

SHIFTING THE PARADIGM BY BRINGING TAX ARBITRAGE TO THE LOWER INCOME SEPARATED FAMILY: WHY SHOULD THE MIDDLE TO UPPER CLASS FAMILY HAVE ALL THE FUN?

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I. INTRODUCTION

The problems caused by divorce and the resultant break-up of the family have been well documented.¹ It has also been well documented

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that divorce in America routinely exceeds 50% of marriages.² This has created a cultural shift where marriage appears to be no longer a lifetime commitment. Worse, in some sectors of society, marriage appears to have past its time.³ Some blame the liberalization of the divorce laws, particularly the emergence of the “no fault” divorce laws for the divorce explosion, and the evidence appears to support this claim.⁴ It is not clear how much of the divorce explosion can be blamed on the no-fault or “irreconcilable differences” grounds for divorce, but removing the stigma of divorce probably played a role in the increase of divorce.⁵ The

2009). Prof. Mombrun has also published a number of articles appearing in the *Fordham Journal of Corporate & Financial Law*, *Ohio Northern Law Review*, *The Tax Lawyer*, *The Journal of Law and Education*, *The Journal of Corporate Taxation*, *Tax Notes*, and other journals. Prior to teaching Prof. Mombrun was an Assistant Branch Chief in the National Office of the IRS in Washington, D.C., specializing in corporate taxation. The author wishes to thank Dean Raymond C. Pierce and Associate Dean Wendy Brown Scott of the NCCU School of Law for providing financial support in the form of a summer research grant despite the current financially challenging environment. The author also wishes to thank Kia Love and Maria DeRamos for research assistance.

1. See Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 62 J. MARRIAGE & FAM. 1269 (2004). The impact of divorce on the child can be devastating. Studies have shown that children of intact families enjoy better physical health than children in disrupted families, including a lesser chance of contracting asthma. Adjusted for race and economic status, children who live in a single parent household are 50% more likely to have fair or poor health than children in two-parent families. Even more alarming, parental divorce before the age of twenty-one was a key predictor of an early death. John F. Coverdale, *Missing Persons: Children in the Tax Treatment of Marriage*, 48 CASE W. RES. L. REV. 475, 485-86 (1998). This is a serious problem that needs to be addressed for the sake of our future. One might even argue that the economic wealth of our country depends on it, especially in light of greater competition from countries like China. It is not inevitable that we will continue to prosper and if we do not ensure the prosperity of our greatest asset, our children, the future will indeed be bleak. See Peter G. Peterson, *How will America Pay for the Retirement of the Baby Boomers?*, in *THE GENERATIONAL EQUITY DEBATE* 42 (Williamson et. al. eds., 1999). For an article discussing ways the U.S. can lessen the impact of its impending decline in science and engineering, See Richard B. Freeman, *Does Globalization of the Scientific/Engineering Workforce Threaten U.S. Economic Leadership?* 6 *Innovation Policy and the Economy* 123 (2006), available at <http://www.nber.org/chapters/c0207.pdf><http://www.nber.org/chapters/c0207.pdf> (last visited Sept. 1, 2010). Among other things, the author argues that United States dominance in science and engineering is being challenged because while other countries such as Japan, China, and the European Union have increased their share of graduates in science and engineering, U.S. degrees in these fields have stagnated. *Id.* at 125.

2. See LINDA J. WAITE & MELISSA J.K. HOWE, *The Family*, in *UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION* 313 (Peter Schuck & John Q. Wilson eds., 2008) [hereinafter *UNDERSTANDING AMERICA*].

3. *Id.* at 315. (The authors depict the decline in marriage from 72% of the adult population in 1970 to 54% in 2000. The authors also note that the decline in marriage has been largest among women with little education while the rate of marriage has remained constant among women who are college educated).

4. *Id.* at 313.

5. See *id.*

economic freedom enjoyed by women since the 1950s as they entered the job market probably played the major role.⁶

One of the by-products of divorce has been the significant increase in single-parent households.⁷ Notwithstanding the separation of the child's parents, the responsibility of raising the child remains that of both parents. At the risk of paraphrasing Supreme Court Justice Clarence Thomas,⁸ this appears to be a natural law and it certainly is ingrained in our enacted laws.⁹ Usually when a relationship (marital or otherwise) ends and there are children born of that relationship, at least one of the parents is granted custody of the offspring of the relationship. The custodial parent is expected to provide sustenance to his or her offspring in the form of shelter, food, clothing, and other basic needs. The non-custodial parent is also required to provide for the child's sustenance in the form of child support payments.¹⁰

Child support orders are the most common forms of civil court orders.¹¹ And violations of those orders are the most frequent of court order violations. It has been said that failure to pay child support is the most frequently committed crime in America.¹² This crime is most

6. Jacob Minter, *Intercountry Comparisons of Labor Force Trends and of Related Developments: An Overview*, 3 J. LABOR ECON. S1, S5 (1985).

7. See UNDERSTANDING AMERICA, *supra* note 2, at 316.

8. Notwithstanding his disclaimers during his confirmation hearings, Justice Clarence Thomas apparently believes in a strong role of natural law, that is, a set of immutable laws and rights that precede the creation of the State, in interpreting the constitution. Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 REGENT U. L. REV. 33, 41 (1997). Examples of natural laws include: "(1) To do what is good and avoid what is bad, (2) To preserve life, man's own being, and his existence, (3) To preserve the species through sexual reproduction, (4) To live in community with other men, and (5) To avoid ignorance and develop the intellect whose object is the search for truth." *Id.* at 42 (quoting ETIENNE GILSON, *THE PHILOSOPHY OF ST. THOMAS AQUINAS* 328-29 (1993)).

9. See, e.g., MD. CODE ANN., FAM. LAW. § 12-204 (West 2007) (imposing child support obligations on parents in almost under any circumstance, even in case of voluntary impoverishment).

10. *Id.*

11. See Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107, 108 (2008).

12. CAROLE A. CHAMBERS, *CHILD SUPPORT: HOW TO GET WHAT YOUR CHILD NEEDS AND DESERVES*, 17 (1991) (quoting Justice Richard J. Huttner, New York State Supreme Court). As the title of the book suggests, this is a self-help book for the custodial parent looking to get child support from the non-custodial parent. While the book has some very good suggestions for the custodial parent such as reminders that she is to put her feelings aside and focus on her children's needs, some of the recommendations, such as when determining how much support your child needs "this is not the time to underestimate expenses," can be misinterpreted. *Id.* at 20-21. See also Martha Minow, *How Should We Think About Child Support Obligations?*, in *FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT* 302, 305 (Garfinkel et al. eds., 1998). Minow summarizes the duty of parents by quoting William Blackstone:

often committed by men because women continue to be awarded custody of children following the break-up of the family.¹³ Hence, the moniker “Deadbeat Dad” is often used to describe the parent failing to pay child support.¹⁴ There are many reasons why the non-custodial parents do not make their child support payments, such as: bitterness, lack of visitation with his children, remarriage, and lack of employment or underemployment.¹⁵ The federal government has been getting tough with parents who fail to meet their child support responsibilities over the past few decades by garnishing their wages, revoking their driver’s licenses, offering them the choice of paying what they owe or having a sterilization procedure,¹⁶ and even jailing them.¹⁷ All of these sanctions have failed to deter this crime. In 2006, it was estimated that the amount of child support in arrears was between \$89 billion¹⁸ and \$105 billion.¹⁹ Clearly, society is failing in its attempts to get parents to take financial responsibility for their children and the parents are arguably laughing all the way to the bank.

In a previous article, I called for allowing a deduction for child support payments as a way to entice payment of child support debt.²⁰ Mindful of the exploding government deficit, I also called for the custodial parent to include child support payments in income, the idea

The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation ... laid on them not only by nature herself but by their own proper act, in bringing them into the world; for they would be in the highest manner injurious to their issue; if they only gave their children life that they might afterwards see them perish.

Id.

13. See *infra* note 53.

14. This is the accepted normal construct used by the popular media to describe the father who misses child support payments regardless of the reason. See DEENA MANDELL, DEADBEAT DADS—SUBJECTIVITY AND SOCIAL CONSTRUCTION, 178 (2002).

15. See Reginald Mombrun, *An End to the Deadbeat Dad Dilemma? Puncturing the Paradigm By Allowing a Deduction for Child Support Payments*, 13 FORDHAM J. CORP. & FIN. L. 211, 228-31 (2008).

16. See Andrea W. Fancher, *Thinking Outside The Box—A Constitutional Analysis of the Option to Choose Between Jail and Procreation*, 19 QUINNIPIAC PROB. L.J. 328 (2006) (discussing the constitutionality of offering defendants who are significantly behind in their child support payments the option of going to jail or having a vasectomy). The article concludes that under a strict constitutional analysis standard, the vasectomy option would not pass constitutional muster and that a lesser standard (the reasonable standard) should be applied and under this standard, the option would pass constitutional muster. See *id.* at 346.

17. See also Jennifer Goulah, *The Cart Before the Horse: Michigan Jumps the Gun in Jailing Deadbeat Dads*, 83 U. DET. MERCY L. REV. 479, 486-87 (2006).

18. *Id.* at 479.

19. See *infra* note 114.

20. Mombrun, *supra* note 15, at 252-53.

being that receiving payment is better than receiving no payment even though such payment may be saddled with a tax.²¹ This call has been echoed by other commentators,²² but Congress has not taken measures to adopt any legislation that would accomplish this.

The background for this article is, of course, the duty of parents to provide sustenance for their children, a duty that necessarily survives the break-up of the family. In this article, I continue to address the problems of the child support system, and I continue to take a holistic view of the problem. A fundamental concept of family law is that the system must do what is in the best interests of the child.²³ Few people will disagree with the soundness of this fundamental concept. However, the problem lies with its application. Although counterintuitive, focusing solely on the child to the exclusion of his parents may not always be in the best interests of the child because the child needs strong parents.²⁴ Hence,

21. *Id.* at 253.

22. See, e.g., Irwin Garfinkel, et al., *Child Support and Child Well-being: What Have We Learned?*, in CHILD SUPPORT AND CHILD WELL-BEING 1, 23-24 (Irwin Garfinkel et al. eds., 1994) (calling for an assured child support benefit, a new form of social security benefit to serve as a backup for private support); Laura Bigler, *A Change is Needed: The Taxation of Alimony and Child Support*, 48 CLEV. ST. L. REV. 361 (2000) (calling for a deduction for child support payments); *ABA Delegates Adopt Resolution to Equalize Child Support, Alimony Treatment*, Daily Tax Rep. (BNA) No. 154 (Aug. 11, 1989) (calling for legislation to include all family support payments (including child support) in income of payee and provide a deduction to payor); Wendy Gerzog Shaller, *On Policy Grounds, A Limited Tax Credit For Child Support and Alimony*, 11 AM. J. TAX. POL'Y 321 (1994) (calling for a limited tax credit for alimony and child support payments); Deborah H. Schenk, *Simplification for Individual Taxpayers: Problems and Proposals*, 45 TAX L. REV. 121, 162 (1989) (arguing that all payments to ex-spouses should be treated as alimony payments unless the parties otherwise agree to a contrary treatment).

23. For an exhaustive analysis of this concept including links to state statutes addressing the concept, see Determining the Best Interests of the Child: Summary of State Laws, CHILD WELFARE INFORMATION GATEWAY, U.S. Department of Health and Human Services, available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm (last visited Sept. 1, 2010). The agency notes that although there is no standard definition of "best interests of the child," state statutes provide guiding principles to making this determination. Among the guidelines that the states provide include: "the importance of family integrity and preference for avoiding removal of the child from his/her home," "the health, safety and/or protection of the child," "the importance of timely permanency decision," "the assurance that a child removed from his/her home will be given care, treatment and guidance that will assist the child . . ." *Id.* at 2. Some states also provide specific factors for their courts to look at in making a best interests decision. These factors include: "the emotional ties and relationship between the child and his or her parents, siblings and other family members or caregivers," "the capacity of the parents to provide a safe home and adequate food, clothing and medical care, the mental and physical health needs of the child," "the mental and physical needs of the parents," and "the presence of domestic violence in the home." *Id.* at 3. Other factors that the courts should consider include federal and/or state constitutional protections, the importance of maintaining sibling and other close family bonds and the child's wishes. *Id.* at 4-5.

24. It is very telling that airlines routinely tell their passengers traveling with young children that, in case of emergency, they should put on their oxygen masks first before attending to their

being mindful of the welfare of the child's parents is central to the well-being of the child. This means that if the concerns of the non-custodial parents who are behind in their child support payments are addressed and if they are financially able to make their child support payments, they will, and their children will benefit. The evidence clearly shows that these parents are usually poor males.²⁵ Middle and upper class parents usually meet their child support obligations notwithstanding the bitterness and rancor that his or her divorce or separation may have caused.²⁶

There are clear societal benefits to stable families,²⁷ and society as a whole is negatively impacted when families break up.²⁸ Although the definition of the family unit has morphed over time,²⁹ when a family breaks up, all of the family members go through a difficult time, and this especially true of the children. Lessening family break-ups should be a societal goal, but if the break-up cannot be avoided, then an important secondary goal should be lessening the negative impact on the children. Some families are able to achieve this secondary goal,³⁰ but the majority

children. Most parents would naturally want to attend to their children but in this case, putting the parent's need for oxygen first is in the best interests of the child because an unconscious parent will be of no help to the child and will only worsen the emergency.

25. Elizabeth G. Patterson, *Civil Contempt And The Indigent Child Support Obligor: The Silent Return Of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 131 (2008).

26. See *supra*, note 12, FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT, at 23.

27. Such benefits include better long-term health of children, greater psychological stability, and better success in school. Amato, *supra* note 1, at 1278.

28. See *id.*

29. The major difference in today's family is that the mother is more likely to work. Hence, current laws, which reflect past notions of the mother as the caretaker (thereby granted sole custody of the separated child) and the father as the provider are no longer appropriate. See C. Garrison Lepow, *The Flimflam Father: Deconstructing Parent-Child Stereotypes In Federal Tax Subsidies*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 129, 134 (2001). See also Wendy C. Gerzog, *Families For Tax Purposes: What About The Steps?*, 42 U. MICH. J.L. REFORM 805, 811-14 (2009) (calling for treating step family members as family members for all purposes. This would end the tax advantage they enjoy as they are treated as family members for many income tax benefit sections but are excluded from the definition of family member for business entity attribution purposes and for gift and estate tax anti-abuse provisions).

30. See CONSTANCE AHRONS, *THE GOOD DIVORCE* (1994), a book claiming that a good divorce is not an oxymoron and advocating traits for achieving such a result. In the book, the author discusses different types of divorced relationships. The author first groups divorced couples into amicable groups and arch-enemies. *Id.* at 5-6. The amicable group consists of two smaller groups, cooperative colleagues and perfect pals. *Id.* at 6. Cooperative colleagues are couples who deal with their anger in productive ways and manage not to let their children get caught in the middle. *Id.* Perfect pals were a small group and consist of couples who remain best friends after divorce and continue to enjoy an intimate relationship. *Id.* The author divides the arch-enemies into two groups, angry associates and fiery foes. The angry associates are "not able to confine their anger

fail miserably and become embroiled in petty battles and keeping score,³¹ to the detriment of the children. One way to put the odds in favor of children is to ensure that both parents, especially fathers, remain actively involved in the life of children.³² There are great societal benefits to be gained when the father is involved in the life of his children, including psychological well-being and stability in school.³³ How can society reduce the number of parents failing to live up to their parental obligations? I propose that this can be accomplished by ensuring that parents are able to make their child support payments. In the current political and fiscal landscape calling for a plan reminiscent of the Marshall plan³⁴ for non-custodial parents would be a non-starter. The custodial parent frequently understands the plight of the parent struggling to meet his or her obligations³⁵ and custodial parents have often been willing to help by allowing the non-custodial parent to claim the child dependency exemption. This is self-help and tax arbitrage³⁶ that is blessed by the Internal Revenue Service (“IRS”).³⁷

. . . and it infuse[s] all the relationships in the family.” *Id.* The fiery foes have an even worse relationship, continue to have battles for custody and sometimes even resort to violence. *Id.* at 7. Finally, the author discusses the dissolved duos, ex-spouses “who totally discontinue contact with each other and one parent disappears completely from their children’s lives.” *Id.*

31. *Id.*

32. See Paul R. Amato, *Father-Child Relations, Mother-Child Relations, and Offspring Psychological Well-Being in Early Adulthood*, 56 J. MARRIAGE & FAM. 1031, 1031 (1994).

33. *Id.* In his study, the author found that “closeness to fathers makes a unique contribution to offspring happiness, life satisfaction and psychological distress”. *Id.* The study concludes that “fathers are important figures in the lives of young adults.” *Id.*

34. The Marshall Plan refers to the economic, social and political remaking of Western Europe undertaken by the United States after World War II. The heart of the plan was a massive economic transfer to Europe. The plan was named after Secretary of State George Marshall and is credited for saving Western Europe but it has its detractors. For an exhaustive description of the plan, see MICHAEL J. HOGAN, *THE MARSHALL PLAN: AMERICA, BRITAIN AND THE RECONSTRUCTION OF WESTERN EUROPE, 1947-1952* (1987).

35. A 1992 survey of the General Accountability Office (GAO) shows that 66% of custodial mothers stated the reason they are not getting support from their father’s child is that “he can’t pay.” See Ronald K. Henry, *Child Support Policy and the Unintended Consequences of Good Intentions*, in *THE LAW AND ECONOMICS OF CHILD SUPPORT PAYMENTS* 128, 155 (William S. Comanor ed., 2004).

36. Tax arbitrage is defined as “[t]he practice of profiting from differences between the way transactions are treated for tax purposes.” <http://www.investopedia.com/terms/t/tax-arbitrage.asp>. (last visited May 3, 2011).

37. See IRS Form 8332, Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent. Some States also have forms parallel to Form 8332. For example California’s form specifically provides that the dependency exemption is granted to the non-custodial parent on the express assumption that he is current in his child support payments. See 6-214 CALIFORNIA FAMILY LAW PRACTICE & PROCEDURE § 214.46 (2d ed. 2009).

In this article, I will address the notion of tax arbitrage following divorce or separation. Simply put, tax arbitrage is the notion of “You scratch my back and I’ll scratch yours.” Following divorce or separation, this phenomenon mostly occurs in middle to upper income families³⁸ that understand (through proper tax advice) that sometimes allowing the non-custodial parent to claim the child dependency exemption ultimately lowers overall taxes for the family unit and bolsters economic wealth. This tax savings can then be passed on to the custodial parent in the form of higher child support payments and/or more regular child support payments. Tax arbitrage is less pervasive in lower income families causing them to forgo over \$6 billion per year in potential tax savings.³⁹ In this article, I will suggest several ways to address the problem including proposed legislative language.

In Part II, I will outline the problems of divorce and the break-up of the family. I will also discuss the historical and continuing child support dilemma that we face and the notion of public versus private responsibilities for raising children. Finally, I will chronicle the rise of parents failing to meet their child support obligations. In Part III, I will address the government’s response to the increasing number of these parents including imposing tougher penalties on these parents who fail to meet their obligations and the constitutional challenges of arresting them for a monetary debt. I will contrast this with commentators calling for more investment in human capital. I will also discuss whether the rise of Obamanomics⁴⁰ and the decline of Reaganomics⁴¹ will affect our overall approach to the problem. In Part IV, I will discuss tax arbitrage in general and in the separated family context and will outline why this form of self-help is not prevalent in the lower income community even though it has been sanctioned by the IRS. I will argue that taking

38. See *infra* note 229.

39. See Adam Looney, *Trading Tax Benefits for Child Support? The Incidence of Child-Related Tax Benefits Among Separated Parents* (c. 2004) (unpublished manuscript) (on file with the author).

40. Obamanomics refers to economic policies associated with the Obama administration. They generally include a bottom up approach that believes economic growth depends largely on the productivity of workers. The focus of such policies tends to be on the internal needs of the United States. See Robert B. Reich, *A Short Primer on McCainomics versus Obamanomics*, ROBERT REICH (July 22, 2008), <http://robertreich.org/post/257309630> [hereinafter Reich, *A Short Primer*]; Robert B. Reich, *Obamanomics Isn’t About Big Government*, WALL ST. J., Mar. 28, 2009, at A1; David Ignatius, *Rolling Out Obamanomics*, WASH. POST, Apr. 2, 2009, at A21.

41. Reaganomics refers to economic policies associated with former President Ronald Reagan. Unlike Obama, Reagan preferred a trickle down version of economics where capital was favored over labor. As capital grows, wealth would presumably trickle down to those who do not hold capital assets. The central tenet of Reaganomics is lower taxes.

advantage of tax benefits allowed by Congress should not depend on one's tax sophistication, and I will also discuss State court cases that mandate tax arbitrage in the separated family context. I will provide general background on tax arbitrage and the contexts where it is seen—colleges, hospitals and other businesses. As discussed in Part IV, direct tax arbitrage is prohibited by the tax code but indirect tax arbitrage is hard, if not impossible, to stamp out; after all, money is fungible. Hence, notwithstanding efforts to stamp out tax arbitrage, it is still prevalent. When taxpayers engage in tax arbitrage in the separated family setting, this may give rise to 16% in increased child support payments⁴² and, more importantly, increased visitation by the non-custodial parent because there appears to be a direct correlation between making child support payments and increased visitation.⁴³ I will include an example of the benefit of tax arbitrage in a moderate income situation. This example will highlight the increased tax benefits that the separated couple would receive if they engage in tax arbitrage.

Finally in Part V, I will discuss solutions to the problem including suggested statutory language. The solutions that I prefer take a bottom up approach and level the playing field for the lower income family by putting the burden on the IRS to determine whether the non-custodial parent would benefit more from the child dependency exemption and, thus, should be allocated the deduction, ultimately ensuring a more secure source of child support payments. This is the exact approach taken by some judges because they understand that the child dependency exemption is an economic benefit that should ultimately be part of the child support equation.⁴⁴ The IRS has achieved some success in administering the Earned Income Tax Credit (EITC),⁴⁵ now the largest government cash transfer program,⁴⁶ and notwithstanding the IRS's

42. See Looney, *supra* note 39, at 2.

43. See *infra* note 217.

44. See, e.g., *Sarver v. Dathe*, 439 N.W.2d 548, 551 (S.D. 1989).

45. For an exhaustive description of the EITC, see Wanda Theriot, *The Earned Income Tax Credit: Putting it to Work for the Working Poor*, 2 LOY. POVERTY L.J. 125 (1996). The EITC was enacted in 1975 by the Tax Reduction Act of 1975. *Id.* at 126. The original focus of the EITC was to help working families with children, but it was expanded in 1993 to cover workers who did not have children since the goal of the EITC was to provide an incentive for work. *Id.* at 126-28. The EITC has enjoyed broad bipartisan support and is now widely used by low income taxpayers. *Id.* at 130-31. In 1989, only 40,000 families used the EITC; by 1996, this had jumped to 21 million families. *Id.* at 128-29. The EITC has also outpaced traditional welfare programs in size and is administered by the IRS and not by government welfare agents. *Id.* at 131.

46. Twenty-two million families receive a total of \$34 billion from the EITC program. It has, thus, eclipsed the Temporary Aid to Needy Families (TANF), the successor to the Aid to Families with Dependent Children, as the largest federal government cash transfer program. See Nadia Eissa

apparently lackluster computer systems,⁴⁷ it should be able to easily handle such operations.⁴⁸

II. THE CHALLENGES OF THE CHILD SUPPORT SYSTEM.

A. *History of Child Support in the United States*

Today, child support payments are made mostly by fathers because, upon separation of the family, mothers usually receive custody of children.⁴⁹ However, this is changing as more judges are becoming more comfortable granting joint⁵⁰ and sole custody to fathers.⁵¹ It may seem natural to grant custody of children to the mother because she is seen as the more nurturing parent and thus, most able to raise children,⁵² but this has not always been the case. In early America, the children stayed with their father if parents divorced.⁵³ This was the prevalent culture⁵⁴ at the time. Prior to the industrial revolution, the economy of

& Hilary W. Hoynes, *Behavioral Responses to Taxes: Lessons from the EITC and Labor Supply*, 79 TAX POL'Y & ECON. 73, 73 (2006).

47. See Anne Broache, *IRS Trudges on with Aging Computers*, CNET News (Apr. 12, 2007), available at http://news.cnet.com/2100-1028_3-6175657.html. For a more optimistic outlook, see Charles O. Rossoti, *Modernizing the IRS*, 53 ADMIN. L. REV. 615, 620-21 (2001).

48. The IRS has handled such operations in the past for taxpayers who request that the IRS compute their taxes or credits. For example, taxpayers have the choice of either determining their own EITC credit or they can have the IRS compute it for them. See 1040 Form and Instructions 2010, P. 47. Anecdotally, I forgot to compute my Making Work Pay Credit for 2009 (Form 1040, line 63); the IRS computed the credit sua sponte and sent me a refund of my overpayment.

49. See Frank J. Furstenberg, Jr., *Dealing with Dads: The Changing Roles of Fathers*, in ESCAPE FROM POVERTY: WHAT MAKES A DIFFERENCE FOR CHILDREN 189, 196 (P. Lindsay Chase-Lansdale & Jeanne Brooks-Gunn eds., 1995).

50. See MARCIA MOBILIA BOUMIL & JOEL FRIEDMAN, DEADBEAT DADS—A NATIONAL CHILD SUPPORT SCANDAL, 88-89 (1996) (reporting that courts are moving more toward recommending that parents share custody because this is generally better for the child).

51. See Henry, *supra* note 35, at 138 (describing a 2004 survey that found that 18% of single parents are men, an increase of 25% over the previous three years).

52. BOUMIL & FRIEDMAN, *supra* note 50, at 87. The mother has been traditionally assigned the role of the caretaker because she normally did not work outside the home. This has greatly changed as more women have entered the labor force.

53. See Henry, *supra* note 35, at 138 (discussing an "early feminist meeting . . . in 1848 . . . [that] included the fact that fathers automatically received custody of children as a principal complaint," mostly because they needed the help of the children on the farm); see also SIMONE SPENCE, DEADBEATS: WHAT RESPONSIBLE PARENTS NEED TO KNOW 15 (2000), at xiv (claiming that up until the nineteenth century, fathers were usually awarded custody of children because since women did not work outside the marriage, they could not afford to take care of children). The two authors have slightly different reasons why men were allowed custody but both reasons are grounded on economics.

54. See THE RANDOM HOUSE COLLEGE DICTIONARY (rev. ed. 1980) (defining culture as the sum total of ways of living built up by a group of human beings and transmitted from one generation to another).

the United States was primarily agrarian. As titular head of the family, the father needed as much help as he could get on the farm. As a result, American society in the eighteenth and mid-nineteenth centuries emphasized “the father’s centrality in raising the children and preparing them for the adult world.”⁵⁵ As the industrial revolution progressed, fathers tended to work outside the homestead.⁵⁶ Thus, the image of the father settled into that of the “external wage-earner,” with the mother as “home-bound nurturer,”⁵⁷ giving rise to the “cult of motherhood” and the “tender years doctrine” of the early twentieth century.⁵⁸

During these times, child support payment orders were rare owing to the fact that parents were only charged with providing a home for their children.⁵⁹ Further, the divorce rate was extremely low due to both the economically devastating costs of divorce and enormous social pressure against the dissolution of marriage.⁶⁰ There were also legal impediments to forcing one parent to pay child support to the other.⁶¹

In the early twentieth century, there was a “reorientation of welfare policy toward children.”⁶² The shift was “premised on the belief that the mother-child relationship was fundamental and sacred and that home life should be encouraged and strengthened.”⁶³ There is also evidence that a precursor to our current welfare system was the attempt in the late nineteenth and early twentieth centuries “to assist poor children in their

55. Henry, *supra* note 35, at 138.

56. See P. Lindsay Chase-Lansdale & Maris A. Vinovskis, *Whose Responsibility? An Historical Analysis of the Changing Roles of Mothers, Fathers & Society*, in *ESCAPE FROM POVERTY: WHAT MAKES A DIFFERENCE FOR CHILDREN* 11, 15 (P. Lindsay Chase-Lansdale & Jeanne Brooks-Gunn eds., 1995). Although “the father remained the head of the household and was responsible for the education and well-being of the children,” his role “diminished as his place of work became separated from home.” *Id.*

57. Henry, *supra* note 35, at 138. Other reasons have been cited for this change. In the Puritan homes of mid-seventeenth century New England, the father was the early educator of the children owing to church pressure and his own educational superiority in the household. This role of educator was transferred to the mother due to the sudden and unexpected drop in church attendance by Puritan men. See Chase-Lansdale & Vinovskis, *supra* note 56, at 13.

58. Henry, *supra* note 35, at 138.

59. See *id.* at 138-39.

60. See JOCELYN ELISE CROWLEY, *THE POLITICS OF CHILD SUPPORT IN AMERICA* 57-59 (2003).

61. English law provided that the responsibility of raising children rested with both parents’ duties. Hence, one parent could not collect money from another parent for discharging his or her duties. American law distanced itself from that view by first recognizing the right of a third-party benefactor to sue a parent for necessities provided to his child. Once that right was recognized, it was extended to a former spouse. See Mombrun, *supra* note 15, at 225-26.

62. Chase-Lansdale & Vinovskis, *supra* note 56, at 19.

63. *Id.*

own homes.”⁶⁴ There were also early efforts in some States to criminalize non-payment of child support.⁶⁵ In most states, however, these new criminal laws were only enforced in cases where destitute children were victimized.⁶⁶ More comprehensive enforcement of the child support laws was still a few decades away.

B. Federal Government Involvement

The federal government’s involvement in supporting children has been recorded as far back as the end of the Civil War and the establishment of the Freedman’s Bureau to support the newly freed Blacks. The federal government also provided “pensions for disabled Union soldiers or their widows and dependent children.”⁶⁷

The federal government did not begin to play a more central role in welfare and child support until after the Depression with the passage of the Social Security Act and Aid to Dependent Children Act.⁶⁸ By the 1960s, the federal government assumed the central role. The father, in theory, remained the party responsible for the well-being of his children but few enforcement efforts were made against him. The last twenty years witnessed an explosion in child support enforcement spurred on, in part, by the bi-partisan Family Support Act of 1988.⁶⁹ The Family Support Act reflected changes in society’s views about child support and greater emphasis on the responsibility of fathers. Such greater share of responsibility was advocated as far back as 1949 when former President Gerald Ford introduced a bill (H.R. 4580) on that score as a Congressman.⁷⁰

The stronger penalties urged by the Family Support Act did not produce the desired results.⁷¹ This failure stems from the fact that the

64. *Id.* at 31.

65. *Id.* at 20.

66. *Id.*

67. *Id.* at 18.

68. *See id.* at 21-22. The Aid to Dependent Children program was intended to cover all needy children in single-mother households, states restricted assistance by insisting that children had to live in a “suitable” home. *Id.* at 22. “Children of African-American or never-married mothers were particularly singled out unfairly for exclusion from the program.” *Id.*

69. Pub. L. No. 100-485 (1988). *See* Chase-Lansdale & Vinovskis, *supra* note 56, at 25-29. The Family Support Act was a watershed event in the child support collection arena. It was the result of the efforts of President Reagan and Senator Daniel Patrick Moynihan who both shared an interest in stronger child support efforts. *Id.* at 25.

70. *See* CROWLEY, *supra* note 60, at 95.

71. Noted commentator Irwin Garfinkel wrote in 1998 that despite twenty years of increasing tougher legislation, child support collections have not shown much improvement. *See* Irwin Garfinkel, et al., *Introduction* to FATHERS UNDER FIRE, *supra* note 12, at 1, 3.

reasons for fathers' non-compliance are diverse and complex⁷² and are not addressed by Congress. Nevertheless, the public became convinced that what was needed was more money from fathers. Adding fuel to the fire was a popular book "claim[ing] that, after divorce, women's standard of living declined by 73 percent while men's standard of living increased by 42 percent."⁷³ Despite being wrong, and acknowledged as such by the author herself, these figures "have been convenient for advocates and have become ingrained in both the popular culture and academic circles."⁷⁴

Control of the debate also shifted. Until the 1960s, social workers largely shaped the child support debate.⁷⁵ "They proposed offering mothers who received Aid to Families with Dependent Children [(AFDC)] much more than cash assistance to support their children . . . and direct[ed] them to all of the in-kind benefits for which they qualified, [including] job training and educational programs."⁷⁶ In the 1970s, conservatives increasingly occupied positions of power and they began to shape the child support debate.⁷⁷ This brought enforcement of child support to the forefront, "with a single focus: welfare cost recovery."⁷⁸ As the number of female legislators grew in the 1980s,⁷⁹ we saw a change of focus back toward the family. Not only did strong enforcement of child support obligations for families on welfare continue, but coverage was expanded to non-welfare families.⁸⁰ In the case of non-welfare families, financial support was sent directly to the family, instead of going first through the State.⁸¹

Today, we are seeing an increase of advocacy on behalf of fathers.⁸² Such advocacy reflects greater concern for the father and includes calls of forgiveness for arrearages, more equitable child support guidelines and "a revamping of all state award formulas to reflect the true cost of child rearing."⁸³ Some states are already responding to these

72. See *supra* note 25.

73. Henry, *supra* note 35, at 140 (citing LENORE WEIZMAN, *THE DIVORCE REVOLUTION- THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985)).

74. *Id.*

75. See CROWLEY, *supra* note 60, at 28.

76. *Id.*

77. See *id.*

78. *Id.* at 29.

79. See *id.* at 29-30.

80. *Id.* at 30.

81. *Id.*

82. See Hatcher and Lieberman, *infra* note 153.

83. CROWLEY, *supra* note 60, at 30.

concerns.⁸⁴ It is not clear where the law will eventually settle on this issue but it appears that the pendulum is swinging back to a more reasoned approach. Finally, it is fair to say that the Obama administration will probably tilt toward a more balanced view of the problem.⁸⁵

C. *Taxation of Divorce and Child Benefits*

Section 71 of the Internal Revenue Code gives preferential treatment for alimony payments by granting an above-the-line deduction⁸⁶ for such payments but the recipient of this income has to include alimonies paid into income under I.R.C. § 215. Child support payments, on the other hand, are not allowed such preference; the reason being that parents, in addition to having a legal and moral duty to take care of their children, also have an inclination to do so. The inclination to ensure the care of one's ex-spouse is rare and the reason for the preference accorded to alimony payments is historical and no longer relevant,⁸⁷ yet, the preference remains. It has been argued that I.R.C. §

84. See, e.g., MD. CODE ANN., FAM. LAW. § 12-204 (West 2007) (amended 2011). Maryland has a child support scheme that holds both parents responsible based on their adjusted annual incomes. See *id.* § 12-204(a). Maryland provides a table mandating a level of expected child expenditures depending on the parents' income. See *id.* § 12-204(e). Each parent is responsible to pay an amount based on his/her percentage of the parents' combined income. See *id.* § 12-204(a)(1). Adjustments are made if certain child expenses are paid solely by one parent; adjustments are also made for the amount of time the child spends in each parent's home. See *id.* § 12-204(m). Finally, the calculation of child support is subject to court review. Even if one parent does not work (unless physically or mentally unable to work), the Maryland scheme would assign income to the non-working parent based on prior work history, availability of jobs in the area etc. See *id.* § 12-204(b). An example of how the Maryland approach works follows: Father and Mother divorce; they each make \$5000 per month. They have one child who stays with the mother full-time. Based on their combined income, the expected combined amount of child support would be \$1040. See *id.* § 12-204(e). They would share this amount equally (\$520 each). Hence, the non-custodial father would have to pay the custodial mother \$520 per month. Based on his hypothetical income, this is a reasonable amount. If they shared joint custody and the child spends equal time with both parents, neither would be liable for child support payments to the other.

Thirty-three states use the Maryland or income share approach. Fourteen use a flat percentage of the non-custodial parent's income. Three states use what has been called the Melson formula. Under this formula, an amount of money set at the poverty limit is set aside from the payor's income before child support is deducted. This way, the payor will not dip below the poverty line due to child support obligations. SPENCE, *supra* note 53, at 10-13.

85. See, e.g., Krissah Thompson, *Obama Steps Up Fatherhood Advocacy With New Mentoring Initiative*, WASH. POST, June 21, 2010, at A6.

86. Above-the-line deduction refers to the unrestricted use of a deduction. Other deductions (not above the line) such as personal medical expenses are subject to limits.

87. Alimony deductions were enacted after World War II out of concerns that, coupled with the high income tax rates enacted to fund the war, some payors would not be able to make their alimony payments and still discharge their tax obligations. See Mombrun, *supra* note 15, at 231.

71 is bad for children and its tax preference should be given instead for child support payments.⁸⁸ Moreover, it has been argued that granting a deduction for alimony payments is an incentive in favor of divorce which is necessarily bad for the household and causes impoverishment of women.⁸⁹ It has even been argued that mandatory cessation of alimony payment upon death⁹⁰ is an incentive to, at least, wish death upon a former partner if not actively promoting her demise; after all, statistics have shown that women are in greater danger of physical harm during the divorce period.⁹¹ Well-advised taxpayers can take advantage of I.R.C. § 71 since tax arbitrage is built into the section.⁹² This is yet another area where the tax law tends to reward tax sophistication and favor the wealthy taxpayer.

Tax benefits afforded parents can be broken into two main categories: (a) tax benefits that can be claimed by either parent like the dependency exemption and the child tax credit and (b) tax benefits that can be claimed by only a specific parent, for example, the child care credit and the parent's filing status such as head of household.⁹³ In addition to reducing the claimant's tax, claiming a child as a dependent can also significantly bolster a claim for the EITC,⁹⁴ a potentially significant source of income for low income taxpayers.⁹⁵ For the

88. See Michael Waggoner, *IRC § 71 May Impoverish Children, Endanger Ex-Wives, and Disrupt Federalism*, 46 FAM. CT. REV. 574 (2008).

89. *Id.* at 575.

90. See I.R.C. § 71(b)(1)(D).

91. See Waggoner, *supra* note 88, at 577-78.

92. Because alimony is deductible, divorcing taxpayers who are in different tax brackets (payee is in a lower tax bracket than payor) have an incentive to disguise child support or other payments as alimony. I.R.C. § 71(f) (the recapture rules) attempts to prevent such abuses by reversing the benefits of the section (i.e., payee receives deduction and payor loses deduction) in situations where there are excess alimony payments. The recapture rules, however, only apply for the first three post-separation years and can be relatively easily avoided. Thus, it is well-known that well-advised divorcing taxpayers can arrange their affairs to take advantage of the tax arbitrage opportunities inherent in I.R.C. § 71 while poorly-advised or unadvised taxpayers do not. See Deborah A. Geir, *Simplifying and Rationalizing the Federal Income Tax Law Applicable to Transfers in Divorce*, 55 TAX LAW. 363, 364 (2002).

93. See Pearlene Anklesaria, *Child Related Tax Breaks For Divorced Parents*, 22 J. AM. ACAD. MATRIMONIAL LAW. 425, 426-30 (2009).

94. Although the EITC was expanded in the 1990s to cover workers who do not have children, its focus remains on working parents with children, hence a claimant without children gets a credit of 7.65% of his income. If the claimant has one child, the benefit jumps to 34%. See I.R.C. § 32(b)(1)(A).

95. Saving low to moderate income taxpayers thousands of dollars, the EITC is an important source of savings. There are claims that it has helped taxpayers put money down on a house, buy a car or even go to college. See Neil Downing, *Earned Income Tax Credit Can Break "Cycle Of Poverty,"* R.I. NEWS, Jan. 26, 2010, available at http://www.projo.com/news/content/earned_income_credit_campaign_01-26-

wealthier taxpayer, a dependency exemption claim could allow her to claim other credits such as Hope or lifetime learning credits.⁹⁶ Under I.R.C. § 152, a dependent can be either a qualifying child or qualifying relative.⁹⁷ The section provides that a qualifying child will be a dependent if the following five tests are met: (a) a relationship test, (b) a residency test, (c) an age test, (d) a support test and (e) a filing test.⁹⁸ Where both parents can meet the tests and claim the child as a dependent, the exemption goes to the parent with the highest income.⁹⁹ Section 152(e) of the Internal Revenue Code was amended to provide specific divorce rules; essentially the IRS wanted to get out of the business of refereeing disputes between divorced taxpayers and Congress acquiesced to IRS concerns.¹⁰⁰ Section 152(e) of the Internal Revenue Code generally provides that, even in situations where the residency or support test may not be met, taxpayers are allowed to designate the non-custodial parent as the parent permitted to claim the dependency exemption.¹⁰¹ This is clearly permissible tax arbitrage.

D. Challenges Facing the Child in a Separated Family

According to the Bureau of Census, “[c]hildren whose parents have separated or divorced or whose parents have never married face numerous difficulties that have the potential for temporary or even

10_ATH81M_v8.3a66c74.htmhttp://www.projo.com/news/content/earned_income_credit_campaign_01-26-10_ATH81M_v8.3a66c74.htm.

96. Under I.R.C. § 24(a) (the Hope and Lifetime Learning Tax Credits), taxpayers can take credit for expenses of a college education for themselves and/or their dependents. These two credits are not refundable; hence, they benefit only taxpayers who have a tax liability. The low income taxpayer is unlikely to take advantage of these credits because the cumulative effect of his standard personal exemption deductions and his EITC probably wipes out his tax liability.

97. See I.R.C. § 152(c)(1).

98. *Id.*

99. See *id.* § 152(c)(4)(B)(ii).

100. Under I.R.C. § 152(e), the IRS will not challenge an election made by the custodial parent to grant the dependency exemption to the non-custodial parent notwithstanding that the non-custodial parent could not have met the residency, the support test or the conflict resolution rules of I.R.C. § 152(c)(4). The only requirement is that this allocation is made in writing and in an appropriate format such as using Form 8332, Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent. This is one of the few areas where the individual taxpayer enjoys near complete freedom.

101. I.R.C. § 152(e)(1). The ABA section on taxation helped in framing this particular rule by urging the Congress to liberalize the rules for divorced taxpayers. The ABA also urged Congress to enact a single definition for the term “child” but the Congress declined. See *ABA Recommends Simplification Of Eligibility Requirements For Receiving A Dependency Exemption*, 86 TNT 48-140, Mar. 10, 1986.

permanent harm.”¹⁰² Among the challenges are declines in family income or the persistent low income of the single parent home typically headed by a female.¹⁰³ According to a 2007 survey, one quarter of all children under the age of twenty-one (21.8 million) live with one parent;¹⁰⁴ hence, this problem is potentially devastating to our country. In the African-American community, the statistics show that almost one out of every two children live with a single parent.¹⁰⁵ Although child support payments (when made) represent about half of the income for custodial parents below the poverty line, only 46.8% of custodial parents received their full payment due and an additional 29.5% received part payment, with the remaining not receiving any payments.¹⁰⁶ Coupled with the shrinking roll of welfare,¹⁰⁷ it is clear that we are enhancing opportunities for poverty.

Children’s needs for emotional support may be as great as economic support. It has been argued that “one dollar of child support is worth \$22 from another source.”¹⁰⁸ This is an extraordinary claim with which many may disagree, but it is made with the knowledge that monetary support typically signals increased visitation and emotional support from the non-custodial parents. In fact, some courts view “the obligations of support and visitation as interdependent and have allowed the willful breach of one provision . . . to be remedied by the intentional

102. See J. Peterson & C. Nord, *The Regular Receipt Of Child Support: A Multi-Step Process*, 52 J. MARRIAGE & FAM. 539, 539 (1990). Among the problems the separated child faces is the low income caused by the separation and the persistent low income of the typical single-parent household. *Id.*

103. According to the Bureau of Census, in 2007, mothers accounted for 82.6% of single-parent households. See TIMOTHY T. GRALL, *Custodial Mothers and Fathers and their Child Support: 2007*, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS 60-237, 2 (2009), available at <http://www.census.gov/prod/2009pubs/p60-237.pdf><http://www.census.gov/prod/2009pubs/p60-237.pdf>.

104. *Id.*

105. *Id.* (explaining that 48.2% of all African-American children live in a single parent household).

106. *Id.* at 1.

107. *Id.* at 5-6. (The participation of custodial parents in public assistance programs has steadily declined over recent years from a high of 40.7 percent in 1993 to 28.4 percent in 2001. With regard to TANF, the percentage fell from 22 percent to 4.3 percent).

108. See Sara S. McLanahan et al., *Child Support Enforcement and Child Well-Being: Greater Security or Greater Conflict?*, in CHILD SUPPORT AND CHILD WELL-BEING, *supra* note 22, at 239, 249-50. This may be because by paying child support, the child benefits by “picking up some unobserved characteristics of the father, such as ‘family commitment’ or the fact that child support dollars have a symbolic value that enhances children’s well-being.” See Mombrun, *supra* note 15, at 242 n.169.

withholding of the other.”¹⁰⁹ Lack of monetary support from the non-custodial parent, on the other hand, may cause psychological harm to the child.¹¹⁰

The separated child also has to navigate the emotional challenges caused by separation and divorce. Clearly, it is critical for the child to have an emotionally stable relationship with the custodial parent,¹¹¹ but the child must also maintain a relationship with the non-custodial parent and sometimes the two may not be compatible. This is due to our adversarial system of divorce and separation which continues long after the divorce or separation.¹¹² To make matters worse, when courts get involved, they do not necessarily make decisions that are in the best interests of the child. For example, if a court suspends or reduces visitation privileges in response to non-payment of child support, the child may view his relationship with the non-custodial parent as financially based rather than emotionally based.¹¹³ As argued below, courts often do not take a holistic view of the child and may be mostly interested in collecting past child support payments because custodial parents have to turn over their child support claims to the government in order to receive assistance. This appears to be the current trend in social policy that government help should be based on “social reciprocity.”¹¹⁴ Under this policy, the government is owed half of the child support payments in arrears, over \$50 billion for 2006.¹¹⁵

To recoup this debt, the government has used all the tools in its arsenal including imposing civil and criminal contempt citations for failure to pay child support, causing some to argue that there has been a

109. See Carolyn Eaton Taylor, *Making Parents Behave: The Conditioning Of Child Support And Visitation Rights*, 84 COLUM. L. REV. 1059, 1061 (1984).

110. *Id.* at 1077-78. But see SUSAN MEYER, WHAT MONEY CAN'T BUY: FAMILY INCOME AND CHILDREN'S LIFE CHANCES (1997).

111. Taylor, *supra* note 109, at 1066-67 (“Researchers studying the divorced family have continually stressed the critical importance of an emotionally stable relationship between the child and the custodial parent.”).

112. *Id.* at n.169.

113. *Id.* at 1078.

114. Under the concept of reciprocity, something is expected from the individual in exchange for help from the government. Examples include work requirement in welfare legislation. The EITC is another example. See Donald Tobin, *Investing In Our Children: A Not So Radical Proposal*, 73 U. CIN. L. REV. 457, 472 (2004).

115. See Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029 (2007). It may not be possible to get an accurate handle on the true amount of child support in arrears because mothers may not want to assign their rights to child support payments to the government due to fears of violence. *Id.* at 1045. On the other hand, in-kind support from non-custodial parents is not easily counted. *Id.* at 1046.

silent return of debtor's prison¹¹⁶ and to question the constitutionality of the government's actions.¹¹⁷ This is not a holistic approach to the problem because low income obligors have trouble getting access to good paying jobs and sometimes fail to pay their child support obligations due to larger issues of poverty.¹¹⁸ Moreover, if the lower income obligor owes \$2.11 for every dollar earned,¹¹⁹ it is not possible for the government to collect this debt. Imprisonment also leads to loss of jobs and an even greater inability to pay one's debt. The cycle, thus, begins again and the child is left attempting to overcome these challenges for the rest of his life.¹²⁰ Hence, although counterintuitive, one commentator has argued that collecting child support from poor fathers may make families poorer as fathers will stop making in-kind contributions and will be forced into the underground economy.¹²¹ This commentator calls for giving separated mothers more responsibility for dealing with fathers and predicts that this could lead to increased cohabitation and marriage.¹²² Increased enforcement, on the other hand, only leads to increased violence.¹²³ In sum, looking out for Mom and Dad means looking out for the child.

E. Public vs. Private Responsibility for Raising Children

It costs about \$233,000 to raise a child from birth to seventeen years of age.¹²⁴ If we add the additional costs of helping a child reach young adulthood such as college or trade school expenses, buying that first car and other ordinary life expenses, there is little doubt that having children is a very expensive monetary responsibility for most

116. See Paterson, *supra* note 25.

117. See, e.g., Thomas C. Gabel, *A Critical Analysis of the Child Support Recovery Act: Do Deadbeat Dads have a Leg to Stand On After the Supreme Court's New Commerce Clause Decision?*, 41 ST. LOUIS U. L.J. 353 (1996); Goulah, *supra* note 17; but see Mark R. Fondacaro & Dennis P. Stolle, *Revoking Motor Vehicle And Professional Licenses For Purposes Of Child Support Enforcement: Constitutional Challenges And Policy Implications*, 5 CORNELL J.L. & PUB. POL'Y 355 (1996); Ronald S. Kornreich, *The Constitutionality of Punishing Deadbeat Parents: The Child Support Recovery Act of 1992 After United States v. Lopez*, 64 FORDHAM L. REV. 1089 (1995).

118. See Patterson, *supra* note 25, at 131.

119. *Id.* at 110 n.99.

120. See Taylor, *supra* note 109, at 1078.

121. See Hatcher, *supra* note 115, at 1074-75.

122. *Id.* at 1083.

123. See Angela R. Fertig, Irwin Garfinkel, & Sara McLanahan, *Child Support Enforcement and Domestic Violence Among Non-Cohabiting Couples*, 1 (Working Paper Ser., March 2006), available at <http://ssrn.com/abstract=895712>.

124. Lepow, *supra* note 29, at 130.

Americans. Who should bear the burden of raising children? Parents? Society? Or a combination? Our society has clearly answered the latter¹²⁵ because we understand that when someone else's child discovers the cure for cancer or a vaccine for AIDS or builds a Microsoft, or joins the Navy, or becomes a good citizen, we all ultimately benefit.¹²⁶ Hence, tax breaks for children have been embraced by both the right and the left as a good investment in children.¹²⁷ The debate is really a matter of degree. Conservatives tend to argue for imposing more of the burden on the individual and liberals (or moderates) tend to clamor for more of a government role.¹²⁸ Hence, regarding government investment in children, liberals or progressives support such investment because it has societal value while conservatives view this as a "socially beneficial private investment."¹²⁹ Reflecting society's views, our laws also reflect our obligations to children through the doctrine of *parens patriae*.¹³⁰

Our current tax system allows tax breaks for children based on both a tax internal (ability to pay) and external argument (societal benefit).¹³¹ Because more than one taxpayer can claim eligibility for the dependency exemption it has engendered friction between parents.¹³² To lessen the friction a commentator has argued that the dependency deduction could be divided equally between the parents.¹³³ Such change would, of course, require legislative action,¹³⁴ and, although a step in the right direction, this would not address the fundamental problem of refusal to

125. Even though more could be done for the poor, social spending in the United States "has increased almost every year since the late 1960s," During the last four decades, social spending has gone from \$88 billion to over \$500 billion, an increase in real dollars and as a percentage of total government spending and Gross Domestic Product. See Ron Haskins, *The Moynihan Report Revisited: Lessons and Reflections After Four Decades: Moynihan was Right: Now What?*, 621 ANNALS 281, 292 (2009).

126. Lawrence Zelenak, *Children and the Income Tax*, 49 TAX L. REV. 349, 358, 388-89 (1994). This is based on a tax external argument, that is, the benefit society gains from giving preference to some behavior by providing a tax break. *Id.* at 388. It has been argued that families with children should receive tax allowances because of "the positive externalities of well-behaved children and the negative externalities of poorly-cared-for ones." *Id.* at 358.

127. *Id.* at 388.

128. *Id.* at 388-89.

129. *Id.*

130. See Taylor, *supra* note 109, at 1071. (starting under the doctrine of *parens patriae*, the court is empowered "to protect the best interests of the child.").

131. Zelenak, *supra* note 126, at 357.

132. Lepow, *supra* note 29, at 132.

133. *Id.* at 174. Commentators in the past have called for such a solution. See also Paul D. Lagomarcino, *The Divorced Husband and the Dependency Exemption Mirage: An Outline of the Problem and of a Statutory Corrective Procedure*, 12 TAX L. REV. 85, 95 (1956-57).

134. Lepow, *supra* note 29, at 183.

pay child support, low child support payments, or inability to make payments. Another commentator has argued that we shift our attention toward helping marriages and toward saving “‘good enough’ marriages”¹³⁵ because marriage should be the preferred institution for raising children and this would lessen the negative impact of divorce.¹³⁶ Although this is a sensitive position, it is not clear what government policy would be effective in reversing the current divorce rate. Although the commentator did not specifically call for enactment of a new government policy,¹³⁷ under the current political climate, it is questionable that such a policy could be enacted.

III. FEDERAL GOVERNMENT RESPONSE

The Family Support Act of 1998¹³⁸ signaled a change in societal attitude toward focusing on parents who do not meet their child support responsibilities and obtaining payment from them. Following passage of the Act, the government increased the pressure on these parents. As the major financier of child support,¹³⁹ the government wants to protect its interest and has decided on imposing tough sanctions for failure to fulfill child support requirements as a solution to the problem. When parents tried to skirt their child support responsibilities by moving out of state, the federal government responded by passing the Child Support Recovery Act (CSRA) which criminalized the relocation of a parent who is delinquent in child support payments.¹⁴⁰ Congress relied on the Commerce Clause to pass the CSRA,¹⁴¹ but commentators disagree whether the CSRA is constitutional.¹⁴² The effectiveness of the CSRA is questionable because eighteen months following passage of the act only five cases had been prosecuted under it.¹⁴³ This may have been because of the challenge of proving (as required by the Act) that the

135. See Coverdale, *supra* note 1, at 506.

136. *Id.* at 479-83.

137. See *id.* at 505-06.

138. *Supra* note 70.

139. See Tobin, *supra* note 114, at 489.

140. The CSRA is codified at 42 U.S.C. § 666 (1990), and its purpose is to remove the incentive for non-custodial parents to evade their child support obligations by moving out of state. See Patterson, *supra* note 25, at 358.

141. See Kornreich, *supra* note 117, at 1089.

142. See Gabel, *supra* note 117 (arguing that the CSRA is unconstitutional); see also Kornreich, *supra* note 117 (arguing that the CSRA is constitutional).

143. Gabel, *supra* note 117, at 358.

parent willfully moved out of state to avoid child support payments.¹⁴⁴ To complicate matters, some courts have also invalidated the CSRA.¹⁴⁵

In addition to using the court system, the government is also using administrative measures such as revoking driver's licenses.¹⁴⁶ This route appears to be one of the more effective tools used by the government because it is more efficient and the likelihood of using the court system is low.¹⁴⁷ Moreover, this raises few constitutional concerns because the right to drive is not seen as a fundamental constitutional right.¹⁴⁸ If the parents who are delinquent in child support payments decide to drive without a license, then the government might "boot"¹⁴⁹ their cars; send them birthday cards reminding them of their kids' birthdays, post their pictures on a most wanted list or even order a ban on procreation.¹⁵⁰ As stated earlier, these tactics have largely failed because the main reason a parent fails to pay his or her child support payments is that he or she does not have adequate money to do so. Jailing the parent is particularly offensive and inefficient because jails are overcrowded and the parent is often quickly released.¹⁵¹ The system is also fraught with errors¹⁵² and does not take in-kind contributions into consideration. In sum, the family court system charged with preservation of the family is ripping the family apart and is ripe for changes.¹⁵³

144. See Kornreich, *supra* note 119, at 1097. One suggestion to avoiding this constitutional crisis is to simply give the IRS the power to collect child support orders. Being a federal agency, the IRS can follow the delinquent anywhere he goes. See Jonathon Jemison, *Collecting and Enforcing Child Support Orders with the Internal Revenue Service: An Analysis of a Novel Idea*, 20 WOMEN'S RTS L. REP. 137, 137 (1999).

145. See, e.g., *United States v. Schroeder*, 894 F. Supp. 360, 368-69 (D. Ariz. 1995), *rev'd sub nom.*, *United States v. Mussari*, 95 F. 3d 787 (9th Cir. 1996); *United States v. Mussari*, 894 F. Supp. 1360, 1368 (D. Ariz. 1995), *rev'd*, 95 F. 3d 787 (9th Cir. 1996); *United States v. Bailey*, 902 F. Supp. 727, 730 (W.D. Tex. 1995), *rev'd*, 115 F. 3d 1222 (5th Cir. 1997); *United States v. Parker*, 911 F. Supp. 830, 843 (E.D. Pa. 1995), *rev'd*, 109 F. 3d 28 (3d Cir. 1997).

146. See Fondacaro & Stolle, *supra* note 117, at 362. This appears to be the modern trend and is encouraged by the federal government in an effort to lessen reliance on the court system which can be more costly and less efficient.

147. *Id.*

148. *Id.* at 379.

149. A car boot is a device that immobilizes a vehicle; it consists of a clamp that surrounds the wheel of a vehicle and that prevents both the clamp and the wheel to be removed. It is most often used by parking departments of big cities as an effective tool to collect unpaid parking fees.

150. See Goulah, *supra* note 17, at 486.

151. *Id.* at 488-89.

152. *Id.* at 496.

153. *Id.* at 502-04. The author suggests several improvements to the system such as: (a) automatic adjustments to child support payments under certain circumstances such as illness of the non-custodial parent, (b) adoption of the presumption of joint custody, (c) calculations of child

Some believe the problem lies in the custodial parent not receiving enough child support payments and call for automatic cost of living adjustments for the recipient parent.¹⁵⁴ This may prove to be a disincentive for work¹⁵⁵ and does not address the root cause of the problem: the non-custodial parent's inability to pay. Others call for an increase in human capital investment such as spending \$2000 per year on each child under the age of fifteen.¹⁵⁶ It is argued that the return for this investment will exceed 10 percent and, hence, worth the risk.¹⁵⁷ Nevertheless, it is doubtful that the current Congress has either the stomach or the means to carry out such a program.

IV. IS TAXPAYER SELF-HELP THE ONLY WAY OUT?

A. *Economic Policy*

Government social and tax policies are necessarily driven by economic policy and the public fisc because ultimately someone (the taxpayer) has to pay for government expenditures. The types of economic policy that we follow signal our priorities, or at least our

support payments based on the true cost of raising children, (d) reduction of errors, (e) repeal the Bradley amendment which prohibits the modification of child support arrearages and (f) institution of programs to help poor fathers obtain meaningful employment. *Id.* See also Daniel L. Hatcher & Hannah Lieberman, *Breaking the Cycle of Defeat for Non-custodial Parents Through Advocacy*, 37 J. POVERTY L. & POL'Y 5 (2003) (claiming that the child support system is broken).

154. See J. Thomas Oldham, *Abating The Feminization of Poverty: Changing The Rules Governing Post-Decree Modification of Child Support Obligations*, 1994 BYU L. Rev. 841, 849-50 (1994). The author correctly claims that expressing child support payment as a fixed amount erodes its purchasing power due to inflation and, thus, puts the burden on the recipient of the award. Modification of child support payments is a solution in theory but it is burdensome on a practical basis. Hence, the author calls for automatic Cost of Living Adjustments (COLA) and notes that courts have been supportive of this approach.

155. *Id.* at 861. If the obligor of child support payments is forced to share any increases in wages with his ex-partner in the form of increased child support payments, he may not see any real value in increasing his efforts at work.

156. See Tobin, *supra* note 114, at 459-60. The author claims that such programs will be more effective than other social programs because if the payments are made directly to children, there is a greater chance they will be spent on children. The author also claims that recent social programs mandate significant restrictions on parents and when they run afoul of these restrictions, families lose these benefits.

157. *Id.* at 463. The author compares his program with the negative income tax as advocated by famed economist Milton Friedman and finds that his program is less monumental and may be more effective than Friedman's program because he (Friedman) proposed the negative income tax 30 years ago and no progress has been made. Not directly rejecting Friedman's call, the author suggests that his proposal may be a small step in that direction. *Id.* at 496. The negative income tax concept is basically a subsistence allocation formula with a refundable feature. Thus, if it is set at \$10,000, a person with no income will receive \$10,000 from the government and a person with a \$100,000 income and a \$30,000 tax liability will only pay \$20,000 in tax. *Id.* at 495.

leaders' priorities. Today, we appear to be in the throes of Obamanomics as Reaganomics and the trickle down economic theory are beginning to be discredited.¹⁵⁸ The now preferred bottom up theory of economics appears to be looking to education, health care and infrastructure for economic growth.¹⁵⁹ The middle class should benefit from this shift in priorities as public investment increases.¹⁶⁰ President Obama also appears to have a better opportunity than his democratic predecessor, Bill Clinton, to focus on public investment.¹⁶¹ His supporters are taking up the mantle and are urging him to reverse course on Reaganomics.¹⁶² With victories in healthcare¹⁶³ and financial reform,¹⁶⁴ he appears to be heeding their calls. With regard to policies on children, at the micro economic level, commentators are arguing that families are not pooling their income as one would suspect,¹⁶⁵ and that children do better when more income is shifted to women.¹⁶⁶ The Obama administration may not be advocating for a gender specific economic policy but their bottom up approach should be beneficial to women and even some in the upper class who appears to be revolting against the extremely rich.¹⁶⁷

158. See Reich, *A Short Primer*, *supra* note 40.

159. *Id.*

160. *Id.*

161. *Id.* According to Professor Reich, this is because Clinton presided over an expanding economy when assets were needed to feed the expansion; Obama, on the other hand, inherited a recession and needs to create a boom. Hence, government spending will be the key to getting the economy moving again. *Id.*

162. See Alan Brinkley, *This is Our Moment*, N.Y. TIMES, Jan. 18, 2009, at BR7. Mr. Brinkley reviewed three books written by supporters of Obama: (1) *A Long Time Coming—The Inspiring, Combative 2008 Campaign and the Historic Election of Barack Obama*, by Evan Thomas, (2) *The Plan—Big Ideas for Change in America*, by Rahm Emmanuel and Bruce Reed, and (3) *Obamanomics—How Bottom-Up Prosperity Will Replace Trickle Down Economics*, by John R. Talbott. All three books are hostile to Reagan-era economic policies.

163. See Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES, Mar. 23, 2010. The Patient Protection and Affordable Care Act represents a major reform of health care in this country and will allegedly cover most of Americans.

164. See Kara Rowland, *Historic Wall Street Reform Signed*, WASH. TIMES, July 23, 2010.

165. See Shelly J. Lundberg, Robert A. Pollak & Terence J. Wales, *Do Husbands and Wives Pool Their Resources? Evidence from the United Kingdom*, 32 J. HUM. RESOURCES 463, 479 (1997). The authors conclude that families do not pool their income and that when resources are allocated to women, they (women) and children benefit. This means that men tend to keep resources to themselves. This is an important finding and should help government devise social policies that are more efficient and more responsive to the needy.

166. *Id.*

167. See Matt Miller, *Goldman Sachs and the Revolt of the Lower Upper Class*, WASH. POST, Apr. 23, 2010. This article chronicles the resentment being built up among doctors, accountants, engineers and lawyers as they realize that a super rich class is being created with income levels that dwarfs theirs. The article points out that the upper lower class feels cheated when they are

B. Tax Policy

The early report on President Obama's shift in tax policy appears to be favoring the middle income taxpayer.¹⁶⁸ However, most would admit that President Obama has not taken bold action regarding taxes and we are arguably still saddled with two tax codes, one for the rich and one for the not so rich.¹⁶⁹ Whichever tax code you fall under, it is clear that the code is complex and getting more challenging. Albert Einstein may have been right—the hardest thing in the world to understand may be the income tax code.¹⁷⁰ This complexity has caused administrative problems and has bred cynicism.¹⁷¹ In addition to income tax simplification, there have been calls to reform the income tax such as replacing it with a value added tax, a flat tax and a national retail sales tax.¹⁷² To date, none of these proposals appears have a serious chance of being enacted. Although it would help lower income taxpayers, tax simplification does not appear to have a constituency.¹⁷³ This may be due to the lack of tax sophistication on the part of low income taxpayers, but tax sophistication should not be a requirement to getting a slice of the economic pie.¹⁷⁴ Commentators have called for more specific changes in tax policy such as combining the household credits into one unified credit which will, in addition to simplifying the tax laws, reduce work disincentive and decrease the need for other welfare provisions.¹⁷⁵ Other suggestions include giving parents a deduction for the costs of raising children or splitting the income of families based on the family

scrapping by “on a million or two—or God forbid, \$300,000” when “people no smarter or better than [them] are making \$10 million or \$50 million or \$100 million in a single year.” *Id.*

168. See Dorothy A. Brown, *Race, Class, and the Obama Tax Plan*, 86 DEN. U.L. REV. 575, 577-81 (2009). In the article, Professor Brown highlights some of the Obama tax ideas that will benefit the middle class such as (1) a automatic enrollment in employer-funded retirement systems, (2) implementation of a refundable mortgage deduction, and (3) an expansion of the EITC.

169. See Dorothy A. Brown, *Two Americas, Two Tax Codes*, N.Y. TIMES, Mar. 8, 2009.

170. Simran Khurana, *Funny Tax Quotes That Unravel the Mystery of Income Tax*, ABOUT.COM, <http://quotations.about.com/od/moretypes/a/taxquotes1.htm><http://quotations.about.com/od/moretypes/a/taxquotes1.htm> (last visited Sept. 1, 2010).

171. See Michael J. Graetz, *A Fair and Balanced Tax System for the 21st Century*, American Enterprise Institute (2005), available at http://www.aei.org/docLib/20050607_Graetz.pdf.

172. *Id.*

173. See Schenk, *supra* note 22, at 123.

174. *Id.* at 126-27.

175. See C. Eugene Steuerle, *Combining Child Credits, the EITC, and the Dependent Exemption-Part Two: The Various Rationales*, TAX ANALYSTS (2000).

members spending the income.¹⁷⁶ As argued above, it is doubtful that the current political climate would permit an expansion of social programs.

One of the few successes of social policy engineered through the tax code is the EITC, a program supported by both Democrats and Republicans¹⁷⁷ that reaches 80% of low income earners.¹⁷⁸ Anecdotal successes include reports of the EITC helping taxpayers put down money on a house, buy a car or even go to college.¹⁷⁹ Nevertheless, the EITC could be made more efficient because it is essentially a transfer from the worker to the government and back to the worker.¹⁸⁰ Also, due to its complexity, most workers have to hire a tax preparer in order to secure the benefits of the credit,¹⁸¹ and millions of workers simply do not take advantage of the credit notwithstanding measures taken by the IRS to publicize it.¹⁸² One way to fix this problem is to enable IRS computers to alert it of taxpayers who qualify but do not apply for the credit.¹⁸³

Building on the relative success of the EITC in providing money to the working American, it has been suggested that it can be used to help the non-custodial parent gain additional funds to support his or her children. For instance, the IRS could treat him or her as if he or she has a child for EITC purposes, or give half of or the entire credit to him or her if the custodial parent does not qualify for the credit, or giving him half of the credit.¹⁸⁴ Of course, this generous extension of benefits would be available only if the parent is current on his or her child support payments,¹⁸⁵ a sensible approach that would incentivize the non-

176. See Allan J. Samansky, *Tax Policy and the Obligation to Support Children*, 57 OHIO ST. L.J. 329 (1996).

177. See Theriot, *supra* note 45, at 130.

178. *Id.* at 131. The EITC is a refundable federal income tax credit for low to moderate income working individuals and families. Congress originally approved the program in 1975 in part to offset the burden of social security taxes and to provide an incentive to work. EITC Home Page—It's easier than ever to find out if you qualify, <http://www.irs.gov/individuals/article/0,,id=96406,00.html> (last visited May 4, 2011).

179. See Downing, *supra* note 95.

180. See Theriot, *supra* note 45, at 134.

181. *Id.* at 133.

182. See *infra* note 256.

183. See Theriot, *supra* note 45, at 135-36.

184. See Laura Wheaton & Elaine Sorensen, *Non-custodial Parents, Child Support, and the Earned Income Tax Credit*, THE URBAN INSTITUTE, Nov. 28, 1997, available at <http://www.urban.org/publications/407347.html>.

185. *Id.* at 26.

custodial parent to work and also to make his or her child support payment.¹⁸⁶

C. The Government's True Priority—Big Business

The tax breaks granted to big business are legendary.¹⁸⁷ The rationale for these tax breaks is that what is good for business is good for America. Therefore, when insurance giant AIG was in danger of failing, the government quickly pumped \$173 billion into AIG's coffers.¹⁸⁸ In response, AIG executives spent millions on bonuses and retreats.¹⁸⁹ The government threatened action, but none is forthcoming.¹⁹⁰ After all, these are highly trained and highly paid executives and they need their bonuses to keep up their summer homes. Had it been low income taxpayers instead of a financial giant found violating tax rules, the government would have likely applied a harsh punishment.¹⁹¹ What if the troubled company is a banking giant like Wachovia? The government quickly found money to bail them out. Hence, executives

186. *Id.* at 50.

187. I.R.C. § 162 is the grandfather of all federal income tax breaks and offers businesses an above the line deduction for any expense imaginable. The rationale for the tax break is to incentivize businesses to spend money. It has been argued that the incentive is not needed because businesses only spend money when it benefits them. Hence, a business would rather lose a tax break if this means, overall, greater savings. States also offer tax breaks to businesses to either attract them or prevent them from seeking greener pastures, but it has been argued that these tax breaks decrease overall welfare and only benefit a few. See Thomas J. Holmes, *Analyzing a Proposal to Ban State Tax Breaks to Businesses*, 19 FED. RES. BANK MINNEAPOLIS 29, 31 (1995).

188. See Tracy A. Thomas, *Bailouts, Bonuses, and the Return of Unjust Gains*, 87 WASH. U. L. REV. 437, 438 (2009-10).

189. *Id.* at 437.

190. Congress responded to the AIG extravagance by attempting to pass several bills that would have restrained such excesses but they were all defeated. *Id.* at 440. The government could have recaptured the money squandered by AIG executives using several contractual and other theories such as restitution, partial rescission, constructive trust, and accounting for profits. *Id.* at 441-46. New York State Attorney General Andrew Cuomo threatened to release the names of executives who received bonuses; to almost no avail (a few executives returned their bonuses). See *Cuomo Wins Ruling to Name Merrill Bonus Recipients*, N.Y. TIMES, Mar. 18, 2009, available at <http://www.nytimes.com/2009/03/19/business/19cuomo.html>. It is fair to say that there has been little accountability for the billions in government funds that were given to businesses under the guise of "too big to fail" and that no punishment is forthcoming with respect to misuse of funds. See Steven Pearse, *Accounting for the Lack of Accountability: The Great Depression Meets the Great Recession*, 37 HASTINGS CONST. L.Q. 409, 426 (2009-10).

191. Under I.R.C. § 32(k), if a taxpayer makes a fraudulent or reckless claim, the taxpayer could be denied the use of the EITC for up to ten years. With the EITC representing a significant portion of a low income taxpayer's income, this is a significant penalty. It is quite telling that the Congress is willing to be harsh with the low income taxpayer and yet does not have the stomach to recoup government funds from millionaires and billionaires.

are rewarded in good times and protected from failure.¹⁹² This is, of course, nothing new. Chrysler was bailed out in 1979 and again in 2009.¹⁹³ It is fair to say that big business (especially big banking) has always had a special seat in government.¹⁹⁴

To get the full protection required, a company only has to be “too big to fail.”¹⁹⁵ This new economic theory, reminiscent of the “domino theory”¹⁹⁶ used by then Secretary of State Kissinger and others to rationalize the Vietnam war, stands for the proposition that the failure of some companies would be disastrous to the economy; hence, the government should prevent their collapse at all costs. The government takes quick action when it comes to big business, legislation is passed overnight and budgetary concerns are no obstacle.¹⁹⁷ Concerns regarding the Troubled Asset Relief Program (TARP),¹⁹⁸ (the too big to fail legislation) such as its delegation of power being unconstitutional and its lack of accountability,¹⁹⁹ and the lax ethics that allow a revolving door between the Federal Reserve Bank and the private sector,²⁰⁰ and

192. See Tim Fernholz, *The Myth of Too Big to Fail*, THE AMERICAN PROSPECT, Oct. 28, 2009, available at http://www.prospect.org/cs/articles?article=the_myth_of_too_big_to_fail.

193. See Richard W. Painter, *Bailouts: An Essay on Conflicts of Interest and Ethics When Government Pays the Tab*, 41 MCGEORGE L. REV. 131, 138 (2009-2010).

194. In 1907, J.P. Morgan acted as a national bank for the US government because it did not have a national bank. In subsequent years, Treasury officials were borrowing from private banks such as Andrew Mellon from Mellon Bank, William Simon from Salomon Brothers, Donald Regan from Merrill Lynch, and most recently, Robert Rubin and Henry Paulson from Goldman Sachs. *Id.* at 140-41.

195. AIG qualified as too big to fail because it was feared that its failure would trigger a “cataclysmic domino effect” that could endanger the entire U.S. financial sector. See Thomas, *supra* note 190, at 437. The financial crisis that was the precursor to the government bailout was blamed on the irresponsible subprime lending market. For a description of how this type of lending worked, see Frederick Tung, *The Great Bailout of 2008-09*, 25 EMORY BANKR. DEV. J. 333 (2008).

196. Under this cold war theory, it was believed that the then Soviet Union intended to extend its influence one country at a time and that if one country in Asia fell to communism, this would trigger the fall of the next country and so on, like dominoes. The United States and its allies had to stop this domino effect and they decided to make their stand with Vietnam. President Dwight D. Eisenhower gave credence to this theory in a press conference on April 7, 1954 by referring to it. See President Eisenhower’s News Conference, Apr. 7, 1954, *Public Papers of the Presidents*, 1954, p. 382, available at <http://www.mtholyoke.edu/acad/intrel/pentagon/ps11.htm>.

197. See Pearse, *supra* note 190, at 410.

198. Pub. L. No. 110-343, 122 Stat. 3765 (2008).

199. See Pearse, *supra* note 190, at 419.

200. See Painter, *supra* note 193, at 140-41. Federal Reserve Bank officials have been accused of taking gifts and socializing with the bankers they are examining and of giving their resumes to banks they were examining. The list of regulatory problems goes on. See Robert D. Auerbach, *The Fed’s Backroom Bailout Policy*, 12 CHAP. L. REV. 535, 539 (2008). A commentator argued that the response to the current financial crisis (more regulations) will not be adequate because underlying the crisis is a lack of moral virtue. The author argues that underlying moral-cultural trends that gave rise to the financial crisis must be addressed by the “cultivation of intangible capital assets such as

that it (the Federal Reserve Bank) is becoming a fourth branch of the government,²⁰¹ are no match for political money.²⁰² The Obama administration was able to push through healthcare reform because it was tied to economic reform and the Democrats enjoyed a large majority in both houses of Congress. Purely social programs such an expansion of the EITC or new tax credits for children are not in the horizon. Any improvement of the economic and therefore social and psychological condition²⁰³ of the separated child will have to be done in the margin by his parents. Hence, the time is ripe for an increase in tax arbitrage, after all billions of dollars are at stake.²⁰⁴

D. Tax Arbitrage

Ideally, the income tax system should play little to no role in bona fide transactions. If a tax benefit is the driving force in a transaction, then the transaction is probably a tax shelter and should be attacked accordingly.²⁰⁵ If the transaction is not driven by the tax system but if the taxpayer is merely using the tax system to enhance the transaction, this may be permissible tax planning. Tax arbitrage generally exists when “deductions and income related to the same transaction are treated differently.”²⁰⁶ The connection between tax arbitrage and tax shelters is

reputational and social capital” and our thinking “needs to be more sensitive to the complexity of the relationship between ethics and economics and more attuned to the importance of trust, truth, and transparency.” Kevin T. Jackson, *The Scandal Beneath the Financial Crisis: Getting a View From a Moral-Cultural Mental Model*, 33 HARV. J.L. & PUB. POL’Y 736, 739 (2010).

201. See Henry S. Cohn, *In Fed We Trust: Ben Bernanke’s War on the Great Panic*, BOOK REVIEWS (2009) (reviewing DAVID WESSEL, *IN FED WE TRUST: BEN BERNANKE’S WAR ON THE GREAT PANIC* (2009)). Mr. Wessell argues that Ben Bernanke’s attitude of “whatever it takes” has turned the Federal Reserve Bank into a fourth branch of government. *Id.*

202. See Painter, *supra* note 193, at 139.

203. See Taylor, *supra* note 109, at 1077-78.

204. See *infra* note 229.

205. The IRS has attacked the use of tax shelters for years and has recently taken a different tactic, preferring to require taxpayers to disclose transactions that qualify as tax shelters. If the taxpayer fails to disclose these transactions, then the taxpayer will be subject to severe penalties. There are six major transactions that the IRS requires to be registered: (1) listed transactions, (2) confidential transactions, (3) transactions with contractual protection, (4) loss transactions, (5) transactions with a significant book/tax difference, and (6) transactions involving a brief asset holding period. For more information, see Treas. Reg. §§ 1.6011-4, 301.6011-1T et. seq.

206. W. Eugene Seago & Edward J. Schnee, *Determining Interest Expense Incurred by Affiliated Corporations to Earn Tax-Exempt Income*, 102 J. TAX’N 299, 299 (2005). Examples of tax arbitrage include borrowing money to purchase tax-exempt bonds and even leasing a piece of equipment. This is because the interest paid on the borrowed money to buy the tax-exempt bond is deductible while the interest received on the bond is not includable in income. In the lease example, the taxpayer gets a deduction for his lease payments, hence, he might be willing to pay more for the equipment while leasing it as opposed to buying it.

clear but not every tax arbitrage is considered a tax shelter.²⁰⁷ As I will explain below, the IRS has even blessed tax arbitrage in the separated family context.

E. Arbitrage by Tax-Exempt Entities—Hospitals and Colleges

Congress is currently grappling with tax arbitrage transactions by non-profit hospitals and colleges.²⁰⁸ While not trying to avoid tax liability, these entities are using their tax-exempt status to bolster income, for example by borrowing money in the tax-exempt bond market at a low rate and investing this borrowed money in higher yielding investments.²⁰⁹ According to the Congressional Budget Office (CBO), in 2007 such schemes bolstered non-profit hospitals income by \$1.8 billion, a significant sum compared with their overall tax-exempt status valued at \$2.5 billion.²¹⁰ Hospitals counter that the CBO study is fundamentally flawed as it assumes that all cash on hand held by hospitals could be used to finance projects and, thus, presumes that such cash, when retained, is used for arbitrage purposes when hospitals borrow to finance projects.²¹¹ Hospitals point out that their bond ratings are partly based on cash on hand and the lower amount of cash on hand, the lower the bond rating and, thus, the higher interest a hospital would pay on borrowed funds.²¹² Such argument, however, does not explain enough cash on hand to pay for 38,000 days of operations.²¹³ Under a broadened definition of tax arbitrage, the financial picture for the federal government would improve as “hospitals would have to reduce their new issues of tax-exempt bonds,” necessarily saving the government money.²¹⁴ As typical of its studies, the CBO did not make a recommendation, instead it left unanswered whether a broader definition of tax arbitrage for hospitals would bring more market efficiency as the advantage of non-profit hospitals over for-profit hospitals narrow or

207. See *infra* note 224.

208. See Goldie Blumenstyk, *Senator Questions Another Tax Break for Colleges: Tax-Exempt Bonds*, CHRON. HIGHER EDUC., May 2, 2010.

209. See Becket Cinda, *Clash on Hand*, 37 MOD. HEALTHCARE 40, 42 (Mar. 25, 2007) (Issue 10).

210. *Id.*

211. *Id.* Under the CBO methodology, if a hospital's assets exceed its bonds, this is tantamount to tax arbitrage.

212. *Id.* This would mean higher costs of capital to the disadvantage of the hospital.

213. CONG. BUDGET OFF., *Nonprofit Hospitals and Tax Arbitrage*, at 14 (2006), available at <http://www.cbo.gov/ftpdocs/76xx/doc7696/12-06-HospitalTax.pdf>.

214. *Id.* at 3.

whether this would be damaging to some non-profit hospitals as a cost capital differential is created among non-profit hospitals.²¹⁵

Under the CBO study, 80% of bonds provided by hospitals could be considered tax arbitrage.²¹⁶ Regarding colleges, the figure jumps to 100%,²¹⁷ and the amounts involved are more staggering—\$5.5 billion in tax arbitrage savings and \$6.6 billion in tax exemption savings.²¹⁸ Even with this apparent total immersion in tax arbitrage, Congress does not appear ready to do anything about the problem, beyond issuing press releases.²¹⁹ Section 148 of the Internal Revenue Code prevents direct tax arbitrage in the bond setting and attempts to prevent indirect tax arbitrage²²⁰ but the section is relatively easy to evade because money is fungible. Moreover, the section's main rule in preventing indirect tax arbitrage (the replacement proceed rules) is very difficult to enforce.²²¹

Outside the non-profit arena, some argue that tax arbitrage is not widespread beyond the financial sector.²²² The evidence, however, appears to the contrary. States appear to heavily engage in tax arbitrage,²²³ and individuals and businesses can engage in tax arbitrage without even knowing it.²²⁴ Tax arbitrage is pervasive and it arguably fuels tax shelters.²²⁵

F. Permissible Tax Arbitrage

As argued above, the likelihood for increased social benefits in the near future is bleak. The separated child, in the meantime, continues to suffer from the economic, social and psychological burden of his

215. *Id.* at 21-22.

216. *Id.* at 15.

217. See CONG. BUDGET OFF., *Tax Arbitrage by Colleges and Universities*, at 16 (2010), available at <http://www.cbo.gov/ftpdocs/112xx/doc11226/04-30-TaxArbitrage.pdf> [hereinafter *College Tax Arbitrage*].

218. *Id.* at 2.

219. See Blumenstyk, *supra* note 208.

220. I.R.C. § 148.

221. See *College Tax Arbitrage*, *supra* note 202, at 7. See also § 148(a), which provides that a bond will be treated as an arbitrage bond if the issuer intentionally uses any portion of the proceeds in a prohibited manner.

222. See Merle Erickson, Austan Goolsbee & Edward Maydew, *How Prevalent is Tax Arbitrage? Evidence from the Market for Municipal Bonds (2002)*, available at <http://faculty.chicagobooth.edu/austan.goolsbee/research/munis.pdf>.

223. See Gilbert E. Metcalf, *Arbitrage and the Savings Behavior of State Governments*, 72 REV. ECON. & STAT. 390 (1990), available at <http://ideas.repec.org/a/tpr/restat/v72y1990i3p390-96.html>.

224. See C. Eugene Seurle, *Defining Tax Shelters and Tax Arbitrage*, TAX POL'Y CENTER (2002), ¶ 6, available at <http://www.urban.org/publications/1000949.html>.

225. *Id.* ¶ 7.

family's separation.²²⁶ Ultimately, our whole society suffers. An increase in child support payment is one way to alleviate this suffering and increasing tax arbitrage among separated couples is an efficient way to do it. This is potentially effective because the average value of child related benefits is \$1500 while the average yearly amount of child support payments that a single parent receives is \$1449.²²⁷ Moreover, parents routinely forego more than \$6 billion in tax arbitrage benefits.²²⁸ Worse, evidence suggests that the use of tax arbitrage is higher among the higher income, reflecting greater tax sophistication.²²⁹ The evidence also proves that, on a consistent basis, the non-custodial parent would benefit more from claiming the children as dependents, and the whole family would benefit if these enhanced benefits are shared.²³⁰ More importantly, evidence shows that non-custodial parents who claim children as dependents pay 16% more in child support payments.²³¹ Additionally, the evidence also suggests that the likelihood of payments increase when separated parents enter into a voluntary agreement.²³² The real benefit will be increased visitation by the non-custodial parent and an increased commitment to the children.²³³

The low income taxpayer may not engage in tax arbitrage due to high transactional costs.²³⁴ There is no reason to believe that the higher income family does not share these same transactional costs, yet, they take better advantage of tax arbitrage.²³⁵ The key factor seems to be the lack of tax sophistication on the part of the low income taxpayer and, as

226. See *supra* note 1 (arguing that the child benefits socially, economically, and psychologically when she is part of a two-parent family, otherwise, she suffers).

227. See Looney, *supra* note 39, at 2.

228. *Id.* at 4.

229. In a prior work, Mr. Looney calculated that if all custodial mothers claim all children, the net tax savings would be \$7.9 billion. If non-custodial fathers claim them instead, the net tax savings would be \$15.3 billion. Of this tax arbitrage potential, he also calculated that only about \$1 billion is used, and mostly by parents with higher income. See Mombrun, *supra* note 15, at note 39.

230. See Looney, *supra* note 39, at 11-12.

231. *Id.* at 3.

232. See Peterson & Nord, *supra* note 102, tbls.3 & 4.

233. Evidence suggests a link between increased payments and visitation. See Robert I. Lerman & Elaine Sorensen, *Child Support: Interactions Between Private and Public Transfers* 45, 38 (Nat'l Bureau of Econ. Res., Working Paper No. 8199, 2001), available at <http://www.nber.org/papers/w8199>.

234. See Looney, *supra* note 39, at 4. Such transactional costs allegedly include a high emotional cost or the role of violence or threatened violence and lack of tax sophistication. There is no reason to believe to believe that the higher income taxpayer who takes better advantage of the available tax arbitrage does not encounter similar transactional costs; the difference is their higher tax sophistication.

235. See *id.*

discussed below, this can be remedied. More importantly, tax sophistication should not be a requirement to taking advantage of a favorable policy granted by Congress.²³⁶

G. States get into the Act

State judges are aware of the economic benefits of the dependency exemption and have used its allocation to enhance child support payments.²³⁷ Some judges believe that:

The facts of life are that income tax exemptions are valuable only to persons with income, and up to a certain point, the higher the income the more valuable exemptions become . . . [c]onsequently, it seems only reasonable that a trial judge should allocate the dependency exemption to the parent in the highest tax bracket, and then enhance (or reduce) the value of the cash child support payments to offset the value of the exemption.²³⁸

Other judges state the same proposition in even stronger language: “We hold that a tax dependency exemption is nearly identical in nature to an award of child support or alimony and is thus capable of being modified as an order of support.”²³⁹ These judges rely on the best interests of the child doctrine for their decisions to decide whom to allocate the dependency deduction to. The dependency exemption being a federal benefit, judges understand that they cannot singularly assign the deduction to the non-custodial parent even when this would benefit the whole family. They get around this technicality by requiring the custodial parent to sign over the dependency exemption or face a contempt citation.²⁴⁰ Some judges do not choose to use their contempt power in this manner but choose instead to take the dependency

236. See *supra* note 40.

237. State judges have generally taken the following three positions with regard to the allocation of the dependency exemption granted by I.R.C. § 151: (1) the section does not prevent a judge from allocating the dependency exemption, (2) the section does not prohibit allocation of the exemption and the use of the state judge’s contempt power to require that the custodial parent sign over the allocation to the non-custodial parent, and (3) the section pre-empts the authority of the state judge. For an exhaustive list of cases on the issue, see Gavin L. Phillips, *State Court’s Authority, in Marital or Child Custody Proceeding to Allocate Federal Income Tax Dependency Exemption for Child to Non-custodial Parent under 152(e) of the Internal Revenue Code* 26 U.S.C.A. 152(e), 77 A.L.R.4th 786 (2009), at *3-5.

238. Cross v. Cross, 363 S.E.2d 449, 459-460 (W. Va. 1987).

239. Hall v. Hall, 472 N.W.2d 217, 221 (Neb. 1991).

240. See, e.g. Nichols v. Tedder, 547 So. 2d 766, 770-780 (Miss. 1989).

exemption into account in determining child support payments.²⁴¹ Hence, the custodial parent will be indirectly punished if she refuses to allow the non-custodial parent the use of the dependency exemption when requested by the judge. Some judges believe that assignment of the dependency exemption is an encroachment on federal power and, therefore, will not take the forced assignment of the dependency exemption into account in calculating child support payments.²⁴² The majority of judges, however, permit this assignment because if it is not done, the winner will be the federal government and the loser will be the child.²⁴³

V. PROPOSED SOLUTIONS

The problems faced by the separated child are severe and must be addressed for the good of society. Doing nothing does not appear to be a viable option. The states have already fashioned a solution to the problem and they should be encouraged to continue to do so. The IRS has recently provided regulations addressing this issue. The regulations encourage the use of the IRS' Form 8332²⁴⁴ and require that a dependency exemption release signed by the custodial parent must be unconditional; hence, if it is contingent on the satisfaction of a condition such as the payment of child support, it will be ineffective.²⁴⁵ Thus, the IRS will not respect the unilateral action of a state court to allocate the dependency deduction but if the court, under its contempt power, obtains the signature of the custodial parent, then this allocation will be respected by the IRS. Hence, the IRS is appropriately leaving the issue of allocation of the dependency deduction to the states.

The following example based on a North Carolina couple illustrates the benefits of tax arbitrage to the separated family:²⁴⁶

241. See, e.g., *Dietz v. Dietz*, 436 S.E.2d 463, 466 (Va. Ct. App. 1993); *Baird v. Baird*, 760 S.W.2d 571, 573 (Mo. Ct. App. 1988).

242. See *Vick v. Superior Court of Los Angeles*, 47 Cal.Rptr. 840, 840 (Cal. Ct. App. 1965).

243. *Nichols*, 547 So. 2d at 775.

244. See Treas. Reg. § 1.152-4(e)(1)(ii).

245. See *id.* § 1.152-4(e)(1)(i). It is clear that the IRS does not want to get in the middle of such disputes.

246. This example was based on a chart based on the 1999 tax return of a California couple.

DIVORCED OR SEPARATED COUPLE WITH TWO CHILDREN,
NC 2009

	Custodial Mother	Non-custodial Father
Earnings	\$20,000	\$40,000
Child Care Expenses	\$1,000	

Scenario (I) Mother Claims Dependency Exemptions

	Custodial Mother	Non-custodial Father
Federal Income Tax	\$71	\$4,184
Dependent Care Credit	(\$71)	
Child Tax Credit	(\$2,000)	
Fed. EITC	(\$4,269)	
NC EITC	(\$213)	
State Income Tax	\$488	\$2,289
Total Tax Liability	(\$5,994)	\$6,473

Scenario (II) Father Claims Dependency Exemptions

	Custodial Mother	Non-custodial Father
Federal Income Tax	\$803	\$2,511
Dependent Care Credit	(\$320)	
Child Tax Credit		(\$2,000)
Fed. EITC	(\$4,269)	
NC EITC	(\$213)	
State Income Tax	\$788	\$1,599
Total Tax Liability	(\$3,211)	\$2,110
Change in Liability	\$2,783	(\$4,363)

Net Gain from "Trade": +\$1,580

The obvious question is how to allocate the gain from this trade. The cases discussed above²⁴⁷ appear to be concerned with ensuring the payment of child support, hence, any net gain from the trade will be allocated toward the non-custodial parent's child support obligations. It is not clear whether judges would allow use of the trade to create a windfall for the non-custodial father. Their central concern seems to be

247. See *supra* notes 238-43.

ensuring that child support payments are made and perhaps enhanced by allocation of the dependency exemption. Most judges are sophisticated, and they understand that the custodial parent (in the above example) is about \$3000 richer and the non-custodial parent is about \$1500 poorer. It appears that most judges would channel this tax savings “into increased child support or other payments, thereby rendering the custodial parent’s after-tax spendable income, including child support or other payments, the same or better than if he or she had claimed the dependency exemption.”²⁴⁸ This means that in the above example a judge would have a number of options including: (a) split the father’s income tax savings of \$4363 evenly between the couple; (b) ensure that both parties share evenly in the tax savings by allocating \$3573 to the custodial mother. She would, thus, recoup her loss of \$2783 and receive one half of the tax arbitrage savings of \$1580; or (c) allocate the full savings of \$4363 to the custodial mother.

The optimum solution would be (b) as both parties would each receive a net benefit of \$790.²⁴⁹ Option (a) appears equitable but upon closer inspection, it leaves the custodial mother in a worse position and provides a large windfall to the non-custodial father. Option (c) does not favor the father as it provides the full benefit of the tax savings to the mother. This option or a modified version of the option could be used by the court in case of child support deficits.

Another solution could be an increase in outreach by the IRS. Such programs have worked in the past,²⁵⁰ and should be part of the solution but not the totality of the solution because there is a limit to the effectiveness of outreach programs.²⁵¹ Yet another solution would be to treat the separated couple as a married couple for purposes of the

248. See *Nichols*, 547 So. 2d at 775.

249. States such as Colorado provide software that are able to take the child dependency allocation into child support calculations. Colorado’s software is available at http://www.divorceplanner.com/webhelp/Divorce_Planner_2010/State_Specific/Colorado/CO_Child_Support_Worksheets.htm (last visited Sept. 1, 2010).

250. Due to the EITC publicity program initiated by the IRS, for the year 2005 taxpayers received over \$41 billion through the EITC credit, for 2006, the amount was \$43.7 billion. See Lower Income Workers Eligible For Earned Income Credit, USA TODAY, Jan. 16, 2008, available at http://www.usatoday.com/money/perfi/taxes/2008-01-16-earned-income-credit_N.htm.

251. Despite the IRS’, and cities’ efforts pushing the EITC, millions of taxpayers are still not taking advantage of the program. See Eileen Putnam, *Millions of Eligible Americans Aren’t Applying For Earned Income Tax Credit*, SFGATE.COM (Jan. 27, 2008), http://articles.sfgate.com/2008-01-27/business/17151009_1_tax-credit.

dependency exemption and any tax savings allocated accordingly.²⁵² This proposal, while controversial, would be effective but, under the current political climate where Congress feels that the sanctity of marriage is being undermined, it appears that this proposal would have to overcome many challenges.

Finally, the tax code could be amended to reflect the permissible tax arbitrage currently allowed. The purpose of the amendment would be to extend current benefits provided by Congress to taxpayers who lack the tax sophistication to take advantage of these benefits. It should be noted that the following amendment is corrective in measure and does not create a new benefit:

Section 24—Child Tax Credit

* * *

(g) Coordination with child support payments—

(1) In the case of an individual who is an obligor of child support payments, any unused credit by a related person (defined as an individual who but for claiming the credit would have entitled the first individual to claim the child tax credit) under this section shall be allowed as a credit against the tax of the obligor. In the case of deficit in child support payments by the obligor, such credit shall be diverted toward the obligor's child support deficit.

(2) For purposes of this subsection, unused credit is any credit amount subject to the limitation under section 24(b)(3).

(3) Rules similar to subsection (1) shall apply with respect to the unused dependency exemption under section 151.

Is the proposal good law? Our voluntary income tax system relies on the acquiescence of taxpayers for its existence. To ensure continued compliance, Congress has to ensure that the laws it enacts are good laws and, thus, will be respected by taxpayers. A good law must be equitable, efficient and simple.²⁵³ To be equitable a tax must affect similarly situated taxpayers in the same manner (horizontal equity), and must

252. This option would be similar as an option advocated by a commentator to allocate the dependency exemption equally between the custodial and the non-custodial parent. *See* Goulah, *supra* note 17, at 502-03.

253. *See* Manoj Viswanathan, *Sunset Provisions in the Tax Code: A Critical Evaluation and Presumptions for the Future*, 82 N.Y.U. L. REV. 656, 668 (2007) ; *see also* Krisanne M. Schlachter, *Repeal of the Federal Estate and Gift Tax: Will it Happen and How will it Affect Our Progressive Tax System?* 19 VA. TAX REV. 781, 792 (2000) (describing a good law as meeting four requirements: fairness, neutrality, efficiency, and simplicity).

disparately impact taxpayers that are not similarly situated (vertical equity). The current system of child support taxation is not equitable because similarly situated taxpayers may have different tax liabilities depending on their tax sophistication and their willingness to negotiate the claiming of the dependency exemption with their separated partner. The current proposal would be more equitable than the current system because it would tax such taxpayers in the same manner because the IRS would decide the optimum use of the tax dependency exemption.

A good tax is also an efficient tax and minimally interferes with economic behavior. Thus, “under a completely efficient system of taxation, a taxpayer’s behavior would be identical to that of a perfectly functioning market.”²⁵⁴ The concept of efficiency is closely related to neutrality. A neutral tax would not affect taxpayer behavior. Some have argued that requiring that a tax be efficient is nonsensical because society needs government to function, which requires funding,²⁵⁵ meaning that any form of taxation imposed by the government would impact taxpayer behavior. The current proposal is not designed to affect taxpayer behavior. In fact, it assumes a particular taxpayer behavior (lack of tax arbitrage) as its starting point.

Finally, a good tax is simple. If a tax rule is complex, it naturally raises the costs of compliance. Complexity is generally determined under the following three criteria: rule, compliance and transactional complexity.²⁵⁶ Rule complexity refers to the problems of understanding and interpreting the law; compliance complexity means the difficulty in complying with the law (forms, records, etc.), and transactional complexity relates to the expense taxpayers undergo structuring their transaction to minimize the impact of the law.²⁵⁷ Under the current proposal, rule, compliance and transactional complexity will significantly decrease because the IRS will be charged with determining the allocation of the dependency exemption

VI. CONCLUSION

The child support problem is more than just an economic challenge. As argued in this article, financial support from the non-custodial parent translates into economic, psychological and social gains for the child.²⁵⁸

254. Viswanathan, *supra* note 253, at 668.

255. See MICHAEL J. GRAETZ & DEBORAH H. SCHENK, *FEDERAL INCOME TAXATION*, 27 (5th ed., 2005).

256. *Id.* at 669.

257. *Id.*

258. See *supra* notes 27, 31-32.

Very few would disagree that helping the family stay strong translates into a stronger society. The quandary is how to provide greater support for the family. Under the current political and budgetary climate, government spending for new social programs does not appear to be the solution. A workable solution is to expand the use of current tools available. The permissible tax arbitrage with regard to the dependency exemption is a good candidate. It is being successfully used by some families to the tune of \$1 billion per year. As we saw above, it is not being used by the needier family mainly due to lack of tax sophistication.

We can do better. More importantly, we have to do better. In this article, I have advocated taking a holistic approach to the problem. Focusing solely on the child to the exclusion of his parents may not be in the best interests of the child. This is simply because a strong child needs strong parents and if parents are weak, they will not be able to produce strong children. Many judges intuitively understand that looking at the separated family as one unit, albeit not under the same roof, produces better results. Hence, they will allocate tax benefits toward the goal of improving the family's overall financial condition. Hence, a dependency exemption that may technically belong to the custodial parent, but will be better used by the non-custodial parent is allocated to the latter. Tax savings of the non-custodial parent are then reallocated to the custodial mother. The result? The non-custodial parent stays current or improves on his child support obligations. The child wins and society ultimately wins also. If the best use of the dependency exemption is not allowed, then the government wins and the child loses.²⁵⁹

In this article, I have not advocated for the adoption of new social programs, just the enhancement of already permissible tax arbitrage. I have highlighted the use of this tax arbitrage by judges to the benefit of children. This use appears to be widespread and illustrates the proper use of tax policy.

This article provides a three-prong approach to solving the problem. First, we must encourage judges to continue and expand their allocation of the dependency exemption when it helps families. Second, we must educate separated parents about the benefits of allocating the dependency exemption in a manner beneficial to the family. Finally, this article provides proposed language to I.R.C. § 24 that would result in a simpler administration of the area and in savings for taxpayers as the

259. See *Vick v. Superior Court of Los Angeles*, 47 Cal.Rptr. 840 (Cal. Ct. App. 1965).

IRS, instead of tax preparers, will determine the optimum use and allocation of the dependency exemption.