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# Eliminating the Secondary Earner Bias: Lessons from Malaysia, the United Kingdom, and Ireland

Tonya Major Gauff\*

## I. INTRODUCTION

¶1 Many working married women are unfairly burdened by the implicit gender bias in the United States Internal Revenue Code (IRC). According to Professor Edward McCaffery, the best financial advice for women today is “Don’t marry. Don’t have kids. Don’t work.”<sup>1</sup> How married women are taxed undoubtedly affects their decisions to work after getting married, to have children, and to continue working after having children. Married women face these questions primarily because of the secondary earner bias—a bias that emerges in the tax rules that govern married couples. Due to this bias, some married working women, as secondary earners,<sup>2</sup> are subject to high marginal income taxes because of the way their income is treated when filing jointly with their husbands. In fact, the average working married woman loses over two-thirds of her pay to income taxes.<sup>3</sup>

¶2 However, many other countries around the world do not tax secondary earners at such surprisingly high rates. For example, in the last two decades, Malaysia, the United Kingdom, and Ireland have implemented extensive tax reforms concerning the treatment of working married women. This Comment undertakes an international and comparative analysis of how these foreign tax systems treat working married women. Through analyzing these tax reforms and highlighting their most progressive measures, this Comment shows that the secondary earner bias within the U.S. tax code produces a discriminatory effect in need of correction.

¶3 In Part II, this Comment commences with an examination of the history and implementation of the married filing jointly designation in the United States that led to

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<sup>1</sup> EDWARD J. MCCAFFERY, *TAXING WOMEN: HOW THE MARRIAGE PENALTY AFFECTS YOUR TAXES* 29–57 (Univ. of Chicago Press 1997) (1999) (McCaffery offers this advice in a joking manner but with the intent of showing how women are greatly affected by the tax code); see also Kim Tso, *Work, Motherhood and Taxes*, MOTHERSANDMORE.ORG, Mar./Apr. 2004, <http://www.mothersandmore.org/Forum/Tso-TaxingMothersFORUM.pdf>.

<sup>2</sup> Women are customarily deemed secondary earners because they earn less than their husbands. MCCAFFERY, *supra* note 1, at 21. Additionally, often the lower earner is the least committed to the workforce (e.g., because of leaving the workforce to have children) and thus can be viewed as the secondary earner. See generally Kristin Maschka, *Tax Law Pushes ‘Secondary Earners’ to Drop Out*, WOMEN’S ENEWS, Apr. 12, 2006, <http://www.womensenews.org/article.cfm/dyn/aid/2703>.

<sup>3</sup> MCCAFFERY, *supra* note 1, at 21.

the creation of the secondary earner bias. It includes an analysis of the common instances of this bias in the IRC and the insufficiency of prior amendments by Congress to eliminate its effects on married couples. This Comment shows that the legislative attempts to alleviate this secondary earner bias have not been sufficient, and hence, we should look outside the United States for solutions, specifically to Malaysia, the United Kingdom, and Ireland. Part III surveys the history of the treatment of working married women in the tax systems of Malaysia, the United Kingdom, and Ireland and then considers the tax reforms responsible for the more favorable treatment that working married women receive in these countries. In Part IV, this Comment proposes that the United States incorporate the tax reforms of Malaysia, the United Kingdom, and Ireland into the IRC. This proposal includes a separate assessment filing designation for married couples whereby married women have the option of filing separately from their husbands and being taxed according to the IRC's joint filing tax rates with applicable transferable credits between the spouses.

## II. HISTORY OF THE TAXATION OF MARRIED WOMEN IN THE UNITED STATES

The IRC currently offers five different filing options:<sup>4</sup> single, married filing jointly, married filing separately, head of household, and qualifying widower with a dependent child.<sup>5</sup> While the specific tax rates associated with each filing status differ, all are progressive; in other words, a taxpayer's marginal rate increases with her income.<sup>6</sup> Aside

<sup>4</sup> See I.R.C. § 1 (2008).

<sup>5</sup> Included is a table briefly explaining the different filing status options. For further explanation, see I.R.S., EXEMPTIONS, STANDARD DEDUCTION, AND FILING INFORMATION, I.R.S. Pub. No. 501, at 6 (Dec. 11, 2008), available at <http://www.irs.gov/pub/irs-pdf/p501.pdf>.

Filing Status	Qualifications
Single	On the last day of the tax year, taxpayer is not married or legally separated from spouse and do not qualify for another filing status.
Married Filing Jointly	On the last day of the tax year, couple is legally married and chooses to file jointly.
Married Filing Separately	Couple is legally married and chooses to file separately.
Head of Household	Taxpayer is not married and paid for cost of maintaining a home for himself and a relative/dependent, who lived with him for over half of the year.
Qualifying Widower with dependent child	Surviving spouse of deceased spouse that died within the last two taxable years and surviving spouse maintained the principal home for qualifying dependents and has not remarried.

<sup>6</sup> The table below portrays the 2009 progressive tax rate schedules for each filing status. Note that married filing jointly and qualifying widower with dependent child share the same schedule. See I.R.C. §1(d), amendment in Rev. Proc. 08-66, 2008-45 I.R.B. 1107, tbls.1-5 (Nov. 10, 2008), available at [http://www.irs.gov/irb/2008-45\\_IRB/ar14.html](http://www.irs.gov/irb/2008-45_IRB/ar14.html).

from a few minor exceptions, married couples must choose either to file jointly or separately.<sup>7</sup> Due to a series of special rules associated with tax credits and exemptions, married couples who file jointly are likely to incur a lower tax burden than similarly situated couples filing two separate returns under the “married filing separately” option.<sup>8</sup> For this reason, 96% of married couples file one joint return.<sup>9</sup> Accordingly, to understand

Filing Status	Tax Rate Schedule
Single	<p>10% on the income between \$0 and \$8350</p> <p>15% on the income between \$8350 and \$33,950; plus \$835</p> <p>25% on the income between \$33,950 and \$82,250; plus \$4,675</p> <p>28% on the income between \$82,250 and \$171,550; plus \$16,750</p> <p>33% on the income between \$171,550 and \$372,950; plus \$41,754</p> <p>35% on the income over \$372,950; plus \$108,216</p>
Married Filing Jointly or Qualifying Widower with dependent child	<p>10% on the income between \$0 and \$16,700</p> <p>15% on the income between \$16,700 and \$67,900; plus \$1,670</p> <p>25% on the income between \$67,900 and \$137,050; plus \$9,350</p> <p>28% on the income between \$137,050 and \$208,850; plus \$26,637.50</p> <p>33% on the income between \$208,850 and \$372,950; plus \$46,741.50</p> <p>35% on the income over \$372,950; plus \$100,894.50</p>
Married Filing Separately	<p>10% on the income between \$0 and \$8350</p> <p>15% on the income between \$8350 and \$33,950; plus \$835</p> <p>25% on the income between \$33,950 and \$68,525; plus \$4,675</p> <p>28% on the income between \$68,525 and \$104,425; plus \$13,318.75</p> <p>33% on the income between \$104,425 and \$186,475; plus \$23,370.75</p> <p>35% on the income over \$186,475; plus \$50,447.25</p>
Head of Household	<p>10% on the income between \$0 and \$11,950</p> <p>15% on the income between \$11,950 and \$45,500; plus \$1,195</p> <p>25% on the income between \$45,500 and \$117,450; plus \$6,227.50</p> <p>28% on the income between \$117,450 and \$190,200; plus \$24,215</p> <p>33% on the income between \$190,200 and \$372,950; plus \$44,585</p> <p>35% on the income over \$372,950; plus \$104,892.50</p>

<sup>7</sup> I.R.S. Pub. No. 501, *supra* note 5, at 6.

<sup>8</sup> *Id.* at 6–7.

<sup>9</sup> I.R.S., SOURCES OF INCOME TAX STATISTICS - INDIVIDUAL INCOME TAX RETURNS, I.R.S. Pub. No. 1304, at tbl.1.2 (All Returns: Adjusted Gross Income, Exemptions, Deductions, and Tax Items), available at <http://www.irs.gov/taxstats/indtaxstats/article/0,,id=134951,00.html>. See also *infra* notes 72–74.

the effects of the current tax rules on married women, this Comment focuses primarily on those who select the “married filing jointly” option and only briefly notes the tax consequences of couples who choose to file separately.

¶15 Before examining the discriminatory effects on the secondary earner under joint filing, it is crucial to first analyze the legislative history of the married filing jointly designation in order to understand where the discriminatory effects on working married women as secondary earners originate. Discussion of the legislative history will show that Congress influenced married couples to file jointly to appease both the economic conditions and social norms of the time.

#### A. *From Independent to Joint Filing*

¶16 The federal government obtained the power to impose an income tax with the ratification of the Sixteenth Amendment in 1913.<sup>10</sup> Initially, regardless of marital status, all taxpayers were taxed as individuals. In the words of Boris Bittker, “[t]ax legislation enacted by Congress was dominated by an individualistic approach at the outset.”<sup>11</sup> Between 1913 and 1948, an identical tax rate schedule governed both married and single individuals.<sup>12</sup> Following the social norms at the time, most husbands worked while their wives remained in the home.<sup>13</sup> As such, the husband’s income was customarily the only income.

¶17 Because of individualized taxation, married couples, primarily wealthy ones,<sup>14</sup> explored avenues to reduce their tax liability. One popular method was income splitting,<sup>15</sup> or the dividing of income between each spouse. To understand why this approach was economically rational, reconsider the progressive tax rates. Unlike a system of flat taxes, which imposes a single rate on every dollar earned, a progressive tax system imposes a higher marginal tax rate on higher levels of income. This means that the first dollars of income are subject to the lowest rates, but as income goes up, so do the rates. In the 1930s, for example, Congress imposed a 0% rate on income between \$0 and \$20,000, but a 40% rate on income over \$70,000.<sup>16</sup> Couples desired to shift income between one another to avail themselves of the tax code’s lower rates and thereby decrease their overall tax burden.

¶18 These tax avoidance schemes were, of course, challenged in federal court. In 1930, the Supreme Court decided two landmark cases addressing the issue. In *Lucas v. Earl*,<sup>17</sup> the Court held that a husband could not shift his earned income to his wife in a *common*

<sup>10</sup> U.S. CONST. amend. XVI.

<sup>11</sup> Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1400 (1975).

<sup>12</sup> MCCAFFERY, *supra* note 1, at 16, 30–32. See also Bittker, *supra* note 11.

<sup>13</sup> MCCAFFERY, *supra* note 1, at 31, 33 (“In 1939, somewhere between 80% and 90% of all income taxes were paid by men or male-dominated households” and “[a]s late as 1940, only 12–15% of wives appeared to be working outside of the home at all, and less than 10% of married mothers worked . . . . A 1936 Gallup poll revealed that 82% of all respondents and even 75% of the females polled, thought that a woman with an employed husband should not work outside the home.”).

<sup>14</sup> *Id.* at 47–48 (“Income splitting was still largely a rich family’s issue in the 1940’s, even after the expansion of the income tax during World War II.”).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 31 tbl.5.

<sup>17</sup> 281 U.S. 111, 113–15 (1930).

law separate property jurisdiction.<sup>18</sup> The Court, however, modified the scope of this rule in *Poe v. Seaborn*,<sup>19</sup> which held that in a *community property* state,<sup>20</sup> shifting was justified given that half the husband's earned income belonged to the wife under state law.<sup>21</sup> However, according to McCaffery, the Supreme Court allowed income splitting in community property states, not under the notion of equality for married women, but rather to validate the authority of the husband.<sup>22</sup> Justice Roberts, writing for the Court, stated, "[public] policy dictates that third parties who deal with the husband respecting community property shall be assured that the wife shall not be permitted to nullify his transactions."<sup>23</sup>

¶19 After *Poe*, while many states retained their preexisting laws,<sup>24</sup> a number of common law states enacted statutes allowing couples to shift income and marital property, influencing "husbands in separate property states [to] attempt self-help income splitting, through both gifts of property and by making their wives business partners."<sup>25</sup> This led to asymmetrical tax treatment of economically identical couples across the nation and confusion in the courts.<sup>26</sup> Accordingly, Congress reacted.<sup>27</sup>

¶10 In 1948, Congress created joint filing for married couples.<sup>28</sup> Instead of the individual filing system, married couples could now file joint returns and be treated as a

<sup>18</sup> In a separate property state, income and property acquired by each spouse during the marriage is treated as separately owned by each spouse. See Bittker, *supra* note 11, at 1400.

<sup>19</sup> 282 U.S. 101, 101–16 (1930). Note that in this case the IRS's argument was that regardless of the type of state the couple resided in, community property or separate property, and regardless if the wife acquired the property on her own, the husband controlled the property. Thus, the husband cannot shift his income or property to his wife. See MCCAFFERY, *supra* note 1, at 40–42.

<sup>20</sup> In a community property state, each spouse is entitled to half of the other spouse's income and property acquired during the marriage. Bittker provides a detailed analysis of the differences between a community property state and a common law separate jurisdiction state. Bittker also discusses how married women were treated in each state during this time. See Bittker, *supra* note 11, at 1400.

<sup>21</sup> *Poe*, 282 U.S. at 101–16. The Supreme Court applied the rationale that a husband could not shift income or property to his wife to decrease his tax liability in a separate property state in *Hooper v. Tax Commission*. 284 U.S. 206, 215 (1931) ("[A]ny attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment.").

<sup>22</sup> See MCCAFFERY, *supra* note 1, at 41–42.

<sup>23</sup> *Poe*, 282 U.S. at 112.

<sup>24</sup> Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 345 (1994).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Revenue Act of 1948, I.R.S. Pub. L. No. 80-471, 62 Stat. 110 (1948). The IRS proposed that Congress enact mandatory joint filing in 1941, but the proposal was defeated. See Bittker, *supra* note 11, at 1408–10. For additional resources concerning the political debate surrounding the creation of the married filing jointly designation, specifically the heightened period of debate between 1913 and 1948, see, for example, *Revenue Revision, 1934: Hearing Before the H. Comm. on Ways & Means*, 73rd Cong. 111 (1933); *Revenue Revision, 1947: Hearing Before the H. Comm. on Ways & Means on Revenue Revisions*, 80th Cong. 890 (1947); ROSWELL MAGILL, *THE IMPACT OF FEDERAL TAXES* 44–72 (1943) (this book was written as the secondary earner provision was being debated and argued for an equity provision for the wife); Alice Kessler-Harris, *Taxing Women: Thoughts on a Gendered Economy: Symposium: A Historical Outlook: "A Principle of Law But Not of Justice: Men, Women and Income Taxes in the United States,"* 6 S. CAL. REV. L. & WOMEN'S STUD. 331, 343–60 (Spring 1997); Godfrey Nelson, *Problems Posed by Joint Returns*, N.Y. TIMES, July 20, 1941, at 5; Roscoe Pound, *Pound Scores Tax Plan*, N.Y. TIMES, July 4, 1941, at 12; *Women Plan to Fight Joint Tax Return: Miss Kenyon, Miss Donlan Direct Drive*, N.Y. TIMES, July 4, 1942, at 16 (noting that women's coalitions that opposed joint tax returns at the time included the National Negro Business and Professional Women's Club, General Federal of Women's Club, and National Association of Women Lawyers).

single economic unit for tax purposes. Initially, the IRC treated the income of the couple as split, allocated equally between the two spouses.<sup>29</sup> Congress stated that the married filing jointly designation was created to answer the income splitting confusion that was occurring in various states and to reduce taxes for married couples:

Adoption of these income-splitting provisions will produce substantial geographical equalization in the impact of the tax on individual incomes. The impetuous enactment of community-property legislation by States that have long used the common law will be forestalled. The incentive for married couples in common-law States to attempt the reduction of their taxes by the division of their income through such devices as trusts, joint tenancies, and family partnerships will be reduced materially. Administrative difficulties stemming from the use of such devices will be diminished, and there will be less need for meticulous legislation on the income-tax treatment of trusts and family partnerships.<sup>30</sup>

Congress assumed that the new joint filing rules would reduce the tax burden on families because, ultimately, only the husband would be taxed.<sup>31</sup> As previously mentioned, “income from a high income, high marginal rate husband, [could be shifted] to a low income, low marginal rate wife (until enough income had been shifted to put both spouses in the same tax bracket).”<sup>32</sup> Thus, even if the wife did work, if her income was less than her husband’s income, the couple could still benefit from joint filing.

¶11

Nevertheless, Congress’ purported reasons for creating the married filing jointly option do not cohere with the evidence available at the time. Research conducted for discussion of the legislation in the congressional record stated that by 1947 “only about one in ten families would benefit from joint filing; statements before the Ways and Means Committee put the figure at 5%.”<sup>33</sup> Most married couples at the time were not sufficiently wealthy to benefit from income splitting, because most married couples earned less than \$40,000.<sup>34</sup> Congress actually was enacting policy that primarily favored wealthy, married men. The legal and social norms at the time placed married women at a subordinate level to their husbands. Justice Roberts’ reasoning in *Poe*<sup>35</sup> and the fact that 99% of the members of Congress in 1948 were men<sup>36</sup> indicate that married women—even women in general—were not well situated to create or influence the preparation of new laws.<sup>37</sup> Although no congressman or senator explicitly stated this at the time, “the common pattern . . . is for Congress not to mention less noble reasons for change.”<sup>38</sup>

<sup>29</sup> MCCAFFERY, *supra* note 1, at 54.

<sup>30</sup> S. REP. NO. 1013, 80th Cong., 2d Sess. 25 (1948).

<sup>31</sup> Maschka, *supra* note 2.

<sup>32</sup> Zelenak, *supra* note 24, at 344–45. As a result, control was often bestowed upon the economically dominant spouse in the relationship, which in many cases was the husband. *Id.*

<sup>33</sup> MCCAFFERY, *supra* note 1, at 48–49.

<sup>34</sup> *Id.* at 47–49. In 1948, couples earning less than \$40,000 were taxed in the lowest income tax bracket.

<sup>35</sup> 282 U.S. 101, 112 (1930).

<sup>36</sup> MCCAFFERY, *supra* note 1, at 57.

<sup>37</sup> Not all members of Congress disregarded married women’s contributions to their family. In response to New York Representative Frank Crowther’s statement that it was inequitable for the husband to income split with his wife when he solely earned the income, Texas Senator Tom Connally argued “[t]hat is not true. I don’t care whether the Treasurer says it or who said it, it is not true, and as to that under our law it is

¶12 Another crucial factor behind the creation of the married filing jointly designation was to maintain the wife's place as a homemaker and not necessarily a worker. After World War II, Congress wanted women to relinquish their jobs so those jobs could be filled by soldiers returning home.<sup>39</sup> In fact, the author of the joint filing plan, Stanley Surrey, wrote in 1948 that "wives need not continue to master the details of the retail drug business, electrical equipment business, or construction business, but may return from their partnership 'duties' to the pursuit of homemaking."<sup>40</sup> McCaffery notes that "[t]here was much hope, or rather much assuming, that the end of the war would mean a return to normalcy in another sense: married women, especially mothers, would leave the workforce they had entered during the war as part of the wartime production effort, and go back home."<sup>41</sup> Once again, Congress' rationale was that only the husband's income would be taxed because the wife would remain in or return to the home. The husband could then reduce the couple's taxes by shifting income to the lower tax bracket of his non-working wife.

¶13 The ultimate consequence, though, of the implementation of the married filing jointly designation was the creation of the secondary earner bias.

#### B. Married Women and the Secondary Earner Bias

¶14 "[N]o one saw the secondary-earner bias because there were so few secondary earners [in 1948] . . . no one paid any significant attention to working wives."<sup>42</sup> The joint filing rules emerged in 1948 at a time when most married women worked at home; since that time, however, an increasing number of married women have moved into the labor force, and for this reason, they are subject to a possible secondary earner bias.<sup>43</sup> To understand the secondary earner bias, it is important to understand both the nature of the law and the reality of married women's market choices. First, recall that the law treats married couples as a single economic unit and imposes progressive tax rates on both

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not all earned by the husband; it is joint earnings of the wife who stays at home, raises the children and helps economize in the kitchen; she is contributing just as much to the success of the husband as the husband is. It is not true that the husband earns it all and I am sure Dr. Crowther will not go home tonight and contend that to Mrs. Crowther." *Revenue Revision, 1934: Hearing Before the H. Comm. on Ways & Means*, 73rd Cong. 111 (1933).

<sup>38</sup> Zelenak, *supra* note 24, at 346.

<sup>39</sup> Tso, *supra* note 1. Congress had statistics indicating that women were leaving the workforce as the war was coming to an end and soldiers were returning home. See, e.g., MCCAFFERY, *supra* note 1, at 51 ("The participation rate for women in the labor force [during the war] rose from 27.9% in 1940 to 35.8% in 1945, but then dipped back down to 31.5% by 1947; the numbers for married women alone were far lower, and for married mothers lower still.")

<sup>40</sup> MCCAFFERY, *supra* note 1, at 57.

<sup>41</sup> *Id.* at 51.

<sup>42</sup> *Id.* at 58.

<sup>43</sup> Mary E. Becker, *Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel and Lazear*, 53 U. CHI. L. REV. 934, 948 (1986) ("Girls are socialized to serve others, to be interested in women's jobs, to be primarily responsible for child care, and to regard their roles as wage earners as secondary to their other material responsibilities."); Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 474 (1990) ("The [unemployment] system historically excluded women because of their different pattern of labor force participation and because it viewed women's income as secondary."); Stephanie Hoffer, *Adopting the Family Taxable Unit*, 76 U. CIN. L. REV. 55, 88 (2007) ("Secondary earner bias is a characteristic that the family taxable unit unfortunately shares with joint filing . . .").



individuals' combined income. The law effectively requires "stacking"<sup>44</sup> one spouse's income atop the other for purposes of determining the total tax burden.<sup>45</sup>

¶15 The income of the spouse that is stacked at the higher level is taxed at higher tax rates.<sup>46</sup> Due to the benefit of income splitting under a progressive tax rate schedule, a couple's tax liability can potentially be decreased through shifting income from the higher earning spouse to the lower income spouse's tax bracket. For a couple to fully realize the benefit of income splitting, the IRC makes it more favorable for the higher income to be placed at the bottom and the lower income to be stacked at the top. In other words, couples implicitly decide which spouse's income is primary and which spouse's income is secondary for tax purposes. By placing the higher income in the lower level, the higher income can be shifted to the lower tax brackets and thus decrease income taxes.

¶16 The higher income possibly loses the benefit of the income shift with the addition of the lower income. Once the shifted income exhausts the lower tax bracket limit, a couple is moved to the next higher tax bracket and higher taxes are due. On top of that, because of the income shift of the higher income to the lower tax brackets and the fact that the lower income is stacked above the higher income, the lower income amount is initially taxed in the next higher income tax bracket. Under the current law, a married man is guaranteed to incur a tax rate of 10% on the first dollar earned, but married women (if they indeed are secondary earners) must face a rate of 25, 28, 33, or 35%.<sup>47</sup> These rules have notable effects for married women at all income levels. "[S]econdary earners among the poor can face tax rates well in excess of 50%, sometimes even exceeding 100%,"<sup>48</sup> while middle- and upper-income married couples lose an average of 78% of the secondary earner's income.<sup>49</sup>

¶17 This leaves couples in the position of having to decide which spouse's earnings are primary and secondary<sup>50</sup> and whether the secondary earner's income is benefiting or penalizing the family financially. If women cannot get paid an amount sufficient to cover the costs associated with market labor (such as clothing, commuting, and child care costs), then they will be less likely to work outside the home.<sup>51</sup> Importantly, it is women's *after-tax* salary that must be considered.<sup>52</sup>

<sup>44</sup> Tso, *supra* note 1.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> For tax rates for married filing jointly, *see infra* note 59. *See also* Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2009 (1999) ("Single workers and married men face a marginal tax rate schedule that starts at zero and rises gradually as earnings rise, but wives, as secondary earners, face a marginal tax rate schedule that begins in the tax rate determined by their husband's earnings."). As a result, the wife, as the secondary earner, cannot take advantage of having her income taxed at zero tax or lower tax rates because her husband has already done so.

<sup>48</sup> Tso, *supra* note 1 (citing MCCAFFERY, *supra* note 1, at 21). What McCaffery is supposing is possible because of the loss of various welfare and social benefits for the poor.

<sup>49</sup> *Id.* at 21.

<sup>50</sup> Lora Cicconi, Comment, *Competing Goals Amidst the "Opt-Out" Revolution: An Examination of Gender-based Tax Reform in Light of New Data on Female Labor Supply*, 42 GONZ. L. REV. 257, 267 (2006–2007) ("Since joint filing pools two incomes and then applies the appropriate exemptions and tax rates to calculate a couple's tax liability number, it encourages couples to think in terms of a primary earner and a secondary earner.").

<sup>51</sup> *See infra* note 65.

<sup>52</sup> *See* Maschka, *supra* note 2.

¶18 In most marriages, secondary earners are women, not men.<sup>53</sup> This is because, for one, wives on average earn less than their husbands.<sup>54</sup> Second, many married women have children and decide to leave the workforce, temporarily or altogether, to become the primary caregivers in the home. Because husbands are frequently able to continue working despite changes in family size, they are often solidified as the primary earners and their wives as the secondary earners.<sup>55</sup> This nomenclature is in no way intended to be derogatory, but rather descriptive of modern family dynamics.<sup>56</sup> Thus, as married women enter the workplace initially or return after an absence, it is they who usually face the tax penalties associated with secondary earner status.<sup>57</sup>

1. Illustrating the Secondary Earner Bias with Three Hypothetical Taxpayers

¶19 This section examines three hypothetical married couples with different levels of income in order to illustrate when and how the secondary earner bias surfaces.<sup>58</sup> The first example involves a married couple in which only the husband works in the paid labor force; the second example involves a married couple in which both spouses earn the same level of market income; and the third involves a married couple in which both spouses earn income, but the husband earns more than his wife. In all three scenarios, because each couple ultimately pays the same amount of taxes, the focus can be on the economic disadvantages to the secondary earner in the family, if one spouse is so classified.

¶20 Example One: Consider a married couple in which only the husband works, earning an annual income of \$80,000. Under the current code provisions, the couple will owe income taxes of \$12,375.<sup>59</sup> Utilizing a progressive tax rate schedule, the IRC breaks down the \$80,000 into tax brackets or levels based on the amount of income earned. The couple is paying 10% on the first \$16,700 of income, 15% on \$51,200 of the next level of income, and 25% on \$12,100 of the last level of income.<sup>60</sup> The *average* effective tax

<sup>53</sup> MCCAFFERY, *supra* note 1, at 21. See also Michael Bar & Oksana Leukhina, *To Work or Not to Work: Did Tax Reforms Affect Labor Force Participation of Married Couples?*, 9 B.E. J. OF MACROECONOMICS (2009), available at <http://www.bepress.com/bejm/vol9/iss1/art28/> (noting that between 1960 and 2000, the number of two earner families in the United States increased from 34% to 77%. In 1959 and 1999, 95% and 79%, respectively, of secondary earners were married women).

<sup>54</sup> MCCAFFERY, *supra* note 1, at 21.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Alstott, *supra* note 47, at 2009.

<sup>58</sup> These examples exclude applicable deductions, exemptions, and credits to simplify the focus on how the secondary earner bias arises.

<sup>59</sup> Income tax is calculated using IRC 2009 schedule for married filing jointly under I.R.C. §1(a)(2), amendment in Rev. Proc. 08-66, 2008-45 I.R.B. 1107, tbl.1 (Nov. 10, 2008), available at [http://www.irs.gov/irb/2008-45\\_IRB/ar14.html](http://www.irs.gov/irb/2008-45_IRB/ar14.html).

If the taxable income is:	The tax is:
Not over \$16,700	10% of taxable income
Over \$16,700 but not over \$67,900	\$1670, plus 15% of the excess over \$16,700
Over \$67,900 but not over \$137,050	\$9350, plus 25% of the excess over \$67,900
Over \$137,050 but not over \$208,850	\$26,637.50, plus 28% of the excess over \$137,050
Over \$208,850 but not over \$372,950	\$46,741.50, plus 33% of the excess over \$208,850
Over \$372,950	\$100,894.50, plus 35% of the excess over \$372,950

<sup>60</sup> *Id.*

rate is 15%.<sup>61</sup> If the wife decides to enter into the workforce, her income will be stacked on top of her husband's income, and thus her very first dollar will be subject to a 25% tax rate—the highest marginal rate imposed on her husband.<sup>62</sup> This means that the wife's average effective tax rate will be at least 10% more than her husband's rate.<sup>63</sup>

¶21 Example Two: Now consider a married couple in which both spouses work and earn the same salary of \$40,000, for a total of \$80,000. Their income tax due is \$12,375, with an *average* effective tax rate of 15%. In this context, we cannot be sure whether the married woman is the secondary earner or not. If she decides to leave the workforce but later re-enter at a salary lower than her husband's, then she will suffer the same economic consequences discussed in Example One. But if both remain in the workforce, the portion of income taxed in the higher 25% bracket comes from neither spouse's income disproportionately; in this scenario, there is no clear secondary earner in the family and equal tax treatment of both spouses' incomes.

¶22 Example Three: Finally, consider a married couple in which both spouses work but the husband earns more than the wife. The husband earns \$60,000 and the wife earns \$20,000, totaling \$80,000. Their income tax, like those of the couples discussed above, is \$12,375, with an *average* effective tax rate of 15%. Assume the wife is the secondary earner, and thus her income is stacked on top of the husband's income. The IRC allocates taxes against the \$60,000 of income first and then the \$20,000 of income. The couple realizes a benefit, because they are able to shift a portion of the higher income to lower tax brackets. However, this benefit becomes limited with the addition of the wife's \$20,000 of income. Her income is taxed at the highest marginal tax rate of her husband's—25%. The wife is mistaken if she thinks she is bringing in net income of \$17,000, which is her \$20,000 income applied to the average effective tax rate of 15%. The wife is actually netting only \$15,000, which is her \$20,000 applied to the marginal tax rate of 25%.<sup>64</sup>

¶23 With these three examples, it should now be obvious that the tax laws provide a distinct disincentive for many married women to work in the paid labor force. Consider again the wife in the couple from Example One above and assume she decides to re-enter the workforce after having children. After paying income taxes, social security taxes, state and local taxes, childcare expenses, transportation expenses to and from work, among other expenses, it is possible that the wife, and the family as a whole, will not acquire any financial gain from her returning to work.<sup>65</sup> Indeed, once a married woman

<sup>61</sup> The effective tax rate is the average rate at which a person is taxed on his taxable or earned income. The effective tax rate is calculated by dividing the total tax due by total amount of taxable income. Thus, the effective tax rate in this example equals \$12,376 divided by \$80,000.

<sup>62</sup> See Tso, *supra* note 1.

<sup>63</sup> In this context, the effective tax rate is the average rate at which a person is taxed on his taxable or earned income. Please note that if the wife earned more than her husband, her income would have been considered first.

<sup>64</sup> Note that if the wife earned more than her husband, her income would have been considered first and the husband would suffer the secondary earner bias. McCaffery provides further numerical examples of how married women as secondary earners are penalized. See MCCAFFERY, *supra* note 1, at 84.

<sup>65</sup> See Tso, *supra* note 1; see also Maschka, *supra* note 2. Maschka uses her and her husband's income as an example. If her husband pays an estimated 8% federal income tax and a 10% state and local tax, her husband would make \$0.68 for every dollar earned on his \$59,400 salary, under an effective tax rate of 14%. If Maschka decides to work and earns \$20,000, she would have to add the social security and state and local income taxes plus estimated childcare expenses of \$6000. As a result, she would only make \$0.27 on the dollar, under an effective tax rate of 25%. This calculation does not include the additional

leaves the workforce, she is less likely to re-enter it given the high marginal taxes.<sup>66</sup> This structure leads women who do decide to re-enter the workforce to seek to counteract the high marginal taxes by undertaking a variety of strategies, such as changing the way in which they are compensated (e.g., paid cash wages or non-taxable fringe benefits).<sup>67</sup> Primary earners in the family do not face the same high marginal tax rates on the first dollar earned and thus need not take such action.

2. Married Filing Separately Designation is an Option but not Economically Feasible

¶24 A complete discussion of how the tax laws affect married women includes mention of the fact that married couples need not file jointly and thus be subject to the analyses set forth above. They also have the option of filing separately. Today, however, individual filing is different from the discrete individual approach adhered to under the IRC between 1913 and 1948.<sup>68</sup> Currently, under the married filing separately designation, each spouse’s individual income will be taxed according to a designated progressive tax schedule different from the schedule for married filing jointly taxpayers.<sup>69</sup> There are limited advantages in filing separately.<sup>70</sup> For example, if one spouse owes a significant amount of income taxes and the other does not or if one spouse sold his home and wants to qualify for profit exclusion, separate filing might be rational.<sup>71</sup>

¶25 In general, however, a couple’s taxes are likely to be quite a bit higher if they file separately than if they file jointly.<sup>72</sup> For instance, a married couple earning \$80,000 and

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expenses she might have to pay (e.g., expenses for clothes and meals). Because of the tax burden, Maschka and her husband decided that she would not work and remain at home.

<sup>66</sup> JOINT ECON. COMM., REPORT ON REDUCING MARRIAGE TAXES: ISSUES AND PROPOSALS: A JOINT ECONOMIC COMMITTEE STUDY 5 (Comm. Print May 1998) (“High marginal taxes may not induce women to leave the workforce to the same extent that low marginal tax rates encourage them to enter.”).

<sup>67</sup> *Id.*

<sup>68</sup> MCCAFFERY, *supra* note 1, at 15–16.

<sup>69</sup> The following is the IRC 2009 schedule for married filing separately under I.R.C. §1(d), *amendment in Rev. Proc. 08-66, 2008-45 I.R.B. 1107, tbl.4 (Nov. 10, 2008), available at [http://www.irs.gov/irb/2008-45\\_IRB/ar14.html](http://www.irs.gov/irb/2008-45_IRB/ar14.html).*

<b>If the taxable income is:</b>	<b>The tax is:</b>
Not over \$8350	10% of taxable income
Over \$8350 but not over \$33,950	\$835, plus 15% of the excess over \$8350
Over \$33,950 but not over \$68,525	\$4675, plus 25% of the excess over \$33,950
Over \$68,525 but not over \$104,425	\$13,318.75, plus 28% of the excess over \$68,525
Over \$104,425 but not over \$186,475	\$23,370.75, plus 33% of the excess over \$104,425
Over \$186,475	\$50,447.25, plus 35% of the excess over \$186,475

*See supra* note 59 for the married filing jointly schedule.

<sup>70</sup> *See* Sandra Block, ‘Til Taxes Do You Part: When Married Couples Should File Separately, USA TODAY, Mar. 4, 2003, at 3B. Other reasons for married couples to file separately include one spouse reneging on child support payments or student loan payments, one spouse incurring an excessive amount of unreimbursed medical expenses, and one spouse having an excessive amount of itemized deductions.

<sup>71</sup> MCCAFFERY, *supra* note 1, at 16.

<sup>72</sup> I.R.S. Pub. No. 501, *supra* note 5, at 6. An overwhelming majority of couples file jointly. *See* I.R.S. Pub. No. 1304, *supra* note 9, at tbl.1.2 (on average, only about 4% of couples filed separately from 2003 to 2006); MCCAFFERY, *supra* note 1, at 16 (“[M]arried, filing separately’ . . . is simply a clerical matter, and rarely used, because almost every couple would pay more tax if the spouses filed this way.”).

filing jointly will pay \$12,375 (ignoring deductions, adjustments or credits).<sup>73</sup> However, if they file separately, the husband earning \$60,000 and the wife \$20,000, their combined tax will be \$13,770 (again, before any adjustments, deductions, or credits).<sup>74</sup> This increase of \$1395 is illustrative of the increased tax liability that couples would face filing separately, and thus 96% of couples choose joint filing.<sup>75</sup>

### C. Congressional Efforts to Minimize the Secondary Earner Bias

¶26 Congress has recognized that joint filing is the best option for married couples, but at the same time that it imposes serious economic costs on married women. Accordingly, legislators have sought to address this problem in numerous ways over the course of the past forty years. In 1964, Congress reduced the marginal income tax rate from 91% to 71%—eliminating some of the penalty associated with stacking the secondary earner’s income on top of the primary earner’s income.<sup>76</sup> In 1973, the Joint Economic Committee of Congress held a session entitled *Economic Problems of Women* to discuss the income tax consequences for working mothers in an effort to explore the problems and consider additional possible solutions.<sup>77</sup> In the late 1980s, another session entitled *Tax Treatment of Married, Head of Household, and Single Taxpayers* was held by the House Ways and Means Committee.<sup>78</sup>

¶27 Although the committees did not lead to actual reforms, in 1981<sup>79</sup> Congress sought to directly address the secondary earner bias by enacting a credit for secondary earners pursuant to Section 221 of the Economic and Tax Recovery Act of 1981 (Act).<sup>80</sup> Under the Act, marginal income tax rates were reduced to 50% and a credit for two-earner couples was created.<sup>81</sup> The credit allowed two-earner couples to deduct 5% in 1982 (and

<sup>73</sup> See *supra* note 59 for the married filing jointly schedule.

<sup>74</sup> See *supra* note 69 for the married filing separately schedule. The husband’s tax is \$11,187.50. The wife’s tax is \$2582.50. Note that if each earned \$40,000 per year for a total of \$80,000 and filed separately instead of jointly, each would incur income tax, before any adjustments, deductions or credits, of \$6187.60. Their total income tax would be \$12,375. This is the same amount as if the couple had filed jointly. However, this occurs when the earnings are the same for each spouse. This does not occur when one spouse earns substantially more than the other spouse, as is the case for many couples in the United States where the husband earns more than the wife.

<sup>75</sup> I.R.S. Pub. No. 1304, *supra* note 9, at tbl.1.2.

<sup>76</sup> Revenue Act of 1964, I.R.S. Pub. L. No. 88-272, 78 Stat. 19 (1964). Note that secondary earners are heavily taxed by marginal tax rates.

<sup>77</sup> *Economic Problems of Women: Hearing Before the Joint Econ. Comm.*, 93rd Cong. 240 (1973).

<sup>78</sup> *Id.* Note that although Congress was having sessions that addressed the income tax impact of the secondary earner, Congress did not enact any substantive legislative bills from 1969 to 1981. During the *Tax Treatment of Married, Head of Household and Single Taxpayers* hearing, many researchers, advocates and some congressmen promoted the idea of mandatory single filing or optional single filing for married couples but with reduced tax consequences.

<sup>79</sup> In 1975, the Earned Income Tax Credit was created to encourage low-income parents to work. Under the credit, working parents receive a stated amount for each child. The credit is refundable, meaning that even if the parent(s)’ tax liability is zero, they can still receive the credit. See Revenue Adjustment Act of 1975, Pub. L. No. 94-12, 89 Stat. 970 (1975); see also Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 623–24 (1996); IRS.gov, It’s easier than ever to find out if you qualify for EITC, <http://www.irs.gov/individuals/article/0,,id=96406,00.html> (last visited Sept. 22, 2009).

<sup>80</sup> Pub. L. No 97-34, 95 Stat. 172 (1981). For further discussion of the Act, see S. REP. NO. 97-144 (1981).

<sup>81</sup> *Id.*

then 10% in 1983 and beyond) of the secondary earner's income, up to a limit of \$30,000.<sup>82</sup> The credit resulted in limited relief for secondary earners.<sup>83</sup>

¶28 Surprisingly, in the mid-1980s, women's groups and social conservatives began protesting the credit.<sup>84</sup> Many felt that the credit was degrading to women and that working mothers were being given an unfair tax advantage over women who chose not to work.<sup>85</sup> Helen M. Coyne, president of Mothers at Home, Inc., testified before Congress that "America's families want a Tax Code which is career neutral; that is, a code which does not create an unfair economic advantage for either two-career families or families choosing to have one spouse stay home."<sup>86</sup> Under political pressure, Congress repealed the secondary earner credit in 1986.<sup>87</sup>

¶29 The failed credit, however, did not deter legislators from continued attempts to reform the tax laws to eliminate the secondary earner bias. Perhaps the most noteworthy mechanism for addressing the problem emerged in the Tax Reform Act of 1986.<sup>88</sup> Under the Act, the maximum marginal income tax rate was lowered from 50% to 28%, thereby drastically reducing bias.<sup>89</sup> Since 1986, however, federal legislation has not been enacted that would fully eliminate the bias for married women embedded in the tax code.<sup>90</sup>

#### D. *The Next Step: Looking Outside the United States for Answers*

¶30 Congress has been unsuccessful in combating the secondary earner bias. Since the Reagan administration, Congress has not focused extensively on lessening or eliminating the secondary bias, because in most instances, the secondary bias is a woman's issue.<sup>91</sup> "Any attempt to change the law to 'favor' working wives is viewed as 'social engineering' or as subverting 'family values.'"<sup>92</sup> Although Congress attempted to eliminate the bias with a tax credit in 1981, this reform was repealed and, in any case, not altogether effective. The adjustment of the marginal tax rates in and since the 1986 tax reform was insufficient as well. Furthermore, the United States' practice of aggregating income under joint filing for married couples is rather uncommon in comparison with

<sup>82</sup> I.R.C. § 221(b)(2) (1981).

<sup>83</sup> MCCAFFERY, *supra* note 1, at 74–75.

<sup>84</sup> *Id.* at 80. During President Clinton's term, the marginal income tax rate was raised again to maximum of 39.6%. See Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 416 (1993). Candidate George W. Bush campaigned in 2000 for the re-institution of the secondary earner credit. See Maschka, *supra* note 2. Between 2001 and 2003, President Bush reduced the marginal income tax rate to 35%. See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001); Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (2003).

<sup>85</sup> MCCAFFERY, *supra* note 1, at 80.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* The repeal was most likely necessary because although the secondary earner credit was helpful, it still had problems, such as a phase-out and time constraints. With a phase-out, a certain prescribed income level earned either individually or jointly reduces the amount of a credit. Also, when enacting a tax-saving vehicle such as a credit, the IRS will often place a time limit on when that measure can be used by the taxpayer. See generally 47B C.J.S. *Internal Revenue* § 336 (2009), 33 Am. Jur. 2d *Tax Credits* § 1270 (2009).

<sup>88</sup> Pub. L. No. 99-514, 100 Stat. 2085 (1986).

<sup>89</sup> *Id.*

<sup>90</sup> See *supra* note 84.

<sup>91</sup> MCCAFFERY, *supra* note 1, at 80.

<sup>92</sup> *Id.*

other countries around the world.<sup>93</sup> It is time to examine laws outside the United States to identify alternative avenues for treating working married women under the IRC.

¶31 The remainder of this Comment focuses on tax reforms outside of the United States, particularly in Malaysia, the United Kingdom, and Ireland. Each of these countries have taken steps to ensure that their tax laws do not penalize working married women. It is important to note that government actors often fail to take action on a pressing social issue until pressured to do so. If there is any doubt that protests and making one's voice known against the secondary earner bias can lead to success, one need only look at the impetus behind many of the tax reforms currently occurring around the world.

### III. EXAMINATION OF THE TAX REFORMS IN MALAYSIA, THE UNITED KINGDOM, AND IRELAND

¶32 In examining the tax reform measures of Malaysia, the United Kingdom, and Ireland, this section is structured to show the progression and extent of the tax reforms concerning working married women in these countries. It begins by discussing Malaysia's system, where working married women possess the right to have their income assessed in their own names, then moves to the United Kingdom, which has automatic separate filing, and ends with a look at Ireland's system, where working married women can participate in a complex single assessment designation and have their income taxed individually from their husbands without the couple incurring higher income taxes. For each country, this Comment discusses a brief history of the tax reforms and illustrates how each country's current tax laws operate for married couples. Malaysia and the United Kingdom were chosen to portray the measures in which the people of those countries brought about tax reform. Ireland was chosen to be a direct example of how the filing designations for married couples in the IRC should be structured.

#### A. Malaysia

##### 1. Malaysia's Treatment of Working Married Women

¶33 In 1957, Malaysia acquired its independence from Great Britain.<sup>94</sup> Ten years later, Malaysia created its personal income tax system.<sup>95</sup> Initially, a married woman's income was combined with her husband's income and filed in the husband's name.<sup>96</sup> Drawing on

<sup>93</sup> Cathal O'Donoghue & Holly Sutherland, *Accounting for the Family: The Treatment of Marriage and Children in European Income Tax Systems*, Innocenti Occasional Papers, Econ. & Social Policy Series, No. 65, 19–20, <http://www.unicef-irc.org/publications/pdf/eps65.pdf> (“France, Portugal and Luxembourg are the only countries [in the European Union] with mandatory joint taxation for couples for all incomes.”).

<sup>94</sup> Terence P. Stewart & Margaret L.H. Png, *The Growth Triangle of Singapore, Malaysia, and Indonesia*, 23 GA. J. INT'L & COMP. L. 1, 20 (1993). In 1957, Malaysia was called the Federation of Malaya, occupying a portion of southwest Asia. It was not until 1963 that Malaya and other areas in Asia, including Sarawak, Sabah, and Singapore, combined to form what is now known as Malaysia. Singapore separated from Malaysia in 1965. *Id.*

<sup>95</sup> Income Tax Act, 1967, Act 53, Part II, § 3 (Malay.) (Act No. 47 of 1967), available at <http://www.kpmg.com.my/kpmg/publications/tax/22/a0053.htm> (amended multiple times since 1967).

<sup>96</sup> Jeyapalan Kasipillai, *Removing Gender Bias in the Malaysian Tax System*, 40 TAX NOTES INT'L 255, 257 (2005). This provision fell under the Income Tax Ordinance No. 48 of 1967.

the United Kingdom's traditional model,<sup>97</sup> Malaysia considered the married woman an "incapacitated person" just like "any infant, lunatic, idiot or insane person."<sup>98</sup> During the 1970s, organizations such as the Malaysian Trade Union Congress and the United Malay National Organisation Wanita lobbied the Malaysian government to change the tax laws to make them more favorable to women.<sup>99</sup> These groups asserted that "a working wife should not be assessed under her husband's name if she did not wish to be—just as his income should not be assessed under her name."<sup>100</sup> Furthermore, "joint taxation was neither neutral to marriage nor efficient because it often caused the tax liability of a married couple to increase after marriage."<sup>101</sup> The Malaysian government responded with a series of tax law amendments, beginning in 1974.<sup>102</sup> By 1977, a Malaysian married woman could elect to have her income assessed separately from her husband's, but only that part of her income which consisted of employment and professional income.<sup>103</sup> If a woman did not elect separate assessment of this income, then all of her income was considered accumulated by her husband and filed in the husband's name.<sup>104</sup>

¶34 In 1990, the Malaysian government amended Section 45(2) of the Income Tax Act of 1967.<sup>105</sup> This amendment gave the Malaysian married woman a unique right. Her income was automatically assessed separately from her husband's income unless she chose to assign her tax liability to her husband.<sup>106</sup> Under separate assessment, she likely would be subject to lower marginal taxes than she otherwise would be as a secondary earner.<sup>107</sup> Additionally, in 1995, Malaysian married women were granted the option to claim child relief.<sup>108</sup> Prior to 1995, only the father or husband could claim child relief.<sup>109</sup>

¶35 Although there had been progress, many remained unsatisfied with the legal status of women in Malaysia. Particularly, in 1999, Malaysian women's organizations and other individuals formed the Women's Agenda for Change to curb the inequality Malaysians faced in various facets of society and to promote women's issues.<sup>110</sup> Some of the organization's initiatives were to "[e]nact laws and policies to protect women from globalisation [sic] and enhance participation through best practices in the workplace,

<sup>97</sup> See *infra* notes 126 to 130.

<sup>98</sup> Tan How Teck, *Income Taxation of Husband and Wife in Singapore and Malaysia*, 58 BULL. FOR INT'L FISCAL DOCUMENTATION 520, 521 (2004).

<sup>99</sup> *Id.* at 523.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Kasipillai, *supra* note 96, at 257. In 1974, married women were granted the right to elect separate assessment of their employment income. In 1977, married women were granted the right to elect separate assessment of their employment income and professional services income, which included "income from a profession such as legal services, medical, and dental practices." *Id.*

<sup>103</sup> *Id.* at 257 ("All the income of a married woman from other sources, such as rental income, royalties, and dividends, was aggregated with the total income of her husband.").

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Kasipillai, *supra* note 96, at 257.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> WOMEN'S AID ORG., WOMEN'S EQUALITY IN MALAYSIA STATUS REPORT (2001), <http://www.wao.org.my/news/20010301statusreport.htm#Culture&Religion> (last visited Sept. 22, 2009). Women's Agenda for Change focused on a number of issues pertaining to women including sexual harassment and domestic violence.



strategies against sexual harassment, and provision of child-care facilities.”<sup>111</sup> Although it is not entirely certain that the organization’s efforts accelerated the reforms, in 2000, Malaysia further amended its tax treatment of married women. The Malaysian married woman is now treated as a *femme sole*<sup>112</sup> under Malaysia’s tax system.<sup>113</sup> Malaysian tax law presently gives a wife the choice of whether she wants her income assessed with her husband’s income.<sup>114</sup> If she does not elect to have her income aggregated with her husband’s, then her income is assessed separately. If her income is assessed separately, she is entitled to a personal deduction,<sup>115</sup> applicable child relief credit,<sup>116</sup> and spousal dependent relief credit.<sup>117</sup>

¶36

There are some drawbacks to this provision. Implicit in the election of a separate assessment without electing combined treatment is that a wife must make certain that her husband does not elect combined treatment either. If he elects combined treatment, then both of their incomes will be assessed in her name.<sup>118</sup> Thus, the way in which the Malaysian tax system treats married women is not altogether perfect. Still, the fact that the Malaysian government amended its tax code multiple times to give Malaysian

<sup>111</sup> Padmaja Padman, *Pushing the Women's Agenda Forward*, NEW STRAITS TIMES (Malay.), May 16, 1999, available at <http://www.twinside.org.sg/title/nst-cn.htm>.

<sup>112</sup> *Femme Sole* translates to a woman treated individually or by herself.

<sup>113</sup> Jeyapalan Kasipillai, *New Tax System Removes Gender Bias*, STAR ONLINE (Malay.), May 12, 2007, <http://thestar.com.my/news/story.asp?file=/2007/5/12/business/17641588&sec=>.

<sup>114</sup> Finance (No. 2) Act, 2000, § 608.9 (Malay.). Section 45(2) of the Income Tax Act 1967, as amended by § 608.9, states:

(2) Subject to this section, where an individual and his wife were living together in the basis year for a year of assessment and did not in that basis year cease to live together or to be husband and wife of each other--(a) the wife may elect in writing (wife who elects) that her total income shall be aggregated with the total income of her husband and assessed in his name for that year of assessment; or (b) the husband may elect in writing (husband who elects) that his total income shall be aggregated with the total income of his wife and assessed in her name for that year of assessment: Provided that where the wife who elects or the husband who elects is not resident for the basis year for a year of assessment, such wife or husband, as the case may be, may elect under this subsection only if she or he is a citizen.

For the purposes of paragraph (2)(b)--

(a) for any year of assessment, that paragraph shall only apply if there is no election made by a wife or wives under paragraph (2)(a) for that year of assessment; and  
(b) the election shall only be made with one wife.[]; and . . . (4) Where under subsection (2) the total income of the wife who elects falls to be aggregated with that of her husband or the total income of the husband who elects falls to be aggregated with that of his wife, for a year of assessment, the wife who elects or the husband who elects, as the case may be, shall be treated as having no chargeable income for that year.

<sup>115</sup> ECONOMIST INTELLIGENCE UNIT, COUNTRY COMMERCE 2006: MALAYSIA: PERSONAL TAXES: DETERMINATION OF TAXABLE INCOME (2006), available at 2006 WL 10053338.

<sup>116</sup> Kasipillai, *supra* note 96, at 257.

<sup>117</sup> Finance (No. 2) Act of 2000, Malaysia Act 608.9 (Malay.). The spousal dependent relief is a credit that either spouse can use if the other spouse elects for combined treatment or has no taxable income for the year. Thus, if the husband elects combined treatment or the husband has no taxable income for the tax year, the wife can use the dependent relief credit. The spousal dependent credit for 2007 amounted to RM 3000 (in Malaysian currency). It is possible for the husband to have greater tax savings regardless of whether his wife files with him or separately. The credit for the husband produces this potential result. The same treatment is given to the husband if the wife elects combined treatment or the wife has no taxable income for the year. In a case where the husband has several wives, the husband can apply the credit to only one wife.

<sup>118</sup> *Id.*

married women options is remarkable for a country in which women and men are not considered equal under most laws.<sup>119</sup> In fact, the cultural norm in Malaysia is that married women will remain in the home and raise the children.<sup>120</sup>

¶37 Undoubtedly, though, the Malaysian government has taken profound steps to lessen gender bias in its tax laws. “The introduction of independent taxation of a wife beginning in 1990 recognizes the contribution of women to the well-being of the country.”<sup>121</sup> Consequently, married women have a better position than they previously had, primarily because they can now make more choices. Malaysian tax laws place married women “at the bargaining table” to discuss with their husbands not only how their income should be treated but also what would be best for the family as whole.

## 2. Illustrating Malaysia’s Tax Code

¶38 This section illustrates how three Malaysian couples are taxed under the Malaysian tax code and determines whether the secondary earner bias arises in any of these cases. The first example involves a couple that selects combined treatment, the second example involves a couple in which each spouse earns the same salary but they opt out of combined treatment, and the third example involves a couple that opts out of combined treatment but the husband earns substantially more than the wife. In all three examples, the applicable deductions and credits are excluded to focus on the differences in spousal and base tax liability. The Malaysian progressive income tax schedule<sup>122</sup> is employed for

<sup>119</sup> WOMEN’S AID ORGANIZATION, WOMEN’S EQUALITY IN MALAYSIA STATUS REPORT (2001), <http://www.wao.org.my/news/20010301statusreport.htm#Culture&Religion>.

<sup>120</sup> *Id.* Between 1998 and 2006, women averaged 36% of Malaysia’s workforce; see table below. International Labour Organization, LABORSTA Database, Malaysia—Tbl. 2A: Employment General Level, *available at* <http://laborsta.ilo.org/> (last visited Sept. 22, 2009). Note that this data represents a sampled survey.

### Malaysian Workforce

	1998	1999	2000	2001	2002	2003	2004	2005	2006
Men	5,718,900	5,851,200	6,086,300	6,055,900	6,141,800	6,323,600	6,390,400	6,470,500	6,618,600
Women	2,880,700	2,986,600	3,235,500	3,301,100	3,400,800	3,546,100	3,589,100	3,574,800	3,656,800
Total	8,599,600	8,837,800	9,321,700	9,357,000	9,542,600	9,869,700	9,979,500	10,045,400	10,275,400
% of Women in Workforce	33%	34%	35%	35%	36%	36%	36%	36%	36%

<sup>121</sup> Kasipillai, *supra* note 96, at 257.

<sup>122</sup> The income tax rate schedule for Malaysia is included below. Inland Revenue Board of Malaysia, Individual, Income Tax Rate, Year 2008, <http://www.hasil.gov.my/lhdnv3e/individuIndex.jsp?process=21000&menu=13&expandable=1> (last visited Sept. 22, 2009). Note that income is in ringgit (RM), the Malaysian currency.

Taxable Income	RM	Rate	Tax (RM)
On the first	2,500	0%	0
On the next	2,500	1%	25
On the first	<b>5,000</b>	-	<b>25</b>
On the next	15,000	3%	450
On the first	<b>20,000</b>	-	<b>475</b>

each example to compute the taxes due. The *average* effective tax rate<sup>123</sup> is calculated as well.

¶39 Example One: Consider a Malaysian couple who earns 80,000 RM (approximately \$21,913)<sup>124</sup> for the taxable year. If the couple elects combined assessment in one spouse's name, or if one of them did not earn any income during the taxable year, leaving only one spouse's income to be assessed, their tax liability would be 9675 RM (approximately \$2650), with an *average* effective tax rate of 12%. The couple is exposed to a marginal income tax rate of 24%. However, if the wife, for example, decides to work and opts to have her income assessed separately, the couple's taxes are likely to be lower, as shown in the following examples.

¶40 Example Two: Consider a Malaysian couple in which each spouse earns the same income, for instance 40,000 RM (approximately \$10,957), totaling 80,000 RM (approximately \$21,913). If they are assessed separately, their tax liability equals 2175 RM (approximately \$596) each, totaling 4350 RM (approximately \$1192). This is 5325 RM (approximately \$1459), less than if they had elected combined treatment. The *average* effective tax rate for each spouse is 5% and each spouse is exposed to a marginal income tax rate of 13%.

¶41 Example Three: Lastly, consider a Malaysian couple in which the wife earns substantially less than her husband, for instance 20,000 RM (approximately \$5478) and the husband earns 60,000 RM (approximately \$16,435), totaling 80,000 RM (approximately \$21,913). If they are assessed separately, the taxes due would be 475 RM (approximately \$130) for the wife (*average* effective tax rate of 2%, marginal income tax rate of 3%) and 4125 RM (approximately \$1230) for the husband (*average* effective tax rate of 7%, marginal income tax rate of 19%). Their total tax is 4600 RM (approximately \$1260), which is 5075 RM (approximately \$1390) less than if they had elected combined treatment.

¶42 These three examples suggest that there is no secondary earner bias in the Malaysian system, especially when couples are assessed separately. The only instance in which there might be a secondary earner bias is in Example One where the couple elects

On the next	15,000	7%	1050
On the first	<b>35,000</b>	-	<b>1525</b>
On the next	15,000	13%	1950
On the first	<b>50,000</b>	-	<b>3475</b>
On the next	20,000	19%	3800
On the first	<b>70,000</b>	-	<b>7275</b>
On the next	30,000	24%	7200
On the first	<b>100,000</b>	-	<b>14,475</b>
On the next	50,000	27%	13,500
On the first	<b>150,000</b>	-	<b>27,975</b>
On the next	100,000	27%	27,000
On the first	<b>250,000</b>	-	<b>54,975</b>
Exceeding	250,000	28%	-

<sup>123</sup> For the formula for *average* effective tax rate, see *supra* note 61.

<sup>124</sup> Income is in ringgit (RM), the Malaysian currency, with approximate US dollar equivalent as of March 21, 2009. See MSN Money, [http://moneycentral.msn.com/detail/stock\\_quote?Symbol=/MYRUS](http://moneycentral.msn.com/detail/stock_quote?Symbol=/MYRUS) (last visited Sept. 22, 2009).

combined treatment and is exposed to marginal income tax rate of 24%. However, this outcome does not necessary control because the wife can opt out of joint filing.

## B. United Kingdom

### 1. The United Kingdom's Treatment of Working Married Women

¶43 In 1799, the United Kingdom<sup>125</sup> created its tax system and instituted joint filing for married couples.<sup>126</sup> Between 1799 and 1990, the United Kingdom's income tax system contained gender bias in favor of the husband.<sup>127</sup> Only the married man possessed the right to file a joint return for his wife and himself.<sup>128</sup> If, during the tax year, the married woman earned any income and even if she elected to have that income assessed separately under the Wife's Earning Election,<sup>129</sup> her non-labor income, including her investment income, was still attributed to her husband.<sup>130</sup> Although there were many reforms to the tax system prior to 1990, including the Married Women's Property Act in 1882,<sup>131</sup> provisions to allow a married women's income to have the same tax relief provisions as those of single filers,<sup>132</sup> and the Finance Act 1978,<sup>133</sup> many married and unmarried women in the United Kingdom felt that the reforms were insufficient.<sup>134</sup>

¶44 John A. Kay and Mervyn A. King, authors of *The British Tax System*, declared, "[t]he British system rests on the *dependency principle*. The wife's income is simply treated as if it were the husband's, and in recognition of the burden which she imposes on

<sup>125</sup> The United Kingdom is comprised of England, Scotland, Wales, and Northern Ireland. Central Intelligence Agency, *The World Factbook: United Kingdom*, <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html> (last visited Sept. 22, 2009).

<sup>126</sup> Janet G. Stotsky, *Gender Bias in Tax Systems*, 14 TAX NOTES INT'L 1913, 1917 (1997).

<sup>127</sup> Note that the legal norm for eighteenth century common law was that "the husband and wife became one person by marriage, and common law added the rider that the husband became that person." 52 JOHN HODDINOTT & CHRISTOPHER ADAM, INT'L FOOD POLICY RESEARCH INST., TESTING NASH BARGAINING HOUSEHOLD MODELS WITH TIME-SERIES DATA 3 (1998), available at <http://www.ifpri.cgiar.org/sites/default/files/publications/dp52.pdf> (internal quotation omitted).

<sup>128</sup> Stotsky, *supra* note 126, at 1917.

<sup>129</sup> Previously, the United Kingdom instituted a Wife's Earnings Election whereby the wife could have her income, excluding investment income, taxed separately from her husband's income. The election was abolished in 1990 due to the creation of independent filing. Additional requirements for the Wife's Earnings Election and separate assessment include "the couple are married and living together, and all the income of the wife would be treated as that of the husband for tax purposes but for the election." HM REVENUE & CUSTOMS, RELIEF INSTRUCTIONS MANUAL: WIFE'S EARNINGS ELECTION, <http://www.hmrc.gov.uk/manuals/remanual/re1400c.htm> (last visited Sept. 22, 2009).

<sup>130</sup> Stotsky, *supra* note 126, at 1917.

<sup>131</sup> *Id.* at 1917. (The Married Women's Property Act of 1882 "allowed women to retain management and control of their separate property and earnings." The 1978 Finance Act "gave married women the right to receive their own withholding repayments.").

<sup>132</sup> *Id.* Previously, the United Kingdom instituted separate assessment whereby the wife could opt to have her income taxed separately from her husband's income. Separate assessment was abolished in 1990 due to the creation of independent filing. Additional requirements for separate assessment include that "the couple are married and living together, and the income of the wife is treated as that of the husband for tax purposes." See HM REVENUE & CUSTOMS, RELIEF INSTRUCTIONS MANUAL: SEPARATE ASSESSMENT: WHEN CAN SEPARATE ASSESSMENT APPLY, <http://www.hmrc.gov.uk/manuals/remanual/RE1312.htm> (last visited Sept. 22, 2009).

<sup>133</sup> Stotsky, *supra* note 126, at 1917–18 (the 1978 Finance Act "gave married women the right to receive their own withholding repayments").

<sup>134</sup> *Id.*

him he receives a specially enhanced personal allowance.”<sup>135</sup> In the late 1970s and 1980s, many other commentators and academics demanded that the United Kingdom’s government amend the tax laws in recognition of women.<sup>136</sup> After reading about the tax laws in periodicals such as the United Kingdom’s *Sunday Times* and *Woman’s Own*, over 36,000 readers registered to protest the tax laws.<sup>137</sup> Parliament responded to the public, organizations, and commentators by amending the tax laws in favor of women. Through the Finance Act of 1988, which became effective in 1990, Parliament first authorized separate filing for married couples.<sup>138</sup>

¶45 Under current regulations,<sup>139</sup> independent taxation stipulates that “the incomes of a husband and wife are assessed separately in any case.”<sup>140</sup> Thus, there is automatic independent filing for each spouse. Each spouse is entitled to applicable allowances to reduce his or her tax liability.<sup>141</sup>

¶46 The United Kingdom’s tax code still contains gender bias. For instance, consider the married couple’s allowance.<sup>142</sup> The married couple’s allowance, equivalent to a tax

<sup>135</sup> JOHN A. KAY & MERVYN A. KING, *THE BRITISH TAX SYSTEM* 206 (Oxford Univ. Press) (2d ed. 1980).

<sup>136</sup> Stotsky, *supra* note 126, at 1918.

<sup>137</sup> Norma Briggs, *Individual Income Taxation and Social Benefits in Sweden, the United Kingdom and the U.S.A.: A Study of Their Interrelationships and Their Effects on Lower-Income Couples and Single Heads of Households*, 39 BULL. FOR INT’L FISCAL DOCUMENTATION 243, 244 (1985) (internal quotation omitted).

<sup>138</sup> Finance Act, 1988, c. 39, § 32 (Eng.), available at [http://www.opsi.gov.uk/acts/acts1988/ukpga\\_19880039\\_en\\_4#pt3-ch1-pb2](http://www.opsi.gov.uk/acts/acts1988/ukpga_19880039_en_4#pt3-ch1-pb2). Note that the Finance Act of 1988 has been amended multiple times.

<sup>139</sup> Income Tax Act, 2007, c. 3, § 45–55 (Eng.), available at <http://www.statutelaw.gov.uk/legResults.aspx?LegType=All%20Primary&PageNumber=1&BrowseLetter=I&NavFrom=1&activeTextDocId=3309124>.

<sup>140</sup> HM REVENUE & CUSTOMS, RELIEF INSTRUCTIONS MANUAL: SEPARATE ASSESSMENT: WHEN CAN SEPARATE ASSESSMENT APPLY, <http://www.hmrc.gov.uk/manuals/remanual/RE1312.htm> (last visited Sept. 22, 2009).

<sup>141</sup> HM REVENUE & CUSTOMS, RATES AND ALLOWANCES – INCOME TAX, <http://www.hmrc.gov.uk/rates/it.htm> (last visited Sept. 22, 2009). Note the following table is pounds (£), United Kingdom’s currency. Applicable credits/allowances include:

Income Tax Allowances	2007–08	2008–09	2009–10
Personal Allowance	£5225	£6035	£6475
Personal Allowance for people aged 65–74 <sup>(1)</sup>	£7550	£9030	£9490
Personal Allowance for people aged 75 and over <sup>(1)</sup>	£7690	£9180	£9640
Married Couple’s Allowance (born before 6 <sup>th</sup> April 1935 but aged under 75) <sup>(1)(2)(3)</sup>	£6285	£6535	Not applicable
Married Couple’s Allowance (aged 75 and over) <sup>(1)(2)</sup>	£6365	£6625	£6965
Income limit for age-related allowances	£20,900	£21,800	£22,900
Minimum amount of Married Couple’s Allowance	£2440	£2540	£2670
Blind Person’s Allowance	£1730	£1800	£1890

(1) These allowances reduce where the income is above the income limit – by £1 for every £2 of income above the limit. However they will never be less than the basic Personal Allowance or minimum amount of Married Couple’s Allowance.

(2) Tax relief for the Married Couple’s allowance is given at the rate of 10 per cent.

(3) In the 2009–10 tax year all Married Couple’s Allowance claimants in this category will become 75 at some point during the year and will therefore be entitled to the higher amount of the allowance - for those aged 75 and over.

<sup>142</sup> Income Tax Act, 2007, c. 3, § 45–55 (Eng.), available at <http://www.statutelaw.gov.uk/legResults.aspx?LegType=All%20Primary&PageNumber=1&BrowseLetter=I&NavFrom=1&activeTextDocId=3309124>. The Income Tax Act of 2007 further defined the married couple’s allowance:

credit in the IRC, can reduce each spouse's income tax liability.<sup>143</sup> The qualifications for the allowance are based on when the couple wed and the age of the spouses.<sup>144</sup> Specifically, if the couple wed before December 5, 2005, and at least one spouse was born before April 6, 1935, then only the husband can use the allowance to reduce his tax liability.<sup>145</sup> If the couple wed after December 5, 2005, or are in a civil partnership and at least one spouse was born before April 6, 1935, "the person with the higher income can claim Married Couple's Allowance."<sup>146</sup> As in the United States, women in the United Kingdom earn less than men on average.<sup>147</sup> Thus, it is likely that it is the husband who can initially claim the married couple's allowance.

¶47

Yet, the married couple's allowance should not be dismissed. According to the provisions of the married couple's allowance, one spouse can transfer any unused portion of the allowance to the other spouse.<sup>148</sup> Thus, with independent filing, the wife can still use the married couple's allowance to reduce her own tax liability, but likely only after the husband has used a portion of it. This treatment of an allowance or credit is completely unlike the IRC's credits for married couples filing separately. Under the IRC, if the wife decides to file separately from her husband, she and her husband would, in most instances, not be able to employ the Hope and Lifetime Educational Credits, Child and Dependent Care Credit, Adoption Credit, and Elderly and Disabled Credit.<sup>149</sup>

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§ 46 Marriages and civil partnerships on or after 5 December 2005

(1) If an individual—

- (a) makes a claim for a tax year, and
- (b) meets the conditions set out in subsection (2), the individual is entitled to a tax reduction for the tax year of 10% of the amount specified in subsection (3)(a) or (b) (as applicable).

(2) The conditions are that—

- (a) for the whole or part of the tax year the individual is married or in a civil partnership and is living with the spouse or civil partner,
- (b) the marriage took place, or the civil partnership was formed, on or after 5 December 2005 or, if the marriage took place before that date, an election for the new rules to apply is in force for the tax year,
- (c) the individual, or the spouse or civil partner, was born before 6 April 1935,
- (d) the individual meets the requirements of section 56 (residence etc), and
- (e) the individual's net income for the tax year exceeds that of the spouse or civil partner or, if they have the same amount of net income for the tax year, the individual is specified in an election as the person to be entitled to relief under this section for the year.

*Id.*

<sup>143</sup> HM REVENUE & CUSTOMS, MARRIED COUPLE'S ALLOWANCE – INCLUDES CIVIL PARTNERSHIPS, <http://www.hmrc.gov.uk/incometax/married-allow.htm> (last visited Sept. 22, 2009). *See supra* note 141 for the amount.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Kate Bell, *Tackling Discrimination Head On*, CTR. FOR AMERICAN PROGRESS, Aug. 13, 2008, [http://www.americanprogress.org/issues/2008/08/tackling\\_discrimination.html/index.html](http://www.americanprogress.org/issues/2008/08/tackling_discrimination.html/index.html) ("Women in the United Kingdom earn on average 16 percent less than men for every hour they work—a significant penalty, though it falls below the 23 percent gap between women and men in the United States.")

<sup>148</sup> HM REVENUE & CUSTOMS, MARRIED COUPLE'S ALLOWANCE – INCLUDES CIVIL PARTNERSHIPS, <http://www.hmrc.gov.uk/incometax/married-allow.htm> (last visited Sept. 22, 2009). Married couples who file separately can also "share" the Blind Couple's Allowance.

<sup>149</sup> *See* IRS.gov, Topic 600: Tax Credits, <http://www.irs.gov/taxtopics/tc600.html> (last visited Sept. 22, 2009).

## 2. Illustrating the United Kingdom's Tax Code

¶48 The issue of secondary earner bias does not customarily arise for working married women in the United Kingdom because each spouse is taxed individually.<sup>150</sup> There is no combination of income in which one spouse's income is stacked up on top of the other's, with the income on the highest level exposed to high marginal taxes. Instead, each spouse's income is taxed according to his or her own marginal income tax rate based on that spouse's income. This is proven in the following examples. Each example excludes applicable allowances and employs the United Kingdom's progressive income tax rate schedule for 2008-2009.<sup>151</sup>

¶49 Example One: Consider that only the husband works, earning a salary of £80,000 (approximately \$115,707).<sup>152</sup> He will be taxed individually and owe incomes taxes of £32,000 (approximately \$46,283). If the wife decides to enter the workforce, her income taxes will be taxed individually, not considering her husband's income.

¶50 Example Two: If both the wife and the husband work, earning identical incomes of £40,000 (approximately \$57,854), they will be taxed individually, owe the same income tax of £16,000 (approximately \$23,141), and be exposed to the same marginal and effective tax rates.

¶51 Example Three: Consider that the husband earns £60,000 (approximately \$86,780), which is substantially higher than the wife's earnings of £20,000 (approximately \$28,927). The basis of each spouse's income tax liability is each spouse's individual income, not the combined income of the couple. The husband will owe £24,000 (approximately \$34,712), while the wife will owe £4000 (approximately \$5785). Each will be exposed to individual marginal and effective tax rates that are not determinate upon the other spouse's income.

¶52 As previously stated, these examples indicate that there is no evident secondary earner bias for either spouse because each spouse's income is assessed separately when

<sup>150</sup> Note, though, that studies indicate that couples are shifting investment income or unearned income to the spouse with the lower marginal income tax rate, usually the wife, to decrease or avoid tax liability. Assuming that the investment income belongs to the husband, this shifting could be occurring because the husband maintains a dominant position in the couple which leads to the wife feeling as though she is secondary or could lead to secondary earner bias if the wife is placed in higher marginal tax bracket/band. See Melvin Stephens, Jr. & Jennifer Ward-Batts, *The Impact of Separate Taxation on the Intra-Household Allocation of Assets: Evidence from the UK*, 88 J. PUB. ECON. 1989, 1995 (2004), available at [http://www.andrew.cmu.edu/user/melvins/ukassets\\_final.pdf](http://www.andrew.cmu.edu/user/melvins/ukassets_final.pdf) ("In many households, this reform [independent taxation] created an incentive to transfer a portion or even all of the household's assets to the wife since she faces the lower marginal tax rate. If she works very little or not at all, then the asset income shifted to her may not be taxed at all.")

<sup>151</sup> The following table is in pounds (£), United Kingdom's currency, and portrays current United Kingdom income tax rates (called Taxable Bands). See HM REVENUE & CUSTOMS, RATES AND ALLOWANCES – INCOME TAX, <http://www.hmrc.gov.uk/rates/it.htm> (last visited Sept. 22, 2009).

<b>Taxable Bands</b>	<b>2008–2009 (£)</b>
Starting Rate: 10%	0–2320
Basic Rate: 20%	0–34,800
Higher Rate: 40%	Over 34,800

<sup>152</sup> Income is in pounds (£), the British currency, with approximate US dollar equivalent as of Mar. 21, 2009. See MSN Money, [http://moneycentral.msn.com/detail/stock\\_quote?Symbol=/MYRUS](http://moneycentral.msn.com/detail/stock_quote?Symbol=/MYRUS) (last visited Sept. 22, 2009).

marginal and effective tax rates are not determinate upon the other spouse's income. Thus, individual filing should relieve working married women of the secondary earner bias.

### C. Ireland

#### 1. Ireland's Treatment of Working Married Women

¶153 Although Ireland acquired its independence from the United Kingdom in 1949, Ireland initially carried over the United Kingdom's income tax laws into its own system.<sup>153</sup> As such, there was initially gender bias in the tax code.<sup>154</sup> If married women did work, their income was considered earned by the husband.<sup>155</sup> Additionally, before the mid-1990s, Ireland applied a heavy marginal tax rate to labor, which directly affected secondary earners.<sup>156</sup> Thus, it cost families extra to have a secondary earner in the household. However, as in Malaysia and the United Kingdom, Ireland began to recognize the importance of secondary earners, usually married women, in the labor force. "To improve secondary earners' incentives to enter work, Ireland is switching gradually from a joint to an individual assessment of married couple income."<sup>157</sup>

¶154 In 1993, Ireland expanded the filing status options for married couples.<sup>158</sup> Ireland allocated a special filing for married couples who wanted their income to be assessed separately. This designation is called separate assessment.<sup>159</sup> In 1993, Ireland "moved from joint filing in the name of the husband with an option for separate assessment on

<sup>153</sup> Under Section 2 of the Republic Act of 1948, Ireland acquired complete independence from the United Kingdom. The Republic of Ireland Act, 1948 (Act No. 22/1978), § 2 (Ir.), *available at* <http://www.irishstatutebook.ie/1948/en/act/pub/0022/sec0002.html#zza22y1948s2>. The Irish tax statutes at this time referenced British income tax laws and how the statutes amended the British laws. *See* 14/04/1923: Double Taxation (Relief) 1923, Order No. 1, sched. Part I, (a) (Ir.), *available at* <http://www.irishstatutebook.ie/1923/en/si/v10pg829.html> ("Relief shall be allowed from British Income Tax in accordance with and under the provisions of section twenty-seven of the Finance Act, 1920, subject to the proviso that for the purpose of determining the Dominion rate of tax.").

<sup>154</sup> *See supra* note 127.

<sup>155</sup> *See* Income Tax Act, 1967, Part IX, c. 1, § 192 (1) (Ir.), *available at* <http://www.irishstatutebook.ie/1967/en/act/pub/0006/sec0192.html#zza6y1967s192> ("[A] woman's income chargeable to tax shall, so far as it is income for a year of assessment or part of a year of assessment during which she is a married woman living with her husband, be deemed for income tax (including sur-tax) purposes to be his income and not to be her income.").

<sup>156</sup> *See* Isabelle Joumard, *Tax Systems in European Union Countries*, 34 OECD ECON. STUD. 91, 98–104 (2001), *available at* <http://pages.stern.nyu.edu/~dbackus/Taxes/OECD%20EU%20tax%20systems%2002.pdf>.

<sup>157</sup> *Id.* at 101.

<sup>158</sup> Finance Act, 1993, (Act No. 13/1993), c. III, § 10(1) (Ir.), *available at* <http://www.irishstatutebook.ie/1993/en/act/pub/0013/sec0010.html#zza13y1993s10>:

(2) Subsection (3) shall apply for a year of assessment where, in the case of a husband and wife who are living together—

(a) (i) an election (including an election deemed to have been duly made) by the husband and wife to be assessed to tax in accordance with the provisions of section 194 has effect in relation to that year of assessment, and

(ii) the husband and the wife by notice in writing jointly given to the inspector before the 6th day of July in that year of assessment elect that the wife should be assessed to tax in accordance with the provisions of section 194 . . . .

<sup>159</sup> Janet G. Stotsky, *How Tax Systems Treat Men and Women Differently*, 34 FIN. & DEV. 30, 30 (1997), *available at* <http://www.imf.org/external/pubs/ft/fandd/1997/03/pdf/stotsky.pdf>.



labor income for the wife, to an option for the wife to be the ‘primary taxpayer.’<sup>160</sup> Under separate assessment, each spouse files his or her taxes individually but is still treated as married.<sup>161</sup> The couple shares equally the following personal tax credits: married tax credit, age tax credit, blind person’s tax credit, and incapacitated child tax credit.<sup>162</sup> The remaining available tax credits, reliefs, and exemptions<sup>163</sup> are allocated based on the cost incurred by the spouse.<sup>164</sup> Furthermore, the “standard rate band up to €45,400 can be transferred to the other spouse, but only at the end of the tax year.”<sup>165</sup> Therefore, €45,400 (approximately \$61,988)<sup>166</sup> of the couple’s income is taxed in the lower tax bracket or band of 20%, if only one spouse works. If both spouses work, up to €72,800 (approximately \$99,399) can be taxed in the lower tax bracket of 20%.<sup>167</sup> Spouses can choose to be separately assessed by making the election orally or in writing.<sup>168</sup>

<sup>160</sup> *Id.*

<sup>161</sup> In Ireland, the income tax schedules are based on whether an individual is married. The income tax schedule for married couples focuses on whether both spouses work or not. Irish Tax and Customs, IT2 – Taxation of Married Couples, <http://www.revenue.ie/en/tax/it/leaflets/it2.html#section14> (last visited Sept. 22, 2009).

The standard rate band for married couples for 2009 is €45,400 subject to an increase of up to €27,400 when both spouses are working. The increase is limited to the lower of €27,400 or the amount of the income of the spouse with the smaller income. This increase is not transferable between spouses.

In other words, if both spouses are working, up to €72,800 (45,400 + 27,400) can be taxed at the lower tax rate of 20%. However, the €27,400 is limited to lower of €27,400 or the income of the lower earning spouse. *Id.* The following table portrays the income tax rate schedule for married couples in the Euro (€), Ireland’s currency. See Finance (No. 2) Act, 2008, c. 3, § 4, Tbl., Part 3 (Ir.), available at <http://www.irishstatutebook.ie/2008/en/act/pub/0025/sec0004.html#sec4>.

<b>2009 Income Tax Schedule for Married Couples: One Spouse Works</b>		<b>2009 Income Tax Schedule for Married Couples: Both Spouses Work</b>	
Rate	Income Band (€)	Rate	Income Band (€)
20%	0 – 45,400	20%	0 – 72,800*
41%	Balance over 45,400	41%	Balance over 72,800

\*27,400 of the 72,800 is limited to the lower of 27,400 or the income of the lower earning spouse.

<sup>162</sup> A married person’s taxed credit is allowed in the first year of marriage. After the first year of marriage, the couple must choose whether they want to be jointly assessed, separately assessed, or singly assessed. See Irish Tax and Customs, Married Persons Taxation, <http://www.revenue.ie/en/tax/it/credits/married-persons-taxation.html> (last visited Sept. 22, 2009).

<sup>163</sup> The remaining tax credits, reliefs, and exemptions include dependent relative credit, health expenses credit, guide dog allowance, rent credit, artist’s relief, loan interest relief, etc. See Irish Tax and Customs, Tax Credits, <http://www.revenue.ie/en/tax/it/credits/index.html> (last visited Sept. 22, 2009); Irish Tax and Customs, Reliefs and Exemptions, <http://www.revenue.ie/en/tax/it/reliefs/index.html> (last visited Sept. 22, 2009).

<sup>164</sup> Irish Tax and Customs, Married Persons Taxation, <http://www.revenue.ie/en/tax/it/credits/married-persons-taxation.html> (last visited Sept. 22, 2009).

<sup>165</sup> Irish Tax and Customs, IT2–Taxation of Married Couples, <http://www.revenue.ie/en/tax/it/leaflets/it2.html#section14> (last visited Sept. 22, 2009). See also *supra* note 161.

<sup>166</sup> Income is in Euros (€), Ireland’s currency, with approximate US dollar equivalent as of March 21, 2009. See MSN Money, [http://moneycentral.msn.com/detail/stock\\_quote?Symbol=MYRUS](http://moneycentral.msn.com/detail/stock_quote?Symbol=MYRUS) (last visited Sept. 22, 2009).

<sup>167</sup> See *supra* note 161. The additional €27,400 rate band allowed to be taxed at the lower income tax rate of 20% is not transferable under separate assessment.

<sup>168</sup> *Id.*

¶55 Due to the enactment of separate assessment in Ireland, married couples presently can choose from three forms of filing: single assessment (each spouse is treated and taxed as a single individual), joint assessment (spouses income are combined and tax is assessed in one spouse's name), and separate assessment (each spouse's taxes are independent of the other spouse's).<sup>169</sup> Under single assessment, the married person is treated as a single individual and taxed at the single rates.<sup>170</sup> Additionally, "[o]ne spouse cannot claim relief for payments made by the other and there is no right to transfer tax credits or standard rate band to each other."<sup>171</sup>

¶56 When assessing the income jointly, a couple decides which spouse's name to use for the assessment of both incomes.<sup>172</sup> If a couple does not nominate a spouse, the spouse with the highest amount of income in the previous year is deemed the assessed spouse.<sup>173</sup> A couple can transfer credits and the standard rate band or bracket to suit their circumstances.<sup>174</sup> Unlike joint filing in the IRC, there is no stacking of income, because the spouses can use the lower income tax rate on both incomes.

¶57 As stated previously, separate assessment allows a couple to have their taxes computed individually with access to available credits and the standard tax band.<sup>175</sup> If no choice is made as to how a couple wants to be assessed, joint assessment is automatically enforced.<sup>176</sup> The filings are illustrated in the next section.

¶58 Although Ireland's separate assessment benefits married women, critics argue that Ireland's effective tax rate on secondary earners remains too high.<sup>177</sup> Additionally, Ireland promotes joint assessment above separate and single assessment.<sup>178</sup> However, a

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* The following table is in the Euro (€), Ireland's currency. See Finance (No. 2) Act 2008, ch. 3, § 4, tbl. Part 1 (Ir.), available at <http://www.irishstatutebook.ie/2008/en/act/pub/0025/sec0004.html#sec4>.

2009 Income Tax Rates for Singles	
Rate	Income Band (€)
20%	0 – 36,400*
41%	Balance over 36,400

<sup>171</sup> Irish Tax and Customs, IT2–Taxation of Married Couples, <http://www.revenue.ie/en/tax/it/leaflets/it2.html#section14> (last visited Sept. 22, 2009). The standard rate band for married couples for 2009 is €45,400.

<sup>172</sup> *Id.* See *supra* note 161 for the tax schedule for married couples.

<sup>173</sup> Irish Tax and Customs, IT2–Taxation of Married Couples, <http://www.revenue.ie/en/tax/it/leaflets/it2.html#section14> (last visited Sept. 22, 2009).

<sup>174</sup> *Id.* Under Joint Assessment, the tax credits and standard rate band can be allocated between spouses to suit their circumstances. For example: "If only one spouse has taxable income, all tax credits and the standard rate band will be given to him or her." *Id.* "If both spouses have taxable income, they can decide which spouse is to be the assessable spouse and request their local Revenue office to allocate the tax credits and standard rate band between them in whatever way they wish. [PAYE tax credit, employment expenses, and the basic standard rate band of €27,400 are non transferable.]" *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Boris Cournede, *Removing Obstacles to Employment for Women in Ireland* 7 (OECD Econ. Dep't, Working Paper No. 511, 2006), available at [http://www.oilis.oecd.org/olis/2006doc.nsf/LinkTo/NT00003C72/\\$FILE/JT03212998.PDF](http://www.oilis.oecd.org/olis/2006doc.nsf/LinkTo/NT00003C72/$FILE/JT03212998.PDF) ("For a Dublin-based family with two young children where one spouse works and earns the average production wage (APW), there is little point for the other spouse to take up a job paid at two-thirds of the APW: the effective 'tax plus childcare' rate is 93%.")

<sup>178</sup> Irish Tax and Customs, IT2–Taxation of Married Couples, <http://www.revenue.ie/en/tax/it/leaflets/it2.html#section14> (last visited Sept. 22, 2009) ("Joint Assessment

fundamental benefit of Ireland's separate assessment is that spouses can transfer excess allowances and credits in order to lower their overall tax rate. A couple decides how they want to allocate their tax liability. Most importantly, Ireland's tax system takes into account the working married woman. As previously stated, Ireland allocates an additional amount of income, €27,400 (approximately \$37,411), to the lower earning spouse or secondary earner, who likely is the married woman,<sup>179</sup> and taxes that income at the lowest tax rate. Thus, unlike the United States, in Ireland, the secondary earner's income is not initially taxed at high marginal tax rates. This is a noteworthy provision because it shows that the Irish government recognizes and will not penalize secondary earners.

## 2. Illustrating Ireland's Tax Code

¶159 In this section, three illustrative couples are taxed under each of Ireland's filing options: single assessment, joint assessment, and separate assessment, exclusive of applicable tax credits and exemptions and applying the assumption that the couple has been married for over a year.<sup>180</sup> The average effective tax rate<sup>181</sup> is calculated and the appropriate income tax schedule is employed.<sup>182</sup> The income tax due is the same under separate assessment and joint filing, because the spouses are treated as married and taxed accordingly.<sup>183</sup> The point is to show whether the lower earning spouse, the wife, experiences the secondary earner bias.

¶160 Example One: Consider a couple where only the husband works earning a salary of €80,000 (approximately \$109,230).<sup>184</sup> The taxes due will be €25,156 (approximately \$34,347) under single assessment, and €23,266 (approximately \$31,767) under separate and joint assessment. The additional tax liability under single assessment is not the only determinative factor for this couple. Remember, with single assessment, the couple cannot transfer tax credits<sup>185</sup> or the lower income tax rate among each other; hence, the couple is likely unable to reduce their income tax liability. Thus, the issue with this

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(also known as aggregation) is usually the most favourable basis of assessment for a married couple.”).

<sup>179</sup> See Herwig Immervoll et al., *An Evaluation of the Tax-Transfer Treatment of Married Couples in European Countries*, 33 *tbl.1* (Econ. Pol’y Research Unit, Univ. of Copenhagen, Working Paper No. 2008-03, 2008), available at [http://www.econ.ku.dk/eprn\\_epru/Workings\\_Papers/wp-08-03.pdf](http://www.econ.ku.dk/eprn_epru/Workings_Papers/wp-08-03.pdf) (noting that in Ireland, for two-earner couples, of the secondary earners, the spouses that earned less income, seventy-eight percent were women.).

<sup>180</sup> Note, however, that the calculations would be different if the couple was married in the current tax year. See Irish Tax and Customs, IT2–Taxation of Married Couples, <http://www.revenue.ie/en/tax/it/leaflets/it2.html#section14> (last visited Sept. 22, 2009).

<sup>181</sup> For the formula for *average* effective tax rate, see *supra* note 61.

<sup>182</sup> For the income tax rate schedule for singles, see *supra* note 170. For the income tax rate schedule for married couples, see *supra* note 161.

<sup>183</sup> Irish Tax and Customs, IT2–Taxation of Married Couples, <http://www.revenue.ie/en/tax/it/leaflets/it2.html#section14> (last visited Sept. 22, 2009). The tax liability will be the same because married couples apply the same income tax rate schedule under separate and joint assessment. See *supra* note 161 for the tax schedule.

<sup>184</sup> Income is in Euros (€), Ireland's currency, with approximate US dollar equivalent as of March 21, 2009. See MSN Money, [http://moneycentral.msn.com/detail/stock\\_quote?Symbol=MYRUS](http://moneycentral.msn.com/detail/stock_quote?Symbol=MYRUS) (last visited Sept. 22, 2009).

<sup>185</sup> For instance, the Home Carer's Tax Credit is only available if the couple files jointly. See Irish Tax and Customs, Home Carer's Tax Credit, <http://www.revenue.ie/en/tax/it/credits/home-carers.html> (last visited Sept. 22, 2009).

couple is not a secondary earner bias issue, but what filing option is best to reduce the couple's taxes. The next two examples examine when the wife decides to work.

¶161 Example Two: Now consider a couple in which the wife and husband earn the same salary of €40,000 (approximately \$54,615), totaling €80,000 (approximately \$109,230). Regardless of whether the couple files under single assessment, joint assessment, or separate assessment, the total tax due for the couple will be €17,512 (approximately \$23,910). The issue in this case is how the tax liability is allocated among the spouses and what marginal and effective tax rates affect each spouse. If the couple chooses single assessment with no transfer of tax credits and the lower tax rate, each will owe taxes of €8756 (approximately \$11,955), and each is exposed to a marginal income tax of 41% and *average* effective tax rate of 22%. However, under joint and separate assessment, the couple can decide whose income, if any, will be shielded from the high tax rate of 41%.<sup>186</sup> Thus, the spouses are able to decide by themselves who will incur the higher tax or penalty and what will be their individual effective tax rates.

¶162 Example Three: Finally, consider a couple in which the husband earns €60,000 (approximately \$81,022) and wife earns €20,000 (\$27,307). If the couple files under single assessment, the total income tax liability is €20,959. This equals income taxes of €16,956 (\$23,151), with a portion of income taxed in the higher bracket of 41%, and an *average* effective tax rate of 28% for the husband, and €4000 (approximately \$5461), with all income taxed in the lower bracket of 20%, and an *average* effective tax rate of 20% for the wife. Under joint and separate assessment, the total income tax liability of the couple is €19,066 (approximately \$26,032). However, if the couple decides to file under separate assessment, the tax liability of the husband is €15,066 (approximately \$20,571), with a portion of income taxed at the higher rate of 41%, and an *average* effective tax rate of 25%, and the liability of the wife is €4,000 (approximately \$5461), with all income taxed at the lower rate of 20%, and an *average* effective tax rate of 20%. Under each filing option, the wife, the secondary earner, is not exposed to high marginal taxes and thus, is not penalized for working.

¶163 These examples show that if a married woman is a secondary earner in Ireland, she is not likely to experience the secondary earner bias. As the spouse with the lower earnings, she will be taxed in the lower tax bracket. This is primarily due to two reasons. First, with single assessment, her income is always initially taxed in the lowest tax bracket and her marginal income tax is not related to her husband's income. Second, with joint and separate assessment, although the couple can allocate up to €72,800 taxed at the lower tax rate, only €45,400 is transferable between the spouses and the other €27,400 is applied towards the income of the lower earning spouse.

¶164 Problems could arise in implementing Ireland's income tax filing structure into the IRC. The main concerns would be how the United States' progressive tax structure would adhere to both spouses being able to divide the same credits, and that the income tax would not exactly be the same under joint filing and separate assessment. These concerns are addressed below.

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<sup>186</sup> Since both spouses work, up to €72,800 of their income can be taxed against the lower band or bracket of 20%. The couple's choices include taxing all of one spouse's income and €32,800 of the other spouse's income at 20% with the remaining €7,200 taxed at 41% or proportioning the €72,800 under a method they create.

## IV. THE PROPOSAL

¶165 Married working women should be able to make the choice of entering, re-entering, or remaining in the workforce without worrying about whether their income will be lost to income taxes. It is understandable that if both spouses choose to work, their income taxes should be greater than that of a family with a sole earner. However, this must be implemented in the IRC in a way that properly recognizes, rather than penalizes, the income of secondary earners. That is what this proposal accomplishes. This proposal integrates the methods that produced tax reform in Malaysia and the United Kingdom with the filing structure of Ireland to mitigate or even eliminate the gender discrimination effects of the secondary earner bias contained within the IRC. None of these countries' tax systems are perfect. Yet, we can still learn from them and apply the parts that are commendatory for working married women.

*A. Lessons from Malaysia and the United Kingdom*

¶166 The systems in Malaysia and the United Kingdom teach us that organizing and publicly protesting for the removal of the secondary earner bias produces results. Consider Malaysia, a country where women's rights were and continue to be infringed upon and, basically, disregarded. Still, women and organizations were able to influence the government to recognize secondary earners in the tax law.<sup>187</sup> Recall what occurred in the United Kingdom. The fact that the United Kingdom's tax code discriminated against women as secondary earners was published in a national newspaper and magazine.<sup>188</sup> After reading this, 36,000 readers protested the tax laws and the United Kingdom amended them.<sup>189</sup>

¶167 This can occur in the United States. Working married women in the United States will continue to be considered secondary earners and penalized for filing both jointly with and separately from their husbands until women decide to make a change and have their voices heard by the government. In a society such as Malaysia, where women's rights continue to be limited, women and organizations fought and still fight for removal of gender bias in the tax code. Yet, in the United States, a country whose ideals rest on equal rights for all, the discriminatory effects of gender bias remain in the tax code. People should organize and protest to have the tax laws changed.

*B. Lessons from Ireland*

¶168 Under this proposal, the IRC will include three filing choices for married couples: married filing separately, married filing jointly, and separate assessment. This is similar to Ireland's tax structure for married couples. The married filing separately and the married filing jointly IRC language, procedures, and tax rates will remain the same as they currently are in the IRC. For the inclusion of the separate assessment, the language of Section 1(d)<sup>190</sup> of the IRC should be amended. The language should be changed to:

<sup>187</sup> WOMEN'S AID ORG., *supra* note 110.

<sup>188</sup> Briggs, *supra* note 137.

<sup>189</sup> *Id.*

<sup>190</sup> By including the separate assessment designation, the remaining subsections in I.R.C. §1 will move down a letter. Thus, "married individuals filing separate returns" will now be I.R.C. §1(e). See I.R.C. §1(d) (2006).

(d) (1) Married individuals filing under separate assessment. There is hereby imposed on the taxable income of every married individual (as defined in section 7703 [26 U.S.C.S. § 7703]) who does not make a single return jointly with his or her spouse under section 6013 [26 U.S.C.S. § 6013], a tax determined in accordance with the following table.<sup>191</sup>

<b>If the taxable income is:</b>	<b>The tax is:</b>
Not over \$16,700	10% of taxable income
Over \$16,700 but not over \$67,900	\$1670, plus 15% of the excess over \$16,700
Over \$67,900 but not over \$137,050	\$9350, plus 25% of the excess over \$67,900
Over \$137,050 but not over \$208,850	\$26,637.50, plus 28% of the excess over \$137,050
Over \$208,850 but not over \$372,950	\$46,741.50, plus 33% of the excess over \$208,850
Over \$372,950	\$100,894.50, plus 35% of the excess over \$372,950

For use of this filing designation, the married individuals must not earn the same amount of income for the taxable year and one spouse's earnings must be at least \$40,000 greater than the other spouse's earnings.<sup>192</sup>

Married couples who choose to be separately assessed in the United States will be individually taxed under the same tax rate schedule as if they filed jointly.

¶69 As practiced in the United Kingdom<sup>193</sup> and Ireland,<sup>194</sup> a couple can share the credits or jointly decide which spouse will use each credit with the restrictions and designated phase-outs for each tax credit applied to each spouse as if the spouse filed as single. Specifically, couples can share the Hope and Lifetime Educational Credits, Child and Dependent Care Credit, Adoption Credit, and Elderly and Disabled Credit, if applicable. If a husband and wife cannot jointly decide how the credits should be allocated when there is separate assessment filing, then, as is done in Ireland,<sup>195</sup> the credit should be apportioned by the cost incurred by each spouse related to the particular tax credit. If spouses cannot determine what cost was paid by whom, then there should be a default provision that the credit is shared equally. The default provision should include that a spouse must fulfill the requirements for the credit.

<sup>191</sup> Note that these are 2009 income tax rates for couples filing jointly.

<sup>192</sup> The IRC provisions for married filing separately should be moved to from I.R.C. § 1(d) to I.R.C. § 1(d)(2).

<sup>193</sup> Each spouse in the United Kingdom is entitled to his or her share of a number of allowances, including the Personal Allowance, Married Couple's Allowance, and the Blind Person's Allowance. See HM Revenue & Customs, Introduction to tax allowances and reliefs, <http://www.hmrc.gov.uk/incometax/intro-tax-allow.htm> (last visited Sept. 22, 2009). See also *supra* note 141.

<sup>194</sup> See Irish Tax and Customs, Married Persons Taxation, <http://www.revenue.ie/en/tax/it/credits/married-persons-taxation.html> (last visited Sept. 22, 2009).

<sup>195</sup> *Id.*

¶70 However, unlike Ireland's tax system,<sup>196</sup> there will not be a set amount of income taxed at the lowest income tax rate that can be transferred among spouses. Instead, under separate assessment, each spouse is taxed progressively accordingly to the income levels in each tax bracket. Furthermore, a married couple would not be able to file under separate assessment unless both spouses work and one spouse earns at least \$40,000 more than the other spouse. This proposal is illustrated in the next section.

### C. Illustrations of the Proposal

¶71 In this section the same explicative couples referenced in the previous sections are employed. Remember, under each scenario, the couple will owe income taxes of \$12,375 if they file jointly.<sup>197</sup>

¶72 Example One: Recall the couple where only the husband worked, earning \$80,000. The couple would not be able to file under separate assessment because both spouses do not work. The purpose of the separate assessment designation is to assist secondary earners. If the wife is not working, she and her husband should not be able to benefit from separate assessment. However, it is important to note that if the wife decided to work, the couple should think about filing under separate assessment instead of filing jointly if the wife earns at least \$40,000 less than her husband. This is because under separate assessment, the wife's income would be initially taxed at 10% and not at the higher 25% marginal tax rate if they filed jointly.

¶73 Example Two: Now recall the couple in which both spouses work, earning \$40,000 each. If they filed under separate assessment, each would owe income taxes of \$5165, totaling \$10,330, which is \$2045 less than filing jointly. As stated above, the separate assessment designation is supposed to help lessen the tax burden on secondary earners. There is no clear secondary earner in this family, because both spouses earn the same income. Thus, this couple should not be able to take advantage of the IRC, by filing under separate assessment instead of jointly, to lessen their income taxes when neither spouse is facing a tax penalty.

¶74 Example Three: Finally, recall the couple in which the husband earns \$60,000, substantially more than his wife, who earns \$20,000. Since the husband earns \$40,000 more than his wife, they can file under separate assessment. Their individual income tax liability would be \$8165 for the husband and \$2165 for the wife, totaling \$10,330. This is \$2045 less than filing jointly. Instead of a 25% marginal income tax and 15% *average* effective tax rate, under separate assessment, the wife's marginal income tax rate, as a secondary earner, is 15% and the *average* effective tax rate is 11%. This example perfectly illustrates the importance of the separate assessment designation. The secondary earner is not penalized with high marginal income taxes for working.

¶75 As these examples indicate, the proposal assists couples who both work, but where one spouse earns at least \$40,000 more than the other spouse. Under this proposal, couples in such a predicament will owe less income tax by filing under separate assessment instead of joint filing primarily because the secondary earner, likely the wife, will not be exposed to the high marginal income taxes she would face under joint filing.

<sup>196</sup> See Irish Tax and Customs, IT2–Taxation of Married Couples, <http://www.revenue.ie/en/tax/it/leaflets/it2.html#section14> (last visited Sept. 22, 2009).

<sup>197</sup> See *supra* note 59. These examples exclude applicable deductions, exemptions, and credits to simplify the focus on how the secondary earner bias arises.

*D. This Proposal can be Applied to the IRC*

¶76 Potential critics of this proposal might argue that the proposal goes too far for secondary earners. If couples are not required to pay the extra penalty for not filing jointly, tax revenues may drop. The status of the current economy could support the argument that the United States cannot afford to pay for the rate deduction. Additionally, critics might argue that married couples should just file jointly instead of under separate assessment because they would be receiving the benefits of filing jointly (i.e., the tax credits). Some might even argue that having married couples think of themselves as individuals could incite the deterioration of the family as a unit. Consequently, divorce rates could increase.

¶77 What these potential arguments do not take into account is the fact that giving people more and better choices as to how they want their income taxed is essential for the betterment of families and the United States as a whole. Under this proposal, married couples, particularly married women, will be able to decide whether the wife should work or not and if she does work, which filing option is best for them without interference by the government. Studies indicate that in countries that offer the choice of joint filing and independent filing or separate assessment, “better-off, two-earner couples can opt for the advantages of independent taxation (such as privacy and autonomy in financial affairs) [separate assessment], and lower income one-earner couples can benefit from the advantages of income pooling [joint filing].”<sup>198</sup> Thus, couples, together, can choose which option is financially best for their families.<sup>199</sup>

¶78 Furthermore, lowering taxes offers an unambiguous *incentive* to work in the market, which in turn creates greater amounts of income to taxation. “Economic theory suggests that reductions in marginal personal income tax rates would increase participation in the labor force. The marginal rate cuts would, in turn, benefit the economy by strengthening the incentives to work and save.”<sup>200</sup> One of the primary reasons behind the Tax Reform Act of 1986, which drastically decreased marginal income tax rates, was the Reagan administration’s proposition that lowering taxes would actually increase revenue. Upon signing the Tax Reform Act of 1986, President Reagan stated:

When I sign this bill into law, America will have the lowest marginal tax rates and the most modern tax code among major industrialized nations, one that encourages risk-taking, innovation, and that old American spirit of enterprise. We’ll be refueling the American growth economy with the kind of incentives that helped create record new businesses and nearly 11.7 million jobs in just 46 months. Fair and simpler for most Americans, this is a tax code designed to take us into a future of technological

<sup>198</sup> O’Donoghue & Sutherland, *supra* note 93, at 6.

<sup>199</sup> *Id.*

<sup>200</sup> WILLIAM W. BEACH, ET AL., THE HERITAGE FOUND., APPENDIX: THE ECONOMIC AND FISCAL EFFECTS OF THE PRESIDENT’S GROWTH PACKAGE 20 (2003), *available at* <http://www.heritage.org/research/budget/cda0305a.cfm>.



invention and economic achievement, one that will keep America competitive and growing into the 21st century.<sup>201</sup>

¶79 President Bush's tax cuts on income, capital gains, and dividends in 2003 produced a \$785 billion increase in revenue over four years.<sup>202</sup> In fact, by lowering taxes, the percentage of taxes paid by the wealthy increased between 1980 and 2005.<sup>203</sup>

¶80 Moreover, although this proposal draws on international examples, the idea of individual filing for married couples is not altogether foreign to the debate in the United States.<sup>204</sup> Specifically, Lawrence Zelenak proposed individual filing in 1994 under the assertion that the IRC should abolish the requirement that married couples identify themselves as married when filing their return.<sup>205</sup> Instead, each spouse is treated as an individual and taxed accordingly, and therefore, by taxing the spouses individually, the secondary earner bias is eliminated and the spouse that actually earned and controlled the income is taxed for it.<sup>206</sup> Zelenak proclaimed that individual filing would alleviate the secondary bias, because under a progressive tax system with joint filing for married couples, the secondary earner is inevitably penalized.<sup>207</sup> This proposal recognizes Zelenak's notion but clarifies which married couples can employ the separate assessment designation and at what rates they will be taxed. As stated above, under the proposal, only married couples in which both spouses work and one spouse earns at least \$40,000 more than the other spouse can file separate assessment, where they are taxed at the married filing jointly rates. Additionally, the proposal does not abolish joint filing or married filing separately designations.

¶81 It must be noted that there would be no need for this proposal if secondary earners, who in most instances are women, were not penalized for working by the IRC. It is extremely important for families to be able to make their own decisions as to whether both spouses will work. Couples making decisions together and thinking about what is best for their families without interference by the government should strengthen families not fragment them. Overall, this proposal does what Congress has not done: It recognizes

<sup>201</sup> Remarks before Signing the Tax Reform Act of 1986, 2 PUB. PAPERS 551 (Oct. 22, 1986), *available at* <http://www.americanrhetoric.com/speeches/ronaldreagantaxreformactof1986.html>.

<sup>202</sup> Pete Du Pont, *Inconvenient Tax Truths: Charlie Rangel and Other Liberal Leaders Want to Raise Tax Rates Even if it Means Lower Tax Revenues*, WALL ST. J., Oct. 30, 2007, <http://www.opinionjournal.com/columnists/pdupont/?id=110010798>. For President Bush's tax cuts, see Economic Growth and Tax Relief Reconciliation Act of 2001, 107th Cong., 115 Stat. 38 (2001); Jobs and Growth Tax Relief Reconciliation Act of 2003, 108th Cong., 117 Stat. 752 (2003).

<sup>203</sup> Du Pont, *supra* note 202 ("According to the Treasury Department, the top 1% of income tax filers paid just 19% of income taxes in 1980 (when the top tax rate was 70%), and 36% in 2003, the year the Bush tax cuts took effect (when the top rate became 35%). The top 5% of income taxpayers went from 37% of taxes paid to 56%, and the top 10% from 49% to 68% of taxes paid. And the amount of taxes paid by those earning more than \$1 million a year rose to \$236 billion in 2005 from \$132 billion in 2003, a 78% increase.").

<sup>204</sup> See Alstott, *supra* note 47, at 222–31; Bittker, *supra* note 11, at 1437–42; MCCAFFERY, *supra* note 1, at 5, 65, 68–69.

<sup>205</sup> Zelenak, *supra* note 24, at 342–44 ("The only way to avoid both marriage bonuses and penalties is to abandon marital status as a tax determinant and to require that spouses file separate returns. . . . Mandatory separate returns . . . can be persuasively defended as reflecting governmental neutrality between traditional families and two-earner couples.").

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 339–40.

the importance of secondary earners and the need to not penalize them with high marginal income taxes.

## V. CONCLUSION

¶82 Most people would agree that working women are necessary contributors to the U.S. economy. Yet, the tax laws do not reflect these notions. The tax laws are outdated and should be amended. Indeed, Congress has enacted some provisions that do favor working women.<sup>208</sup> However, this is not enough. By learning from the tax reforms in Malaysia, the United Kingdom, and Ireland, Congress could move forward in allowing working married women in the United States to make choices about whether they want to work or not without being penalized by the tax code if they do decide to work.

¶83 If the Malaysian and the United Kingdom experiences are any indication, then it is most likely that the secondary earner bias will not be adequately addressed until protestors, particularly voters, make it known to Congress that women should not be explicitly or implicitly discriminated against by the tax code. What is very disturbing is that it has taken so much time to bring to Congress's attention the fact that many working married women are unfairly treated by the tax code. In a country where every citizen is supposed to be treated fairly and equally, it would seem that a discriminatory effect, such as the secondary earner bias, would have not remained in force for such a long period of time.

¶84 This proposal presents a considered method for lessening the discriminatory effects of the IRC on working married women who earn less than their husbands. The creation of the separate assessment designation allows most working married women to not be taxed more than they would have been taxed if they had been joint filers. Such a designation prevents these women from becoming victims of the secondary earner bias and its associated higher marginal income tax rate. Additionally, under separate assessment, working married women may still access the same applicable tax credits available had they filed jointly with their husbands. Most importantly, with the separate assessment filing designation, married women will be able to make their own choices: whether they want to begin working or resume a career, and how they want their income to be assessed without interference or influence by the government. They will be able to make these decisions unburdened by the secondary bias presently lurking in the tax code.

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<sup>208</sup> For instance, the "head-of-household" filing designation may result in a better tax position for women if the taxpaying woman is a single mother. However, the child care credit, head of household status, earned income tax credit, and dependant care credit all generally improve women's tax positions less than they improve men's. See, e.g., Lily Kahng, *Fiction in Tax in TAXING AMERICA* 25 (Karen B. Brown & Mary Louise Fellows eds. 1996); Alstott, *supra* note 47, at 2038–39, 2056–60; Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 *BUFF. L. REV.* 49, 63–91 (1971); Staudt, *supra* note 79, at 1571, 1601–05, 1609.