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Taxing Parents: Welfarist Theories

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Taxing Parents: Welfarist Theories

Shannon Weeks McCormack*

The Internal Revenue Code (the “Code”) taxes parents inequitably. Couples with a sole earner are undertaxed compared to couples with dual earners and to single parents. Legal tax scholarship (including my own) has identified the many inequities that result from this sole-earner bias and have called for its elimination. But while these arguments have been sufficient for some, they do remain susceptible to the criticism that they are theoretically incomplete.

That critique might proceed as follows. Simply establishing that an inequity exists does not create a full argument for legal reform. After all, it might be argued, the Code plays favorites all the time. To evaluate whether tax preferences are warranted, scholars have traditionally turned to theories of distributive justice. These theories offer competing visions about the way resources should be allocated. Rather than advocating blanket equality, these theories identify higher order principles that justify preferentialism. But, critics might argue, scholars who have asked Congress to eliminate the Code’s preference for sole earners have often failed to connect their arguments with this distributive literature.

This Article, the first in a series, begins to respond to this potential criticism by connecting traditional theories of distributive justice with the debate surrounding the Code’s inequitable taxation of parents. To do so, I focus on welfarist theories – a body of distributive theories that seek to maximize social welfare – because of the dominant influence they have exerted over tax debates. It shows why welfarism, and in particular utilitarianism, may sometimes support the Code’s sole-earner bias despite the inequities it creates. And it shows how,

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more generally, it may favor parents who have relatively expansive opportunity sets and are, therefore, better positioned to use their income to achieve well-being than other parents with fewer choices.

Some will find these prescriptions counterintuitive and even troubling. For them, the analysis may reveal the limitations of relying too heavily on welfarism to analyze the taxation of parents. Recognizing this, I conclude by identifying other non-welfarist theories that have received less attention in the legal tax scholarship and discussing how they could expand conversations about how parents should be taxed relative to one another.

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INTRODUCTION

How should parents be taxed relative to one another? Should, for instance, single parents receive tax benefits that two-parent families do not? Between two-parent families, should dual- and sole-earners be differentiated? More generally, when two families are similarly situated—i.e., when they earn the same taxable income and provide care to the same number of dependent children—should it matter for tax purposes if they employ different parenting models? While much has been written about the taxation of the family,¹ the answers to these seemingly basic questions remain undertheorized in the legal tax literature.

To be clear, it is now well recognized that the Internal Revenue Code (the “Code”) taxes parents inequitably, undertaxing sole-earner couples relative to dual earners and single parents.² For example, because the Code allows only limited recovery of childcare expenses, it often favors sole earners (who do not typically have to incur these costs) at the expense of other parents (who generally will).³ Legal tax scholarship, including my own, has identified the many inequities that result from this sole-earner bias. In particular, scholars have carefully described how this congressional favoritism is gendered,⁴ classed,⁵ raced,⁶ and

1. See, e.g., Lawrence Zelenak, *The Income Tax and the Costs of Earning a Living*, 56 TAX L. REV. 39 (2002); Pamela B. Gann, *The Earned Income Deduction: Congress’s 1981 Response to the “Marriage Penalty” Tax*, 68 CORNELL L. REV. 468, 469, 475–84 (1983); Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971); Shannon Weeks McCormack, *Overtaxing the Working Family: Uncle Sam and the Childcare Squeeze*, 114 MICH. L. REV. 559 (2016) [hereinafter Weeks McCormack, *Overtaxing the Working Family*]; Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996).

2. See, e.g., Weeks McCormack, *Overtaxing the Working Family*, *supra* note 1; Blumberg, *supra* note 1; see also *infra* Part I (discussing how sole earners are undertaxed relative to dual- and single-earner parents).

3. See, e.g., Staudt, *supra* note 1; Gann, *supra* note 1.

4. See, e.g., Edward McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595 (1993) (discussing incomplete markets in America); Blumberg, *supra* note 1; Shannon Weeks McCormack, *Postpartum Taxation and the Squeezed Out Mom*, 105 GEO. L.J. 1323 (2017) [hereinafter Weeks McCormack, *Postpartum Taxation*]; Staudt, *supra* note 1.

5. Dorothy A. Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY L.J. 755 (2005); Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469 (1997).

6. See sources cited *supra* note 5.

heteronormative.⁷ In light of this, scholars have generally called for the elimination of the Code's preference for sole earners.

For some (including myself) these arguments have been more than convincing. At the same time, they remain susceptible to the criticism that they are theoretically incomplete. That critique might proceed as follows. The tax laws are littered with tax preferences and incentives that purposefully result in non-uniform (that is, unequal) taxation. For instance, the Code taxes capital gains from the sale of assets differently than wages earned through labor.⁸ It taxes wages earned by independent contractors differently than those earned by employees.⁹ Even something as fundamental as the Code's progressive rate structure, in which tax rates increase with income, results in unequal treatment among taxpayers. In other words, the Code plays favorites all the time.

To evaluate whether a particular tax preference is warranted, legal tax scholars have generally turned to distributive theories of justice, which offer competing frameworks to determine how society's resources should be allocated.¹⁰ Far from advocating blanket equality, these varied theories identify higher order goals that justify unequal taxation and preferentialism. And it is the content of these higher order goals around which (often vehement) debate centers. To provide a few examples, adherents of welfarism (the focus of this Article would distribute resources in whatever way maximizes overall social welfare (discussed more in Part II), regardless of what preferences result.¹¹ Optimal tax theorists prescribe unequal taxation to achieve the dual goals of maximizing social welfare and minimizing behavioral distortions.¹² And resource egalitarians tolerate inequality so long

7. Anthony Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 3 UTAH L. REV. 605, 605 (2010) (identifying the discriminatory aspects of relying on federal marriage, which results in the "privileg[ing of] the so-called traditional, nuclear family over all other family arrangements").

8. I.R.C. § 1(a)-(d), (h) (2012).

9. I.R.C. § 199A (2018).

10. See *infra* Section I.C.

11. See, e.g., LOUIS KAPLOW, *THE THEORY OF TAXATION AND PUBLIC ECONOMICS* 359 (2008).

12. See, e.g., J.A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175 (1971); N. Gregory Mankiw, Matthew Weinzierl & Danny Yagan, *Optimal Taxation in Theory and Practice* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 15071, 2009), <https://www.nber.org/papers/w15071.pdf> [<https://perma.cc/GT7U-WEUD>]

as it is not caused by bad luck entirely outside of one's control ("brute luck").¹³

Legal tax scholars have invoked these and other theories to assess the wisdom of all sorts of tax preferences.¹⁴ However, critics might argue, scholars who have argued for the elimination of the Code's sole-earner bias have often failed to explicitly link their arguments with this distributive tax literature.

In this Article, the first part of a series of projects, I seek to respond to these potential criticisms by drawing the theoretical connections that some may find lacking. I hope that these projects will not only create a more complete conversation about how parents should be taxed but also draw more voices into the debate. In this particular Article, I focus on welfarist theories because of the clear dominance they have exerted over distributive debates in legal tax scholarship.¹⁵ Other distributive theories will be discussed in companion work.¹⁶

("The standard theory of optimal taxation posits that a tax system should be chosen to maximize a social welfare function subject to a set of constraints. The literature on optimal taxation typically treats the social planner as a utilitarian . . .").

13. See, e.g., RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 73 (Harvard Univ. Press 2000) (making differentiation between brute and option luck); Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601, 625 (2011) ("Most liberal egalitarians . . . tolerate unequal outcomes due to choices, but not unequal outcomes due to chance.").

14. For instance, a rich line of scholarship has asked how well the Code's progressive rate structure accomplishes the welfarist aim of maximizing overall social welfare. See, e.g., Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CALIF. L. REV. 1905, 1915-17 (1987).

15. See, e.g., Sarah B. Lawsky, *On the Edge: Declining Marginal Utility and Tax Policy*, 95 MINN. L. REV. 904, 910 (2011) (welfarist theories have predominated tax discourse for decades); see also *id.* at 911 n.21 (citing numerous sources describing welfarism's dominance in tax literature); Linda Sugin, *A Philosophical Objection to the Optimal Tax Model*, 64 TAX L. REV. 229, 239-40 (2011) ("[Welfarist theories] have had the upper hand in the tax policy literature for quite some time because their arguments sound in [both] fairness and efficiency, and resonate as [both] specific and determinative."); Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469, 474-75 (2007) (explaining that welfarism has "dominated normative legal analysis in the last generation" by offering "intellectual rigor" and rejecting the use of "ad hoc norms").

16. See Shannon Weeks McCormack, *Taxing Parents: Resource and Luck Egalitarianism* (unpublished manuscript) (on file with the author); Shannon Weeks McCormack, *Taxing Parents: Welfarism and Other-Regarding Preferences* (unpublished manuscript) (on file with the author); Shannon Weeks McCormack, *Taxing Parents: Equality of Opportunity Approaches* (unpublished manuscript) (on file with the author); Shannon Weeks McCormack, *Taxing Parents: A New Theoretical Approach* (unpublished manuscript) (on file with the author).

The Article proceeds as follows. In Part I, I briefly discuss the Code's historic favoritism of sole earners and how the recently enacted Tax Cuts and Jobs Act reinforced this bias. I next discuss the work of legal tax scholars who have urged Congress to eliminate these preferences and show that their ideas have not always been fully linked to the distributive theories most frequently invoked by scholars to analyze the wisdom of tax preferences.

To begin to make these connections, I turn in Part II to welfarist theories, which have dominated distributive tax debates, and ask how they may contribute to conversations about the way parents should be taxed. When employing the welfarist lens to evaluate the tax laws, legal scholars often begin with—if not focus entirely on—utilitarianism,¹⁷ one particular type of welfarism. And when applying utilitarianism, these scholars often assume that individuals enjoy the same utility from a given level of income and that utility of income declines as income increases.¹⁸ I show that when these simplifying assumptions are maintained, utilitarianism appears to strengthen the case for eliminating the Code's sole-earner bias and may even suggest that dual earners and single parents receive special benefits.

In Part III, however, I show why it is unrealistic to make these assumptions when comparing parenting models. First, individuals using different parenting models will not have the same choices (i.e., opportunity sets) just because they have the same income. And relatedly, the extent to which income can be expected to serve as a sound proxy for utility will differ depending on the parenting model used. I then conclude that, once assumptions are relaxed, utilitarianism may sometimes justify the Code's favoritism for sole earners and may, more generally, prescribe transfers to parents who have more expansive opportunity sets and/or who are better positioned to use their income to enhance well-being. In the process of making these observations, which some will find counterintuitive or even troubling, I identify potential limitations of relying too heavily on welfarism to analyze questions about the taxation of parents, situate the discussion within the larger

17. Miranda Perry Fleischer, *Charitable Giving and Utilitarianism: Problems and Priorities*, 89 IND. L.J. 1485, 1487 n.8 (2014) (citing tax sources recognizing utilitarianism's prevalence in tax scholarship or employing the frame).

18. See *infra* Section II.B.1.

non-legal literature, and suggest more careful consideration of other non-welfarist theories that have received relatively little attention in legal tax scholarship. I end with a brief conclusion.

I. THE CODE'S SOLE-EARNER BIAS

As the first Section of this Part recognizes, family models have evolved and diversified significantly over time, creating a panoply of arrangements. The Code, however, differentiates between only three types of parents—dual-earning married parents, sole-earning married parents, and unmarried parents. As the second Section of this Part shows, the Code has historically undertaxed sole earning couples compared with dual-earning couples and single parents, creating a sole-earner bias that the recently enacted Tax Cuts and Jobs Act (TCJA)¹⁹ not only reinforced but also sharpened.

A. *The Code's Categorization of Parents*

There are various ways that parents support their children. Once children are older, parents may provide financial and emotional support.²⁰ Younger children, however, require the consistent physical presence of a caregiver. To provide this support, parents must divvy the responsibilities of earning income and providing personal care—that is, they must choose a “parenting model.” Parenting models have both evolved and diversified a great deal over the past sixty years.

19. Act of December 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 26 U.S.C.). Many commentators refer to this legislation as the “Tax Cuts and Jobs Act” or “TCJA,” although it was not the official name of the Act passed and signed into law.

20. See, e.g., Kim Parker & Eileen Patten, *The Sandwich Generation*, PEW RSCH. CTR. (Jan. 30, 2013), <http://www.pewsocialtrends.org/2013/01/30/the-sandwich-generation/> [<https://perma.cc/8955-8HMK>] (“According to a new nationwide Pew Research Center survey, roughly half (48%) of adults ages 40 to 59 have provided some financial support to at least one grown child in the past year, with 27% providing the primary support. These shares are up significantly from 2005.”); MARK LINO, KEVIN KUCZYNSKI, NESTOR RODRIGUEZ & TUSAREBECCA SCHAP, U.S. DEP’T OF AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES, 2015, at 10 (2017) (providing recent estimates of annual child-rearing expenses among families).

1. *Today's diverse family models*

In the 1960s, American children were most often raised by two married,²¹ biological parents.²² In other words, in the aggregate, the “sole-earner model” — i.e., the model in which one parent earns all outside income while the other works only within the home — was normatively and statistically dominant. But there have always been significant and important demographic differences.²³ To provide one of many possible examples, through the mid-1970s, black wives worked outside the home at a rate that was twelve to fourteen percent higher than white wives.²⁴

Today, far fewer families are “sole earners” regardless of race or ethnicity. Around 1980, “dual earners” became the norm among

21. In the 1960s, this would have only referred to opposite-sex couples, given the failure to recognize marriages among same-sex couples.

22. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN: 1960 TO PRESENT, fig.CH-1, <https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/families-and-households/ch-1.pdf> [<https://perma.cc/58TR-EQ24>] (showing percentage of children raised by married parents over time); see also PEW RSCH. CTR., PARENTING IN AMERICA: OUTLOOK, WORRIES, ASPIRATIONS ARE STRONGLY LINKED TO FINANCIAL SITUATION 15 (2015), <https://perma.cc/3F6V-K227> [<https://perma.cc/UR5D-VS25>] [hereinafter PEW RSCH. CTR., PARENTING IN AMERICA] (“[I]n 1960, the height of the post-World War II baby boom, there was one dominant family form. At that time 73% of all children were living in a family with two married parents in their first marriage.”).

23. See, e.g., ALLYSON SHERMAN GROSSMAN, WORKING MOTHERS AND THEIR CHILDREN, SPECIAL LABOR FORCE REPORTS—SUMMARIES 51-52, <https://www.bls.gov/opub/mlr/1981/05/rpt3full.pdf> [<https://perma.cc/Z9H2-AHKC>] (explaining statistics about demographic differences). This Article does not summarize all relevant demographic statistics, an undertaking which would require discussion of issues including (but not limited to) the ways the methodologies used by government agencies to collect demographic data have changed over time and what problems persist with these methodologies and categorizations (which rely generally on self-identification). MGMT. & BUDGET OFF., STANDARDS FOR MAINTAINING, COLLECTING, AND PRESENTING FEDERAL DATA ON RACE AND ETHNICITY (2016), <https://www.federalregister.gov/documents/2016/09/30/2016-23672/standards-for-maintaining-collecting-and-presenting-federal-data-on-race-and-ethnicity> [<https://perma.cc/4XQB-853N> and <https://perma.cc/P426-MXCM>] (describing review of 1997 questions used to “measure race and ethnicity”); see also Alex Wagner, *The Americans Our Government Won't Count*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/2018/03/30/opinion/sunday/united-states-census.html> (explaining history of Census's collection of racial and ethnic data and identifying perceived problems).

24. See, e.g., GROSSMAN, *supra* note 23, at 51 (explaining statistics about demographic differences).

married-parent families in the aggregate²⁵ and this has remained steadily true. According to the Bureau of Labor Statistics, “among married-couple families with children [in 2019] . . . 64.2% had both parents employed” in some fashion.²⁶ Furthermore, the number of American households in which both married parents work full-time appears to be increasing. A Pew Research Center analysis of the 2015 *Current Population Survey (CPS)*²⁷ found that 46% of married parents used a full-time-dual-earner model, “up from 31% in 1970.”²⁸ Still, important demographic differences remain. For example, it remains more common for Black families to rely upon the dual-earner model than other demographic groups.²⁹

The increased prevalence of the dual-earner model is far from the only important trend. There has also been a marked increase in unmarried parents.³⁰ Analyzing data from the 2015 CPS, the

25. See, e.g., *id.* at 49–51 (“[By] the . . . 1980s . . . children with working mothers [became] more the rule rather than the exception” among both black and white families, though families with a self-identified Hispanic parent were still less inclined to utilize a dual-earner model, doing so in only about 44% of cases.); see also Scott A. Hodge & Andrew Lundeen, *America Has Become a Nation of Dual-Income Working Couples*, TAX FOUND. (Nov. 21, 2013), <http://taxfoundation.org/blog/america-has-become-nation-dual-income-working-couples> [<https://perma.cc/RBE4-B2ZV>] (providing graph showing over 50% of married couples were dual earners since 1980); PEW RSCH. CTR., *THE RISE IN DUAL INCOME HOUSEHOLDS* (June 18, 2015), https://www.pewresearch.org/ft_dual-income-households-1960-2012-2/ [<https://perma.cc/R5K9-Y7S7> and <https://perma.cc/965X-BEZM>].

26. *Economic News Release, Employment Characteristics of Families Summary*, BUREAU OF LAB. STAT., <https://www.bls.gov/news.release/famee.nr0.htm> [<https://perma.cc/CFC4-HGRQ>].

27. The CPS is a monthly survey “sponsored jointly by the U.S. Census Bureau and the U.S. Bureau of Labor Statistics (BLS) . . . [that] is the primary source of labor force statistics for the population of the United States.” See *Current Population Survey (CPS)*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/cps.html> [<https://perma.cc/P2FV-PEEM>].

28. See PEW RSCH. CTR., *RAISING KIDS AND RUNNING A HOUSEHOLD: HOW WORKING PARENTS SHARE THE LOAD 2* (Nov. 4, 2015) [hereinafter PEW RSCH. CTR., *RAISING KIDS AND RUNNING A HOUSEHOLD*], <http://www.pewsocialtrends.org/2015/11/04/raising-kids-and-running-a-household-how-working-parents-share-the-load/> [<https://perma.cc/YQ6Q-YYV9> and <https://perma.cc/6TJU-VF38>].

29. See, e.g., U.S. CENSUS BUREAU, *Living Arrangements of Children Under 18 Years and Marital Status of Parents, by Age, Sex, Race, and Hispanic Origin and Selected Characteristics of the Child for All Children: 2016*, tbl.C3 (May 4, 2018), <https://www.census.gov/data/tables/2016/demo/families/cps-2016.html> [<https://perma.cc/ATZ3-PSGA> and <https://perma.cc/77P4-6W6Z>].

30. Emily Badger, *The Unbelievable Rise of Single Motherhood in America Over the Last 50 Years*, WASH. POST: WONKBLOG (Dec. 18, 2014, 2:03 PM), <https://www.washingtonpost.com/news/wonk/wp/2014/12/18/the-unbelievable-rise-of-single-motherhood-in-america-over-the-last-50-years/>.

Pew Research Center reported that “[t]he share of children living in a two-parent household is at the lowest point in more than half a century: 69% are in this type of family arrangement today, compared with 73% in 2000 and 87% in 1960.”³¹ Reporting on CPS data that year, the Department of Labor reported, “the share of families that are one-parent . . . has nearly doubled since 1975.”³² And the Center of Disease Control and Prevention found that 40% of 2014 births involved unmarried mothers,³³ compared to 18% of births in 1980.³⁴ Even more recent CPS data suggest that the trend away from the two-married-parent model is stable—in 2016 and 2017 only about 65% of children were living with two married parents.³⁵

Once again, there are demographic differences. For instance, Black children are more likely to be raised by a “solo mother” than other demographic groups. Summarizing the March 2017 Census Data, Pew Research reported that 47% of all Black children were being raised by a solo mother, compared to 23% of Hispanic children, 13% of white children, and 7% Asian children.³⁶

There are, of course, more than three family models. That is, not all families fit neatly within the “sole-earner,” “dual-earner,” or “single-parent” categories. Indeed, while there is a trend toward

31. PEW RSCH. CTR., *PARENTING IN AMERICA*, *supra* note 22, at 16.

32. WOMEN’S BUREAU U.S. DEP’T OF LABOR, *WORKING MOTHERS ISSUE BRIEF 5* (June 2016), https://ia801902.us.archive.org/1/items/WorkingMothersIssueBrief/Working_Mothers_Issue_Brief.pdf [<https://perma.cc/JG8K-N6U5>].

33. Brady E. Hamilton, Joyce A. Martin, Michelle J. Osterman, Sally C. Curtin & T.J. Mathews, *Births: Final Data for 2014*, 64 NAT’L VITAL STAT. REP. 7 (Dec. 23, 2015), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf [<https://perma.cc/G3NV-TU97>]. Interestingly, this does represent a steady decline from 2007, when the single motherhood rate peaked at over 50%. *Id.* For purposes of this Article, however, the important observation is that single motherhood is becoming a common family composition.

34. *Id.*

35. For instance, in 2016, among demographic groups studied, the Census Bureau found that it was most common for Black children to be raised by unmarried parents and least common for Asian children. See U.S. CENSUS BUREAU, *supra* note 29. Falling in the statistical middle, about 30% of white children and about 40% of Hispanic children were raised by unmarried parents in 2016. See *id.*; see also U.S. CENSUS BUREAU, *Living Arrangement of Children Under 18 Years and Marital Status of Parents by Age, Sex, Race, and Hispanic Origin and Selected Characteristics of the Child for All Children: 2017*, tbl.C3, <https://www.census.gov/data/tables/2017/demo/families/cps-2017.html>.

36. Gretchen Livingston, *About One-Third of U.S. Children Are Living with an Unmarried Parent*, PEW RSCH. CTR. (April 27, 2018), <http://www.pewresearch.org/fact-tank/2018/04/27/about-one-third-of-u-s-children-are-living-with-an-unmarried-parent/> [<https://perma.cc/8WGR-RPS3>].

the dual-earner and unmarried parent models, researchers have also found a trend away from models generally—that is, that there is no longer a “typical” U.S. family.³⁷ Instead, the Pew Research Center elaborates, “there is no . . . dominant family form,” and instead, “[p]arents today are raising their children against a backdrop of increasingly diverse, and for many, constantly evolving family forms.”³⁸

Moreover, there is increased diversification within typologies. Unmarried parents increasingly cohabitate.³⁹ Families with married parents are increasingly in blended families—that is, families in which “more than one family is mixed together, with at least one outside family member whose relationship is not shared with everyone.”⁴⁰ Thus, while “the nuclear family . . . has declined to the point of no return[,]” it has been replaced by a “whole grab bag of family arrangements.”⁴¹

But while American parenting models have evolved and diversified significantly over time,⁴² creating a great variety of arrangements, the Code differentiates between only three types of parents, adhering to the same typology it has used for decades.

2. Acknowledged parenting models

The Code, both before and after the TCJA took effect, divides parents into three rigid categories:

37. Brigid Schulte, *Unlike in the 1950s, There Is No ‘Typical’ U.S. Family Today*, WASH. POST (Sept. 4, 2014, 5:00 AM), https://www.washingtonpost.com/news/local/wp/2014/09/04/for-the-first-time-since-the-1950s-there-is-no-typical-u-s-family/?utm_term=.91b5f3f0ded4.

38. PEW RSCH. CTR., PARENTING IN AMERICA, *supra* note 22.

39. *Id.* (citing statistics showing rise of unmarried cohabitant parents).

40. PHILIP COHEN, THE FAMILY: DIVERSITY, INEQUALITY, AND SOCIAL CHANGE 370 (2d ed. 2018).

41. Belinda Luscombe, *There Is No Longer Any Such Thing as a Typical Family*, TIME (Sept. 4, 2014, 1:01 AM), <http://time.com/3265733/nuclear-family-typical-society-parents-children-households-philip-cohen/> [<https://perma.cc/Z85M-7S8Y>].

42. Schulte, *supra* note 37; PEW RSCH. CTR., PARENTING IN AMERICA, *supra* note 22.

- sole-earning married couples;
- dual-earning married couples; and
- unmarried individuals.⁴³

Parents generally fall into the sole-earning married couple category (“sole earners”) if one parent earns every dollar of earned income.⁴⁴ They fall into the dual-earning married couple bucket (“dual earners”) if both parents earn at least some income in the external workforce.⁴⁵

Unmarried parents are separated into two possible sub-categories. As discussed more in Section I.B, unmarried parents who are primary caregivers for their minor children will often fall into the “head of household” bucket while unmarried parents that are non-primary caregivers will largely be treated like unmarried taxpayers without children (“single taxpayers”).⁴⁶

These lines are bright. For instance, if one married parent works full-time and earns 99% of all family income while the other works sporadically, earning 1% of overall earnings, that couple will be eligible for the same “dual-earner” benefits as a family in which both married parents work full-time and each earn half of all income. Further, the Code relies heavily on whether parents are married under federal law to make differentiations. To name two of many limitations, the Code does not ask whether a single parent shares a home with a cohabitant partner or whether parents are divorced.⁴⁷

43. See *infra* Section I.B. The Code also distinguishes between unmarried parents that do and do not work in various ways, but these differences will often implicate anti-poverty measures, which are not the focus of this Article, as discussed *infra* Section II.A.3.

44. See *infra* Section I.B (discussing married-filing-jointly status and Code provisions allowing relief for working childcare expenses of dual earners).

45. See *infra* Section I.B.

46. See I.R.C. § 2(b) (2018) (defining head of household).

47. Scholars have extensively and rightly criticized the Code’s overreliance on federal marriage to determine tax liabilities and eligibility for benefits (as described in Sections I.B and C). This Article does not disagree with this important literature. See Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695, 700 n.23 (2013) (“[A] number of scholars in taxation and family law have questioned the law’s reliance on outdated categories, including formal marriage and the nuclear family.”); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 3 (1980) (advocating individual filing on equity and efficiency grounds); Infanti, *supra* note 7, at 605.

Among the three types of parents the Code acknowledges, it has historically favored sole earners, a preference that many legal tax scholars have criticized (discussed more in Section I.C). The TCJA did not eliminate this bias and, in fact, both entrenched and sharpened it.

B. The TCJA and the Sole-Earner Bias

This Section identifies two of the ways in which the TCJA reinforced and expanded the Code's sole-earner bias. First, by failing to make long-overdue inflation adjustments to provisions of the Code that allow dual earners and single parents to receive relief for childcare costs incurred to work outside the home, the TCJA further embedded the Code's preferences for sole earners. Second, by curtailing benefits reserved for unmarried parents, it made the bias even worse than it was before.⁴⁸

1. Working childcare benefits, ignored

Before the TCJA, dual earners and single parents that incurred childcare costs to work (working childcare costs) had two choices. First, they could claim a "childcare tax credit" for childcare expenses "necessary for gainful employment,"⁴⁹ which would reduce their tax liability dollar for dollar. But the credit was subject to very strict limits. Once a family earned more than \$43,000 (far less than the median income for all families in 2017),⁵⁰ dual earners could credit (and thus receive tax savings of) no more than \$1,200 if care of two or more children was involved and \$600 for care of one child.⁵¹

Alternatively, dual earners and single parents could claim a "dependent care exclusion" to reflect their working childcare costs, which would reduce their taxable income. Like the childcare tax credit, the dependent care exclusion was strictly limited—expenses were capped at \$5,000.⁵² Unlike the credit, the actual tax savings of

48. For a more comprehensive analysis of the TCJA's changes, see Shannon Weeks McCormack, *Caregivers and Tax Reform: Before and After Snapshots*, 39 VA. TAX REV. (forthcoming Summer 2020).

49. I.R.C. § 21 (2012).

50. See *Income and Poverty in the United States: 2017*, U.S. CENSUS BUREAU, <https://www.census.gov/library/publications/2018/demo/p60-263.html>.

51. I.R.C. §§ 21, 129 (2012).

52. I.R.C. § 129 (2012).

the exclusion depended on the family's marginal tax bracket. For instance, if a family's marginal tax rate was 15%, the exclusion would provide a \$750 benefit ($15\% \times \$5,000$ reduction in taxable income) while those with a 39.6% marginal tax rate could receive a benefit of about \$2,000 ($39.6\% \times \$5,000$).

Dual earners and single parents could claim the benefits that allowed the most savings (though could not double up). But regardless of whether the exclusion or credit was claimed, these parents often received relief for only a fraction of actual costs. I have written about this at great length elsewhere.⁵³ In America, childcare costs can be very high. For instance, if children are not of school age and require full-time care, parents may spend as much (if not more) on childcare than they do on anything else in a given year.⁵⁴ The annual expense of sending two preschool-aged children to a day care center can easily exceed \$20,000.⁵⁵

Even for families with two school-aged children, the before-and after-school care needed to allow two parents to work full-time adds up quickly. According to Child Care Aware's recent report, nine months of after-school care for two children can easily exceed \$10,000 in some of the highest-cost states (which include Wyoming, Utah, Oregon, Montana, Oklahoma, Alabama, Arizona, and Nevada, in addition to the more likely candidates of New York and Hawaii).⁵⁶

As a result of these stringent limitations, the Code has historically overtaxed dual earners and single parents, resulting in a sole-earner bias. Suppose, for instance, a single parent or dual-earning couple spent \$10,000 on childcare while working and claimed the maximum \$1,200 credit. They would have been taxed only \$1,200 less than a sole-earning couple with the same income, even though they had fully \$10,000 less at their disposal.

53. See, e.g., Weeks McCormack, *Over-Taxing the Working Family*, *supra* note 1; Weeks McCormack, *Postpartum Taxation*, *supra* note 4; Shannon Weeks McCormack, *America's (D)evolving Childcare Tax Laws*, 53 GA. L. REV. 1093 (2018-19) [hereinafter Weeks McCormack, *America's (D)evolving Childcare Tax Laws*].

54. CHILD CARE AWARE OF AM., PARENTS AND THE HIGH COST OF CHILDCARE 20 (2017), https://usa.childcareaware.org/wp-content/uploads/2017/12/2017_CCA_High_Cost_Report_FINAL.pdf [<https://perma.cc/LG29-ZHHH>].

55. *Id.*

56. *Id.* at 17.

As I have also explained elsewhere, this bias was created slowly over time.⁵⁷ Since the enactment of the dependent care exclusion in 1981, Congress has never once changed applicable caps (\$5,000).⁵⁸ Furthermore, since that time, it has only changed the dollar caps and income phase-downs applicable to the “childcare tax credit” once “[i]n 2001 – twenty years after the last change . . . [And] [t]his adjustment did not even fully reflect inflation.”⁵⁹

But even more can be said. The working childcare benefits discussed have always been available only to parents with enough taxable income to absorb them. As a result, the Code’s bias for sole earners extends to families with negative tax liabilities, too. Because working childcare benefits have never been refundable, dual earners and single parents at lower income ranges have never received any tax benefits to reflect the childcare costs they incur just to work (and that sole earners do not have to).⁶⁰

The TCJA changed the way parents were taxed in various ways, but it failed to make a single adjustment to the Code’s working childcare provisions. It did not adjust benefits to reflect decades of inflation or make benefits refundable for parents at lower income levels.⁶¹ Through this inaction, the TCJA did nothing to address the Code’s sole-earner bias.

But there is still more. The Code has historically provided unmarried parents that qualify as “heads of households”⁶² with additional benefits to which married parents were not entitled. These benefits partially mitigated the Code’s bias between sole earners and single parents. But the TCJA curtailed these head of household benefits significantly, making the sole-earner bias even sharper than it was before.

57. Weeks McCormack, *America’s (D)evolving Childcare Tax Laws*, *supra* note 53.

58. I.R.C. § 129.

59. Weeks McCormack, *America’s (D)evolving Childcare Tax Laws*, *supra* note 53, at 1135; *see also* I.R.C. § 21.

60. *See, e.g.*, Elaine Maag, *How the Tax Cuts and Jobs Act Reduced the Value of the Child Care Credit*, TAX POL’Y CTR. (Nov. 27, 2018), <https://www.taxpolicycenter.org/taxvox/how-tax-cuts-and-jobs-act-reduced-value-child-care-credit> [<https://perma.cc/NU2C-RLAK>].

61. Furthermore, while the Code allows parents to claim a refundable Earned Income Tax Credit (EITC) and Additional Child Tax Credit (ACTC), no differentiation is made between the dual- and sole-earner married parent models.

62. I.R.C. § 1(b) (2012).

2. Head of household benefits, curtailed

Unmarried parents that qualify as “heads of households”⁶³ have traditionally been entitled to other benefits that married parents are not. Generally, “head of household” filing status can be claimed when an unmarried taxpayer has primary care of a qualifying individual. More specifically, a taxpayer can file as a head of household if (s)he is unmarried at the end of the taxable year and maintains (i.e., pays more than half the cost of)⁶⁴ a household that is the principle place of abode of both the taxpayer and a qualifying individual (which generally includes dependent children) for more than half of the year.⁶⁵

For taxpayers with sufficient income to absorb them, the pre-TCJA tax laws provided two head-of-household benefits. First, while all married taxpayers, regardless of number of children, were entitled to the same standard deduction (in 2017, \$12,700), heads of households could claim a standard deduction that was greater than the deduction available to unmarried taxpayers without children.⁶⁶ In 2017, the standard deduction for heads of household was \$9,350—approximately the average of \$6,350 and \$12,700, which are the standard deductions available to unmarried taxpayers that were not heads of household and to married taxpayers respectively.⁶⁷ Second, the 2017 tax laws allowed heads of households to use a rate schedule that was more favorable than the rates that other unmarried taxpayers could use.

These benefits at least softened the Code’s bias between sole-earner married couples and single parents. But while the TCJA maintained the favorable, averaged standard deduction for heads of household, it drastically curtailed the favorable rate schedule for heads of household, watering down a benefit to which heads of

63. *Id.*

64. Treas. Reg. § 1.2-2(d) (“A taxpayer shall be considered as maintaining a household only if he pays more than one-half the cost thereof for his taxable year.”).

65. I.R.C. § 2(a) (2012).

66. Rev. Proc. 2016-55 § 3.14(1).

67. *Id.* Like the childcare exclusion (discussed above), the benefits of this averaged standard deduction depended on the head of household’s marginal tax bracket and, as a result, those of higher incomes could receive more tax savings than those of lower income.

households had been entitled since 1951.⁶⁸ And in doing so, the TCJA made its favoritism for sole earners even clearer.

C. W(h)ither the Sole-Earner Bias?

Influential lines of scholarship⁶⁹ have now recognized that the Code taxes parents inequitably, undertaxing sole-earner couples compared to dual earners and single parents.⁷⁰ And as I have explained, the TCJA served to entrench and further pronounce this bias.

This scholarship has contributed to the legal tax literature in crucial ways. It has, for instance, revealed congressional favoritism and advanced conversations about gender, racial, and sexual inequities.⁷¹ Having revealed the disparate impacts of the sole-earner bias, scholars have generally called for the elimination of the Code's sole-earner bias.

And for some (including myself) these arguments have been more than convincing. At the same time, these arguments remain susceptible to the criticism that they are theoretically incomplete. That critique may go roughly as follows. The tax laws are littered with tax preferences and incentives. Indeed, by statutory fiat, both the Joint Committee on Taxation and the Treasury Department publish a capacious list of "tax expenditures" each year that chronicle the many tax provisions that deliberately result in preferentialism.⁷² It is, therefore, not enough to show that a bias exists, offensive as it might be to one's sensibilities.

To evaluate whether a particular tax preference is warranted, legal tax scholars have generally turned to distributive theories of justice, which offer competing frameworks to determine how

68. For discussion of history of head of household status, see, for example, Deborah H. Schenk, *Simplification for Individual Taxpayers: Problems and Proposals*, 45 TAX L. REV. 121, 139 (1989); Lawrence Zelenak, *Children and the Income Tax*, 49 TAX L. REV. 349, 405 (1993) (discussing that income splitting is a weak rationale for head of household benefits).

69. See *supra* note 1 and accompanying text.

70. See, e.g., Weeks McCormack, *Overtaxing the Working Family*, *supra* note 1; Blumberg, *supra* note 1.

71. See sources cited *supra* notes 4–7.

72. See, e.g., JOINT COMM. ON TAX'N, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2018–2022, JCX-81-18 (2018), <https://www.jct.gov/publications.html?func=startdown&id=5148> [<https://perma.cc/589G-UPPV>].

society's resources should be allocated.⁷³ Far from advocating blanket equality, these varied theories identify higher-order goals that justify tax preferences. For instance, adherents of welfarism advocate for a distribution of resources that maximizes overall social welfare, regardless of what inequities result.⁷⁴ Optimal tax theorists prescribe unequal taxation to achieve the dual goals of maximizing social welfare and minimizing behavioral distortions.⁷⁵ And resource egalitarians tolerate inequality so long as it is not caused by bad luck entirely outside of one's control ("brute luck").⁷⁶

Legal tax scholars have invoked these and other theories to assess the wisdom of all sorts of tax preferences.⁷⁷ However, critics might point out, scholars who have argued for the elimination of the Code's sole-earner bias have often failed to fully link their arguments with this distributive tax literature. In this Article, which is the first part of a series of projects, I attempt to respond to these potential criticisms. In doing so, I hope to create a more complete argument about how parents should be taxed and draw more voices into the debate. In this first Article, I focus on welfarist theories⁷⁸ because of the clear dominance they have exerted over distributive debates in legal scholarship.⁷⁹

II. WELFARISM AND SIMPLIFIED UTILITARIANISM

Welfarism has exerted a remarkably strong influence in tax scholarship.⁸⁰ As Professor Linda Sugin explains, welfarist theories "have had the upper hand in the tax policy literature for quite some time because their arguments sound in a combination of fairness and efficiency, and resonate as specific and determinative."⁸¹ And Professor Anne Alstott notes how welfarism has "dominated

73. See, e.g., Bankman & Griffith, *supra* note 14 (analyzing progressiveness of tax through welfarist lens); Alstott, *supra* note 15 (analyzing estate tax through lens of resource egalitarianism).

74. See, e.g., KAPLOW, *supra* note 11.

75. See, e.g., Mirrlees, *supra* note 12 and accompanying text.

76. See, e.g., DWORKIN, *supra* note 13 and accompanying text; Fleischer, *supra* note 13 and accompanying text.

77. See sources cited *supra* note 73.

78. Other distributive theories are addressed in companion work. See sources cited *supra* note 16.

79. See *supra* note 15 and accompanying text.

80. See *supra* note 15 and accompanying text.

81. Sugin, *supra* note 15, at 239-40.

normative legal analysis in the last generation” by offering “intellectual rigor” and rejecting the use of “ad hoc norms.”⁸² To begin to link debates about the Code’s inequitable taxation of parents with the distributive tax literature, it makes sense to first focus on these welfarist theories.

In the first Part of this Section, I provide a primer on welfarism, highlighting concepts often invoked in legal tax scholarship. To apply these frameworks to questions about the taxation of parents, I next start where legal tax scholars often do, applying utilitarianism with simplifying assumptions. I show that when assumptions are maintained, this “baseline utilitarian analysis” strengthens the case made by legal tax scholars for eliminating the Code’s sole-earner bias and may even prescribe special benefits for dual earners and single parents.

A. A Primer on Welfarism

Welfarism has been defined as “the principle that the goodness of a state of affairs depends ultimately on the set of individual utilities in that state, and—more demanding—can be seen as an increasing function of that set.”⁸³ Tracking this definition, I will refer to theories that view utility as the only object of interest as “welfarist theories” or “welfarism,” and will refer to theorists utilizing welfarism as “welfarists.”⁸⁴

A welfarist’s analysis will generally include the following two steps: first, individual utilities must be measured or otherwise estimated; second, a method of aggregating utilities must be selected by devising a “social welfare function.”⁸⁵ There are different ways to view utility, and theoretically infinite social welfare functions could be devised to aggregate them. But the frameworks of all welfarists have two things in common: the welfarist’s only goal is to maximize the chosen function and the only variable of interest in that function is utility.

82. Alstott, *supra* note 15, at 474.

83. Amartya Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463, 464 (1979).

84. See, e.g., KAPLOW, *supra* note 11, at 263 (justifying limitation on individual well-being/utility).

85. See, e.g., Lawsky, *supra* note 15, at 911–13 (describing two-step analysis); see also KAPLOW, *supra* note 11, at 37 (describing two steps as well as others, such as determining whose utilities to aggregate in a particular case study).

1. *What is utility anyway?*

To accomplish her analysis, the welfarist must generally decide what she means by utility. It will be no small task—a myriad of nuanced conceptions exists. This Part will sketch two prominent camps often occupied in the legal tax literature, starting with theorists who view utility in terms of mental states and turning to those who measure utility in terms of preference satisfaction.⁸⁶

The earliest accounts of utility focused on mental states. Indeed, one of the first versions construed utility solely in terms of “pleasure” and “pain.”⁸⁷ Over time, “experience utilitarians” developed more nuanced views that added more depth to this pleasure/pain dichotomy. For instance, theorists seeking to move beyond the oversimplicity and “hedonism” of these interpretations,⁸⁸ argued that utility should incorporate not only happiness but also more sophisticated mental states such as “knowledge, contemplation, or awareness.”⁸⁹

However, many welfarists (particularly economists) have now abandoned “subjective well-being” altogether and instead measure utility in terms of “preference satisfaction”—that is, they measure utility by asking how well an individual’s preferences are satisfied.⁹⁰ Thus, while an experience utilitarian might ask how happy or fulfilled a given level of income makes a person, the preference utilitarian might ask to what extent that income allowed her to fulfill her preferences.

The two may not always track one another. For instance, suppose that A uses her income to buy candy while B uses the same funds to buy nourishing food. B might be much happier than A once A realizes that she’s nauseous. But A and B may have fulfilled their *ex ante* preferences equally (that is, A really preferred the

86. Lawsky, *supra* note 15, at 912 n.32.

87. JEREMY BENTHAM, THE COLLECTED WORKS OF JEREMY BENTHAM: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 100 (J.H. Burns & H.L.A. Hart eds., 1970).

88. See, e.g., Marc Fleurbaey & François Maniquet, *Optimal Income Taxation Theory and Principles of Fairness*, 56 J. ECON. LITERATURE 1029, 1036 (2018) (noting that some welfarists remain “convinced hedonists and believe that individuals who pursue other goals than happiness are mistaken”).

89. See, e.g., Matthew Adler & Eric A. Posner, *Happiness Research and Cost-Benefit Analysis*, 37 J. LEGAL STUD. 253, 259 (2008).

90. *Id.* at 257 (“Economists traditionally equate well-being with the satisfaction of actual preferences . . .”).

Snickers bars and B really preferred the kale). In addition to showing problems of interpersonal comparisons—e.g., how do we know whose preference was stronger?—this simple hypothetical reveals two other issues along which preference utilitarians split.

First, discerning actual preferences is hard to do. But “decision utilitarians” offer a way out—by looking at what individuals actually choose, they assert, individuals end up revealing their preferences through their own behavior.⁹¹ Tracking this “revealed preference view,” suppose A and B each could have made the other’s choices. The “revealed preference” view would suggest that the two individuals derived about the same utility from their income when they made their respective decisions to buy junk food and health food. After all, the theory goes, if A and B had the same range of choices, their actions probably satisfied their actual preferences to a roughly equal degree.⁹² But this ends up collapsing actual preferences into observations about behavior.

This raises a second issue—even if both A and B’s *ex ante* preferences were equally fulfilled, we might not think the now-ill A and not sick B derived the same utility from these choices. People make bad, misinformed decisions. As a result, some utilitarians adhere to the preference satisfaction frame but limit the inquiry to “informed” preferences. Put another way, these theorists would “launder” preferences to be both idealized and self-interested, including only “those items that well-informed, rational, self-interested individuals would generally prefer.”⁹³ Under this frame, perhaps, A’s candy preference might be filtered out of the calculus since, had she known how much her stomach would ache, she would not have chosen to buy all that candy.

As one should have no difficulty believing, there are many other sub-camps that have emerged in the legal and non-legal welfarist literature that offer further refinements to the definition of utility. But this Article will focus on two conceptions upon which legal tax theorists have often concentrated: (1) the mental state view (e.g., happiness or fulfillment) and (2) the actual preference

91. *Id.*

92. Daniel Shaviro, *Endowment and Inequality*, in TAX JUSTICE: THE ONGOING DEBATE 123 (Joseph J. Thorndike & Dennis J. Ventry Jr. eds., 2002) (when individuals have the same choices one can assume they have the same utility).

93. Adler & Posner, *supra* note 89, at 254.

satisfaction view.⁹⁴ The filtered preference view raises extremely interesting questions when applied to caregiving including, but not limited to, the question of how to deal with “other regarding preferences” that may not actually improve—or may even reduce—the well-being of parents. Full exploration of this set of questions is reserved for companion work.

Once a welfarist has decided how to define utility, she must then choose her social welfare function.

2. Social welfare functions

Once utility has been defined and somehow measured or estimated, the welfarist must decide how she wishes to aggregate those utilities. She must, in welfarist parlance, devise a social welfare function. In theory, one could create infinite functions all of which can qualify as welfarist so long as utility is the sole variable.⁹⁵

Adherents of utilitarianism—one type of welfarism that has exerted a particularly strong influence on tax scholarship—adopt a linear function equal to the simple sum of individual utilities.⁹⁶ As a result, if an heiress derives more utility from purchasing caviar than a pauper derives from purchasing bread, the utilitarian will deem the former action preferable. The fact that this may be deemed unfair will not, in itself, change the utilitarian’s analysis unless that unfairness affects utility itself. For instance, if individuals have a disdain for or preference against unfairness that reduces utility, then that will get factored into the analysis.⁹⁷ Otherwise, it will not. Perhaps for these reasons, utilitarianism has been called the “least egalitarian” form of welfarism,⁹⁸ though its proponents argue that its equal regard for each individual’s utility provides ample recognition of equity concerns.⁹⁹

94. The revealed preference view will be addressed in footnotes and its significant limitations in this context explained.

95. Bankman & Griffith, *supra* note 14.

96. *Id.* at 1915 (discussing how utilitarianism looks at unweighted sum of utilities).

97. KAPLOW, *supra* note 11, at 42 n.5 (explaining that individual utility includes pleasure one derives from fairness but not fairness for its own sake). An implication is that notions of fairness or equity have no role unless they are concerned with the distribution of utility or they are in some respect a proxy for effects on utility. *Id.* at 42.

98. Bankman & Griffith, *supra* note 14, at 1916 n.51.

99. See Amartya Sen, *Equality of What?*, in THE TANNER LECTURES ON HUMAN VALUES 197, 199 (Sterling M. McMurrin ed., 1980) (“According to one interpretation, this equality of

But utilitarianism is only one type of welfarism. And other egalitarian principles can be introduced into the welfarists' analysis if she adopts a nonlinear "social welfare function" that weighs utilities differently.¹⁰⁰ For instance, a welfarist might assign "greater weight to the well-being of the least well-off . . ."¹⁰¹ Unlike the utilitarian, this welfarist might grant the pauper the loaf of bread after all, even though the heiress would enjoy more utility from her caviar.

As discussed, welfarist theories have dominated tax discourse. And while more controversial in other areas, utilitarianism has exerted a particularly strong influence on distributive justice conversations in the legal tax scholarship.¹⁰² This next Section, therefore, asks how utilitarian theory might inform an analysis of how parenting models should be taxed relative to one another. It begins where legal tax scholarship often does—employing utilitarianism with specific baseline assumptions.

B. Utilitarianism in the Tax Law, with Baseline Assumptions

To determine how close the tax rules come to the utilitarian ideal, one must somehow ascertain how much utility individuals derive from the income that is being taxed—or, conversely, how much utility is lost from taxing it. Alternatively, one can recognize that this is implausible and make assumptions. Choosing the latter route, legal tax scholars often employ three baseline assumptions.

1. Common baseline assumptions

Legal theorists have often made three assumptions to begin a utilitarian analysis of the tax laws:¹⁰³

marginal utility embodies equal treatment of everyone's interests."); KAPLOW, *supra* note 11, at 282 (discussing how many criticisms of welfarism's failure to account for equity mistakenly and/or misleadingly focus on utilitarianism).

100. See KAPLOW, *supra* note 11, at 282 (discussing different social welfare functions); Bankman & Griffith, *supra* note 14, at 1915–16 (same).

101. Bankman & Griffith, *supra* note 14, at 1916.

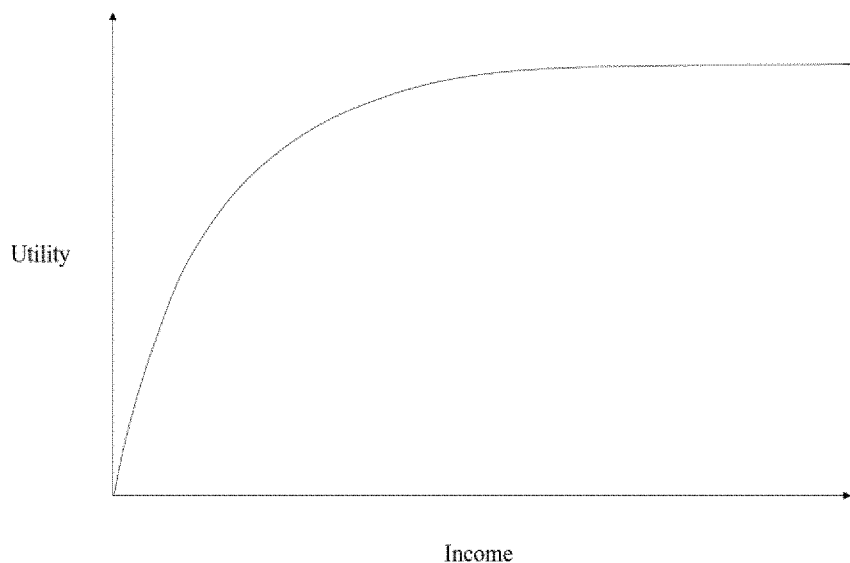
102. Fleischer, *supra* note 17 (citing various tax sources that recognize utilitarianism's prevalence in tax scholarship or employ the frame).

103. *Id.* at 1506 (discussing three assumptions).

- First, the marginal utility of income is declining for all individuals;
- Second, all individuals enjoy the same utility from the same income (and thus have identical utility of income curves); and
- Third, “measuring income or wealth is the best proxy for measuring utility.”

The first assumption may warrant some attention for the novice. It is easy to tell an intuitive story about why the marginal utility of income—that is, the additional utility derived from each additional dollar of income—might decline. One might expect an additional dollar of income to create more utility for the pauper than the heiress. To be clear, this is different than claiming that the pauper *should* value the dollar more. This claim is normative and irrelevant in traditional utilitarian analysis.

More technically, if one has a “strictly declining marginal utility of income . . . [their] utility curve [will be] strictly concave, . . . the slope of the utility curve [will be] strictly decreasing, and . . . the second derivative of the utility curve [will be] negative.”¹⁰⁴ A depiction follows:



104. Lawsky, *supra* note 15, at 915.

Because the curve flattens as income rises, the marginal utility of income is strictly declining. Put another way, when one's income is on the left-most portion of the curve, each additional dollar of income leads to a steeper jump in utility than it will when one's income falls farther to the right where the curve flattens.

Using these baseline assumptions, transfers to the pauper will create more utility than transfers to the heiress and, thus, will be deemed desirable. Indeed, if (but only if) these assumptions hold, a transfer from higher to lower income individuals will always maximize overall utility (the utilitarian's goal) until marginal utilities have been completely equalized (i.e., everyone is on the same point of the utility curve). But even more can be said. Under these assumptions, marginal utility and *total utility* will be both equalized and maximized at the same points. But this happy result is "equality by serendipity"¹⁰⁵ and does not hold if assumptions are relaxed.

With this in mind, I now ask how "baseline utilitarianism" can inform an analysis about the Code's current taxation of parents?¹⁰⁶ To consider this question, it is important to be explicit about several preliminary assumptions that meet the U.S. tax laws "where they are."

First, it is assumed that children will not be treated like purely consumptive goods, such as pets, as some have argued.¹⁰⁷ This is important because the Code does not usually allow taxpayers to recover costs associated with purely consumptive items.¹⁰⁸ The below discussion, however, assumes that the Code will continue to provide some benefits to parents of dependent children (as it has historically done)¹⁰⁹ and focuses on the question of how these

105. Sen, *supra* note 99, at 202 ("This is, however, egalitarianism by serendipity: just the accidental result of the marginal tail wagging the total dog.").

106. KAPLOW, *supra* note 11, at 315 ("[A]nalysis of the purely distributive dimension of the taxation of families requires a careful microeconomic examination inside the black box of family units.").

107. Martha Fineman, *Having a Child Is Nothing Like Deciding to Buy a Porsche*, GUARDIAN (Dec. 1, 2013, 7:30 AM), <https://www.theguardian.com/commentisfree/2013/dec/01/harvard-professor-maternity-coverage-children-porsche> (discussing a Harvard professor's statement that the choice to have a child is analogous to the choice of what car to drive).

108. I.R.C. § 262.

109. Weeks McCormack, *America's (D)evolving Childcare Tax Laws*, *supra* note 53.

benefits should be distributed among families who earn the same income but use different family models.

Second, but relatedly, the discussion assumes that childcare expenses incurred while working will not be treated as pure costs of earning income, for which full recovery might be justified under fundamental tax principles.¹¹⁰ Instead, this Article assumes that the Code will continue its failure to categorize working childcare expenses in this manner.

Third, this Section assumes that the Code will continue to differentiate only between three family models discussed in Section I.A.2.

It is worth being explicit about these points because I do not endorse them. To the contrary, scholars (including myself) have roundly criticized these stances as being, for instance, peculiarly American,¹¹¹ theoretically immature,¹¹² gendered,¹¹³ raced,¹¹⁴ and heteronormative.¹¹⁵ But I use these starting points provided by current laws to begin the inquiry of what utilitarianism suggests about the Code's current taxation of parents.

To begin this analysis, it will be useful to imagine three families. Each family has two small children and earns the same income, *I*. But each family uses a different parenting model. In the Single Family, solo mother (Single Parent) earns all of the family income *I* by working full-time and does not have a cohabitant or other involved partner. In Family Sole, there are two married parents (the Sole Earners) but one parent earns all income *I* while the other works inside the home. And in Family Dual, there are two married parents (the Dual Earners) but both parents work full-time in the external workforce, and together earn income *I*. An analysis of these three families allows for the starkest comparisons between

110. Weeks McCormack, *Overtaxing the Working Family*, *supra* note 1, at 593 ("The preceding analysis strongly suggests that working childcare costs are, at least in significant part, nonconsumptive expenditures for which substantial tax relief is warranted."); *see also* I.R.C. § 162 (allowing recovery of costs associated with a trade or business); I.R.C. § 212 (allowing recovery of costs associated with for-profit activities, though not applicable until 2026).

111. Weeks McCormack, *Overtaxing the Working Family*, *supra* note 1, at 564 n.20; *see* ROBERT W. DRAGO, *STRIKING A BALANCE: WORK, FAMILY, LIFE* (2007).

112. Weeks McCormack, *Overtaxing the Working Family*, *supra* note 1, at 584.

113. McCaffery, *supra* note 4; Staudt, *supra* note 1; Alstott, *supra* note 47.

114. *See* sources cited *supra* note 5.

115. Infanti, *supra* note 7.

the models the Code recognizes, hopefully generating insights that can be extended to a more heterogeneous reality.

2. Application of baseline utilitarianism

When the baseline assumptions (discussed in Section II.B.1) are maintained, the only way utility of income can differ among parents (or individuals more generally) is if income differs. By assumption, each of our hypothetical families earns income I from paid labor. But single parents and dual earners will often incur more work-related costs (including, but not only, childcare costs) than sole earners. Relatedly, single parents and dual earners may produce less so-called “imputed income” from household labor than sole earners. For instance, sole earners may be able to provide childcare and other household services that dual earners and single parents cannot perform while working (and which they may purchase on the external market).

As a result, Single Parent and the Dual Earners may have less actual income than the Sole Earners even though they initially earn the same amount I from paid labor. And when baseline assumptions are maintained, this might suggest a utilitarian case for eliminating the sole-earner bias and providing special benefits to dual earners and single parents.

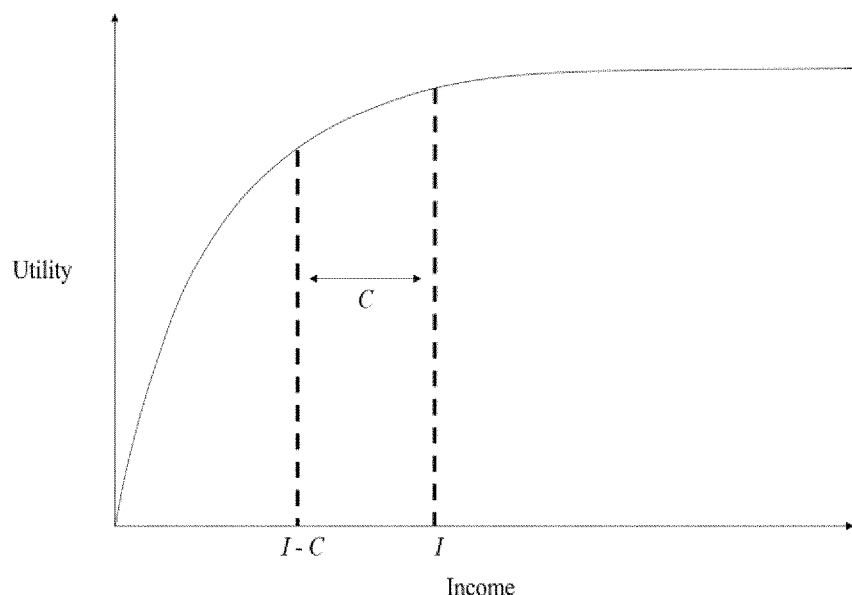
To illustrate this, I begin with childcare costs that must be incurred to work (as opposed to those that are not associated with earning income, such as babysitting for date nights). These working childcare expenses are often one of the most significant costs working parents like Single Parent and the Dual Earners incur. Assume that both Single Parent and the Dual Earners incur childcare costs C to work.¹¹⁶ By contrast, because the Sole Earners do not have to incur these expenses to work, $C = 0$. Put together, Single Parent and the Dual Earners have disposable income $I - C$ while the Sole Earners have disposable income I .

Because of the assumption that all families have identical and strictly declining utility curves, Single Parent and the Dual Earners will shift left of I , to a lower and steeper part of the presumed curve. As a result, Single Parent and the Dual Earners will have higher

116. Note that this assumes for simplicity that these expenses are the same though they certainly could differ at which point different variables could be created, for example, CS and CD .

marginal utilities of income than the Sole Earners. This, in turn, suggests that a transfer of C to Single Parent and the Dual Earners and away from the Sole Earners would enhance overall utility (the utilitarian's goal).¹¹⁷

This idea could be represented graphically as follows:



There are numerous other differences that could be explored. For instance, one might turn to differences in imputed income production. Suppose, for instance, that the non-wage earner of the Sole Earners devotes a great deal of time providing a clean home, healthy meals, and help on her children's homework. Allow the value of this imputed income to be i , so that the Sole Earners' total income can now be denoted $I + i$.

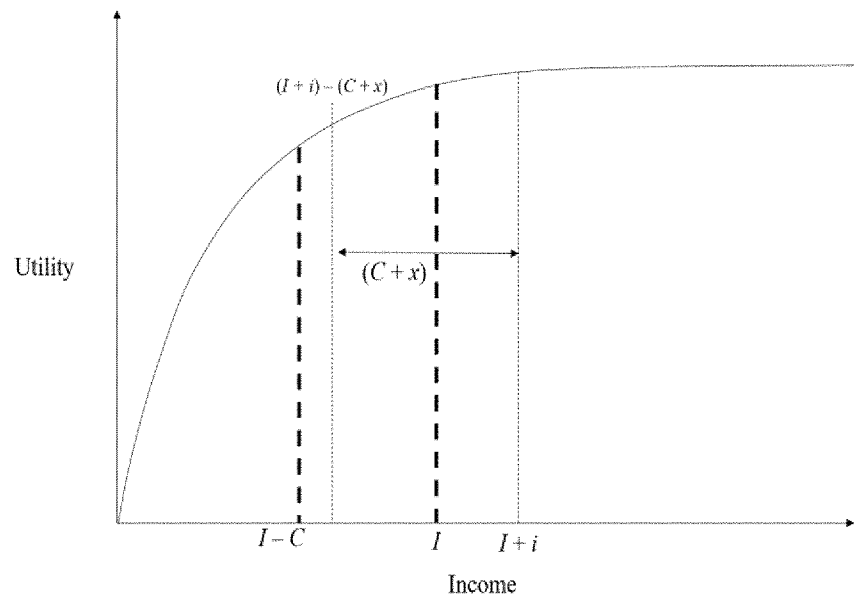
Now assume that Single Parent is unable to devote as much time to the above activities.¹¹⁸ But she does not make external purchases to compensate—her house is just not as neat, her meals

117. This is very similar to the Goldin/Liscow model discussed below, *infra* Section III.B.1. However, it is not clear whether utility curves are presumed to be identical or not, and I do not want to mischaracterize their work.

118. The activities exclude childcare for which she pays, as that will result in double counting.

not as healthy, and her children less able to benefit from her assistance. To quantify, she only produces imputed income $i - x$, so that her total income is $(I - C) + (i - x)$. Because the Sole Earners produce additional imputed income (x), they will be pushed farther to the right on the assumed curve (where marginal utility is presumed to flatten) than Single Parent will. The distance between the family models will widen, suggesting that an even larger transfer of $C + x$ from Sole Earners to Single Parent would enhance utility. A similar case for differentiating the Dual Earners from the Sole Earners could be made, assuming the former produces less imputed income than the latter (though, of course, this gap may be narrower than the gap between Single Parent and the Sole Earners).

So, for instance, the graphs might look something like the one below, with the actual distance $C + x$ between the curves expanding or contracting depending on the value of those variables.



One could continue on this path for some time to create further nuance. For instance, one might add a variable that recognizes differences in work-related costs (dual earners will incur two sets of costs while single parents and sole earners will only incur one). Another variable could capture differences in expenses incurred to “outsource” home maintenance. To provide one example, single

parents and dual earners may sometimes hire housekeepers and other service providers to achieve the standard of living that sole earners can hypothetically achieve without monetary cost and which they may often actually achieve at less expense.

But the above discussion is already sufficient to show the following: when one applies utilitarianism under the baseline assumptions often used in legal tax literature, a case for eliminating the sole-earner bias emerges. Put another way, baseline utilitarianism seems to reinforce the arguments made by legal tax scholars who have urged Congress to end the Code's favoritism towards sole earners. Indeed, baseline utilitarianism might even prescribe special benefits for dual earners and single parents.

The strength of these prescriptions, however, is dependent on the strength of the assumptions made. In the next Part, I reexamine these assumptions and show that however useful they may be generally, they are particularly implausible in the present context. I identify numerous reasons why this is true and then explore what utilitarianism might prescribe once assumptions are relaxed.

III. UTILITARIANISM, BASELINE ASSUMPTIONS RELAXED

A. The General Case for Baseline Utilitarianism's Assumptions

As discussed, when utilitarianism is applied to the tax laws, theorists often begin by assuming that individuals enjoy the same strictly declining utility over all income ranges. This is not because welfarists think that this is true. Rather, the assumptions are employed because they are believed to be correct enough to provide a useful baseline case.¹¹⁹ However, their ability to provide valuable information seems to rest on how true the following two statements are:

- Statement 1: Individuals who have the same income have a similar range of choices; and
- Statement 2: Individuals with a similar range of choices experience similar utility.¹²⁰

119. Lawsky, *supra* note 15, at 904.

120. See Shaviro, *supra* note 92, at 127 (discussing how when individuals have the same choices one can assume they have the same utility).

It is certainly not the case that these statements are universally accepted to be true. For instance, the idea that individuals with the same income have roughly the same choices has been criticized roundly as “fetishizing” resources.¹²¹ Indeed, theorists such as Amartya Sen have developed approaches that explicitly repudiate the idea that equal possession of resources can proxy equal choices given the panoply of social factors—for example, physical and mental disability, mental illness, discrimination—that curtail individual opportunities.¹²²

But I do not seek to assess the wisdom of these assumptions as a global matter. Instead, I argue that even if these baseline assumptions are generally helpful, they are not realistic in the present context. While the discussion that follows is (naturally) not exhaustive, it identifies numerous reasons why utility of income curves can be expected to differ across parenting models. The discussion also reveals two related reasons why this is true: First, individuals using different parenting models will not have the same choices (i.e., opportunity sets) just because they have the same income. In other words, Statement 1 is untenable. And relatedly, the extent to which income can be expected to serve as a sound proxy for utility will differ depending on the parenting model used.

B. The Particular Case of Parents

As discussed above in Section II.B.2, single parents and dual earners will often incur significant childcare costs to earn income that sole earners do not have to, resulting in differences in disposable income. As also discussed, when one maintains baseline assumptions of identical, strictly declining utility curves, the effect of these expenditures is straightforward—the costs shift single parents and dual earners towards the left, steeper portion of the curve, suggesting that at a given earned income level, (I) transfers towards these families (and away from sole earners) will enhance utility. As a result, the baseline utilitarianism often invoked by legal

121. Amartya Sen, The Standard of Living (March 11–12, 1985), in THE TANNER LECTURES ON HUMAN VALUES, at 3, 16–17 [<https://perma.cc/N8G2-MXC8>] (discussing relevance of Karl Marx’s and Adam Smith’s previous criticisms of commodities fetishism in other contexts to the standard of living).

122. Amartya Sen, *Gender Inequality and Theories of Justice*, in WOMEN, CULTURE AND DEVELOPMENT (Martha C. Nussbaum & Jonathan Glover eds., 1995).

tax scholars seems to create a case for eliminating the Code's sole-earner bias.

But in reality, because dual earners and single parents need to pay for childcare to work while sole earners can typically avoid these expenses, they do not have the same opportunity sets. As a result, utility of income curves can also be expected to vary. In other words, the need to pay for childcare will *change* the shape of the curves, not just shift dual earners and single parents to a different space on the same curve.

I now look at how differences in working childcare expenses might change the utility of income for our hypothetical families.

1. *Childcare costs*

How might differences in necessary childcare costs change utility of income curves? There are numerous possibilities, a few of which will be sketched here to illustrate a key point—because of differences in working childcare expenditures, it becomes implausible to assume that utility of income curves are identical (or even substantially similar) across parenting models.

a. Possibility 1: Higher and steeper. One possibility is that the need to—as contrasted with the discretionary choice to—incur childcare costs increases the actual and marginal utility of income for single parents and dual earners relative to sole earners, over some income range that reflects these expenses. To the extent this story is true, the former two models would have utility of income curves that are *higher and steeper* than the latter model's curves (again, over the portion of the curve that reflects the childcare expenses).

Recently, Professors Goldin and Liscow¹²³ developed what I believe to be a case for this interpretation. In making “a welfarist case for maintaining an extra subsidy for single parents,”¹²⁴ their work represents one of few attempts in the legal tax literature to connect observations about parenting models to welfarist principles. Also to their credit, I read Goldin and Liscow to go somewhat beyond baseline utilitarian assumptions to recognize that utility curves may differ among parenting models.

123. See generally Jacob Goldin & Zachary Liscow, *Beyond Head of Household: Rethinking the Taxation of Single Parents*, 71 TAX L. REV. 367, 367–68 n.2 (2018). I am not claiming to address the nuances of the Goldin/Liscow model in their totality. Their argument rests on similar analysis regarding the marginal utility of consumption.

124. *Id.* at 393.

Goldin and Liscow primarily compare single parents and sole-earner models but acknowledge that their analysis can be extended to dual and sole-earner models as well. They write:

The extra tax benefit for single parents with children compensates for the extra cost of raising a child as a result of not benefitting from the additional home child care a partner can provide. . . . [B]ecause singles need to pay for child care outside of the home, . . . [it may be more] valuable for the government to increase transfers for singles than for married couples when they have a child.¹²⁵

In other words, working parents require childcare, and without it they cannot work. It is an essential necessity in their lives. Indeed, we might expect many dual earners and single parents to experience feelings such as relief and gratitude if they successfully secure needed childcare, a task which can be difficult in America (discussed more below).

Tracking this, one might argue, some single parents and dual earners may experience higher *actual* utility over some income range that reflects these needs, resulting in a portion of their utility of income curves being *higher* than sole earners.¹²⁶ Along similar lines, just as we might expect individuals to experience higher *marginal* utility of income when income is needed to pay for food and other basic needs than when it is used to purchase luxuries, we might believe that the need to pay for childcare results in dual earners and single parents having higher marginal utility of income than sole earners over some range. This would suggest that the relevant portion of the former curves are *steeper* for the former two families compared to the latter.

The scenario may be plausible for some families, particularly those who are able to afford and attain high quality external care.¹²⁷ But if one more closely considers the lived experiences of most dual earners and single parents, one finds an equally plausible case that the reverse might be true—that is, that the need to spend earned

125. *Id.*

126. This is so prescriptions will largely track the baseline utilitarianism's prescriptions outlined above—that is, utilitarianism may still prescribe elimination of the Code's sole-earner bias and suggest special benefits for dual earners and single parents.

127. Even if true, this implicates problematic issues of adaptive preferences. Miriam Teschl & Flavio Comim, *Adaptive Preferences and Capabilities: Some Preliminary Conceptual Explorations*, 63 REV. SOC. ECON. 229, 229–47 (2005).

income on childcare results in the *lowering and flattening* of utility curves over many income ranges.

b. Possibility 2: Lower and flatter. I now explore the possibility that the need to incur childcare costs decreases the actual and marginal utility of income for single parents and dual earners relative to sole earners, over some income range. To the extent *this* story is true, the former two models might have utility of income curves that are *lower and flatter* than the latter model's curves (again, over the portion of the curve that reflects childcare expenses).

I start with the idea that the curves might be *lower* over some range (i.e., because the need to pay for childcare results in lower actual utility of income). To illustrate an especially strong case, return to the view of utility as "actual preference satisfaction," discussed in Section II.A.1. Because of the need to pay for childcare while working full-time, one might observe, single parents and dual earners will not have the same array of spending choices sole earners will have, even when each family earns the same income.

Returning to our variables, for Single Parent and the Dual Earners, income I is encumbered by the obligation to pay C to earn income, so they have only $I - C$ at their disposal.¹²⁸ By contrast, one could argue the Sole Earners have their entire income I to spend unencumbered.¹²⁹ As a result, one might expect sole earners to be able to fulfill *more* of their actual preferences with income I than single parents and dual earners can with income $I - C$, creating an argument that single-earning two-parent families may derive more utility from their income than dual earners and single parent families.

This idea (i.e., that the need to pay childcare lowers the utility of income curves of single parents and dual earners relative to sole earners over some range) can be developed further by looking at the *importance* of the preferences at stake. Suppose the main concern was that sole earners were able to dine at restaurants that are slightly more pleasing than the restaurants at which single parents and dual earners can dine. One might not think that the utility each

128. And in America, where childcare costs are high, this may be a sizeable percentage of a family's income. CHILD CARE AWARE OF AM., *supra* note 54 ("Across all states, the average cost of center-based infant care exceeds 27 percent of the median [household] income for single [working] parents.").

129. But see *infra* Section III.B.3 regarding differences in autonomy and discretion over use of income.

derives from their income (which they use to purchase their dining experiences) diverges significantly (though, in truth, they still might).

However, the discussion at hand does not involve preferences that are likely to be “mild” or “marginal.” Instead, it implicates preferences most parents will rank (very) highly—preferences about how often children are cared for by a parent.¹³⁰ With this in mind, one might observe that sole earners (who retain an available parent in the home) have more ability to fulfill this preference for parental care than single parents and dual earners enjoy. Sole earners might *choose* to pay for childcare for any myriad of reasons but could also *choose* not to.

By contrast, one might continue, single parents and dual earners with full-time work obligations do not have such expansive choice sets—they must secure non-parental care in order to earn income *I*. In other words, a case may be made that sole earners not only have greater ability to fulfill *more* preferences (because they have disposable income *I* as opposed to *I* – *C*), but that they also have greater ability to fulfill an *important, highly ranked preference for parental care*.

Indeed, with this in mind, one might even argue that the payment of *C* for childcare costs could create *disutility* for some dual earners and single parents (who have no choice but to incur these expenses if they are to earn income *I*). To more fully understand how this can be so, consider two particularly relevant contextual factors—current norms of parenting and America’s lack of affordable external childcare options.¹³¹

130. I set aside for another article the issue of other-regarding preferences, which could muddy even these waters. See, e.g., Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility and the Pareto Principle*, 110 YALE L.J. 173, 190 (2000) (discussing other-regarding preferences).

131. SUZANNE M. BIANCHI, JOHN P. ROBINSON & MELISSA MILKIE, CHANGING RHYTHMS OF AMERICAN FAMILY LIFE 60–61, 92 (2006) (“[P]arenting practices are affected by cultural norms and values that convey notions of appropriate parental behavior. . . . Ethnographic studies of parenting practices suggest that parental behavior has changed with the emergence of ‘intensive mothering’ and ‘involved fathering’ in recent decades.”). As one Pew Research study found, “[p]arents care a lot about what their spouse or partner thinks of how they are doing as a parent, and they care what their own parents think as well. The opinions of friends and neighbors are important, too, [though] less so.” PEW RSCH. CTR., PARENTING IN AMERICA, *supra* note 22, at 30.

Begin with parenting norms. Few would argue with the idea “that children need and deserve time with their parents”¹³² and “should be raised by parents, not by strangers.”¹³³ But what constitutes adherence to these basic ideas has changed dramatically over time.¹³⁴ During some periods of history, American parents could outsource large portions of childcare without feeling that they had violated societal expectations—during World War II, for instance, few questioned Rosie the Riveter’s choice to find external childcare so she could work.¹³⁵ And in the late 1800s, to provide another example, “domesticating children was a job [middle- and upper-class mothers] would just as soon hand over to someone else.”¹³⁶

Today, however, parental norms “valorize[] a time-intensive, parent-centric . . . model of childrearing that demands more resources than ever before.”¹³⁷ These norms of “intensive care” have “been common in upper-middle-class households for at least a generation.”¹³⁸ Recent survey data, however, suggests that “this child-rearing philosophy now has a much broader appeal, one that holds across race and class.”¹³⁹ The authors of that study concluded as follows:

Results indicate that parents of different social classes express remarkably similar support for intensive mothering and fathering across a range of situations, whether sons or daughters are involved. These findings suggest that cultural norms of child-

132. Joan C. Williams, *Sandberg vs. Slaughter: Both Right*, HUFFINGTON POST (Aug. 22, 2012), http://www.huffingtonpost.com/joan-williams/ann-marie-slaughter_b_1619324.html [<https://perma.cc/5FUC-VUCF>].

133. Joan C. Williams, *Restructuring Work and Family Entitlements Around Family Values*, 19 HARV. J. L. & PUB. POL’Y 753, 753 (1996).

134. See, e.g., Mary Blair-Loy, *COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN* (2003) (outlining the various approaches of female executives for balancing career and family).

135. Jennifer H. Sperling, *Reframing the Work-Family Conflict Debate by Rejecting the Ideal Parent Norm*, 22 AM. U. J. GENDER SOC. POL’Y & L. 47, 63 (“During the war, many mothers were, by necessity encouraged to work, taking the places of men who were now fighting overseas.”).

136. *Id.* at 57.

137. *Id.* at 48.

138. Joe Pinsker, *‘Intensive’ Parenting Is Now the Norm in America*, ATLANTIC (Jan. 16, 2019), <https://www.theatlantic.com/family/archive/2019/01/intensive-helicopter-parenting-inequality/580528/>.

139. *Id.*

centered, time-intensive mothering and fathering are now pervasive, pointing to high contemporary standards for parental investments in children.¹⁴⁰

Given these increasingly pervasive “norm[s] of exhaustive care,”¹⁴¹ one can more easily see how some dual earners and single parents might experience disutility when using their earned income to outsource childcare. As one commentator put it, “[t]he style of child-rearing that most aspire to takes a lot of time and money, and many families can’t pull it off.”¹⁴² This also suggests that disutility may be disproportionately felt by those of lower socioeconomic status and that racial and demographic differences are likely to exist.

The idea that childcare purchases may cause disutility for some single parents and dual earners becomes even more concretized when one considers the lack of affordable childcare options available to American working parents. If these parents had an array of quality childcare providers to choose from, one might expect the disutility experienced from outsourcing childcare to be (at least somewhat) tempered. But American working parents do not enjoy plentiful choices to fulfill their childcare preferences.

The American government does not subsidize childcare facilities like other nations, making them expensive, not readily available and of spotty quality. When compared to the United States, “other liberal welfare states display less resistance than the United States to the idea that motherhood should trigger benefits entitlements.”¹⁴³ Thus, rather than offering parents affordable and accessible childcare and preschool like its peers, the United States forces parents to compete for limited spots at expensive, privately run facilities that often provide rather mediocre care.¹⁴⁴

In sum, given demanding parental norms and lack of desirable childcare options, some dual earners and single parents may pay a significant percentage of their income ($C/I\%$) for childcare they

140. Patrick Ishizuka, *Social Class, Gender, and Contemporary Parenting Standards in the United States: Evidence from a National Survey Experiment*, 98 SOC. FORCES 31, 31 (2018).

141. Sperling, *supra* note 135, at 77.

142. Pinsker, *supra* note 138.

143. Linda A. White, *The United States in Comparative Perspective: Maternity and Parental Leave and Child Care Benefits Trends in Liberal Welfare States*, 21 YALE J. L. & FEMINISM 185, 185 (2009); see DRAGO, *supra* note 111.

144. See generally CHILD CARE AWARE OF AM., *supra* note 54.

would actually prefer not to use and/or feel unhappy using. Of course, not all single and dual earning parents will feel so negatively about using non-parental care, and some will find external providers with whom they feel very comfortable. Even in these cases, however, it does not follow that single parents and dual earners will enjoy as much utility when they use their income to pay for childcare to earn income as the sole earners experience when they spend C as they choose.¹⁴⁵

This discussion has so far suggested that the need to pay for childcare might *lower* a portion of the utility of income curves for many single parents and dual earners relative to sole earners. There is also an argument that the curves of single parents and dual earners might be *flatter*—i.e., less steep—than sole earners because of these costs. Recall that the steepness of a utility of income curve depends on the marginal utility of income—that is, how much additional utility is created when an additional dollar of income is earned.

Also recall the argument that the need to pay for childcare might increase the marginal utility of income for dual earners and single parents. Just as we might expect families to have higher marginal utility of income when used to purchase food and other basic necessities than when they are purchasing luxuries, one might think that the need to pay for childcare has a similar effect. But while of some initial appeal, this argument has strong counters.

Is it really likely that income earned to pay for any particular day (hour?) of childcare *that enables a person to work* will enhance her utility more than any other day? Does it not seem just as plausible that she derives very little additional utility for each increment of care, suggesting a very flat curve along whatever income range reflects the needed childcare purchase? Digging deeper, it may be that childcare is a “lumpy” good—that is, a good that “cannot be usefully provided in *any* amount[] but only in more or less massive ‘lumps.’”¹⁴⁶ While an individual can enjoy cookies or tennis lessons in increments, one generally only enjoys an automobile once purchased in its entirety. Similarly, because one may need to work

145. It is possible, however, that adaptive preferences could lead to this conclusion. These more nuanced conceptions of utility are discussed in companion work.

146. Lee Anne Fennell, *Lumpy Property*, 160 U. PA. L. REV. 1955, 1958 (2012) (citing Michael Taylor & Hugh Ward, *Chickens, Whales, and Lumpy Goods: Alternative Models of Public-Goods Provision*, 30 POL. STUD. 350, 353 (1982)).

a set number of hours to retain a job and/or earn sufficient income, childcare may only be useful when received in chunks.¹⁴⁷ If childcare is a lumpy good, single parents and dual earners may have flat (and perhaps very low) utility curves until they are able to earn enough to purchase worthwhile amounts of childcare. And they may only then experience a surge equal to whatever (perhaps minimal) utility is ultimately derived from the payment of C in exchange for the childcare they need to earn income and/or keep their job.¹⁴⁸

There are countless nuances that could be explored. For instance, the way in which power and autonomy are shared among two parent families might differ depending on the number of earners. Perhaps, for example, the non-wage earner of a sole earner couple may wish (s)he could outsource more childcare but not feel that (s)he has the autonomy to do so.¹⁴⁹ But I do not need to explore all of these alternatives to make a critical observation: the need to pay for childcare is likely to *change* the utility of income curves of dual earners and single parents in ways that make it unrealistic to assume that these curves are identical across parenting models.

This is, however, not the only reason why this assumption unravels—the need to pay for childcare is not the only critical difference between parenting models. Suppose, for instance, that Single Parent and the Dual Earners had managed to cobble together care with family, friends, and neighbors so that they did not end up incurring childcare costs (i.e., like the Sole Earners, $C = 0$ so that each family now has disposable income I).

In this situation, does it become plausible to assume that utility of income curves are substantially similar? I argue that it does not,

147. *Id.*

148. This discussion exposes the limitations of the revealed preference view. Suppose that each of the hypothetical families spend C on childcare—Single and Duals do so during working hours and Soles do so for literally any possible reason one can imagine. The Soles' expenditure reveals useful information about their preferences because they could have chosen to spend C on anything else they wanted. By contrast, the "decision" of Single and the Duals to spend C on childcare during working hours reveals little (if any) useful information about their actual preferences or the utility they derived from the expenditure. But a theorist that applied a revealed preference framework without recognizing these differences in opportunity sets would not have captured this distinction. This observation about the limitations of using a revealed preference view to understand differences in utility among parents will be reinforced throughout the remainder of the Section.

149. See, e.g., Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993).

and the idea that parents that earn the same income will have similar choice sets (Statement 1, above) remains unrealistic. Aside from differences in actual costs incurred, a more general observation can be made. The time parents have to allocate among various life tasks—e.g., childcare, paid work, unpaid work, leisure—can be expected to differ (in some cases, significantly) among parenting models. While time constraints provide a “zero sum game” for all humans, the game is not even across families. I now turn to these “time gaps” and show how they are likely to change the utility of income for our three hypothetical families.

2. Time gaps

Most obviously, the “time gap” between single parents working full-time and sole earner families can be sizeable. The idea that single parents face different time constraints than two parent families is neither novel nor hard to grasp. As one expert puts it, “[t]he two key resources parents provide for their children are money and time.”¹⁵⁰ But because “parental efforts to earn and provide money for their children [often] require time committed to paid labor,” time is a valuable commodity that has to be rationed.¹⁵¹ As a result, because “[s]ingle-[parent] households . . . have similar time demands as married-parent households when children are present but half as many adults to provide family economic support and fulfill family caregiving needs,” they are more likely to experience “time deficit[s],”¹⁵² “severe time shortages,”¹⁵³ and “time poverty.”¹⁵⁴

150. Ronald E. Bulanda & Stephen Lippman, *Wrinkles in Parental Time with Children: Work, Family Structure, and Gender*, 13 MICH. FAM. REV. 5, 5 (2009).

151. *Id.*

152. Sarah M. Kendig & Suzanne M. Bianchi, *Single, Cohabiting and Married Mothers' Time with Children*, 70 J. MARRIAGE & FAM. 1228, 1229 (2008) (first citing S. Himmelweit, B. Bergmann, K. Green, R. Albeda & C. Koren, *Dialogue: Lone Mothers: What Is To Be Done?*, 10 FEMINIST ECON. 237 (2004); then citing H. B. Presser, *Can We Make Time for Children? The Economy, Work Schedules, and Child Care*, 26 DEMOGRAPHY 523 (1989); and then citing C. Vickery, *The Time-Poor: A New Look at Poverty*, 12 J. HUM. RES. 27 (1977)); see also Melissa A. Milkie, Kei Nomaguchi & Scott Schieman, *Time Deficits with Children: The Link to Parents' Mental and Physical Health*, 9 SOC'Y & MENTAL HEALTH 277 (2019).

153. Kendig & Bianchi, *supra* note 152, at 1228.

154. Andrew S. Harvey & Arun K. Mukhopadhyay, *When Twenty-Four Hours Is Not Enough: Time Poverty of Working Parents*, 82 SOC. INDICATORS RSCH. 57 (2007).

There is also evidence to suggest a significant time gap between sole earners and dual earners when full-time work is involved. Studies, for instance, suggest that the total combined workweek for dual-earning families is significantly longer than the workweek of sole-earning families.¹⁵⁵ One study utilizing American Time Use data found that while only 40% of all couples (sole earners and dual earners combined) reported working over 80 hours or more, 60% of dual earners reported doing so.¹⁵⁶ By contrast, less than 40% of sole earners reported working more than 50 hours a week.¹⁵⁷ Future research could more fully explore the extent of the time gap between sole earners and dual earners.

The general point, however, is as follows: single parents and dual earners can be expected to have (sometimes substantially) less time to allocate among life tasks than sole earners do. Where does this observation lead? At the outset, it is important to note that time gaps do not *necessarily* result in utility gaps. For instance, while the “zero sum” nature of time gaps may result in fewer preferences being satisfied among families with the same income, scenarios can be created in which foregone preferences are not particularly important (i.e., highly ranked) preferences.

To illustrate, suppose our hypothetical families live in a country with plentiful jobs, and whose government provides free and accessible childcare of the highest quality, a mandated maximum workweek of twenty hours and a minimum wage that ensures a comfortable standard of living by even the most rigorous standards. Further, the residents of this country fervently espouse laissez-faire norms of parenting, in large part due to the freely available, world-class childcare at their disposal. Single Parents and the Dual Earners may still, given the finite nature of time, experience a time gap compared to the Sole Earners.

But, because of governmental support structures and forgiving cultural norms, it is possible that time gaps do not significantly constrain choice sets and that utility gaps may not be particularly wide. In other words, despite time gaps, Single Parents and the Dual Earners may still be able to fulfill most of the preferences that

155. BIANCHI ET AL., *supra* note 131, at 48.

156. *Id.* at 50. This suggests a much larger difference between dual and sole earners because dual earners were included in the latter category.

157. *Id.* at 50–51.

are important to them, and they may feel relatively happy and/or satisfied with the lives they are able to lead.

America, however, differs from this hypothetical country in significant respects. And once relevant contextual factors are added, it becomes far more likely that time gaps will result in significant differences in choice sets and, thus, utility gaps between U.S. parents. I continue the discussion by more deeply exploring a concept introduced in the previous Section—that the amount of time parents have available to provide care for children will differ by parenting model.

a. Time for parental care. Even if Single Parent and the Dual Earners manage to secure some type of non-paid arrangement that allows the child(ren) to be cared for during working hours, they are not in the same position as the Sole Earners who retain an available parent in the home.¹⁵⁸ Their choice sets are different in crucial respects. As mentioned in the previous Part, compared to Single Parent and the Duals Earners (who must devote significant chunks of time to paid work), the Sole Earners seem to have more freedom to decide how much parental care their children will receive. And as discussed above, this likely implicates a very important (i.e., highly ranked) preference for most parents.

But I now move beyond this point. The conversation has so far assumed that parents have the option to outsource childcare to paid providers. In truth, however, many American parents cannot afford to do so. Instead, as Joan Williams has explained, “[f]or most working-class families, child care is often patched together in ways that leave parents anxious and children in jeopardy.”¹⁵⁹

Moreover, sometimes childcare cannot be outsourced at all, whether to paid or unpaid providers, because parental care is the

158. Studies have shown that employed mothers spend significantly less time with their children than non-employed mothers. BIANCHI ET AL., *supra* note 131, at 62. They also suggest single mothers spend less total time with their children than married mothers, though more recent analysis concluded that differences could be largely eliminated after controlling for socioeconomic status and that once time was subcategorized, single mothers and married mothers provided similar time in “primary” care and only differed on time spent in “secondary” care. See generally Kendig & Bianchi, *supra* note 152, at 1228 (citing numerous studies on time use patterns of single parents and identifying potential concerns about a “widening gap between married and single mothers’ time investments in their children”).

159. JOAN C. WILLIAMS, ONE SICK CHILD AWAY FROM BEING FIRED: WHEN “OPTING OUT” IS NOT AN OPTION 10 (2006) (quoting LILLIAN RUBIN, FAMILIES ON THE FAULT LINE 82-83 (1994)).

only feasible option. For instance, when a child falls ill, as children invariably do, usual childcare options may become unavailable (e.g., because the caregiver is unwilling to care for the sick child) or inappropriate (e.g., because the child is so sick that it is not safe for a non-parent to provide care).

In these situations, the non-wage earner in the Sole Earner family can provide needed care while the wage earner draws income I as usual. But Single Parent and the Dual Earners do not have these same options. If parental care is required, parents in these families will often have to forego work. And for many American parents, this will also frequently result in lost income because their workplaces provide few accommodations.

To provide some data points, the United States is the only country in the industrialized world that fails to mandate any paid parental leave.¹⁶⁰ According to the Bureau of Labor Statistics (BLS) only 13% of private-sector workers in America had access to paid family leave in 2016.¹⁶¹

Unlike many peer countries, the United States does not have broad mandatory paid sick leave either.¹⁶² In fact, the United States does not require that employers provide any paid sick leave to their employees, as the Family Medical Leave Act (FMLA) only requires 12 weeks unpaid leave.¹⁶³ But some parents cannot afford to take unpaid leave.¹⁶⁴ For example, evidence suggests “that mothers

160. Gretchen Livingston & Deja Thomas, *Among Countries, Only U.S. Lacks Paid Parental Leave*, PEW RSCH. CTR.: FACT TANK (Dec. 16, 2020), <https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/>.

161. *Employee Benefits Survey: Paid Sick Leave: Number of Annual Days by Service Requirement*, U.S. BUREAU OF LAB. STAT. (Mar. 2017), <https://www.bls.gov/ncs/ebs/benefits/2017/ownership/civilian/table35a.htm> [<https://perma.cc/ZHB8-AGSF>].

162. CTR. FOR ECON. POL’Y RSCH., *United States Lags World in Paid Sick Days for Workers and Families*, <http://cepr.net/documents/publications/psd-summary.pdf> [<https://perma.cc/QAR9-P667>] (last visited Oct. 15, 2020) (reporting that of the twenty-two “rich countries,” the U.S. was the only country that did not require paid vacation time).

163. *Sick Leave*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/topic/workhours/sickleave> [<https://perma.cc/Q8DS-VWNT>] (last visited Oct. 15, 2020) (“Currently, there are no federal legal requirements for paid sick leave.”).

164. Ann P. Bartel, Soohyun Kim, Jaehyun Nam, Maya Rossin-Slater, Christopher Ruhm & Jane Waldfogel, *Racial and Ethnic Disparities in Access to and Use of Paid Family and Medical Leave: Evidence from Four Nationally Representative Datasets*, U.S. BUREAU OF LAB. STAT.: MONTHLY LAB. REV. (Jan. 2019), <https://www.bls.gov/opub/mlr/2019/article/racial-and-ethnic-disparities-in-access-to-and-use-of-paid-family-and-medical-leave.htm> (“[P]arents frequently do not take unpaid FMLA leave—even when they need to take time off to care for family members—because they cannot afford it.”).

from racial and ethnic minority groups, as well as less educated and unmarried mothers, are less likely to take unpaid leave such as that provided by the FMLA.”¹⁶⁵

Nor does the United States provide minimum paid vacation time, which is untrue of any other OECD member nation.¹⁶⁶ Indeed, while all European Union member states are required to guarantee that all employees receive at least four weeks of paid vacation leave each year,¹⁶⁷ the Bureau of Labor Statistics (BLS) recently found that nearly 25% of Americans working in the private sector do not receive any paid vacation time at all¹⁶⁸ and that even after two decades of service the average American worker has only 20 days paid vacation available.¹⁶⁹

Furthermore, it is important to recognize that “access to paid leave is not evenly distributed across the workforce.”¹⁷⁰ For instance, one study concluded that “[w]orking parents with higher incomes and those who are non-Hispanic are significantly more likely to have access to any form of paid leave compared to low-income or Latin[x] workers.”¹⁷¹

165. *Id.* (emphasis omitted).

166. Rebecca Ray, Milla Sanes & John Schmitt, *No-Vacation Nation Revisited*, CTR. FOR ECON. POL’Y RSCH. 1 (2013), <https://cepr.net/documents/no-vacation-update-2014-04.pdf> (reporting that among the twenty-one “rich countries” identified by the Center of Economic Policy Research, the U.S. was the only country that did not require paid vacation time); see also Derek Thomas, *The Only Advanced Country Without a Vacation Policy? It’s the U.S.*, ATLANTIC (July 2, 2012), <http://www.theatlantic.com/business/archive/2012/07/the-only-advanced-country-without-a-national-vacation-policy-its-the-us/259317/> [<https://perma.cc/3NYN-MAPA>] (“The United States is practically the only developed country in the world that doesn’t require companies to give their workers time off.”).

167. *Working Conditions – Working Time Directive*, EUR. COMM’N, <http://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=205> [<https://perma.cc/7KER-JWPR>] (last visited Oct. 15, 2020).

168. *Private Industry Workers Received Average of 15 Paid Vacation Days After 5 Years of Service in 2017*, U.S. BUREAU OF LAB. STATS.: ECON. DAILY (June 28, 2018), <https://www.bls.gov/opub/ted/2018/private-industry-workers-received-average-of-15-paid-vacation-days-after-5-years-of-service-in-2017.htm> [<https://perma.cc/LSG5-FTV4>].

169. *Id.*

170. Sarah Jane Glynn, *Working Parents’ Lack of Access to Paid Leave and Workplace Flexibility*, CTR. FOR AM. PROGRESS 1, 4 (Nov. 20, 2012), <https://www.americanprogress.org/wp-content/uploads/2012/11/GlynnWorkingParents-1.pdf>.

171. *Id.* (citing Sarah Jane Glynn & Jane Farrell, *Latinos Least Likely to Have Paid Leave or Workplace Flexibility*, CTR. FOR AM. PROGRESS (Nov. 20, 2012), https://cdn.americanprogress.org/wp-content/uploads/2012/11/GlynnLatinosPaidLeave1.pdf?_ga=2.187591278.734630241.1602781781-1704321206.1602781781).

Moreover, even if some leave is theoretically available, taking time off may carry other costs. It may even put the parent's job in jeopardy. In a report entitled, *One Sick Child Away from Being Fired: When "Opting Out" Is Not an Option*,¹⁷² expert Joan Williams chronicles the plight of working parents who have been demoted and lost jobs as they struggled to balance the demands of inflexible work schedules and caregiving.

Even if their job is not in jeopardy, many parents may rationally worry that taking time off to provide needed care compromises their reputation at work and flouts workplace expectations. This is especially likely to be true if the parent works in one of the many American workplaces that valorizes the "ideal worker."¹⁷³ As experts explain, the ideal worker norm that remains "alive and well" in America reflects the once-prevalent male breadwinner model.¹⁷⁴ This ideal worker "works full[-]time and overtime and takes little or no time off for childbearing or child rearing."¹⁷⁵ (S)he is assumed to have another adult taking care of a disproportionate share of household tasks,¹⁷⁶ so that (s)he is discharged not only of caretaking but also of most other domestic responsibilities. Taking too much time off of work to care for a sick child, therefore, may signal that a parent falls outside this ideal worker norm, possibly lowering his or her own assessment of her job performance as well as the views of her employer.

All of the issues just described have been amplified during the COVID-19 pandemic where schools were shut down leaving parents with unanticipated and weighty burdens, including but not limited to homeschooling and providing care during the day.¹⁷⁷

172. WILLIAMS, *supra* note 159.

173. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1 (2000).

174. *See supra* Section I.A.

175. WILLIAMS, *supra* note 173.

176. Adrienne D. Davis, *Straightening It Out: Joan Williams on Unbending Gender*, 49 AM. U. L. REV. 823, 830 (2000) ("[T]he ideal worker is actually supported by the family work done by another adult. This distinction proves essential to why, although not all men can, do, or seek to perform as ideal workers, overwhelmingly it is *only* men who are capable of doing so . . .").

177. Claire Cain Miller, *Nearly Half of Men Say They Do Most of the Home Schooling*, 3 Percent of Women Agree., N.Y. TIMES (May 6, 2020), <https://www.nytimes.com/2020/05/06/upshot/pandemic-chores-homeschooling-gender.html>; Deb Perelman, *In the Covid-19 Economy, You Can Have a Kid or a Job. You Can't Have Both.*,

While no doubt difficult for all families, the options available to sole earners differed dramatically from those available to dual earners and single parents. By definition, sole earners retained a partner that was not committed to external, paid work and could, therefore, typically take on the newly required care.¹⁷⁸

Dual earners and single parents did not have this safety net. At best, these parents were able to work from home and somehow balance the simultaneous demands made by children and their jobs.¹⁷⁹ Many others, however, were not able to work from home. In particular, low-wage workers and Black and Hispanic workers were less likely to be able to work from home than others.¹⁸⁰ One survey estimated that “[h]igher-wage workers [we]re six times as likely to be able to work from home as lower-wage workers.” It also estimated that “[l]ess than one in five black workers and roughly one in six Hispanic workers [we]re able to work from home.”¹⁸¹

These disproportionate burdens were caused by many factors. Even before the pandemic, Black and Latinx workers reported less ability to “telework” than other workers.¹⁸² Furthermore, as the Center for Disease Control has explained, “[p]eople from some racial and ethnic minority groups are disproportionately represented in essential work settings such as healthcare facilities, farms, factories, grocery stores, and public transportation,”¹⁸³ and were exempted from stay at home orders.

N.Y. TIMES (July 2, 2020), <https://www.nytimes.com/2020/07/02/business/covid-economy-parents-kids-career-homeschooling.html>; Douglas Clement, *Jobs or Kids? Parenting During the Pandemic*, FED. RESRV. BANK OF MINNEAPOLIS (July 8, 2020), <https://www.minneapolisfed.org/article/2020/jobs-or-kids-parenting-during-the-pandemic>; Neil Paine & Amelia Thomson-Deveaux, *How The Pandemic Could Force a Generation of Mothers Out of the Workforce*, FIVETHIRTYEIGHT (July 27, 2020), <https://fivethirtyeight.com/features/how-the-pandemic-could-force-a-generation-of-mothers-out-of-the-workforce/>.

178. See Miller, *supra* note 177.

179. See Clement, *supra* note 177.

180. Elise Gould & Heidi Shierholz, *Not Everybody Can Work from Home: Black and Hispanic Workers Are Much Less Likely to Be Able to Work from Home*, ECON. POL’Y INST.: WORKING ECON. BLOG (Mar. 19, 2020 1:15 PM), <https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home/>.

181. *Id.*

182. See also *Workers Who Could Work from Home*, U.S. BUREAU OF LAB. STATS. (Sept. 24, 2019), <https://www.bls.gov/news.release/flex2.t01.htm>.

183. *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTR. FOR DISEASE CONTROL & PREVENTION (July 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

In sum, time gaps may result in significant differences in the amount of time parents can choose to care for their children. As a general matter, single parents and dual earners may have less ability to decide how much parental care their children receive, a preference that most will rank highly.¹⁸⁴ And more specifically, when parental care is needed (i.e., cannot be outsourced), single parents and dual earners will generally have very different choice sets when compared to sole earners. Whereas sole earners can provide care without sacrificing income, dual earners and single parents may often have to forego income and may worry their job is at risk and/or their professional reputations compromised. Furthermore, parents of low socioeconomic status and certain racial and ethnic groups may have even more constrained choice sets than other similarly situated parents.

These differences in choice sets can be expected to significantly change the utility different families can derive from income, further undermining the assumption that utility of income curves is similar among family models. Relatedly, time gaps may lead to utility gaps among parenting models because of differences in work aversion.

b. Work aversion. Labor—the activity that allows many parents to earn income—is generally presumed to create at least some disutility.¹⁸⁵ Disutility may result from the nature of the actual work and from the opportunity costs of working.¹⁸⁶

But the preceding discussion shows that the opportunity costs of working are different among parenting models. And as a result, work aversion can be expected to differ across parents too.¹⁸⁷ For instance, as discussed, when dual earners and single parents work, they may be trading out time that their children can receive

184. Survey data and happiness studies may flesh these points out further. For instance, the Pew Research Center recently reported that “one-in-five full-time working moms say balancing the two is *very* difficult for them, compared with 12% of dads who work full time and 11% of moms who work part time.” PEW RESCH. CTR., RAISING KIDS AND RUNNING A HOUSEHOLD, *supra* note 28, at 5.

185. David A. Spencer, *Love’s Labor’s Lost? The Disutility of Work and Work Avoidance in the Economic Analysis of Labor Supply*, 61 REV. SOC. ECON. 235, 235 (2003) (“It has been routinely assumed within mainstream economics that work is a source of ‘disutility.’”).

186. *Id.* at 236.

187. See Fleurbaey & Maniquet, *supra* note 88, at 1074 (“Some workers may be more averse to work than others because . . . they have children or relatives needing care at home . . .”); Shaviro, *supra* note 92, at 24 (noting that those with high work aversion will be affected particularly when labor decisions are lumpy); see also Sugin, *supra* note 15, at 234 (noting “utility gains from substituting leisure for work”).

parental care. And for the many working-class families who have cobbled together childcare options, they may believe they are trading out their children's safety as well.

Studies also suggest that dual earners are able to spend less time with one another than sole earners and that this is not by choice but because of the time constraints imposed when both partners engage in external work.¹⁸⁸ It also seems likely the amount of time available for leisure,¹⁸⁹ often a source of utility, will differ by parenting model.¹⁹⁰ These are just a few ways in which time gaps between parenting models may result in differences in the opportunity costs of paid labor. Yet it is already enough to show that work aversion is likely to vary among parents, further discrediting the idea that parents with the same income have similar choice sets and the assumption that utility of income curves are identical.

Of course, some individuals may also experience utility from work. But once again, there are reasons to think that these benefits will differ across parenting models.

3. *The benefits of paid work*

Just as work can create disutility, it can also create utility.¹⁹¹ For instance, some individuals find their work provides them with meaning and a sense of purpose. This seems particularly likely

188. Sarah M. Flood & Katie R. Genadek, *Time for Each Other: Work and Family Constraints Among Couples*, 78 J. MARRIAGE & FAM. 142, 160 (2016).

189. Leisure provides fertile ground for academic debates. Indeed, "leisure studies" is often identified as a separate branch of the social sciences. See Michael Silk, Jayne Caudwell & Heather Gibson, *Views on Leisure Studies: Pasts, Presents & Future Possibilities?*, 36 LEISURE STUD. 153, 153 (2017). There is, for instance, a vast literature debating what constitutes leisure in the first place. *Id.*

190. Nor is data particularly clear about how leisure differs among family models. As one scholar has put it: "Leisure time provides a measurable but understudied indicator of discretionary time, which has implications for social isolation, mental and physical health, and overall life satisfaction." Joanna R. Pepin, Liana C. Sayer & Lynne M. Casper, *Marital Status and Mothers' Time Use: Childcare, Housework, Leisure, and Sleep*, 55 DEMOGRAPHY 107, 108 (2018). Existing studies have suggested that employed mothers enjoy less sleep and less leisure than non-employed mothers. BIANCHI ET AL., *supra* note 131, at 89. Some have found that single parents have more overall leisure time than married parents, but researchers caution that one should not draw conclusions too quickly, as this leisure might be less restorative, more contaminated, more isolating, and more fragmented. *Id.* at 103.

191. See Warren S. Gramm, *Labor, Work, and Leisure: Human Well-Being and Optimal Allocation of Time*, 21 J. ECON. ISSUES 167, 168, 171 (1987), <https://www.tandfonline.com/doi/abs/10.1080/00213624.1987.11504603>.

among the class of workers who characterize themselves as having “careers” rather than “jobs.”¹⁹²

Non-wage earners in sole-earner couples will not derive this possible meaning from paid work (by definition they are not in the paid workforce). But, of course, they might derive utility from the nonpaid, internal work or other activities in which they engage instead. It is, however, likely that the utility derived from nonpaid, internal work and activities will *differ* from the utility derived from paid work, and this is the critical point this Part keeps making.

To note a few other possible benefits of work, there is evidence that dual earners share more equally in nonpaid housework than sole-earner couples, which could result in divergence in joint utilities.¹⁹³ It is also possible that dual earners more equally share discretion to choose how jointly earned income is spent whereas the non-wage earner in a sole-earner couple may enjoy less autonomy over spending decisions.¹⁹⁴

In response, one might counter that if the utility of engaging in paid work were to outweigh the benefits of not having time encumbered in the labor force, the non-wage earner in a sole-earner partnership might *choose* to enter the paid workforce. As discussed more below, the strength of this counter rests to a significant extent on the “lumpiness” of labor decisions. But for now, this discussion provides another category of reasons why the assumption that utility of income curves are identical across parenting models is untenable.¹⁹⁵

192. See, e.g., Susan Levine, *The Feminine Mystique at Fifty*, 36 FRONTIERS: J. WOMEN STUD. 41, 41–46 (2015) (noting how author Betty Freidan called on women to find purpose by establishing careers, an argument that has now come to be criticized as classist since many women were already working to make ends meet and many cannot be expected to find such fulfillment in the work that is realistically possible for them).

193. See Suzanne M. Bianchi, Melissa A. Milkie, Liana C. Sayer & John P. Robinson, *Is Anyone Doing the Housework? Trends in the Gender Division of Household Labor*, 79 SOC. FORCES 191 (2000); Arnstein Aassve, Giulia Fuochi & Letizia Mencarini, *Desperate Housework: Relative Resources, Time Availability, Economic Dependency, and Gender Ideology Across Europe*, 35 J. FAM. ISSUES 1000, 1014 (2014); BIANCHI ET AL., *supra* note 131, at 92 (“[M]arried mothers . . . reduced the amount of housework they do so much that [by 2000] they d[id] almost as little housework as single mothers.”).

194. Kornhauser, *supra* note 149, at 88–89.

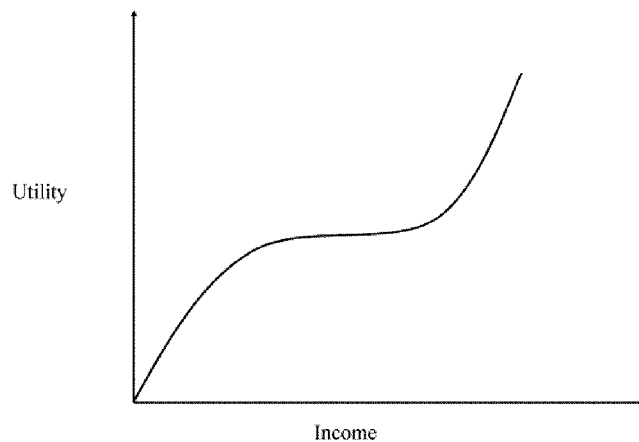
195. Finally, an observation about revealed preferences emerges that reinforces observations made in previous subparts—the actual behavior of the Soles reveals far more useful information about their preferences than the behavior of Single and the Duals, since the latter models lack critical choices. For instance, one may reasonably conclude that the

Before resting this case, I question the strength not only of that assumption (i.e., that the utility of income curves are identical among parents) but also of the assumption that the utility of income is *strictly declining*. Once this assumption is reexamined, the possibilities for extremely divergent curves becomes even more apparent.

4. Friedman-Savage curve

As Professor Sarah Lawsky puts it, “while some evidence supports” the general assumption of “declining marginal utility, other evidence also suggests some individuals actually experience increasing marginal utility, at least over some range of income.”¹⁹⁶ Professor Lawsky discusses the alternative Friedman-Savage curve, depicted below:

Like the declining marginal utility curve, the Friedman-Savage curve has an intuitive story to tell:



[T]he . . . segments with declining marginal utility . . . represent distinct classes, or “socioeconomic levels.” An increase in income

amount of parental time the Soles devote to their children or the money or time they devote towards keeping their house a certain way reflects their preferences because one partner is not engaged in the workforce and thus available to make these choices. By stark contrast, little can be discerned about Single’s or the Duals’ preferences (when full-time hours are involved) just by looking at how time is allocated. But application of the revealed preference view would obscure these differences.

196. Lawsky, *supra* note 15, at 907–08.

that does not shift someone out of his class has diminishing marginal utility. The . . . section, with increasing marginal utility, represents the transition between the two classes.¹⁹⁷

Assume this story to be true and consider two alternative scenarios. First, suppose that all of our hypothetical families do have identical curves but that they are more like the curve pictured above than the traditionally assumed strictly declining curve. Suppose also that the spike in utility begins once one has disposable income S . In cases where the difference between childcare costs (C) and income (I) are less than S —that is, $I - C < S$ —Single Earner and the Dual Earners may completely miss the utility surge that the Sole Earners enjoy.

Now suppose that for myriad reasons discussed above that Single Earner and the Dual Earners have curves that are lower and flatter than the Sole Earners (e.g., because of childcare costs and time gaps) and that, additionally, they miss the utility spike just discussed. If this true, the curves can be expected to diverge quite significantly.

While these are just two possibilities, they are entirely realistic given this Section's discussion. And it shows that once one relaxes the assumption that marginal utility of income is strictly declining and explore alternative curves like the Friedman-Savage curve, it becomes apparent how the utility of income curves of different families could diverge quite dramatically.¹⁹⁸

* * *

This Section has identified numerous reasons why utility of income curves are likely to vary significantly across parenting models and developed at least two related reasons why this is true. First, parents using different models cannot be expected to have the same range of choices just because they earn the same income. And relatedly, income will not be an equally strong proxy of utility among parents.

197. *Id.* at 935–36 (footnotes omitted).

198. This Section has now identified myriad reasons why opportunity sets are likely to vary across parenting models and in doing so, has shown that the revealed preference view of utility lacks the descriptive value it might have in other contexts. I will not belabor this point further, except to restate one last time that application of this approach will yield questionable conclusions about the utility parents derive from a given level of income when parenting models differ.

Having made this case, I now outline the welfarist's possible responses to this argument.

C. Welfarist Responses

There are several ways in which the welfarist might respond to the case just made above.

First, she might refute it, arguing that utility of income curves won't vary significantly and that it is still somehow likely that curves are substantially similar despite all the differences the previous Part has identified. Second, the welfarist might concede that there is no real sense of how curves differ across parenting models and that welfarism cannot currently offer much guidance about the taxation of parents. This might serve as a concession to allow other non-welfarist theories to govern or open the door for more meaningful engagement with empirical data (such as time use and happiness studies) to devise more realistic assumptions about the way in which utility of income differs among parents. Each of these debates would substantially enrich conversations about the taxation of parents.

A third possibility is for the welfarist to continue to rely on the baseline assumptions so often used in legal tax literature—i.e., that the marginal utility of income is declining for all individuals and that all individuals enjoy the same utility from the same income—without refuting the case made. The welfarist who does so should then acknowledge what normative or other non-welfarist judgments are driving that choice. For instance, a welfarist may prefer her function to be simple and be willing to sacrifice accuracy for it. But that is not a utilitarian justification; it is a practical choice to value one thing over another. Or she may think that we *should* assume utility curves are identical across parenting models because each parent has chosen their own lot. However, this view is not rooted in utilitarianism (which views utility as a fact about the world) but seems to reflect a normative judgment that people should bear the consequences of certain choices they make.

The point of making this observation is not to criticize welfarism but to instead encourage more explicit discussion of what principles are being used. Going forward, if one were to offer a welfarist analysis concerning the taxation of parents and use the simplifying assumptions identified in Section II.B.1, she should explicitly identify the non-utilitarian choices driving that decision

and discuss the reasons for making those choices over other alternatives.

Having clarified these parameters, I now sketch some of the possible prescriptive implications of Section III.C's discussion.

D. Prescriptive Implications

a. Preliminary observations, predictable themes. As has been repeatedly stated, I have tried in this Article to show why utility of income curves can be expected to differ significantly among parents using different parenting models. I have not tried to undertake the task of identifying precisely how they might differ. Of course, to identify exactly what utilitarianism prescribes about the taxation of parents, one would need to make this determination. Nevertheless, given the preceding discussion, some preliminary observations remain possible and reveal a predictable theme: utilitarianism, once stripped of baseline assumptions, will often prescribe transfers away from those family models that have more constrained choice sets and are thus relatively inefficient at converting income into utility and towards those with more expansive choice sets who are more efficient utility converters. To illustrate, I sketch three possible ways in which utility of income curves might diverge among family models to see what utilitarianism would prescribe if future research were to confirm these scenarios to be accurate.

First, using the discussion in Section III.C, consider a set of facts that show why some single parents and dual earners may have lower actual and marginal utility of income than their sole-earner counterparts. Suppose that Single Parent and the Dual Earners are in the common situation of believing that all earned income (I) is needed (i.e., they deem none of their income “discretionary”). Furthermore assume—as is often true for “[w]orking-class families [who routinely] face inflexible [work] schedules that conflict with family needs”¹⁹⁹—that workplaces are not accommodating, and it is extremely difficult for these parents to miss days (or even hours) when caregiving emergencies arise. In economic parlance, the labor

199. WILLIAMS, *supra* note 159, at 3; see also Claudia Goldin, *Hours Flexibility and the Gender Gap in Pay*, CTR. FOR AM. PROGRESS (April 2015), https://scholar.harvard.edu/files/goldin/files/goldin_equalpay-cap.pdf [<https://perma.cc/DKB7-TCTH>].

decisions of these families are very smooth—they cannot simply select how much they would like to work.²⁰⁰

While at work and unable to provide care, assume the Dual Earners and Single Parent have cobbled together both paid and unpaid arrangements for their children. They do not feel comfortable with this care, believing it to be unstable and inconsistent, and as a result, experience disutility about these caregiving arrangements and have high work aversion. Finally, suppose each of the families have a utility of income curve that resembles the Friedman-Savage curve, but because of paid childcare expenses, Single Parent and the Dual Earners miss the “utility surge” the Sole Earners experience (a possibility sketched in Section II.C.3).

In short, in this scenario—which may be particularly common for families in relatively low socioeconomic classes and of certain racial, demographic, and ethnic identities—the Sole Earners may derive much more utility from income *I* than Single Parent or the Dual Earners. And as a result, at this income level, utilitarianism would prescribe transfers *away* from Single Parent and the Dual Earners and *towards* the Sole Earners because that transfer will maximize utility. Utilitarianism, therefore, creates a case not only for preserving but possibly also strengthening the Code’s sole-earner bias. These prescriptions run counter to the arguments often made in the legal tax scholarship for eliminating this preference and would end up enhancing the inequities that result from it.

Next, consider how the choice sets of single parents and two-parent families at a given level of income might diverge. Many of the differences just discussed will be amplified for solo parents, particularly when all income (and perhaps more) is needed. For instance, when parental care is required, the solo parent’s presence might be the only option. But because solo parents may not have another parent to “take turns” with, they may more quickly “use up” whatever accommodations their employers provide. Further, solo parents may often have even smoother labor decisions than dual earners, because they cannot scale back while the other parent scales up or otherwise toggle care and work.²⁰¹ In other words, solo

200. WILLIAMS, *supra* note 159.

201. Penny Edgell Becker & Phyllis Moen, *Scaling Back: Dual-Earner Couples’ Work-Family Strategies*, 61 J. MARRIAGE & FAM. 995, 995 (1999) (“[I]n some couples, husbands and wives trade family and career responsibilities over the life course.”).

parents may often have more constrained choice sets than two-parent families. It is, therefore, quite feasible that solo parents have utility of income that is lower than that of two-parent families with the same earnings. To the extent this is true, utilitarianism will prescribe transfers *away* from single parents and *towards* two-parent families to maximize utility.

This is not to imply the divergence (and attendant prescriptions) will always result in transfers to sole earners. Of course, scenarios could be created in which sole earners enjoy less utility from a given level of income than dual earners. Suppose, by contrast to the previous hypothetical, that dual earners have lumpy labor decisions—i.e., at least one partner has the power to decide how much (s)he will work.²⁰² Suppose also that earners in the workforce are able to find deep meaning in their work while the non-wage earner in the sole-earner couple does not find similar meaning in the nonpaid activities in which (s)he engages. Assume finally that the dual earners share more equally in household labor and spending decisions. A story emerges where, at some income levels, dual earners might enjoy more utility from income than sole earners. To the extent this is true, utilitarianism would prescribe transfers towards dual earners and away from sole earners. These scenarios seem most likely at higher income levels. At the outset, the scenario depends on parents attaining a high enough income level that some income is deemed unneeded. And it is high earners that disproportionately enjoy the ability to find deep meaning from work and enjoy the flexibility to decide how much to work.²⁰³

So while it not possible to make precise prescriptions without further empirical research, the above sketches begin to reveal two important points. First, utilitarianism, once stripped of baseline assumptions, may often prescribe transfers away from those family models that have more constrained choice sets and towards those with more expansive choice sets. And second, it will do so because some parents are better at converting income to utility than others.

How one feels about these prescriptions depends on one's theoretical devotions.

202. See, e.g., Goldin, *supra* note 199 (summarizing research on hours flexibility and part time options among work at different income levels); see also Shavero, *supra* note 92, at 24 (adding realistic assumption that labor market decisions are “lumpy”); McCaffery, *supra* note 4 (discussing incomplete markets in America).

203. Goldin, *supra* note 199, at 4.

b. So what? What comes next? Utilitarians will accept the prescriptions above as a necessary consequence of their frame. This is because they rely on a linear social welfare function and ask only that the sum of individual utilities be maximized. No room is left for other considerations.

By contrast, even the nonutilitarian welfarist may not accept the prescriptions above. As discussed in Section II.A.2, many welfarists advocate for social welfare functions that incorporate non-welfarist principles, such as egalitarianism.²⁰⁴ This move is not heretical unless one conflates utilitarianism with welfarism—a mistake which seems to happen much more often in legal tax literature than elsewhere.²⁰⁵

As pioneering scholar Louis Kaplow has long insisted, “[t]he chosen functional form implicitly indicates the weight given to equality.”²⁰⁶ And many scholars have now explored the idea of incorporating all sorts of non-welfarist principles into a welfarist analysis. Recently, for instance, Professor Marc Fleurbaey argued, “the traditional tool of welfare economics, the social welfare function framework, is flexible enough to incorporate many approaches, from egalitarianism to libertarianism.”²⁰⁷ Still other recent welfarist literature has argued that normative considerations might be incorporated into the definition of utility itself.²⁰⁸ This Article will not enter the thorny debate about the wisdom of these machinations. The key point here is as follows: those who continue to use welfarism to analyze the taxation of parents but that wish to push against the prescriptions above will have to turn to non-welfarist principles to do so.

204. See Lawskey, *supra* note 15, at 914 (“Tax legal scholarship sometimes explicitly adopts or assumes a utilitarian social welfare function . . .”).

205. *Id.* (legal tax scholars often “[do] not specify” the chosen social welfare function); KAPLOW, *supra* note 11, at 40 (“However, much work on taxation and other subjects in public economics is not seen primarily as posing the tradeoff between redistribution and efficiency, and it is not generally conducted using this inclusive framework. There is tremendous variation in the extent to which existing work is deficient because of the failure to undertake explicit social welfare analysis.”)

206. KAPLOW, *supra* note 11, at 37.

207. Fleurbaey & Maniquet, *supra* note 88, at 1029.

208. I will not opine as to the point at which these ideas move a theory beyond welfarism entirely. Inasmuch as the aims of this Article are to open avenues for debate in the legal tax literature, this is irrelevant. What matters is that there is ample and unexplored room to debate the relative taxation of parenting models.

Of course, many other scholars are not committed solely to the welfarist frame. For them, Section III.D's analysis may reveal the limitations of too heavily relying on welfarism to consider the taxation of parents. Indeed, some scholars may be less interested in the prescriptions themselves and more interested in the reasons behind them. Others will view the observations above as just one manifestation of utilitarianism's general limitations.

Recognizing that there remains room for non-welfarist principles for all but the utilitarian, I conclude this Article by situating the preceding analysis within the larger philosophical literature. I then sketch several non-welfarist theories that have received relatively little attention in legal tax scholarship and show how they could expand debates about the way parents are taxed.

E. Beyond Utilitarianism and/or Welfarism

I have, in this Section, attempted to show that opportunity sets are likely to differ across parenting models, resulting in different abilities to convert income into utility. I made these observations by exploring welfarism, the body of theories upon which I focused because of the consistent dominance they exert over distributive justice conversations in the legal tax literature.

But the observations I have made should also be interesting to those committed to various non-welfarist theories, which receive less attention in legal tax scholarship. Even though one may not be committed to maximizing utility (the welfarist's goal), she may remain interested in the observation that opportunity sets, and therefore the ability to convert income to utility, are likely to vary by parenting model. Many theorists care about utility. They just do not agree with welfarists that utility is the *only* object of interest or that it constitutes a complete measure of well-being.

Nor do these theorists agree with the welfarist's assertion that society should aim only to *maximize* total utility (or some function of it). As discussed, because of this goal, utilitarianism may often prescribe transfers away from certain parents because they have particularly constrained options. This specific observation illustrates a well-recognized critique of utilitarianism. The idea that individuals will not convert resources into utility with the same

efficiency is discussed widely in non-legal literature.²⁰⁹ What if, a common example asks, an individual with a physical disability finds it particularly difficult to derive utility from material goods? Utilitarianism may prescribe transfers *away* from the disabled individual to more efficient utility converters. In this way, critics argue, utilitarianism may deliver a double blow to the disabled individual—she already finds it difficult to produce utility and now she will have more resources taken away because of it.

In response to this scenario, some non-welfarists argue that society should instead equalize opportunities,²¹⁰ rather than maximize utility. Future work will delve more deeply into these distributive theories, but I conclude this Article by sketching three frameworks which develop the concept of equalizing opportunities—Richard Arneson’s opportunity for welfare approach, G.A. Cohen’s access to advantage approach, and Amartya Sen’s capabilities approach (developed in critical ways by Martha Nussbaum)²¹¹—and show how they could be used to substantially expand conversations about the taxation of parents.

In developing his equality for welfare approach, Richard Arneson defines an opportunity as “a chance of getting a good if one seeks it” and believes that “equal opportunity for welfare . . . obtain[s] [when] . . . each [person] . . . face[s] an array of options that is equivalent to every other person’s in terms of the prospects for preference satisfaction that it offers.”²¹² Put more succinctly, individuals will have equal opportunities for welfare when they “face equivalent decision trees.”²¹³ Arneson recognizes that it is not enough for an option to be technically available and insists that “[e]qual opportunity for welfare obtains [only] when all persons face effectively equivalent arrays of options.”²¹⁴ This means (among other things) that there is an equivalent “ability to choose

209. Amartya Sen, *supra* note 99, at 204 (“[U]tilitarianism would compound his disadvantage by settling him with less income on top of lower efficiency in making utility out of income.”).

210. Richard Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD.: INT’L J. PHIL. ANALYTIC TRADITION 77, 77 (1989).

211. These theories could be used to guide the nonutilitarian welfarist in devising her social welfare function or be employed by the non-welfarist to supplant the welfarist analysis completely. More complete coverage reserved for future work.

212. Arneson, *supra* note 210, at 85.

213. *Id.*

214. *Id.* at 86.

reasonably among them.”²¹⁵ Thus, for Arneson, “opportunity” does the work of recognizing differences in ability to convert resources (e.g., income) into wellbeing.²¹⁶ While utilitarianism (once stripped of its unrealistic assumptions) supports the Code’s sole-earner bias because sole earners have more expansive opportunities than dual earners and single earners, Arneson’s opportunity for welfare approach might counsel the opposite—it would create a case against the sole-earner bias in favor of special benefits for those family models that have more limited choices.

G.A. Cohen’s “access to advantage” approach offers similar prescriptions. Cohen’s approach is, by his own description, intended to be consistent with but broader than Arneson’s opportunity for welfare frame.²¹⁷ To illustrate the difference, Cohen considers the situation of poorly situated individuals (e.g., the severely disabled) who may nevertheless be easily contented. For Cohen, “access” does the work of recognizing different abilities to transform resources into well-being. Differentiating opportunity from access, Cohen argues that the disabled individual may have the opportunity to do all sorts of activities (no one prohibits him from doing so) but that these options are not really accessible to him without additional accommodations.²¹⁸ Cohen argues that “advantages” will encompass things that increase welfare but will also capture things that do not. For instance, Cohen maintains that the disabled individual may have the same welfare as an able-bodied person because of his happy disposition. But he may have

215. *Id.* (“People might face an equivalent array of options as above yet differ in their awareness of these options, their ability to choose reasonably among them, and the strength of character that enables a person to persist in carrying out a chosen option.”).

216. This theory, therefore, seems to allow room to consider how opportunity sets differ by parenting model. As for the ultimate end-state to be measured, Arneson’s earlier work confined its focus to self-interest preference satisfaction (i.e., what a person prefers when pursuing her own advantage). *Id.* at 82. Like the welfarists’ view of utility (discussed in Section II.A.1), this may not account for parents’ ability to pursue goals for their children but that do not enhance (or even reduce) their personal well-being. However, Arneson’s later work articulates a more expansive view of well-being, which would measure “quality of life . . . [or] . . . level of wellbeing . . . with achievement of what is objectively worthwhile or choiceworthy in human life.” Richard Arneson, *Luck Egalitarianism and Prioritarianism*, 110 *ETHICS* 339, 341 (2000). This expanded conception of well-being is similar to that articulated by capability theorists (discussed in Section III.E) and would provide more room to theorize parenting models.

217. G.A. Cohen, *On the Currency of Egalitarianism*, 99 *ETHICS* 906, 916 (July 1989).

218. This seems to run close to Arneson’s effective opportunities, but this need not be teased out here.

far fewer advantages.²¹⁹ Like the “opportunity for welfare approach,” Cohen’s approach may create a case against the Code’s bias for sole earners who already enjoy greater access to advantage than other parents.

Finally, Amartya Sen’s capabilities approach—at least as originally conceived—is neither an egalitarian theory nor a theory of social justice. Instead, the approach provides tools to compare the standards of living among individuals and communities.²²⁰ According to Sen, standard of living should be understood by focusing “on what life we lead and what we can or cannot do, can or cannot be.”²²¹ Life, he has famously put it, is about “doings” and “beings.”²²² To fully assess standard of living, Sen would take stock of “functionings” and “capabilities.”²²³ Functionings are the “various living conditions we can or cannot achieve” while “our ability to achieve [these functionings] . . . [are] capabilities.”²²⁴ For Sen, while functionings are actual “achievements,” capabilities “are notions of freedom, in the positive sense: what real opportunities you have regarding the life you may lead.”²²⁵ As Sen puts it, it is not enough to know that *A* and *B* would have both preferred their current state over all others. If *A* had no other choice but to live this way while *B* had a full range of options to choose from, Sen writes, “there is some loss in [*A*’s] living standard in this reduction of freedom.”²²⁶

Like both Arneson’s “opportunity for welfare,” and Cohen’s “access to advantage” approaches, the capabilities approach could offer useful tools for more fully considering the way parents should be taxed.

219. Cohen, *supra* note 217, at 918, 930.

220. Ingrid Robeyns, *The Capability Approach*, in STANFORD ENCYCLOPEDIA OF PHIL. (Edward N. Zalta, ed., Winter 2016), <https://plato.stanford.edu/archives/win2016/entries/capability-approach> [<https://perma.cc/XC4Q-PD75>] (“The capability approach is often wrongly taken to be an egalitarian theory or a theory of social or distributive justice.”).

221. Sen, *supra* note 121, at 23.

222. *Id.* at 39.

223. *Id.* at 23.

224. *Id.*

225. *Id.* at 48.

226. *Id.* at 49.

CONCLUSION

The Code taxes parents inequitably, undertaxing sole-earner couples compared to dual earners and single parents. Previous scholarship has identified the many inequities this creates and has argued for the elimination of this sole-earner bias. But scholars have often failed to connect their arguments with the distributive theories most invoked in legal tax literature to evaluate the wisdom of tax preferences. In this Article, the first in a series, I start drawing these connections by focusing on welfarist theories, which have exerted tremendous influence over tax debates.

I show why welfarism, and in particular utilitarianism, may sometimes support the Code's sole-earner bias despite the inequities it creates. And I also show how, more generally, it may favor parents who have relatively expansive opportunity sets and are, therefore, better positioned to use their income to achieve well-being than other parents with fewer choices. I recognize that some will find these prescriptions counterintuitive and even troubling. For them, the analysis may reveal the limitations of relying too heavily on welfarism to analyze the taxation of parents. In light of this, I conclude by identifying other non-welfarist theories that have received less attention in the legal tax scholarship and discussing how they could expand conversations about how parents should be taxed relative to one another.

