

WHAT INNOCENT SPOUSE RELIEF SAYS ABOUT WIVES AND THE REST OF US

STEPHANIE HUNTER McMAHON†

Every time spouses sign joint returns, knowingly or not they accept joint and several liability, meaning that either spouse may be held liable for all of the tax due on the joint return. Although joint and several liability facilitates tax collection, it may conflict with a spouse's claims to have signed the return while being lied to, abused, or manipulated. The question for Congress is how to balance these competing demands. Innocent spouse relief provides some tax relief for spouses Congress does not believe should be jointly and severally liable. The existence of this relief also offers an opportunity to explore how the government views married women, as wives have always composed the lion's share of seekers and recipients of innocent spouse relief. The relief currently provided is both over- and under-inclusive by (1) not offering relief to all spouses or former spouses who are unable to assess the validity of their returns and (2) offering relief to some who both knew of, and helped orchestrate, tax evasion. This Article argues that the existing innocent spouse relief regime should be replaced with one that respects joint filers' agency when signing joint returns and affords relief only when a joint filer was unable to exercise that agency. In the event that a spouse is coerced into signing the return, relief needs to be speedier and less burdensome in application than under today's law. This approach would increase the equity of the tax system and reduce the administrative costs on both the taxpayer and the government.

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INTRODUCTION

A core feature of the U.S. tax system is the decision to view married couples as a single filing unit for income tax purposes. This decision is effectuated through the system of joint returns: a single return filed by a married couple reporting all income, deductions, and credits due to the spouses individually or as a unit.¹ Although this is the dominant approach taken by tax filing couples,² an alternative option exists, “married filing separately,” which allows a spouse to file an individual return reporting only her income, expenses, and credits. For the 95% of spouses using a joint return, there is joint and several liability for the taxes due on that return.³ Thus, either spouse can be required to pay the tax due regardless of who prepared the return, who earned the income, or who spent or otherwise benefited from the income.

Why might this joint and several liability pose a problem? To the extent that a spouse knowingly files a false return (such as when the couple fails to list all the income they earned or claims erroneous deductions), it might not be a problem. However, if a spouse submitted a false return as a result of abuse or without knowledge of the missing income because the other spouse hid information, the “innocent” spouse may have an equitable argument that she should not have to pay the tax due even though there is joint and several liability for the return.

Consider a simple example: In year one, Jack and Jill, a married couple, file a joint return. Jack, who has extra income that he has kept secret from Jill, prepares the return (with or without her participation). They sign and file the return. In year two, Jack and Jill divorce. In year three, the Internal Revenue Service (“IRS”) audits the year one return and determines that the couple has underreported income (the income Jack failed to include) and owes additional tax, interest, and penalties. Because of joint and several liability, the IRS can pursue either Jack or Jill for the amounts owed. If Jack cannot be found, the IRS may seek to recover the entire amount from Jill.⁴

¹ I.R.C. § 6013 (2006).

² Over 95% of couples choose to file jointly, at least in part because the tax brackets that apply to joint returns are wider than those that apply to spouses who file separately and because certain credits require joint filing. INTERNAL REVENUE SERVICE, STATISTICS OF INCOME—2011, INDIVIDUAL INCOME TAX RETURNS, PUBLICATION 1304, at 37 (2012). Spouses may not file as “single” taxpayers.

³ I.R.C. § 6013(d)(3) (2006); Treas. Reg. § 1.6013-4(b) (as amended in 2002).

⁴ Legally the IRS does not have to pursue Jack first; however, it is the policy of the IRS to collect from the more culpable spouse first. See Letter from Grant Newman, Director, Office of Field Operations (July 6, 1988), *quoted in* Marjorie O’Connell, *Innocent*

Jill, in turn, might argue that such liability is inequitable given her lack of knowledge of, access to, or benefit from the income.

The tax system has acknowledged this equitable argument and created “innocent spouse relief” in § 6015 of the Internal Revenue Code that applies three different facts and circumstances tests described more fully in Part I below.⁵ The application of § 6015 relief has generated controversy over its scope.⁶ Some scholars argue that innocent spouse relief should be broadened because liability “itself is unfair”⁷ or that the “principal rationale for joint and several liability—marital unity—is little more than a fiction. . . ,”⁸ but the primary argument made is that wives should not be held liable for joint returns.⁹ Thus, these critics generally prefer fundamental reform to our filing system. Rather than revise § 6015, they suggest we abandon joint filing (with joint and several liability) and move to a system of individual filing in which each individual files a return reflecting her own income and her own deductions. Similar to the option of married filing separately, with mandatory individual filing each spouse is liable only for the taxes due on her own return.¹⁰ Given that there is no indication that such a significant change is likely to occur in the foreseeable future, the analysis of innocent spouse relief provided in this Article operates on the very realistic assumption that joint filing will continue to operate as the standard approach for married couples.¹¹

This Article agrees that the current system of innocent spouse relief is flawed; however, it contends that it is both under- and over-inclusive, and

Spouse Rules Can Avoid Unexpected Liability on Joint Returns with Former Spouses, 17 TAX’N FOR LAW. 226, 229 (1989).

⁵ Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3201(a), 112 Stat. 685, 734–40 (1998).

⁶ See Shari Motro, *A New “I Do,”* 91 IOWA L. REV. 1509, 1532 (2006); Richard Beck, *The Failure of Innocent Spouse Reform*, 51 N.Y.L. SCH. L. REV. 928, 932 (2006); Lily Kahng, *Innocent Spouses*, 49 VILL. L. REV. 261, 261–62 (2004); Amy Christian, *Joint and Several Liability and the Joint Return*, 66 U. CIN. L. REV. 535, 535 (1998). For students who critique the liability, see Abraham Gutting, Note, *The “Price” is Right*, 2 CHARLESTON L. REV. 751 (2008); Meghan Kerns, Note, *Duress*, 58 HASTINGS L.J. 1123 (2007); Adrienne Hodgkins, Comment, *Getting a Second Chance*, 65 LA. L. REV. 1167 (2005); Svetlana Attestatova, Note, *The Bonds of Joint Tax Liability Should Not Be Stronger Than Marriage*, 78 WASH L. REV. 831 (2003); Kari Smoker, Comment, *IRS Restructuring and Reform Act of 1998*, 60 OHIO ST. L.J. 2045 (1999). One practitioner recently completed a how-to book for seeking innocent spouse relief. ROBERT B. NADLER, *A PRACTITIONER’S GUIDE TO INNOCENT SPOUSE RELIEF* (2011).

⁷ Beck, *supra* note 6, at 932.

⁸ Kahng, *supra* note 6, at 262.

⁹ Beck, *supra* note 6, at 932; Kahng, *supra* note 6, at 262.

¹⁰ Individual filing would remove the perceived bracket penalty imposed on married filing separately and would allow spouses to claim credits without joint filing.

¹¹ Although I have argued elsewhere that we should retain the joint return, accepting that position is not necessary for accepting the value of the innocent spouse reform proposed in this Article. See Stephanie Hunter McMahon, *To Have and to Hold: What Does Love (of Money) Have to Do with Joint Tax Filing?*, 11 NEV. L.J. 718 (2011); Stephanie Hunter McMahon, *London Calling: Does the U.K.’s Experience with Individual Taxation Clash with the U.S.’s Expectations?*, 55 ST. LOUIS U. L.J. 159 (2010).

thus mere expansion of its scope would not be the appropriate remedy. Rather, this Article argues that § 6015 should be reformed to provide speedier and less costly relief for a narrower category of spouses who were coerced into signing the joint return.¹² Under this proposal, once a requesting spouse satisfies a relatively low burden of establishing that she was coerced into signing the return, either by being abused or deceived about the return, the spouse wins mitigation of the tax burden unless certain extenuating circumstances discussed in Part III make it equitable for the IRS to collect from the innocent spouse. In the latter case, the burden of proof falls on the IRS or the “guilty spouse” to prove it is equitable to collect from an otherwise innocent spouse.

Why is this reform preferable to both the current system and others’ proposed expansions of innocent spouse relief? Three important reasons, discussed in more detail in Part II, support a reform of § 6015 that addresses both its underinclusiveness and its overinclusiveness. First, the current system of providing innocent spouse relief is costly and difficult to administer. Not only is the relief’s direct cost in terms of tax revenue high, estimated to be \$1.4 billion in § 6015’s first decade, but so is the relief’s indirect cost.¹³ For the last decade, in all but one year § 6015 has been one of the IRS’s top ten litigated issues.¹⁴ Moreover, we should not forget that at least some couples work together to use innocent spouse relief against the IRS to reduce their collective taxes and that some former spouses strategically (or vindictively) use innocent spouse relief to avoid tax and punish their former partner.¹⁵ With the proposal, the IRS can target its efforts on those most likely

¹² As used in this Article, coercion is a lesser standard than legal duress, which requires a specific threatening act by the other spouse at the time of the signing of the tax return. See *infra* note 26. If a spouse signs a joint return under duress, legally there is no joint return. See *In re Hickley*, 256 B.R. 814, 828 (2000); *Wiksell v. Comm’r*, 67 T.C.M. (CCH) 2360, 2368-89 (1994), *rev’d on other grounds*, 90 F.3d 1459 (9th Cir. 1996).

¹³ STAFF OF THE JOINT COMM. ON TAXATION, 105th Cong., ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT RELATING TO H.R. 2676, JCX-51-98 (1998). Allowing each spouse to be liable only for her share of liability was estimated to cost \$5.2 billion. STAFF OF THE JOINT COMM. ON TAXATION, 105th Cong., ESTIMATED REVENUE EFFECTS OF H.R. 2676, JCX-42-98 (1998). Because of the limited reporting, it is unknown how much the provision costs today.

¹⁴ 1 NAT’L TAXPAYER ADVOCATE, 2011 ANNUAL REPORT TO CONGRESS, § 3, at 587 (2012), *archived at* <http://www.perma.cc/0xWw5P6upiV>; 1 NAT’L TAXPAYER ADVOCATE, 2010 ANNUAL REPORT TO CONGRESS, at 414 (2011), *archived at* <http://www.perma.cc/0xWw5P6upiV>; 1 NAT’L TAXPAYER ADVOCATE, 2009 ANNUAL REPORT TO CONGRESS § 3, at 403 (2010), *archived at* <http://perma.cc/0Wmcyd9DgGm>; 1 NAT’L TAXPAYER ADVOCATE, 2008 ANNUAL REPORT TO CONGRESS § 3, at 455 (2009), *archived at* <http://perma.cc/0xnZ7r9D7xV>; 1 NAT’L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT TO CONGRESS § 3, at 558 (2008), *archived at* <http://www.perma.cc/0zWf9aJGXfs>; 1 NAT’L TAXPAYER ADVOCATE, 2006 ANNUAL REPORT TO CONGRESS § 3, at 553 (2007), *archived at* <http://www.perma.cc/0rgv6gZ6RaQ>; 1 NAT’L TAXPAYER ADVOCATE, 2005 ANNUAL REPORT TO CONGRESS § 3, at 471 (2006), *archived at* <http://perma.cc/09kz9TN2kp7>; 1 NAT’L TAXPAYER ADVOCATE, 2004 ANNUAL REPORT TO CONGRESS, at 496 (2005), *archived at* <http://perma.cc/08vf7GAu5UV>.

¹⁵ It is impossible to anticipate the extent of this behavior, although the adoption of the income-splitting joint return in 1948 was largely a response to what Congress per-

exploiting innocent spouse relief rather than investigating each relief request as required under current law.

Second, arguments to broaden the existing package of innocent spouse relief conceive of the dilemma as one that pits the “innocent,” or at least the less guilty spouse, against the IRS. Framed that way, the innocent spouse can seem more appealing than the tax collector. However, the more accurate description is that granting innocent spouse relief shifts tax burdens among different taxpayers. If in the hypothetical above we decide not to impose any tax burden on Jill, we have effectively shifted her burden not to Jack, who is judgment proof because he cannot be located, or to the IRS as a government agency, but to other taxpayers, both married and single, who did report all of their income, paid all of their taxes due, and managed their lives on the income left over. This selective lowering of tax burdens should only be permitted if it accomplishes a just objective.

Third, the current system (including changes implemented by the Treasury Department in January 2012)¹⁶ and any expanded version thereof advocated by some scholars would reward spouses who were not coerced but chose to sign the return as prepared. These spouses often benefit from (1) the decision to file jointly and receive certain rate schedule and other tax benefits, (2) the marital division of labor they negotiated with their spouse, and (3) the tax savings from filing the false return or failing to pay the taxes due. For spouses who were not coerced into signing their returns, failing to recognize these benefits dismisses the choices they made. Embedded in some current arguments about innocent spouse relief are visions of spouses’, especially wives’, roles that may not reflect the reality of their individual agency.¹⁷ Moreover, these arguments equate certain divisions of marital duties with presumed incapacity on the part of women as the group most often requesting innocent spouse relief.

The review of this issue’s effect on wives is made difficult because wives are not a cohesive group, and they do not always share economic interests with respect to taxes. Anne Alstott has illustrated how feminist theory does not, and cannot, provide a clear agenda for the development of tax policy.¹⁸ A single feminist position on most tax issues is impossible because of conflicts within the feminist camp.¹⁹ As long as liberal feminists argue for

ceived as inappropriate income shifting. McMahon, *To Have and To Hold*, *supra* note 11, at 723–38.

¹⁶ I.R.S. Notice 2012-8, 2012-4 I.R.B. 309. This notice has been followed by a new Revenue Procedure implementing most of the changes proposed in 2012. Rev. Proc. 2013-34, 2013-43 I.R.B. 397.

¹⁷ The gendered implications of joint and several liability and innocent spouse relief are now more complicated because married same-sex couples can file joint returns. Rev. Rul. 2013-17, 2013-38 I.R.B. 201. This paper does not discuss this added dimension.

¹⁸ Anne Alstott, *Tax Policy and Feminism*, 96 COLUM. L. REV. 2001 (1996).

¹⁹ For discussion of race and sexual orientation bias and the tax laws, see generally Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787 (1997); Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805 (2008); Anthony C. Infanti, *Taxing Civil Rights Gains*, 16 MICH. J. GENDER & L. 319

measures to increase equality between the sexes and cultural feminists argue that females and males are simply different, there will be different conclusions on most policy matters.

The form of the debate between protectionist and equality models of feminism has changed over time; however, the options remain largely the same.²⁰ And despite the debate, society has failed to ease women's vulnerability, especially within the confines of marriage. Theories of inequality developed by feminists challenge the legal and non-legal forces that reinforce, either explicitly or implicitly, an economic and power structure that disadvantages women.²¹ Thus, even where women are formally equal under the law, a continuing question for feminist scholars is why women are still disadvantaged relative to men.²² Part of that question for scholars must also be how best to raise the government revenue necessary to help redress that inequality when government action is required. This Article explores these issues and, in doing so, highlights the risks of reinforcing wives' vulnerability.

This Article proceeds as follows: Part I examines existing innocent spouse relief as part of the larger tax system. Innocent spouse relief must be evaluated as one of several relief provisions in the Code that allows taxpayers, such as Jill, to avoid paying the taxes they legally owe. Part II analyzes the administrability concerns of innocent spouse relief, its inter-taxpayer equity, and whether this relief operates in ways detrimental to the group it was intended to help: wives. Innocent spouse relief raises important questions of how the government judges taxpayers; the spouses most often judged are wives as they have always claimed and received the vast majority of relief. Part III proposes a more administrable form of relief for spouses who file joint returns that maintains the strict liability of the income tax and respects filers' agency when signing joint returns. This revised innocent spouse relief provides an easier path to relief but only for those spouses who are coerced into signing a joint return, either through abuse or through deception. The article concludes that this revised relief is part of a necessary balancing of individual equity and administrability that should be undertaken for all aspects of the income tax if the tax system is to function fairly for all taxpayers.

(2010); Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129 (1998); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996).

²⁰ Martha Albertson Fineman, *Grappling with Equality: One Feminist Journey*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 47, 49–50 (Martha Albertson Fineman ed., 2011).

²¹ Feminists have articulated many theories of inequality including liberal, radical, dominance, difference, and postmodern theories. *See generally* NANCY LEVIT & ROBERT R.M. VERCHICK, *FEMINIST LEGAL THEORY* 15–39 (2006); Martha Albertson Fineman, *Introduction to FEMINIST AND QUEER LEGAL THEORY* 1, 2–4 (Martha Albertson Fineman et al. eds., 2009); Karen J. Maschke, *Introduction to FEMINIST LEGAL THEORIES* vii, ix–xi (Karen J. Maschke ed., 1997).

²² *See, e.g.*, MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* (2004).

I. STANDARD RELIEF FROM JOINT AND SEVERAL LIABILITY

The taxes due on a joint return are not “his” or “her” taxes but “their” taxes in the same way that if both spouses sign a mortgage, it is their joint obligation.²³ This joint liability for joint returns exists even if only one spouse earns the income reported on the return and even if only one spouse participates in the preparation of the return. The question then becomes how the government collects their taxes.²⁴ Under existing law, either spouse may be pursued for the tax due but not paid on a joint return, whether or not the income is properly reported.

This Part evaluates current innocent spouse relief as a means of accomplishing its congressional objective of selectively mitigating joint and several liability. From a review of its legislative history, the provision was intended to help certain spouses, namely wives, who were thought unfairly burdened by the joint return. In drafting this relief, however, Congress did not parse exactly what it meant by an unfair burden. Although case law demonstrates that many of the spouses Congress intended to relieve of their taxes are, in fact, relieved, the balancing of factors required for relief has led to complexities in the provision’s application when the unfairness of the burden is less clear. Finally, this Part examines innocent spouse relief as one part of the statutory safety net that assists taxpayers unable to pay, or unjustly required to pay, their legally owed taxes. Because innocent spouse relief is only one form of relief a taxpayer might seek, when evaluating the provision, we should consider how it operates within the larger system of tax compliance and tax relief.

A. *The Innocent Spouse Law*

Until the late 1960s, joint and several liability had been imposed on the joint return with little, if any, complaint about the lack of relief for joint filers.²⁵ In the early period of joint filing, the only way to negate joint and several liability was if a spouse successfully claimed to have signed a return under duress, which invalidates the joint return. To win a duress claim, courts require that the victim spouse prove the joint tax return was actually *signed* under duress.²⁶ In 1971, Congress responded to claims that the duress defense was insufficient after several cases held wives liable for taxes on

²³ See I.R.C. § 6013(d)(3) (2006); Treas. Reg. § 1.6013-4(b) (as amended in 2002).

²⁴ An alternative regime is transferee liability. See I.R.C. § 6901 (2006). However, transferee liability prescribes the order of spouses from whom the IRS may collect and restricts the IRS to collecting in limited circumstances. *Id.*

²⁵ I.T. 1575, 2-1 C.B. 144 (1923); see also T.D. 1882, 15 Treas. Dec. Int. Rev. 203 (1913) (indicating that husband and wife may file as a single unit).

²⁶ See *In re Hickley*, 256 B.R. 814, 828 (2000); *Wiksell v. Comm’r*, 67 T.C.M. (CCH) 2360, 2368–69 (1994), *rev’d on other grounds*, 90 F.3d 1459 (9th Cir. 1996). For an article arguing the duress defense needs to be broadened, see Claire O. Finkelstein, *Duress*, 37 ARIZ. L. REV. 251 (1995).

funds their husbands had embezzled, including one in which the husband embezzled from his wife.²⁷ This new relief was a hardship relief provision for those spouses in serious financial difficulty; it was not intended to apply to all joint filers.²⁸ Although innocent spouse relief was somewhat liberalized in 1984,²⁹ the provision continued to operate as narrowly defined relief until it was greatly expanded to its current form in 1998.³⁰

The 1998 change in innocent spouse relief was enacted as part of a general restructuring of the IRS, during which Congress required the IRS to give renewed attention to taxpayers as customers.³¹ Congress expanded many relief provisions, and late in the process added greater innocent spouse relief.³² The inquiry was no longer whether innocent spouse relief worked for those spouses suffering economic hardship from their tax obligations but whether it provided “*meaningful relief in all cases where such relief is appropriate.*”³³ Unfortunately, however, Congress did not define exactly when relief was appropriate. Moreover, Congress did not attempt to fit this provision within the existing network of tax relief but considered this part of the Code in isolation. One objective of this Article is to push Congress to define exactly what it takes to negate the otherwise strict liability for one’s taxes.

Congress indicated whom it wanted to help in broad strokes but did not make important differentiating distinctions. For example, Congress did not define whether it wanted to help spouses who are truly innocent (which I interpret as coerced into filing the return), spouses who negotiated bad deals with their spouses or former spouses over allocating family tasks, or spouses who are otherwise suffering financial hardship (if the latter, Congress did not explain why measures available to all taxpayers were insufficient). Committee reports and many statements made on the congressional floor did stress that an innocent spouse had no knowledge of his or her spouse’s actions in submitting the false return or failing to pay the taxes due.³⁴

²⁷ Act of Jan. 12, 1971, Pub. L. No. 91-679, § 1, 84 Stat. 2063, 2063.

²⁸ See S. REP. NO. 91-1537, at 3 (1971); H.R. REP. NO. 91-1734, at 3 (1971); STAFF OF THE JOINT COMM. ON TAXATION, 105th Cong., PRESENT LAW AND BACKGROUND RELATING TO TAX TREATMENT OF “INNOCENT SPOUSES,” JCX-6-98 (1998); *Treasury Department Report on Innocent Spouse Relief: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 105th Cong. 50 (1998) (statement of Lynda Willis, Director, Tax Policy and Administration Issues, General Government Division).

²⁹ Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 424, 98 Stat. 494, 801 (1984).

³⁰ Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3201(a), 112 Stat. 685, 734-40 (1998); I.R.C. § 6013(e)(3) (2006).

³¹ H.R. REP. NO. 105-599, at 252-55 (1998). 144 CONG. REC. 3234 (1998) (statement of Sen. Grassley).

³² H.R. REP. NO. 105-599, at 252-55.

³³ H.R. REP. NO. 104-506, at 7-8 (emphasis added). For more of the legislative history, see Stephanie Hunter McMahon, *An Empirical Study of Innocent Spouse Relief*, 12 FL. TAX REV. 629, 636-45 (2012). [hereinafter McMahon, *Empirical Study*].

³⁴ See S. REP. NO. 105-174, at 56-58 (1997); H.R. REP. 105-599, at 251-55; 144 CONG. REC. 8509 (1998) (statement of Sen. Barbara Boxer); 144 CONG. REC. 8509 (1998) (statement of Sen. Dianne Feinstein); 144 CONG. REC. 14,689 (1998) (statement of

Regardless of the unanswered questions, Congress was clearly worried about wives.³⁵ “Nine out of 10 innocent spouses are women. Maybe that is because they are more likely to pay up when confronted by the IRS. Maybe it is because women sometimes have fewer resources available to defend themselves. In either case, singling out women for abusive collection effort is just plain wrong.”³⁶ As I have shown in an earlier article, the resulting tripartite relief provision was cobbled together with the intent of granting relief from liability to divorced or separated wives who were left crushing tax burdens by their nefarious husbands.³⁷ Congress “referr[ed] to wives who were deceived before being left” struggling under large tax bills, “often while caring for the couples’ children.”³⁸ There was no discussion of less sympathetic cases.³⁹

One reason for Congress’s choice not to answer fundamental questions of innocence is the cost of doing so. It is more costly for the government to draft rules that provide those answers with the necessary specificity.⁴⁰ Existing innocent spouse relief does not assume the cost of securing society’s agreement (or even Congress’s) as to when relief should be granted. Instead, the IRS and the courts examine the facts and circumstances of each requesting spouse in order to determine if relief from joint and several liability should be granted under a holistic review.⁴¹ This *ex post* relief from taxes risks inconsistent application and means that spouses cannot know the consequences of their choices until after they have filed their returns, been found to owe tax, and sought relief.

Section 6015 contains three means of relief that have degenerated into more or less three separate evaluations of equitable standards, each of which contains ambiguity. Two subsections provide standards that expressly call

Sen. William Roth); 144 CONG. REC. 14,715 (1998) (statement of Sen. Carol Moseley-Braun).

³⁵ All but one mention of innocent spouse relief in the *Congressional Record* referred to wives, most often divorced wives. For example, see 144 CONG. REC. 14,711 (1998) (statement of Sen. Max Baucus); 144 CONG. REC. 2045 (1998) (statement of Sen. Bob Graham); 144 CONG. REC. 2043 (1998) (statement of Sen. Al D’Amato); 144 CONG. REC. 8510 (1998) (statement of Sen. Spencer Abraham); 144 CONG. REC. 7694 (1998) (statement of Sen. Mike DeWine); 144 CONG. REC. 8492 (1998) (statement of Sen. Kent Conrad); 144 CONG. REC. 13,968 (1998) (statement of Rep. William Archer). For a rare reference to husbands as victims, see 144 CONG. REC. 8521 (1998) (statement of Sen. Olympia Snowe).

³⁶ 144 CONG. REC. 1417–18 (1998) (statement of Sen. Jon Kyl).

³⁷ McMahon, *Empirical Study*, *supra* note 33, at 636–42.

³⁸ *Id.* at 642.

³⁹ *Id.* at 636–42.

⁴⁰ See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 73 (1983) (explaining that rulemaking incurs costs of gathering information and of securing agreement among authorities).

⁴¹ One critic of innocent spouse relief argues that Congress should adapt a more refined, equitable standard that provides a “fuller, more textured view of real people’s lives and motivations.” Stephen Zorn, *Innocent Spouses, Reasonable Women and Divorce*, 3 MICH. J. GENDER & L. 421, 426 (1996). This would increase the law’s cost of creation and application.

for the evaluation of the equity of granting relief, but the statute does not define how equity is to be judged.⁴² That power is delegated to the Treasury Department, which has included in Treasury Regulations various factors to be balanced.⁴³ A third subsection provides relief that is meant to function as a clear allocation of liability for divorced, widowed, or separated spouses unless the spouse is proven to have actual knowledge of the tax evasion.⁴⁴ However, this third test is not applied mechanically. Not only do courts consider equitable factors before applying this last form of relief, in 15.4% of reported cases in which a spouse won under this third test the requesting spouse was found to have actual knowledge of the tax evasion contrary to the test's statutory requirement.⁴⁵

With this broad statutory power for granting relief, the IRS is charged with wading through the myriad factors for each of the approximately 55,000 requests submitted each year.⁴⁶ Of those seeking relief, it is not abnormal for taxpayers to prevail, even in part, less than 30% of the time.⁴⁷ The practice of wading through who should and should not be granted relief is a costly practice for the IRS and, unlike in many areas of the law, the IRS cannot ignore § 6015 when its resources are limited because this is not an issue of whether or not the IRS imposes tax but an issue of whether the IRS must mitigate taxes that are legally owed. The IRS must affirmatively grant or deny relief to applicants, creating a minimum amount of resources that must be spent each year.⁴⁸

In addition to the direct cost in lost revenue, estimated to be in the hundreds of millions of dollars annually, processing relief requests commands a considerable amount of government resources.⁴⁹ Although not all of the agency's costs are known, innocent spouse relief is one of the top ten most litigated issues, and there is room for litigation to increase because of the relatively small percentage of denied claims that currently go to court.⁵⁰

⁴² I.R.C. § 6015(b), (f) (2006).

⁴³ I.R.C. § 6015(h) (2006). The Treasury Department's guidance includes: Rev. Proc. 2003-61, 2003-32 C.B. 296; Treas. Reg. § 1.6015-2(d) (2002); Treas. Reg. § 1.6015-4(c) (2002); I.R.S. Notice 2012-8, 2012-4 I.R.B. 309; Notice 2013-32, 2013-43 I.R.B. 397.

⁴⁴ I.R.C. § 6015(c) (2006).

⁴⁵ McMahon, *Empirical Study*, *supra* note 33, at 675-76.

⁴⁶ 1 NAT'L TAXPAYER ADVOCATE, 2005 ANNUAL REPORT TO CONGRESS § 1, at 329 (2006), archived at <http://www.perma.cc/0A4XNtmhDf6> [hereinafter NTA, 2005 ANNUAL REPORT § 1].

⁴⁷ *Id.*

⁴⁸ See Barton Massey, *IRS Receiving Rising Number of Innocent Spouse Relief Cases*, 83 TAX NOTES 1543, 1543 (1999).

⁴⁹ See sources cited *supra* note 13.

⁵⁰ See reports cited *supra* note 14. Some of these cases were frivolous. See McMahon, *supra* note 33, at 657 (discussing taxpayers filing for innocent spouse relief without having filed joint tax returns). In collection due process, another relief measure, frivolous arguments are raised in between 5% and 37% of cases. STAFF OF THE JOINT COMM. ON TAXATION, 108th Cong., REPORT RELATING TO THE INTERNAL REVENUE SERVICE 15, JCX-53-03 (2003), archived at <http://perma.cc/07KfjZ6aVpb>; Bryan Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57, 104 (2009) [hereinafter Camp, *Failure of Adversarial Process*].

When taxpayers disagree with a denial of relief by the IRS, they have a right to pursue relief in courts even if their claim is frivolous.⁵¹ Despite its cost, there is evidence to show that current relief is satisfying some goals.⁵² The question is whether it is meeting the most goals in the most efficient manner.

For the same reason § 6015 is costly, it is unfair in its application. Because the application of the regulatory factors is so fact intensive, it is hard to predict a priori who will be granted relief. Some winning spouses fit the congressional stereotype, but others do not. From court opinions decided under § 6015, the gender and marital status of successful claimants generally conformed to Congress's expectations but with significant variations. As Congress had anticipated, almost 90% of successful spouses were wives and were separated, divorced, or widowed at the time of trial.⁵³ This is consistent with congressional expectations. However, unlike congressional expectations, 25% of requesting spouses were still married when they sought innocent spouse relief.⁵⁴ Similarly, Congress depicted the spouses it was helping as vulnerable, but how this description is applied varies widely. Although spouses won more often when the court noted that their education level was high school or less, some highly educated spouses nonetheless won relief as did some self-employed spouses and some spouses who controlled family finances and completed the tax returns themselves.⁵⁵

One factor that goes to the heart of whether a spouse was coerced into filing a joint tax return is whether the spouse was abused. Abuse is currently recognized in the regulatory factors and since 2012 has been given greater weight in the balancing of factors; however, the role it plays in securing relief is unclear.⁵⁶ In almost two-thirds of the opinions mentioning abuse, judges mentioned abuse only to state that it was not alleged in the case.⁵⁷ When abuse was alleged, it did not have a consistent impact on the result of the case: in "60.71% of the cases in which abuse was alleged, the judge found that there was no abuse, but in 14.75% of those cases the requesting

⁵¹ Although 71.5% of requests were denied by the IRS, only 1.7% of those not deemed ineligible on their face were litigated. NTA, 2005 ANNUAL REPORT § 1, *supra* note 46, at 329–30.

⁵² McMahon, *Empirical Study*, *supra* note 33, at 705–07.

⁵³ Wives sought relief in 85.4% of cases brought under § 6015 and won 37.4% of their trials and 21.6% of subsequent appeals. *Id.* at 662. Husbands, on the other hand, won 25.4% of their trial cases and 0.0% of their subsequent appeals. *Id.* As a result of the disproportionate number of wives bringing suit, wives won 89.5% of total taxpayer victories. *Id.*

⁵⁴ *Id.* at 663. However, only 14.2% of still married spouses won. *Id.* at 664.

⁵⁵ *Id.* at 666, 670–71. A wife requesting relief when her husband prepared the return won 52.4% of the time, and a husband requesting relief when his wife prepared the return won 75% of the time. *Id.* at 671. However, in 13.3% of cases where both spouses were found to participate in family finances, a requesting spouse won relief; and in 30% of the cases where the spouse seeking relief also prepared the return, the requesting spouse won. *Id.*

⁵⁶ Rev. Proc. 2003-61, 2003-32 I.R.B. 296, 298–99. *See also* I.R.S. Notice 2012-8, 2012-4 I.R.B. 309; Rev. Proc. 2013-34, 2013-43 I.R.B. 397.

⁵⁷ McMahon, *Empirical Study*, *supra* note 33, at 695.

spouse was, nevertheless, granted relief.”⁵⁸ In 27.3% of the cases in which the judge found abuse, no relief was granted.⁵⁹ Unfortunately for the scholar and policy analyst, there is insufficient information in the opinions to know exactly how abuse influenced these decisions.

Another important factor that, under current law, is impossible to fully examine is when the requesting spouse claims to have been deceived over the joint return because the issue is hidden in questions of whether the spouse knew of the tax evasion. Lack of knowledge of the tax deficiency may or may not equate to deception by the other spouse. Although a claim of deception should aid a requesting spouse’s claim under current law, it does not have to be alleged and is not specifically asked about on the IRS’s form for requesting relief. Until 2012, deception alone was insufficient to cause the lack-of-knowledge factor to weigh in favor of relief and recent changes to the IRS’s factors are unlikely to change this result. In several cases, spouses were even required to exercise greater diligence than requesting information. In *Cheshire v. Commissioner*⁶⁰ and *Wiksell v. Commissioner*,⁶¹ wives noticed either an ineligible deduction or unreported income on the return and asked about the tax consequences of the mistakes but were deceived by their husbands’ responses. Because they asked about the items, the wives were held to have actual knowledge of the deficiency and, ultimately, denied relief.

As an illustration of inconsistencies in the application of the § 6015 factors for relief, courts have struggled to determine whether the requesting spouse significantly benefited from the tax evasion. Judges have not agreed on what it means to create a significant benefit. The example provided in the Regulations is of a spouse receiving life insurance proceeds beyond normal support that is traceable to items omitted from income.⁶² In the two cases involving life insurance, one found there was a significant benefit and the other did not.⁶³ Similarly, improving cash flow, even if the money was reinvested in the tax shelter generating the cash flow, is sometimes, but not always, a significant benefit to both spouses.⁶⁴ Finally, paying for one’s children’s college can be, but is not always, a significant benefit to both.⁶⁵

Thus, the application of the rules is hard to assess definitively. Some relief is granted to those Congress intended but at times the provision is both under- and over-inclusive. As a result of Congress’s overall poor job of explicating what it meant by an innocent spouse, some spouses winning relief

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 282 F.3d 326, 335 (5th Cir. 2002).

⁶¹ 90 F.3d 1459, 1462–63 (9th Cir. 1996).

⁶² Treas. Reg. § 1.6015-2(d) (2002).

⁶³ *Bozick v. Comm’r*, 99 T.C.M. (CCH) 1242, 1244; *George v. Comm’r*, 86 T.C.M. (RIA) ¶ 2004-261.

⁶⁴ McMahon, *Empirical Study*, *supra* note 33, at 681.

⁶⁵ *Id.*

are clearly not consistent with the stereotype portrayed by Congress when it expanded relief in 1998. Relief has been granted to those whom Congress would likely not have labeled as “innocent” in 1998 and denied to some who would almost certainly be innocent under the congressional analysis.

Recent changes to how the Treasury Department applies the law have not made the application of the law clearer or more consistent with its legislative history. Although the IRS considered questions not answered with its regulatory factors “relatively infrequent situations,”⁶⁶ in January 2012, the IRS announced it was making it easier to qualify for relief.⁶⁷ The new guidelines, interpreted again in 2013, contain additional ambiguities, but the IRS showed a new willingness, consistent with this Article’s proposal, to make abuse or lack of financial control outweigh other factors.⁶⁸ However, the IRS has not gone far enough in reforming the system.⁶⁹ Moreover, the burden imposed by this provision is likely to grow with the broadening of the equitable factors. New, streamlined procedures available to some requesting spouses are likely to allow the IRS to perform a less intensive balancing, but some balancing of factors is still required by the statute.⁷⁰ It will require an act of Congress to get us out of this burdensome balancing test.

Although it is the Treasury Department and the courts that struggle to apply these facts-and-circumstances tests, as discussed in Part II it is other taxpayers who bear the cost of this relief. With the available information it is impossible to know exactly how much revenue is at stake in innocent spouse cases. The Treasury Inspector General for Tax Administration found that for fiscal year 2004, 6,555 requesting spouses were granted relief in the amount of \$117.6 million and 10,439 were denied relief of \$260.8 million.⁷¹ These numbers are not insignificant.

⁶⁶ *Treasury Department Report on Innocent Spouse Relief: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 105th Cong. 17 (1998) (statement of Donald C. Lubick, Assistant Secretary for Tax Policy, U.S. Department of Treasury).

⁶⁷ I.R.S. Notice 2011-70 removed the two-year statute of limitations imposed on § 6015(f) applications. Rev. Proc. 2003-61, 2003-32 C.B. 296, § 4.01(3). I.R.S. Notice 2012-8 liberalized many of the factors, which were further liberalized in Rev. Proc. 2013-34, 2013-43 I.R.B. 397.

⁶⁸ I.R.S. Notice 2012-8, 2012-4 I.R.B. 309, § 4.03(2)(c)(i); Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.03(2)(c)(i)(A) and (ii).

⁶⁹ The revised factors are to be considered in their totality and whether relief is to be granted remains a facts and circumstances test. Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.03(2). This increases, not decreases, uncertainty regarding the evaluation of often-murky facts because relief may be granted or denied despite the number of factors weighing for or against relief.

⁷⁰ Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.02.

⁷¹ TREAS. INSPECTOR GEN. FOR TAX ADMIN., Ref. No. 2005-40-075, THE INNOCENT SPOUSE REVIEW FUNCTION ENSURED ACCURATE RELIEF DETERMINATIONS, BUT IMPROVEMENTS COULD INCREASE CUSTOMER SERVICE, at 7–8 (2005) [hereinafter TIGTA, INNOCENT SPOUSE REVIEW].

B. As Part of a Relief System

What happens to those who are not granted innocent spouse relief? First, there are other statutory relief provisions available to all taxpayers, most relief being available if a requesting taxpayer is suffering economic hardship. Second, even if the requesting spouse is not granted mitigation from the government, the spouse can request contribution from the non-tax-paying spouse. Thus, the 71.5% of requesting spouses (only 0.0007% of joint filers) who fail to win innocent spouse relief may still not have to pay the taxes they legally owe.⁷² These relief measures exist outside of innocent spouse relief and provide the backdrop against which we must measure the innocent spouse system. However, there is no assurance that these tax provisions will mitigate every requesting spouse's tax liabilities.⁷³

Congress has created relief measures available to all taxpayers who are unable to pay, or are determined that they should not pay, the taxes they owe. These other relief provisions are not contingent upon the type of return that is filed. The IRS currently administers this relief according to criteria established by Congress and the Treasury Department. Some of this relief is need-based and some is not.⁷⁴ Because these other provisions are broadly applicable, use of these provisions does not carry the same gendered problems as does innocent spouse relief, as discussed in the next Part, and any taxpayer who satisfies the requirements of these provisions may be relieved of liability.

First, taxpayers who are experiencing economic hardship and cannot pay their taxes have collection alternatives available.⁷⁵ We as a society may or may not think these alternatives are sufficient or that the measures may have a disparate impact on vulnerable taxpayers, but that is a matter for another article. This relief from tax collection is limited to those taxpayers Congress deems most burdened. For example, tax levies can be released if the levies are shown to produce an economic hardship for the taxpayer.⁷⁶ Similarly, the National Taxpayer Advocate, an independent office within the IRS tasked with assisting taxpayers, can issue taxpayer assistance orders if it concludes that the taxpayer has suffered or is about to suffer a significant hardship due to collection and if certain other requirements are met.⁷⁷ In

⁷² NTA, 2005 ANNUAL REPORT § 1, *supra* note 46, at 329; INTERNAL REVENUE SERV., SOI TAX STATS—INDIVIDUAL STATISTICAL TABLES BY FILING STATUS, TAX YEAR 2005, Table 1.3, *archived at* <http://perma.cc/0ihhDE4QAtX>.

⁷³ There is insufficient research on the gendered impact of other relief measures to evaluate them from a gendered perspective. This Article is a first step in evaluating taxpayer relief in this manner.

⁷⁴ For a discussion of IRS relief, see Shu-Yi Oei, *Who Wins When Uncle Sam Loses?*, 46 U.C. DAVIS L. REV. 421 (2012); Camp, *Failure of Adversarial Process*, *supra* note 50; Steven R. Mather & Paul H. Weisman, "Federal Tax Collection Procedure – Defensive Mechanisms," 638 Tax Mgmt. (BNA) U.S. Income (2005).

⁷⁵ See Oei, *supra* note 74; Mather & Weisman, *supra* note 74.

⁷⁶ I.R.C. § 6343(a)(1)(D) (2006); Treas. Reg. § 301.6343-1(b)(4) (1995).

⁷⁷ I.R.C. § 7811 (2006).

response to the latter, the IRS must release a levy on the taxpayer's property or cease or refrain from taking collection or other actions.⁷⁸

Additionally, relief is not limited to preventing collection but may come earlier in the audit process. During negotiations with the IRS over payment of tax liabilities, if certain requirements are met taxpayers have three alternatives: installment agreements,⁷⁹ in which a taxpayer pays the full amount of the liability including interest but pays these amounts over time; offer-in-compromise,⁸⁰ in which the taxpayer and the IRS agree to a payment of a percentage of the liability and interest; and designation of the liability as "currently not collectible," in which the liability remains on the books but there is no attempt made to collect from the taxpayer.⁸¹ Taxpayers can have multiple bites at these apples. For example, in 2005, 40% of taxpayer offer-in-compromise submissions were repeat submissions.⁸² Moreover, the amount of taxes relieved is significant. With offers-in-compromise, for example, amounts written off ranged from \$2.15 billion in 2000 to \$1.13 billion in 2004.⁸³

Not all of these relief measures provide absolute relief. If the IRS determines that a tax liability cannot be collected, the IRS may report the account as "currently not collectible"⁸⁴; however, the IRS reserves the right to renew collection efforts should the taxpayer experience a windfall, such as winning the lottery.⁸⁵ On the other hand, the offer-in-compromise procedures release the taxpayer from the obligation by allowing the taxpayer to settle unpaid tax debts for some lesser amount after an assessment has been completed.⁸⁶ The compromise is granted if the claim falls within one of three categories: (1) doubt as to collectability; (2) doubt as to liability; or (3) the promotion of effective tax administration.⁸⁷ Although doubt as to collectability requires economic hardship, for either doubt as to liability and the promotion of effective tax administration, the taxes need not create an economic hardship

⁷⁸ I.R.C. § 7811(b) (2006).

⁷⁹ I.R.C. § 6159 (2006).

⁸⁰ I.R.C. § 7122 (2006).

⁸¹ I.R.C. § 6404(c) (2006); Camp, *Failure of Adversarial Process*, *supra* note 50, at 65.

⁸² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-525, IRS OFFERS IN COMPROMISE: PERFORMANCE HAS BEEN MIXED; BETTER MANAGEMENT AND SIMPLIFICATION COULD IMPROVE THE PROGRAM, 13 Fig. 2 (2006), *archived at* <http://www.perma.cc/0KmmZxFjZP5> [hereinafter GAO-06-525]. *See also* note 89.

⁸³ GAO-06-525, *supra* note 82, at 12.

⁸⁴ I.R.S. Policy Statement 5-71, IRM 1.2.14.1.14 (Nov. 11, 1980) ; I.R.C. § 6343(a)(1)(D) (2006).

⁸⁵ I.R.S., IRM 5.16.1.6 (May 22, 2012), *archived at* <http://www.perma.cc/0b4L9u7e32j>.

⁸⁶ I.R.C. § 7122 (2006). For a discussion of offer-in-compromise, see Shu-Yi Oei, *Getting More By Asking Less*, 160 U. PA. L. REV. 1071 (2012).

⁸⁷ Treas. Reg. § 301.7122-1(b) (2002); GAO-06-525, *supra* note 82; *Information on Selected IRS Tax Enforcement and Collection Efforts: Testimony Before the Comm. on Finance, U.S. Senate* (2001 (statement of Michael Brostek, Director, Tax Issues) [hereinafter Brostek statement]).

for the taxpayer.⁸⁸ Similar to the procedure in cases of innocent spouse relief, the IRS is required to consider the facts and circumstances of each case and independently review all rejections of relief.⁸⁹

As a final backstop to these relief provisions, Congress has imposed a statute of limitations for collecting the taxes that a taxpayer legally owes. This statute of limitations ensures that the IRS cannot collect from taxpayers on a liability that is more than ten years old.⁹⁰ Although the period may be extended in limited circumstances or with the agreement of the taxpayer, it generally operates as a deadline after which taxpayers are released from their tax obligations.⁹¹

Even if a spouse does not satisfy the requirements of the statutory relief provisions, if the IRS collects a couple's taxes from one spouse, that spouse has the right to demand at least a partial payment from the other spouse. The state law right of contribution generally allows the apportionment of liability when one tortfeasor pays more than her appropriate share of liability.⁹² Whether a state court judge would apportion the tax liability according to spouses' relative responsibility for earning the income or committing the tax evasion depends on state law.⁹³ Thus, through the right of contribution, the paying spouse explains to a state judge that the nonpaying spouse is the one who earned or enjoyed the income and, therefore, should pay some portion of the taxes owed. If the state judge agrees, the nonpaying spouse is required to pay the paying spouse whatever portion of the taxes the judge thinks is fair to reallocate. Although there are problems with the right of contribution, taxpayers have won most of the decided cases in which they sought contribution for taxes paid.⁹⁴

⁸⁸ Treas. Reg. § 301.7122-1 (2002).

⁸⁹ Brostek statement, *supra* note 87, at 8–9. In some circumstances, spouses may seek an offer-in-compromise and, if it is denied, request innocent spouse relief, requiring a second analysis of much of the same information by a different department within the IRS.

⁹⁰ I.R.C. § 6502(a) (2006); Treas. Reg. § 301.6502-1(a) (2006). This is in addition to the three-year statute of assessment for the IRS to complete the assessment process. I.R.C. § 6501(a) (2006).

⁹¹ I.R.C. § 6501(c) (2006); Treas. Reg. § 301.6501(c)-1 (as amended in 2000).

⁹² See Uniform Contribution Among Tortfeasors Act § 1, 12 U.L.A. 194 (1955). For a discussion of contribution, see Richard Wright, *Allocating Liability Among Multiple Responsible Causes*, 21 U.C. DAVIS L. REV. 1141, 1182–85 (1988). In addition, I.R.C. § 66(c) may provide relief for community income if married persons did not file joint returns. See also IRS, Pub. 971 (I.R.S.), 2008 WL 1704156.

⁹³ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 (2013).

⁹⁴ See *Murchison v. Murchison*, 33 Cal. Rptr. 285, 288 (Cal. Ct. App. 1963); *Bormaster v. Bormaster*, 274 P.2d 757, 760 (Kan. 1954); *In re Cooper*, 83 B.R. 544, 547 (1988); *Estate of McClure v. United States*, 288 F.2d 190, 192 (Ct. Cl. 1961); *Richter v. Henningsan*, 42 P. 1077, 1077 (Cal. 1895); *Hanson v. Hanson*, 350 P.2d 859, 860–62 (Wash. 1960); *Strange v. Rubin*, 456 S.W.2d 416, 416–19 (Tex. App. 1970); *Miller v. Miller*, 310 N.Y.S.2d 18, 20–21 (N.Y. Civ. Ct. 1970); *Rocha v. Rocha*, 297 P.2d 505, 507 (Cal. Ct. App. 1956). But see *Gillman v. O'Connell*, 574 N.Y.S.2d 573, 575 (N.Y. App. Div. 1991) (concluding no right of contribution existed because spouse requesting contribution created the liability); *Chappell v. Chappell*, 253 So.2d 281, 287 (Fla. Dist. Ct. App. 1971) (disallowing setoff against alimony for payments of joint tax liability); *McDermitt*

A legitimate complaint about this form of relief, although arguably true of all legal creations, is that the right of contribution is imperfect in its operation. Several problems may motivate paying spouses not to exercise their right even if it is appropriate to do so. Use of the court system means incurring legal fees that may or may not be assigned to the nonpaying spouse, state court judges may be relatively ignorant of federal tax law and taxpayers may fear judicial mistakes, and some nonpaying spouses may be judgment proof.⁹⁵ These and other factors make the right of contribution less than a perfect solution for some spouses.

However, contribution places the cost of equalizing the tax burden between spouses or former spouses on the people signing the incorrect return or failing to pay the taxes due. Through this process, the cost of allocating the liability between spouses is not indirectly placed on other taxpayers as it would be by absolving the less culpable spouse of liability. For spouses who are not coerced into filing joint returns, they are in the best position to prevent the tax evasion in the first place and should bear its cost.

Within this framework of possible relief, not all spouses who sign joint returns will be, or are intended to be, relieved of the taxes that they legally owe. A relatively more innocent spouse who does not suffer economic hardship or meet the requirements of the other relief provisions will still owe 100% of the taxes due on the joint return if the other spouse is judgment proof, and so the right of contribution cannot be exercised. The reason this is a just result is that the spouse is only relatively more innocent as discussed in the next Part. *Vis-à-vis* other taxpayers and the government, the relatively more innocent spouse should pay the taxes on the return unless the spouse qualifies for the relief provided in Part III that absolves taxpayers who were not culpable in the joint filing.

II. THE GROUNDS ON WHICH TO JUDGE

Unlike most laws that are underpinned by a belief in a fundamentally just world, innocent spouse relief is based on the desire to *create* such a world. However, innocent spouse relief's contribution to this endeavor is contingent upon how one frames the issue. One way to look at innocent spouse relief focuses on which spouse is most culpable for a particular bit of tax evasion on a joint return. Alternatively, one can look at the joint return as part of the larger tax system. With the latter perspective, the critical question

v. United States, 67 A.F.T.R.2d 91-324 (S. D. Ohio 1991) (disallowing contribution because spouse requesting contribution was responsible for the penalty); *Gooden v. Wright*, No. 14823, 1991 WL 57230 (Ohio Ct. App. Apr. 18, 1991) (finding separation agreement assigned liability to spouse requesting contribution). For complaints about contribution, see Kahng, *supra* note 6, at 264; Christian, *supra* note 6, at 588. Richard Beck proposes a bad loss deduction if the right of contribution does not result in payment. See Richard Beck, *The Deductibility of a Worthless Right to Contribution for Joint Income Taxes*, 9 VA. TAX. REV. 313 (1989).

⁹⁵ Christian, *supra* note 6, at 588–89.

is not the relative interests of husbands versus wives or the government versus spouses requesting relief. Rather, the interests that must be balanced are those of different taxpayers and recipients of government services when some taxpayers pay their legally owed taxes and others do not. If the government is to raise revenue to fund social policies with a progressive income tax,⁹⁶ that one gender may be the one most often requesting innocent spouse relief from that tax should not protect the relief from critical review in the quest for an improved world.

Interests conflict because innocent spouse relief selectively absolves requesting spouses from the strict liability on their joint returns that is normally imposed on taxpayers.⁹⁷ As discussed in the Introduction, this Article does not debate whether spouses should file jointly (as opposed to married filing separately) or whether the United States should adopt individual filing. Instead, this Part assumes, consistent with the current political and economic environment, that joint returns will be retained and focuses on how we should evaluate the joint and several liability imposed on those returns.

This Part analyzes the consequences of innocent spouse relief from joint and several liability in the quest to make the world more just. First, it examines innocent spouse relief's impact on the administrability of the federal income tax. Only with an administrable tax can the government raise sufficient revenue to fund its operations. Second, this Part analyzes the equity of granting innocent spouse relief. Equity must be separately judged both as between spouses and as between taxpayers. When one spouse is relieved of liability under innocent spouse relief, as opposed to the other forms of relief, the other spouse becomes solely liable, possibly shifting the burden inequitably from one to the other. If the other spouse cannot or will not pay, the couple's effective tax rate is also lowered relative to comparable taxpayers. Finally, this Part looks specifically at innocent spouse relief's impact on wives as they are the spouses Congress intended to request, and win, most innocent spouse relief.⁹⁸ To the extent there are consequences, albeit unintended, that disadvantage wives, the innocent spouse regime is not accomplishing its objective.

A. *Administrability of the Tax System*

The tax system does not operate on paper alone. Taxpayers must comply with the law when filing their returns and the IRS must enforce it. Therefore, the income tax should be judged, at least in part, based on its administrability.⁹⁹ The National Taxpayer Advocate has complained regard-

⁹⁶ Marjorie Kornhauser, *What Do Women Want: Feminism and the Progressive Income Tax*, 47 AM. U. L. REV. 151, 153 (1997).

⁹⁷ I.R.C. § 6151 (2006).

⁹⁸ See *supra* note 35.

⁹⁹ Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567, 568, 572-74 (1965); Leandra Lederman, *Statutory Speed Bumps*, 60 STAN. L. REV. 695,

ing the system's administrability that "tax code complexity [is] the most serious problem facing taxpayers and the IRS alike."¹⁰⁰ Any rules or regulations that add to the law's complexity also increase the administrative burden on taxpayers and the government, and they need to be evaluated in this context. Expansive innocent spouse relief, a complex determination as discussed above, removes a central tenet of the federal income tax system, the strict liability for the taxes a person owes. Thus, current relief makes it harder to collect the taxes owed and increases the cost of administering the tax system.

The numbers of taxpayers and the amount of revenue involved in the federal income tax system require an honest assessment of the workability of any proposed changes to the tax collection process. In 2012, the IRS processed over 237 million tax returns, of which approximately 53 million are likely to be joint returns, and 2.2 billion information returns (such as W-2s and 1099s).¹⁰¹ Most returns were accepted as filed, although the IRS was left collecting the taxes owed on over eleven million returns.¹⁰²

Collection is made easier by imposing strict liability on taxpayers.¹⁰³ As a result of strict liability, the IRS does not have to prove taxpayers were negligent with respect to their failure to pay taxes or to accurately file a return, unless the IRS seeks to collect penalties.¹⁰⁴ Movements away from that liability, such as innocent spouse relief, increase the complexity and cost of the tax system because they provide opportunities for taxpayers to contest the liability based on some factor other than the law.¹⁰⁵ To be clear, innocent spouse relief, and most other forms of relief, does not involve a question whether the liability exists, only whether the contesting spouse should have to pay it.

Although the IRS has powers that other creditors do not possess, taxpayers are not without due process of law when the IRS determines that they owe taxes. If the IRS disagrees with the return a taxpayer files, the IRS assesses all taxes owed through a process within which the taxpayer may

709–10, 742 (2007); Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 *Tax L. Rev.* 1, 1 (2006); Steven B. Johnson, *Administrability-Based Tax Simplification*, 4 *NEV. L.J.* 573, 583 (2004).

¹⁰⁰ 1 NAT'L TAXPAYER ADVOCATE, 2011 ANNUAL REPORT TO CONGRESS, § 1, at 4 (2012), archived at <http://www.perma.cc/0fhvxe2mJ42>.

¹⁰¹ INTERNAL REVENUE SERVICE DATA BOOK, 2012 PUBLICATION 55B, at 4, 37 (2013). 2012 data is not yet available for the number of joint returns, but 2011 saw more than 53 million joint returns. INTERNAL REVENUE SERVICE, STATISTICS OF INCOME, *supra* note 2, at 37 (2012).

¹⁰² INTERNAL REVENUE SERVICE DATA BOOK, *supra* note 101, at 41.

¹⁰³ I.R.C. § 6151 (2006).

¹⁰⁴ I.R.C. § 6662 (2006).

¹⁰⁵ That there are spouses to whom Congress desires to grant relief does not mean that joint and several liability is bad. It simply means that there are some spouses who do not have the requisite agency over their tax filing document. Moreover, the fact that some spouses win § 6015 relief does not mean that joint and several liability is to blame for creating an unfair tax obligation. Instead, it is an indication that the system works to mitigate the liability of those whom Congress does not want to hold liable for their joint returns.

participate and from which the taxpayer may appeal.¹⁰⁶ The IRS generally has three years to complete this assessment.¹⁰⁷

An assessment of tax liability permits the IRS to pursue three avenues for collecting the taxes owed: (1) to issue a tax lien, (2) to levy taxpayer property, and (3) to offset refunds or other amounts received from the government.¹⁰⁸ Each collection method has requirements aimed to protect taxpayer rights. For example, tax liens arise automatically; however, in order for the IRS's lien to be perfected, and take priority over competing creditors to the extent that it can, the IRS must file a Notice of Federal Tax Lien.¹⁰⁹ Thus, a lien attaches by operation of law to all property but has limited value without further action as to specific property. Moreover, the Code requires the IRS give the taxpayer notice of its intent to use its levy power to seize property and certain types of property are exempted from the IRS's power to levy.¹¹⁰ Except in limited circumstances, the IRS must complete its collection within ten years or the authority to pursue these avenues lapses.¹¹¹

Much of the collection process is automated, largely for reasons of cost.¹¹² A computer performs the audit and makes all contact with the taxpayer for two or three years before an IRS employee enters the process.¹¹³ The queue for field operators is so long that, in 2005, 788,083 delinquent accounts were removed from the queue without payment and without human contact.¹¹⁴

The review of the facts and circumstances necessary for the mitigation of taxes cannot currently be made through an automated process. From a specially created Cincinnati Centralized Innocent Spouse Operation, IRS agents rule on each innocent spouse relief request.¹¹⁵ Unlike in the auditing process, in which the IRS can assume taxpayers are compliant if it does not want to invest the resources to question their liability, the structure of the law requires the IRS perform the balancing of equity or the allocation of liability for each request. This system generally operates well, with the In-

¹⁰⁶ I.R.C. § 6201 (2006). For a discussion of the process of collection and collection due process, see Camp, *Failure of Adversarial Process*, *supra* note 50.

¹⁰⁷ I.R.C. § 6501 (2006).

¹⁰⁸ I.R.C. §§ 6212, 6321, 6331, 6402 (2006). See also *United States v. Munsey Trust*, 332 U.S. 234, 239 (1947); Field Serv. Adv. No. 200213012 (Mar. 20, 2002).

¹⁰⁹ I.R.C. § 6323 (2006). Without perfection, tax liens take precedence over all creditors but for purchasers for value, mechanic's lienors, holders of security interests, and judgment lien creditor.

¹¹⁰ I.R.C. § 6331(d) (2006).

¹¹¹ I.R.C. § 6502 (2006).

¹¹² Camp, *Failure of Adversarial Process*, *supra* note 50, at 68. One may question how well flexibility works in an automated system.

¹¹³ *Id.*

¹¹⁴ TREASURY INSPECTOR GENERAL FOR TAX ADMIN., REF. NO. 2006-30-055, TRENDS IN COMPLIANCE THROUGH FISCAL YEAR 2005, at 26 (2006), archived at <http://perma.cc/0a2hDpNSFMX>.

¹¹⁵ I.R.S., IRM § 25.15.8.2 (2010).

spector General of Tax Administration finding that the IRS properly resolved 94% of the cases it reviewed, but it is a drain on the resources of the IRS.¹¹⁶

When the IRS collects from a spouse as a result of joint and several liability, the spouse is not being held liable for the other spouse's actions or for greater damages than she caused. Instead, this system of liability results in one spouse being held liable for the damages that she caused by filing an inaccurate return. Critics who prefer to split the liability fifty/fifty between spouses, or according to some other proportionate regime, focus on the creation of the income and not its report to the government. The result, however, is that critics are effectively stating that one spouse is 50% negligent or 50% responsible for the return. However, neither spouse's actions in signing an inaccurate return caused the government to miss out on 50% of the revenue owed. Rather, each spouse was 100% negligent with respect to the return and each spouse is therefore fully responsible for the entire tax obligation the return triggers.¹¹⁷ A spouse's full responsibility for an injury to other taxpayers that was an actual and proximate result of her submitting an inaccurate return does not become partial or minimal because the other spouse's behavior seems worse.

If one spouse pays the taxes owed on a joint return and is unable to seek contribution from the other spouse because of the insolvency or unavailability of the other spouse, an unfair result has occurred. However, the government is not a part of and is not responsible for that unfairness. The unfairness results from the taxpaying spouse's unfulfilled equitable claim against the judgment-proof spouse. That claim is secondary to the government's claim against each spouse. Limiting the collection of the taxes legally owed from the *less guilty* spouse unjustifiably shifts the unavailable spouse's immunity (for example, his bankruptcy) to the available spouse, who has no such immunity.

This immunity was estimated to cost \$1.4 billion in its first decade and led to substantial IRS litigation.¹¹⁸ Despite the high cost, those seeking innocent spouse relief are a small subset of all taxpayers. With more than 53 million joint tax returns filed annually, the possible group seeking relief is much larger than those filing approximately 55,000 applications annually

¹¹⁶ TIGTA, INNOCENT SPOUSE REVIEW, *supra* note 71, at 5–6. *See also id.*, at 4.

¹¹⁷ This is the case even if a spouse does not know that the return is inaccurate. Currently there is no good faith or mistake-of-law or mistake-of-fact exception to tax filing. Although people debate joint and several liability in a comparative responsibility regime, most agree that joint and several liability should be retained for defendants acting in concert. *See* U.S. ATT'Y GEN. TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 33 n.29, 64–65 (1986) (recommending the elimination of joint and several liability in comparative responsibility context but not when defendants act in concert).

¹¹⁸ *See* STAFF OF THE JOINT COMM. ON TAXATION, 105th Cong., ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT RELATING TO H.R. 2676, JCX-51-98 (1998); Reports cited *supra* notes 13–14.

today.¹¹⁹ Few joint filers are audited and, of those, fewer are assessed a liability, and even fewer contest the liability. Expanding relief risks opening the floodgates even as the IRS awaits potential budgetary cuts.¹²⁰

Innocent spouse relief's more flexible approach to tax collection may well reflect postmodern life, where liability for taxes may actually be a matter for negotiation. If true, we are atop a slippery slope of individualized tax relief. A difficulty with this approach is that the tax system is complicated, and many people rely on accountants or software to prepare their returns.¹²¹ Allowing spouses, or any taxpayer, to limit responsibility for their legally-valid returns on the basis that they did not know or understand what was on the return calls into question holding anyone strictly accountable for their returns, particularly those returns completed by tax return preparers.¹²² Furthermore, if innocent spouse relief increases awareness that tax relief is selectively available, it might increase other taxpayer groups' demands for additional relief or, worse, their tax evasion if relief is not granted.¹²³

Thus, not only are the direct effects of policies at issue but also the public's perception of those policies.¹²⁴ Attempts to assess individual equity in the application of the federal income tax risk undermining the efficient operation of the tax system for the public as a whole. This risk, in turn, may upset the critical balance between administrability and equity that underpins our tax regime. Instead of favoring one good over the other, relief from legally owed taxes should protect the balance of the system by providing relief in ways that are reasonably administrable.

B. Equity as Between Taxpayers

It is not enough for a tax system to be administrable; it must also be equitable. With respect to joint and several liability for joint returns, we must measure equity both as between spouses and as between taxpayers. Successful requesting spouses win mitigation of their taxes vis-à-vis their spouses and other taxpayers who report their income, pay their taxes, and live off

¹¹⁹ See NTA, 2005 ANNUAL REPORT § 1, *supra* note 46, at 329; INTERNAL REVENUE SERVICE, STATISTICS OF INCOME, *supra* note 2, at 37.

¹²⁰ Howard Gleckman, *House GOP's Solution for Short-Staffed, Poorly Trained IRS: Slash Its Budget 24%*, FORBES, July 11, 2013, archived at <http://perma.cc/03fUWw6famK>.

¹²¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-297, TAX ADMINISTRATION: MANY TAXPAYERS RELY ON TAX SOFTWARE AND IRS NEEDS TO ASSESS ASSOCIATED RISKS (2009), archived at <http://perma.cc/0Q2KPzUTgrv>.

¹²² Return preparers are liable for penalties for negligent disregard of rules and regulations. I.R.C. § 6694(a) (2006).

¹²³ For a good review of material, see generally Ingrid Wahl, Barbara Kastlunger & Erich Kirchner, *Trust in Authorities to Enforce Tax Compliance*, 32 L. & POL'Y 383 (2010); Marjorie Kornhauser, *A Tax Morale Approach to Compliance*, 8 FLA. TAX REV. 599 (2007).

¹²⁴ Dan Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350–51 (1997).

their remaining income. Thus, innocent spouse relief from that liability is not pitting the requesting spouse against the government, as some black box or blank check, but against other people. That the majority of those winning relief are women does not make it any less necessary to recognize this potential injustice. Considering relief in this light, for spouses who were not coerced into signing joint returns, the selective lowering of their tax burdens produces inequitable results.

First, looking at the equity as between spouses: for a variety of reasons, and a significant one is a reduced tax burden compared to being married but filing separately, joint filers choose to file their tax returns as marital units.¹²⁵ Although this Article does not rehash arguments regarding the equity of the joint return, the Treasury Department's initial justification for the imposition of joint and several liability was that a joint return was a single filing by a couple and not two individual returns on one sheet of paper.¹²⁶ To the extent that the joint return amalgamates both spouses' incomes, the liability reflects the singularity of the return.

Although studies show that most couples pool some amount of their earnings either by choice or because they have no other option, joint filing, and with it joint and several liability, does not mean, or theoretically require, that spouses pool their income.¹²⁷ Instead, joint filing simply accepts that ownership as between spouses is ambiguous. In other words, it is a sufficient justification for the joint and several liability on joint returns to find that within most marriages (if not within most relationships) people who earn income are not always the only ones who feel as though they "own" or "co-own" the income in something other than a strictly legal sense.¹²⁸ When a couple files a single return containing both spouses' incomes, the spouses forgo the burden of defining who owns what within the marriage. Innocent spouse relief, on the other hand, requires that the IRS or the courts determine who "owns" income and should owe tax on that income. That the answers to these questions are often ambiguous as between spouses does not negate the fact that answers must be concluded and that real world economic consequences flow from that determination.

¹²⁵ See *supra* note 2.

¹²⁶ See *supra* note 25.

¹²⁷ PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 96 (1983); JANET STOCKS ET AL., *MODERN COUPLES SHARING MONEY, SHARING LIFE* 49 (2007) (noting that, in Sweden, where economic independence and gender equality are explicit public policy goals, pooling is still overwhelmingly the practice for established couples); Judith Treas, *Money in the Bank*, 58 AM. SOC. REV. 723, 729 (1993); Lawrence Zelenak, *Marriage and the Income Tax*, 57 S. CAL. L. REV. 339, 348–54 (1994). See also JAN PAHL, *MONEY AND MARRIAGE* (1989); Shelly Lundberg, Robert Pollak & Terence Walles, *Do Husbands and Wives Pool Their Resources?*, 32 J. HUM. RESOURCES 463 (1997). But see BARBARA BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN* 211–12 (1986); VIVIANNA ZELIZER, *THE SOCIAL MEANING OF MONEY* 3–65 (1994); Marjorie Kornhauser, *Love, Money, and the IRS*, 45 HASTINGS L.J. 63, 80–91 (1993).

¹²⁸ But see Dennis J. Ventry, *Saving Seaborn: Ownership Not Marriage as the Basis of Family Taxation*, 86 IND. L.J. 1459 (2010).

To dismiss this understanding that ownership might be messy risks making the exceptional couple the rule. Focusing the tax on the couple for whom ownership of property is clear and divisible does not mean that the average couple will be better served. Instead, the couple that shares resources or delegates tasks will no longer be recognized as doing so. Their real situations will be dismissed in order to give deference to those couples who keep financial matters separate and either do not perceive themselves as an economic unit or do so in order to game the tax system.

Consider Edith and Frank. Frank works at home caring for the children and Edith works many odd jobs throughout the year to earn the couple's income. When preparing their tax return, the couple fails to notice they did not receive a W-2 from one of Edith's employers, and the accountant fails to properly report the income. At some point the couple divorces. In the divorce, each is given one-half of any amount saved from Edith's wages. If the joint return is ever audited and if Frank did not have reason to know of the omission of the income on the couple's joint return (for example if he could reasonably fail to keep track of the number of her employers), Frank can claim innocent spouse relief, keep the savings, and Edith will owe all of the tax due.

In this example, we may not blame this couple for tax evasion, but they nevertheless failed to pay the taxes that were owed. Holding Edith liable for all of the taxes, even amounts she spends with and even on Frank or transfers to Frank in the divorce, seems inequitable.¹²⁹ However, that is the likely result under the innocent spouse rules. Extending innocent spouse relief further than it exists today as some advocates propose, for example by requiring liability based on who earns the income, would guarantee the shifting of the tax burden from Frank to Edith. Even if the couple shared all the family's earnings and made all financial decisions together, the fact that Edith earned the income would require the government to shift the entire tax burden to her.¹³⁰ This is not unexpected based on the operation of innocent spouse relief; one spouse is more often granted relief while the other remains liable for the entire tax.¹³¹

However, inequitable divisions of resources and burdens do plague many marriages.¹³² Couples do not always view themselves as equal, even if

¹²⁹ This also illustrates how individual filing clashes with the idea of not taxing household labor because the value of the wage earnings is effectively being shifted to the non-wage earning spouse without being taxed as such.

¹³⁰ If the couple lived in a community property state, 50% of the earnings would legally belong to Frank from the time they were earned. Still, if he did not have reason to know of the omission, Edith would be responsible for 100% of the taxes owed. Treas. Reg. § 1.6015-1(f)(1) (2002).

¹³¹ In the context of divorce, there is no notion of unclean hands in the granting of relief. I.R.C. § 6015(c) (2006). A study of innocent spouse relief showed that only 4 of 444 cases involved both spouses seeking relief. McMahon, *Empirical Study, supra* note 33, at 662.

¹³² If one spouse has disproportionate control over the other spouse's earnings, a tax system that operates on spouses as individuals is unlikely to change that power dynamic.

they pool some amount of income, which raises questions as to how the income tax system should treat these spouses.¹³³ Spouses are acting as though their income is joint property, that ownership is in some sense combined; however, one spouse might not know the extent of the family's financial situation. The government can recognize the jointness of the couple, and thereby possibly collect tax from a spouse who does not know the couple's financial position, or tax each spouse separately, and possibly create artificial divisions of ownership. This is the fundamental choice before us.

Many spouses, even among those who perceive themselves as equals in their marriages, make the choice to delegate financial obligations and responsibility to one spouse, and in doing so limit the other spouse's awareness of financial information.¹³⁴ For couples for whom this is true, neither spouse genuinely lacks agency in the sense that a spouse desires to exercise a role, is willing to take on the responsibilities and burdens of that role, and is then denied the opportunity. Rather, the spouse not delegated responsibility for financial tasks exercises an element of choice. To the extent Frank in the prior example does not ask the designated return preparer about the couple's tax return, he is culpably failing as a tax-paying member of society. And even to the extent that he cannot know because neither spouse knows, as in the example, he is as culpable as his wife. Frank should not receive a free pass on the legal document that he signed, the tax return, because of the delegation. Of course this does not mean that all spouses have agency over their returns. As discussed in Part III below, the inability to assume the role should result in relief from joint and several liability.

Unless spouses are coerced when they allocate responsibility for joint tasks among themselves, they assume the risk associated with that allocation.¹³⁵ For example, despite the fact that I (the author) am a tax professor in a self-proclaimed equal relationship, as a couple, my husband and I have delegated to him the work of completing our tax returns. Not only do I save the time necessary to complete the forms when I designate my husband as "our" return preparer, but I have exercised a choice. With that choice come

See generally Alicia Brokars Kelly, *Money Matters in Marriage*, 47 U. LOUISVILLE L. REV. 113 (2008). Many marriages do not have two earners and wives produce less than half of most families' total earnings. Sara Raley et al., *How Dual are Dual-Income Couples?*, 68 J. MARRIAGE & FAM. 11, 11 (2006).

¹³³ Amy Kroska, *Examining the Husband-Wife Differences in the Meaning of Family Financial Support*, 51 SOC. PERSP. 63, 65 (2008). The annual division of income necessary for separate liability would also illustrate which spouse is economically better off and which one is not. This might reinforce gendered divisions within the marriage.

¹³⁴ See generally Bryndl Hohmann-Marriott, *Shared Beliefs and the Union Stability of Married and Cohabiting Couples*, 68 J. MARRIAGE & FAM. 1015 (2006).

¹³⁵ An argument has been made that wives do not contest their husbands' actions because of a willingness to forgive or because they wish to preserve the marriage. Therefore, the government should relieve wives of their taxes. Bryan Camp, *The Unhappy Marriage of Law and Equity in Joint Return Liability*, 108 TAX NOTES 1307, 1318 (2005). This alleged willingness may be commendable, but why should the cost of that willingness be borne by other taxpayers if husbands do not pay their taxes? Should we not respect a wife's choice and impose the cost on her?

risks. If I trust my husband to cook dinner for me and he is a bad cook, I risk a bad meal or, worse, food poisoning. If I trust my spouse to negotiate the purchase of our house, I risk overpaying if my husband is the weaker negotiator. There is nothing intrinsic to the federal income tax that suggests I should be insured against the risk of allocating my taxpaying responsibility. If a spouse does not want to assume the risk, the spouse does not have to accept the division and can file a return as married filing separately. And if she signs the return because she is coerced, she should have relief available, as described in the next Part.

Some critics argue that requiring both spouses to prepare or understand the return is “wasteful and inefficient” and that we should support the allocation of responsibilities.¹³⁶ It is implied that the allocation of tax responsibility should, therefore, come with an isolation of liability to whomever was allocated the task. However, it is unlikely the critic would say that only one spouse should understand the family’s financial position or understand whether the other spouse is committing a crime in both of their names. Requiring the creation of two versions of the same document might be wasteful, but having enough working knowledge of the family’s finances to confirm the other’s work on the return is just good planning. If a couple chooses not to do so, this is not something the government should encourage or needs to insure.

Thus the reality of joint and several liability is different from how the story is often told. Frequently, spouses who are being held liable are depicted as tragic figures deserving the mitigation of their taxes. However, putting aside spouses who are coerced into signing their returns, spouses who file joint returns have a choice. Those reading this Article might not agree with the choices that any particular couple makes, but that disagreement does not mean these are not legally valid choices. Moreover, that we might not agree with a choice does not mean that those who make a choice to defer proper evaluation of the family’s finances or the tax return should be insured against the risk of improper tax filing when those who are aware of family finances and do participate in the preparation of the return are not so protected.

In addition to considering potential inequity as between spouses, it is important to examine the equity of innocent spouse relief as between taxpaying groups. Other taxpaying groups may have equitable claims because innocent spouse relief allows a spouse to enjoy the benefit of filing jointly while avoiding its attendant burdens. With joint filing, spouses avoid potentially erroneously allocating income between themselves. In addition, they are taxed using wider tax brackets so that more income is taxed at lower rates, and they can claim certain tax credits not available to spouses filing separately. With relief, both spouses (the innocent spouse and the one guilty of tax evasion) enjoy lower taxes because they filed jointly, even though with

¹³⁶ Richard Beck, *The Innocent Spouse Problem*, 43 VAND. L. REV. 317, 369 (1990).

relief they will be taxed separately. The innocent spouse is then relieved of liability for the other spouse's income and, in some circumstances, her own.¹³⁷

Thus, not only does innocent spouse relief potentially create inequities as between the spouses who sign the joint return, the taxes that are paid are no longer drawn equitably from all members of society. Spouses who are able to mitigate the taxes they owe pay less in tax than those with the same amount of income who pay their taxes. As a result, the tax rates applicable to different taxpayers are no longer the rates Congress enacted. Consequently, increasing innocent spouse relief benefits some taxpayers at the expense of others by decreasing some people's taxes but not others. Similarly situated taxpayers are not taxed similarly. Whether the spouse given relief is unjustly enriched depends on the spouse's particular facts and circumstances; nevertheless, in all instances issues of inter-taxpayer equity are raised.

Compare two couples: Alice and Ben versus Cathy and David. Both couples earn \$150,000 per taxable year. Ben invests in a tax shelter that generates \$50,000 of unauthorized deductions, reducing Anne and Ben's reported tax obligation by \$12,719. Cathy and David, on the other hand, pay all of their taxes owed, increasing their effective tax rate compared to Alice and Ben by approximately 8.5%. Alice and Ben, with the money that was legally owed to the government, buy a house that they otherwise could not have afforded. Cathy and David, lacking those resources, rent an apartment.

After a number of years, both couples divorce. In their divorce, Alice gets the house and, as a result, Ben owes less in alimony. By contrast, there is no house for Cathy to receive, so she is entitled to more alimony from David. The innocent spouse rules provide that if Alice did not actually know of the tax evasion, she keeps the house, although Ben should owe penalties and interest on his tax evasion.¹³⁸ Therefore, not only do Alice and Ben have years of enjoyment of a house they could not have afforded without the tax evasion, but also, in their divorce, one spouse keeps the house forever and the other spouse benefits by owing less in alimony. Finally, throughout their marriage Alice has no interest in checking their returns because, even if the couple is caught and Ben is judgment proof, she is still better off.¹³⁹

¹³⁷ See, e.g., *Gilbert v. Comm'r*, T.C. Summ. Op. 2007-16 (2007); *Yakubik v. Comm'r*, T.C. Summ. Op. 2008-74 (2008); *Campbell v. Comm'r*, 89 T.C.M. (RIA) ¶ 2006-024 (2006). The availability of relief from taxes on one's own income was expanded in 2012. See I.R.S. Notice 2012-8, 2012-4 I.R.B. 309, § 4.01(7); Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.01(7).

¹³⁸ I.R.C. §6015(c) (2006).

¹³⁹ Recent changes to the innocent spouse rules by the Treasury Department illustrate inequities in the system. Under the new rules, a requesting spouse only needs to "reasonably expect []" that the nonrequesting spouse will pay the tax liability "within a reasonably prompt time." Notice 2012-8, *supra* note 16, at § 4.03(2)(c)(ii); Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.03(2)(c)(ii). This changes the rule for when payment of tax is due. All other individual taxpayers must pay by April 15, unless an extension is granted, and a reasonably prompt payment thereafter results in interest due. Not only are innocent spouse recipients not held to the same rule as other taxpayers, they do not have to expect

These rules encourage cheating: keeping the tax evasion from Alice was the best thing Ben could do for his wife and possibly himself.¹⁴⁰ The couple that complied with the law is worse off and might even see their tax rates increase if a sufficient number of couples take the path of Alice and Ben. The unjust enrichment that results from the tax evasion must be minimized to preserve an equitable tax system even if the spouse who benefits the most (by getting the house and being relieved of tax) is more often the vulnerable spouse.

Considering again Jill from the Introduction, she has assets other divorced taxpayers do not have because, during her marriage, Jill's family did not pay the taxes they legally owed.¹⁴¹ It is important that we not cast Jill in the role of a victim of tax oppression simply because she owes taxes. She might be in a hard position and we might justly sympathize with her as a divorced woman, but her position is a better position than it otherwise would be as a result of tax evasion. And if the taxes are too great for Jill to pay, there are generally applicable hardship provisions available to her.¹⁴²

A question that arises from this inter-taxpayer inequity is the extent to which we are comfortable allowing either spouse to benefit from tax evasion. With innocent spouse relief, it is unavoidable that some spouses who benefit from tax evasion will be unjustly enriched after avoiding paying the taxes the couple owes. Critics who want expanded innocent spouse relief often disagree with this characterization of the inter-taxpayer comparison. One critic of joint and several liability on the joint return has argued, "in the tax context, it does not seem particularly unfair that the victim (the government) should bear the burden of collection and the risk of insolvency."¹⁴³ However, although the government receives the tax revenue, other taxpayers are the ones funding the collection process and will bear the loss of government expenditures if the revenue is not collected.

C. *Effect of Relief on Wives*

Innocent spouse relief is gender-neutral in form, as is all of the Internal Revenue Code.¹⁴⁴ Nevertheless, not only was the provision gendered in in-

their spouse to follow the rules either. An innocent spouse is able to avoid interest on taxes that she knew would not be paid on time.

¹⁴⁰ A similar problem troubled Senator Chafee in 1998. Senate Committee on Finance, *Unofficial Transcript of Finance Hearing on Innocent Spouse Tax Rules*, 98 TNT 32-23, 34-35.

¹⁴¹ A nonrequesting spouse can have transferred "disqualified assets" to the requesting spouse, and the requesting spouse will win relief and keep the assets if (i) the nonrequesting spouse abused the innocent spouse or restricted her access to financial information or (ii) the requesting spouse did not have actual knowledge that disqualified assets were transferred. Notice 2012-8, *supra* note 16, at § 4.01(5); Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.01(5).

¹⁴² See *supra* Part I.B.

¹⁴³ Kahng, *supra* note 6, at 282.

¹⁴⁴ I.R.C. § 7701(p)(1)(3) (2006).

tent as discussed in Part I, it is gendered in its impact: 85.4% of spouses requesting relief and 89.5% of spouses winning relief are wives.¹⁴⁵ Therefore, it is appropriate to examine what innocent spouse relief does for this targeted group. This issue, which intersects wives' public and private lives, offers an opportunity to explore how the government views women in these roles. Moreover, it provides the opportunity to reexamine the complexity of the very question of how best to promote wives' well-being. A significant risk of expansive innocent spouse relief is that, for wives who are not coerced into signing the joint return, the government dismisses wives' valid choices and equates their divisions of marital tasks with presumed incapacity.

Regardless of whether or not one accepts that a goal of the income tax system should be to help the vulnerable, which this author does, it does not necessarily follow that all wives should be relieved of tax liability because of their vulnerability. With respect to tax filing, the question is not as simple as either (1) absolving wives from taxes or (2) treating them as equals with their husbands but (as is often feared) subjecting them to disproportionate liability. A narrower relief draws a line at the degree of vulnerability we as a society accept negates liability.

For Congress to engage in this line-drawing, however imperfect, it must recognize that wives are not in a homogenous position within their marriages. To do so is a positive step for wives because recognizing the different positions of wives validates the gains that have been made by some women while trying to develop those gains further and for more women. To conclude that all wives are sufficiently vulnerable within marriage so as to negate their taxpaying obligations risks reinforcing a culture of dependence that does not hold true for all wives. Although wives are often the more vulnerable spouse within marriage, not all wives are equally vulnerable. The government should recognize some spouses' vulnerability but encourage them, when possible, to minimize the vulnerability, in this case the vulnerability that results from the lack of information about the couple's financial position and inability to perform the civic and legal obligation of filing an accurate tax return and paying their taxes owed.¹⁴⁶

¹⁴⁵ McMahan, *Empirical Study*, *supra* note 33, at 662.

¹⁴⁶ Particularly troubling is that if Congress eliminates joint filing or joint and several liability, spouses will likely lose innocent spouse relief. For example, Bryan Camp argues that the elimination of joint liability "fully resolves the tension" created between spouses. Camp, *Unhappy Marriage*, *supra* note 135, at 1314. However, if spouses allocate tax filing to one spouse, abused and deceived spouses will lose relief without gaining independence. Strangely, even those who recognize that spouses may specialize within marriage think "it is likely" that each will prepare their own return. Larry Jones et al., *For Better, For Worse or For Taxes!*, 6 J. TAX PRAC. & PROC. 35, 38 (2004). If there is a concern that the current system does not properly recognize the plight of some wives, and it for better or worse recognizes that wives are often in vulnerable positions within marriage, we should not expect a system in which the underlying theory is that wives are independent taxpayers and not liable for anything but their own income to give them more sympathy.

Moreover, a limited innocent spouse relief recognizes the complex roles that wives play by reinforcing the idea that wives retain their role as taxpayers even when they marry. If one thinks of marriage as a contract, this view seeks to put each contracting party in the marriage on an equal footing before the government. On the other hand, if one accepts that marriage is more fundamentally a status that spouses assume, the government is expressing its view that wives retain multiple statuses and do not lose these other statuses when they marry. Wives are taxpayers, and as part of their obligation to society they cannot have that obligation subsumed by their husband any more than they can have their obligation to be jurors or voters subsumed.

That Congress has created this type of tax system sends a message to married couples because law has an expressive function.¹⁴⁷ In its best light, the expressive function of joint and several liability holds that wives are equal members in the marriage and capable of being held liable for the couple's debts, as are their husbands. Couples who choose to file a joint return are making the tacit statement that they have such unity, as opposed to spouses who file separately. That equality comes with burdens. Both spouses are deemed to be equally aware of marital finances, at least with respect to the return. Both are deemed to double-check joint tax returns for their accuracy. That this does not always happen is really no different from the fact that taxpayers do not always double-check their tax return preparers' work. In short, simply because the law acts on the principle and expresses a belief that people should be aware of their own tax obligation does not mean that everyone is.

This expression made by the law of joint returns exists even if couples are unaware of the joint return's potential consequences. Taxes and other laws have an expressive function regardless of whether people are aware of how the laws operate. For example, the unrelated business taxable income rule, which taxes otherwise tax-exempt entities engaged in for-profit business, expresses a congressional desire to protect the market from unfair competition.¹⁴⁸ Similarly, the Foreign Investment in Real Property Tax Act, which imposes a withholding tax and reporting obligations on non-U.S. taxpayers who buy U.S. real estate, expresses a congressional desire to minimize foreign holdings of U.S. real estate.¹⁴⁹ Both laws increase the cost of those who want to thwart Congress's expressed will, even if they have not heard of the laws. Therefore, even if only fully understood by Congress, the

¹⁴⁷ See, e.g., Matthew Adler, *Expressive Theories of Law*, 148 U. PA. L. REV. 1363, 1364 (2000); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 948 (1995); Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2045 (1996).

¹⁴⁸ See generally Ethan G. Stone, *Adhering to the Old Line: Uncovering the History and Political Function of the Unrelated Business Income Tax*, 54 EMORY L.J. 1475 (2005).

¹⁴⁹ See generally David J. Herzig, *Rethinking FIRPTA*, 4 COLUM. J. TAX L. (2013) (forthcoming) (proposing ways to increase the amount of tax collected under FIRPTA).

IRS, tax advisors, and academics, the law shapes how the government interacts with people and expresses a vision of how society does (and should) function.

This is not to ignore the fact that wives, and husbands, would benefit from better education of what it means to sign a joint return. The expressive function of the law can be made more salient to taxpayers.¹⁵⁰ Nevertheless, much as joint elections can have “an information-forcing function,”¹⁵¹ so too can the joint return inform married couples of the ideas Congress intends to express with respect to their presumed equality.

Through the expression of jointness, the government encourages both spouses, but particularly wives, to learn about their family’s finances. Studies have found that, regardless of race or class, economic and perceived dependency by wives on their husbands is positively correlated to abuse of those wives.¹⁵² However, it is the economic dependency that keeps wives in these relationships.¹⁵³ For their independence, wives need access to wealth while married, access to marital assets upon divorce, and access to information regarding the wealth to which they might be entitled.¹⁵⁴ The joint return helps fulfill the last function by providing information regarding at least reported income, and the government needs to continue to promote this information sharing.¹⁵⁵

On the other hand, current innocent spouse relief as administered by the IRS and the courts is not conducive to the free flow of information: if wives ask about the family’s economic position but are told nothing, they are more likely to be granted tax relief. For example, in *Wiener v. Commissioner*, the Tax Court granted the wife of the still-married couple innocent spouse relief in part because her husband denied her financial information.¹⁵⁶ One commentator noted, “in general, the more the requesting spouse was kept in the dark regarding the family’s tax and financial matters, the greater the chances

¹⁵⁰ For example, Form 1040 could state above the signature line that, by signing, spouses are assuming joint and several liability.

¹⁵¹ Heather M. Field, *Tax Elections and Private Bargaining*, 31 VA. TAX REV. 1, 39 (2011).

¹⁵² See generally Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552 (2007); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359 (1996); Debra S. Kalmuss & Murray A. Straus, *Wife’s Marital Dependency and Wife Abuse*, 44 J. MARRIAGE & FAM. 277 (1982).

¹⁵³ See generally sources cited *supra* note 152.

¹⁵⁴ Spouses who file joint returns have a right to copies of those returns, but no right to see a spouse’s separate return. See I.R.S. Form 4506-T.

¹⁵⁵ Under proportional liability, there is no reason for one spouse to double check the other, and it is reasonable to expect that some spouses would refuse to explain tax items if the other spouse cannot be held liable for them. This cabining of information is risky for wives who might have few other means to financial information.

¹⁵⁶ 96 T.C.M. (CCH) 227, 238 (2008). Although it cannot be known for sure, it is possible that the husband in the case was judgment proof, so that thereafter neither spouse paid the tax.

of gaining relief.”¹⁵⁷ Perversely, husbands are doing wives a favor by withholding information.

Those wives with the power to understand their family’s finances should do so and government relief programs should encourage them to do so. To undo the consequences of their choices means that society is insuring wives against the risk of not exercising a power they have. This is not to say that all spouses are capable of demanding this information, but spouses who file under duress are already recognized not to have filed a valid joint return. Consequently, the tax system already recognizes spouses as not equally culpable in the case of duress.¹⁵⁸ Moreover, for those who are granted innocent spouse relief, the government holds that the relieved spouse should not be treated as an equal within the marriage, at least with respect to the return. For all other couples who are jointly and severally liable, the government is treating both spouses as equal members of the economic unit.

Much as law has an expressive function, so too does Congress changing the law. A change in the regime would require the federal government to change this law and the message sent by the law. The rhetoric justifying the change is likely to be similar to that used by its critics today. Scholars have claimed that “the current tax system exacerbates dependent spouses’ vulnerability”¹⁵⁹; that “it is unfortunately only a slight exaggeration to describe the wife who is assessed with her husband’s taxes as doomed to exploitation and abuse”¹⁶⁰; and that the tax system’s structure “produces a powerful structural bias against wives.”¹⁶¹ This rhetoric states that all wives should not be held liable because of their vulnerable position within marriages, and it risks reinforcing that vulnerable position through its reiteration.¹⁶²

An expansive innocent spouse relief does not simply imply that wives are the more vulnerable spouse but also releases them from an obligation to third parties (the IRS and, subsequently, other taxpayers) because of any degree of vulnerability, whether or not it directly impedes a spouse’s ability to meet the obligation. Wives, as the spouses targeted for relief, will be defined as those who lack the ability (either by choice or by force) to accurately file a joint return. As a result, the change signals to the nation the lower value and rights of the country’s wives.

¹⁵⁷ William P. Brown, *Recent Cases Expand Potential for Obtaining Innocent Spouse Relief*, 83 PRAC. TAX STRATEGIES 86, 90 (2009).

¹⁵⁸ Some critics argue that Congress should expand procedures for challenging whether a purported joint return was filed jointly or was the product of forgery or duress. See Carlton M. Smith, *How Can One Argue ‘It’s Not My Joint Return’ in Tax Court?*, 124 TAX NOTES 1266 (2009).

¹⁵⁹ Motro, *supra* note 6, at 1533.

¹⁶⁰ Beck, *The Failure of Innocent Spouse Reform*, *supra* note 6, at 939–40.

¹⁶¹ Christian, *supra* note 6, at 537.

¹⁶² This does not mean that we should not call attention to problems of inequality when they arise, but we must be concerned about the message that is sent by the rhetorical and expressive function of proposed changes.

Even if there were a tabula rasa upon which to write the tax law, many alternatives to the current regime reinforce the notion that wives, as the lower earning spouse, are not equal within marriage. First, in any regime that imposes the initial tax liability based on earnings, husbands, as the higher earning spouse on average, would have more money reflected on their returns. Annual filings would show who is economically better off and who is not. Second, alternatives also validate those marriages in which husbands do not tell their spouses about the family's finances. This risks providing the state's endorsement of such behavior.

Third, and perhaps most critically, alternatives risk assuming that behavior changes just because the tax law does.¹⁶³ If spouses allocate tasks between themselves based on interest or abilities, an individual filing regime or a regime allocating liability in some fashion is unlikely to result in each spouse completing his or her own return. Moreover, if husbands dominate their families' finances, they may simply fill out their wives' returns or provide their wives' information on joint returns in the new regime, which no longer has a theoretical justification for innocent spouse relief. Thus even the panacea for wives as taxpayers, individual filing, is not a perfect answer for the reasons discussed herein. It is not, and cannot be, a perfect solution for all taxpayers. Although it would likely protect some spouses whose returns only reflect their wages and whose families have no jointly owned assets, for all other spouses the risk is run that a spouse will complete the return improperly, opening the innocent spouse to liability. And with individual filing or allocated liability it is likely to be liability without any innocent spouse relief.

For Congress to isolate liability based on the theory of isolated ownership interests between spouses is also troubling because the nation is moving to valuing both spouses as equal contributors to the marriage in other areas of the law. Proportional liability, under which many wives as the lower-earning spouse would be liable for less than half of the tax due, seems at odds with the movement towards equal divisions of assets at divorce (although the movement is certainly not complete).¹⁶⁴ To the extent we want to move to greater equality of assets, it might be unwise as a political matter to seek protection from the tax liability for those assets.

As a final concern for wives, if wives succeed in having Congress limit their tax liability, it potentially bodes ill for wives in other arenas. Limiting liability signals that wives (or at least increasing numbers of them) are not to be held responsible for the legal documents that they sign. If women want equal access to markets, they must be accountable for their agreements. If Congress legislates that wives cannot be held accountable for the tax returns they sign, it is a small slide on a slippery slope to say that wives should not

¹⁶³ See *supra* note 146.

¹⁶⁴ See AM. LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 815–20 (2008).

be held liable for the mortgages or leases that they sign, if only within the context of marriage.¹⁶⁵ Without their signature and their legal obligation, wives are likely to have less access to markets.

Thus, this movement towards a new coverture is a dangerous message for the government to send, not only to wives and their husbands, but also to third parties. Attempting to protect wives by selectively invalidating their signatures or holding the government to a higher standard when it comes to their signatures as opposed to their mates' is a costly protection, not only in federal revenue but also in women's rights. This dismissal of women's independence may be justified in some cases, but it should be limited with respect to joint filing to the modified innocent spouse relief proposed in the next Part.

III. HOW TO IMPROVE RELIEF BY LIMITING IT

That joint and several liability on a joint return can be a good thing for married couples, society, and even wives, does not mean that spouses should always be made to pay the taxes they owe. As discussed in Part I, there are times when we, as a society, do not want to hold people liable for their taxes. In addition, society agrees that some marriages are sufficiently unequal to relieve one spouse of responsibility for her actions because of the dominance of the other spouse. The question is how to provide relief to those spouses in such a way that relief does not subsume the general rule of strict liability for a taxpayer's return. This Part proposes two forms of relief: a right to implead the other spouse in matters involving the joint return and a revised innocent spouse relief provision.

The IRS's Internal Revenue Manual requires agents to seek taxes from the most culpable spouse first.¹⁶⁶ It is impossible to know for certain whether this process is always applied correctly or that agents can correctly determine a priori which spouse is more culpable. When this process fails, in the period before a paying spouse wins a right of contribution, the nonpaying spouse enjoys the time value of nonpayment. To help joint filers for whom the Manual's ordering does not work appropriately, signers of joint returns should be given a right to implead the other in any proceeding, whether on audit or in litigation, for the liability due on a joint return.¹⁶⁷

¹⁶⁵ This movement has already begun by denying credit cards to non-wage earning wives. See Blake Ellis, *Stay-at-Home Mom Fights New Credit Card Rule*, CNN MONEY (May 16, 2012), <http://money.cnn.com/2012/05/16/pi/credit-cards-stay-at-home-moms/>, archived at <http://perma.cc/0QvaQLCewbP>.

¹⁶⁶ See *supra* note 4.

¹⁶⁷ For a discussion of the right to implead in the context of personal injury torts, see generally W.E. Shipley, *Uniform Contribution Among Tortfeasors Act*, 34 A.L.R.2d 1107 (2011); E.H. Schopler, *Right of Defendant in Act for Personal Injury or Death to Bring in Joint Tortfeasor for Purpose of Asserting Right of Contribution*, 11 A.L.R.2d 228 (2010). Congress has created a similar right, at least in litigation, for taxes due on trust funds. I.R.C. § 6672(d) (2006).

This proposal has broader reach than the right to implead granted in Federal District Courts or the right of intervention in current innocent spouse law.¹⁶⁸ The proposal would apply not only in the U.S. Tax Court, which is not currently governed by the Federal Rules of Civil Procedure, but also before litigation has begun. Moreover, although under current innocent spouse rules, a nonrequesting spouse may intervene in a case involving innocent spouse relief either on behalf of the requesting spouse or opposing the grant of relief,¹⁶⁹ the requesting spouse has no legal power to demand an intervention. If one spouse successfully impleads the other in a proceeding, the requesting spouse compels the participation of the nonrequesting spouse. Thus, this proposal fills in gaps in current law.

An expansive right to implead a spouse with respect to a joint tax return would reduce the collection cost and increase the equity as between spouses or former spouses. Thereafter, payment of the joint liability could be based on relative guilt for the tax evasion or, if there is no culpable conduct, on the relative ownership or benefit of the income. The government would receive its revenue, and the spouses or former spouses, with the aid of the IRS or court as arbiter, could work out how to settle liability between them. Unlike a system of proportional liability that allocates liability for taxes at the time the return is filed, impleading would only apply after the IRS challenges the return and more information is available. Therefore, impleading would not be invoked by the great number of joint filers, reducing its cost of operation. In addition, impleading could be designed to put the burden of locating and allocating the liability on the taxpayer seeking to avoid liability instead of on the IRS or, more accurately, other taxpayers.

Because some spouses will be unable to implead their spouses or former spouses because of the difficulty or expense of locating them, it may be reasonable to require the IRS provide minimal research services to joint filers seeking to implead their spouses, in the form of phone numbers or addresses of last filed tax returns and/or information from driver licenses and passports. This would require amending § 6103 of the Code, which provides that this information is confidential. Congress should evaluate the burden this would impose on the agency and privacy risks to the impleaded spouse before creating this new obligation. Regardless of the IRS's role in the impleading, with this right a greater number of spouses liable for the returns they file should not be left solely responsible for the taxes due.

Relief from the other spouse is unlikely to be sufficient for innocent spouses if the other spouse is judgment proof; therefore, Congress should revise innocent spouse relief for all of the reasons described in Part II. Requesting spouses who win relief under existing innocent spouse relief fall

¹⁶⁸ Fed. R. Civ. P. 14; I.R.C. §§ 6015(e)(4), 6015(h)(2) (2006).

¹⁶⁹ See *Van Arsendalen v. Comm'r*, 123 T.C. 135 (2004); *Fretty v. Comm'r*, T.C. Summ. Op. 2008-76 (2008); *Coleman v. Comm'r*, T.C. Summ. Op. 2004-165 (2004).

into one of two groups.¹⁷⁰ The first group includes spouses who are incapable of validating the information on the joint return because they were coerced in some form. The second are spouses for whom the IRS or the courts show mercy by relieving them of their legally valid tax obligation. The proposal explained in this Part extends greater relief to the former while denying innocent spouse relief to the latter. Under this proposal, this second group who would otherwise be shown mercy is denied relief in order to preserve the fairness of the tax regime. The cases for which relief is to be granted need to be clearly defined if all taxpayers are to be equal under the law.¹⁷¹ Furthermore, to grant a taxpayer reprieve from taxes for reasons unrelated to the act of filing creates arbitrariness in the application of the income tax and “makes it seem more unjust to apply the rule rigidly in the next case”¹⁷²

Thus, this Part proposes that Congress tailor relief to those requesting spouses who were coerced into signing a joint return.¹⁷³ This revision to § 6015 would generally grant relief in the event that the requesting spouse was either deceived about the family’s finances as it relates to the tax filing or was abused.¹⁷⁴ Spouses who were not coerced into the filing retain the other generally applicable relief measures discussed in Part I. The critical element of this revised relief is the determination of what it means for a spouse to be coerced and, therefore, innocent of the tax evasion. Not everyone will agree with this proposal’s definition of coercion or any other definition of that term. However, even if everyone does not accept this definition, it is for Congress and not the IRS or the judiciary to give meaning to the term “innocent” for congressionally-created tax relief. This proposal pushes Congress to craft a test that measures innocence in an administrable way.

This proposal’s definition of coercion derives from situations in which a spouse does not have agency over the joint return. For example, the group of cases that led to the enactment of the current innocent spouse relief involved wives who were held liable for taxes on money that their husbands had embezzled and from which the wives did not benefit.¹⁷⁵ Similarly sympathetic

¹⁷⁰ As mentioned previously, if there is duress as to the signing of a joint return, there is no legally valid joint return. See *In re Hickley*, 256 B.R. 814, 828 (2000).

¹⁷¹ Dan Merkel, *Against Mercy*, 88 MINN. L. REV. 1421, 1445 (2004).

¹⁷² Duncan Kennedy, *Form and Substance*, 89 HARV. L. REV. 1685, 1701 (1976).

¹⁷³ Adopting this revised rule, relief would only apply to those who sign a joint return with some degree of freedom. For spouses who sign returns under duress, the returns are, and remain, invalid. See *In re Hickley*, 256 B.R. at 828.

¹⁷⁴ If society chooses to give greater aid to the abused, that aid should be available to all abuse victims and not just those whose spouses cheated on their taxes.

¹⁷⁵ *Wissing v. Comm’r*, 54 T.C. 1428 (1971); *Abrams v. Comm’r*, 53 T.C. 230 (1970); *Sharwell v. Comm’r*, 419 F.2d 1057 (6th Cir. 1969); *Huelsman v. Comm’r*, 416 F.2d 477 (6th Cir. 1969); *Scudder v. Comm’r*, 48 T.C. 36 (1967); *Scudder v. Comm’r*, 405 F.2d 222 (6th Cir. 1968); *Davenport v. Comm’r*, 48 T.C. 921 (1967); *Wenker v. Comm’r*, 25 T.C.M. (CCH) 1237 (1966); *Hackney v. Comm’r*, 24 T.C.M. (CCH) 655 (1965); H.R. REP. NO. 91-1734, at 2 (1970). The innocent spouse relief laws were amended again in 1984 and 1998. See *supra*, text accompanying notes 29–30.

are the cases of spouses who signed returns as a result of physical or emotional abuse from their mates that was not directly related to their signing of the tax returns.¹⁷⁶ Relief from joint and several liability on the joint return should be tailored to these two instances because the inequality in the relationship between the spouses makes it impossible for a requesting spouse to verify the information on the return. However, under existing law, these issues are often overshadowed by others in the determination of relief as a result of the complex balancing of factors that is required.¹⁷⁷ This proposal more appropriately confines relief to its original purpose by focusing on the causes of the inequality that troubled Congress.

The result is also a simpler provision. Focusing on the causes of spouses' inability to meet their tax-filing and tax-paying obligations allows Congress to eliminate the complex weighing of factors that has been created to evaluate the innocence of a requesting spouse. By narrowing the group that can win relief, revised innocent spouse relief provides specific rules for those situations in which there is sufficient inequality of power between spouses to make it impossible for the requesting spouse to have control over the joint return.

Therefore, in the event of a threshold showing of abuse or deception by a requesting spouse, this Article proposes shifting the burden of proof to the IRS to either disprove the claim or to prove an exception discussed below if the IRS seeks to collect from the requesting spouse.¹⁷⁸ To disprove the requesting spouse's claim, the IRS does not need to prove a happy marriage existed, only that the requesting spouse did not meet the requirements provided below regarding abuse or deception at the time the joint return was filed. This shifting of the burden is unusual for most civil tax litigation in which the burden of proof is on the taxpayer, where the taxpayer must prove by a preponderance of the evidence that the IRS's determination of liability is erroneous.¹⁷⁹

There has been a movement away from this traditional allocation of the burden of proof. For example, in the Tax Court, the most frequent location of § 6015 litigation, if the taxpayer proves that the IRS's determination was arbitrary and excessive, the burden to show the correct amount of tax liabil-

¹⁷⁶ Some critics of joint and several liability argue that abuse should be given greater weight than other factors. Gary Fleischman & Sean Valentine, *How to Improve Equitable Relief for Innocent Spouses*, 96 TAX NOTES 874, 877 (2002).

¹⁷⁷ Only 12.6% of cases requesting relief alleged abuse, and it is impossible to determine how many contained claims of deception. McMahon, *Empirical Study*, *supra* note 33, at 695.

¹⁷⁸ For a discussion of the burden of proof in tax cases, see Janene Finley & Allan Karnes, *An Empirical Study of the Change in the Burden of Proof in the United States Tax Court*, 6 PITT. TAX REV. 61 (2008); John Gardner & Benjamin Norman, *Effects of the Shift in the Burden of Proof in the Disposition of Tax Cases*, 38 WAKE FOREST L. REV. 1357, 1364 (2003).

¹⁷⁹ Tax Court Litigation Detailed Analysis, VII. Trials, D. Burden of Proof, BNA 630-4th T.M. VII-D.

ity shifts to the IRS.¹⁸⁰ Also, § 7491 provides that if the taxpayer introduces credible evidence relevant to ascertaining the taxpayer's liability, the burden of proof shifts to the IRS.¹⁸¹ In this latter instance, however, there are questions regarding whether the burden is shifted in practice.¹⁸² For this Article's proposal to operate justly, a true shifting must occur so that, if someone makes the threshold showing, the default position is tax relief.

A tension exists as to the requirements of the threshold showing. If the threshold is high, few spouses will meet the burden, even if they are the victims Congress intends to relieve of taxes. If the showing is low, common behaviors may qualify for relief and more taxpayers may be induced to commit fraud in order to mitigate their tax obligations. Recognizing these risks, this proposal favors a minimal showing that includes specific allegations of the behaviors targeted for relief that meet the definitions described below. This accomplishes the twin goals of granting relief to deserving applicants while improving the administration of relief.

To be clear, under this proposal, the initial showing by the requesting spouse is minimal. When this initial showing is made, the burden of persuasion shifts to the IRS. For example, a requesting spouse would meet the burden by submitting an affidavit signed under penalties of perjury that claims deception about the facts of the return or abuse at the time of the filing. However, it is insufficient for a spouse to claim a power differential in the marriage at the time the return was filed. Something more specific is necessary to demonstrate that the requesting spouse could not be expected to know or seek to know about the accuracy of the return the spouse signed.

For purposes of this threshold showing, the claim of abuse should be defined broadly to include physical and non-physical abuse, a position the Treasury Department recently endorsed.¹⁸³ Congress should define abuse to include efforts to control, isolate, humiliate, and intimidate the requesting spouse or to control family finances by preventing the requesting spouse from gaining access to financial information through reasonable channels. Under existing relief, it is hard to decipher from the cases what claim or level of abuse is sufficient to outweigh other considerations weighing against relief. Details of abuse are necessary and, preferably, result in police involvement, although the opinions rarely note a significant amount of detail

¹⁸⁰ Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 417 (1999). The burden is higher on the taxpayer in a refund case. *Id.* at 417–18. For more information on the burden of proof, see Leandra Lederman, “Civil”izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency, 30 U.C. DAVIS L. REV. 183 (1996).

¹⁸¹ The taxpayer must have substantiated items, maintained records, and cooperated with the IRS. I.R.C. § 7491 (2006).

¹⁸² Johnson, *Dangers of Symbolic Legislation*, *supra* note 180; Philip N. Jones, *The Burden of Proof 10 Years After the Shift*, 121 TAX NOTES 287 (2008).

¹⁸³ Notice 2012-8, *supra* note 16, at § 4.03(2)(c)(iv); Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.03(2)(c)(iv).

regarding the abuse.¹⁸⁴ This lack of guidance for abuse victims puts undue pressure on them in weighing their chance of success before seeking relief.¹⁸⁵ For purposes of the threshold showing for this proposal, details of abuse at or before the time of the filing should be sufficient to shift the burden of proof to the IRS.

Although the Treasury Department recently adopted a broad definition of abuse, under the current balancing required to win innocent spouse relief, abuse can be outweighed by other factors.¹⁸⁶ Thus, despite a taxpayer having been coerced into signing the return, relief might be denied. This denial is more likely if a requesting spouse is not experiencing economic hardship. From a theoretical perspective, it is unjust to say that wealthier abused spouses are less victims of abuse than poor abused spouses, even though wealthier victims may have some amount of economic resources to leave the abusive relationship. The issue of coercion over the joint return is the same for each victim. That judgment should be taken out of the equation at least with respect to this issue; if abuse is the trigger for relief it should trigger relief for everyone equally.¹⁸⁷

Potentially the more troubling showing from Congress's perspective is the deception showing, because spouses looking to escape liability might be more willing to claim deceit than abuse. To minimize the number of taxpayers who exploit the provision, deception must be framed in terms of whether a spouse was coerced into signing a faulty return or into believing the tax obligation was paid when it was not. For this showing, the requesting spouse must have reviewed the return and the guilty spouse must have made an overt statement with respect to specific items on the return that was inaccurate, except in the limited context that the nonrequesting spouse committed fraud without the requesting spouse's knowledge. In the case of fraud, the requesting spouse must deny knowledge of the fraud. It is insufficient for the nonrequesting spouse to have stated that the return was accurate because this would absolve the requesting spouse from her obligation to review the return.

Some additional restrictions should be imposed before allegations of deception shift the burden of persuasion. First, the nature of the deception

¹⁸⁴ See, e.g., Knorr v. Comm'r, 86 T.C.M. (RIA) ¶ 2004-212 (2004); Collier v. Comm'r, 81 T.C.M. (RIA) ¶ 2002-144 (2002); Fox v. Comm'r, 89 T.C.M. (RIA) ¶ 2006-024 (2006).

¹⁸⁵ The initial showing may present a difficult choice for some abused spouses who are deciding whether to seek relief. Even though the threshold is purposefully low, a requesting spouse with children who lives with an abuser risks losing her children if she admits the abuse. There is no equitable alternative if joint and several liability is to be retained. If spouses want mitigation of their taxes under a regime that does not require economic hardship, they must admit the problem.

¹⁸⁶ Notice 2012-8, *supra* note 16, at § 4.03(2); Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.03(2).

¹⁸⁷ The IRS may collect from a wealthy abused spouse if the spouse has property that is traceable to the evasion. This source of liability eliminates the class-based judgment of who is abused.

must be such that it would cause a reasonable person to think the return was accurate as filed. The default is that the IRS accepts the requesting spouse's determination of reasonable reliance; however, using the same common law theories of reasonable reliance as otherwise apply, the IRS must be allowed to challenge the reasonableness of the reliance. Second, the deception must be as to fact and not to law. Although the tax law is complicated, and some may complain unknowable, for our tax system to work people cannot be allowed to claim ignorance of the law as an excuse for tax evasion.¹⁸⁸

At this time, only a small subset of the 55,000 annual cases involve abuse or deception, although either allegation would improve a taxpayer's chance of winning under the current balancing of factors for relief.¹⁸⁹ Therefore, although it is possible that there would be an increase in requests alleging abuse and deception if the proposal is enacted, the increase should not be large. So that Congress can learn whether joint filers are likely exploiting this provision, Congress should require that the IRS calculate how many requests have included these allegations in the past three to five years and compare this data to future requests. If the number of requests grows significantly, there is a greater chance that people are inappropriately claiming these factors; and the definitions of abuse and deception may need to be refined.

Of course, there remains a chance for the exploitation of this provision as it exists under current innocent spouse relief and any mitigation provision. However, under the proposed regime, the IRS will be able to devote its resources to those who are inappropriately claiming relief instead of evaluating every request under the myriad facts and circumstances tests. This proposal's categorization of ruled relief frees the IRS from the burden of determining for all requesting spouses whether relief should be granted. Instead, the IRS must engage in substantial fact-finding only when it seeks to challenge a claim for relief. Only if the facts raise questions regarding the validity of the request should the IRS invest the resources to confirm or deny relief. The default position would no longer demand government action. This does mean that some premium in the form of unwarranted tax relief will be paid to requesting spouses who complete a good affidavit and that some inequity will be created. This is, however, similar to the current premium for those completing the relief form requesting existing innocent spouse relief.

To the extent that the IRS chooses to expend its resources seeking unpaid taxes from a requesting spouse, this proposal provides the IRS two avenues to do so. The IRS could challenge the initial showing by disproving the existence of abuse or deception at or before the filing of the joint return. Alternately, the IRS could prove one of the following three situations in which it is equitable to collect from an otherwise innocent spouse. First, the

¹⁸⁸ This is not currently an excuse in other types of tax cases because of strict liability. *See supra* note 103.

¹⁸⁹ *See supra* note 63.

IRS should be able to collect from a spouse who successfully passes the initial threshold to the extent that it can prove that the requesting spouse earned the income and that the nonrequesting spouse did not abusively control the family's finances. Second, the IRS should be able to collect to the extent that it can prove that the requesting spouse significantly benefited from the tax evasion through the acquisition or retention of property. Finally, the IRS should be able to collect to the extent that it can prove that the requesting spouse created the error on the return or caused the underpayment of tax.

The first exception to relief is self-evident. A strict liability tax system requires that taxpayers pay taxes on their own income. However, under this proposal, some requesting spouses will avoid tax on income they have earned themselves if the other spouse abusively controlled the family's finances. Although this negates strict liability for one's taxes, all relief measures do this when their criteria are satisfied. In this version of innocent spouse relief, the exception is created for abused spouses on the grounds that the requesting spouse had insufficient agency to make a choice with respect to taxes for the period covered by the return. Unless there is property or the proceeds of property from that period, the greater social good is produced by offering relief, even from taxes on the spouse's own income.

The second exception to relief is in the event the requesting spouse significantly benefited from the tax evasion through the acquisition or retention of property. This exception reduces the unjust enrichment enjoyed by requesting spouses who would otherwise be relieved of the taxes they legally owe. If a spouse benefits from the evasion of tax, the spouse's property that is traceable to that tax period is collectible as long as the spouse has the same property or property that was purchased with the proceeds from the sale of the property. Because money is fungible, the requirement of tracing is suspect. However, to allow the IRS to collect in every case unless the nonrequesting spouse absconded with the funds seems unjust as well as politically infeasible.

A balance is therefore necessary between the desire to prevent unjust enrichment to ensure that all taxpayers are treated the same and the two desires to make relief administrable and to relieve coerced spouses who either did not choose or did not enjoy the prior consumption. Therefore, even though a requesting spouse might have benefited from expensive dinners or European vacations, this Article's proposal would relieve that spouse from paying the taxes on those benefits. On the other hand, if a requesting spouse owes taxes for a given year and, during that year, made house payments, the IRS would be able to exercise its normal collection powers against the house. Whether the IRS can force the sale of the house depends on the generally applicable rules for collection discussed in Part I. To the extent that a requesting spouse receives property that is necessary to maintain a basic level of income, protection of that property is available with the other relief measures also discussed in Part I.

Third, under the proposal, the IRS can collect from an abused or deceived spouse if the spouse instigated the tax evasion or underpayment of tax. The purpose of this exception is to recognize that the requesting spouse may perform the culpable conduct. An empirical study of innocent spouse cases decided between 1998 and 2011 found that in seventeen cases wives prepared the return and sought relief (six winning) and in thirteen cases husbands prepared the return and sought relief (three winning).¹⁹⁰ It is not the intention of this exception to require a requesting spouse to pay taxes if the spouse completed the return incorrectly because the nonrequesting spouse forced the requesting spouse to do so. Instead, this exception, like the others, focuses on the spouse's level of control over the completed return.

Even with the three exceptions to relief, some spouses will misuse this revised innocent spouse relief. That this proposal shifts the burden of proof onto the IRS increases the cost to the IRS of collecting from spouses inappropriately requesting relief. As a result, it creates an incentive for some who are not abused or deceived to claim abuse and deception.¹⁹¹ This proposal also makes it unlikely that, except in blatant cases of taxpayer misuse, the government would pursue spouses who make the threshold showing, especially if the IRS can pursue the other spouse. Therefore, some spouses who should not win relief under a complete facts-and-circumstances review will avoid liability. To the extent that we accept the need for administrable relief, this is a cost that we must accept, the goal being to minimize the ease with which the relief provision can be cheated. There is also no reason to think that similar, or even worse, cheating does not occur under the current relief system.

To reduce the amount of cheating under the proposal, nonrequesting spouses must retain the right to intervene.¹⁹² Because one of the objectives of the proposal is to get the IRS out of the job of contesting abuse or deception, the burden of proving or disproving the existence of the factors should rest on the nonrequesting spouse when possible and not the IRS. This is despite the tension in allowing potentially abusive and deceptive spouses an arena to further abuse or deceive their spouses or former spouses. Although the Tax Court has held that granting innocent spouse relief does not impose a burden on the nonrequesting spouse because he was jointly and severally liable,¹⁹³

¹⁹⁰ McMahan, *Empirical Study*, *supra* note 33, at 671.

¹⁹¹ Admittedly, it is unfortunate that some unscrupulous tax evaders will claim abuse when they have not been abused while some who are abused will not be willing to claim relief.

¹⁹² After *Villela-Wilcox v. Comm'r*, T.C. Summ. Op. 2009-75 (2009), it is questionable whether an intervenor can prevail once the government concedes relief. In *Villela-Wilcox*, the court found the intervenor to be the more credible witness and the "intervenor's evidence show[ed] petitioner's connection and involvement with intervenor's participation" in the tax shelter. *Id.* Nevertheless, the court concluded that "intervenor's evidence is persuasive, but it is not so compelling to require that the settlement between respondent and petitioner be disregarded." *Id.*

¹⁹³ See *Holloway v. Comm'r*, 322 Fed. Appx. 421, 423 (6th Cir. 2008); *Baranowicz v. Comm'r*, 432 F.3d 972, 974 (9th Cir. 2005).

relief can shift the taxes on the income enjoyed by the requesting spouse onto the nonrequesting spouse as discussed in Part II. The result of shifting the tax burden is just, if in fact the nonrequesting spouse abused or deceived the requesting spouse. It is not just if a spouse fabricates the necessary showing. If the nonrequesting spouse does not have the opportunity to present evidence that the requesting spouse is fabricating a claim for relief because there is no right to intervene, the injustice cannot be avoided.¹⁹⁴ When the nonrequesting spouse is judgment proof and therefore has no incentive to intervene, it is up to the IRS to devote the resources it currently spends investigating all innocent spouse claims to preventing this injustice.

Finally, revised innocent spouse relief should completely negate the joint return for both spouses, instead of the current allocation of the liability on that return.¹⁹⁵ Each spouse's liability would be recalculated as though the spouses filed as married filing separately, which has less favorable tax filing brackets and at the cost of certain tax credits.¹⁹⁶ Because joint and several liability is a cost imposed on those couples who file jointly, eliminating joint and several liability should come at the cost of the joint return. Therefore, if a spouse chooses after the fact to claim not to support the joint return, the couple suffers the consequences of that choice.¹⁹⁷ Eliminating use of the joint filing brackets may mean that an innocent spouse has a larger tax obligation for her share of income, but this would have been the result if she had the ability to refuse to sign the incorrect return *ex ante*.

The mechanics of this rule-based relief are significantly simpler administratively than those of current relief. Requesting spouses simply make a threshold showing that they were abused or deceived to win relief unless the IRS disproves their claims or there are extenuating reasons to collect from the requesting spouse. This process makes the method to obtain relief clear to potential requesting spouses and frees the IRS from investigating every claim for relief.

¹⁹⁴ Of course, couples might collude (for example, a wealthy spouse could claim abuse if the other spouse is judgment proof). That the IRS has the ability to collect from the requesting spouse in certain circumstances reduces this risk.

¹⁹⁵ The IRS tried to equate innocent spouse relief with married filing separately but the Tax Court disagreed. *Wiest v. Comm'r*, 85 T.C.M. (CCH) 1082, 1085 (2003). At least one person within Congress objected to this idea in 1998. 144 CONG. REC. 2045 (1998) (statement of Sen. Bob Graham).

¹⁹⁶ This may raise the aggregate tax liability and an abuser might offer to reimburse the abuse victim for the tax bill if she does not go forward with her innocent spouse claim. These results do not thwart the objective of the proposal.

¹⁹⁷ This does mean that a non-income earning spouse might "stick it" to the income earning spouse after a divorce, but that risk primarily exists if the income-earning spouse did not pay the taxes owed on that income and abused or deceived the spouse. Those factors should reduce the sympathy we have for the income-earning spouse.

CONCLUSION

Joint and several tax liability raises the issue of whether Congress should value equity for individuals over administration of the tax system. This issue pervades the income tax and is one that society is loath to answer. Should the tax system be made to work for the greatest number, understanding that some people will be treated inequitably based on their individual circumstances, or should we aim for individualized equity, understanding that the system will cost more to operate and open itself to greater tax evasion?

In the case of innocent spouse relief, in the attempt to help wives, relief might well cause more harm than good. For those spouses targeted for relief, we are creating a dangerous double standard. The reason for a more protective tax regime is that advocates worry that it is unfair to presume that wives can meaningfully evaluate the returns they sign. It is hard to see how this fails to send a signal to the nation that wives are not, or are at least not considered to be, equal members in marriage. This is not a message that we want Congress to send.

More streamlined rules can provide relief in instances in which Congress seeks to provide protection because of the inequality within some marriages. The result balances the objectives of recognizing wives' agency, protecting coerced wives, and defending federal revenue. In the process, it also encourages wives to become educated about the couple's finances. Unfortunately, as will always be the case with tax laws and tax relief, there will be stories of inequity in the application of the proposed relief, both by the government and taxpayers. And, although the proposal would fix many of the difficulties that arise when couples file joint returns, it cannot be the end of this debate. As people adapt both their behavior and their claims for relief to the law, the law may need to change. For now, however, if the government introduces this new policy by providing proper information to joint filers, taxpayers can understand the consequences of their actions and, as a result, move to a more perfect union.