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CHARLES R. O'KELLEY, JR.*

The Parenting Tax Penalty: A
Framework for Income Tax
Reform

The Internal Revenue Code contains four principal mechanisms intended to achieve an equitable allocation of tax burdens among taxpayers with different family and employment responsibilities. These devices are: (1) the personal exemption;¹ (2) the separate income tax rate structures for married individuals,² unmarried individuals,³ and heads of households;⁴ (3) the tax credit for certain employment-related childcare expenses;⁵ and (4) the deduction for two-worker married couples.⁶ In this Article I work out the implications of my intuition that, despite this impres-

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¹ I.R.C. § 151 (1984).

² *Id.* § 1(a).

³ *Id.* § 1(c).

⁴ *Id.* § 1(b).

⁵ *Id.* § 21.

⁶ *Id.* § 221.

sive array of tax provisions, the present federal income tax system discriminates⁷ against taxpayers with dependent children by failing to take into account the negative income generated by parenting. In the process of so doing, this Article further develops a theory of income taxation consistent with the accretion definition of income⁸ and sets forth a coherent framework for determining the fair relative tax burdens of parents and nonparents.

Implicit in any tax reform proposal is a theory of legal change which explains why and under what conditions Congress will respond favorably to the measures advocated.⁹ My working hypothesis is that Congress only enacts laws that are to some extent consistent with society's governing beliefs about what is just.¹⁰ Thus, a tax reform proposal may be labeled "good" if it is more consistent with governing social beliefs than is the existing tax regime.¹¹

Part I considers the proper tax treatment of out-of-pocket parenting expenses such as the costs incurred in providing food, clothing, shelter, and other goods and services to children for their consumption. Part I first characterizes the principal design alternatives to the present flat dependency deduction. It then examines the dominant accretion definition of income and concludes that the current flat dependency deduction is more consistent with the accretion concept and our actual governing beliefs than is any of the alternatives advocated by its critics.

Part II considers the tax relevance of imputed income from self-performed services. It explains: (1) how the positive imputed income from household production should be taxed; and (2) the ex-

⁷ What I mean by this is that the present tax treatment of parents is unjustifiable given the theory of proper treatment developed in this Article. For a similar use of the term "discrimination" see O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 OR. L. REV. 395, 412^a(1982).

⁸ This Article is in some respects an extension of arguments about the accretion concept of income contained in O'Kelley, *Tax Policy for Post-Liberal Society: A Flat-Tax-Inspired Redefinition of the Purpose and Ideal Structure of a Progressive Income Tax*, 58 S. CAL. L. REV. 727 (1985).

⁹ This would not be true if the reformer contemplated violent change.

¹⁰ O'Kelley, *supra* note 8, at 735.

¹¹ I am distinguishing between scholarship designed to identify changes that would bring social institutions more into accord with existing social beliefs and scholarship implicitly or explicitly advocating fundamental change in governing social beliefs. Proposals of the latter type have little relevance to those interested in current tax policy because Congress will not enact legislation which is inconsistent with existing governing beliefs. On the possibility of peacefully changing basic social beliefs see O'Kelley, *Rawls, Justice, and the Income Tax*, 16 GA. L. REV. 1, 16-32 (1981); Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293, 316-21 (1982).

tent to which a parent's childcare obligations constitute negative imputed income. Part II concludes that the present income tax system discriminates against all parents by failing to allow a deduction for the negative income produced by parenting and discriminates against two-worker married couples by failing to allow a more generous deduction for employment-related childcare expenses.

I

THE CASE FOR A FLAT DEPENDENCY DEDUCTION

A. *The Flat Dependency Deduction and Ability to Pay*

Since 1917 the Internal Revenue Code has authorized a dependency deduction which does not vary in amount to reflect a taxpayer's income level or actual parenting expenditures.¹² Currently the dependency deduction is \$1000 per child.¹³ The existing flat dependency deduction is usually defended by reference to the "ability to pay" maxim.¹⁴ Tax, it is argued, cannot be paid out of income which does not exceed the subsistence level.¹⁵ Therefore, a flat dependency deduction is necessary to exempt from tax the cost of providing basic necessities to a child. Amounts spent in excess of the flat dependency deduction are discretionary personal consumption expenses and should be taxed.¹⁶ However, it is equally plausible to argue that the impact of family responsibilities on taxpaying capacity declines as income rises. Under this in-

¹² See Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1444-45 (1975); H. GROVES, *FEDERAL TAX TREATMENT OF THE FAMILY* 18-20 (1963).

¹³ What I call the dependency deduction is the additional personal exemption available to a taxpayer for each qualifying dependent I.R.C. § 151(e) (1984). The term "dependent" is defined in I.R.C. § 152 (1984) and may include individuals other than children. However, this Article is concerned only with the proper tax treatment of dependent children. Under I.R.C. § 151(f) (1984) the exemption amount is set at \$1,000. For tax years beginning after December 31, 1984 the exemption amount is adjusted annually to reflect increases in the cost-of-living. *Id.* For simplicity this Article will consider the current dependency deduction to be \$1,000.

¹⁴ 1 U.S. DEP'T OF THE TREASURY, *TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH* 66 (1984) [hereinafter cited as U.S. DEP'T OF THE TREASURY]; J. PECHMAN, *FEDERAL TAX POLICY* 74 (3d ed. 1977).

¹⁵ H. GROVES, *supra* note 12, at 23-24.

¹⁶ Brannon and Morss, *The Tax Allowance for Dependents: Deductions Versus Credits*, 26 NAT'L TAX J. 599, 602-03 (1973).

terpretation the dependency deduction should decrease as income increases, and at some point vanish.¹⁷

Because the "ability to pay" maxim is inherently ambiguous it provides an unsatisfactory justification for a flat dependency deduction.¹⁸ This section examines the relationship of parenting expenses and the income tax and develops a coherent theoretical justification for the flat dependency deduction.

B. THE OTHER TRADITIONAL ARGUMENTS ABOUT CHILDREN

There are three significant theories as to the proper tax treatment of parenting expenses.¹⁹

1. *Children as Parental Investments*

Children are often described as a form of parental investment intended to insure that parents will be cared for financially and otherwise in the event of disability or old age. Parenting expenses are incurred to create and foster these investment assets. Thus, parenting costs are analogous to capital expenses and should be nondeductible.²⁰

This argument raises no serious tax policy questions. Viewing parenting costs as capital investments requires a determination that these expenses create an asset—children with good will toward their parents—which has a useful life of more than one year.²¹ Common experience suggests, however, that a child's long-term love and respect for his or her parents is a product of the love and respect extended by the parents to the child rather than a

¹⁷ R. GOODE, *THE INDIVIDUAL INCOME TAX* 218-19 (1976).

¹⁸ For a scathing criticism of the "ability to pay" maxim, see H. SIMONS, *PERSONAL INCOME TAXATION* 17 (1938). See also O'Kelley, *supra* note 8, at 745; Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 *YALE L.J.* 1081, 1092-93 (1980).

¹⁹ This Article is not concerned with arguments that the dependency deduction should be replaced by a tax credit in order to subsidize poor families. Such suggestions belong in the arena of welfare policy rather than tax design. The primary question is whether the subsidy is desirable. Whether the income tax is the preferable mechanism for accomplishing a desired subsidy is a secondary question relating to efficiency criteria rather than to tax policy principles. See e.g., Brazer, *The Federal Income Tax and the Poor: Where Do We Go From Here?*, 57 *CALIF. L. REV.* 422 (1969).

²⁰ Bittker, *supra* note 12, at 1447-48.

²¹ Of course investments in human capital are, generally, neither currently deductible or amortizable. For a general discussion, see Stephan, *Federal Income Taxation and Human Capital*, 70 *VA. L. REV.* 1357 (1984).

function of the amount of money spent on the child. If any affection or respect is obtained in return for parenting expenses, it is likely to be acquired in an immediate exchange. Thus, if there is a basis for viewing parenting expenses as the "quid" in a parent-child exchange, the "quo" is current psychic income from affection and respect tendered by the child, rather than expected future services.²² Accordingly, the view that children are parental investments is counterfactual and without relevance in the tax policy arena.

2. Children as Parental Consumption

A second theory views children as items of personal consumption. One form of this argument begins with the proposition that for any given taxpayer the decision to procreate is voluntary. In choosing to procreate parents necessarily elect to incur the future costs associated with parenting. A second version of this theory places no emphasis on the original decision to procreate, but, instead, characterizes parenting expenses as the product of ongoing parental consumption choices. Under either view, parenting costs are just another type of nondeductible personal consumption expenditure.²³

3. Parenting Expenses as the Income of Children

Diametrically opposed to the above theories which treat children as items of investment or nondeductible consumption is the view that all parenting expenses should be deductible. Proponents justify this position on the basis that income should be taxed to the person consuming it who, in the case of parenting expenses, is the child.²⁴

C. The Underlying Conflict

The "children as nondeductible items of personal consumption" theory implicitly relies on the accretion definition of income, and on the view that parenting expenses constitute personal consump-

²² Viewed as current expenditures, the case for deductibility turns on a choice between the accretion and consumption definitions as discussed in *infra* I(D).

²³ H. SIMONS, *supra* note 18, at 139-40; Bittker, *supra* note 12, at 1445-47.

²⁴ Bittker, *supra* note 12, at 1448-49; McIntyre and Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573, 1602-07 (1977).

tion by the parents. The "full deductibility of parenting expenses" theory is either an application of the consumption definition of income or relies on the theory that money spent on children is not parental income even under the accretion definition. Under the accretion concept, income should be taxed whether spent or saved, and personal consumption expenditures are not deductible. Under the consumption ideal only the actual consumer of income is taxed. Accordingly, the proper treatment of parenting expenses depends on a choice between the accretion and consumption definitions of income, and on a determination of the extent to which parenting expenses may be properly characterized as the personal consumption of parents or, instead, of the child benefiting from the expenditure.

D. The Accretion and Consumption Definitions of Income

The accretion definition of income continues to dominate tax policy debate. The leading expression of the accretion concept is the Haig-Simons definition:

Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question. In other words, it is merely the result obtained by adding consumption during the period to "wealth" at the end of the period and then subtracting "wealth" at the beginning.²⁶

Analysis of the arguments concerning proper treatment of parenting expenses reveals an ambiguity in this definition. It is unclear what constitutes exercise of a consumption right. Suppose A earns \$10,000 and gives \$5,000 of her earnings to B, who spends it. Does A have \$5,000 in psychic income which is realized upon giving the gift? Should we view B as merely the agent through whom A exercises the consumption right? Instead, does A avoid tax on the gift because income arises only when one personally exercises a consumption right? Without clarifying this ambiguity about the meaning of "rights exercised in consumption," appeal to the Haig-Simons definition does not produce a clear answer to the question of whether or not parenting expenses should be deducted.²⁶

²⁶ H. SIMONS, *supra* note 18, at 50.

²⁶ Traditionally, advocates of a comprehensive tax base rest their case on the Haig-Simons definition of income. *E.g.*, see Musgrave, *In Defense of an Income*

It is unlikely that those opposing deductibility of parenting expenses believe in psychic income or view parents as agents of their children's consumption. Instead, their position is based on a different articulation of the accretion concept; namely, income equals the value of consumption rights *earned* during the year, whether spent or saved.²⁷ Parenting expenses are nondeductible under the accretion definition because they have no relevance to a determination of the amount of consumption rights *earned* by parents during the tax year.

In direct opposition to the accretion definition is the view that income should be defined as the market value of consumption rights *personally* exercised. Under this definition of income, parenting expenses are deductible by parents and are included in the income of the child benefited.²⁸

The dispute between those favoring deductibility of all parenting expenses and those opposing any deduction can now be seen to involve markedly different views of the purpose of the income tax. Under the accretion definition it is critical that the earner of income be taxed, while under the consumption definition determining the earner of consumption rights is irrelevant. Present law reflects the accretion-based concern that the earner of income be taxed. For example, a donor is not allowed a tax deduction for gifts.²⁹ Moreover, a taxpayer may not anticipatorily assign income to a family member in a lower tax bracket.³⁰ In contrast, under

Concept, 81 HARV. L. REV. 44, 47-49 (1967). For a discussion of some of the normative deficiencies of the Haig-Simons definitions, see Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925 (1967).

²⁷ This definition is an improvement over the Haig-Simons definition because it makes a normative judgment about *who* should be taxed. In contrast, the Haig-Simons definition is ambiguous. Most scholars interpret it as neutral toward a determination of the proper taxpayer. See, e.g., Bittker, *supra* note 26, at 974-77; Pechman, *Comprehensive Income Taxation: A Comment*, 81 HARV. L. REV. 63, 65-66 (1967). But see McIntyre and Oldman, *supra* note 24, at 1576-78.

²⁸ U.S. DEP'T OF THE TREASURY, BLUEPRINTS FOR BASIC TAX REFORM 103-04 (1977); McIntyre and Oldman, *supra* note 24, at 1602-07.

²⁹ Until recently most mainstream tax scholars assumed the nondeductibility of gifts. The only real question was whether a gift should *also* be included in the taxable income of the donee. See, e.g., H. SIMONS, *supra* note 18 at 56-58; Dodge, *Beyond Estate and Gift Tax Reform: Including Gifts and Bequests in Income*, 91 HARV. L. REV. 1177 (1978).

³⁰ *Helvering v. Clifford*, 309 U.S. 331 (1940); *Helvering v. Horst*, 311 U.S. 112 (1940); *Helvering v. Eubank*, 311 U.S. 122 (1940); *Lucas v. Earl*, 281 U.S. 111 (1930); *Corliss v. Bowers*, 281 U.S. 376 (1930). For a suggested solution to

the consumption definition of income a donor should be allowed a deduction for ordinary gifts and for anticipatorily assigned income.³¹ This dissonance between present law and the consumption definition indicates that the consumption concept is inconsistent with our underlying governing beliefs about what is just and, accordingly, is an inappropriate theoretical base for tax reform.³² Therefore, determination of the proper treatment of parenting expenses requires an elaboration of the dominant accretion concept.

E. The Purpose of the Income Tax Under the Accretion Concept

The purpose of the income tax and the dominance of the accretion ideal can be explained in terms of a hypothetical social contract³³ which is consistent with our society's actual governing beliefs.³⁴ Assume self-interested autonomous individuals A and B decide to form a new society ("Nirvana"). The purpose of this social union is to provide a framework within which each citizen may use his or her talents in coordination with others to produce a greater total output of goods and services than would result from continued, uncoordinated effort in a state of nature. The citizens of Nirvana also realize that public goods,³⁵ such as roads and police protection, can be provided most efficiently through coopera-

the continuing problem of income shifting to lower tax bracket family members, see McMahon, *Expanding the Taxable Unit: The Aggregation of the Income of Children and Parents*, 56 N.Y.U. L. REV. 60 (1981).

³¹ Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 348-51 (1972); 1 U.S. DEP'T OF THE TREASURY, *supra* note 14, at 193.

³² Gunn, *The Case for an Income Tax*, 46 U. CHI. L. REV. 370, 377 (1979). A fuller account of the case for and against the consumption ideal is beyond the scope of this Article. For a list of references on this subject, see Warren, *supra* note 18.

³³ For a more elaborate account of the hypothetical social contract described in this subsection, see O'Kelley, *supra* note 8, at 739-55.

³⁴ I am using a hypothetical state of nature as a device to develop arguments and ideological myths which I believe capture the ordinary citizen's sense of justice. This endeavor has its analogues in John Rawls' use of the "original position" device to justify the difference principle, J. RAWLS, *A THEORY OF JUSTICE* 118-83 (1971), and in Robert Nozick's use of a theoretical state of nature to justify libertarian principles, R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 277-94 (1974).

³⁵ A good is a "public good" if it is capable of being used simultaneously by many citizens without reducing the amount available for use by others. A. ALCHIAN AND W. ALLEN, *EXCHANGE & PRODUCTION* 100-01 (3d ed. 1983). Duplicative production of a public good is wasteful.

tive effort. Each citizen, therefore, agrees to devote an equal amount of time to the coordinated provision of these services.³⁶

For illustrative purposes assume individuals A and B represent the citizens of Nirvana. Prior to forming Nirvana, A and B each separately produced 50 ears of corn while laboring 30 hours per week. Both A and B also spent 30 hours per week providing themselves with police protection, roads, and other public goods. After forming Nirvana A and B are able to produce 100 ears of corn, while each spending only 25 hours per week in the corn fields. Moreover, A and B are able to produce needed public goods while each laboring only 25 hours per week. Both A and B remain entitled to the product of their individual labor. Because A and B make equally valuable contributions to the production of the total social product, each receives 50 ears of corn as compensation for services. The public goods produced by A and B are, of course, available for use by all citizens without charge.³⁷

Nirvana's citizens soon realize that further efficiency gains can be obtained by having some of Nirvana's citizens specialize in public goods production while others specialize in private goods production. Accordingly, A specializes in private goods production and B in public goods production.³⁸ A now can produce 100 ears of corn by laboring 40 hours per week—10 hours less than A's total labor time when working in a less specialized manner. In 40 hours per week, B now can produce the same amount of public goods that previously required 50 hours of combined work by A and B. Both A and B have reduced their labor time by 10 hours and are, thus, better off as a result of their increased specialization. A and B continue to receive 50 ears of corn each, representing the value of their equal contributions to the total social product. A has no claim to more than 50 ears of corn, even though A's labor directly produced 100 ears, because 50 ears are traceable to the public service time which A owed to society. Likewise B has a moral claim to 50 ears of corn because this amount represents the

³⁶ Alan Gunn interprets the "ability to pay" maxim and the accretion concept in terms of the requirement that each citizen contribute an equal proportion of his or her income producing efforts to the government. Gunn, *supra* note 32, at 384-86. *But see* Kelman, *Time Preference and Tax Equity*, 35 STAN. L. REV. 649, 667 n.45 (1983).

³⁷ Each citizen is morally entitled to the product of his or her own labor. Public goods are the product of public service time. In effect each citizen earns a right to use public goods in common with others without further charge.

³⁸ A and B are, respectively, representative of all members of the private and public sector.

value of B's private production time which B has agreed to devote to public goods production thereby enabling all Nirvana's citizens to realize efficiency gains from greater work specialization.

Now let us consider what happens when Nirvana begins to use a free market and money as a medium of exchange. A continues to produce 100 ears of corn which has a market value of \$100. Accordingly, A will receive a gross income of \$100 for his production efforts. A has no claim to \$50 of this gross income because it represents the value of the public service time which A owes to Nirvana. Therefore, Nirvana uses a 50 percent income tax to extract from A the value of his public service time. The \$50 in tax revenue is then used to compensate B for the deemed value of B's contribution to the total social product—the deemed value of the private production time which B has agreed to forego.

The accretion definition relies, then, on a particular vision of the nature of society and the relationship between government and citizen. The purpose of the income tax is to extract the value of the equal public service time which all citizens owe to society.³⁹ At the same time, the income tax identifies the value of each citizen's private production time—the portion of gross income which each citizen is morally entitled to consume. To accomplish this purpose, each citizen's tax liability must be based on the consumption rights which he or she earns.

Personal consumption expenditures are not relevant to a determination of the amount of consumption rights *earned* by a worker and should have no role to play in the calculation of taxable income. Accordingly, even if children are characterized as the *actual consumers* of parenting expenses, the accretion concept precludes any deduction for voluntary, nonbusiness expenses. Deductibility of parenting expenses turns, then, on the applicability of the forced consumption doctrine.

³⁹ Basing the accretion concept on each citizen's deemed responsibility to contribute equal amounts of public service time might seem to dictate a pure proportional or flat rate income tax. See, e.g., Kelman, *supra* note 36. However, this view overlooks the possibility that graduated rates and the personal exemption are necessary to correct for market-dictated overvaluation of the contributions of high income taxpayers and undervaluation of low-income taxpayers. In other words, graduated rates and the personal exemption recognize that the value of low-income taxpayers has been partially appropriated by high-income taxpayers. Therefore, equal contribution of time to public service requires high-income taxpayers to pay a greater proportion of their market incomes to the government than do lower income taxpayers. See O'Kelley, *supra* note 8, at 744-55, 750 n.64.

E. Parenting Expenses as Forced Consumption

1. The Forced Consumption Doctrine

The accretion concept precludes a deduction for personal consumption expenditures, ordinary gifts, or anticipatorily assigned income. However, the exclusion from income of certain items of forced consumption is consistent with the accretion concept. One example of this in our income tax system is the exclusion from gross income of meals and lodging provided to employees for the convenience of the employer.⁴⁰ Consider a firefighter who, while on duty, must eat and sleep at the firehouse.⁴¹ The meals and lodging consumed have a fair market value, but in no real sense constitute compensation for services. The firefighter must maintain lodging facilities elsewhere. If he or she has a family the preparation of family meals will continue in his or her absence at little or no reduction in cost.⁴² The food and lodging may have a substantial fair market value to a tourist visiting the firefighter's city, but no fair market value to the firefighter. Given a choice the firefighter might gladly live and eat at home and commute to the firehouse. The absence of free choice removes our normal ability to assume that a consumption choice has value to a given taxpayer equal to its potential value in the market.⁴³ Therefore, items of forced consumption are treated as if they had never been received by the taxpayer.

The deductibility of medical expenses⁴⁴ is also explained by the forced consumption exception to the accretion definition. Medical expenses are incurred because of illness, injury, or for diagnostic or preventive measures made necessary by the legitimate fear of illness or injury; they are not voluntarily incurred.⁴⁵ Moreover,

⁴⁰ I.R.C. § 119 (1984). For a history and criticism of § 119, see Krage and Speer, *I.R.C. Section 119: Is Convenience of the Employer a Valid Concept*, 29 HASTINGS L.J. 921 (1978).

⁴¹ For two recent cases applying I.R.C. § 119 in the firehouse setting, see *Sibla v. Comm'r*, 611 F.2d 1260 (9th Cir. 1980); *Duggan v. Comm'r*, 77 T.C. 911 (1981).

⁴² Even critics of excluding meals and lodging from gross income recognize this point. See, e.g., Bittker, *The Individual as Wage Earner*, 11 INST. ON FED. TAX'N 1147, 1153-54 (1953).

⁴³ This point is made more generally by Henry Simons with respect to income in kind. H. SIMONS, *supra* note 18, at 53. See also M. CHIRELSTEIN, *FEDERAL INCOME TAXATION* 18-20 (4th ed. 1985).

⁴⁴ I.R.C. § 213 (1984).

⁴⁵ Present law can be criticized to the extent that voluntary medical expenses are deductible. For example, a face-lift required only by personal vanity cannot

medical expenses (if successful) only return the taxpayer to a state of good health that other taxpayers enjoy without expense.⁴⁶ From this perspective, medical expenses have zero value because, given a choice, any taxpayer would prefer to avoid the medical condition which necessitates the expenditure.⁴⁷

Parenting expenses, too, should be deductible from gross income to the extent they constitute items of forced consumption. However, it is here that arguments based on the voluntary nature of procreation have their greatest force. Each citizen chooses whether or not to become a parent.⁴⁸ Those who become parents do so knowing full well the economic consequences of that decision. Under this view parenting expenses cannot properly be characterized as involuntary in nature.

This "children as voluntary consumption" argument is unpersuasive because it could be made with respect to any form of forced consumption. The recipient of meals and lodging provided for the convenience of the employer voluntarily accepted or continued employment knowing the conditions imposed by the employer. A person injured in a car wreck voluntarily chose to drive thereby creating the possibility of injury. A person hospitalized with influenza voluntarily chose to live in a climate where such was likely to occur, or voluntarily came in contact with other people likely to transmit the disease.

Consider, for example, the persuasiveness of the following policy argument: Some people do not drive cars or use any means of public transportation because of the risks involved. Instead, they find housing adjacent to their place of work. Because some tax-

be justified under the forced consumption analysis, yet it is deductible. Rev. Rul. 76-332, 1976-2 CB 81. Likewise, a vasectomy is a matter of personal choice. The medical expenses incurred do not return the patient to an original state of good health. Instead they are analogous to ordinary market purchases of personal consumption items. *But see* Rev. Rul. 73-201, 1973-1 CB 140 (deductibility of vasectomy and abortion expenses).

⁴⁶ Thus, medical expenses are different than items of forced consumption such as food, clothing, and shelter because every taxpayer must incur these costs.

⁴⁷ Put another way, medical expenses do not constitute *personal* consumption, and, accordingly, are not income within the accretion definition. Under this view the medical expense deduction is not a tax expenditure, but, instead a necessary mechanism for correctly measuring income. Andrews, *supra* note 31, at 309-43 (1972). *But see* Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an 'Ideal' Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN L. REV. 831 (1979).

⁴⁸ All adults through natural parenting or adoption can become a parent if they so choose.

payers choose to arrange their lives to avoid the risk of automobile and similar transportation accidents, those who voluntarily expose themselves to such risks should not be allowed a deduction for resulting medical expenses. Surely, this argument would not be taken seriously.

The forced consumption doctrine does not depend on whether a particular taxpayer theoretically could have avoided the situation resulting in forced consumption. Some will take the jobs in which accepting meals and lodging on the business premises is a requirement for continued employment. Some will drive cars and suffer injuries. Some will have children. All of these occurrences are inevitable and expected. Society as we know it would be impossible if no one drove a car or if no one had children. The voluntary nature of procreation is, therefore, irrelevant to a determination of the extent to which parenting expenses are involuntary within the meaning of the forced consumption doctrine. Instead, it is necessary to evaluate parenting expenses in light of the relative rights, duties, and responsibilities of parents and society.

2. Characterizing Parenting Expenses

In a social system characterized by parental autocracy, the family is an autonomous unit and parents are its sovereign. Parents have total authority over, and responsibility for, minor children. Parents make all decisions about the child's environment and bear all costs associated with raising the child. Indeed, parents have the right to decide whether their child lives or dies.⁴⁹ Therefore, under a regime of parental autocracy, parenting expenses must be viewed as voluntarily incurred and nondeductible.

In our society the family is a basic social institution having as one of its principal functions childrearing. Parents have the right to determine most aspects of a child's environment, including the child's education, food, clothing, religious training, and other experiences. However, unlike a pure parental autocracy, the rights of parents can be limited or terminated by the state to prevent

⁴⁹ I use the term parental autocracy to refer to a family headed by a single individual, or by married or unmarried individuals of the same or different sex. In actual human history parental autocracy generally took the form of patriarchy with the man having rights of life and death over both his wife and children. See F. ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE* 120-22 (1972).

physical abuse or neglect.⁵⁰ Moreover, there is a positive duty to provide a dependent child with "necessaries," such as food, clothing, and shelter.⁵¹ To the extent of this basic support obligation, parenting expenses should be characterized as involuntary and deductible from gross income.⁵² This is so because there is no societally acceptable means of determining whether, in the absence of legal or social constraints, a given taxpayer would voluntarily continue to provide support, rather than abandon or neglect, his or her child.⁵³

The amount of forced consumption inherent in parenting expenses, and thus the proper level of the dependency deduction, could be determined by reference to state-created parental support obligations. This would initially create difficult enforcement problems. In general, while state law requires parents to provide "necessaries" to their children, this standard has not been precisely defined or interpreted. It does not tell us, for example, the quantity and quality of shoes to which a dependent child is entitled. Moreover, the definition of a "necessary" may depend on the parent's wealth or standard of living.⁵⁴ Of course, state legislatures would soon amend their child support laws to eliminate the problem of lack of precision. However, the cure would be worse than the disease. New legislation predictably would be designed to maximize the tax advantages of a state's citizens. Each state would both clarify and expand the definition of necessities making most parenting expenditures legally required.⁵⁵ Therefore, to avoid initial administrative complexity and eventual tax avoidance-motivated state legislation, the dependency deduction must be determined from a federal perspective.

⁵⁰ For a list of cases and other references dealing with the distribution of power between parents and the state, and for a brief discussion of current law, see Note, *State Intrusion Into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1974).

⁵¹ 59 AM. JUR. 2D *Parent and Child* § 55 (1971).

⁵² The current allocation of power and responsibility between parents and society as a whole is but one step removed from parental autocracy. In contrast, a society organized under the ideal of community would directly bear the cost of raising children. In a communitarian-based society there would be no individual parenting expenses to be taken into account.

⁵³ See text accompanying *supra* notes 40-43.

⁵⁴ 59 AM. JUR. 2D *Parent and Child* § 56 (1971).

⁵⁵ For an account of one example of the predictable consequence of hinging federal tax consequences on state law, see Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 13-19 (1980).

From this national perspective a flat dependency deduction equal to the cost of providing a minimally acceptable amount of food, clothing, shelter, and other necessities to each child seems appropriate. Our society rejects absolute parental autocracy and will intervene to force parents to provide an acceptable amount of support to their children. If a child is abandoned, or its parents are financially unable to provide necessities, then direct governmental care or assistance will be provided.⁵⁶

The amount of direct government support or government mandated support presently flowing to children cannot be accurately calculated and certainly is not the same for each child. Nevertheless, our governing beliefs about equal treatment of all like situated individuals necessitate a dependency deduction premised on the myth that an equal amount of basic subsistence is provided to each American child either through direct federal assistance or forced parental expenditure.⁵⁷ Parents who are financially able should be viewed as forced to expend an amount of money equal to the basic support which society will provide to any child if it is abandoned or if its parents become destitute. Accordingly, a modest, flat dependency deduction appropriately acknowledges the element of forced consumption inherent in parenting expenses and is the best mechanism for adjusting tax burdens to reflect the actual difference in market income earned by parents and nonparents.

II

POSITIVE AND NEGATIVE IMPUTED INCOME FROM SELF-PERFORMED HOUSEHOLD AND CHILDCARE SERVICES

A. The Relationship Between Rate Structures and Imputed Income

The present income tax divides taxpayers into three filing categories based on family responsibilities: (1) married individuals; (2) heads of households; (3) unmarried individuals other than heads of households.⁵⁸ Underlying these separate rate structures is an

⁵⁶ For a brief catalog of government income transfer programs affecting children, see R. MNOOKIN, *CHILD, FAMILY AND STATE* 219-21 (1978).

⁵⁷ Without this myth, every consideration of the proper level of the dependency deduction would require an investigation of actual family sharing practices. Instead, exemption levels are based on the total income received by the family. Appropriate intra-family allocation is assumed. See, e.g., 1 U.S. DEP'T OF THE TREASURY, *supra* note 14, at 5-6.

⁵⁸ See *supra* notes 2-4.

implicit judgment about the fair relative tax burden to be born by members of each class. This same judgment could be made explicit using a single rate structure.⁶⁹ For example, assume a tax system with two rate structures: (1) a flat 10 percent tax on the market income of unmarried individuals; (2) a flat 20 percent tax on the market income of married individuals. Under this regime unmarried individual A with a taxable income of \$10,000 would pay \$1,000 in income tax, while married individual B with taxable income of \$10,000 would pay \$2,000 in income tax. The same tax results could be obtained under a single rate structure imposing tax at the flat rate of 10 percent, so long as the tax system contained a mechanism for increasing B's taxable income from \$10,000 to \$20,000.

In this Article I assume that the underlying purpose of multiple rate structures is to adjust indirectly the taxable incomes of members of each filing class to reflect relevant differences in nonmonetary income. I argue that the relevant nonmonetary differences are: (1) the positive income from self-performed household services; and (2) the negative income from self-performed childcare services. Further, I demonstrate how nonmonetary differences should be taken into account under a tax system utilizing one rate structure for all taxpayers. In so doing, I explain how the present tax system discriminates against parents with dependent children.

B. The Imputed Income from Self-Performed Household Services

Taxpayers receive a large amount of imputed income⁶⁰ from self-performed services. For example, taxpayer A may clean A's own house, or A may hire a housekeeper at a cost of \$40 per week. By doing A's own cleaning, taxpayer A receives \$40 of imputed income. Indeed, every productive act done for oneself produces imputed economic income. Thus, an individual realizes im-

⁶⁹ McIntyre and Oldman, *supra* note 24, 1624. Cf. Coven, *The Decline and Fall of Taxable Income*, 79 MICH. L. REV. 1525, 1538-55 (1981) (advocating single filing and explicit deductions from gross income to reflect relevant differences flowing from family and employment responsibilities).

⁶⁰ "Imputed income may be defined . . . as a flow of satisfactions from durable goods owned and used by the taxpayer, or from goods and services arising out of personal exertions of the taxpayer on his own behalf." Marsh, *The Taxation of Imputed Income*, 58 POL. SCI. Q. 514 (1943). Imputed income is distinguished from other forms of income in kind because it does not result from an ordinary market transaction.

puted income from self-performed services such as answering the phone, making the bed, balancing the checkbook, and so on.⁶¹

While tax theorists agree that it is impractical to tax every item of imputed income, there is considerable support for adjusting tax burdens to reflect the imputed income realized by nonworking spouses.⁶² To appreciate the need for such adjustment let us compare A and B, a two-worker married couple and C and D, a one-worker married couple.⁶³ A and B each earn \$10,000 annually from full-time market employment. C earns \$20,000 from full-time market employment. D, C's spouse, does not hold market employment. Instead, D works in the home producing goods and services for consumption by C and D. While couple AB and couple CD each have a total market income of \$20,000, C and D are economically better off than A and B. To have the same amount of leisure time as couple CD, A and B must purchase basic household services in the market. To have the same discretionary purchasing power⁶⁴ as does couple CD, A and B must devote leisure time to household production. As a result, couple CD will either have more leisure time or more money than couple AB, and the value of this excess leisure or money equals the value of the household services performed by D during the normal market work period.

Unequal amounts of imputed income occur, however, even when individuals devote like amounts of time to market employment. For example, A may be an accomplished gardener who in A's spare time grows substantially all of couple AB's vegetables. The imputed income from A's services might equal or exceed the imputed income flowing from D's household production.⁶⁵

⁶¹ McIntyre and Oldman, *supra* note 24, at 1611.

⁶² O'Kelley, *supra* note 8, at 759; Coven, *supra* note 59, at 1540-52; Gann, *supra* note 55, at 30-31; Bittker, *supra* note 12 at 1425-26. *But see* McIntyre and Oldman, *supra* note 24, at 1607-24.

⁶³ The term "one-worker couple" refers to a family arrangement in which one partner is employed in the market and the other is not. The terms "married" and "spouse" may be interpreted broadly to refer to the status of two individuals of the same or different sex who have chosen to intertwine their personal lives in a more substantial way than mere roommates. On the possibility of designing a sharer-status-neutral income tax, see O'Kelley, *supra* note 8, at 766-69.

⁶⁴ This hypothetical assumes no differences in preexisting wealth between couples.

⁶⁵ It is tempting to ignore these differences on the theory that no substantial disparities are in fact likely to occur. H. SIMONS, *supra* note 18, at 110-13.

Therefore, in order to justify a tax on the excess imputed income enjoyed by nonworking spouses it is necessary to explain how other inequalities in imputed income from self-performed services should be treated.⁶⁶ Moreover, implementing a tax on imputed income requires the existence of an effective, administratively practicable counting mechanism.⁶⁷

The accretion concept of income, and the vision of society to which it relates, provides an explanation of how imputed income should be taken into account. Each working citizen owes an equal amount of public service time to society, and it is the function of the income tax to extract from taxable income the value of the public service time owed.⁶⁸ Spouses who work in the home are providing valuable services which they and their spouse would otherwise have to purchase. The value of the self-performed services attributable to a household worker's extra nonemployment time (the time which average market workers devote to their job) must be included in gross income so that the value of the household worker's public service time may be extracted.⁶⁹

The accretion concept recognizes the autonomy of each citizen and the voluntary nature of the cooperative venture for mutual advantage which constitutes our society. Society has a claim to a portion of the market or imputed income generated during the normal market employment period only because the tax extracted is a reasonable proxy for the equal public service time owed to society by each citizen. However, each citizen remains entitled to the imputed income from their private time—time outside of the normal market work period. Accordingly, it is appropriate to tax imputed income from household production during the normal market work period, while ignoring differences in imputed income attributable to private time.⁷⁰

⁶⁶ 3 REPORT OF THE ROYAL COMM'N ON TAX'N 14-15 (Canada, 1966).

⁶⁷ Valuation of imputed income from household services is generally considered administratively impracticable. McIntyre and Oldman, *supra* note 24, at 1613; Gann, *supra* note 55, at 37.

⁶⁸ See the discussion in *supra*, section I(C).

⁶⁹ O'Kelley, *supra* note 8, at 762-63.

⁷⁰ "The ability to pay" maxim lacks credibility as a tax policy maxim because of the politically unfeasible solutions which can be predicated on it. *Id.* at 745. The Haig-Simons definition of income also loses credibility when it seems to suggest that every productive human act *should* be taxed. The accretion concept as interpreted in this article avoids that difficulty by acknowledging the difference between: (1) market employment and its equivalent (home production of equivalent duration); and (2) imputed income from nonemployment time.

Actual valuation of household work is unnecessary. Providers of household services—for example, cooks, janitors, and childcare providers—are among the lowest paid workers in society. Thus we may assume that every nonworking spouse performs household services which could otherwise be acquired in the market by paying the minimum wage. It is true that a wealthy taxpayer might willingly pay his or her nonworking spouse a great deal more than the minimum wage because of pleasing personal attributes or social connections. However, under the accretion concept the amount of money a given taxpayer would pay to obtain a luxury spouse is irrelevant. Instead, we are interested in determining the value of the basic household services which nonworking spouses are presumed to perform. Nor are we concerned that a wealthy nonworking spouse might hire servants to perform these chores. This is so because each able-bodied adult citizen owes society an equal amount of public service time. If a wealthy nonworking spouse uses the normal work day for personal leisure, we should impute to him or her an income from extra leisure time equal in amount to the income from self-performed services voluntarily foregone.⁷¹

To illustrate how imputed income from household production would be taxed under the accretion model let us make two simplifying assumptions: (1) each adult taxpayer needs twenty hours per week of household services such as grocery shopping, house cleaning, cooking, laundering, and mending clothes; (2) the minimum wage law guarantees every full-time worker an annual income of \$7,000.⁷² Now let us consider again the appropriate tax treatment of two-worker married couple AB and one-worker married couple CD.⁷³ Each couple has a total market income of \$20,000. While

⁷¹ Another problem with the Haig-Simons definition is the proper treatment of leisure. Leisure is a form of personal consumption. Defining income as all personal consumption plus accumulation means that leisure should be taxed. Yet proposing a tax on the value of all time used for leisure would be ludicrous. Henry Simons concluded that both imputed income from household services and income from leisure could be ignored because a taxpayer realizes income from one at the sacrifice of income from the other. H. SIMONS, *supra* note 18, at 52-53, 110-13. Simons did not take into account the extra time for home production and leisure attributable to nonworking spouses. Under the accretion concept developed in this article it is only the value of this extra nonemployment time which must be taken into account.

⁷² The current minimum wage is \$3.35 per hour. 29 U.S.C. § 206(a) (1982). A minimum-wage worker who works forty hours per week, fifty-two weeks per year earns \$6,968 annually.

⁷³ See *supra* notes 62-64 and accompanying text.

A, B and C are employed full-time in the market, D is not. Instead D works 40 hours per week providing household services for C and D. In order to measure the value of D's private production time and, thus, extract the value of D's public service time, we must attribute \$7,000 of imputed income to D. This gives couple CD \$7,000 more taxable income than couple AB.

The implications of this method of taxing imputed income can be illustrated by comparing the present and proposed tax treatment of couples AB and CD from the foregoing hypothetical, and E, an unmarried individual who earns \$20,000 and has no dependent children.⁷⁴

CHART I PRESENT TAX TREATMENT					
Taxpayer	Gross Income	Personal Exemption	Two-Earner Deduction	Taxable Income	Tax
AB	\$20,000	\$2,000	\$1,000	\$17,000	\$1,921
CD	20,000	2,000	0	18,000	2,101
E	20,000	1,000	0	19,000	2,945

CHART II PROPOSED TAX TREATMENT				
Taxpayer	Market Income	Imputed Income	Taxable Income	Tax
AB	\$20,000	0	\$20,000	\$3,205
CD	20,000	\$7,000	27,000	5,165
E	20,000	0	20,000	3,205

As Chart I illustrates, current law differentiates between childless one-worker and two-worker married couples only to the extent of the deduction for two-earner married couples. This deduction is limited to the lesser of: (1) 10 percent of the lower paid spouses market income, or (2) \$3,000.⁷⁵ Compared to any reasonable estimate of the imputed income attributable to a nonworking spouse's

⁷⁴ Chart I calculates the tax liability of couples AB and CD under I.R.C. § 1(a) (1984) and the tax liability of E under I.R.C. § 1(c). Chart II calculates tax under the rates specified in I.R.C. § 1(c). The rates for 1984 are used without adjustment for inflation under I.R.C. § 1(f). The proposed tax treatment uses one rate structure and explicit adjustments to reflect differences in time available for leisure and home production.

⁷⁵ I.R.C. § 221.

extra nonemployment time, this deduction is indeed meager. Moreover, the two-earner deduction does not provide any relief to single worker E relative to one-worker married couple CD, even though the latter taxpaying unit is better off to the extent of the nonworking spouse's imputed income. Even worse, as Chart I shows, present law imposes a substantially heavier tax burden on single individual E than on either childless married couple. Again, whatever our estimate of the imputed income realized by a nonworking spouse, this allocation of tax burdens is indefensible. As Chart II shows, the tax burdens borne by childless single taxpayers and childless two-worker couples should be substantially lower than that borne by childless one-worker couples. Charts I and II also show that present law discriminates against unmarried individuals without dependent children relative to married individuals without dependent children.

The accretion concept gives us, then, an objectively justifiable and administratively practicable mechanism to be used in determining the relative tax burdens of nonworking spouses and other taxpayers without dependent children, whether married or single. However, in order to construct a coherent model for allocating tax burdens among taxpayers with different family situations, we must also understand the proper tax treatment of taxpayers with childcare responsibilities.

C. Children as Negative Income

Self-performed childcare services can be viewed as a source of imputed income. For example, a parent might hire a housekeeper to perform required services such as babysitting, laundering, grocery shopping, and cooking. Alternatively a parent may self-perform these services. By so doing, the parent saves an amount of money equal to the market cost of purchasing required services in the market.⁷⁶ However, viewing self-performed childcare services as positive imputed income overlooks the forced consumption exception to the accretion definition and the relationship of children, parents and the state. Society requires all parents to provide basic services to their children. Moreover, society does not compensate parents for childcare services performed. To be consistent with the forced consumption doctrine, we cannot assume that all parents receive personal satisfaction from performing childcare services

⁷⁶ McIntyre and Oldman, *supra* note 24, at 1614-15.

equal to the value of time given up.⁷⁷ Nor can self-performed childcare services be viewed as voluntary. While many parents would continue to provide adequate childcare to their children under a system of parental autocracy, there are also parents who would neglect, abandon, or kill their children if not deterred by legal sanctions. Accordingly, self-performed childcare services must be viewed as producing negative income, the value of which is fully deductible in calculating taxable income.

To illustrate the concept of negative income from parenting, let us compare C and D, a one-worker married couple without dependent children⁷⁸ and F and G, a one-worker married couple with one preschool-age dependent child. C and F earn \$20,000 annually from full-time market employment. D and G are not employed in the market. Instead, each works in the home producing goods and services for family consumption. Couple CD is economically better off than couple FG to the extent of FG's forced expenditures of time and money for childcare.

Part I of this Article demonstrated that a flat dependency deduction adequately adjusts tax burdens to reflect out-of-pocket parenting expenses incurred to provide children with basic physical goods such as food, clothing, and shelter. While necessities can be provided for a modest amount of money, childcare and related services require a substantial amount of a parent's time. Moreover, younger children cannot be left unattended at any hour. It is this requirement of full-time supervision which allows us to make certain simplifying assumptions about the amount of negative income inherent in the childcare services performed by nonworking spouse G.

Let us assume that parents may satisfy their obligations to supervise preschool-age children either by self-performance or by market purchases of required supervision services. Further let us posit that acceptable childcare can be purchased from individuals who will not charge for the eight hours of supervisory time covering the period when children are sleeping. Under these assumptions, parental supervision of preschool- and school-age children is required sixteen hours a day, seven days a week. Acquiring these services at the minimum wage would cost \$19,510.40.⁷⁹

⁷⁷ See discussion *supra*, section I(D)(1).

⁷⁸ Couple CD is the subject of earlier consideration. See *supra*, section II(B).

⁷⁹ Based on a minimum wage of \$3.35 per hour with no additional pay for overtime.

However, parents who self-perform 112 hours of required childcare services weekly do not realize a negative income of \$19,510.40 because forced supervisory time can also be used in ways productive of positive imputed income. For example, while a young child is napping, a parent must remain on duty in case of fire or other emergency. However, this time can also be spent doing household chores which are exclusively for the parent's benefit. To the extent that required supervisory time is productive of imputed income to the parent, negative income should not be imputed.

Comparing nonworking spouses D and G illustrates this point. During normal market employment time G's childcare responsibilities prevent G from producing as many household services for consumption by couple FG as D can produce for consumption by couple CD. Instead, a portion of normal market employment time goes to production of goods and services needed by couple FG's child and to its required supervision. On the other hand, couple FG realizes a positive amount of imputed income from self-performed services in comparison to the imputed income of a two-worker couple. Accordingly G has positive imputed income from household production during the normal market employment period in an amount less than \$7000 but more than zero. For illustrative purposes, let us assume that nonworking spouses who self-perform all household services and all supervision of preschool-age children realize \$3000 in imputed income during the normal market employment period.

It is also clear that couple FG experiences substantial forced reductions in the value of their nonemployment time as a result of their state-mandated, full-time childcare obligations. Again for purposes of illustration, let us posit that self-performed care of preschool-age children produces \$8,000 of negative income during the nonemployment time that nonparents may devote to leisure or home production for their own benefit.

The foregoing analysis produces strikingly different relative tax burdens among one-worker married couples with and without pre-

school-age children than does present law. Chart III calculates the income tax bill of couple CD and couple FG under present law.⁸⁰

CHART III PRESENT TAX TREATMENT					
Taxpayer	Market Income	Personal Exemption	Dependency Deduction	Taxable Income	Tax Liability
CD	\$20,000	\$2,000	0	\$18,000	\$2,691
FG	20,000	2,000	\$1,000	17,000	2,461

Chart IV determines the tax liability of Couple CD and Couple FG under the imputed income method.⁸¹

CHART IV PROPOSED TAX TREATMENT						
Taxpayer	Market Income	Positive Imputed Income	Negative Imputed Income	Dependent Deduction	Taxable Income	Tax Liability
CD	\$20,000	\$7,000	0	0	\$27,000	\$5,165
FG	20,000	3,000	\$8,000	\$1,000	14,000	1,801

As Chart III shows, present law differentiates between one-worker married couples on the basis of parenting responsibilities only by allowing a modest dependency deduction. As Chart IV shows, recognizing the negative income from childcare obligations produces a dramatic reduction in the relative tax burdens of parents with childcare responsibilities.

For illustrative purposes hypotheticals in this Article focus on parents with preschool-age children, and assume that preschool-age children require full-time parental supervision which produces stipulated amounts of imputed negative income. The suggested approach might yield different negative income figures for older children. For example it might be reasonable to assume that school-age children attend class during the normal market work period. Accordingly nonworking spouses with dependent school-age children might be treated as experiencing a lesser reduction in im-

⁸⁰ The calculations in Chart III assume no other deductions or items of income than those shown. Tax liability is calculated under I.R.C. § 1(c) (1984) using 1984 rates.

⁸¹ The calculations in Chart IV assume no other deductions or items of income than those shown. Tax liability is calculated under a hypothetical single rate structure income tax using the 1984 rates shown in I.R.C. § 1(c) (1984).

puted income from household services self-performed during the normal market work period than is experienced by nonworking spouses with preschool-age children. Moreover, the required supervision and care of older children may produce a lesser amount of imputed negative income during nonemployment time. Empirical study might also indicate a need to vary tax burdens to reflect differences in negative income based on the number of dependent children for whom a taxpayer is responsible. In contrast to the present tax law, the suggested approach would easily accommodate such precise, incremental adjustments in the tax burdens of parents relative to both other parents and nonparents.

D. *Childcare Services Necessary for Gainful Employment*

Single parents and two-worker married parents must either incur out-of-pocket childcare expenses or forego market employment in order to care for their children.⁸² Prior to 1954 these childcare expenses were classified as nondeductible personal, living, or family expenses.⁸³ Since 1954 the Internal Revenue Code has provided a mechanism to lessen the tax burden of some working parents on account of their employment-related childcare expenses.⁸⁴ The present tax relief provision is a modest tax credit.⁸⁵ In effect, present law treats these childcare expenses as in part deductible business expenses and in part nondeductible personal, living, or family expenses. However, the principle of neutrality between market and home production inherent in the accretion concept of income⁸⁶ requires both full deductibility of employment-related childcare expenses and taxation of imputed income real-

⁸² Parents in the hypotheticals in this section are assumed to have preschool-age dependent children requiring full-time supervision.

⁸³ *Smith v. Comm'r*, 40 B.T.A. 1038 (1939).

⁸⁴ 2 B. BITTKER, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 37.1.1 (1981). For a list of references on this subject see W. ANDREWS, *BASIC FEDERAL INCOME TAXATION* 719 (3d ed. 1985).

⁸⁵ I.R.C. § 21 (1984) allows a tax credit equal to the "applicable percentage" of employment-related expenses. The applicable percentage is 30 percent reduced (but not below 20 percent) by 1 percentage point for each \$2,000 by which the taxpayer's adjusted gross income exceeds \$10,000. The applicable percentage is multiplied by the smaller of: (1) employment-related expenses; or (2) the earned income of a single taxpayer, or, if the taxpayer is a married couple, the earned income of the lower paid spouse. The maximum credit available for expenses incurred for the care of one child is \$720.

⁸⁶ It is a central tenet of the accretion concept that the income tax should treat gain the same whatever its source. Andrews, *supra* note 31, at 320-25.

ized by nonworking spouses during the normal market work period.

To the extent possible a tax should not affect individual choices between leisure and work, or among different types of work. Thus, a well-designed income tax would be neutral as to the choice between market and home production.⁸⁷ In fact present law discriminates in favor of self-performed childcare services and against market employment. To illustrate this point, consider individual X, a nonworking spouse who presently self-performs all childcare services required by her dependent preschool-age child during the normal market work period. X is offered market employment at an annual wage of \$7,000. In order to perform this job, X must purchase childcare services at an annual cost of \$4,000. Let us assume that X's income from the normal market employment period is subject to tax at the flat rate of 30 percent.⁸⁸ Chart V shows X's after-tax income from the normal market employment period under five alternative scenarios: (1) X chooses home production under an income tax which does not tax the resulting imputed income;⁸⁹ (2) X chooses home production under an income tax which does tax the resulting imputed income; (3) X accepts market employment under an income tax allowing no credit or deduction for employment-related childcare expenses; (4) X accepts market employment under an income tax containing I.R.C. § 21; (5) X accepts market employment under an income tax allowing full deductibility of employment-related childcare expenses.

X must choose between home production generating net pretax imputed income of \$3,000 and market employment which will produce a net pretax monetary income of \$3,000. The income tax is neutral if the after-tax rewards available to X from either choice have the same relative value to X as the pretax rewards.⁹⁰ Present law, as depicted in lines 1 and 4 of Chart V, discriminates in favor of home production because imputed income from home production is not taxed. Comparing the net after-tax rewards for alternatives 1 and 5 shows that making childcare expenses fully

⁸⁷ Rosen, *Is It Time to Abandon Joint Filing?*, 30 NAT'L TAX J. 423, 426-27 (1977); Gann, *supra* note 55, at 39 n.131.

⁸⁸ In this hypothetical we are ignoring the income of X's spouse and X's imputed negative income from nonmarket employment time.

⁸⁹ The net imputed income is deemed to be \$3,000. See *supra* notes 79-80 and accompanying text.

⁹⁰ Idiosyncratic valuations are irrelevant for tax purposes.

deductible would not eliminate the present discrimination against market production. However, as illustrated by comparing alterna-

CHART V X'S AFTER-TAX INCOME						
Market Income	Imputed Income-a	Taxable Income	Income Tax Liability-c	Out-of-Pocket Childcare Expenses	Net After-Tax Imputed or Market Income	
1 0	\$3,000	0	0	0	\$3,000	
2 0	3,000	\$3,000	\$ 900	0	2,100	
3 \$7,000	0	\$7,000	2,100	0	900	
4 7,000	0	7,000	1,380-d	\$4,000	1,620	
5 7,000	0	3,000-b	900	4,000	2,100	
1. X chooses home production; imputed income not taxed. 2. X chooses home production; imputed income taxed. 3. X chooses market production; childcare expenses not deductible. 4. X chooses market production; § 21 in effect. 5. X chooses market production; childcare expenses fully deductible.						
a. Posited value of home production by nonworking spouse with preschool-age child. b. \$7,000 market income less out-of-pocket childcare expenses. c. 30 percent of taxable income. d. 30 percent of taxable income less I.R.C. § 21 credit.						

tives 2 and 5, the relative value of pretax income from home and market production is unchanged by an income tax which both taxes the imputed income arising from household production by nonworking spouses during the normal market employment period and treats employment-related childcare expenses as fully deductible.⁹¹

E. Fair Relative Tax Burdens Under a Single Rate Structure: A Critique of Current Law

An income tax can differentiate between taxpayers with the same market income but different family responsibilities: (1) by

⁹¹ Full deductibility of childcare expenses *alone* would make the income tax neutral as between one-worker parents and two-worker parents only if self-performed childcare services both created positive imputed income and precluded the nonworking spouse from realizing imputed income from household production. I suggest, however, that self-performed childcare is negative income. In other words it reduces the amount of positive income from household production that the nonworking spouse could otherwise realize. Viewed in this fashion, the nonworking spouse is presently allowed to exclude from gross income *more* than the full value of self-performed childcare services.

making explicit adjustments to taxable income to reflect relevant differences in nonmonetary income; (2) by using multiple rate structures to implicitly accomplish the same adjustments; or (3) through some combination of multiple rate structures and explicit adjustments. The present income tax uses the third approach.

The preceding parts of this Article develop a theory of how relative tax burdens could be explicitly adjusted under a single rate structure system. If the foregoing analysis is correct, then the present income tax is flawed to the extent that it fails to produce relative tax burdens which are consistent with this theory. Therefore, let us now compare the full range of tax burdens resulting under present law and under the approach advocated in this Article.

Chart VI illustrates the tax treatment under present law of the following six taxpaying units: (1) a single taxpayer with no dependents; (2) a single taxpayer with one dependent preschool-age child; (3) a one-worker married couple with no dependents; (4) a one-worker married couple with one preschool-age dependent child; (5) a two-worker married couple with no dependents; and (6) a two-worker married couple with one dependent child. Single parents and two-worker married parents are assumed to spend \$3,000 annually for employment-related childcare services.

CHART VI RELATIVE TAX BURDENS UNDER PRESENT LAW					
Taxpayer Unit/ No. of Workers in Unit/No. of Dependent Children	Personal and Market Income	Dependent Exemption	§ 221 Deduction-a	Taxable Income	Tax Liability-e
Single/1/0	\$20,000	\$1,000	0	\$19,000	\$2,945(b)
Single/1/1	20,000	2,000	0	18,000	1,894(c)
Couple/1/0	20,000	2,000	0	18,000	2,101(d)
Couple/1/1	20,000	3,000	0	17,000	1,321(d)
Couple/2/0	20,000	2,000	\$1,000	17,000	1,921(d)
Couple/2/1	20,000	3,000	1,000	16,000	1,141(d)

a. Assumes each worker earns \$10,000 annually.
 b. Calculated under I.R.C. § 1(c) as in effect for 1984.
 c. Calculated under I.R.C. § 1(b) as in effect for 1984.
 d. Calculated under I.R.C. § 1(a) as in effect for 1984.
 e. Tax credit calculated under I.R.S. §21.

Chart VII depicts the tax treatment of these same hypothetical taxpayers under the approach advocated in this Article. Chart VII imputes positive and negative income on the following basis: \$7,000 imputed positive income from the normal market employment period to nonworking spouse without children;⁹² \$3,000 imputed positive income from the normal market employment period to nonworking spouse with preschool-age child;⁹³ and \$8,000 imputed negative income from childcare responsibilities during nonemployment time to taxpaying units with a dependent preschool-age child.⁹⁴ Chart VII assumes a dependency deduction of \$1,000 and a single rate structure identical to that applicable to unmarried individuals under present law.

CHART VII RELATIVE TAX BURDENS UNDER SUGGESTED APPROACH							
Taxpayer Unit/No. of Workers in Unit/No. of Dependent Children	Market Income	Net Imputed Income	Negative Imputed Income	Dependent Deductions	Childcare Expense	Taxable Income-a	Tax Liability-b
Single/1/0	\$20,000	0	0	0	0	\$20,000	\$3,205
Single/1/1	20,000	0	\$8,000	\$1,000	\$3,000	8,000	760
Couple/1/0	20,000	\$7,000	0	0	0	27,000	5,165
Couple/1/1	20,000	3,000	8,000	1,000	0	20,000	3,205
Couple/2/0	20,000	0	0	0	0	20,000	3,205
Couple/2/1	20,000	0	8,000	1,000	3,000	8,000	760

a. Assumes no other deductions
b. Calculated under I.R.C. § 1(c) as in effect for 1984.

Chart VI shows that within the three major classes of taxpayers, single persons, one-worker married couples, and two-worker married couples, present law produces only a slightly lesser tax burden for taxpayers with dependent children than their childless counterparts. In contrast, as illustrated in Chart VII, the tax burden of taxpayers with dependent children should be substantially less than the tax burden of members of the same taxpayer class who do not have dependent children but are otherwise like situated.

An equally striking flaw in present law is its treatment of single taxpayers relative to married taxpayers. Under the approach ad-

⁹² See *supra* notes 68-73 and accompanying text.

⁹³ See *supra* notes 79-80 and accompanying text.

⁹⁴ *Id.*

vocated in this Article, a single taxpayer without dependent children bears a lesser tax burden than a one-worker married couple without dependent children. This treatment is correct because the one-worker couple realizes imputed income from the household services performed by the nonworking spouse during the normal market employment period.⁹⁵ However, as Chart VI shows, under current law the single taxpayer without dependent children pays substantially more income tax than the one-worker couple without dependent children.

The same pattern holds true when we compare the tax burdens of parents. Under the suggested approach, as illustrated in Chart VII, the lowest tax burden should be borne by single parents and two-worker married parents. Each type of taxpayer realizes no positive imputed income from self-performed household services during the normal market employment period, requires like amounts of employment-related childcare services, and experiences like amounts of negative income from childcare responsibilities during nonemployment time. Nonetheless, present law imposes a heavier tax burden on single parents than on two-worker married parents and imposes a similar tax burden on single parents and one-worker married parents.

This perplexing assignment of tax burdens under present law can be explained in a manner which both affirms the appropriateness of the positive and negative income approach and highlights the need for a unifying theory. First compare line one of Chart VI and line one of Chart VII. The tax burden for a single taxpayer without dependent children is similar under present law and the suggested approach. Next compare line four of Chart VI and line four of Chart VII. The tax burden for a one-worker married couple with dependent children is similar under present law and the suggested approach. Thus, present law and the suggested approach make the same judgment about the fair relative tax burdens of single taxpayers without dependent children and a married one-worker couple with dependent children. Moreover, these judgments are consistent with the view that one-worker married taxpayers with dependent children should pay substantially less tax than single taxpayers because of the substantial net imputed negative income generated by parenting.⁹⁶

⁹⁵ See *supra* note 74 and accompanying text.

⁹⁶ But see McIntyre and Oldman, *supra* note 24, at 1620.

Present law could be explained then as evolving from an initial assumption that all taxpayers fall into one of two stereotypical groups, single taxpayers with no children and one-worker married taxpayers with dependent children. The initial decision to create a rate differential in favor of married individuals necessarily represented an implicit judgment about the amount of net negative income experienced by these taxpayers relative to single individuals.⁹⁷ While Congress has since recognized the legitimate complaints of single parents,⁹⁸ single individuals generally,⁹⁹ and two-worker married couples,¹⁰⁰ it has done so in an ad hoc fashion, constrained by the revenue consequences of substantial relief to the complaining group, the political danger inherent in explicitly raising the taxes of the unfairly advantaged groups, and the lack of a coherent theory of how tax burdens should be adjusted to reflect family and household responsibilities.

⁹⁷ Prior to 1948 individuals were required to pay tax on their own income under a single rate structure applicable to all taxpayers. *Poe v. Seaborn*, 282 U.S. 101 (1930) determined that for federal tax purposes spouses in community property states could each report one-half of the community income. Because of this ruling and graduated rates, one-worker married couples in community property states paid less income tax than one-worker married couples having the same market income but residing in common law states. In 1948 Congress extended income-splitting privileges to all married couples with respect to a couple's total joint income. As a result, a one-worker married couple paid substantially less tax than a single taxpayer with the same taxable income. Bittker, *supra* note 12, at 1404-16.

⁹⁸ Income-splitting was generally viewed as a tax allowance for family responsibilities. However, its benefits were not available to single parents. In 1951, in response to public complaints, Congress enacted a special head-of-household rate structure under which single parents were taxed less heavily than unmarried individuals without family responsibilities. However, the tax burden of single parents remained higher than that of married couples (with or without dependent children) having the same taxable income. Bittker, *supra* note 12, at 1417-18.

⁹⁹ The income-splitting provision was widely viewed as too favorable to married couples relative to childless unmarried individuals.

In 1969 Congress created separate rate structures for married couples filing jointly, married couples filing separately, and unmarried individuals. Under these rate structures the tax paid by an unmarried individual could not exceed by more than 20 percent the tax paid by a married couple having the same taxable income. Gann, *supra* note 55, at 20-21; McIntyre and Oldman, *supra* note 24, at 1588; Bittker, *supra* note 12, at 1428-29.

¹⁰⁰ In 1981 Congress enacted I.R.C. § 221 (1982) to alleviate the marriage tax penalty—the extra tax paid by two-worker married couples under I.R.C. § 1(a) (rates for married individuals filing jointly) compared to the total tax which would be due if the income of each spouse were separately taxed under I.R.C. § (1)(c) (rates for unmarried individuals). S. REP. NO. 797, 97th Cong., 1st Sess. 29-33, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 136-40.

Proceeding in this fashion Congress and tax policy scholars have not developed a coherent theory of the tax consequences flowing from differing family responsibilities. This Article provides a theoretical basis for reforming the present system to remove the discrimination against parents, and, more generally, to take account of the relevant differences in imputed income among taxpayers with similar market incomes, but dissimilar family responsibilities.

III

CLOSING THOUGHTS

Boris Bittker in his classic article on taxation and the family concluded that there was no possible solution to the problems presented which did not favor one category of taxpayers over others with equally plausible claims to tax preference.¹⁰¹ To be sure, determining the relative tax burdens of taxpayers with identical market incomes but different family responsibilities requires normative judgments about the purpose of the income tax and the relative rights and duties of parents and the state. However, the problem is not insoluble. This Article demonstrates that the dominant accretion concept of income, when properly interpreted, produces an objectively justifiable allocation of tax burdens between parents and nonparents.

The accretion concept of income is based on the view that citizens are obligated to contribute equal amounts of public service time to society. Adjusting tax burdens to reflect the negative income from parenting is consistent with both the accretion ideal and social reality. If no one raised children the species would disappear in short order. Thus, parents perform a service to society as a whole when they procreate and subsequently care for their children.¹⁰² Allowing a deduction for the negative income from parenting recognizes that parents have already contributed substantial public service time to society.

The negative income concept also has implications for the design and public perception of federal welfare programs. An unem-

¹⁰¹ Bittker, *supra* note 12, at 1442-44, 1463.

¹⁰² For a society troubled by overpopulation, not every birth would represent a contribution to society. Nonetheless, society would still require parents of existing children to provide necessary childcare. Thus, it would be inappropriate to decrease the childcare related deductions available to parents of existing children in order to discourage excessive additional births.

ployed parent with preschool-age children who self-performs required childcare services realizes substantial amounts of negative income. Therefore, begrudgingly given welfare assistance should be replaced with a refundable tax credit based on the negative income experienced by such parent.

The accretion and negative income concepts provide a principled basis for recognizing the important public service rendered by parents. Moreover these concepts provide an objectively justifiable basis for adjusting tax burdens between parents and nonparents to reflect relevant differences in market and nonmarket childcare expenses.

