

# Income Taxation and Commuting Expenses Tax Policy and the Need for Nonsimplistic Analysis of Simple Problems<sup>1</sup>

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# INCOME TAXATION AND COMMUTING EXPENSES: TAX POLICY AND THE NEED FOR NONSIMPLISTIC ANALYSIS OF "SIMPLE" PROBLEMS

William A. Kleinf

Should any or all commuting expenses be deductible for purposes of personal income taxation? The present federal income tax provision covering this issue is the broad one that allows the deduction of "all the ordinary and necessary expenses" of a "trade or business" with certain expenses, including "traveling expenses . . . while away from home in the pursuit of a trade or business,"<sup>1</sup> expressly brought within the ambit of this catch-all phrase. Setting the boundaries of the phrase "traveling expenses . . . away from home" has required considerable litigation and has resulted in much legalistic refinement,<sup>2</sup> but for present purposes broad doctrinal generalities will suffice.

At one end of the spectrum is the pure and simple case of the ordinary commuter who drives or takes public transportation to his job and back home every day. It is clear that his transportation expense is not and never has been deductible.<sup>3</sup> It has generally been assumed

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<sup>1</sup> INT. REV. CODE OF 1954, § 162. Also of relevance is § 262, the negative counterpart of § 162, disallowing deduction of "personal, living, or family expenses."

<sup>2</sup> See, e.g., 4A J. MERTENS, LAW OF FEDERAL INCOME TAXATION §§ 25.91-100, at 329-78 (rev. ed. 1966); Haddleton, *Traveling Expenses "Away from Home,"* 17 TAX L. REV. 261 (1962); McDonald, *Travel and Entertainment Expenses*, N.Y.U. 11TH INST. ON FED. TAX. 1173 (1953); Venuti, *A Taxpayer's Home—A Matter of Choice*, 17 DE PAUL L. REV. 278 (1968); Comment, *Living Expenses While "Away from Home": Business or Personal?*, 19 U. CHI. L. REV. 534 (1952); Note, *A House Is Not a Tax Home*, 49 VA. L. REV. 125 (1963).

<sup>3</sup> See Treas. Reg. §§ 1.162-2(e), 1.262-1(b)(5) (1958); 4A J. MERTENS, *supra* note 2, at 350-58. But see *Wright v. Hartsell*, 305 F.2d 221 (9th Cir. 1962); *Traufner v. United States*, 68-1 U.S. Tax Cas. ¶ 9212 (D. Utah Feb. 13, 1968). In *Hartsell* the court allowed deduction of the transportation expenses of a construction worker incurred in traveling daily from his home to a temporary job at an isolated Atomic Energy Commission site some 70 miles away. The court also allowed a deduction for the amount it would have cost to travel daily between the job site and the nearest habitable town (a distance of 46 miles) when the taxpayer's job was of indefinite (as opposed to temporary) duration and when he was in fact traveling the greater distance (70 miles) between the place where he actually lived and the job site. The court reasoned that the expense should be deductible because it was not feasible to move nearer to the job site. Although this reasoning seems to support a deduction in any case in which the job is temporary and the distance great, such a rule would represent a radical departure from prior law, and the court did not purport to be fomenting a revolution. Thus, the holding should probably be limited by the peculiar facts that the job site was a very substantial distance from the nearest habitation and that the court

that the correctness of this result is a self-evident consequence of the fact that the decision to live in any particular place is a purely "personal" decision. From this it is reasoned (illogically, as will be seen<sup>4</sup>) that a decision to live at a great distance from one's job is a purely "personal" decision which includes the decision to incur a commuting expense for the satisfaction of personal tastes, and that such expense, having nothing to do with business, should not be deductible. This rationale accounts for one of the few exceptions to the rule disallowing deduction of commuting expenses: the case in which housing is literally not available except at a very substantial distance from the job site.<sup>5</sup>

At the other end of the spectrum is the "travel expense" (a term of art in taxation) such as the expense of transportation, food, and lodging incurred by a traveling salesman while on the road or by any other businessman while on an occasional business trip. These expenses are and clearly ought to be deductible. Problems arise, however, because of the notion that for tax purposes one is expected to minimize his expenses by living next door to his job,<sup>6</sup> with any expenses resulting from a different decision being regarded as "personal." This has led to the general rule that one's "home" is his principal place of work, regardless of where he lives in fact, so that the only deductible travel expenses are those incurred while away from one's principal place of work. But inasmuch as one cannot reasonably be expected to move his residence every time he takes a new "temporary" job, there is an exception to the effect that a "temporary" job (generally one expected to last less than a year) does not result in a shift of the tax "home" to the job site.<sup>7</sup> Thus a construction worker who usually works in Chicago and maintains his home there and who takes a two-month job in Madison, Wisconsin (a distance of 150 miles), can deduct the cost of getting to Madison and back to Chicago (one round trip) and the cost of living

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directed its attention almost exclusively to the taxpayer's temporary job. See Arthur Sansone, 41 T.C. 277 (1963); Rev. Rul. 54-497, 1954-2 CUM BULL. 75, 81. Even as so limited, the case is out of tune with the general rule that commuting expenses are not deductible.

<sup>4</sup> See pp. 876-79 *infra*. Basically, the illogic stems from the implicit insertion of the unwarranted assumption that the location of one's job is fixed and the location of his home variable, and not vice versa.

<sup>5</sup> See note 3 *supra*.

<sup>6</sup> This expectation seems curiously inconsistent with the limitations imposed by traditional zoning laws.

<sup>7</sup> E.g., *Peurifoy v. Commissioner*, 358 U.S. 59 (1958); Rev. Rul. 60-189, 1960-1 CUM. BULL. 60.

in Madison. But if the job is expected to last for more than a year, no deduction is allowed, even if the worker retains his Chicago residence.

Although these rules seem sensible, they produce some anomalous and disturbing results that raise serious doubts about their soundness. Suppose our Chicago-based construction worker takes a three-day job at Belvidere, Illinois, a distance of about seventy miles from his home. Suppose his home, like his Belvidere job site, is adjacent to a toll road interchange, so that the trip is an easy one. Suppose further that it would cost ten dollars a night to stay at Belvidere and nine dollars a day to commute. Except for tax considerations he would be better off financially to commute. But suppose he is in a thirty percent tax bracket. If he stays at Belvidere, he will be entitled to deduct his ten dollar expense,<sup>8</sup> and his net cost will be only seven dollars. On the other hand, the nine dollar commuting cost will be his net cost, since it is not deductible. If the man is sufficiently tax conscious and sufficiently concerned about money, the tax effect could alter his decision in favor of the more expensive alternative. Yet this result is economically unsound and serves no apparent social objective. And even if a special rule could be devised for this kind of case, it nonetheless raises the basic question: Why are traveling expenses and commuting expenses treated differently? What difference between them is significant for tax purposes?

Take another example. Suppose a husband and wife both work but have jobs far apart. Suppose they live near the husband's job, so that the wife has a long commute. Does it seem fair or helpful to say that the wife's commuting expense is a consequence of her purely "personal" decision to marry and live with her husband? Is her decision to marry and live with her husband not different in nature from a single woman's decision to live in a neighborhood far from her job simply because she likes it there and would not be happy anywhere else? Will not the nondeductibility of commuting expenses in such cases sometimes tip the scales in favor of taking a job nearer home? If so, will not the tax system thereby effect a purposeless distortion of the allocation of human resources?

A final hypothetical casts even more doubt on the commuting expense rule. Suppose a man has been unemployed and has been receiving welfare payments, and is then offered a one-day job paying fifteen dollars that requires a four dollar outlay for commuting. If he takes the job (and let us assume that welfare practice is such that he will be re-

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<sup>8</sup> This assumes, of course, that while commuting is feasible, staying at Belvidere would not be unreasonable.

quired to do so), his welfare stipend will be reduced by the full amount of his net earnings. In traditional welfare practice, however, the amount by which his welfare stipend will be reduced is eleven dollars (fifteen dollars earned less the four dollars' commuting expense). In our welfare system the four dollars' commuting expense is regarded as a cost of earning the income. The rule is obviously a sensible one, since failure to allow the deduction would mean that by taking the job the man would be worse off financially than he would be if he refused the job. Why is the commuting expense considered a cost of earning income by the welfare system but not by the tax system? Is the propriety of the "deduction" for welfare purposes solely a function of the job's being short-term, so that moving closer to it is not feasible? Or are there other circumstances in which the offset would seem equally appropriate and, if so, what are they?

This article will develop an analytic framework within which the kinds of issues raised by these hypothetical cases may be intelligently examined. The focus is on commuting expenses, but the issues raised in this area merge with the issues presented in cases involving travel expenses, since the facts in each area tend to merge at the middle of a spectrum and since the assumptions that have led to the denial of a deduction for commuting expense are similar, if not identical, to those that have led to the rules governing travel expense. In fact, the question posed in many of the cases is whether a given expense is, on the one hand, a travel expense or, on the other hand, a commuting expense. Since the nondeductibility of pure and simple commuting expenses rests on long and firmly established legal doctrine, any suggestions emerging from the discussion of such expenses should be addressed to Congress. When the discussion relates to a case in which the expense is arguably either a commuting expense or a travel expense, however, we are in the arena of administrative and judicial policy or practice.

## I

### THE "MOTIVATION" TEST

The leading case of *Commissioner v. Flowers*<sup>9</sup> involves unusual facts, but like many such cases it serves as a good vehicle for discussion. The taxpayer, Flowers, lived and practiced law in Jackson, Mississippi. In 1927 he was offered a full-time job with a railroad whose main offices were about 250 miles away in Mobile, Alabama, but he did not

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<sup>9</sup> 326 U.S. 465 (1946).

want to move from Jackson. It was finally agreed that he would take the job but could continue to live in Jackson, with the understanding that he would bear personally any costs incurred in traveling to Mobile.<sup>10</sup> The court of appeals opinion<sup>11</sup> emphasized that there was a good business reason for Flowers to maintain his home in Jackson: He might lose his job with the railroad and would then need his contacts there to re-establish his law practice. Whatever force this suggestion might have had initially, however, any business connections in Jackson were surely insignificant by 1939 and 1940, the tax years in question. Thus, we can assume that this was a case in which the decision to live in Jackson rather than in Mobile was dictated solely by personal preference for Jackson, and that but for this preference the expenses in question would not have been incurred. However, it could also be said that but for the decision to switch to the presumably higher-paying job in Mobile the expenses likewise would not have been incurred.

The Supreme Court held that the Commissioner had properly denied the deduction. Had it done so solely on the ground that commuting expenses have never been deductible and that all that was involved in *Flowers* was a long commute, the opinion would simply represent a relatively unimpeachable example of the application of the doctrine of *stare decisis*. But this was not what the Court did. Instead, it justified the result on the ground that the expenses "were incurred solely as the result of the taxpayer's desire to maintain a home in Jackson while working in Mobile."<sup>12</sup> The trouble with this statement is that it is just as sensible to turn it around and say, "The expenses were incurred solely as a result of the taxpayer's decision to take a job in Mobile while maintaining his home in Jackson." The Court went on to state its rationale in somewhat more general terms: "The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors."<sup>13</sup> Thus the Court suggested that the outcome should turn on the taxpayer's state of mind—on "motivating factors"—but failed to spell out what kind of mental

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<sup>10</sup> Since *Flowers* had a railroad pass (Record, p. 18, *Commissioner v. Flowers*, 326 U.S. 465 (1946) (unreported tax court opinion)), his expenses were limited to lodging in Mobile and food there and en route. The Court, however, treated the case as if it involved transportation costs as well as living expenses. Analytically this is sound enough, since the two kinds of expense raise the same issue.

One of the anomalies of the present law is that although the government would not have allowed the deduction of railroad fares in this kind of case, it did not treat the value of the railroad pass as income in kind. See O.D. 946, 4 CUM. BULL. 110 (1921).

<sup>11</sup> 148 F.2d 163 (5th Cir. 1945), *rev'd*, 326 U.S. 465 (1946).

<sup>12</sup> 326 U.S. at 473.

<sup>13</sup> *Id.* at 474.

phenomenon is relevant and why. It also invoked a vague concept of causation, using the term "exigencies," but again avoided the task of explaining the precise content of the concept and its application to the facts of the case. In short, the opinion is weasel-worded. Problems of motivation and causation are difficult and elusive. To dispose of them at the level of glib generality is merely to mask confusion. But the concepts may be relevant and the confusion must be dispelled. We must ask what conclusions or inferences can properly be drawn from the decision.

In the first place, the Court cannot have meant that the expense in *Flowers* is equivalent to an expense—such as for vacations, fur coats, sporting goods, and other nonessentials—that has no other function than the satisfaction of personal desires and would be incurred wholly independently of any job. No exposition is needed to establish that such expenses should not be deductible. But transportation expenses are different; "but for" the necessity of getting to a job they would not be incurred. A closer analogy is the food and lodging expense of a working man. It can be argued that these expenses are in part a cost of earning income, for the obvious reason that one must stay alive and reasonably healthy in order to work. Nondeductibility of such expenses can be defended on either of two grounds. First, the basic expense of personal maintenance falls equally on all income earners and is adequately accounted for by the \$600 per person personal exemption.<sup>14</sup> Second, basic maintenance expenses would be incurred even if the individual had no job; they do not increase significantly as employment is accepted. But neither of these arguments explains why commuting expenses are not deductible.

Obviously, then, the Court was dealing with an expense that has a substantial connection with the taxpayer's business. We must therefore pose the following questions: What can be said about the precise nature of this causal nexus to income-earning activity and, more important, how should it be accounted for, if at all, in our policy on the deductibility of commuting expenses? As noted earlier, the Court stated that the expenses "were incurred *solely* as the result of the taxpayer's"<sup>15</sup> personal decision to live in Jackson. As has already been suggested, however, this is simply not so in a purely causative sense. In order for the expense to arise there must have been two decisions—to work in Mobile and to live in Jackson. Thus, if the Court's causative concept was one of necessary conditions, its statement that the personal decision was the

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<sup>14</sup> INT. REV. CODE OF 1954, § 151.

<sup>15</sup> 326 U.S. at 473 (emphasis added).

sole necessary condition was plainly wrong. Nor does it make much sense in the context of *Flowers* to suggest that the decision to live in Jackson was the sole "motivating"<sup>16</sup> factor. As already indicated, the precise content of the concept of motivation and its application to the facts of this case are not spelled out. Moreover, the opinion in general is not cast in terms of inquiries into the elusive phenomenon of the individual taxpayer's state of mind.<sup>17</sup> But if a serious, thorough effort to fathom the taxpayer's psyche had been attempted, the Court might well have been constrained to allow the deduction. This suggestion is derived from one of the central concepts of the present article: It is highly pertinent and useful to try to determine whether the location of the home, and of the job, is fixed or variable. There are of course infinite degrees of flexibility in the individual decision on location of job and home. For the present, however, let us examine taxpayer *Flowers*'s circumstances and speculate as to his probable thought processes.

Three aspects of *Flowers*'s situation are most relevant. First, he had established his home in Jackson before he was offered the job in Mobile. Second, since he had a job in Jackson, he had the very reasonable option of turning down the Mobile job offer. Finally, he seems to have been very strongly personally committed to maintaining his home in Jackson. From these facts it is not possible to infer with certainty the taxpayer's mental processes, but some inferences seem more reasonable than others.

The least likely possibility is that once the taxpayer was offered the job in Mobile he knew he wanted it and would take it, that he then considered the open question of where he would live, weighing the cost and inconvenience of commuting, and finally decided that on balance he loved Jackson enough that he would live there. In other words, it is possible but unlikely that in his mind the job was fixed and the location of his home was variable. It is also possible, and seems far more likely, that he was so strongly committed to living in Jackson (given the job opportunities available to him there) that he never considered moving and that the open question for him, having decided that the job in Mobile represented a career improvement, was whether that career gain was worth the financial and personal burden of commuting. In other words, it seems likely that the location of his home was fixed in his own mind, and the job variable. This would make his situation

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<sup>16</sup> See pp. 875-76 *supra*.

<sup>17</sup> On the problems involved in such inquiries see Blum, *Motive, Intent, and Purpose in Federal Income Taxation*, 34 U. CHI. L. REV. 485 (1967); Klein, *The Deductibility of Transportation Expenses of a Combination Business and Pleasure Trip—A Conceptual Analysis*, 18 STAN. L. REV. 1099, 1108 (1966).

similar to those illustrated earlier,<sup>18</sup> involving the construction worker, the welfare recipient with short-term job offers, and the working wife. Of course, it is even more likely that both the job and the home location were variables but that his mental process was much closer to the second hypothesis than to the first. In any event, if the case is viewed in these terms, it is nonsensical to assert unequivocally that the expenses were incurred "as the result of" a decision involving only personal variables, or even a decision involving predominately personal variables.

Thus the only meaningful generality that can safely be used to describe the expenses and the personal objective of living at a considerable distance from work in a case like *Flowers* is the following: The personal objective was a necessary condition to incurring the expense and *Flowers's* choice of Jackson as his home did in fact give him significant personal satisfaction. The correctness of the result is not self-evident from this description, however. The presence of personal conditions or satisfactions in a decision to incur an expense does not always defeat its claim to deductibility as a business expense. For example, when a taxpayer leaves his home base on a business trip he can decide to fly first class, stay at a reasonably luxurious hotel, and eat at good restaurants. There is no tax provision or practice that disallows the deduction of any expense in excess of the cost of flying tourist class, staying at the YMCA, and eating at lunch counters. If it is the taxpayer's personal style to go first class all the way, that is accepted. In effect, we accept, albeit perhaps not consciously or expressly, the view that he is committed to his life style, which is taken as given or, in the terms used earlier, fixed. We treat the extra cost of going first class as being the nonvariable and inevitable consequence of the necessity of making a business trip—despite the fact that the extra expenses would not have been incurred by a person with simpler tastes and that therefore personal preferences or idiosyncracies were a necessary condition to incurring those expenses. In other words, for this kind of issue we take the individual *as* we find him, while for commuting expenses we do not take the individual *where* we find him.

The foregoing discussion should establish that the question of whether commuting expenses should be deductible is not an easy one and that the soundness of our present rules is not self-evident. To understand the problem better it will be necessary to delineate appropriate policy criteria, to demonstrate that in relation to these criteria not all commuting expenses are alike, and to examine various prototypic possibilities in terms of these criteria. It seems unnecessary to

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<sup>18</sup> See pp. 872-74 *supra*.

refer to all meaningful criteria of tax policy; only three are pertinent. These three are economic neutrality, equity, and administrability.

## II

### ECONOMIC NEUTRALITY

The best analytic starting point is an appraisal of the deduction of commuting expenses in light of economic neutrality. The theoretical underpinning for economic neutrality as a criterion of tax policy is the idea that ordinarily any distortion of the allocation of resources that would be generated by uncontrolled market decisions represents a deviation from the economic optimum. This is a much hedged and highly over-simplified statement; the articulation and application of a criterion of tax policy based on this economic concept can be an extraordinarily refined and uncertain process. Since, however, our present concern is with a relatively simple problem, and since the present analysis is intended to be suggestive, not dispositive, a simple version of the criterion seems adequate: A tax rule offends the goal of economic neutrality if, all other things being equal, decisions affecting the use or allocation of resources are different when the tax rule is in effect than they would be in the absence of tax considerations. Obviously, a tax rule that offends the criterion of economic neutrality may be justified if it serves some other economic, social, or political goal. But if no worthwhile goal is served, a provision that is not economically neutral is a bad provision. Thus, if the nondeductibility of commuting expenses would tip the scales in favor of certain taxpayers' taking jobs near their homes, rather than jobs farther away that would have been more attractive in the absence of tax considerations, then nondeductibility represents a departure from economic neutrality.<sup>19</sup> If there is no good social or other justification for thus altering the dictates of uncontrolled personal preference and market forces, the deduction should be allowed. On the other hand, if allowing the deduction would tip the scales in favor of, say, moving from the city to the suburbs, then the deduction would produce an inefficient economic

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<sup>19</sup> It might seem that non-deductibility in such a case is economically neutral because the commuting cost, even in the absence of a tax system, would tend to induce one to take a job near his home. However, if we assume that a "near" job pays just enough less than a "far" job, so as to make the choice an even one in the absence of taxation, the increase in taxable income, and therefore in tax, that would result from taking the "far" job (commuting expenses being nondeductible), tips the scales in favor of the "near" job. See pp. 881-83 *infra*.

allocation in the form of excessive use of transportation facilities. What follows is a more detailed examination of these and other economic effects and the circumstances that would tend to produce them.

Like the Supreme Court in *Flowers*, courts and commentators approaching the problem of travel *versus* commuting make the implicit assumption that a person invariably decides first where he will work and then, with that decision made, considers the options of living near to or at some distance from his job. In other words, it is assumed that there really is no choice as to job location but that there is as to home location. Only with this assumption does it make sense to speak of the cost of commuting as a purely personal expense. If, for purposes of analyzing the commuting expense in terms of economic neutrality, we make the same assumption, the nondeductibility of commuting expenses is consistent with economic neutrality.

Two examples will demonstrate this.<sup>20</sup> Take the case of a man tied to a job in the city, all of whose potential employers are also tied to city locations, who finds living in the city and living in the suburbs equally attractive disregarding cost considerations. Suppose further that housing in the city would cost \$2,000 per year, that comparable housing in the suburbs would cost \$1,500, that transportation to the suburbs would cost \$600, and that all other financial factors are neutral or balanced. The case is an unusual one in that the decision is very close. Both under the present law and in the absence of any tax system, however, the choice will be to live in the city. Living in the city provides the taxpayer with the same satisfactions he would have from living in the suburbs, but leaves him an extra \$100 to spend on additional satisfactions. On the other hand, if the commuting expense were deductible and if he were in a twenty-five percent tax bracket, his net transportation cost would be \$450 (\$600 less the \$150 tax savings), so that the total cost of living in the suburbs would be \$1,950. Thus, by living in the suburbs, he would be \$50 better off than in the city. He would also be \$50 better off than he would be in the absence of any tax system; he would be living in the suburbs, which is equally as attractive as the city, but his total cost would be \$50 less. But while this taxpayer would be \$50 better off under a rule allowing the deduction, the government, which ultimately means other taxpayers, would be \$150 the loser. Even if a redistribution of income from the public at large to our putative taxpayer could be justified on distributional grounds, which it cannot,

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<sup>20</sup> The fixed-variable analysis developed here may be thought of as one version of causative analysis. If so, it has the virtue of avoiding the confusion created by a case like *Flowers*; it isolates and delineates a particular concept of causation and demonstrates how that concept bears on tax-policy analysis.

it could not be justified in terms of efficiency; a \$150 loss in satisfactions for taxpayers in general would have been traded for a \$50 gain in satisfactions for one. Looking at the same point from a slightly different angle, the \$150 tax saving is like a subsidy for living in the suburbs. Suppose that we have no social, political, or other reason for preferring to have people move to the suburbs, but that we have somehow allotted a \$150 subsidy to our hypothetical taxpayer. We could either give the \$150 to him outright or give it to him on the condition that he live in the suburbs. Obviously he would be better off if we gave it to him outright. He would then live in the city and have \$150; if the payment were tied to living in the suburbs, he would live there and have a net of only \$50 after subtracting the added \$100 cost of obtaining equal satisfaction. In short, the deductibility of the expense produces a result that is \$100 less than optimum.

To demonstrate the generality of the foregoing, consider a variation of the facts. Suppose again that a man in a twenty-five percent tax bracket is tied to a job in the city and is trying to decide whether to live there or in the suburbs. But now suppose that it would cost \$1500 for housing either in the city or in the suburbs, that transportation to the suburbs would cost \$600 per year, and that he has a substantial preference for the suburbs. We can quantify this preference by asking how much extra cost he is willing to incur to live in the suburbs. Suppose that with the transportation cost at \$600 he will live in the city, but that if it were \$400 he would live in the suburbs and if it were \$500 the choice would be a matter of indifference to him. We can now say that he values the extra satisfaction of living in the suburbs at \$500. Under the present tax system or under a no-tax system he would live in the city, but if a deduction were allowed he would live in the suburbs. The analysis supporting this conclusion is essentially the same as before and need not be repeated. Allowing the deduction would offend the goal of economic neutrality.

The analysis of these two hypotheticals has been short-run. Many changes might occur in the long run, but the general conclusion concerning economic neutrality would be the same. For example, the effect of allowing the deduction and inducing some migration to the suburbs would be, in the long run, to drive up the cost of suburban real estate relative to the cost of city real estate and thereby reduce the extent of the migration. But the effect of the change in relative prices would be spread over all persons choosing between the city and the suburbs and the distortion of the elements of their choice would produce a less-than-optimal result.

Now let us examine the economic effects of deductibility when it

is assumed that in the mind of the taxpayer residence is fixed and the job variable. Situations in which this set of assumptions seems unavoidable or at least reasonable already have been cited: the case of the construction worker, the working wife, and the *Flowers* case. To illustrate the economic effects, assume that *Flowers* was irrevocably committed to living in Jackson, that he was earning \$20,000 a year there, that the job in Mobile paid \$26,000, that the annual commuting cost was \$5,000, that *Flowers's* marginal tax rate was forty percent, and that *Flowers* enjoyed traveling enough so that the train rides and the necessity of spending some time in Mobile were neutral factors. In the absence of any tax considerations *Flowers* would take the job in Mobile, since by doing so he would increase his disposable income by \$1,000. This is the desirable result from an economic standpoint. The value of his contribution to the economy is \$6,000 higher in Mobile than in Jackson. If he takes the job in Mobile, no other person is any worse off; others would be paying \$6,000 more but presumably would be receiving services worth at least an additional \$6,000. If the market had been operating properly, *Flowers's* services in Jackson were not worth more than \$20,000 and could be replaced for that amount. It would be economically inefficient for him to continue work in Jackson, just as it would be economically inefficient for a cabinet-maker to do rough carpentry work at four dollars an hour if he could instead do fine cabinetry at six dollars an hour. Thus, if economic neutrality were the sole criterion of social policy, a tax system which induced *Flowers* to reject the job in Mobile would be indefensible. Yet the present tax system will produce precisely this effect. If *Flowers* were to take the job in Mobile, his income, on the assumed facts, would increase by \$6,000 but his expenses would increase by \$7,400 (\$5,000 in commuting expenses plus \$2,400 in additional tax liability). The choice confronting him under the present system is precisely analogous to that which he would be confronted with if he were offered another job in Jackson at an earnings increase of \$6,000 and if he were told that the tax rate on the increase would be 123 percent. Economic neutrality can be achieved only by allowing a deduction for the commuting expense.

In the *Flowers* setting the assumption that the residence is fixed is only a reasonable likelihood. Other instances can easily be cited in which the same assumption is not only reasonable but necessary. A construction worker may be confronted with a choice between two short-term jobs, one near home and one at a distance of fifty miles paying a higher rate. If the job is to last for only a month or so, he will not consider moving his residence. The economic consequences of nondeductibility of commuting expenses will be the same as those just described;

on certain reasonable assumptions about wage differentials and costs of commuting the present tax system will induce a less-than-optimal economic result. The same is true in the case of a working couple; one of them is inevitably confronted with a residence that is fixed and therefore with a job location choice that can easily be distorted by the tax system.

The preceding discussion of economic neutrality is little more than an analytic model. By itself it tells us nothing about the likely aggregate economic effects of the present rule generally disallowing the deduction of commuting expenses. Unfortunately, the information needed to make even the crudest kinds of economic predictions is simply not available. If, however, we could identify those people for whom the location of residence is fixed and job location is an open question and those people for whom the opposite is true, and if we wanted to promote the goal of economic neutrality, we would allow a deduction to the former and not to the latter. For those falling in neither group this criterion points in neither direction.

Failure to follow the dictates of economic neutrality in this area is hardly a matter for great national concern. The money value of a tax deduction will rarely be large in relation to other financial factors. The *Flowers* case, particularly under the facts assumed for purposes of illustration, was unusual in this respect. Thus, the number of cases in which the tax factor will make a difference is likely to be small, and even in such cases the shift from one job to another will be a shift to only a very slightly inferior economic position. But this kind of observation may be misleading, since it ignores the size of the economic effect in relation to the amount of tax revenue involved; in this perspective, the economic effect may seem quite substantial. In other words, the economic waste resulting from the nondeductibility of commuting expenses by construction workers on short-term jobs may not be large in relation to total wages and other costs of such jobs, and the tax revenue causing the waste may itself be small, but the economic waste may be very large in relation to the amount of tax revenue. A rule is offensive to sound economic policy although it has relatively minor aggregate economic effects if the cost of the change is small.

### III

#### EQUITY

The next criterion to be applied to the question of whether commuting expenses should be deductible is equity. In its simplest terms,

this criterion dictates that people with equal incomes should be taxed equally. Money income or its equivalent is selected as the standard for determining equality because we are concerned with capacity to contribute to societal costs, and income is thought to be the fairest measure of that capacity. The concept of income for tax purposes must also be reasonably objective; highly individualized assessments would be anathema in our society.<sup>21</sup> Thus, the calculation of income for tax purposes does not take into account psychic benefits, at least not directly, even when they might have substantial economic value. For example, consider two equally qualified lawyers, both avid skiers. One takes a job in Aspen, Colorado, where he can ski frequently in his spare time; the other takes a higher-paying job in Chicago and uses all of his extra income to pay for skiing trips to Aspen. In a sense, the Chicago lawyer is no better off financially than the Aspen lawyer, and it might be argued that for tax purposes the incomes of these two individuals are the same. But it does not seem feasible to design a politically acceptable tax system that could account for this kind of psychic factor. We do not add to the Aspen lawyer's income the value of his proximity to skiing or the amount by which his income could have been increased by working in Chicago, nor do we try to account for the same factor by allowing the Chicago lawyer to deduct the cost of his trips to Aspen. This is not to say, however, that the differential cost of achieving equal satisfaction is irrelevant to equity or that this factor should be ignored if it can be indirectly accounted for by fashioning a rule that raises no problems of administration.

Even after we have decided to ignore psychic elements and to concentrate on money income, we are faced with a difficult task in determining what kinds of receipts should be included, and what kinds of expenditures deducted, in arriving at income subject to taxation. The income tax is a tax on net, not gross, income. The costs of producing gross receipts must be offset against those gross receipts in arriving at the amount subject to income taxation because to the extent of those costs the gross receipts are not at the taxpayer's disposal for the purpose of paying taxes. We also allow a deduction for medical expenses of a taxpayer's nonworking dependents—presumably on the analogous theory that medical expenses are unavoidable and that therefore the income used to buy medical treatment is not at the disposal of the taxpayer for the purpose of paying taxes.

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<sup>21</sup> See Klein, "From the Thoughtful Tax Man," 44 TAXES 461 (1966); Klein, *Federal Income Tax Reform: A Reaction to Professor Blum's Twenty Questions*, 42 TAXES 175 (1964).

Commuting expenses create a problem because they cannot readily be categorized. Are they expenses of earning income; are the amounts expended never available to the taxpayer for other, personal purposes? This is perhaps an indirect way of asking whether commuting costs are business expenses. But the indirectness is justified because it sensitizes us to the fact that the answer will depend upon our attitudes and assumptions about the choices available to the commuting employee and upon what kinds of comparison we draw.

The case of the construction worker with a series of short-term jobs will again be useful for illustration. Consider the man who lives with his family in Chicago and takes a two-month job in Belvidere. Suppose the cost of getting to work and back each day is eight dollars. He will no doubt regard this expense as wholly unavoidable, as the direct consequence of a decision in which the job itself was the only variable, and therefore as a cost of earning his wages—in other words as a business expense. If he earns forty dollars a day, all that is reasonably subject to his disposal is thirty-two dollars. But since we are now focusing on equity, we must ask how others will feel. The question then arises, which “others”? A second construction worker who lives next door to our Chicago-Belvidere commuter and has the same feeling of attachment to his home, but who has a job in Chicago, would in all probability share the view that the proper standard of comparison between them is wages after allowance for the commuting cost. If the second worker were earning only thirty-two dollars a day in Chicago he would probably consider the first worker no richer than himself. But what about a third worker who lives in a mobile home that he moves from Chicago to Belvidere for the two-month duration of a job there? Will he consider himself fairly treated if the first man pays lower taxes on the same wages? Will he really feel richer than the first man? This kind of question is extremely difficult to answer and requires a good deal of intuition and speculation. I suspect that the third man’s attitudes would depend on how common it is for construction workers to live in mobile homes and thus on assumptions as to the first man’s probable willingness to take up residence in a mobile home and move to Belvidere for two months.

The suggestion that what is equitable depends on estimates of the probable willingness of others to change their location will be borne out, I believe, by consideration of the case of a long-term job. Suppose that all the facts are the same but that the first man’s job in Belvidere will last for two years and that he still chooses to live in Chicago. Our view of what equity demands may now turn on our assumptions about

the mental process by which the decision to live in Chicago was reached. On the one hand, we might assume that the taxpayer was strongly committed to living in Chicago and that he never seriously entertained the possibility of moving; in other words, that the choice was virtually the same as if the job were to last for only two months. On the other hand, we might assume that the choice between remaining in Chicago or moving to Belvidere was a close one. The same possibilities exist as in the case of a two-month job. The difference between our attitudes toward the short-term and long-term jobs seems to lie in our *assumptions* as to the taxpayer's mental process in each case. No doubt these assumptions are based on our feelings about how we ourselves would react. When the job is of short duration most people probably would not consider moving to the job site a reasonable alternative. When the job is of longer duration the opposite is probably true; avoidance of the commuting expense becomes a real possibility and the amount spent on commuting, if commuting is elected, becomes an amount that was at the disposal of the taxpayer. To the extent that we deny deductibility in accordance with this kind of assumption, we achieve equity only in those cases in which the assumption is valid; we achieve only rough justice. For administrative reasons we may not be able to do any better, but we should be prepared to feel some uneasiness about cases such as *Flowers* in which the facts seem to place in doubt the assumption of flexibility of home location in the long run. In any event, it seems that such flexibility is the critical issue; duration of the job is merely an indicator of its presence. If we say that we are not concerned with idiosyncratic attitudes toward home location, we are responding not to equity but to administrability or to irritation with deviance and the problems it creates.

Our conclusions about the equity of allowing a deduction for commuting expenses may be affected not only by our assumptions concerning the flexibility of home and job location but also by other factors, such as the costs and preferences that influence the taxpayer's decision, and by the proposition that, although our tax system does not generally take account of psychic benefits, strong equitable arguments can be made for doing so. Without purporting to exhaust the variations presented in the complex and subtle world of reality, it is useful to examine at least a few prototypes that include some of these additional variables.

Suppose that two lawyers, *A* and *B*, work side by side in downtown Chicago and receive the same income, that neither of them considers the possibility of working elsewhere to be a reasonable alternative, that both have roughly similar preferences for residential location, that

both would be willing to live in either the city or the suburbs but, all other things being equal, would choose the suburbs by a significant margin, that the basic costs of acceptable housing in the city and in the suburbs are the same, and that commuting to the suburbs would cost \$500 per year. Now suppose that this \$500 is just enough to induce *A* to live in the city, while it is not quite enough to deter *B* from locating in the suburbs. This case clearly justifies the view that commuting expenses should not be deductible. *B* uses part of his income to achieve something that is a satisfaction to him—living in the suburbs. *A* foregoes that satisfaction and has \$500 extra with which he may either satisfy his craving for the bucolic scene by taking vacations in the country or buy something else that pleases him. The cost of *A*'s vacations bears only the remotest connection to his business activity and thus can fairly be characterized as purely personal expense, with no reasonable claim to deductibility. The nondeductibility of *B*'s commuting expense then, by comparison, is easily understood. *B*'s case seems less clear if we compare him to a lawyer with the same preference for the suburbs who decides to work in the suburbs or who has an independent income and avoids commuting expenses simply because he does not work at all. But since working in the suburbs or living on an independent income is relatively rare, the comparison to *A* seems more relevant.

Next, consider the same *A-B* facts with two changes: first, that *A* greatly prefers living in the city and, second, that the cost of housing in the suburbs is \$500 less per year than the cost of comparable housing in the city, so that *B*'s total living cost, including commuting expenses, is the same as *A*'s. This is another easy case. *A* and *B* are both living where they are happiest, and their costs are the same. Plainly a deduction for *B*'s commuting expense would produce inequity.

But now return to the original assumption that the cost of housing in the city and the suburbs is the same, so that, while both *A* and *B* are living where they would want to live in the absence of jobs, *B*'s total costs of living where he desires are higher by the amount of his commuting expense. This comparison is much like that of the two skier-lawyers living respectively in Aspen and Chicago, but is not precisely the same. In the case of the skier from Chicago it is not possible to say with much assurance that but for his job he would have lived in Aspen. For purposes of the earlier analysis we assumed that the two skiers had roughly similar preferences, but it seems unlikely that this kind of similarity will often be found. Thus it seems reasonable to assume, for the purposes of developing a general rule, that the Aspen lawyer's

easy access to skiing is one of a bundle of psychic benefits that cannot be measured and must be presumed to be no greater than the bundle of psychic benefits that the Chicago lawyer derives from living in Chicago. The latter's ski trips can then reasonably be regarded as an additional satisfaction purchased with his additional income. In other words, it may be reasonable to presume that each individual lives where he is most content and that while, for example, the Chicago lawyer must pay to get to a good ski area, the Aspen lawyer would have to pay to get to the museums, concerts, political conventions, and other attractions available to Chicagoans. But if we apply the same presumption to *A* and *B*—that each derives the same total satisfaction from his choice of residential location, so that no special allowance is required to account for a particular advantage of one locale over another—then it may be said that the relevant difference between the commuter and the noncommuter is simply the cost of the commute. If we then say that the tax system should, where feasible, account for differences in the cost of achieving equal positions, deductibility of the commuting cost is indicated.

This last point is sufficiently elusive to warrant a restatement in somewhat different terms. We start with the proposition that each individual is confronted with a different, complex set of potential psychic satisfactions that can be achieved at different costs and that as a result one person may have at his disposal, after achievement of certain "basic" satisfactions, greater resources than another person with the same income. For example, one man's idea of the day-to-day good life may be to come home at night and watch television, while his income counterpart may find comparable satisfaction only with concerts, the theater, and night clubs. Generally, we ignore this kind of difference for the fairly obvious reason that it is not feasible to account for it. Nonetheless, it *may* be proper, and feasible, to segregate from the total bundle of psychic satisfactions one particular item, residential location, and try to account for it separately. The justification for doing so is that the costliness of achieving other satisfactions may be a factor randomly distributed throughout the population of taxpayers, while the achievement of residential location satisfaction requires expenditure by only those taxpayers who are tied to a particular job location. This last observation does not directly support the conclusion that commuting costs should be deductible; it does directly support the conclusion that such costs may reasonably be taken into account separately from the costs of achieving other satisfactions. Having reached this conclusion, we can, by posing two questions, proceed to the issue of whether a

deduction should be allowed. First, is it generally true that people live where they prefer without regard to cost and derive roughly equal, or at least randomly distributed, satisfactions from their residential locations? Second, is it generally true that the cost of housing in areas in which most people must commute to work is not less than the cost of comparable housing in areas in which commuting cost is insubstantial? Only if both these questions are answered affirmatively is there a reasonable basis for arguing that the criterion of equity justifies deduction of commuting costs. This is not to say that such cost should be deductible because it can be called a business rather than a personal expense; rather it is to avoid that blind-alley issue. Nor is it to say that the deduction is required under any reasonable definition of the concept of tax equity; a reasonably defensible concept of equity could consciously exclude *all* efforts to account for the differences in costs of achieving equal satisfactions on the ground that tax equity has nothing to do with satisfactions or well-being. But it is not unreasonable to argue that commuting costs are analogous to other costs that are allowed as deductions, such as the medical expense<sup>22</sup> and the casualty loss.<sup>23</sup> The dominant characteristics of these costs seem to be that they maintain the status quo and are nonvolitional. An expenditure for medical treatment does, in a short-term view, buy a satisfaction: relief from illness. But in the long-run view that most people ultimately take of such an expenditure, it achieves nothing more than a maintenance of the status quo determined by reference to the normal condition of the usually healthy majority of the population. Moreover, even though rich people may spend more on the cure of a given illness than not-so-rich people, most people probably look upon amounts spent for medical treatment as being beyond their control. Similarly, if one's house is destroyed by fire and he feels he must replace it, the expenditure<sup>24</sup> merely returns him to the status quo before the fire. And the difficulty of giving up a way of life to which one has become accustomed may make the decision to replace the house seem essentially involuntary.<sup>25</sup> If we have properly isolated the dominant general characteristics of the medical expense and

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<sup>22</sup> INT. REV. CODE OF 1954, § 213.

<sup>23</sup> INT. REV. CODE OF 1954, § 165(c)(3).

<sup>24</sup> The casualty loss deduction is actually for the amount of the loss, not the amount of the replacement cost. Replacement cost, however, is usually the best measure of the amount of loss, and the substitution seems warranted.

<sup>25</sup> In certain cases the deduction can be justified in terms of maintenance of the status quo and involuntariness by looking directly at the loss. For example, consider the case of a man whose pay envelope is stolen from him on his way home from work. This latter case also more clearly supports the somewhat questionable underlying assumption of the casualty loss deduction, that the loss is out of current income rather than capital.

casualty loss deductions, commuting expenses exhibit the same characteristics, once the assumptions of equal satisfactions and different costs are made, and should also be deductible.<sup>26</sup> On these assumptions the commuting expense does not result in any satisfaction or improved position in relation to what we consider the relevant standard of comparison. And the commuting expense is equally nonvolitional once it is assumed that job location is fixed and that everyone lives where he is most content to live.

Analysis of commuting expense in terms of costs of achieving equal satisfaction confirms the conclusion reached earlier by a different mode of analysis,<sup>27</sup> that the commuting expenses of construction workers with short-term jobs should be deductible. Among such a population the assumption that satisfaction with residential location is equally or at least randomly distributed seems virtually inescapable. Moreover, job location either is beyond control or involves considerations that make commuting expenses involuntary. Thus the expenditure meets the two standards that argue for the equity of deductibility.

The effort to resolve the problem of commuting expense by reference to satisfactions and costs is less tidy than resolution by application of concepts of causation, but it has been demonstrated that causation simply cannot be treated as the relevant issue when, as here, it is clear that the expense required the concurring existence of both a substantial deduction-generating condition (the choice of job) and a substantial nondeduction-generating condition (the choice of residential location). The futility of reference to concepts of causation in resolving such problems is illustrated in other tax contexts as well, and it will be instructive to examine one of these to test the utility of the analysis offered here. In *United States v. Gilmore*,<sup>28</sup> the taxpayer claimed a

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<sup>26</sup> It is not, of course, self-evident that there should be a deduction for casualty losses or even for medical expenses. The casualty loss deduction may unjustly discriminate among the unlucky; after all, the man who has just lost his house in a fire could be compared to a man who has been a consistent loser at poker and who, as a result, has never had enough money to buy a house. And perhaps it is not self-evident that an expenditure for medical treatment does not procure any personal satisfaction. The opposite may be true, to take an extreme example, in the case of a man who gains satisfaction from viewing himself as one for whom nothing but the best is good enough and who may find an opportunity to achieve such satisfaction in being attended by highly trained, highly respected, and highly paid specialists. In light of such possibilities, it may be that the wisest tax policy is the one that most rigorously avoids taking account of psychic losses or psychic gains. Yet the deductions for medical expenses and for casualty losses seem to appeal to the public's or at least Congress's sense of fairness or equity; they therefore seem to be within the realm of reasonable policy.

<sup>27</sup> See pp. 882-83 *supra*.

<sup>28</sup> 372 U.S. 39 (1963).

deduction for legal expenses incurred in connection with a suit for divorce. The total legal expenses were approximately \$40,000, but only \$8,000 was allocable to the job of ending the marriage; the remaining \$32,000 was allocable to the successful effort to defeat his wife's claim to what he regarded as his property and to his effort to protect his reputation in order to preserve his business as an automobile dealer. The Court of Claims allowed a deduction for the \$32,000 under what is now section 212 of the Internal Revenue Code of 1954, which provides for the deduction of expenses "incurred . . . for the conservation . . . of property held for the production of income." The Supreme Court reversed. Most of its opinion seems consistent only with the view that the Court considered the expenses in question to be "personal" and that this was the reason for the result.<sup>29</sup> Assuming that this is a proper reading of the opinion, why did the Court view the expense as "personal"? Some of the Court's language suggests that it relied on vague concepts of causation. Thus it stated that the outcome turned on "the origin and character of the claim with respect to which [the] expense was incurred."<sup>30</sup> Analysis in these terms of the *Gilmore* problem is no more enlightening than it is in commuting expense problems. The acquisition and ownership of the property was as much a necessary antecedent of the expense as was the institution of the divorce proceeding and the wife's claim to the property. The latter factor was more immediate in time, but the relevance of that observation is not apparent. There is other language in the opinion suggesting that the expense was not deductible because litigating a divorce case is not a

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<sup>29</sup> It is difficult to determine precisely what the Court's rationale was. The government "contended that the expense . . . must be deemed nondeductible 'personal' or 'family' expense . . . not deductible expense under [§ 212]." *Id.* at 44. The Court said, "For reasons given hereafter we think the Government's position is sound and that it must be sustained," *id.*, and "Thus none of [the taxpayer's] expenditures in resisting [his wife's claims to community property] can be deemed 'business' expenses and they are therefore not deductible under [§ 212]." *Id.* at 52. In the very next paragraph, however, the Court went on to state:

In view of this conclusion it is unnecessary to consider the further question suggested by the Government: whether that portion of respondent's payments attributable to litigating the issue of the existence of community property was a capital expenditure or a personal expense. In neither event would these payments be deductible from gross income.

*Id.* Since a capital expenditure is a category of "business" as opposed to "personal" outlay, or is at least property-related, and since the Court had in the earlier passages indicated that the expenses in issue were *either* personal *or* business expenses, this last statement is extremely difficult to understand. *But see Gilmore v. United States*, 245 F. Supp. 383 (N.D. Calif. 1965), holding that the expenses were capital expenditures, increasing taxpayers' tax basis for the property that was subject to the conflicting claims in the divorce action.

<sup>30</sup> 372 U.S. at 49. *See Klein, supra* note 17, at 1109 n.31.

business or property-management type of activity.<sup>31</sup> In other words, the Court may have intended to rest its conclusion on the vague notion that litigating a divorce action is not normally thought of as part of one's investment-management life and, on an inference from this characterization, that Congress simply would not have thought that the expenses of such litigation should be deductible as investment-management expenses. This possible rationale may represent a respectable interpretation of the statute, particularly in light of the legislative history to which the Court referred,<sup>32</sup> but it casts no light on the question whether the result can be justified in terms of reasonable tax policy. Indeed, one can question whether this version of the Court's rationale is anything more than a fuzzed-up man-in-the-street version of causative analysis. To say that the expense in issue in *Gilmore* is an expense of litigating a divorce action is to beg the question by assuming erroneously that it was the divorce, not the ownership of property, that was the sole "cause" of the part of the litigation that gave rise to the expense.

Let us turn, then, to the previously developed notions of personal satisfaction and voluntariness of expense, trying to determine whether analysis in those terms can remove the sense of confused futility associated with analysis by reference to the abstruse and unenlightening concepts of causation relied upon by the Court.<sup>33</sup> Does the litigation expense procure a satisfaction? As with medical expenses and casualty losses, the answer depends on the perspective. At the time of the divorce action, it is clear that the expense procures a significant satisfaction of sorts in the form of a relief from an unhappy relationship—just as medical expense buys relief from illness. But if one looks farther back

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<sup>31</sup> For example, the Court stated, "For in context 'conservation of property' seems to refer to operations performed with respect to the property itself . . . rather than to a taxpayer's retention of ownership in it." 372 U.S. at 44. Later the Court observed that deductibility "of the litigation costs of resisting a claim depends on whether or not the claim arises in connection with the taxpayer's profit-seeking activities." 372 U.S. at 48 (emphasis by the Court).

<sup>32</sup> 372 U.S. at 44-45. The reader who has gotten this far will, I assume, understand that this is not the kind of issue with which the present article is concerned.

<sup>33</sup> The problem cannot usefully be analyzed by means of the fixed-variable approach applied earlier. That method of analysis is helpful only where it can reasonably be expected that the deductibility of the expense might have some effect on the decision whether that expense will be incurred. In the present case it cannot reasonably be supposed that the decision to marry (or to seek a divorce, had the taxpayer initiated the action) or the decision to accumulate wealth could be affected in any significant manner by the deductibility of the kind of expense involved in *Gilmore*. It seems appropriate, therefore, to take as fixed, rather than variable, both the decision to marry (or divorce) and the decision to accumulate wealth.

to the time when the litigant was in a state of either blissful marriage or idyllic bachelorhood, it can be said that the divorce action, like medical treatment or repair of casualty loss, merely helps to restore the normal status quo ante and therefore should not be considered the purchase of a satisfaction.<sup>34</sup> The latter perspective assumes that the proper standard of comparison for the individual involved in a divorce action is people in a state of contented marriage or bachelorhood, just as the deduction for medical expenses or casualty losses assumes that the proper standard for comparison is those individuals who have not been struck by illness or casualty. This latter assumption and, therefore, the latter perspective, does seem the more appropriate one, though it must be conceded that this conclusion seems to rest largely on emotion and intuition.

What about control or volition? Is litigating a divorce case a volitional act? The predetermined personal factors that affect the choice are likely to weigh so heavily as to make it sensible to say that there really is no practical choice. To most people, however, a decision to seek a divorce is not likely to seem as clearly nonvolitional as a decision to seek medical treatment. My guess is that the general public would be more likely to expect that sickness in a marriage can be cured by an act of will—a change in attitude, if you prefer—than to expect that a bodily malfunction can be willed into or out of existence, Christian Science and much of modern psychosomatic medicine to the contrary notwithstanding. Thus the expense in *Gilmore* is one for which neither the claim to deductibility nor the decision disallowing the deduction seems wholly outrageous.

One final observation about the *Gilmore* problem will cast further light on the previously developed analytic scheme. If we argue that the litigation expenses incident to a divorce action should be deductible merely because of the absence of satisfaction and control, we have established no foundation for limiting the deduction to that part of the expenses allocable to protection of property. But a further consideration might support such a limitation—the element of randomness. It may be reasonable to assume that the expense of ending a marriage is randomly distributed throughout the population of taxpayers, or that it is at least unpredictably distributed, which as a practical matter amounts

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<sup>34</sup> This assumes, of course, that a personal battle, as part of a judicial proceeding, is something that very few individuals would relish or look upon as a source of satisfaction, even before the advent of any of the events giving rise to the battle. This assumption may be unwarranted, and the possibility that it is may again suggest (*cf.* p. 889 *supra*) the wisdom of a tax policy that rigorously eschews accounting for psychic gains and losses.

to the same thing. This is not true, however, of the property-defense expense involved in *Gilmore*; that kind of expense occurs only among the segment of the taxpaying population that owns property. This factor may be just enough to tip the scales. As to the general-expenses of ending a marriage we can take a let-the-chips-fall-where-they-may attitude. But we cannot take the same attitude when we know that the chips will fall on only one class of people. This is not to say that property ownership is significant because of its relation to income; to take that position would be to fall into the trap of causal reasoning. It is merely to say that because property ownership is not randomly distributed, but is a necessary condition for the incurring of the expense, the expense in question may reasonably be separated from the great mass of those expenses of meeting misfortune that may befall any of us.

#### IV

##### ADMINISTRABILITY

Having analyzed the commuting expense problem in terms of economic neutrality and equity we come to the final criterion, administrability. In terms of the first two criteria our conclusions may turn on whether we assume that the job or the home location is fixed or variable, but it is not feasible from an administrative standpoint to determine this issue on an individual basis.<sup>35</sup> The criterion of administrability requires that any rules we develop in response to the fixed-variable analysis must be based not on actual circumstances in individual cases but rather on assumptions as to the probabilities in a given class of cases. For example, it would not be feasible to ask whether an individual construction worker with a short-term job regarded his home as fixed and his job as variable, but it would be feasible to administer a rule that the abnormal expenses of commuting to a job expected to last less than a year are deductible. Such a rule would be justified by the assumption that among the class of workers with such jobs it is almost always true that the home location is not variable.

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<sup>35</sup> Indeed, a rule that made mental processes relevant to deductibility might make such a finding impossible. Consider the *Flowers* case again. If a man like *Flowers* is confronted with a rule denying deduction of his commuting expense and if, in the face of this rule, he decides to incur a substantial commuting expense, it is reasonable to assume that in his view his home location is fixed. If, on the other hand, a deduction for commuting expense were allowed, we would have no practical means of determining what he would do in the absence of the prospect of the deduction; in other words, we would have no way of learning the strength of his commitment to living in Jackson.

## CONCLUSION

The principal purpose of this article has been to develop analytic tools and insights, hopefully with some relevance beyond the immediate context, not to fashion proposals for changes in the law. A few modest suggestions for change may nonetheless serve to summarize and make more concrete some of the ideas that have been expressed.

The one area in which the preceding analysis shows a clear need for change is that of the short-term job requiring an abnormally long and expensive commute. From the standpoint of both economic neutrality and equity, the expense of such commuting ought to be deductible. Administrative considerations dictate a rather arbitrary rule—for example, one allowing the deduction of the amount of any commuting expense allocable to transporting oneself beyond a radius of ten miles from one's home for any person with a job expected to last less than one year. Such a rule might produce some unintended benefits; for example, it would allow a deduction to a man who would have lived fifty miles from his job even if it had been permanent. These unintended benefits could be partially foreclosed by limiting the deduction to the miles traveled in excess of the distance between the last permanent job and the home at the time that job was held. But such a rule would probably accomplish too little to justify the complexity of administering it.

Another possible change would be to exclude from income any compensation for commuting paid by an employer. Surely if an employer does not expect his employee to move closer to the job site, believes that commuting expense is a relevant consideration, and backs his appraisal by making payments that cannot be regarded as normal compensation, because not available to all employees, the tax system can accept that appraisal. To preclude an exclusion for compensation disguised as reimbursement for commuting, the exclusion would have to be limited to cases in which the amount paid was tailored to the employee's actual expense.

The working wife also deserves a break. All of her commuting expense should be deductible because she has no control over where she lives in relation to her job, but is usually free to decide whether to work and, if so, where. Again, a simple rule might produce some unintended benefits; for example, it would allow a deduction to the woman whose decisions as to home and job location would have been the same even if she had not been married. Some of these benefits might

be eliminated by rules that could be framed in wholly objective terms. But none have occurred to me that would have a sufficiently significant effect to justify the complexity that they would add.

A more questionable suggestion is a deduction for commuting expenses for all low-income people.<sup>36</sup> The assumption underlying this suggestion is that people with low incomes cannot make home-location decisions that procure substantial psychic satisfactions; at best, they can purchase only subsistence. If they live far from their jobs, it is presumably because they have no choice about where to live. Accordingly, the commuting expense buys no satisfaction and is involuntary. Thus deductibility can be defended not only as a device for helping the poor but also as a means of achieving equity and economic neutrality. There is precedent for this proposal in section 214 of the present Code. Under that provision a woman or a widower is allowed to deduct up to \$900 of the cost of child care, but the deduction is reduced by the amount by which her income and her husband's exceeds \$6,000 per year. The same approach could be used for commuting expenses.

These suggestions are limited in scope. They would of course be subsumed by a general rule allowing the deduction of all commuting expenses. Whether such a general rule should be adopted depends, according to my analysis, on assumptions about matters of fact, and we lack information that would permit us to make these assumptions with any sense of assurance. For example, the strongest case for deductibility could be made if it were assumed that for most of the taxpaying population (1) home location is determined by personal factors that operate so strongly as to make commuting cost largely irrelevant, (2) individual home locations provide roughly similar satisfactions, (3) the costs of comparable housing are roughly the same at different locations, and (4) there are fairly wide choices as to job location. On these assumptions both the criterion of equity and the criterion of economic neutrality support deductibility. But in the absence of any sound basis for making these assumptions, it seems appropriate to accept the existing rules. Any studies that produced reliable information on the economic and psychological factors specified here would be relevant to tax policy, but it is beyond the scope of this article to consider even the feasibility of such studies.

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<sup>36</sup> The issue of a commuting expense deduction for the poor arises quite clearly in drafting income-determination rules for a negative income tax. This article is in part an outgrowth of a discussion of such rules among members of the University of Wisconsin Institute for Research on Poverty, which drafted rules for a negative income tax experiment now underway in New Jersey.