The Deductibility of Nondiscretionary Personal Expenses

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I. INTRODUCTION

Although personal expenses are generally nondeductible for purposes of the federal income tax,¹ a few personal expenses, such as medical care and personal casualty losses, are deductible.² Virtually everyone who justifies these exceptions rests his case on the assertion that these deductible personal expenses are nondiscretionary.³ In addition, those who seek to reform the tax treatment

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1. I.R.C. § 262.
of personal expenses, rather than to defend our current system, almost invariably must determine which expenses are discretionary and which are nondiscretionary as an early step in their analysis. In fact, even those who argue for tax bases other than income, when discussing the possibilities of deductions or exemptions for personal expenditures, justify their choices on the basis of their

6 (1957) (characterizes medical expenses as "involuntary"); Pogue, Deductions vs. Credits: A Comment, 27 Nat'l Tax J. 659, 661 (1974) ("these latter deductions are perhaps more readily seen as the adjustment of gross income for nondiscretionary [subsistence] expenditures that reduce ability to pay.") (emphasis added).

4. 2 U.S. DEP'T OF TREASURY, TAX REFORM FOR FAIRNESS, SIMPLICITY AND ECONOMIC GROWTH 63 (1984) ("It is argued by some that state and local taxes should be deductible because they are not voluntarily paid"); [Treasury goes on to show that they are voluntarily paid]; See also Turnier, Evaluating Personal Deductions in an Income Tax—the Ideal, 66 CORNELL L. REV. 262, 280 (1981) [hereinafter Turnier, Evaluating Personal Deductions] ("It is, in this author's opinion, appropriate to allow a deduction for two types of involuntary expenditures: [1] those that are necessary for survival and basic well-being; and [2] those that do not provide the taxpayer with personal benefit substantially commensurate in value with the amount of the expenditure."); U.S. DEP'T OF TREASURY, BLUEPRINTS FOR BASIC TAX REFORM 89 (1977) ("opponents of deductibility can cite a fairly high degree of 'consumer choice' in the extent, type and quality of medical services that may be elected by persons of similar health."); R. GOODE, THE INDEPENDENT INCOME TAX 157-58 (1976) ("The attitude seems to be that a person has little control over the amount of his medical expense."); Bittker, Federal Income Taxation and the Family, 27 STAN. L. REV. 1389, 1446 (1975); Bittker, Income Tax Deductions, Credits and Subsidies for Personal Expenditures, 16 J. LAW AND ECON. 143, 197-98, 201 (1973) [hereinafter Bittker, Income Tax Deductions] (argues at 197 that casualties are not voluntary; at 198 that the issue with respect to the medical expense deduction is control; at 201 that state tax payments are compulsory, and therefore are not consumption); Bittker, Income Tax Reform in Canada: The Report of the Royal Commission on Taxation, 35 U. CHI. L. REV. 637, 639 (1968) ("statutory allowances taking account of the way a taxpayer chooses to spend his income are customarily criticized, unless they serve an objective that cannot be effectively achieved by a nontax route."); Coven, The Decline and Fall of Taxable Income, 79 Mich. L. REV. 1525, 1553 (1981) ("The more difficult problem lies in distinguishing between volitional and forced consumption.") (discussion of dependency exemptions); Due, Personal Deductions in COMPREHENSIVE INCOME TAXATION (J. Pechman, ed. 1977) 46 ("medical expenditures are essentially involuntary") and 51 (discussion of state and local taxes as mandatory payments); Kelman, Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Far Worse in a Far From Ideal World, 31 STAN. L. REV. 831, 865 (1979); ("Professor Andrews' justification for the section 213 scheme would be stronger if we could assume the following features of the medical care market: [1] A taxpayer is unambiguously either in 'good health' or in a state of illness or injury, the latter status always being involuntary.") Klein, Tax Deductions for Family Care Expenses, 14 B.C. IND. & COM. L. REV. 917, 941 (1973) ("the only amount that should be subject to taxation is the amount that a taxpayer has left after subtracting certain payments over which he or she has no control."); Turnier, Personal Deductions and Tax Reform: The High Road and the Low Road, 31 VILL. L. REV. 1703 (1986) [hereinafter Turnier, Personal Deductions and Tax Reform]; White, Proper Income Tax Treatment of Deductions for Personal Expenses, in HOUSE COMM. ON WAYS AND MEANS, 86TH CONG., 1ST SESS., TAX REVISION COMPENDIUM 365, 370 (1959) (medical deductions defended as "involuntary risk of hardship due to illness.") (emphasis added).
nondiscretionary character.\(^5\)

The line between discretionary and nondiscretionary personal expenditures, then, is apparently a very important one to our system of taxation. Three things should follow: (1) We should know why the line is important, (2) We should know how to draw the line, and (3) We should be drawing the line consistently. It is submitted that none of these things is true. First, no one has offered a coherent explanation as to why the line should be important. Many possible justifications come to mind, some more defensible than others. Second, we do not know how to draw the line. Drawing the line requires us to know what “discretionary” and “nondiscretionary” mean. These terms have many definitions, which can serve many different purposes. Moreover, if we do not know why the line is important, the line will be harder to draw. Definitions of terms often depend upon how the terms are to be used.\(^6\) Finally, whatever line is drawn by our laws, whether consciously or not, it is not drawn consistently. Drawing a consistent line would require that all nondiscretionary personal expenditures would be deductible, while all discretionary personal expenditures would be non-deductible. This requirement has not been met.

Many discretionary personal expenditures are in fact deductible. The voluntary decisions to marry,\(^7\) to have children,\(^8\) and to divorce\(^9\) can all lead to tax reductions. In addition, discretionary medical care, such as cosmetic surgery, is deductible.\(^10\)

Many nondiscretionary expenditures are nondeductible. For example, few would argue that the inadvertent misplacement of a

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5. 3 Report of the Royal Canadian Commission on Taxation 19 (1966) (See discussion of the Royal Canadian Commission’s tax base of “discretionary economic power” at notes 24, 61, 62 infra and accompanying text); N. Kaldor, An Expenditure Tax 209 (1955) (supporting personal deductions for “unavoidable obligations of some kind and [which are] not part of a person’s ‘voluntary’ expenditure on which his standard of living depends”); Andrews, Personal Deductions in an Ideal Income Tax, 86 Harv. L. Rev. 309, 336 (1972), as interpreted by Kelman, supra note 4, at 859; Graetz, Expenditure Tax Design in What Should Be Taxed: Income or Expenditure? 235 (J. Pechman, ed. 1980); Graetz, Implementing a Progressive Consumption Tax, 92 Harv. L. Rev. 1575, 1592 (1979) (“the deductibility of medical expenses can be expected to endure the shift to expenditure taxation, principally on the strength of the argument that such expenses are not voluntary consumption”).


7. See note 92 infra and accompanying text.

8. See notes 81-87 infra and accompanying text.


valuable possession is any more discretionary than its inadvertent
destruction. Yet, the misplacement does not give rise to a deductible
expense while the destruction does. 11 This Article will explore
possible rationales for the line and possible definitions for the
terms “discretionary” and “nondiscretionary.” Then it will con-
sider whether or not it is possible to construct a coherent scheme
of taxation in which all nondiscretionary personal expenses are de-
ductible and all discretionary personal expenses are nondeductible.
If such a scheme is not possible, we must then ask whether the
notion of nondiscretionary personal expenses is so incoherent and
unworkable that it should no longer be used as a justification for
personal deductions.

II. RATIONALES FOR THE LINE

A. CONTEXT

Although no one has suggested any direct rationale for the
line, it is still helpful to see what has been said about discretionary
and nondiscretionary expenses, and to explore the general contexts
in which it has been said. To this end, a brief review of ability to
pay, clear income, discretionary economic power, consumption, and
the business/personal distinction will follow.

1. Ability to Pay

Our tax laws would be much simpler if we determined the to-
tal amount of federal expenditures for a year, say $750 billion, 12
and counted the number of people in the United States, say 250
million, 13 and divided the expenditure by the number of people.
The result would be a tax bill of $3,000 per year per person. The
problem with this approach is that some of us cannot afford to pay
$3,000 per year, while others can afford to pay considerably more.
The intuitive negative reaction to a scheme of equal tax payments
for all taxpayers illustrates the appeal of the notion of ability to
pay, that each taxpayer should pay a different amount of tax, de-
pending upon his relative ability to pay taxes. 14 When one at-

11. See Newman, Of Taxes and Other Casualties, 34 Hastings L.J. 941, 963, 964
(1983).
12. Total federal budget outlays for 1982 were $728.4 billion. Estimated federal budget
outlays for 1983 were $805.2 billion. U.S. Department of Commerce, Bureau of the Census,
13. The population of the United States was 234.2 million in 1983. Id at 6.
14. See H. Groves, Tax Philosophers (1974), for the thoughts of the following philos-
tempts to make practical applications of the ability to pay principle, however, it is found wanting. Ability to pay is impossible to measure.\textsuperscript{15} Therefore, we turn to other tax bases, such as income. This may not be as ideally correct as ability to pay in measuring abstract taxpaying capacity, but it can function in the real world.

Since income is admittedly an imperfect substitute for ability to pay, we correct for its more glaring deficiencies by adjusting the tax base with deductions. The function of deductions for personal expenditures, then, is to adjust the income base so that it more closely approximates the ideal tax base.\textsuperscript{16} Should all significant deductions in ability to pay be deductible? Consider two taxpayers, with identical incomes and comparable in all other respects. One month before taxes are due, the first taxpayer suddenly contracts a serious illness. The medical bills far outstrip his insurance coverage, and effectively wipe him out financially. At the same time, the second taxpayer decides to take an extravagant trip around the


15. The ability to pay concept arguably serves to minimize the sacrifice each taxpayer must make; by redistributing the tax burden according to ability to pay, the aggregate sacrifice suffered by taxpayers is minimized. Yet if ability to pay is measured solely by degree of sacrifice, it becomes an impracticable standard by which to impose taxation. For example, imagine two potential taxpayers who are financially equal, except that one has an inordinate love for money. A coerced taking of even one penny from his hoard, even for as worthy a cause as the public welfare, would create extreme anguish. He is making a larger sacrifice than the nonmiser. For those who truly believe in ability to pay, this taxpayer's extreme love of money makes him less able to pay taxes than the other. Accordingly, a pure application of ability to pay theory would require a comparison of the differing psychological satisfactions that money brings to different individuals. Such measurements are impossible, if not unfair. Newman, supra note 11, at 943 n. 7; see R. Goode, supra note 14, at 18. Second, application of a pure ability to pay theory would require that those with the capacity to earn income should be taxed on that capacity, whether or not that capacity is exercised. Consider two street musicians, each of whom earns $5,000 a year. One of them has the potential to earn $200,000 a year as a stockbroker, but prefers his current vocation. Clearly, the potential stockbroker has more ability to earn income than the other, hence he has more ability to pay. However, if he is taxed more heavily, he will be forced to give up his preferred life as a street musician and become a stockbroker in order to pay his taxes. This may represent slavery for many of us, and does present a serious problem for the ability to pay theory. Newman, supra note 11, at 943. See also Gunn, supra note 14, at 381-82.

world. He returns just before taxes are due, also financially devastated. Both taxpayers have incurred expenditures which significantly reduce their ability to pay taxes. On ability to pay grounds, both expenditures should be deductible. However, intuitively, the taxpayer who became ill has a much better case for a deduction than the world traveller. Note that the medical expense, which appears to merit a deduction, is nondiscretionary, while the trip, which appears not to merit a deduction, is discretionary.

In the above exercise, use of the ability to pay principle alone led to a result which did not appear to be fair. It was only when discretionary and nondiscretionary expenses were differentiated that a satisfactory result was achieved. Therefore, starting with ability to pay may lead to a consideration of discretionary and nondiscretionary expenses, but the ability to pay principle alone does not require or explain this result.

2. Clear Income

A number of commentators state flatly that the best measure of taxing capacity is achieved by subtracting some form of nondiscretionary expenses from income. Curiously, these statements are couched in terms of ability to pay. Unfortunately, there has been no attempt to justify or explain these assertions. “Clear income,” for example, has been defined as “net income (adjusted gross income on the tax forms) minus an uncertain allowance to the taxpayer of personal expense money deemed sufficient to maintain himself and his dependents according to some biological or conventional standard.” The adherents of this concept assert that “relative ability to pay must be reckoned only in terms of this least common denominator.” The “uncertain allowance” of the clear

18. Id. For a critique of the clear income concept, see McIntyre & Oldman, Taxation of the Family in a Comprehensive and Simplified Income Tax, 90 Harv. L. Rev. 1573, 1603 (1977). Professor Turner argues for a scheme which closely resembles clear income, and the context of his discussion suggests that his scheme flows from the concept of ability to pay. He suggests the following rule for the deduction of involuntary expenditures:

It is, in this author’s opinion, appropriate to allow a deduction for two types of involuntary expenditures: (1) those that are necessary for survival and basic well-being; and (2) those that do not provide the taxpayer with personal benefit substantially commensurate in value with the amount of the expenditure. It would be unwise to tax the consumption necessary to sustain life and good health. The latter category of deductions is appropriate because it represents involuntary expenditures that are not calculated to avoid taxation.

His first category, and its justification, fits very well with clear income. The only item which
income adherents, which is presumed to be the same as the "subsistence income" of the economists, certainly fits one definition of nondiscretionary expenditure, in that one does not have too much choice about expending the necessary funds to maintain one's self. Therefore, the clear income concept is one argument for subtracting nondiscretionary expenses from the tax base.

Unfortunately, the proponents of clear income make no argument for their position except for a mystifying assertion that ability to pay demands it. An argument does exist, however, for those at the bottom of the income scale. Most, though not all, commentators agree that the tax collector ought to leave the taxpayer with enough resources after taxes so that he can survive at least at a minimum subsistence level. This limitation on taxation would require that those whose incomes were less than that necessary for minimum subsistence would pay no tax at all. In effect, the taxable income of these taxpayers would be reduced to zero by the amount of their expenditures necessary for minimum subsistence. Since minimum subsistence expenses are nondiscretionary expenses, this limitation is effectively an argument for deducting nondiscretionary expenses from the taxable income of this low income group. However, unless the minimum subsistence argument can be applied to all income levels, it is not of any use in justifying the deduction of nondiscretionary expenses across-the-board. In fact, the

he cites as deductible under his second category is state and local income tax, and it is difficult to imagine any others. Turnier, Evaluating Personal Deductions, supra note 4, at 279-81. The economists who assert that "there is a coherent notion of ability to pay which can be expressed as some function of income in excess of subsistence income" and who maintain that their idea is "widely endorsed in the economic literature" are in the same tradition. Brannon & Mors, The Tax Allowance for Dependents: Deductions Versus Credits, 26 Nat'l Tax J. 599, 602 (1973); See Pogue, Deductions vs. Credits: A Comment, 27 Nat'l Tax J. 659, 660 (1974). See H. Groves, supra note 14, at 70 for an argument that the clear income concept was supported by the economist A.C. Pigou.


20. Arguments have been raised that taxes should be no less compulsory than food, clothing and shelter, H. Groves, supra note 17, at 24; Report on Japanese Taxation Submitted to the Supreme Commander for the Allied Powers 52 (1949) and that everyone, no matter how poor, should pay some tax as a means of participating in government. H. Groves, supra, at 25-26; Pollock v. Farmer's Loan & Trust Company, 157 U.S. 429, 596-97 (1894) (Field, J., concurring).
minimum subsistence argument justifies a full exemption from taxation for those below the minimum subsistence level, and a vanishing exemption for those slightly above it.\textsuperscript{21} No exemption would be necessary for those in the high income ranges. Consider, for example, a taxpayer who earned $1,000,000. Given that our highest marginal tax rate is currently 28 percent, that taxpayer would have more than 700,000 dollars after tax on which to live, even without subtracting any minimum subsistence amount from taxable income. Surely, such a taxpayer could manage to get by. Presumably, this analysis lies behind the switch to a vanishing personal exemption in the Tax Reform Act of 1986.\textsuperscript{22} Solicitude for low income taxpayers, then, does not support a minimum subsistence exemption at all income levels. Moreover, there is another problem with an across-the-board exemption, assuming that the minimum subsistence amount is the same for every individual at every income level. As mentioned in the discussion of ability to pay, the very purpose of defining and adjusting a tax base is to determine differences in taxpaying capacities. Ignoring the effects of progressive versus proportionate rate structures, a deduction which subtracts the same amount from everyone's tax base does not change the relative position of one taxpayer from another.\textsuperscript{23} Therefore, in terms of defining a proper tax base, giving every taxpayer an identical deduction for minimum subsistence expenses is a worthless

\textsuperscript{21} Assume a minimum subsistence amount of $1,000 and a proportional tax rate of 10\%. In order to leave all taxpayers with at least $1,000 after tax, taxpayers with incomes ranging from 0 to $1,000 would pay no tax. In exemption terms, all of their income would be exempt. Similarly, a taxpayer with $1,050 income would have a $550 exemption leaving $500 taxable income, a tax of $50, and after tax income of $1,000. A taxpayer with $1,100 income would have a $100 exemption, leaving $1,000 taxable income, a tax of $100, and after tax income of $1,000. Taxpayers with $1,111 or more of income would need no exemption. A 10\% tax on $1,111 yields $111, leaving $1,000 after tax. See W. BLUM & H. KALVEN, supra note 14, at 90-95; R. GOODE, supra note 4, at 218; Bittker, A "Comprehensive Tax Base" as a Goal of Income Tax Reform, 80 HARV. L. REV. 925, 940 (1967).


\textsuperscript{23} Assume a flat tax of 10\% and two taxpayers with incomes of $100,000 each. Each taxpayer would pay a tax of $10,000. If each were given an identical deduction of $1,000, then each would pay a tax of $9,900. No distinction between the two is created by the deduction. Across-the-board deductions would, however, effect slight changes in the amount of difference in the tax burden of taxpayers at different levels. Assume a $1,000 deduction and a flat 10\% tax. First, the deduction would effectively exempt all those with incomes under $1,000 from the tax. As to those with incomes above $1,000, the deduction would create a degressive tax, with effective rates which approach 10\% asymptotically as follows:
exercise.

3. Discretionary Economic Power

The 1967 Royal Canadian Commission had a slightly different

gross income | income net of deduction | tax | effective rates
---|---|---|---
$ 2,000 | $ 1,000 | $ 100 | 5%
10,000 | 9,000 | 900 | 9%
100,000 | 99,000 | 9,900 | 9.9%
1,000,000 | 999,000 | 99,900 | 9.9%

See W. Blum & H. Kalven, supra note 14, at 3-6, 90-95. Now assume a progressive tax structure with rates of 10% on the first $10,000 of income, 20% on next $10,000, and 30% on the remainder. A $1,000 deduction across-the-board would have the following effect:

gross income | income net of deduction | tax | effective rates
---|---|---|---
$ 2,000 | $ 1,000 | $ 100 | 5%
10,000 | 9,000 | 900 | 9%
15,000 | 14,000 | 1,800 | 12%
20,000 | 19,000 | 2,800 | 14%
100,000 | 99,000 | 26,700 | 26.7%
1,000,000 | 999,000 | 296,700 | 29.67%

Without the deduction the figures would be:

2,000 | 200 | 10%
10,000 | 1,000 | 10%
15,000 | 2,000 | 13.33%
20,000 | 3,000 | 15%
100,000 | 27,000 | 27%
1,000,000 | 297,000 | 29.7%

Thus, it can be seen that the deduction serves to flatten the progressivity in the low income levels, but less so as income increases. The effect of identical across-the-board deductions, then, is one which is more easily achieved by changing the rate structure. Such deductions do little to help differentiate one taxpayer from another. "It has often been pointed out that the elimination of an exclusion would serve no purpose if it is so equally distributed that the tax burden would be unaffected by the tidier system resulting from the change." Bittker, supra note 21, at 984. See also Stephan, Federal Income Taxation and Human Capital, 70 VA. L. REV. 1357, 1390 n. 76 (1984). See also, the comment of the Royal Canadian Commission:

We have not tried to exclude from personal income tax an absolute amount that purports to be the income necessary to maintain a minimum standard of living. The idea that income taxes should not reduce income below "subsistence" is laudable in its intention, but we believe, misconceived. Subsistence has no absolute meaning. It is the relative positions of individuals and families that are important.

3 Royal Canadian Commission, supra note 5, at 21 (emphasis added).
formulation. Its report stated:

In our judgment taxes should be allocated among tax units in proportion to their ability to pay. We believe this would be achieved when taxes were allocated in proportion to the discretionary economic power of tax units. This statement is only meaningful if the term “discretionary economic power” is defined. For this purpose we have found it useful to think of discretionary economic power as the product of the tax unit’s total economic power and the fraction of the total economic power available for the discretionary use of the unit. By “tax units” we mean families and unattached individuals. By “total economic power” we mean the power of a tax unit to command goods and services for personal use, whether the power is exercised or not. By the “fraction of the total economic power available for discretionary use”, we mean the proportion of the unit’s total economic power that does not have to be exercised to maintain the members of the unit. Maintenance is not synonymous with bare, physical subsistence. Rather, it denotes the provision of the services necessary to maintain the appropriate standard of living of the family or unattached individual relative to others.\(^4\)

Whether or not the Commission’s notion of subsistence is better than the clear income notion must be addressed later.\(^5\) The issue to be addressed now is whether or not the Commission’s formulation gives us any insight into the rationale for differentiating discretionary from nondiscretionary expenditures. It does not. Once again, all we have is the bare assertion that ability to pay demands this result, with no explanation whatsoever.

4. Consumption

Some have suggested that, rather than taxing income, we should tax consumption. As early as Nicholas Kaldor’s work, the notion has developed that only discretionary expenses should be treated as taxable consumption. Kaldor writes:

There remains the question of what kinds of expenditures ought to be specially exempted on the grounds that they arise out of misfortunes or unavoidable obligations of some kind and are not part of a person’s “voluntary” expenditure on which his standard of living depends. It is arguable that a great deal of an average person’s expenditure consists of items which in some way he is “forced to” incur as

\(^{24}\) 3 Royal Canadian Commission, supra note 5, at 5.
\(^{25}\) See infra notes 61-62 and accompanying text.
a result of some unfavorable occurrence or other. 26

Kaldor gives us no hint, however, why a consumption tax base might require such exemptions.

Others, while willing to stay with income as a tax base, have argued that we take the Haig-Simons definition of income more seriously. Simons defined income 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." 27 Some have argued that an item must fit either the first or the second part of the Haig-Simons definition, either the consumption part or the accumulation part, if it is to be considered income at all. Clearly, personal expenditures are not accumulation. Therefore, to be considered taxable income under the Haig-Simons definition, it must be shown that they are consumption. 28

Professor Bittker argues that neither personal casualty loss expenditures nor medical care expenditures are taxable consumption. As to casualty losses, Bittker suggests that to tax an expenditure to replace a residence destroyed by fire, "it is necessary to argue that what is consumed by fire should be treated as consumed by the taxpayer and brought into income as part of 'market value of rights exercised in consumption.'" 29 Bittker recognizes as an argument against the exclusion of casualty expenditures from taxable consumption, that "destruction by fire is one of the hazards of home ownership, 'voluntarily' assumed when the taxpayer chooses to buy a personal residence." 30 However, Bittker argues, "casualties undeniably reduce the taxpayer's net worth and should therefore presumptively reduce his income, if the Haig-Simons definition is to be the standard and it is debatable whether they are offset by the satisfaction implied by the term 'consumption.'" 31 As to medical expenditures, Bittker argues, "the cost of prolonged illness and major operations is not so readily characterized as a 'consumption expenditure,' despite the occasional chronic invalid who

27. H. SIMONS, PERSONAL INCOME TAXATION 50 (1938).
28. Bittker, Income Tax Deductions, supra note 4, at 193; Block, Personal Deductions Under the Bradley-Gephardt Fair Tax Act, 29 St. Louis U. L. J. 921, 957 (1985) (personal state and local taxes arguably "involuntary payments and, thus, are not real consumption to be included in income").
30. Id. at 197.
31. Id.
happily enjoys bad health.”\textsuperscript{32}

Bittker also makes the following comment, which he apparently regards as an argument against his position: “Of course, the taxpayer has some control over his medical expenses, both because preventive steps may help to reduce them and because when illness strikes, he can often choose between cheap and expensive medical care.”\textsuperscript{33} In rebuttal to this argument, Bittker suggests that business expenses are also within the control of the taxpayer, and yet business expenses are fully deductible. Bittker notes that there is a natural restraint on the amount of business expenses, that “the businessman necessarily seeks to maximize his disposable income by reducing his business outlays, while the taxpayer is under no such pressure when incurring medical expenses.”\textsuperscript{34} However, finally, Bittker counters his last argument, saying “the business outlays that I have analogized to medical expenses produced personal satisfactions.”\textsuperscript{35}

Apparently, for Bittker, not all consumption should be taxable consumption as described by the first part of the Haig-Simons definition. Two themes emerge from the above excerpts of his analysis. First, Bittker seems willing to accept the argument that, if casualty and medical care expenditures could be shown to be voluntary, then they would be taxable consumption. Accordingly, part of his notion that such expenditures are not taxable consumption must stem from his belief that they are not voluntary. Second, taxable consumption is apparently consumption that is gratifying, or furnishes satisfaction to the consumer.

Professor William Andrews starts essentially from the same point as Bittker. He notes: “The medical expenses deduction should be evaluated primarily by considering whether there are good reasons to exclude medical services generally from the category of taxable personal consumption.”\textsuperscript{36} He comments:

The purpose for which personal consumption is used in specifying a personal tax base is not simply to account for the distribution of the national product; it is rather to provide an index of relative material well-being on the basis of which to distribute tax burdens. . . . [D]ifferences in health affect relative material well-being. It would

\textsuperscript{32} Id. at 198.
\textsuperscript{33} Id.
\textsuperscript{34} Id at 199.
\textsuperscript{35} Id.
\textsuperscript{36} Andrews, supra note 5, at 335.
be impractical to try to include robust good health directly as an element of personal consumption for those who have it, but the difference between good and poor health can be partially reflected—or the failure to include the difference directly can be partially offset—by also excluding or allowing a deduction for the medical services that those in poorer health will generally need more of.\textsuperscript{37}

Essentially, Andrews suggests that relative material well-being would be a better tax base than either income or consumption.\textsuperscript{38} Accordingly, we use income as a tax base merely because it is the best workable approximation of relative material well-being. When necessary, we adjust the income tax base in order to approximate more closely the ideal. The medical expense deduction, as a surrogate for differentiating the well from the sick, is one such adjustment.

One might well ask whether happiness is not also a significant factor in relative material well-being.\textsuperscript{39} In fact, most would concede that happiness is even more significant than health. Andrews' logic suggests that those who spend money on maintaining their health must have started out less healthy than those who do not so spend their money. By similar logic, one could argue that those who spend money maintaining their happiness must have started out less happy than those who do not. Accordingly, those who go on expensive vacations, indulge in expensive evenings on the town, or purchase home entertainment devices such as television sets, stereo equipment, video games and the like, must have been fundamentally less happy than those who were not inspired to spend their money in this fashion. Therefore, all of these expenses should be deductible, on the grounds that people who incur these expenses were obviously relatively lower in material well-being than those who do not. Presumably, one who is content with a loaf of bread and a jug of wine is better off than one who needs money to buy happiness.

The foregoing analysis suggests that all personal expenditures should be deductible as surrogates for differences in the level of

\begin{itemize}
\item \textsuperscript{37} Id.
\item \textsuperscript{38} See U.S. Dep't of Health, Education, and Welfare, A Report on Measurement of the Quality of Life (1973) for an indication of how difficult it is to measure such things as relative material well-being, even when the measurements are for the society rather than the individual.
\item \textsuperscript{39} As Kelman points out, Andrews "gives no persuasive reason for the tax base to account for such psychic income derived from good health while ignoring all other psychic income." Kelman, supra note 4, at 860.
\end{itemize}
material well-being. Professor Andrews, however, does not go that far. He states that “what distinguishes medical expenses from other personal expenses at bottom is a sense that large differences in their magnitude between people in otherwise similar circumstances are apt to reflect differences in need rather than choices among gratifications.”\textsuperscript{40} Andrews later notes, apparently as a possible objection to the deductibility of medical expenses, that “particular medical expenses may reflect a considerable component of voluntary personal gratification.”\textsuperscript{41} Andrews responds to this objection by noting that taxation, like politics, is the art of the possible.

Apparently, both Bittker and Andrews consider the discretionary/nondiscretionary line and gratification to be the two significant factors in determining which sorts of personal consumption should be taxable consumption within the meaning of the Haig-Simons definition. Kelman’s critique of Andrews makes the connection to nondiscretionary expenses explicit when he notes: “A third argument which Professor Andrews never explicitly makes but which his reasoning leads one to make is: (3) the proper consumption tax base is ‘total discretionary consumption,’ consumption spending net of spending on ‘needs.’”\textsuperscript{42} Unfortunately, neither one suggests why these two factors should be significant. Two possibilities should be considered. First, perhaps there is an obvious reason why the consumption contemplated by the Haig-Simons definition had to be discretionary consumption. No such reason is obvious to me. Second, perhaps it is obvious that Haig-Simons consumption has to be gratifying to the consumer. If so, perhaps only discretionary consumption can be gratifying. It is not apparent why Haig-Simon’s consumption must be gratifying. However, even if that could be shown, there is no necessary connection between gratification and discretionary consumption. To support such a connection, one would have to prove that only discretionary expenditures gratify the consumer while nondiscretionary expenditures do not. Kleinwachter’s description of the Flugeladjutant who was forced to accompany the crown prince on hunting trips during the day and to the opera at night furnishes a ready example of nondiscretionary activity which was still gratifying, assuming that the Fluge-

\textsuperscript{40} Andrews, \textit{supra} note 5, at 336.
\textsuperscript{41} Id. at 337.
\textsuperscript{42} Kelman, \textit{supra} note 4, at 859.


 ladjutant enjoyed hunting and opera. 43 Frankfurt’s example of the happy addict, who would rush to readdict himself if he were ever cured, suggests another possibility. 44

 The possibility of nondiscretionary expenditures producing gratification refutes the argument for a necessary causal connection between discretionary activity and gratification. Therefore, neither Bittker’s and Andrews’ emphasis on gratification, nor their more general approach of analyzing personal expenditures to see whether or not they are taxable consumption, lead to any coherent rationale for the line between discretionary and nondiscretionary expenditures.

 5. The Business/Personal Distinction

 There is a sense in which business expenses can be viewed as nondiscretionary and personal expenses as discretionary. An inquiry into the basic thrust of the law to allow business deductions and to disallow personal deductions might shed some light on the distinction between discretionary and nondiscretionary expense.

 Why are business expenses deductible while personal expenses are not? Assume for this analysis that there are only two categories of expense, business and personal. There are no hybrids. Assume further that there is no inherent pleasure in incurring a business expense, and that there is nothing but pleasure in incurring a personal expense. Under these assumptions, a business expense would be only a means to an end. The only reason to incur a business expense would be to increase bottom line profits, which could then be used for pleasurable personal expenses. Therefore, no one would incur a business expense unless impelled to do so. A dollar of business expense that did not increase profits would create no pleasure, and would deplete funds which could otherwise have been used for pleasure. 45 Seen in this light, the nondiscretionary character of the pure business expense is apparent. Moreover, even when the assumption stipulating the existence of only pure business and pure personal expenses is relaxed, it is apparent that the business component of a mixed business/personal expense has a nondiscretionary flavor to it. The bias of our system in favor of business deduc-

 43. F. Kleinwachter, Das Einkommen und Sein Verteilung 6 (1896). The translation of the Introduction by H. McDowell is available in the Wake Forest University Law Library.

 44. Frankfurt, Freedom of the Will and the Concept of a Person, 68 J. of Phil. 5 (1971).

 45. Bittker, Income Tax Deductions, supra note 4, at 199.
tions and against personal deductions is a bias toward nondiscretionary expenses and against discretionary expenses.

Is there anything about the business/personal distinction that would explain the discretionary/nondiscretionary distinction? The first justification that comes to mind for the business/personal distinction is the fact that the deductibility of business expenses follows automatically from the selection of net income as the tax base, while the deductibility of personal expenses does not. This distinction, however, is not relevant to the discretionary/nondiscretionary distinction. A second justification for the business/personal distinction would be the fact, as shown above, that those who incur business expenses are restrained in so doing by a very significant nontax factor—the bottom line. There is no comparable restraining factor to those who incur personal expenses. The system, therefore, can better afford to allow the deduction of business expenses than personal expenses because business expenses are self-limiting, and personal expenses are not. This analysis suggests that revenue considerations might be a significant reason for the discretionary/nondiscretionary distinction. Indeed, they are. They will be considered in their own right in the next section.

B. NEW RATIONALES

No rationale for the importance of choice can be found in the tax literature. Accordingly, since a rationale does not exist in print, perhaps it needs to be invented. Three rationales come to mind: revenue considerations, consideration of pity, and considerations of moral blameworthiness. These will be discussed in turn.

1. Revenue

Although there are other reasons for taxation, revenue is clearly the primary one. Any theory or concept which seriously impaired the ability of a tax system to raise revenue would have to be rejected. It seems clear that the deductibility of discretionary personal expenditures would make it virtually impossible for the tax system to raise sufficient revenue.

Allowing a deduction for discretionary personal expenditures would be tantamount to allowing each taxpayer to determine how much tax he or she would pay, since any taxpayer could totally

avoid taxation merely by increasing discretionary personal expenditures. Given the government's revenue needs, making the yield of the federal taxation depend heavily on individual choice could not be countenanced. Consequently, the deduction of discretionary personal expenditures cannot be allowed. However, while revenue considerations explain why discretionary personal expenditures cannot be deductible, they offer no clue as to why nondiscretionary personal expenditures should be deductible, so other rationales must be considered.

2. Pity

Pity might be the ultimate rationale for deducting personal expenditures. On this rationale, personal expenditures would be deductible only if the incurring of these expenditures tended to generate a sense of pity. Since it is quite plausible to assert that we pity those who did not create their own misfortunes and that we do not pity those who did create their misfortunes, the line between discretionary and nondiscretionary personal expenditures would distinguish nondeductible and deductible expenditures.

It would be unfortunate, however, for tax treatment to turn on a criterion such as pity. Pity, as an emotion, cannot be statutorily defined. It can only be discussed in terms of the persons feeling this emotion, and as such it is felt differently in different people. Clearly, it would vary as a criterion in different times and places. As a statutory standard, it hardly lends itself to uniform administration, nor to the stability over time necessary to predict the tax consequences of future activity.

3. Moral Blameworthiness

Given the problems with pity as a standard, perhaps we should search elsewhere. Thomas Hobbes postulated a relationship between pity, self identity, and moral desert. He suggested that we pity those with whom we identify, and that we identify most with

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47. See Bittker, Income Tax Deductions, supra note 4, at 195.
48. Hardship is often mentioned in justifying personal deductions. H.R. Rep. No. 432, 98th Cong., 1st Sess. 279 (1983) ("extraordinary medical costs reflect an economic hardship"); M. Chirelstein, supra note 3, at 142 ("we recognize this loss in taxing capacity because it would be harsh not to."); J. Pechman, supra note 3, at 80 (supports vanishing exemptions because "the expenditures for children are not a hardship at these levels."); Pechman, Erosion of the Individual Income Tax, 10 Nat'L Tax J. 6 (1957) ("Some deductions for unusually large but essential personal expenditures may be necessary to prevent hardship.") [emphasis added].
those whom we consider to be morally deserving.⁴⁹ These relationships are captured in a common negative response to a proposed subject for pity: "He has only himself to blame."

Assume that the legislature deemed it appropriate to confer tax deductions only upon those who are morally deserving, and not on those who are morally blameworthy. Again, the line between discretionary and nondiscretionary expenditures would fit nicely. Clearly, those who did nothing to cause their need could not possibly be morally blameworthy.⁵⁰ Therefore, those whose expenditures were nondiscretionary should be granted deductions. However, although the discretionary/nondiscretionary line might be a helpful first step, it would not by itself create a system of deductions based upon moral blameworthiness. After nondiscretionary expenditures had been carved out, then all of the discretionary expenditures would have to be considered individually to determine which ones were morally blameworthy.

It is questionable whether our system makes such conscious and sweeping moral choices. It is also questionable whether it should. Currently, there is no difference in deductibility between the expense of going to the opera and going to a brothel. Both are nondeductible personal expenditures, even though some might find going to the opera to be praiseworthy and going to a brothel morally blameworthy. On the other hand, although most of the choices made by our tax laws are not moral choices, some are. How else can the tax breaks for a taxpayer who has children be justified,⁵¹ when another taxpayer who chose to spend his money on expensive recreational travel instead receives no comparable tax benefit?

To the extent that our tax laws make moral choices, one can argue for a moral rationale for the distinction between discretionary and nondiscretionary expenditures. I believe, however, that the tax laws would be far better if the moral choices were not made. Moral standards are at least as difficult to define as are standards based on pity. Even though it is unavoidable that the laws promulgated in a democracy will reflect the values of the majority, it is

⁴⁹. T. Hobbes, Elements of Law 9, 10 (Tonnies ed. 1889); T. Hobbes, Leviathan 126 (Macpherson ed. 1968).

⁵⁰. It should be noted, however, that some acts which some would consider to be coerced, and therefore nondiscretionary, might be considered differently when viewed from a moral perspective: "There seem to be some acts which a man cannot be compelled to do, and rather than do them he ought to submit to the most terrible death." Aristotle, Nicomachean Ethics, 119-120 (Rackham transl. 1926).

⁵¹. See I.R.C. § 151, and notes 81-87 infra and accompanying text.
especially important to resist this tendency when it comes to taxation. It is tyranny enough that citizens in their other relationships with the state are rewarded and punished depending upon how their values relate to those of the majority.52 When it comes to the allocation of the costs of government among the citizens, individuals should not be asked to bear a greater or lesser burden depending upon their morals or values. In the words of the manager of the original 1913 tax bill: "The object of this bill is to tax a man's net income; that is to say, what he has at the end of the year after deducting from his receipts his expenditures or losses. It is not to reform men's moral characters."53 Since the tax system ought to be morally neutral, a rationale based upon morality ought to be particularly suspect as a justification for allocating personal deductions.

Although none of the proposed rationales for drawing the line is fully satisfying, it would seem that revenue and pity make the most sense. Yet all of the proposed rationales have their merits, and should be considered in light of the search for a definition of nondiscretionary expenditures.

III. POSSIBLE DEFINITIONS

A. DEFINITIONS PER SE

In defining "discretionary," it must be remembered that it is in fact a concept, rather than a word, which is being defined. Although the words "discretionary" and "nondiscretionary" have been used in this discussion, they are not the only appropriate words. In fact, "voluntary" and "involuntary" have been used more often in the literature.54 Since more than one word can be used to describe the concept, care must be taken not to focus too narrowly on the definition of any particular word. Dictionary definitions of

53. 50 Cong. Rec. (Part 4) 3849 (1913).
54. I am now convinced that "voluntary" and "involuntary" are far from the best terms to use. J.L. Austin notes: "For example, take 'voluntary' and 'involuntary': we may join the army or make a gift voluntarily, we may hiccup or make a small gesture involuntarily." J. Austin, Philosophical Papers 139 (1961). Austin makes it clear that "voluntary" and "involuntary" are not opposites; in fact, they are hardly related. Therefore, I have used the terms "discretionary" and "nondiscretionary." See generally, F. Oppenheim, Dimensions of Freedom (1961) and materials cited therein for a similar distinction between power and freedom.
these terms, therefore, are of limited use.\textsuperscript{55}

1. The Narrowest Definition

Perhaps the simplest definition would be that nondiscretionary activities are those absolutely necessary to prevent death. Such a definition would allow deductions for the expenses of the following commodities and activities: 1) the amount of food necessary to prevent starvation, 2) the amount of shelter and clothing necessary to prevent death from exposure, and 3) emergency medicine to cure life-threatening diseases. This definition has the attraction of simplicity. There would be very little variation in the deductions allowed to different people. The food expenses would vary only according to body size and rates of metabolism. The clothing and shelter would vary mostly along the lines of differential climates.\textsuperscript{56} There would be some problems of interpretation, such as whether or not expenses of preventive medicine would be allowed, but these problems would be relatively minor. Restricting personal deductions in this manner, however, is intuitively wrong. Anyone with a sense of the ability to pay principle would look askance, for example, at a system which allowed the same deductions to a healthy person as to a deaf, dumb, and blind person, merely because both incurred the same expenses to maintain bare physical survival. Accordingly, perhaps a broader definition should be found.

2. Broader Definitions and the Problems of Surveys

Going beyond the narrowest definition of "nondiscretionary," the concept becomes increasingly subjective and culturally based. For example, John Stuart Mill's slightly broader notion that the amount of income exempt from taxation should not exceed "the amount of income needful for life, health, and immunity from bodily pain"\textsuperscript{57} introduces two new concepts, health and freedom from

\textsuperscript{55} I have also found philosophical definitions to be of limited use. ARISTOTLE, NICOMACHEAN ETHICS III (Rackham transl. 1926); Nozick, Coercion in PHILOSOPHY, SCIENCE & METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440 (S. Morgenbesser ed. 1969); Coercion, 14 NOMOS (Yearbook American Society for Political and Legal Philosophy 1972). I have also found philosophical discussion of the concept of free will to be irrelevant. Determinists would hold that the line which I seek to draw does not exist. Free will advocates hold that the line exists, but give no guidance as to how to draw it.


\textsuperscript{57} J.S. MILL, supra note 19.
pain, which are defined differently by different people, and perhaps even differently by the same person at different times.

Introducing the concept of decency has a similar effect. Jeremy Bentham proposed that an amount of income ought to be exempt from taxation "which, in the estimation of the world, would enable a man to maintain himself with decency in the station in which he has been placed by the occupation from which his income is derived." Similarly, Adam Smith, in discussing which commodities ought to be excluded from a tax on commodities, suggested that we exclude "not only those things which nature, but those things which established rules of decency have rendered necessary to the lowest rank of people." In order to apply the concept of decency, one would have to survey the populace as to what it means. Arguably, that survey would have to be repeated at least once a generation. It should also be noted that Bentham's definition contemplates that different class and occupational groups will have different requirements. This concept is supported by Cassel, who, in his defense of progressive taxation, argued "it is certain that the necessities of life of the higher classes of society are on the average considerably greater than those of the lower classes. . . . It is simply impossible for a professional man to live as cheaply as a common miner." The Royal Canadian Commission on Taxation saw nondiscretionary expenses as a function not of occupational group or class, but of income level. Remember its comment that "most nondiscretionary expenses increase, although not proportionately, as income rises." This comment, added to the earlier statement: "what constitutes a 'necessity' and what constitutes a 'luxury' is essentially subjective. The wealthy man's necessities are the poor man's luxuries; with a rising income what was once a luxury becomes a necessity," makes the Commission's position clear.

Any notion that nondiscretionary spending is a function of another variable, be it occupational group, income level, or something else, would have to be proved before it could be the basis for law.

58. Bentham, supra note 19.
59. A. Smith, The Wealth of Nations, Bk V, ch. II, art. 4, 822 (1776). Bentham's and Smith's formulations are similar to clear income, which can be defined in terms of "money deemed sufficient to maintain himself . . . according to some . . . conventional standard." See also supra text accompanying note 17.
61. 3 Royal Canadian Commission supra note 5, at 9.
62. 1 Royal Canadian Commission supra note 5, at 20.
First, the relationship between spending and the other variable would have to be proved, presumably by survey. Second, it would have to be shown that that relationship was a product of compulsion, not desire or coincidence. Finally, the precise nature of the relationship would have to be ascertained, and decisions would have to be made as to how to codify this relationship in a scheme of deductions.

As to the problem of proof, little is proved by surveys of spending behavior. If most people do not spend money in a certain way, then it would be silly to argue that that expenditure is non-discretionary; demonstrably most people get along without such expenditures. But the converse is not true—if almost all people spend money in a certain way, they could be doing so either because they have to, or because they like to. Of course, as more and more people spend their money in the same way, it becomes more and more likely that there is social pressure, at least the pressure to conform, to spend money in that way. Should such social pressure alone create a deductible nondiscretionary expenditure? Assume that a certain high income group spends more on shelter than its lower income counterpart does. Assume further that each member of that high income group states in all candor that he or she feels compelled to spend money at that level rather than at a lower level. Clearly, a high income family does not need a more expensive house for sheer physical survival. The penalty for not living up to one's means would not be a physical penalty, but would be some form of social ostracism. Assuming that such social coercion exists, can it justify larger deduction for housing expenses for the high income family than for the low income family?

63. Whyte's description of the penalties for nonconformity in a suburban neighborhood is a vivid portrayal of social coercion:

Reprisal is inevitable. The sanctions are not obvious, indeed, people are often unconscious of wielding them but the look in the eye, the absence of a smile, the inflection of a hello, can be exquisite punishment, and they have brought more than one to a nervous breakdown. And the more social the block, the rougher it is on those who don't fit in.

W.H. Whyte, The Organization Man 359 (1956).

64. Kaldor apparently argued against such deductions. He commented:

Some people would argue that all expenditure incurred as a result of having to "keep up a social position" or to maintain one's social responsibilities is of an unavoidable or "necessitous" character. But the assumption of social responsibilities is essentially a voluntary act; nor could the fact that a person has acquired, or was born into, a certain "social position" be treated as an unfavourable event, like being struck down in a street accident.

65.
Even if it could be shown that nondiscretionary spending is a function of income level, and that the kind of compulsion involved makes it appropriate to grant a deduction, how can this relationship be applied in a tax statute? First, a more detailed sense of the function is required. The Royal Canadian Commission made an estimate of what the function would look like, but it did not explain how the estimate was made. Bittker points out that one could determine the minimum that those in a given income group spent on a given category of personal expenditure, or the average amount spent, or the average amount spent by the most parsimonious half of the group. These amounts would then function as ceilings for the allowable personal deduction for a taxpayer in that group. Using any of these methods rewards those whose patterns of spending approximate the average, and penalizes those whose lifestyles are different. Moreover, it encourages those who spend less than the

<table>
<thead>
<tr>
<th>Income Bracket</th>
<th>Assumed Fraction of Income in the Bracket Available Discretionary Use</th>
<th>Discretionary Income From Bottom to Top of Bracket</th>
<th>Cumulative Total to for Top of Bracket</th>
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<td>0 - 195</td>
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<td>195 - 390</td>
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<td>390 - 781</td>
<td>0.2</td>
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<tr>
<td>781 - 1,562</td>
<td>0.3</td>
<td>234</td>
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<td>1,562 - 3,125</td>
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<td>3,125 - 6,250</td>
<td>0.5</td>
<td>1,562</td>
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<td>6,250 - 12,500</td>
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<td>12,500 - 25,000</td>
<td>0.7</td>
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<td>50,000 - 100,000</td>
<td>0.9</td>
<td>45,000</td>
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<td>100,000 - 200,000</td>
<td>1.0</td>
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3 Royal Canadian Commission 11 (columns 4-7 omitted from table).

stated amount to lie—to claim the stated amount anyway.

None of these concerns even gets to the problems of those experiencing a change in income level. As Blum points out,\textsuperscript{67} those who experience a rise in income level will continue to spend at their lower income level patterns for a while until they are accustomed to their new affluence. Should the system encourage such people fraudulently to overstate their expenditures to the levels which their new income level warrants, even before their actual expenditures catch up? Also, consider those who experience a fall in income level. Normally, such persons continue to spend at a higher level than their income warrants, at least until some readjustments can be made. For example, it takes some time after a fall in income for a family to sell a house which has become too expensive, and move into something more modest. Should such a taxpayer be limited to the expenditure patterns warranted by the lower income level, even though he is actually spending considerably more, and has very little choice about doing so?

Two related measurements, the poverty line and elasticity of demand, can furnish further insights into the problems of a survey based definition. Moreover, either one could function itself as a definition.

a. Elasticity of Demand

Demand for a good is inelastic if a change in the price effects no change in the quantity demanded, that is, if the consumer will continue to buy the good no matter what the price.\textsuperscript{68} Arguably, consumers would not behave this way unless they absolutely must have this good. Therefore, if demand for an item of personal expenditure is totally inelastic, then that expenditure is totally non-discretionary. The measure of elasticity, however, changes depending upon the broadness of the category of the good measured. That is, elasticity may be very low for the category of food, but considerably higher for the category of fried liver. Perhaps this simply means that the category for which expenditures should be considered nondiscretionary is food, not fried liver. The fact that fried


liver is a subcategory of food should not matter, and should not make the expenditures for the purchase of fried liver any less deductible. Yet, because it would make caviar as deductible as bread, this analysis becomes suspect. Is it enough to say that the purchases of bread and caviar have a better claim to deductibility than the purchase of a yacht?

In addition, elasticity changes considerably depending upon the length of time over which it is measured. For example, when the price of gasoline goes up, the immediate reaction suggests that demand for gasoline is inelastic. In the short run, people will purchase the same amount of gasoline at the new price. However, over time, people tend to react to the higher prices by purchasing more fuel efficient automobiles, using other modes of transportation, and the like. Therefore, if consumer behavior is examined over a longer period, the elasticity of demand for gasoline becomes higher. Perhaps only those commodities which retain their zero elasticity over a certain period of time should be considered as nondiscretionary purchases. Note, however, what this formulation does to the medical emergency. A person undergoing a heart attack may have a dire need for a specific medicine. If his need for it dwindles over time, does the fact that he does not need it later say anything about how badly he needed it during the heart attack?

There is also the problem of defining population groups. The population group cannot be fixed as the entire universe of consumers for all computations of elasticity of demand. Again, consider the heart attack victim. His medicine may have zero elasticity for him, but nothing close to a zero elasticity when considered in the context of all consumers. If, however, zero elasticity to a group of one is sufficient, then the survey has no utility as a labor-saving device to a legislature trying to define deductible categories.

A look at elasticity of demand, then, shows that any survey-based definition of nondiscretionary expenditures will turn on the broadness of the expenditure categories, and the broadness of the categories of the surveyed populations.

b. The Poverty Line

The poverty line, as a measure of minimum subsistence, is clearly relevant to the definition of nondiscretionary expenditures. Since it is based upon survey evidence, it can also provide

69. The 1984 Treasury proposal comments:
a different perspective on the problems of surveys in this area. The original poverty line computations were made in the 1940s. The basic method was to construct a market basket of goods and services necessary to a minimal, poverty existence, and to determine a cost for that market basket for a year. That cost constituted the poverty line. One category of commodities which obviously had to be in the market basket was food. The United States Department of Agriculture annually promulgates menus for food consumption at four different levels. The U.S.D.A. "economy plan" is the lowest priced of these menus, although it still satisfies minimal nutritional requirements. The cost estimated by the U.S.D.A. for its economy plan food budget for a year was used for the food component of the poverty line market basket. Statistical relationships were used to determine the rest of the poverty line market basket. Contemporary survey evidence of low income families revealed that they generally incurred total expenditures of three times the amount of their food expenditures. Therefore, the poverty line was computed simply by tripling the U.S.D.A. economy plan food budget for the relevant family size and region.

To the extent of the two-thirds not attributable to food expenditures, the poverty line is based upon survey evidence of the consumer behavior of the lowest income group, with no inquiries as to the nature of the expenditures. The fact that such a significant governmental index has been based for so many years on surveys of consumer behavior suggests that such survey-based measures can work reasonably well. Perhaps there should be no reluctance to use them for tax purposes. A simple survey of what various income groups spend on certain defined categories, such as food, clothing, shelter, medical care, could be done once a generation and the

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It is commonly agreed that households with incomes below the poverty level should pay little or no tax. Otherwise, they will be paying taxes with income that is needed to maintain a minimal standard of living. In a real sense, families with poverty level incomes do not have taxpaying ability. Taxpaying capacity exists only once income exceeds the poverty level.


71. See U.S. DEP’T OF HEALTH, EDUCATION AND WELFARE, supra note 70, for the categories of expenditures presumed to be in the poverty line market basket.
survey results used to create a scheme of deduction ceilings, or perhaps fixed zero bracket amounts, for the income levels.

Should strong survey evidence negate normative concerns? If 90 percent of a given income group purchases a rock music album, does that purchase become nondiscretionary? Does the strength of the majority prohibit the legislature from calling the purchase frivolous, hence nondeductible? These questions become significant only at the higher income levels. Families whose incomes are below the poverty line start out with insufficient resources for minimum subsistence. Their budget process is one of deciding which insufficiency is the least palatable. As to families whose incomes are just at the minimum subsistence level, the budget process is similarly constrained. Any expenditure not necessary for minimum subsistence would reduce the amounts available for basic living expenses to below minimally acceptable levels. By contrast, families with higher incomes can afford both minimum subsistence expenditures and other expenditures. For such families, the cost of reasonable discretionary spending is merely a reduction in the amount available for other discretionary spending or for savings. These comments are not meant to suggest that families with incomes at or below the poverty line never spend their money on items which some would consider less than absolutely necessary, or perhaps even frivolous.\textsuperscript{72} However, in light of the significant consequences each expenditure made by a low income family has on the resources available for other expenditures, it must be assumed that each expenditure is considered very seriously. At this level of income the question of the frivolity or inappropriateness of the expenditure is not very compelling.

The poverty line, then, might be cited as a success story for a survey-based measurement. However, the welfare considerations used to construct the poverty line are significantly different from the tax policy considerations that should be used to construct a scheme of personal deductions.\textsuperscript{73} Moreover, the poverty line's mea-

\textsuperscript{72} Alfred Marshall's definition of necessaries also recognizes this point:
In addition, perhaps, some consumption of alcohol and tobacco, and some indulgence in fashionable dress are in many places so habitual, that they may be said to be conventionally necessary, since in order to obtain them the average man and woman will sacrifice some things which are necessary for efficiency.

\textsuperscript{73} In U.S. Dep't of Health, Education and Welfare, supra note 70, at 56 it is argued that I.R.S. income data is not helpful to making poverty determinations. It is submitted that the reverse relationship is equally unhelpful. See also, Blum, Revisiting the Uneasy Case for Progressive Taxation, 60 Taxes 16, 20 (1982).
measurement methods are most defensible when applied to low income groups. If nondiscretionary expenditures were defined as only those which the lowest income groups could afford, then this method could be supported. If on the other hand it were contemplated that nondiscretionary expenditures could rise with income, so that higher income consumers had to be surveyed, then the arguable success of the poverty line measurements would be less relevant.

A survey-based definition could create a workable statute. If some percentage, say 90 percent, of a given population group, incurred a certain category of expenditure, then that category could be termed a deductible, nondiscretionary expenditure for that group, perhaps with the deduction not to exceed the average expenditure shown by the survey. There is a danger that such survey definitions could be distorted by inappropriate groupings of populations and expenditures, as experience with elasticity of demand shows. Moreover, the analysis of the poverty line suggests that such surveys provide relative certainty only for the lowest income groups and that as income levels rise, normative questions as to the appropriateness of expenditure patterns remain unanswered.

B. DEFINITIONAL SUB- ISSUES

The discussion of sub-issues will cover point of view, degree of choice, and timing and causation. Then, the question of the expenses of raising children will be considered, as a case that creates a variety of definitional issues.

1. Point of View

Consider the taxpayer who claims that an expenditure was nondiscretionary because God made him incur it. What is the appropriate vantage point for determining the presence or absence of choice? * Should the tax law adopt the taxpayer's point of view, or

74. See generally, Blum, Motive, Intent, and Purpose in Federal Income Taxation, 34 U. Chi. L. Rev. 485 (1967). Nozick also considers point of view to be significant in defining coercion. He poses the following hypothetical:

P doesn't speak English, but has picked up the sentence "your money or your life" from a movie, though he does not know what it means. To be friendly P utters this one sentence to Q who is sitting next to him in a bar (perhaps while showing Q his unusual knife for Q to admire). Q hands over his money.

When Nozick says that Q was not coerced, he obviously is using an outsider's point of view, not Q's. Nozick, Coercion in PHILOSOPHY, SCIENCE AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440, 443 (S. Morgenbesser ed. 1969). See also, Kessler v. Comm'r, 87 T.C. 1285
should it adopt a reasonable and prudent man standard? Should the choice be different depending upon whether God told the taxpayer to set fire to his money, or give all of his money to X, or send his children to an expensive parochial school?

2. Degree of Choice

The questions posed above relate to whether the taxpayer's point of view is acceptable in determining whether or not coercion existed at all. The point of view is also crucial in determining whether the coercion that admittedly existed was sufficient to negate personal choice. What if, for example, the taxpayer claims that he was forced to arrange for a professional landscape maintenance program, for fear of the disapproval of his neighbors? There is undeniably coercion, but is there enough to support a deduction?

What if the taxpayer lived in an inner city neighborhood, and had justifiable fears that his children would be beaten up if they attended public school? Arguably, the taxpayer has been coerced into paying for private school tuition. Should the tuition therefore be deductible? In each of these examples, the consequences of not spending the money are not catastrophic, but they are negative. How bad must the alternative be before the element of choice disappears?

3. Timing and Causation

The timing element can also be crucial. At least since Aristotle, it has been recognized that a choice can be made today which

(1986) (expenses of trip to Puerto Rico held nondeductible, despite taxpayer's assertion that he believed in the Sun God, and was required to journey to the tropics in order to worship.).

75. See N. Kaldor, supra note 5, at 210, n. 1.

76. At the very least, what is bad about the alternative must be the infliction of a penalty, rather than the withholding of a reward, if the chosen behavior is to be nondiscretionary. In Nozick's terms, the behavior must be in response to a threat, not an offer, if it is to be nondiscretionary. Nozick defined "threat" and "offer" as follows:

If P intentionally changes the consequences of two actions A1 and A2 available to Q so as to lessen the desirability of the consequences of A1, and so as to increase the desirability of the consequences of A2, and part of P's reason for acting as he does is to so lessen and increase the desirabilities of the respective consequences then: (a) This resultant change predominantly involves a threat to Q if he does A1, if Q prefers doing the old A1 (without the worsened consequences) to doing the new A2 (with improved consequences). (b) This resultant change predominantly involves an offer to Q to do A2 if Q prefers doing the new A2 (with the improved consequences) to the old A1 (without the worsened consequences).
forecloses further choices tomorrow. For example, a choice to experiment with drugs today could lead to a future addiction. Similarly, a choice to smoke cigarettes today could lead to lung cancer in later life. The issue raised is the relevant time frame for determining whether or not an expenditure is nondiscretionary. With regard to lung cancer, if only the period starting from the diagnosis of the disease is considered, then the medical expenses would appear to be totally nondiscretionary. If, however, the relevant time frame begins with the lighting of the first cigarette, then the expenses of the lung cancer are merely the result of that prior choice. Should the current, nondiscretionary medical expense be tainted by the prior discretionary choice to start smoking?

Looking back in time can have enormous ramifications. For example, should all of the expenses of raising children be nondeductible because they are merely the consequences of a prior decision to have the children in the first place? Should a deduction be denied for a casualty loss of a nonessential asset, since the loss would not have been incurred but for the prior choice to acquire the asset? Should the higher costs of living in New York City be nondeductible if the taxpayer chooses to live there? Moreover, if the taxpayer’s occupation makes it necessary to live in New York City, should the choice of occupation serve to deny the deductions?

Looking back in time raises again all of the issues that have arisen in the common law of torts. For example, what if the taxpayer did not know when he started smoking cigarettes that his habit was an unhealthy one? Surely, the taxpayer cannot be deemed to have chosen to contract lung cancer if he did not make the choice consciously. What if, however, the taxpayer did not know that cigarette smoking was unhealthy, but should have known? Should negligence be allowed to convert an unconscious

Nozick, supra note 74. Finally, for a criminal law perspective on the problem, see Morris, Ake Dah, 52 U. Chi. L. Rev. 553 (1985). For Kaldor’s argument that such an expenditure should not be deductible, see N. Kaldor, supra note 5, at 210, n. 1.

77. Aristotle, supra note 55.

78. See Kelman, supra note 4, at 868-69; Fitzgerald, Voluntary and Involuntary Acts in Oxford Essays in Jurisprudence 1, 20 (A. Guest ed. 1961). Similarly, Bittker suggests, but rejects, the proposition that alimony should be nondeductible because it stemmed from a prior, voluntary decision to get married. Bittker, Income Tax Deductions, supra note 4, at 211. As to children, see McIntyre, Fairness to Family Members Under Current Tax Reform Proposals, 4 Am. J. Tax Pol’y 155 (1985).

79. See Newman, supra note 11, at 962.
choice into a conscious choice?80 Finally, assume that the taxpayer did know that cigarette smoking would increase his chances of lung cancer by 10 percent. Should the taxpayer be allowed to deduct all of his resulting medical expenses? None of his medical expenses? Ninety percent of medical expenses? The courts have done a good job with these issues in tort cases. However, court backlogs notwithstanding, there are relatively few tort cases. Does it really make sense for the tax system, with its enormous volume of returns every year, to get embroiled in these issues?

4. Children

Imagine two married couples with equal aggregate taxable incomes. One couple has two children, and the other couple owns an expensive yacht. The dollar amount of the expenses associated with the children is identical to that of the expenses associated with the yacht. Why should one couple’s hobby be deductible while the other couple’s hobby is not?81 The discretionary character of

80. This concept has a long pedigree. See ARISTOTLE, supra note 55, at 147. See also, Newman, supra note 11, at 951-954 (1983).

81. Many have accepted uncritically the notion that the tax burden should be adjusted for family size. WHITE HOUSE WORKING GROUP ON THE FAMILY, THE FAMILY: PRESERVING AMERICA’S FUTURE 43-45 (1986); Brannon, How to Reconcile Democratic and Republican Differences Over the Personal Deduction, 30 TAX NOTES 265 (1986); Robert Nisbet quotes Bertrand de Jouvenel with approval, “it is quite incomprehensible that a breeder of dogs for the race track should be allowed his costs, depreciation etc. while the father of the family is not.” Nisbet, Beseiged by the State, 268 HARPER’S 49, 52 (June 1984); see also REPORT OF THE ROYAL COMMISSION ON TAXATION 55 (1920); N. KALDOR, supra note 5, at 206-209; J. MEADE, THE STRUCTURE AND REFORM OF DIRECT TAXATION 14-15 (1978); MUSGRAVE, IN DEFENSE OF AN INCOME CONCEPT, 80 HARV. L. REV. 44 (1968); A. Pigou, Report of the Royal Commission, in ESSAYS IN APPLIED ECONOMICS 126, 135 (1924); Turnier, Evaluating Personal Deductions, supra note 4, at 280; Comment: Tax Treatment of the Family, The Canadian Royal Commission on Taxation and the Internal Revenue Code 117 U. PA. L. REV. 98, 126 (1968). See generally House Select Comm. on Children, Youth and Families, 99th Cong., 1st Sess., Tax Policy: How Do Families Fare? (Comm. Print 1985); L. Seltzer, supra note 3, at 1314; H. SIMONS PERSONAL INCOME TAXATION 140 (1938). Other commentators agree that having children is a form of voluntary consumption. Bittker, Federal Income Taxation and the Family, supra note 5, at 1445-49; Brannon & Morris, The Tax Allowance for Dependents, 26 NAT’L. TAX J. 599, 602 (1973); Klein, Child Care Deduction in the Federal Income Tax, 14 B.C. IND. & COMM. L. REV. 917, 941 (1973). Some, including those who view having children as consumption, argue for a vanishing exemption, so that low income families with children receive tax relief while high income families do not. 3 ROYAL CANADIAN COMMISSION, supra note 5, at 17; R. Goode, supra note 4, at 219-29; H. Groves, supra note 17, at 24; Bittker, A “Comprehensive Tax Base,” supra note 21, at 940-41. One commentator argues that expenditures for the basic necessities of one’s children ought to be deductible but the indulgence of one’s children ought not. Coven, supra note 4, at 1553. McIntyre and Oldman recognize the nature of having children as consumption, but hold that the issue would become moot if their benefit concept were adopted. McIntyre & Oldman, Taxation of
these activities, however, must be analyzed at different time frames. The choices involved are much more apparent before the acquisition of the child or yacht in question than they are after.

Assume, in light of current technology and subject to later qualification, that the decision to conceive a child is just as voluntary as the decision to acquire a yacht. However, once the child is born or the yacht is acquired, there appears to be much less choice about the consequent expenses. The law obligates parents to support their children. Similarly, common sense obligates a yacht owner to do what is necessary to prevent such an expensive asset from deteriorating. However, the owner of the yacht has an option which is not practically available to the parent of the child: he can get rid of it. With this option in place, the expenses of maintaining the yacht become much more discretionary than those of supporting the child. Accordingly, whether or not the activities of child rearing and yachting are seen as equally discretionary depends somewhat upon whether they are viewed from inception, or from some later point.

Whether having and raising children is a discretionary activity needs to be refined further. The comparison which served as the starting point did not take income level into account. In fact, the comparison of a high income couple with children versus a high income couple without children is quite different from the comparison of a poverty level couple with children versus a poverty level couple without. First, although birth control technology exists, access to that technology is by no means equal at the various income levels. It remains true that high income people are more aware of birth control technology than are their low income counterparts.\(^\text{82}\)

\[^{82}\text{the Family in a Comprehensive and Simplified Income Tax, 90 Harv. L. Rev. 1573, 1602-607 (1977).}\]

Professor O'Kelley argues that children are "forced consumption," hence their expenses are nondiscretionary. He argues that having children is no more voluntary than getting sick (one chooses to live in a climate in which the sickness was likely) or having an automobile accident (one chooses to drive a car, thus placing one's self at risk) or accepting the meals and lodging described in section 119. I argue that the degree of choice in having children is much greater than that involved in getting sick or having an auto accident, so much greater that the analogy fails. I argue further that the distinction between personal and business expenses is so crucial to the tax law that section 119 items, which are business expenses, cannot be analogized to the profoundly personal expenses of having children. See O'Kelley, The Parenting Tax Penalty: A Framework for Income Tax Reform, 64 Ok. L. Rev. 385-87 (1986).

\(^{82}\text{See U.S. Dep't of Health and Human Services, Nat'l Center for Health Statistics, Use of Services for Family Planning and Infertility, Table 3 (1981); U.S. Dep't of Health and Human Services, Nat'l Center for Health Statistics, Trends in Contra-
Therefore, it is not yet true that the decision to have children is totally within the control of low income couples.

Second, the low income comparison has a welfare dimension which does not exist with the high income comparison. When the income is sufficiently high, the financial aspect of a couple's decision to have a child, or an additional child, is one which affects their rate of saving, or their luxury purchases, and nothing more. In contrast, when the income is sufficiently low, the decision to have a child, or another child, can take a couple who were barely capable of maintaining themselves at a minimum subsistence level and make them incapable of sustaining the now larger family at that level. Arguably, couples who, in that sense, cannot afford to have children should be encouraged not to. However, once they have already had that child, should the government refuse to increase welfare payments because the couple has created financial need by personal choice? This question is the welfare dimension of the problem, and the answer of our society has clearly been no.\textsuperscript{83}

The reason that welfare payments increase with family size, even though the larger family was caused by the personal choice of the parents, lies in the needs of the new child. If government has any justification, it is in the protection of its citizens. The yacht is not a citizen, but the new baby is. This simple fact brings out another dimension to the problem. Normally, when determining whether or not to grant a deduction, the situation of the taxpayer who incurred the expenditure is examined. The question is normally whether or not that individual had any choice about that expenditure. Here, however, whether or not the spender had any choice, the object of the expenditure must also be considered. Obviously, the child did not have any choice about being born, nor does it have any choice about its current need to be supported. Denying the deduction to the parent on the grounds that the parent chose to have the child will also penalize the child, who had absolutely no choice in the matter. This dimension exists at all income levels.\textsuperscript{84}

\textsuperscript{83} But see, Dandridge v. Williams, 397 U.S. 471 (1970).

\textsuperscript{84} This argument is analogous to one which has long been made by the anti-abortion movement—that arguments about the mother's choice must be tempered in light of the total lack of choice of the fetus. See generally A. Okun, Equality and Efficiency: The Big
If, arguendo, some of the expenses of raising children should be deductible, there remain important questions as to how much. The manner in which children are raised is not totally within the control of the parents, both for structural and sociological reasons.

First, for structural reasons, it is often practically impossible for children to be raised at a standard of living different from that of the parents. It is not conceivable for the parents to live in an expensive suburban house, while their minor children are brought up in a cheap inner city tenement, or for the parents to eat a rich, expensive diet while the children eat a meager, cheap diet.\textsuperscript{85} Second, there are sociological problems. Many of us, when considering the acquisition of a second automobile, might consider owning one expensive automobile and one cheap one. In deciding to have a second child, however, it is inconceivable that a couple would decide that the first child would be given a college education while the second child would be supported only through high school.\textsuperscript{86} For these reasons, a compelling argument can be made that the relatively higher expenditures per child incurred by higher income families are not a matter of choice. Therefore, if any deductions are allowed for the expenses of child rearing, those deductions should arguably increase as income rises.

Another dimension must also be considered. Having children is clearly not just another hobby. Many see a religious significance in having children which is not apparent in owning a yacht. More would argue that having children has a moral significance which is lacking in mere hobbies. Whether or not tax deductions should hinge on such moral significance is, of course, questionable. All would agree that the state has a vital interest in its population level. Whether or not it is appropriate for government to influence behavior in this area, beyond making birth control information available and maintaining health and nutrition standards, is debatable. Moreover, whether the tax laws are an appropriate device for governmental action in this area is debatable, and beyond the


\textsuperscript{86} Okun, \textit{supra} note 84, at 238. For a satirical look at this mode of economic analysis, see Blinder, \textit{The Economics of Brushing Teeth}. 82 \textit{J. Pol. Econ.} 887 (1974).
scope of this Article. If these questions are answered in the affirmative, then tax incentives can be justified for population control purposes. These arguments, however, have nothing to do with the discretionary character of the activity.

C. THE RELATIONSHIP OF RATIONALES TO DEFINITIONS

As noted earlier, sometimes a knowledge of the rationale for a definition will help to choose the definition, or at least to resolve some definitional sub-issues. Some of the relationships between rationales and definitions should be noted. Some of the concepts discussed as possible rationales contain their own definitions. For example, "clear income" defines nondiscretionary expenses in terms that approach the narrowest possible definition. "Discretionary economic power" defines "maintenance" in a way that accepts survey evidence, and accepts the notion that rich people have more nondiscretionary expenses than poor people do.

One might think that the rationale of revenue would always require the smallest dollar amount of deductions. It must be remembered, however, that the revenue consideration here is not necessarily to maximize revenue, but to prevent its elimination. Since the main thrust of this consideration is to prevent the taxpayer from incurring personal expenditures for purely tax avoidance reasons, it would appear that all timing and negligence questions would be irrelevant. For example, it is hard to imagine that a taxpayer would smoke cigarettes for 25 years just so that he could take a larger medical expense deduction later on.

What if pity were the rationale? The crucial item to remember is that we do not pity everyone. No matter how nondiscretionary an expenditure might be for a person with a certain condition, if everyone suffered from the condition, the expenditure would not engender a sense of pity. Therefore, only extraordinary nondiscretionary expenditures would be deductible. Moreover, we tend not to pity wealthy people. Very likely, the amount expended on a deductible category would have to exceed some threshold of income before it was deductible, thus making it harder for the wealthy to

obtain deductions.\footnote{Senator Packwood's proposal that certain itemized deductions offset only the middle bracket of taxable income, not the upper bracket, would have had a similar effect. \textit{Staff of Joint Committee on Taxation, Tax Reform Proposals in Connection with Committee on Finance Markup} 2-3 (Jt. Comm. Print JC 5-8-86 Mar. 18, 1986).}

IV. Constructing a Workable Scheme

If administrative problems could be ignored, then I would argue for a scheme of deductions for nondiscretionary personal expenses based upon the rationale of pity. All above average personal expenses that were, in the eyes of the taxpayer, nondiscretionary would be deductible. Questions of degree would be resolved by asking the taxpayer if he felt that he had no choice about incurring the expense, for whatever reason. Such questions, if answered honestly, would allow a deduction to the taxpayer who really felt coerced to spend an above average amount on clothes, parties, or furniture in order to keep up with the neighbors, while another taxpayer, who incurred the same expenses solely for self-gratification, would get no deduction.

Expenses which were truly caused by prior discretionary activity, such as the decision to have children or to acquire a yacht, would be nondeductible. The separate problem of large, low income families would be resolved through the mechanism of welfare, not taxes. Expenses caused by prior negligence, whether casualty losses or medical expenses, would be nondeductible, with any perceived hardships alleviated by separate government transfer or insurance payments.

Such a scheme, however, could not work in the real world. The problem of creating categories of expenditures with clear lines between "average" and "above average" is apparent. Shifting the definitional problems to the taxpayer does not make the problems disappear. Furthermore, this scheme requires the government to accept not only the taxpayer's definition, but also the taxpayer's word, with no way to prove that the taxpayer is lying. Such a scheme would be doomed to failure.

A more workable scheme must be found. To this end, one overriding practical constraint will be considered, and three current tax systems will be discussed. The American system will serve as an example of incoherence. Then, the British and German systems will be discussed, as two radically different approaches to nondiscretionary personal expenses which come considerably closer
to coherence. Finally, with these practical applications in mind, we will discuss four major alternatives for recognizing, or ignoring, the discretionary character of personal expenses.

A. A PRACTICAL CONSTRAINT

Consider food. Everyone has to eat. Therefore, eating is a non-discretionary activity, and its expenses should be deductible. The very pervasiveness of the activity, however, suggests the opposite. Assume that everyone has identical food expenditures. It has already been shown that a deduction which subtracts the same amount from everyone’s tax base does not change the relative position of one taxpayer from another. Therefore, in terms of defining a proper tax base, giving everyone an identical deduction is a worthless exercise.89 In fact, however, some eat more than others, and many of those who incur additional food expenses have no choice about it. These differences in the nondiscretionary eating expenses of taxpayers deserve to be recognized. Presumably, either a deduction for total food expenditures or a deduction for those food expenditures that exceed a minimum amount would suffice. However, many who spend more than the minimum on eating do so out of choice, not compulsion. Either deduction suggested above would benefit the voluntary gluttons as well as the truly deserving. Moreover, any attempt to isolate those whose excessive eating expenses were truly nondiscretionary would be an immensely costly administrative undertaking. Here is where the practical constraint arises. In view of the relatively small number of people who truly need a deduction for excess food expenditures, the enormous cost (and impossibility, perhaps) of administering a fair deduction, and the enormous opportunities for abuse, this deduction is too impractical, and therefore must be ignored.

Similarly, clothing and shelter expenses are too pervasive to be reflected in deductions which would have any effect on adjusting ability to pay in a workable tax system. Since food, clothing and shelter represent the bulk of personal expenses, making them non-

89. In this context, Professor Turnier and I part company. He views food expenditures as nondiscretionary and hence deductible, and believes that personal exemptions, dependency deductions and the zero bracket amount provide the deduction. Turnier, Evaluating Personal Deductions, supra note 4, at 280. I view these items as essentially rate adjustments, and I view a true deduction for food expenses as unworkable. See Halperin, Business Deductions for Personal Living Expenses, 122 U. Pa. L. Rev. 859, 885 (1974) and Stephan, supra note 24, at 1395 n. 88 for similar arguments that pervasive expenses should be non deductible for administrative reasons.
deductible makes the revenue loss from deducting personal expenditures considerably smaller. Moreover, since these three categories of expenses are the ones most likely to rise with income, disallowing their deductibility lowers the stakes considerably on the question of whether the increased nondiscretionary expenditures of high income taxpayers should be deductible.

B. APPLICATIONS TO THE CURRENT UNITED STATES SCHEME

A brief survey of the way the United States tax system treats various personal expenditures, and a look at the ways that the various definitional issues come out under that system, will give some notion of the scope of the problem.

1. Expenditure Categories

Food and clothing expenditures are nondiscretionary, at least in their minimum subsistence amounts. Yet they are nondeductible, unless they are considered covered by the personal exemptions and the standard deduction.\(^{90}\) Shelter expenses can be analyzed in the same way. Admittedly, homeowners can take the mortgage interest and real property tax deductions, but these deductions arguably stem from other aspects of the system, and have both been under attack.\(^{91}\)

Getting married and getting divorced are largely discretionary activities, yet these changes in status have enormously significant tax consequences.\(^{92}\) However, it is arguable that these tax consequences stem not from a conscious desire to subsidize or penalize these activities, but rather from insuperable problems with the nature of the taxpaying unit. Having children has similar tax bene-

\(^{90}\) I.R.C. §§ 63(c), 151. See Turnier, Evaluating Personal Deductions, supra note 4, at 280. The provision of the House Ways and Means Committee version of the Tax Reform Bill of 1985 which would have reduced itemized deductions by $500 for each personal exemption taken also suggests that personal exemptions function as substitutes for personal deductions. H.R. 3838, 99th Cong., 1st Sess. § 102 (1985).


\(^{92}\) Marriage: See inter alia, I.R.C. §§ 1(a), 213 (medical expenses of taxpayer and spouse aggregated), 1041, 6013. The marital status of the taxpayer can have positive or negative tax consequences. The point here is that marriage makes a tax difference. See generally, McIntyre, Individual Filing in the Personal Income Tax: Prolegomena to Future Discussion, 58 N.C.L. REV. 469 (1980); Gann, Abandoning Marital Status as a Factor in Allocating Income Tax Burdens. 59 Tex. L. Rev. 1 (1980); Divorce: I.R.C. §§ 71, 215.
fits, the largest of which is the additional exemption for each dependent. The provision of the Tax Reform Act of 1986 which allows these exemptions to vanish as income rises is a step in the right direction. However, the exemptions do not vanish fast enough. They remain intact at middle income levels, when the taxpayers have more than enough resources to support their hobby of raising children without financial discomfort.

Recreational expenses are purely discretionary, and are nondeductible. Personal educational expenses are also nondeductible.

Medical expenses are considered nondiscretionary and deductible, but only if they exceed seven and one-half percent of adjusted gross income. This percentage threshold serves to limit the deduction to those with above average medical expenses. Similarly, personal casualty losses are considered to be nondiscretionary even if caused by ordinary negligence, but not if caused by willful negligence. They are also subject to a threshold of ten per cent of adjusted gross income. Whether or not religious expenditures are nondiscretionary is a religious question. Such expenditures are nondeductible except to the extent that they come under the charitable deduction.

State and local income taxes are nondiscretionary, hence deductible. One might argue that they are discretionary in that one could reduce the tax by reducing one's income, but that appears to be an absurdly high price to pay for lowering one's tax bill.

Sales and use taxes are nondiscretionary if the underlying purchase of goods or services was nondiscretionary. Accordingly, sales tax on the purchase of basic necessities is nondiscretionary, while the sales tax on the purchase of luxuries is discretionary. Arguably, current law is correct in denying a deduction for sales taxes on the grounds that the nondiscretionary portion is covered by the


94. I.R.C. § 1(g); Sheppard, Ideas Whose Time Has Come, 30 Tax Notes 1095 (March 17, 1986). According to Birnbaum and Murray, the personal exemption was phased out for higher incomes not for the policy reasons espoused in this Article, but as a trick to keep the tax reform legislation revenue neutral. J. BIRNBAUM & A. MURRAY, SHOWDOWN AT GUCCI GULCH 219-20 (1987).

95. I.R.C. § 213; See Newman, supra note 46.


personal exemption and standard deduction.\textsuperscript{100}

2. Definitions

The American tax system shows some applications of the narrowest definition, but the applications are not consistent. The timing dimension is usually, but not always, ignored. The treatment of point of view and income level is also inconsistent.

da. The Narrowest Definition

In one sense, it would appear that the deductible nondiscretionary personal expenditures under United States tax law are defined in a manner that approaches the narrowest definition. If the personal exemption is deemed to be a deduction for basic food, clothing, and shelter expenses, then the relatively low amount of the personal exemption,\textsuperscript{101} plus the fact that it is the same amount for every taxpayer, would suggest that only the minimum expenditures for food, clothing, and shelter are deductible. Yet many other deductions, such as those for cosmetic surgery, the dependency exemptions, and others belie the notion that only minimum subsistence expenses are deductible.

b. Looking back

Our system normally does not look back from a current nondiscretionary expenditure to a prior discretionary choice. Yet, if negligence is at all an issue, then the law will look back and make a casualty loss nondeductible if caused by willful negligence. In at least one instance, a prior discretionary act can taint the later, presumably nondiscretionary expense caused by a casualty loss.

c. Point of View

The relevance of willful negligence in the casualty loss area suggests that an ordinary, prudent man standard is the appropriate point of view from which to determine the deductibility of a casualty loss. However, the medical expense deduction presents a

\textsuperscript{100} 2 Dep't of Treasury, Tax Reform for Fairness, Simplicity and Economic Growth 62-68 (1984); Block, supra note 28, at 957; Turner, Evaluating Personal Deductions, supra note 4, at 281.

\textsuperscript{101} The increase in the Tax Reform Act of 1986 to $2,000 plus indexation does not get it past minimum subsistence.
more confusing case. On the one hand, the Ferris case stands for the proposition that only medical expenditures that are reasonable in amount will be deductible. The standard of reasonableness suggests an objective, third party point of view. However, other cases suggest a willingness to accept the taxpayer's point of view, whether or not reasonable. Note, moreover, that the word "reasonable" does not appear in the medical expense deduction statute.

d. Income Level

On balance, the United States tax laws appear to accept the proposition that different income groups spend different amounts in nondiscretionary categories, and allow differential deductions accordingly. First, the fact that most personal expenditures give rise to deductions rather than credits supports this view. Deductions are worth correspondingly more in the 28 percent tax bracket and correspondingly less in the 15 percent bracket, while credits are worth the same in both tax brackets. Moreover, there is substantial evidence that higher income groups spend more on deductible medical services than do lower income groups. On the other hand, the fact that the thresholds for allowance of the medical expense and casualty loss deductions rise with income suggests that there are limits to the extent that high income taxpayers can deduct their higher expenses.

e. Summary and Conclusion

A look at the categories of personal expenses that are deductible in the United States suggests that most nondiscretionary personal expenses are deductible, while some are not. Similarly, most discretionary expenses are not deductible, though some are. The same inconsistency is apparent in the various definitional issues. Thus, the United States law is incoherent. Perhaps other countries

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102. Ferris v. Comm'r, 582 F.2d 1112 (7th Cir. 1978).
104. Sen. Packwood's proposal that only the middle bracket of income would be offset by personal deductions would have mitigated this effect, but it was not accepted. See note 88, supra.
105. Kelman, supra note 4, at 866-68.
have done better.

C. THE BRITISH SYSTEM

In the British system, there are essentially no personal deductions, save for personal and dependency exemptions.\(^{106}\) In effect the British use something close to the narrowest definition of nondiscretionary expenses, and then subtract that identical amount from everyone's income in the form of a personal exemption.\(^{107}\) The British scheme is clearly a coherent and workable one. In many ways, the British scheme appears to indicate the direction in which United States income taxation is going. Personal deductions in the 1980s have been steadily eroded in exchange for higher personal exemptions, standard deductions (or zero bracket amounts), and lower rates. This trend has been justified in the name of simplification and the avoidance of fraud, but it also involves a trade-off of administrability for fairness in individual cases.\(^{108}\)

The problem with the British alternative is that it satisfies none of the proposed rationales for the deduction of nondiscretionary expenditures. In effect, the British personal and dependency exemptions effect an across-the-board rate adjustment. Except for family size differentials, nondiscretionary personal expenses are

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We have been asked to recommend allowances for expenses arising out of illness or disability such as the travelling expenses of attendants of disabled persons; or to give compassionate rebate to persons who are compelled to maintain and pay personal attendants; or special relief to disabled persons in view of their decreased earning capacity. These claims, while differing in degree, all arise out of the personal or domestic circumstances of the taxpayer, and although we are conscious that in particular cases the operation of the general rule may result in individual hardship, we feel that we cannot advise of any general relaxation of the principles on which the tax is levied.

There is, however, a limited deduction for mortgage interest. J. Tiley, Revenue Law 91 (3d ed. 1981).


108. See Coven, supra note 4. At least one British commentator, however, viewed our tax system in the opposite way. He saw the American penchant for such things as standard per diem travel expenses as "quite offensive to the current British approach, with its emphasis on individual equity and the policing of individual cases through a personal relation between the tax inspector and the individual taxpayer." Johnson, Self-Assessment to Personal Income Tax: The American System, Brit. Tax Rev. 78, 84-85 (Mar.-Apr. 1971).
disregarded.

D. THE GERMAN SYSTEM

The German tax code approaches the other extreme. Rather than no deduction, or a flat deduction for everyone, German law allows each taxpayer to apply for an individual adjustment.

1. The Law

Under the German tax code, any extraordinary, unavoidable expense which is reasonable in amount will be allowed to reduce taxable income in the amount by which such expense exceeds the reasonable tax burden on the afflicted taxpayer. This reasonable tax burden is computed with reference to the income level and family size of the taxpayer.\textsuperscript{109}

An expense can be unavoidable for legal, actual, or moral reasons. If the expenditure was voluntarily caused, then it cannot be unavoidable. However, unavoidability is presumed in certain customary categories, such as medical expenses. In noncustomary categories, it is possible to consider an earlier, avoidable event in the causal chain as nullifying the unavoidable status of the event. The status of negligence is as yet unclear.

An expense is morally unavoidable when a majority of all fair and just thinking citizens would agree that the situation created an obligation on the part of the taxpayer to incur the expense. A subjective feeling of obligation on the part of the taxpayer is not enough, nor can a sense of propriety rise to the dignity of a moral obligation. For example, purchasing appropriate clothes for a period of mourning would satisfy a sense of propriety, but the expenditure would not be deemed to have stemmed from a moral obligation. The subjects of moral obligations are usually relatives, but may include others. For example, it was held that payments to support a friend and his sick family in East Germany were morally obligated, since that friend had unselfishly supported the taxpayer in his time of need. Similarly, a moral duty can exist toward an illegitimate child, even if no legal duty exists.

The reasonableness of the expenditures is measured by an ob-

\textsuperscript{109} § 33 Einkommensteuergesetz (1983); A. RAUFACH, Einkommensteuer-Korpora-
schaftsteuergesetz mit Nebengesetzen: Kommentar, § 33 (19th ed. 1982); IV G. SOFFING, Kom-
mentar zum Einkommensteuergesetz § 33 (English translations of the two commenta-
ries are available from the author).
jective standard. It is not measured with respect to the income level of the taxpayer, nor are the other individual circumstances of the taxpayer taken into account. For example, if certain medical treatment was necessary and otherwise reasonable, the deduction would not be denied or lowered because a less wealthy taxpayer could not have afforded the procedure at all.

Reasonableness is often applied to educational expenses. Expenditures for the education of the taxpayer’s child, brother, sister, or wife, especially where her education began before marriage, has often been held to fit the category of unavoidable expenses. However, the obligation is to train only to the point of self-sufficiency. For example, the additional expenses necessary to help a relative who was already a doctor to practice a specialized branch of medicine were held not to be morally unavoidable.

2. Analysis

The German formulation touches upon previously considered categories in inconsistent ways. For example, German law does accept the principle of looking back to prior expenditures in determining whether an expenditure was unavoidable, but carves out certain customary expenses, such as medical expenses, in which it will not do so. German law treats different taxpayers differently. The extraordinariness of the expenditure is defined in terms of the taxpayer’s income, assets, and family status. Moreover, the amount deductible is the excess of the expenditure over the reasonable tax burden. The tax burden computation takes into account the taxpayer’s income and family size. Yet the reasonableness standard purports not to take individual circumstances into account.

The point of view analysis of German law is most interesting. On the one hand, what constitutes a moral obligation is determined from the standpoint of the group—the majority of all fair and just thinking citizens. On the other hand, a medical expense is considered unavoidable if the taxpayer in good faith believes that he is ill whether or not he is in fact ill. Therefore, for medical expenses, it is the individual’s perspective, not the group’s, which controls.

The German scheme, therefore, is inconsistent. Yet it assigns much more direct importance to the nondiscretionary character of an expense, and seems less inconsistent than the American approach. Differences between the United States and Germany, however, make it questionable whether the German approach would
work here. For example, the German scheme requires a homogeneous society, so there is substantial agreement on such issues as what fair and just thinking citizens would consider to be a moral obligation. It is doubtful that such a concept could work in a society as heterogeneous as that of the United States.

V. Conclusion

There appear to be four options. First, all personal deductions could be eliminated. Second, personal deductions could be kept, but the discretionary or nondiscretionary character of an activity would be deemed irrelevant to deductibility. The deductions would have to be justified on other grounds. Third, all extraordinary, nondiscretionary activities could give rise to personal deductions. Taxpayers would have to apply for these deductions on a case-by-case basis. Fourth, the nondiscretionary character of an expense could be irrelevant in creating a personal deduction, but the discretionary character of an otherwise deductible expense would prohibit the deduction.

The first option, akin to the British approach, would be the easiest to administer. It would eliminate, however, one of the ways in which the tax system attempts to make adjustments to achieve true fairness in individual cases. Moreover, the elimination of all personal deductions would function better if the United States were more of a welfare state. The more closely a country approaches the status of welfare state, the fewer the instances of necessary adjustments to reflect individual ability to pay.

The second option recognizes the incoherence and unworkability of attempts so far to recognize the relevance of the discretionary or nondiscretionary character of personal activity. It is uncertain, however, which personal deductions would be justifiable if their nondiscretionary character were ignored. For example, would the expenses of an automobile accident be deductible based on hardship, even if it meant that intentional crashes were as deductible as unavoidable accidents?

The third option would be an attempt at the German solution. The system of making highly individualized adjustments would be less likely to work here. Moreover, it would entail a great deal of administrative expense.

I believe that the fourth option is the best. It creates a more limited function for the discretionary character of a personal expense. Moreover, it would place the burden upon the government
to deny a deduction for discretionary activities, rather than placing the burden on the taxpayer to show that an activity was nondiscretionary. In the larger picture, it seems more appropriate to place this burden on government, once the taxpayer has shown that an expense should be deductible on some other ground.

This burden might be an impossible one for the government. The Service would not have the facts to know when a medical expense, for example, was for elective surgery, or a casualty loss, for example, was tainted by voluntary activity. Nevertheless, it is conceivable that the Service would quickly develop categories of deductible personal expenditures which should be investigated further. For example, all cases of lung cancer could be investigated, and those caused by smoking could be litigated. Eventually, a case law rule would determine whether the expenses of lung cancer caused by cigarette smoking should be deductible. Similarly, the tax form could require that all those claiming casualty losses for automobile accidents in which the taxpayer was the driver would have to disclose whether the taxpayer was intoxicated at the time of the accident. Once again, the government could litigate the question, and case law (or perhaps a special statutory rule) would determine whether casualty losses caused by a drunk driver should be deductible by that driver.

Why would the concept of nondiscretionary activity be any more coherent under the fourth option than it is under the third option? The difference lies in the narrowed function of the distinction between discretionary and nondiscretionary activity. Under the fourth option, personal expenses would be deductible, if at all, only if the deduction could be justified on some grounds other than the nondiscretionary character of the activity. Once the deduction had been justified in some other way, then that premise would help to define the scope and function of any exception for discretionary activity. For example, if medical expenses were deemed to be deductible on a pity rationale, then the function of the discretionary activity exception would become clear: we do not pity those who cause their own misfortunes. With that clearer perspective, it might then be easier to define discretionary activity for medical deduction purposes, and to work out a coherent set of rules for application of the exception. At least it is worth a try.