

Taxation and the Family: The Next Generation

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- Anne Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of the New Individualism*, **Tax L. Rev.** (forthcoming, 2013) available at [SSRN](#).
- Shari Motro, *Preglimony*, 63 **Stan. L. Rev.** 647 (2011).

The tax treatment of marriage, children, and the family unit has attracted increasing attention in the past few years. The most dramatic example is the same sex or “gay marriage” phenomenon, where academics—Patricia Cain and Anthony Infanti come particularly to mind—have frequently anticipated real-world developments. But taxation of heterosexual couples is stuck in a similar time warp, and scholars have been no less aggressive in trying to catch up.

Two authors in particular have done provocative work in this area. The first, Anne Alstott, has a long track record: her book “No Exit” describes the unique phenomenon that is motherhood and the need for tax, spending, and social policies to recognize that uniqueness. In a more recent article, “Updating the Welfare State: Marriage, The Income Tax, and Social Security in the Age of the New Individualism,” Alstott focuses specifically on the tax component. She argues that, because of the overall decline in marriage and the concentration of marriage among higher-income groups, it is no longer appropriate to organize the taxation of families around the existence of the marriage relationship. The most obvious implication is that joint returns should be repealed and replaced with separate, individual returns or (more ambitiously) with combined returns for households whether or not organized by marriage. The social security system would likewise be amended to replace spousal benefits with a system that emphasized caregiver relationships. Many additional portions of tax and nontax law would require similar adjustment: Alstott does not purport to provide a complete list but rather to focus attention on the paradigm shift from which these changes would flow.

If Alstott is concerned primarily with people who have children, Shari Motro is more immediately concerned with the process of making them. In an earlier article, “The Price of Pleasure,” Motro argued that men who impregnate unmarried lovers should have a legal responsibility toward the women they make pregnant as well as any potential offspring. In her article “Preglimony,” which appeared in the *Stanford Law Review*, Motro takes the somewhat softer position that—if men are not legally required to provide such support—the tax law should provide a deduction to those who agree voluntarily to do so. Combining tax and feminist analysis, she argues that such a system would both encourage responsible behavior and support a relational ethos in place of the individualist one that now governs (or is assumed to govern) nonmarital sexual activity. While recognizing that this function has traditionally been performed by marriage, Motro argues—convincingly, in my view—that many or even most lovers are likely to remain unmarried and the law should properly recognize this phenomenon.

There is no shortage of debatable points in Alstott’s or Motro’s papers. Conservatives may ask, if marriage is associated with so many benefits, do we really wish to punish rather than reward it? Skeptics may likewise ask if a small tax credit will be strong enough medicine to combat a more generalized form of social breakdown. Still, by addressing the issue of social change in intellectually honest terms—by breaking out of the sterile dichotomy of “married” and “single” to look at what is actually going on between men and women in the real world—both scholars have made an enormous and lasting contribution. It remains to be seen if the real world will keep up with them.

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