further support from British and American research which indicates that factors other than money play the most important role in work motivation.[163] Studies involving the work motivation of male professionals and executives[164] are frequently cited. Such research should probably not be used to measure the effect of tax disincentive on wives.

Firstly, male executives are likely to work for different reasons or, more precisely, to feel comfortable articulating certain non-monetary motivations. A male executive or professional says that he likes the power, prestige or sense of indentity that he obtains from work.[165] While the same factors may motivate a wife to work, she generally does not feel comfortable expressing them. A desire for power and prestige is unfeminine. She is supposed to find her identity at home and she is expected to enjoy staying at home. She says, therefore, that she works primarily to supplement family income. If she is not substantially adding to family income, she ought not, by her own articulated criterion, be working. Any wife contemplating work or actually working will compare her disposable income (after taxation without exemptions at her husband's marginal rate) with the additional expenses incurred because of her daily departure from the home. If the difference is not great (and under our present system

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162. R. GOODE, *supra* note 161, at 80-81.

163. C. HALL, EFFECTS OF TAXATION: EXECUTIVE COMPENSATION AND RETIREMENT PLANS (1951); C. LONG, THE LABOR FORCE UNDER CHANGING INCOME AND EMPLOYMENT (1958); T. SANDERS, THE EFFECTS OF TAXATION ON EXECUTIVES (1951); Break, *Income Taxes and Incentive to Work: An Empirical Study,* 47 AM. ECON. REV. 530 (1957).

164. HALL; SANDERS; Break, *supra* note 163.

165. George Break in his article, *Income Tax and Incentives to Work: An Empirical Study, supra* note 163, studied male self-employed English solicitors and accountants to determine whether a high marginal tax rate influenced their decision to assume additional work. The author determined that the most important incentive factors were: attractiveness of the work itself; ambition to make a professional reputation; and rejection of the concept of idleness. He concluded

> that contrary to the frequently repeated injunctions of so many financial commentators, solicitude for the state of work incentives does not under current conditions justify significant reductions in the role of progressive income taxation. Indeed, it would appear that, in the United States at least, income tax rates could be raised considerably, especially in the middle and upper-middle income ranges, without lowering unduly the aggregate supply of labor.

Break, *supra* note 163, at 549.

of taxation and prevalent pattern of wage discrimination, it is not likely to be), the wife may well stop working regardless of the unarticulated non-monetary benefits that she and her family derive from her work.

Secondly, the male executive is the primary family earner. He and his family expect him to be employed. Even if he can choose between early retirement and continued employment, he is likely to opt for a continuation of his life pattern.[166] Unlike the wife, he has no reentry problem. Between his first job and his final retirement, it is unlikely that a male will ever consider the possibility of not working. His wife's initial employment is likely, however, to have been terminated by marriage or child-bearing. Her reentry into the labor market is generally the result of a considered and often discretionary choice.

Thirdly, the studies involved general tax increases. The larger resultant tax burden did not imply any societal judgments regarding the desirability of the taxpayer's gainful employment. But the disincentive provisions not only reflect national policy; they also express it normatively. The married woman who is instructed to claim "0" exemptions, informed that child care expenses are disallowed because her family is not poor, and taxed at her husband's marginal rate is effectively told that her proper place is the home.

### B. *The Proper Role of Social and Economic Policy*

Although consideration will be given to the furtherance of social and economic policies through taxation, threshold inquiry must be made into the propriety of effectuating national policy by work disincentives directed at one class of citizens. If the right to work is understood as a fundamental individual right, every individual should be afforded a neutral context in which to make a decision about work. Consider the comments of Oldman and Temple:

> Several irrational factors have influenced the development of various tax systems. . . .
>
> Those who oppose taxation of the married couple as a unit often assert that the system is based upon unjust and outmoded concepts of the legal incapacity of the married woman. Certainly

166. *See* HALL, *supra* note 163.

> such concepts should not serve as a basis for designing tax law. From a more understandable view, a country may feel that it is socially desirable for wives to tend house and children and thus to strengthen the home or family as a social unit. Even so, this behavior should be a matter of personal choice and not the result of compulsion by taxation. There may be social policies which should be implemented by a government through its tax system, or by other quasi-compulsory devices, but decisions as to marriage and children should be left to the widest range of individual choice that is consonant with the mores and with the economic and sociological needs of a given society.[167] . . . While the working wife, like other taxpayers, must bear the disincentive effect always characteristic of progressive income taxation, a deliberate design to discourage her from earning money would be discriminatory and unjust.[168]

Provisions which designedly or effectively create work disincentive must be distinguished from incentive provisions, for example, the Swedish and English wives' earned income exemptions. The latter do not deter a wife from choosing not to work while the former effectively deter a decision to work. Incentive provisions do, of course, tend to redistribute a portion of the tax burden on the entire population thereby increasing a general but constitutionally permissible work disincentive, while disincentive provisions affect one class of citizens, an arguable violation of the equal protection guarantee.[169] We should, therefore, embark on a discussion of policy considerations with the reservation that the discussion may be entirely improper, that is, that such work disincentives are per se impermissible.[170]

### C. *National Economic Policy and the Taxation of Working Wives*

Our examination of national income taxation in Canada, England and Sweden shows that the American system has inequitably and insensitively treated working wives. It should be frankly acknowledged, however, that Canada, England and Sweden want to encourage married women to enter the labor market. Each country has a labor shortage and has determined that favorable economic growth requires maximum citizen participation in the

167. The authors later restrict this exception to instances of strict societal necessity, for example, compulsory birth control.

168. Oldman & Temple, *supra* note 135, at 601-02.

169. *See* text following *supra* notes 100, 104 & 105.

170. *Id.*

work force.[171] The United States, on the other hand, does not have any general labor shortage and has chosen to maintain a relatively high unemployment rate as an anti-inflationary measure. While a comprehensive study of economic policy is beyond the scope of this paper and the competence of the author, a few observations should be made.

The desirability of new labor force entrants appears to be determined by the manner in which entry is characterized. One American tax policy writer rejects a return to pre-1948 individual taxation because it would encourage wives and mothers to work. Their return to work would, he argues, displace employed persons and create greater unemployment.[172] If each wife who elects to work is understood to replace an employed person, his conclusion is correct. The work force is not, however, limited to a fixed number of participants. An employed wife uses her disposable income to purchase goods and services, thus creating job opportunities for other workers. Increased labor force participation and increased disposable income would seem to foster national economic growth.

While unemployment is a problem in certain economic sectors, many American wives are trained in areas plagued by labor shortages, for example, nursing,[173] social work and secretarial services. Their entry into the labor force would not displace any workers while disposition of their income would stimulate growth in other areas. This is not to suggest that tax disincentives should only be removed for wives working in understaffed occupations. Rather, the displacement effect of increased entry of wives into the labor market should not be assumed in the absence of any detailed projection of wives' occupational destinations.

D. *National Social Policy and the Taxation of Working Wives*

The national social policy reflected in disincentive provisions is simply expressed: a married woman ought to stay at home

171. 2 REPORT OF ROYAL COMMISSION ON TAXATION 122-27 (Canada, 1966); JEBS, *supra* note 135; THE SWEDISH BUDGET 1970/71, *supra* note 148, at 17, 21, 26; UHR, *supra* note 148, at 15.

172. Brenner, *An Inquiry into the Possibility of Lowering the Tax Rates by Increasing the Tax Base through Elimination of Income Splitting*, in COMPENDIUM OF PAPERS, *supra* note 46, at 487.

173. *See* S. 1870 (McCarthy), 90th Cong. 2d Sess., allowing a maximum deduction of $2,600 or one-half of earned income, whichever is less, for expenses incurred for child care and housekeeping. This provision would have covered nurses only. REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES, *supra* note 107, at 123 (1968).

unless her family is virtually destitute, that is, in danger of becoming or presently a public charge. The apparent basis for this policy is the belief that the family is better off, that is, more stable or cohesive, and, perhaps, that the wife also benefits from enforced domesticity.

Definitions of the proper role of wives and mothers have fluctuated from pole to pole in the last half century. Remarkably, their course has followed the fluctuations and needs of the national economy. Working mothers and day care were highly praised during World War II;[174] in the recessionary fifties the mother's place was in the home, reproducing and consuming. While the attitude of the fifties is slowly receding, the home is still widely thought to be the proper place for middle class mothers.[175]

On the other hand, welfare mothers, who are generally understood to be a burden on the economy, are seriously told that they are better off, financial considerations aside, if they go out to work and leave their children in day care centers. Politicians, social workers and government economists advise each other and welfare mothers that:

> [W]e are becoming a bit more realistic, as many mothers are, in recognizing that there may be situations in which it is *better* for the mother to work.[176]

While the negative inference is that there may also be situations in which it is better for the mother to stay at home, a welfare mother is now required to work unless suitable day care is not available.[177]

WIN (Work Incentive Program) is, of course, directed to the poor, and fiscal rather than social considerations may have played an important part in the formulation of the program. Furthermore, the government's failure to fund day care centers has effectively precluded any implementation of the WIN program. Nevertheless, the government policy is now that dependent

174. In 1944 and 1945 the United States even allowed working wives a credit of up to $15 against normal taxes. J. PECHMAN, FEDERAL TAX POLICY 89 (1966).

175. C. BIRD, BORN FEMALE 32-37, 205 (1968).

176. New York State Administrative Letter 68 (PW D-65, Nov. 4, 1968) (emphasis added). A welfare mother *must* work unless her "presence in the home is required because adequate child-care services are not furnished." 33 Fed. Reg. 10026 (1968) (emphasis added).

177. 33 Fed. Reg. 10026 (1968).

children benefit more from having a gainfully employed mother, assuming adequate day care, than from full-time motherly care in the home combined with State paternalism in the form of welfare payments. Since in many cases welfare payments will necessarily be continued, albeit in lesser amounts, the chief value to the family is not freedom from state support but rather the presence of an employed mother with the dignity and sense of self-worth that gainful employment fosters.

The working father, like the paternalistic state, supports, although more adequately, the dependent housewife. If children on A.F.D.C. are likely to benefit from the dignity their mother derives from gainful employment, there is no reason to believe that middle class children, particularly girl children, would not also benefit from a gainfully employed mother. In any case, having determined that it is better for the A.F.D.C. mother to work, the Government should not be heard to say that the non-welfare mother's place is in the home.

Students of family life and social organization have not reached any firm consensus on the proper place of wives and mothers. Children and the family unit do not appear to suffer (indeed, they often benefit) in nations which encourage women to work and provide their children with competent day care.[178] Thus, the needs of the family and dependent children do not dictate a policy of encouraging wives to stay at home.

The balance should be tipped in favor of abandoning tax disincentives by an important factor that most (male) American commentators never take into account.[179] They discuss the needs of children, the family and the economy but they never consider the needs of the wife as an individual. Yet they would probably be horrified at the suggestion that men be taxed into guarding the hearth unless employment is absolutely necessary for family subsistence. People, women included, get a sense of themselves from the productive work that they do. Productive, in our culture, largely means "gainful." Housework is not only redun-

178. *E.g.*, Israel, U.S.S.R. and Sweden. *See generally* B. BETTELHEIM, THE CHILDREN OF THE DREAM: COMMUNAL CHILD RAISING AND AMERICAN EDUCATION (1969) (comparing child rearing practices in Israel); R. COX, MARRIAGE AND THE FAMILY, THE ROLE AND STATUS OF WOMEN IN THE SOVIET UNION (1968); O. Palme, Emancipation of Man 3, 8, 13 (mimeo, 1970) (an address delivered on June 8, 1970, by Olaf Palme, Swedish Prime Minister).

179. *E.g.*, Brenner, *supra* note 172; SMITH, *supra* note 100.

dant and stultifying. It also lacks the financial reward by which we measure achievement and independence. Consider Simone de Beauvoir's thesis that a mother's gainful employment is necessary for her own well being and the welfare of her children.

> [W]oman's inferiority originated in her being at first limited to repeating life, whereas man invented reasons for living more essential, in his eyes, than the not-willed routine of mere existence; to restrict woman to maternity would be to perpetuate this situation. She demands today to have a part in that mode of activity in which humanity tries continually to find justification through transcendence, through movement toward new goals and accomplishments; she cannot consent to bring forth life unless life has meaning; she cannot be a mother without endeavoring to play a role in the economic, political and social life of the times. . . . [T]he woman who works—farmer, chemist, or writer—is the one who undergoes pregnancy most easily because she is not absorbed in her own person; the woman who enjoys the richest individual life will have the most to give her children and will demand the least from them; she who acquires in effort and struggle a sense of true human values will be best able to bring them up properly.[180]

## V. CONCLUSION AND RECOMMENDATIONS

The pattern of work disincentive embodied in the Internal Revenue Code is entirely inconsistent with the principle of sexual equality enunciated in title VII[181] and further expanded by the federal and state judiciaries.[182] The aggregation of spousal income should be abandoned in favor of individual taxation for all wage earners; the section 214 income limitation for working couples should be abolished; and an earned income allowance for secondary family earners should be enacted.

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180. S. DE BEAUVOIR, THE SECOND SEX 495 (H. M. Parshley transl. & ed. 1949).

181. Pub. L. No. 88-352, § 701, 78 Stat. 253, *codified at* 42 U.S.C. § 2000e-2 (1965). *See also* The Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, *codified at* 29 U.S.C. § 206 (d) (1964).

182. Mengelkoch v. Industrial Welfare Comm'n, Civil No. 23, 997 (9th Cir., filed Jan. 11, 1971 and amended May 3, 1971); Schultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied,* 398 U.S. 905 (1970); Schultz v. First Victoria Nat'l Bank, 420 F.2d 648 (5th Cir. 1969); Seidenberg v. McSorley's Old Ale House, Inc., 317 F. Supp. 593 (S.D.N.Y. 1970); Kirstein v. Rector, 309 F. Supp. 184 (E.D. Va. 1970); *In re* Estate of Legatos, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969); Patterson Tavern & Grill Owners Ass'n v. Hawthorn, 57 N.J. 180, 270 A.2d 628 (1970).

# APPENDIX

## PROPOSED REVISION OF SECTION 214

Section 214. Expenses for Care of Certain Dependents

[Sec. 214 (a)]

(a) General Rule—There shall be allowed as a deduction expenses paid during the taxable year by a taxpayer[183] for the care of one or more dependents but only if such care is for the purpose of enabling the taxpayer to be gainfully employed.

[Sec. 214 (b)]

(b) Limitations

(1) Dollar Limit—The deduction under subsection (a) shall not exceed $600 for each dependent for any taxable year.[184]

(2) Married couples in which one spouse is not employed—The deduction under subsection (a) shall not be allowed unless the unemployed spouse is incapacitated, institutionalized or a student.[185]

[Sec. 214 (c) repealed]

[Sec. 214 (d)]

183. This is to eliminate the unwarranted exclusion from eligibility of men who have never been married. *See* Moritz v. Commissioner, 55 T.C. 113 (1970), *appeal pending*, Civil No. 71-1127 (10th Cir. 1971).

184. Since organized day care is considered the most desirable form of care for children, the current maximum deduction of $900 for two or more children bears no rational relationship to the current maximum of $600 for one dependent, that is, day care centers do not provide drastically reduced rates for second and third children. The $600 maximum may also be unrealistically low.

185. Income limitation for married couples repealed. There is no rational basis for applying an income limitation to married couples when dependent care is necessary for the pursuit of gainful employment while simultaneously applying no income limitation to single, divorced and separated taxpayers.

(d) Definitions—For purposes of this section—

(1) "Dependent" means a spouse[186] or a person with respect to whom the taxpayer is entitled to an exemption under 151 (e) (1):

(A) who has not attained the age of 13[187] or

(B) who is physically or mentally incapable of caring for himself.

(2) "Widower" [repealed].

(3) "Incapacitated spouse"—A spouse shall be considered incapacitated if he is mentally or physically incapable of caring for dependents.[188]

(4) "Institutionalized spouse"—A spouse shall be considered institutionalized when he is, for the purpose of receiving medical or correctional treatment, an inpatient, resident or inmate of a public or private hospital, sanitarium or similar institution; or an inmate of a correctional, penal or similar institution.[189]

(5) A "student"

(A) is a full time student at an educational institution; or

(B) is pursuing a full time course of vocational training under the supervision of an accredited agent of an educational institution or of the federal government, a State or political subdivision of the State.

For the purposes of this paragraph, the term "educational institution" means only an educational institution

186. Under current law on incapacitated spouse residing in taxpayer's home does not entitle taxpayer to a deduction for the cost of dependent care necessary to enable him to work. *See* INT. REV. CODE of 1954, § 151 (e) (2); Treas. Reg. § 1.214-1 (d) (2) (iv).

187. Omission of "son, stepson, daughter or stepdaughter of taxpayer" clarifies rather than alters the provision since the Treasury Department takes the position that any person under the age of 13 is mentally or physically unable to care for himself. Thus (B) subsumes (A) and "deduction paid for the care of a dependent under the age of 13 is allowable even though the dependent is not a child or stepchild of the taxpayer." Treas. Reg. § 1.214-1 (d) (2) (ii).

188. The word "dependents" is inserted to replace the word "himself."

189. Shouldn't the employed spouse of an incarcerated person also be eligible for dependents' care deductions? The provision might also be extended to cover dependents' care expenses incurred by any taxpayer whose spouse is unemployed but is absent from the home.

which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on.

(6) For purposes of this section, persons are not "married" if

(A) one spouse has secured a decree of divorce or separate maintenance at the close of the taxable year, or

(B) one spouse has been deserted by the other.