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Postpartum Taxation and the Squeezed out Mom

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Postpartum Taxation and the Squeezed Out Mom

SHANNON WEEKS MCCORMACK*

Faced with too-short (or nonexistent) maternity leaves, inflexible work schedules, and the soaring costs of childcare in the United States, many new mothers temporarily leave the workforce to care for their young children. Although media attention has focused on the “opt-out” mom, many more mothers are squeezed out of the external workplace. But mothers that try to return to work may discover that it is difficult to do so, as employers have been shown to be less likely to hire mothers than others. A mother that does reenter may find that even short periods out of work cost (sometimes far) more than the income foregone during her intended time out and may result in a reduction in her overall earning potential, retirement, disability, and Medicare benefits. This may contribute to severe economic hardships among divorced mothers and their children, the underrepresentation of women in high-level leadership positions, and a wage gap between mothers and others, to name a few problems.

Recognizing these realities, experts that study the biases faced by women in the workplace encourage mothers who want or need to work to resist leaving, even during their children’s preschool years when child-care (and other financial and personal) costs are so high that the short-term prospects of working may seem (in some cases quite) low. These experts instead urge mothers to view these high costs as investments in their most valuable economic asset: their lifelong earning potential. Using these insights, this Article proposes ways in which the Internal Revenue Code could be modified to help prevent some new mothers from being squeezed out of the external workplace.

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INTRODUCTION

The typical American mother’s career path tends to be far more winding than the chosen paths of American men and childless women.¹ Research indicates that a significant percentage of women temporarily leave the external work-

1. See Marianne Bertrand, Claudia Goldin & Lawrence F. Katz, *Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors*, 2 AM. ECON. J. 228, 230 (2010) (documenting that greater career discontinuity and shorter work hours for female MBAs are associated with motherhood); see also Audrey Light & Manuelita Ureta, *Early-Career Work Experience and Gender Wage Differentials*, 13 J. LAB. & ECON. 121, 121 (1995) (explaining “women tend to interrupt their careers to bear and raise children”); Christy Spivey, *Time Off at What Price? The Effects of Career Interruptions on Earnings*, 59 INDUS. & LAB. REL. REV. 119, 119 (2005) (“Statistically significant interruptions were more numerous for women than men . . .”). See generally Kim Parker, *Women More Than Men Adjust Their Careers for Family Life*, PEW RES. CTR.: FACTTANK (Oct. 1, 2015), <http://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/> [<https://perma.cc/N83C-KDTJ>] (“39% of mothers said they had taken a significant amount of time off from work in order to care for a family member (compared with 24% of men). And mothers

place, often to care for young children.² Some members of the media have oversimplified the reasons for this, painting a monochromatic picture of “opt-out” mothers gleefully abandoning work to care for their infants.³ But for many mothers, the decision to leave the workforce is far more complex and involves an array of “pull factors” (factors in the home that pull women away from the external workforce) and “push factors” (factors external to the home that push women out).⁴

Pull factors are not limited to the desire to care for one’s children. Mothers also face apathy, and in many cases significant anxiety, about placing their children in non-parental care, especially given evidence that many American childcare facilities provide (at best) mediocre care,⁵ and that facilities providing high quality care can be very expensive and difficult to access.⁶ Furthermore, studies expose that “behind most pull factors [lurks] a highly traditional division of labor.”⁷ Coined the “second shift,”⁸ studies have documented the way in which women disproportionately shoulder the burden of daily household tasks,

were about three times as likely as men to report that at some point they quit a job so that they could care for a family member (27% of women vs. 10% of men).”).

2. See, e.g., Bertrand, Goldin & Katz, *supra* note 1; Light & Ureta, *supra* note 1; see also SYLVIA ANN HEWLETT ET AL., THE HIDDEN BRAIN DRAIN: OFF-RAMPS AND ON-RAMPS IN WOMEN’S CAREERS 17 (2005) (“Nearly half (45%) of highly qualified women who off-ramp told us, ‘I wanted to or needed to spend more time with my child(ren).’ . . . Almost one-fourth (24%) of highly qualified women who off-ramp cite ‘needing to spend time with parents or other family members’ as a precipitating factor.”). The phrase “highly qualified women” is used throughout works by Hewlett and her colleagues. They define it as “those with a graduate degree, a professional degree, or a high-honors undergraduate degree,” and it shall have that meaning whenever it is used in this Article. *Id.* at 11.

3. See, e.g., Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG. (Oct. 26, 2003), <http://www.nytimes.com/2003/10/26/magazine/26WOMEN.html?pagewanted=all> [<https://perma.cc/4Y5U-HFUV>] (describing the decision of high-achieving women to leave the workplace after having children as “opting out,” leading to the controversial term “opt-out” mother). But see LESLIE BENNETTS, THE FEMININE MISTAKE 34 (2007) (discussing dangers of the media romanticizing mothers’ decisions to leave the workforce).

4. See generally HEWLETT ET AL., *supra* note 2, at 14, 16–24; WORKPLACE FLEXIBILITY: REALIGNING 20TH-CENTURY JOBS FOR A 21ST-CENTURY WORKFORCE 98 (Kathleen Christensen & Barbara Schneider eds., 2010). For in-depth discussion, see *infra* Part I.

5. NAT’L INST. OF CHILD HEALTH & HUMAN DEV., NAT’L INSTS. OF HEALTH, THE NICHD STUDY OF EARLY CHILD CARE AND YOUTH DEVELOPMENT 11 (2006) (“[T]he data suggest that most child care settings in the United States provide care that is ‘fair’ (between ‘poor’ and ‘good’). Fewer than 10 percent of arrangements were rated as providing very high quality child care.”).

6. See, e.g., CHILDCARE AWARE OF AM., PARENTS AND THE HIGH COST OF CHILDCARE 8 (2015) (“Many parents are unable to access high-quality, affordable child care for their children.”); see also Sue Shellenbarger, *Day Care? Take a Number; Baby*, WALL ST. J. (June 9, 2010, 12:01 AM), <http://www.wsj.com/articles/SB20001424052748704256604575294523680479314> [<https://perma.cc/HG6W-5MFM>] (“With more women than ever in the work force, many of the country’s roughly 11,000 nationally accredited child-care centers are full to capacity.”).

7. HEWLETT ET AL., *supra* note 2, at 17.

8. ARLIE HOCHSCHILD ET AL., THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME 4 (2012) (first coining term “second shift”). Other legal scholars have discussed the second shift in connection with the tax law. See, e.g., Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1574 (1996) (arguing that the imputed income from household labor should be taxed not only to equalize treatment of single- and dual-earning couples but also to allow women that work in the home to accrue benefits, such as Social Security, that traditionally accrue only for those in the outside labor force).

resulting in a formidable “double day”⁹ of work once tasks internal and external to the home are aggregated.¹⁰

As for push factors, new mothers in America will confront too-short maternity leaves,¹¹ too-long hours,¹² and inflexible work schedules.¹³ Moreover, the cost of dependable childcare in America is extremely high. Today, day care expenses for two children can equal or exceed the cost of in-state college tuition¹⁴ or rent¹⁵ in some states. The working mother will also incur a series of other costs that she would be able to avoid if she were to leave the workforce, including the costs of commuting and purchasing work attire.¹⁶

With costs this high, many families in the lower and middle classes are left “to choose between spending a sizable portion of their paycheck on childcare, finding less expensive—and possibly lower quality—unregulated childcare, or leaving the workforce to become a full-time caregiver”¹⁷ until their children

9. HOCHSCHILD ET AL., *supra* note 8, at 3 (discussing Alexander Szalai’s 1965–1966 study documenting the working woman’s “double day”).

10. See, e.g., Joni Hersch & Leslie S. Stratton, *Housework and Wages*, 37 J. HUM. RESOURCES 217, 217 (2002) (finding women perform significantly more housework and finding negative correlation between wages and housework); Melissa A. Milkie et al., *Taking on the Second Shift: Time Allocations and Time Pressures of U.S. Parents with Preschoolers*, 88 SOC. FORCES 487 (2009) (finding that although it is more common today than in the past for dual-earner couples without children to share household tasks more equitably, this equity often fails to persist once children arrive); see also Joni Hersch & Leslie S. Stratton, *Housework, Fixed Effects and Wages of Married Workers*, 32 J. HUM. RESOURCES 285, 285 (1997) [hereinafter Hersch & Stratton, *Married Workers*] (“Married women’s housework time is, on average, three times that of married men’s.”); Sholeh A. Maani & Amy A. Cruickshank, *What Is the Effect of Housework on the Market Wage, and Can It Explain the Gender Wage Gap?*, 24 J. ECON. SURV. 402, 402 (2010) (“In the USA, men spend approximately a quarter less time than women do on housework every week.”).

11. Susanna Kim, *US Is Only Industrialized Nation Without Paid Maternity Leave*, ABC NEWS (May 6, 2015, 6:02 PM), <http://abcnews.go.com/Business/us-industrialized-nation-paid-maternity-leave/story?id=30852419> [<https://perma.cc/SVL9-KEZE>]; see also Gretchen Livingston, *Among 41 Nations, U.S. Is the Outlier When It Comes to Paid Parental Leave*, PEW RES. CTR.: FACTTANK (Sep. 26, 2016), <http://www.pewresearch.org/fact-tank/2016/09/26/u-s-lacks-mandated-paid-parental-leave/> [<https://perma.cc/J8BY-UQLJ>].

12. Press Release, Int’l Labour Org., *Americans Work Longest Hours Among Industrialized Countries* (Sep. 6, 1999), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_071326/lang=en/index.htm [<https://perma.cc/G6GR-KN26>] (“US workers put in the longest hours on the job in industrialized nations, clocking up nearly 2,000 hours per capita in 1997, the equivalent of almost two working weeks more than their counterparts in Japan where annual hours worked have been gradually declining since 1980, according to a new statistical study of global labour trends published by the International Labour Office (ILO).”).

13. JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 1 (2000) (describing how, in America, the ideal worker “works full time and overtime and takes little or no time off for childbearing or child rearing”).

14. CHILD CARE AWARE OF AM., *supra* note 6, at 31 (“[I]n many states the cost of a year’s tuition and fees at a four-year public college is comparable to the average cost of child care.”).

15. *Id.* (“The cost of full-time center-based care for two children is the highest single household expense in the Northeast and Midwest. In the West and the South, the cost of child care for two children is surpassed only by the cost of housing in the average family budget.”).

16. See *infra* Section III.B.

17. MICHAEL MADOWITZ, ALEX ROWELL & KATIE HAMM, CTR. FOR AM. PROGRESS, *CALCULATING THE HIDDEN COST OF INTERRUPTING A CAREER FOR CHILD CARE* 1 (2016), <https://cdn.americanprogress.org/wp->

reach school age. Seeking to explain a recent uptick in stay-at-home mothers,¹⁸ the U.S. Census Bureau posits that “[e]specially for mothers who have more than one child under 5, the cost of day care might be higher than she could support unless she has fairly high earnings.”¹⁹ And new mothers with spouses or partners having sufficient income, although in far less dire financial positions than those of more limited means, still confront a complicated decision to leave their careers in which they may have invested a great deal of time and resources and from which they may have forged a strong sense of identity and pride.²⁰ Thus, although significant media attention has focused on the “opt-out” mom,²¹ it is far more common that new mothers feel squeezed out of the workforce. Unfortunately, a mother’s decision to leave the workforce is often costlier than she initially realizes it will be.

Women that attempt to reenter the workforce may find it difficult to do so. Some studies conclude that employers are less likely to hire mothers compared with childless women, even without career interruptions.²² Other studies document wage penalties for motherhood, irrespective of time out of the workforce.²³

But the problems do not stop with reentry. A mother that manages to reenter the workforce may find that even short interruptions cost (sometimes far) more than the income foregone during her time out, resulting in a significant reduction in her overall earning potential, and reductions in retirement, disability, and

content/uploads/2016/06/17091517/ChildCareCalculator-methodology.pdf [https://perma.cc/V7HY-VU5K].

18. D’VERA COHN, GRETCHEN LIVINGSTON & WENDY WANG, PEW RES. CTR., AFTER DECADES OF DECLINE, A RISE IN STAY-AT-HOME MOTHERS 5 (2014), http://www.pewsocialtrends.org/files/2014/04/Moms-At-Home_04-08-2014.pdf [https://perma.cc/LL3T-KYT6] (“The share of mothers who do not work outside the home rose to 29% in 2012, up from a modern-era low of 23% in 1999 . . .”); *see also* MADOWITZ, ROWELL & HAMM, *supra* note 17, at 2 (“Available data suggest that many families are opting to have a stay-at-home caregiver, usually the mother, in the face of exorbitant child care costs. A multidecade rise in mothers’ labor force participation peaked in 1999, when 23 percent of mothers did not work outside the home. However, the share of mothers not working outside the home rose to 29 percent in 2012.”).

19. ROSE M. KREIDER & DIANA B. ELLIOTT, U.S. CENSUS BUREAU, HISTORICAL CHANGES IN STAY-AT-HOME MOTHERS: 1969 TO 2009, at 13 (2010).

20. *See, e.g.*, Sylvia Ann Hewlett & Carolyn Buck Luce, *Off-Ramps and On-Ramps: Keeping Talented Women on the Road to Success*, HARV. BUS. REV., Mar. 2005, at 45 (“[W]omen find deep pleasure in their chosen careers and want to reconnect with something they love. Forty-three percent [of women who left their careers but wished to return] cite the ‘enjoyment and satisfaction’ they derive from their careers as an important reason to return—among teachers this figure rises to 54% and among doctors it rises to 70%.”).

21. *See, e.g.*, Belkin, *supra* note 3.

22. *See, e.g.*, Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1330 (2007) (explaining that mothers are disadvantaged in employer hiring decisions even without career interruptions).

23. *See, e.g.*, Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 219–20 (2001) (finding a wage penalty for motherhood in the United States); Tamar Kricheli-Katz, *Choice, Discrimination, and the Motherhood Penalty*, 46 L. & SOC’Y REV. 557 (2012) (analyzing the motherhood wage penalty).

Medicare benefits.²⁴ Economists have documented wage penalties for career interruptions in certain industries (in addition to the more general motherhood penalty).²⁵ For instance, studies found “that the cost of career interruptions is very great in the corporate and financial sectors,”²⁶ as well as in the legal field,²⁷ even when interruptions are brief.²⁸ Another study concluded that highly qualified “women who take a career break are penalized out of proportion to any objective deterioration of their skills.”²⁹ Thus, although childless females may hit the glass ceiling, many mothers strike the “maternal wall.”³⁰

This situation likely contributes to the disturbingly high poverty rate among divorced mothers who became dependent on their ex-spouse’s income and their children.³¹ It forces dual-earner families to forego an often-needed second

24. See, e.g., Staudt, *supra* note 8, at 1574 (discussing how mothers that are not in the external labor force do not receive Social Security and other benefits, and instead are dependent on their spouses); see also MADOWITZ, ROWELL & HAMM, *supra* note 17, at 2 (discussing loss in benefits).

25. See, e.g., Bertrand, Goldin & Katz, *supra* note 1, at 252 (describing large earnings losses associated with any career interruptions for MBAs); see also Spivey, *supra* note 1, at 137 (“This study finds that total nonemployment time has a statistically significant depreciation effect on wages, which corroborates past findings.”).

26. Stephen J. Dubner, *SuperFreakonomics Book Club: Goldin and Katz on the Male-Female Wage Gap*, FREAKONOMICS BLOG (Jan. 28, 2010, 1:00 PM), <http://freakonomics.com/2010/01/28/superfreakonomics-book-club-goldin-and-katz-on-the-male-female-wage-gap/> [<https://perma.cc/QVN2-QR4C>]; see also HEWLETT ET AL., *supra* note 2, at 41 (“In the business sector and in banking/finance, penalties are particularly draconian. The data suggest that highly qualified women in these sectors lose 28% of their earning power when they off-ramp.”).

27. See Robert G. Wood, Mary E. Corcoran & Paul N. Courant, *Pay Differences Among the Highly Paid: The Male-Female Earnings Gap in Lawyers’ Salaries*, 11 J. LAB. ECON. 417, 438 (1993).

28. See Bertrand, Goldin & Katz, *supra* note 1, at 234 (“Non-work spells are generally brief for both men and women . . .”).

29. JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 25 (2010).

30. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 77 (2003) (“We all know about the glass ceiling. But many women never get near it; they are stopped long before by the maternal wall.”); see also Kristen Rowe-Finkbeiner, *Breaking Through the Maternal Wall: The Time Is Now*, SHRIVER REP. (Jan. 14, 2014), <http://shriverrreport.org/breaking-through-the-maternal-wall-the-time-is-now-kristin-rowe-finkbeiner> [<https://perma.cc/D3JF-HDYN>] (“A Maternal Wall is standing in the way of most women ever entering a room with a glass ceiling.”).

31. See Press Release, U.S. Census Bureau, *Divorce Rates Highest in the South, Lowest in the Northeast*, Census Bureau Reports (Aug. 25, 2011), http://www.census.gov/newsroom/releases/archives/marital_status_living_arrangements/cb11-144.html [<https://perma.cc/VLU9-4UNX>] (“Children living with a parent who divorced in 2009 were more likely to live in a household headed by their mother (75 percent) than in a household headed by their father (25 percent). Additionally, children living with a parent who divorced in 2009 were more likely to be in a household below the poverty level (28 percent) compared with other children (19 percent), and they were more likely to live in a rented home (53 percent) compared with other children (36 percent).”). According to other Census Bureau data, “[t]he poverty rates for women remained at historically high levels in 2014. . . . Women’s poverty rates were once again substantially above the poverty rates for men. More than one in seven women—nearly 18.4 million—and more than one in five children—more than 15.5 million—lived in poverty in 2014. More than half of all poor children lived in families headed by women.” ALANA EICHNER & KATHERINE GALLAGHER ROBBINS, NAT’L WOMEN’S L. CTR., NATIONAL SNAPSHOT: POVERTY AMONG WOMEN & FAMILIES, 2014, at 1 (2015), <http://nwlc.org/wp-content/uploads/2015/08/povertysnapshot2014.pdf> [<https://perma.cc/GDK3-TNZZ>].

stream of income.³² It causes married and cohabitant mothers to suffer psychological harms and forfeit their senses of identity.³³ It disrupts the perceived equality of marriages and other committed relationships.³⁴ It helps explain the underrepresentation of mothers in high-level positions, depriving the processes by which legal, corporate, and other policies are formed of vital perspective.³⁵ It leads to a female “brain drain” in the workforce more broadly,³⁶ and it runs afoul of most rational concepts of gender equity.³⁷

Given existing realities, experts studying the biases women face in the workplace encourage mothers who need or wish to work to avoid leaving despite the often-low immediate financial prospects of doing so. They instead encourage mothers to view the high costs of childcare (and other financial and personal costs) as investments in their most valuable financial asset: their lifelong earning capacity.³⁸ Of course, the United States could make it easier for

32. See Hewlett & Luce, *supra* note 20, at 45 (“It’s also true that a significant proportion of women currently seeking on-ramps are facing troubling shortfalls in family income: 38% cite ‘household income no longer sufficient for family needs’ and 24% cite ‘partner’s income no longer sufficient for family needs.’ Given what has happened to the cost of homes (up 38% over the past five years), the cost of college education (up 40% over the past decade), and the cost of health insurance (up 49% since 2000), it’s easy to see why many professional families find it hard to manage on one income.”); Steven Greenhouse, *Recession Drives Women Back to the Work Force*, N.Y. TIMES (Sept. 18, 2009), <http://www.nytimes.com/2009/09/19/business/19women.html> [<https://perma.cc/P8SF-VSDR>] (discussing women who left their careers facing difficulties finding jobs after their husband’s wages were insufficient during the recession).

33. See, e.g., PAMELA STONE, *OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* 145 (2007) (“More than half [of opt-out moms interviewed] discussed the anguish they continued to feel about having lost a vital aspect of their identity and status in the world.”).

34. See, e.g., BENNETTS, *supra* note 3, at 73 (quoting one woman who scaled back freelance-writing career to accommodate her family’s needs, saying “I didn’t put myself first, or even second,” and noting her spouse’s habit of referring to her work as her “little books”); Hewlett & Luce, *supra* note 20, at 45 (“However good their marriages, many [off-ramped women] disliked needing to ask for money. Not being able to splurge on some small extravagance or make their own philanthropic choices without clearing it with their husbands did not sit well with them.”).

35. See JUDITH WARNER, CTR. FOR AM. PROGRESS, *THE WOMEN’S LEADERSHIP GAP: WOMEN’S LEADERSHIP BY THE NUMBERS* (2015), <https://www.americanprogress.org/issues/women/report/2015/08/04/118743/the-womens-leadership-gap/> [<https://perma.cc/EPR6-VLF6>]; MARIE C. WILSON, *CLOSING THE LEADERSHIP GAP: WHY WOMEN CAN AND MUST HELP RUN THE WORLD* 1–16 (2004) (explaining the critical perspective and skills women leaders have been shown to contribute to those organizations that have them); *Chapter 1: Women in Leadership*, PEW RES. CTR.: SOC. & DEMOGRAPHIC TRENDS (Jan. 14, 2015), <http://www.pewsocialtrends.org/2015/01/14/chapter-1-women-in-leadership/> [<https://perma.cc/3XSX-ZPBR>] [hereinafter *Women in Leadership*, PEW]; Mary Ann Glendon, *Feminism and the Family: An Indissoluble Marriage*, CATHOLIC EDUC. RES. CTR. (Feb. 14, 1997), <http://www.catholiceducation.org/en/controversy/marriage/feminism-and-the-family-an-indissoluble-marriage.html> [<https://perma.cc/2K6F-9E6L>].

36. See generally HEWLETT ET AL., *supra* note 2.

37. See WILLIAMS, *supra* note 13, at 2.

38. See BENNETTS, *supra* note 3, at 127–28 (encouraging women to consider work–life balance under a “fifteen-year paradigm” and to remember that the challenges presented by children are most pronounced for only a portion (perhaps fifteen years) of a lifelong career (perhaps over forty-five years)); S.M., *Women in the Workforce: A Taxing Situation*, ECONOMIST (Apr. 9, 2013, 6:05 PM), <http://www.economist.com/blogs/democracyinamerica/2013/04/women-workforce> [<https://perma.cc/9CNL-FPUX>] (“[I]f women consult the statistics and really crunch the numbers, they will be more

new mothers to stay in the workforce by following the example of the many developed nations that provide an array of services, such as universal preschool and affordable, guaranteed childcare,³⁹ alongside legal protections for new mothers, including mandatory paid and work-protected parental leaves.⁴⁰ But America is far behind its peers—it is, for instance, still debating the merits of requiring employers to provide some form of paid parental leave, despite being the only industrialized nation that does not yet require it.⁴¹

Cognizant of these realities, this Article considers whether reforming the tax laws could present a feasible path forward that would not require the creation of government-run programs or employer mandates. Specifically, this Article explores ways in which the tax laws might be modified to keep some new mothers from being squeezed out of the workforce when their children are born.

To do so, this Article builds off of my prior work and identifies several ways in which the Internal Revenue Code (the IRC or Code) overtaxes the postpartum earnings of new mothers and argues that these laws should be corrected. Currently, the Code mischaracterizes the childcare expenses incurred by working parents as personal costs rather than costs of earning income. The Code does so in various ways.

Most critically, the Code strictly limits the ability of parents to recover childcare costs incurred while working.⁴² Once these limitations are applied, working parents often recover only a fraction of the high childcare costs they incur. But, under fundamental principles of taxation, costs of earning income are generally deductible without such stringent limitations. The Code should be corrected to allow working parents to recover a far greater share of their childcare costs.

Further, the Code limits the ability of parents to recover interest expenses that might help them afford today's high cost of early childcare. Taxpayers are generally allowed to recover only “non-personal” interest—that is, interest on

wary of opting out of the workforce when their babies arrive.” (citing JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE* (2010)); see also *infra* Section III.C.

39. See DIRECTORATE OF EMP'T, LABOUR & SOC. AFFAIRS, ORG. FOR ECON. CO-OPERATION & DEV., PF2.1: KEY CHARACTERISTICS OF PARENTAL LEAVE SYSTEMS 3, tbl.PF2.1.A (2016), https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf [<https://perma.cc/K3U3-NKD3>] (summarizing paid leave available to mothers across OECD member states); Dan Clawson & Naomi Gerstel, *Caring for Our Young: Child Care in Europe and the United States*, 1 CONTEXTS 28 (2002) (describing different European models of childcare); Claire Lundberg, *Trapped by European-style Socialism—And I Love It!: Maybe Working Moms Can Have It All—in France*, SLATE (Nov. 2, 2012, 7:07 AM), http://www.slate.com/articles/life/family/2012/11/socialist_child_care_in_europe_creche_ecole_maternelle_and_french_child.html [<https://perma.cc/SS22-5393>] (discussing various government provided childcare options in France).

40. See *infra* Section II.B.

41. See Kim, *supra* note 11. As one commentator notes, while some Presidential candidates have proposed “tepid” solutions to the problems faced by working mothers, “the political reality for any of them is bleak.” Bryce Covert, Opinion, *The Politics of Paid Time Off to Have a Baby*, N.Y. TIMES (Nov. 23, 2015), <http://www.nytimes.com/2015/11/23/opinion/campaign-stops/the-politics-of-paid-time-off-to-have-a-baby.html> [<https://perma.cc/RG63-PH5S>].

42. See *infra* Section III.A.1.

loans associated with activities aimed at earning a profit.⁴³ Because of the Code's failure to properly characterize working parents' childcare expenses as costs of earning income, interest incurred to pay for childcare is deemed "personal" and thus not recoverable. Along similar lines, taxpayers are generally allowed to recover losses from their profit-seeking activities. But if a new mother were to incur childcare costs in excess of her current earnings to keep herself in the workforce during her children's early years, she could not recover those "losses."⁴⁴ This Article considers how these laws could be modified to more appropriately reflect that working parents' childcare expenses are (at least primarily) costs of earning income.

This Article then recognizes that although childcare costs are often the most significant costs incurred by working parents, there are also other work-related expenses, such as the costs of commuting and work attire, that the new mother could avoid if she left the workforce.⁴⁵ For reasons that include administrative efficiency, these expenses are generally nondeductible. Although this bar on deductions might be defensible generally, this Article considers whether new parents should be able to recover some of these expenses to ensure that their already strained postpartum earnings are not overtaxed and to reflect that dual-earner and single-parent families incur costs that single-earner, two-parent families do not.

Before concluding, this Article pushes more on the core idea that new mothers should avoid leaving the workforce when children are young and view high childcare (and other) costs as investments in their long-term earning potential. Many tax laws create incentives for taxpayers to make investments yielding primarily long-term benefits. The final Part of this Article imagines what the Code might look like if it took the goal of helping new mothers invest in their careers as seriously as helping other taxpayers invest in other long-term assets.

These proposals—like all proposals—have their limitations. Families that do not have sufficient taxable income or tax liability will be unable to fully benefit from the proposed reforms, unless tax relief measures are made refundable. Nothing in this Article is meant to suggest that lawmakers should not also focus on the even more dire situations of these parents, whether through tax refunds or by other means. They should do so with extremely high priority. Parents from different race and class backgrounds face different challenges, which cannot all be addressed in the same manner.⁴⁶ This Article seeks to address the significant

43. I.R.C. § 163 (2012).

44. See I.R.C. § 165(c) (2012) (identifying types of losses taxpayers may claim to reduce their taxable income).

45. See *infra* Section III.B.

46. Indeed, understanding this is central to some seminal literature on feminism and critical race theory. See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1246 (1991) ("[I]ntervention strategies based solely on the experiences of women who do not share the same class or race backgrounds will be of

challenges faced by some mothers and does so under the assumption that this need not—indeed, must not—foreclose the opportunity to also address the problems faced by other mothers.⁴⁷

Part I describes how the typical career trajectory of mothers—often interrupted once children arrive—differs considerably from the generally uninterrupted trajectory of others. It also summarizes the various push and pull factors that affect a new mother's decision to leave the workforce. Part II discusses how even short career interruptions can cost mothers far more than the revenue foregone during her time off. It also presents the case for some intervention through the Code. Part III considers a series of reforms to change the way the postpartum earnings of some mothers are taxed. These reforms would hopefully keep some new mothers from being squeezed out of the workforce and allow them to avoid the harms of taking even brief time out.

I. THE MATERNAL CAREER TRAJECTORY: CAREER, INTERRUPTED

The American male's career path is often linear. This is not to discount that recessions and unexpected life events can disrupt his work patterns. However, frequently, once men enter the workforce, they do not exit voluntarily until retirement.⁴⁸ The early years of a woman's career often progress in a similar, steady fashion.⁴⁹ And for the 10% of females that do not have chil-

limited help to women who because of race and class face different obstacles.”); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (encouraging feminists to resist the tendency to try to define one, essential feminine experience and to question existing categorizations which often ignore marginalized groups).

47. In short, it is explicitly recognized that this Article and this author do not—and cannot—speak for all mothers. As bell hooks writes:

[W]hite women who dominate feminist discourse today rarely question whether or not their perspective on women's reality is true to the lived experiences of women as a collective group. Nor are they aware of the extent to which their perspectives reflect race and class biases, although there has been a greater awareness of biases in recent years.

BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 3 (2d ed. 2000). This Article is written with a humble awareness of its limitations and hopes to add to the large and varied dialogue that seeks to address the varied problems of different women.

48. See AM. ASS'N OF UNIV. WOMEN, *THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP* 9 (Fall 2015 ed.), <http://www.aauw.org/files/2015/09/The-Simple-Truth-Fall-2015.pdf> [https://perma.cc/T264-QM29] (“Becoming a parent is an example of a choice that often has different outcomes for women and men. Taking time away from the workforce or working fewer hours, both of which are more common for mothers than fathers, hurts earnings. . . . [Ten] years after graduation, 23 percent of mothers were out of the workforce, and 17 percent worked part time. Among fathers, only 1 percent were out of the workforce, and only 2 percent worked part time.”); Spivey, *supra* note 1, at 119 (“Statistically significant interruptions were more numerous for women than men”); Parker, *supra* note 1 (“39% of mothers said they had taken a significant amount of time off from work in order to care for a family member (compared with 24% of men). And mothers were about three times as likely as men to report that at some point they quit a job so that they could care for a family member (27% of women vs. 10% of men).”). See generally WILLIAMS, *supra* note 13.

49. See Bertrand, Goldin & Katz, *supra* note 1, at 228 (“Although male and female MBAs have nearly identical earnings at the outset of their careers, their earnings soon diverge, with the male earnings advantage reaching almost 60 log points a decade after MBA completion.”).

dren,⁵⁰ this pattern often continues.

But the work patterns of the 90% of women who are mothers will frequently diverge from those of men and childless women, leading one expert to observe that “[o]ur economy is divided into mothers and others.”⁵¹ Once children arrive, many new mothers temporarily leave the workforce.⁵² A study conducted by the Pew Research Center recently reported that “mothers were about three times as likely as men to report that at some point they quit a job so that they could care for a family member.”⁵³ Further, the number of stay-at-home mothers has recently upticked from its low point in 1999.⁵⁴ As analysts with the Pew Research Center note: “With incomes stagnant in recent years for all but the college-educated, less educated workers in particular may weigh the cost of child care against wages and decide it makes more economic sense to stay home.”⁵⁵

Speaking of the corporate and financial sectors, economists found that only 10% of male MBA graduates interrupted their careers ten years after graduation compared with 41% of female MBA graduates.⁵⁶ In a study by Sylvia Ann Hewlett and her colleagues (the Hewlett Study), nearly 40% of highly qualified women voluntarily interrupted their careers, but only 25% of men off-ramped.⁵⁷ Tellingly, though “men leave the workforce mainly to reposition themselves for a career change,”⁵⁸ most women reported off-ramping to care for children or other family members.⁵⁹

It is, therefore, important to understand the various reasons women leave the workforce when children arrive and the long-term effects of doing so. Some of the reasons women leave work are not difficult to predict. It is tempting (and comforting) to imagine a romantic scene in which mothers are so drawn to their newborn infants and young children that they cannot bear to be away from them. And it is certainly the case that some women with the financial means to

50. See WILLIAMS, *supra* note 13, at 2 (stating that 90% of women become mothers during their lifetimes).

51. *Id.*

52. See, e.g., AM. ASS’N OF UNIV. WOMEN, *supra* note 48; HEWLETT ET AL., *supra* note 2; Light & Ureta, *supra* note 1.

53. Parker, *supra* note 1.

54. See COHN, LIVINGSTON & WANG, *supra* note 18, (“The share of mothers who do not work outside the home rose to 29% in 2012, up from a modern-era low of 23% in 1999, according to a new Pew Research Center analysis of government data. This rise over the past dozen years represents the reversal of a long-term decline in ‘stay-at-home’ mothers that had persisted for the last three decades of the 20th century.” (footnotes omitted)).

55. *Id.* (citing Sharon R. Cohany & Emy Sok, *Trends in Labor Force Participation of Married Mothers of Infants*, MONTHLY LAB. REV., Feb. 2007, at 9).

56. Bertrand, Goldin & Katz, *supra* note 1, at 234.

57. Hewlett & Luce, *supra* note 20, at 44–45.

58. *Id.* at 45.

59. *Id.* at 44. Nearly half of the women who off-ramped in Hewlett’s study cited children as a primary reason for doing so; another 24% cited the need to care for another, such as an elderly parent. *Id.* at 45.

do so wish to stay home with their children.⁶⁰ But for many other mothers, the decision to leave the workforce is far more complex, consisting of a series of push factors and pull factors.⁶¹

Beyond the desire to spend more time with their children, there are far less romantic pull factors. The decision to allow a non-parent to care for her children is not one that mothers take lightly. Instead, mothers are confronted with media reports suggesting (to name just some conflicted findings) that too much day care might undermine their relationship with their child,⁶² endanger their child's ability to form later relationships,⁶³ and increase their child's chances of having behavioral difficulties, anxiety, or hyperactivity.⁶⁴ Moreover, evidence suggests that the large majority of U.S. childcare facilities provide mediocre care.⁶⁵ The small percentage of facilities providing care assessed as high quality are often very expensive,⁶⁶ sometimes boast very long waitlists,⁶⁷ and may not even accept newborn children.⁶⁸ Furthermore, a new mother will soon discover that children are frequently ill and require parental care, leaving one expert to opine that some mothers are just "one sick child away from being fired."⁶⁹

60. See Kim Parker & Wendy Wang, *Modern Parenthood: Roles of Moms and Dads Converge as They Balance Work and Family*, PEW RES. CTR.: SOC. & DEMOGRAPHIC TRENDS (Mar. 14, 2013), <http://www.pewsocialtrends.org/2013/03/14/modern-parenthood-roles-of-moms-and-dads-converge-as-they-balance-work-and-family> [https://perma.cc/U8NS-D5N7] ("The rise in the share of mothers saying they would prefer to work full time since 2007 has been more pronounced among working mothers themselves than among those who do not work outside of the home.").

61. See *supra* note 4 and accompanying text.

62. See, e.g., Jay Belsky, *Early Day Care and Infant-Mother Attachment Security*, ENCYCLOPEDIA ON EARLY CHILDHOOD DEV. (Oct. 2009), <http://www.child-encyclopedia.com/child-care-early-childhood-education-and-care/according-experts/early-day-care-and-infant-mother> [https://perma.cc/3KT6-FM6A].

63. See, e.g., Maria Magher, *The Negative Effects of Day Care on Children*, LIVESTRONG (Aug. 12, 2005), <http://www.livestrong.com/article/234110-negative-effects-of-day-care-on-children> [https://perma.cc/J4QD-7T8D].

64. Amelia Gentleman, *The Great Nursery Debate*, GUARDIAN (Oct. 1, 2010, 7:05 PM), <https://www.theguardian.com/lifeandstyle/2010/oct/02/nurseries-childcare-pre-school-cortisol> [perma.cc/7RML-TT2F].

65. NAT'L INST. OF CHILD HEALTH & HUMAN DEV., *supra* note 5.

66. See CHILD CARE AWARE OF AM., *supra* note 6, at 8.

67. See Shellenbarger, *supra* note 6.

68. This is likely due, in significant part, to the fact that more stringent limitations are placed on infant care facilities (as opposed to facilities that care only for older children) wishing to maintain their state certifications. See CHILD CARE AWARE OF AM., *supra* note 6, at 24. For instance, legally required infant-to-caregiver ratios are far lower than non-infant-to-caregiver ratios. See, e.g., CHILD CARE LICENSING UNIT, ARK. DEP'T OF HEALTH & HUMAN SERVS., MINIMUM LICENSING REQUIREMENTS FOR CHILD CARE CENTERS 14–15 (2006), <http://www.arkansas.gov/childcare/licensing/pdf/Center2-06rev.pdf> [https://perma.cc/5GJ6-PVKV] (requiring staff-to-child ratio of 1:6 for infants less than eighteen months; 1:9 for children between eighteen and thirty-six months; 1:12 for ages two-and-a-half through three years; 1:15 for four year olds; 1:18 for five year olds to kindergarten; 1:20 for kindergarten and above).

69. See generally JOAN C. WILLIAMS, ONE SICK CHILD AWAY FROM BEING FIRED: WHEN "OPTING OUT" IS NOT AN OPTION (2006), <http://www.worklifelaw.org/pubs/onesickchild.pdf> [https://perma.cc/83ZE-J4FA]. Reflecting this, childcare providers sometimes offer "back-up" childcare services that come at a high surcharge if a mother, for instance, finds her child ill in the morning and unable to attend her normal day care. One of many examples of such care in this author's resident area of Seattle, Bright

Moreover, behind most pull factors “is the pervasiveness of a highly traditional division of labor,”⁷⁰ well-known among experts as the “second shift.”⁷¹ In her groundbreaking book, first published in 1989, Professor Arlie Hochschild of the University of California, Berkeley, coined the term “second shift” to explain the “double day” that working women typically endure and to contrast the single shift of many working men.⁷² Women, she found, were typically in charge of the lion’s share of household tasks once the working day was complete.⁷³ Stunningly, Hochschild found that, once paid and unpaid (that is, household) work were combined, “women worked roughly fifteen hours longer each week than men” so that “[o]ver a year, [women] worked an extra month of twenty-four-hour days.”⁷⁴ Hochschild also found that “[e]ven when couples share[d] more equitably in the work at home, women d[id] two-thirds of the *daily* jobs . . . like cooking and cleaning—jobs that fix[ed] them into a rigid routine,” whereas men took on tasks, such as repairing broken items that could be performed when convenient.⁷⁵

Economists Joni Hersch and Leslie Stratton have more recently documented that women spend substantially more time on housework, particularly on routine tasks such as cooking and cleaning.⁷⁶ Other studies have shown that, although the second shift has probably shortened considerably since Hochschild’s original work, it remains “alive and well,” at least among heterosexual couples.⁷⁷ Melissa Milkie and others, for instance, find that women still spend an additional five hours per week on household chores.⁷⁸ This may not add up to an extra month of twenty-four hour days per year, but it still adds up to an extra month of eight-hour workdays. Thus, the demands of childrearing, anxiety

Horizons “provides families with a safety net for those days when regular day care, child care, or elder care arrangements fall through.” *Back-Up Care Programs: Emergency Child Care, Adult & Elder Care*, BRIGHT HORIZONS, <http://www.brighthorizons.com/programs/back-up-care> [https://perma.cc/9WJP-Q9VV].

70. Hewlett & Luce, *supra* note 20, at 44.

71. See generally HOCHSCHILD ET AL., *supra* note 8.

72. *Id.* at 3–4.

73. *Id.* at 4.

74. *Id.* (emphasis omitted).

75. *Id.* at 8–9.

76. Hersch & Stratton, *Married Workers*, *supra* note 10, at 293–94, 301.

77. HEWLETT ET AL., *supra* note 2, at 18. For a recent discussion of housework allocation among LGBTQ couples, see Nicole Civettini, *Housework as Non-Normative Gender Display Among Lesbians and Gay Men*, 74 SEX ROLES 206 (2016). Evidence seems to suggest that arrangements may be more equitable among homosexual couples. See *id.*; see also HOCHSCHILD ET AL., *supra* note 8, at 5.

78. Milkie et al., *supra* note 10, at 498 (also finding that while it is more common today than in the past for dual earner couples without children to share household tasks more equitably, this equity often fails to persist once children arrive); see also Hersch & Stratton, *Married Workers*, *supra* note 10; Maani & Cruickshank, *supra* note 10; Trond Petersen, Andrew M. Penner & Geir Høgsnes, *The Male Marital Wage Premium: Sorting vs. Differential Pay*, 64 INDUS. & LAB. REL. REV. 283, 285 n.2 (2011) (“In the United States, average household work for married women decreased from 34 to 19.5 hours per week between 1965 and 1995 whereas among married men it increased from 5 to 10.5 hours.”).

about locating and affording external care, and the second shift create a powerful combination of factors that pull new mothers away from the workforce.

Nevertheless, these factors still represent only part of the overall picture. Women also heavily weigh push factors in their decision to leave the workplace. Faced with too-short maternity leaves, too-long hours, and inflexible work schedules,⁷⁹ many mothers feel it is too hard to balance work with childcare duties and their second shifts. In fact, women in the business sector report that, although pull factors are strong, even stronger is the feeling of being pushed away by their jobs.⁸⁰

Added to the list of push factors are the staggeringly high costs that come with working full time and having children. In the United States, childcare costs typically constitute one of the highest costs in a household budget⁸¹ and can exceed the costs of in-state college tuition and rent.⁸² In the ten highest-cost states, the average cost of placing one infant in a day care facility ranges between \$11,201 and \$17,062 per year.⁸³ In the ten states deemed “least affordable,” the average cost of day care for one infant represents between 46.9% and 53.6% and between 14.1% and 15.2% of the median salaries of a single parent and married couple, respectively.⁸⁴ The average cost for two preschool children in a day care center in these states ranges between \$19,000 and \$29,000.⁸⁵ One survey estimated the average cost of day care for two preschool-aged children in America is \$18,000.⁸⁶

Given these high costs, some women report that even though they need additional income, they cannot find work that would even cover childcare costs.⁸⁷ In fact, in a recent survey, one-quarter of families reported that they had “put themselves in debt—or further debt—to pay for child care.”⁸⁸ To put these childcare costs in perspective, the Center for American Progress reported that “[f]amilies living below the poverty line who pay for child care spend an average of 36 percent of their annual income on child care.”⁸⁹ The twenty-fifth

79. See *supra* notes 11–13.

80. See HEWLETT ET AL., *supra* note 2, at 20.

81. CHILDCARE AWARE OF AM., *supra* note 6, at 31 & fig.3; see also Tara Siegel Bernard, *Choosing Child Care When You Go Back to Work*, N.Y. TIMES (Nov. 22, 2013), <http://www.nytimes.com/2013/11/23/your-money/choosing-child-care-when-you-go-back-to-work.html> [<https://perma.cc/6AKM-ZFAP>].

82. CHILDCARE AWARE OF AM., *supra* note 6, at 31 & fig.3.

83. *Id.* at 24 tbl.3.

84. *Id.* at 27 tbl.4.

85. *Id.* at 61 app. V.

86. Tiffany Smith, *The Cost of Child Care — 2014 Care.com Report*, CARE.COM (2014), <https://www.care.com/c/stories/6812/the-cost-of-child-care-2014-carecom-repor/> [<https://perma.cc/D4W5-D7HZ>].

87. Jillian Berman, *When Being a Stay-at-Home Mom Isn't a Choice*, HUFFINGTON POST: BUSINESS (June 30, 2014, 7:32 AM), http://www.huffingtonpost.com/2014/06/30/stay-at-home-moms_n_5537503.html [<https://perma.cc/G4FT-D7BD>] (“[F]or a growing number of women, staying home is not a choice. More mothers say they’re staying home because they can’t find work that pays for the rising cost of child care. Many simply can’t find a job at all.”).

88. Katie Bugbee, *How Much Does Child Care Cost?*, CARE.COM, <https://www.care.com/c/stories/2423/how-much-does-child-care-cost/> [<https://perma.cc/C83M-NL8K>].

89. MADOWITZ, ROWELL & HAMM, *supra* note 17, at 2.

percentile earnings for a teacher are shy of \$44,000.⁹⁰ Thus, a mother earning this income would have to spend over 40% of her *pre-tax* income if she were to send two small children to day care at the average cost in the ten most expensive states. A woman earning in the twenty-fifth percentile wages as a social worker will earn \$33,000,⁹¹ so the average cost of day care for two preschool-aged children in these states would represent over 50% of her salary.

With costs this high, many families in the lower and middle classes are left “to choose between spending a sizable portion of their paycheck on child care, finding less expensive—and possibly lower quality—unregulated child care, or leaving the workforce to become a full-time caregiver,”⁹² until their children reach preschool age. They are “stuck in a financial catch-22, with too little income today to afford child care that can sustain careers . . . and provide a measure of financial security for the rest of their lives.”⁹³

Time-crunched working parents will also find themselves racking up costs besides those associated with childcare, such as the costs of commuting,⁹⁴ purchasing work attire,⁹⁵ and (perhaps more controversially) costs of outsourcing some portion of the second shift by hiring service providers to help with household tasks.⁹⁶ And this is before taxes are taken into account. As will be discussed further in Part III, the tax laws add several more push factors to the already formidable lineup of factors new working mothers face when having children.

Considering this array of push and pull factors, the initial decision to leave the workforce is a complicated one for many new mothers. That complexity stands in sharp contrast to the way in which the media has sometimes portrayed

90. Bureau of Labor Statistics, *May 2015 National Occupational Employment and Wage Estimates United States*, U.S. DEP’T. OF LAB., https://www.bls.gov/oes/current/oes_nat.htm [<https://perma.cc/M5VF-AAHX>].

91. *Id.*

92. MADOWITZ, ROWELL & HAMM, *supra* note 17, at 1; *see also* Drew DeSilver, *Rising Cost of Child Care May Help Explain Recent Increase in Stay-at-Home Moms*, PEW RES. CTR.: FACTTANK (Apr. 8, 2014), <http://www.pewresearch.org/fact-tank/2014/04/08/rising-cost-of-child-care-may-help-explain-increase-in-stay-at-home-moms/> [<https://perma.cc/4M6V-JMWT>] (opining that the recent uptick in stay-at-home mothers involves inability to cover high childcare costs at moderate or low salaries).

93. MADOWITZ, ROWELL & HAMM, *supra* note 17, at 1.

94. Census data estimates that the average American worker commutes 25.1 minutes to work each way. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, *COMMUTING IN THE UNITED STATES: 2009*, at 2 (2011), <https://www.census.gov/prod/2011pubs/acs-15.pdf> [<https://perma.cc/QR55-8M7U>]. One survey estimated that average costs of commuting are \$2,600. Citi, *Citi ThankYou Premier Commuter Index Reveals U.S. Consumers Spend an Average of \$2,600 per Year on Their Commute*, PR NEWswire (June 08, 2015, 9:00 AM), <http://www.prnewswire.com/news-releases/citi-thankyou-premier-commuter-index-reveals-us-consumers-spend-an-average-of-2600-per-year-on-their-commute-300095179.html> [<https://perma.cc/5FKE-Y9NQ>].

95. *See* Robert Cage, *Spending Differences Across Occupational Fields*, 133 MONTHLY LAB. REV. 37 (1989).

96. In the words of Arlie Hochschild, to balance a full-time career and the demands of young children, working mothers may need to develop an “outsourced self.” *See generally* ARLIE RUSSELL HOCHSCHILD, *THE OUTSOURCED SELF* (2012) (discussing how working parents have to outsource and thus pay for various services that one traditionally performs themselves).

matters.⁹⁷ For instance, in 2003, a highly publicized article in the *New York Times* drew great attention to the so-called “Opt-Out Revolution”⁹⁸ among college-educated women, “embrac[ing] [the opt-out trend] with enthusiasm, promoting the alleged peace and comfort offered by a return [to motherhood]” in terms of personal choice, and seeming to “accept[] at face value the blithe assertion of its . . . subjects that they could always go back to work if and when they wanted to.”⁹⁹

Although spurring an important conversation, *The Opt-Out Revolution* and other media articles that followed in its path¹⁰⁰ have now been criticized for greatly oversimplifying the situation faced by new mothers in America, for giving “short shrift to the potential barriers to reentry and the economic vulnerability of women who depend on husbands to support them,” and for ignoring “the long-term implications of that choice.”¹⁰¹ As the above discussion shows, rather than referring to mothers as opting out, it is often far more accurate (and fair) to describe mothers as being squeezed out by high costs, inflexible work places, and persistent hetero-masculine norms.

As Part II will show, the decision to leave the workforce, even for short periods of time, can come with high financial and personal costs. The current reality faced by new mothers creates an array of problems that warrant government intervention. Part II will argue that some of this intervention might be accomplished through a modification of the tax laws.

II. THE CASE FOR GOVERNMENT INTERVENTION THROUGH THE TAX CODE

A. THE FINANCIAL AND PERSONAL COSTS OF LEAVING THE WORKFORCE

When a mother leaves the workforce, it will have financial impacts beyond the income she foregoes during her time out. For instance, time out of the workforce will affect the retirement savings new mothers are able to personally accrue.¹⁰² With respect to Social Security benefits, for instance, when a worker retires, benefits will depend on the highest thirty-five years of earnings—the

97. See generally Arielle Kuperberg & Pamela Stone, *The Media Depiction of Women Who Opt Out*, 22 GENDER & SOC. 497 (2008).

98. Belkin, *supra* note 3.

99. BENNETTS, *supra* note 3, at 34. To illustrate one example from the article itself, Belkin writes: “Talk to any professional woman who made this choice [to opt out], and this is what she will say. She is not her mother or her grandmother. She has made a temporary decision for just a few years, not a permanent decision for the rest of her life. She has not lost her skills, just put them on hold.” Belkin, *supra* note 3.

100. See, e.g., Claudia Wallis, *The Case for Staying Home: Why More Young Moms Are Opting Out of the Rat Race*, TIME, Mar. 22, 2004, at 51.

101. BENNETTS, *supra* note 3, at 34.

102. Of course, women are entitled to spousal benefits. Divorced spouses receive different benefits. See *Retirement Planner: If You Are Divorced*, SOC. SECURITY ADMIN., <https://www.ssa.gov/planners/retire/divspouse.html> [<https://perma.cc/4UJA-A6B3>]. But this Article focuses on the benefits women can accrue personally for their work. See, e.g., Staudt, *supra* note 8, at 1597 n.105 (expressing concerns about women having to be reliant on spousal benefits).

higher the earnings, the higher the benefits.¹⁰³ If a mother has “less than 35 years of earnings (for example, [she was] laid off and out of work for three years during [her] working years),” the Social Security Administration “will average in zeros for any years less than 35” resulting in her “Social Security retirement benefit [being] lower, due to the zero earning years.”¹⁰⁴ To remedy this, a mother would have to work additional years to have thirty-five years of non-zero earnings, increasing the age at which she retires. Time out of the workforce will also affect the Medicare benefits—which depend directly on Social Security credits earned¹⁰⁵—and disability benefits—which require that one has worked a certain amount of years and accrued a sufficient amount of credits (based on income earned in the external workforce) prior to the disability claim—to which a mother is entitled.¹⁰⁶

Moreover, a mother that leaves the workforce may find it is far more difficult to return than she expects, so her career interruption may be longer than she wants or can afford. This will only compound the loss of Social Security and other benefits just discussed. In its follow up article, *The Opt-Out Generation Wants Back In*, the *New York Times* tracked the women who off-ramped their careers in the *Opt-Out Revolution* and found that, although many of these opt-out moms wanted to return to work, they were finding it difficult to do so.¹⁰⁷ The Hewlett Study found that 93% of the professional women studied wished to return to work after off-ramping.¹⁰⁸ Unfortunately, only 74% of women who tried to on-ramp actually attained employment and only 40% found full-time jobs.¹⁰⁹

Data about hiring practices helps explain why it can be so difficult for mothers to reenter the workforce. To start, studies have concluded that employers are less likely to hire mothers compared with childless women, even without

103. SOC. SECURITY ADMIN., PUB. NO. 05-10070, YOUR RETIREMENT BENEFIT: HOW IT'S FIGURED (2016). For a more detailed explanation of how earnings are calculated, see SOC. SECURITY ADMIN., PUB. NO. 05-10072, HOW YOU EARN CREDITS (2016) [hereinafter PUB. NO. 05-10072].

104. *My Retirement Paycheck: How Are Social Security Benefits Calculated?*, NAT'L ENDOWMENT FOR FIN. EDUC., <http://www.myretirementpaycheck.org/social-security/how-are-benefits-calculated.aspx#> [<https://perma.cc/AH4V-C8QW>]; see also Staudt, *supra* note 8, at 1597–98 (explaining the effects of career interruptions on Social Security and other benefits). For details about Medicare and Social Security taxes, see *infra* note 205.

105. “The Social Security credits [a mother] earn[s] also count toward eligibility for Medicare when [she reaches] age 65.” PUB. NO. 05-10072, *supra* note 103, at 6.

106. *Id.* at 4–5.

107. Judith Warner, *The Opt-Out Generation Wants Back In*, N.Y. TIMES MAG. (Aug. 7, 2013), <http://www.nytimes.com/2013/08/11/magazine/the-opt-out-generation-wants-back-in.html?pagewanted=all> [<https://perma.cc/7NQW-V5G9>] (“Among the women I spoke with, those who didn’t have the highest academic credentials or highest-powered social networks or who hadn’t been sufficiently ‘strategic’ in their volunteering (fund-raising for a Manhattan private school could be a nice segue back into banking; running bake sales for the suburban swim team tended not to be a career-enhancer) or who had divorced, often struggled greatly.”).

108. HEWLETT ET AL., *supra* note 2, at 15.

109. *Id.*

career interruptions.¹¹⁰ For instance, in one study researchers gave subjects résumés with similar qualifications. When nothing indicated parental status, the résumés were rated the same. But when one résumé indicated that the subject was a mother through the addition of a Parent Teacher Association (PTA) membership and the other did not, “participants recommend[ed] 84% of the female nonmothers for hire, [but] recommend[ed] a significantly lower 47% of mothers.”¹¹¹

Mothers are also limited by the broader forces all women face when seeking employment. Economists Claudia Goldin and Cecilia Rouse found that female musicians were 50% more likely to “advance[] from certain preliminary rounds” when auditions were conducted behind a screen than when they were conducted face to face and that “the screen . . . increase[d] by severalfold the likelihood that a woman will be selected in the final round.”¹¹² Gapjumpers, an innovative company that devises software to foster blind résumé screening, reports (noting their own financial interest in the data results) that when companies “us[ed] conventional résumé screening, about a fifth of applicants who were not white, male, able-bodied people from elite schools made it to a first-round interview” but that when companies used “blind auditions, 60 percent did.”¹¹³

For mothers that do manage to reenter, studies also suggest that “when employers do make an offer to a mother, they offer her a lower salary than they do other women,” again even without time out of the workforce.¹¹⁴ In the PTA-membership experiment described above, researchers found that “[t]he recommended starting salary for mothers was \$11,000 (7.4%) less than that offered to nonmothers, a significant difference.”¹¹⁵ Another study found a 5% penalty per child after controlling for time out of the workforce.¹¹⁶ Thus, a mother that does manage to get hired may suffer wage penalties even if she has not taken time off work.

One study suggests not only that the wage penalty for motherhood exists across income and education levels, but that, troublingly, the motherhood penalty may be larger for mothers that have only a high school level education compared to those that have attained higher levels of education.¹¹⁷ One researcher writes that “[e]xisting survey analyses have found a motherhood

110. Correll, Benard & Paik, *supra* note 22, at 1316 & tbl.1.

111. *Id.* at 1316.

112. Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 738 (2000).

113. Claire Cain Miller, *Is Blind Hiring the Best Hiring?*, N.Y. TIMES MAG. (Feb. 25, 2016), https://www.nytimes.com/2016/02/28/magazine/is-blind-hiring-the-best-hiring.html?_r=0 [https://perma.cc/U9NC-SUFH].

114. AM. ASS’N OF UNIV. WOMEN, *supra* note 48, at 9.

115. Correll, Benard & Paik, *supra* note 22, at 1316.

116. Budig & England, *supra* note 23, at 204–06.

117. See Deborah J. Anderson, Melissa Binder & Kate Krause, *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility*, 56 INDUS. & LAB. REL. REV. 273, 286–89 (2003).

penalty across a wide range of occupations and jobs,”¹¹⁸ although more research would be useful to tease out differences between occupations more precisely. By contrast, some studies have found that fatherhood has the opposite effect on men’s earnings, creating a “fatherhood bonus.”¹¹⁹

Still other studies show career interruptions may further reduce one’s earning potential, especially in certain industries.¹²⁰ For instance, one study found that “the cost of career interruptions is very great in the corporate and financial sectors,”¹²¹ even though career interruptions tend to be brief in these fields. “[T]he average woman [with an MBA degree] spends 0.28 years out of work by year six, and 0.57 years out of work by year nine.”¹²² In the Hewlett Study, the average professional woman left the workforce for only 2.2 years before attempting to reenter,¹²³ but even this short off-ramp resulted in a sizeable reduction in her annual earnings. The Hewlett Study found that highly qualified women who left the workforce for just a year or less see their earnings drop by 11%.¹²⁴ Off-ramps of three years or more resulted in a 37% penalty.¹²⁵

Thus, time periods out of the workforce can cost a new mother (sometimes far) more than the income she foregoes in her expected years out. As Joan Williams, the director of the Center of WorkLife Law at the University of California, Hastings College of Law, puts it: “These statistics dramatise the grim fact that women who take a career break are penalised out of proportion to any objective deterioration of their skills.”¹²⁶ Although childless females may hit the much talked about glass ceiling, most mothers never even get close to it¹²⁷ and are hit with motherhood wage penalties and the maternal wall.¹²⁸

An economist might respond that new mothers should, therefore, take all of these costs into account when coming to an “economically rational” decision

118. Correll, Benard & Paik, *supra* note 22, at 1333 (“[T]he magnitude of the effect likely varies with the job type.”).

119. MICHELLE J. BUDIG, *THE FATHERHOOD BONUS AND THE MOTHERHOOD PENALTY: PARENTHOOD AND THE GENDER GAP IN PAY* 9–13 (2004), http://s3.amazonaws.com/content.thirdway.org/publishing/attachments/files/000/000/198/NEXT_-_Fatherhood_Motherhood.pdf?1412698808 [<https://perma.cc/4WQF-XH5N>]; see also Claire Cain Miller, *The Motherhood Penalty vs. the Fatherhood Bonus: A Child Helps Your Career, If You’re a Man*, N.Y. TIMES: THE UPSHOT (Sep. 6, 2014), <https://www.nytimes.com/2014/09/07/upshot/a-child-helps-your-career-if-youre-a-man.html> [<https://perma.cc/DPD5-JFFW>].

120. See, e.g., James W. Albrecht et al., *Career Interruptions and Subsequent Earnings: A Reexamination Using Swedish Data*, 34 J. HUM. RESOURCES 294 (1999); Moon-Kak Kim & Solomon W. Polachek, *Panel Estimates of Male-Female Earnings Functions*, 29 J. HUM. RESOURCES 406 (1994); Light & Ureta, *supra* note 1; Spivey, *supra* note 1.

121. Dubner, *supra* note 26.

122. Bertrand, Goldin & Katz, *supra* note 1, at 234; see also Spivey, *supra* note 1, at 137 (“This study finds that total nonemployment time has a statistically significant depreciation effect on wages, which corroborates past findings.”).

123. HEWLETT ET AL., *supra* note 2, at 37–38.

124. *Id.* at 38.

125. *Id.*

126. S.M., *supra* note 38 (quoting Williams).

127. Williams & Segal, *supra* note 30, at 77.

128. *Id.* The authors seemed to have coined the term “maternal wall” to capture the tendency of employers to perceive mothers as less competent than comparable non-mothers. See *id.* at 94.

and avoid leaving work despite the high financial (not to mention emotional and personal) costs of doing so. Experts studying the biases mothers face in the workplace understand this calculus too. For instance, Williams encourages “women [to] consult the statistics and really crunch the numbers,” in hopes that new mothers “will be more wary of opting out of the workforce when their babies arrive.”¹²⁹ Similarly, expert Leslie Bennetts urges women to look at the work–life balance as a “fifteen year paradigm,” and to remember that the challenges presented by children are most pronounced for only a portion (perhaps fifteen years) of a lifelong career (perhaps over forty-five years).¹³⁰ In short, despite the often meager short-term prospects of doing so, experts encourage new mothers to remain in the workforce during their children’s preschool years if they want to protect their most valuable long-term financial asset: their career.

But as the Center for American Progress explains: “[T]he costs of child care are concentrated in a few years, while the benefits in earnings are spread out over many years”¹³¹ Some parents “simply cannot afford to pay for the child care they need to keep their careers going strong in their children’s early years.”¹³² Behavioral biases may also help explain why it is too simplistic to ask our “economically rational” mother to simply “do the math.” There is reason to believe that people tend to overinflate present risks and discount future risks and gains.¹³³ Thus, a new mother—like other human beings—may overinflate the present risks of leaving her child in non-parental care (assuming she can secure a spot at a facility with which she feels comfortable). And she may discount the future gains of remaining in the workforce (for example, accrual of retirement, disability, and Medicare benefits) as well as the potential future risks of leaving (for example, difficulty reentering, wage penalties, or her spouse losing his job or falling ill).

Considering that “nearly 90 percent of women become mothers during their working lives,” the situation new mothers face in the American workplace seems wholly “inconsistent with gender equality.”¹³⁴ The next section of this

129. S.M., *supra* note 38.

130. BENNETTS, *supra* note 3, at 128–47.

131. MADOWITZ, ROWELL & HAMM, *supra* note 17, at 6.

132. *Id.*

133. See Gregory S. Berns, David Laibson & George Loewenstein, *Intertemporal Choice—Toward an Integrative Framework*, 11 TRENDS COGNITIVE SCIS. 482, 482–83 (2007) (“Humans . . . have been shown to discount the future hyperbolically.”); George Loewenstein & Richard H. Thaler, *Anomalies: Intertemporal Choice*, 3 J. ECON. PERSP. 181, 182–83 (1989) (discussing various examples of individuals applying high discount rates to future gains); Dilip Soman et al., *The Psychology of Intertemporal Discounting: Why are Distant Events Valued Differently from Proximal Ones?*, 16 MKTG. LETTERS 347, 348 (2005) (“[W]hile past [research in intertemporal choice] cover[s] a wide range of choice situations, there is a remarkable consensus in the literature that future outcomes are discounted (or undervalued) relative to immediate outcomes. Put differently, an identical (positive) outcome will become increasingly attractive the closer it is located in time to the time of decision-making.”).

134. See WILLIAMS, *supra* note 13, at 2.

Part highlights some of the problems to which this reality contributes, building a strong case for government intervention.

B. PROBLEMS THAT DESERVE ADDRESSING

Time out of the external workforce (and the consequences that have been described above) can contribute to severe economic hardships among divorced mothers who became dependent on their ex-spouse's income and their children.¹³⁵ In 2014, the Census Bureau found that 40% of women who head families—that is, non-married women who raise children—lived below the poverty level.¹³⁶ This report came on the heels of a 2009 Census Bureau report finding that only 18% of fathers retained sole custody of their children after divorce¹³⁷ and a 2011 report finding that custodial parents—which are mothers 82% of the time—received only 62% of the child support they were owed.¹³⁸ Making it easier for mothers to remain in the workforce and avoid the costs of time out might help this situation.

Furthermore, “forced” career interruptions create dangers for what some call “intact” families as well.¹³⁹ Women who are unable to reenter the workforce often suffer a severe emotional toll. Many describe a feeling that they have forfeited a sense of identity and equality in their marriage.¹⁴⁰ But the harm extends well beyond the psychological. Married and cohabitant mothers are forced to be economically dependent on their spouses or partners.¹⁴¹ Moreover, as costs continue to rise, two-parent families increasingly require dual incomes to meet their needs.¹⁴² The reduced prospects and earning potential a mother

135. Brendan Lyle, *After Divorce, Women Rebound Faster but Stay in Poverty Longer*, HUFFINGTON POST: THE BLOG (Oct. 22, 2012, 2:34 PM), http://www.huffingtonpost.com/brendan-lyle/after-divorce-women-rebou_1_b_1970733.html [https://perma.cc/ZV96-WBX9] (“According to George Mason University Sociology and law professor Lenore Weitzman in her book ‘The Divorce Revolution,’ a typical woman endures a 73 percent reduction in her standard of living after a divorce. Her typical ex-husband enjoys a 42 percent increased standard of living.”).

136. Alana Eichner & Katherine Gallagher Robbins, *National Snapshot: Poverty Among Women & Families, 2014*, NAT'L WOMEN'S LAW CTR. 2 (Sept. 2015), <http://nwlc.org/wp-content/uploads/2015/08/povertysnapshot2014.pdf> [https://perma.cc/T9L2-2LAC] (showing a poverty rate of 39.8% for female-headed households).

137. TIMOTHY S. GRALL, U.S. DEP'T OF COMMERCE, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2009, at 2 (2011), <http://www.census.gov/prod/2011pubs/p60-240.pdf> [https://perma.cc/7BCB-UMW7].

138. TIMOTHY S. GRALL, U.S. DEP'T OF COMMERCE, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2011, at 11 (2013), <https://www.census.gov/prod/2013pubs/p60-246.pdf> [https://perma.cc/YB2R-TD96].

139. *Your Right to Equal Pay*, THE WHITE HOUSE, <https://www.whitehouse.gov/issues/equal-pay> [https://perma.cc/9SB7-TGEU] (“Equal pay is a family issue. Women make up nearly half of the U.S. labor force and are a growing number of breadwinners in their families. More women are also working in positions and fields that have been traditionally occupied by men. When women are not paid fairly, not only do they suffer, but so do their families.”).

140. See STONE, *supra* note 33, at 145, 148–49.

141. See BENNETTS, *supra* note 3, at 200–45.

142. SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, THE NEW BREADWINNERS: 2010 UPDATE 2 (2012), <https://cdn.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/breadwinners.pdf> [https://perma.cc/9SB7-TGEU].

faces when she attempts to reenter the workforce may deprive families of a not only wanted but also needed stream of income (or reduce that stream of income considerably). This situation can become extremely dangerous for two-parent families if a spouse is unexpectedly laid off or falls ill.

Additionally, the challenges faced by mothers in the workforce surely contribute to women being so severely underrepresented in high leadership positions. To cite one of many studies, the Pew Research Center found that in 2015 “26 women [were] serving as CEOs of Fortune 500 companies (5.2%) [and the] share serving as CEOs of Fortune 1000 companies [was] virtually the same (5.4%).”¹⁴³ Some call this problem the female “brain drain,”¹⁴⁴ while others lament a gender “leadership gap.”¹⁴⁵ Whatever term of art is used, the point is not particularly difficult to comprehend: By allowing this underrepresentation to persist, the group of individuals that shape policies, laws, and corporate culture (to name just a few examples) will lack an extremely important perspective.¹⁴⁶

Furthermore, “forced career interruptions” and their attendant consequences may contribute to what gender pay gap persists in the workforce today. In 1963, when the Equal Pay Act (EPA) was first enacted,¹⁴⁷ women earned about sixty cents for every dollar earned by men.¹⁴⁸ Although the gender pay gap has narrowed, the average woman still earns only 79% of what the average man earns annually.¹⁴⁹ This average statistic can be a source of great contention and all sorts of factors help explain the gap, including that women may prefer different, perhaps lower paying, careers than men.¹⁵⁰

cc/B5H6-GE2N] (“[M]ost children today are growing up in families without a full-time, stay-at-home caregiver. In 2010, among families with children, nearly half (44.8 percent) were headed by two working parents and another one in four (26.1 percent) were headed by a single parent. As a result, fewer than one in three (28.7 percent) children now have a stay-at-home parent, compared to more than half (52.6 percent) in 1975, only a generation ago.”); see also E.J. Dionne Jr., Opinion, *Two-paycheck Couples Are Quickly Becoming the Norm*, WASH. POST (Apr. 18, 2012), https://www.washingtonpost.com/opinions/two-paycheck-couples-are-quickly-becoming-the-norm/2012/04/18/gIQUALSz1RT_story.html [<https://perma.cc/H99H-MJPJ>] (discussing *The New Breadwinners: 2010 Update*, a report written by Sarah Jane Glynn for the Center for American Progress).

143. See *Women in Leadership*, PEW, *supra* note 35.

144. See, e.g., HEWLETT ET AL., *supra* note 2, at 15.

145. See WILSON, *supra* note 35; see also WARNER, *supra* note 35, at 1.

146. See WILSON, *supra* note 35, at 3–10; Glendon, *supra* note 35.

147. Equal Pay Act of 1963, 29 U.S.C. § 206 (2012).

148. Claudia Goldin, *Gender Gap*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2d ed. 2008), <http://www.econlib.org/library/Enc/GenderGap.html> [<https://perma.cc/54TD-BX5F>] (“[B]etween 1950 and 1980, when so many married women were entering the labor force, the ratio of female earnings to male earnings for full-time, year-round employees was virtually constant, at 60 percent.”).

149. *Your Right to Equal Pay*, *supra* note 139; see also U.S. Equal Emp. Opportunity Comm’n, *Public Input into the Proposed Revisions to the EEO-1 Report* (Mar. 16, 2016) (written testimony of Betsey Stevenson, Associate Professor, University of Michigan) (“In 2014, the median woman working full-time, all year, earned only 79 percent of what her male counterpart earned—a gap of more than \$10,000.”); Claudia Goldin, *A Grand Gender Convergence: Its Last Chapter*, 104 AM. ECON. REV. 1091, 1093 (2014) (“The mantra of the women’s movement in the 1970s was ‘59 cents on the dollar’ and a more recent crusade for pay equality has adopted ‘77 cents on the dollar.’”).

150. See Goldin, *supra* note 148 (“What accounts for the difference in earnings between men and women . . . ? [O]bservable factors that affect pay—such as education, job experience, hours of work,

Nevertheless, economist Claudia Goldin finds “that the majority of the current earnings gap comes from *within* occupation differences in earnings rather than from between occupation differences. What happens within each occupation is far more important than the occupations in which women wind up.”¹⁵¹ Furthermore, research finds a remaining pay gap even after accounting for “observable factors that affect pay—such as education, job experience, hours of work, and so on.”¹⁵² Various studies have found motherhood to play a significant role in explaining the gender pay gap not explained by other factors, creating yet another reason to be concerned about the plight of new mothers in the American workforce.¹⁵³

Although studies still find childless females suffer some pay gap,¹⁵⁴ the gap between males and childless females seems to be narrower than the average gap and to be closing over time.¹⁵⁵ By contrast, studies suggest that “the gap between the wages of mothers and others [may have] widened in recent years.”¹⁵⁶ It appears that the wage gap increases with age,¹⁵⁷ and seems to do so “across the spectrum of education and skills.”¹⁵⁸ While women between twenty-five and thirty-five years of age tend to earn 90% of what their male counter-

and so on—explain no more than 50 percent of the wage gap The remainder of the gap—termed the residual—is the part that cannot be explained by observable factors. This residual could result from workers’ choices or, alternatively, from economic discrimination. Surprisingly, the differing occupations of men and women explain only 10–33 percent of the difference in male and female earnings. The rest is due to differences within occupations, and part of that is due to the observable factors.”).

151. Goldin, *supra* note 148, at 1097.

152. See Goldin, *supra* note 148.

153. Jennifer Glass, *Blessing or Curse? Work-Family Policies and Mother’s Wage Growth Over Time*, 31 WORK & OCCUPATIONS 367, 369 (2004) (providing that employed mothers are the group of women accounting for most of the “gender gap” in wages); see also Williams & Segal, *supra* note 30, at 77 (“Sociological studies show that motherhood accounts for an interesting proportion of the wage gap between men and women.”).

154. See U.S. BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN’S EARNINGS IN 2014, at 9 tbl.1 (2015), <https://www.bls.gov/opub/reports/womens-earnings/archive/highlights-of-womens-earnings-in-2014.pdf> [<https://perma.cc/UQH6-DY9T>]; Catalina Amuedo-Dorantes & Jean Kimmel, *The Motherhood Wage Gap for Women in the United States: The Importance of College and Fertility Delay*, 3 REV. ECON. HOUSEHOLD 17, 24 (2005).

155. See WILLIAMS, *supra* note 13, at 2; see also ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED 87 (2001).

156. WILLIAMS, *supra* note 13, at 2; see CRITTENDEN, *supra* note 155; see also Correll, Benard & Paik, *supra* note 22, at 1297 (“In a summary of economic research, Crittenden . . . concludes that, for those under the age of 35, the pay gap between mothers and nonmothers is larger than the pay gap between men and women.”); Jane Waldfogel, *Understanding the “Family Gap” in Pay for Women with Children*, 12 J. ECON. PERSPECTIVES 137, 137 (1998); Jane Waldfogel, *The Family Gap for Young Women in the United States and Britain: Can Maternity Leave Make a Difference*, 16 J. LABOR ECON. 505, 505–06 (1998).

157. AM. ASS’N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 11 (Spring 2017 ed.), http://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The-Simple-Truth [<https://perma.cc/DK7D-JXRY>] (“The gender pay gap also grows with age, and differences among older workers are considerably larger than differences among younger workers.”).

158. COUNCIL OF ECON. ADVISERS, GENDER PAY GAP: RECENT TRENDS AND EXPLANATIONS 4 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/equal_pay_issue_brief_final.pdf [<https://perma.cc/J89E-RTBE>].

parts earn,¹⁵⁹ the gap widens until women reach the age of thirty-five. From age thirty-five to retirement, “women are typically paid 75 to 80 percent of what men are paid.”¹⁶⁰ Explaining why the gender wage gap widens as women approach the age of thirty-five, Massachusetts Institute of Technology economist Lester Thurow has observed: “These are the prime years for establishing a successful career. These are the years when hard work has the maximum payoff. They are also the prime years for launching a family.”¹⁶¹

Studies focused on women with higher education levels find that the wage gap widens after graduation from post-high school programs. One study found that a woman’s earnings one year out of college represented 80% of the earnings of a comparable male.¹⁶² But ten years after graduation, women were estimated to earn only 69% of what similarly situated males are paid.¹⁶³ Other studies suggest that the earnings of male and female MBA graduates¹⁶⁴ and legal graduates¹⁶⁵ also diverge quickly. Motherhood and career interruptions seem to play a significant role in explaining why the gender pay gap widens in this manner.¹⁶⁶

Given this host of problems, the government should consider ways to make it easier for new mothers to “maintain[] at least a foothold in the labor force even when their children are very young.”¹⁶⁷ This desired intervention differs in important ways from already existing government measures that seek to ensure that women receive equal pay for equal work. Since 1963, the EPA has prohibited an employer from paying higher wages to men than women for substantially similar work.¹⁶⁸ But this legislation focuses only on women and men that have managed to stay in the workforce and does nothing to help new parents do so.

159. See BUDIG, *supra* note 119, at 5 (“[A]mong full-time workers, women aged 25 to 34 years earn 90.2 cents on a man’s dollar, but this gap widens precipitously among those aged 35 to 44 to 78 cents and never recovers for any older age group.”); see also AM. ASS’N OF UNIV. WOMEN, *supra* note 48, at 12 (summarizing these statistics).

160. AM. ASS’N OF UNIV. WOMEN, *supra* note 48, at 12–13.

161. HEWLETT ET AL., *supra* note 2, at 38 (quoting Lester C. Thurow, 63 *Cents on the Dollar: The Earnings Gap Doesn’t Go Away*, *Working Mother*, October 1984, at 42, 42).

162. JUDY GOLDBERG DEY & CATHERINE HILL, AM. ASS’N OF UNIV. WOMEN EDUC. FOUND., *BEHIND THE PAY GAP 2* (2007), <https://www.aauw.org/files/2013/02/Behind-the-Pay-Gap.pdf> [<https://perma.cc/5LPC-KSDJ>].

163. *Id.*

164. Bertrand, Goldin & Katz, *supra* note 1, at 229 (“We find that at the outset of their careers, male and female MBAs have nearly identical labor incomes. Their earnings, however, soon diverge. The male annual earnings advantage reaches 30 log points 5 years after MBA completion and almost 60 log points 10 to 16 years after MBA completion.”).

165. Wood, Corcoran & Courant, *supra* note 27, at 422–23 (finding “modest” gap right after graduation that quickly widens); see also Goldin, *supra* note 148, at 1112–13 (finding only small gaps initially but a 55% gap fifteen years after, and a 13% gap even after accounting for career interruptions).

166. Glass, *supra* note 153, at 369 (finding employed mothers to account for most of the gender gap in wages).

167. See Glendon, *supra* note 35.

168. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012).

Of course, the U.S. government could drastically improve the plight of young mothers by following the example of the many other developed nations whose governments provide both services and legal protections to support new mothers. The French government, to cite one of many examples, heavily subsidizes day care facilities for infants starting at three months of age and provides universal, free preschool for all children starting at three years of age, which runs for the entire, normal working day.¹⁶⁹ In this way, France creates extremely affordable and guaranteed childcare options for new working mothers. Many other nations in the European Union and around the globe provide similar programs.¹⁷⁰

By sharp contrast, in the United States, new parents often find themselves on notoriously long waitlists for years before they secure a place in an expensive, privately-run childcare facility.¹⁷¹ The government does make some childcare available to low-income families¹⁷² through programs such as the Early Head Start (EHS) program, a “federally-funded, community-based program that provides comprehensive child and family development services to low-income children under age 3.”¹⁷³ Programs such as EHS, however, are available mostly to families that fall below the poverty level,¹⁷⁴ and recent government investigations suggest that these programs are difficult to access even by those eligible.¹⁷⁵

169. Lundberg, *supra* note 39.

170. See generally Clawson & Gerstel, *supra* note 39.

171. Shellenbarger, *supra* note 6 (“These days, many parents are so intent on getting high-quality care for their kids, that they are signing up at popular child-care centers at the moment they know they are expecting a baby—or before. Some child-care centers don’t even offer applications, but merely hand parents a wait-list form. That means some kids spend the first two years of their lives on a day-care wait list.”).

172. ADMIN. FOR CHILDREN & FAMILIES, OVERVIEW OF 2016 CHILD CARE AND DEVELOPMENT FUND FINAL RULE 1 (2016), https://www.acf.hhs.gov/sites/default/files/occ/ccdf_final_rule_fact_sheet.pdf [https://perma.cc/S7YN-S9ED] (“The Child Care and Development Fund (CCDF) is the primary Federal funding source devoted to providing low-income families that are working or participating in education and training with help paying for child care and improving the quality of care for all children. . . . On November 19, 2014, President Obama signed bipartisan legislation that comprehensively updated the Child Care and Development Block Grant (CCDBG) Act for the first time in nearly twenty years. The law made many important statutory changes focused on strengthening child care to better support the success of both parents and children, while also providing a new emphasis on the importance of providing high-quality early education and care for our youngest learners.”).

173. JAMIE COLVARD & STEPHANIE SCHMIT, EXPANDING ACCESS TO EARLY HEAD START: STATE INITIATIVES FOR INFANTS & TODDLERS AT RISK 2 (2012), <http://www.clasp.org/resources-and-publications/files/ehsinitiatives.pdf> [https://perma.cc/DYP4-HRLU].

174. See Head Start Act § 645, 42 U.S.C. § 9840 (2012). EHS only has 10% of spots available to families above the poverty line. U.S. Dep’t of Health & Human Servs., *Frequently Asked Questions About Head Start*, HEAD START (Feb. 19, 2015), [https://eclkc.ohs.acf.hhs.gov/hslc/hs/directories/apply/Frequently Asked.htm](https://eclkc.ohs.acf.hhs.gov/hslc/hs/directories/apply/Frequently%20Asked%20Questions) [https://perma.cc/GE96-QAEQ] [hereinafter HHS FAQ].

175. Jen Christensen, *Kids, Parents Still Waiting on Head Start*, CNN (Oct. 25, 2010, 1:07 PM), <http://www.cnn.com/2010/US/10/25/headstart.investigation.update> [https://perma.cc/S7YN-S9ED]; see also *Undercover Testing Finds Fraud and Abuse at Selected Head Start Centers: Hearing Before the H. Comm. on Educ. & Labor*, 111th Cong. (2010) (statement of Gregory D. Kutz, Managing Director, Forensic Audits and Special Investigations, U.S. Government Accountability Office), <http://www.gao.gov/assets/130/124660.pdf> [https://perma.cc/4H4R-PF9Y] (“GAO found that most of the 550 Head Start

Unfortunately, the United States does not just lag behind its peer nations in terms of services provided to new mothers. In addition to providing affordable and accessible childcare services to all parents, many developed nations also have strictly enforced, well-normalized legal structures that protect new mothers in the workplace, including mandatory paid maternity or parental leave and work-protected leave. Canada, for instance, requires employers to provide new parents with a full fifty-two weeks of paid leave and to reinstate parents returning from leave to work positions that are comparable to those they left.¹⁷⁶ By contrast, the United States is the only country in the industrialized world that does not require employers to provide any paid parental leave whatsoever.¹⁷⁷ As a matter of fact, of the 183 members of the United Nations, the United States, Suriname, and Papua New Guinea are the only three nations to completely fail to mandate any paid parental leave.¹⁷⁸

This is not to dismiss small steps in the right direction. During the most recent presidential election season, for instance, both Democratic presidential candidate Hillary Rodham Clinton and now Republican President Donald J. Trump recognized the need for paid parental leave.¹⁷⁹ But paid parental leave hardly represents a comprehensive plan to combat the complex problems faced by mothers in the workplace. Even a standalone law guaranteeing some amount of paid parental leave comes nowhere close to providing the array of services and legal protections that other nations provide.

In short, the United States falls far short of many other developed nations when it comes to protecting working mothers, and there is little reason to believe that the United States will follow the lead of these nations any time soon. This reality is limiting, but it does not foreclose opportunities for improving the work prospects of new mothers. The next Part of this Article considers

centers contacted had wait lists. GAO also found that 2 centers where it enrolled fictitious children later became full and developed wait lists after the fictitious children had been withdrawn. Only 44 centers reported that they had openings. GAO interviewed families on wait lists from other centers and found that many stated that their incomes were at or below the federal poverty level.”).

176. See Canada Labour Code, R.S.C. 1985, c. L-2 s. 204–206.

177. See Kim, *supra* note 11.

178. See *id.* One-quarter of women in the United States take a mere two weeks of maternity leave before returning to work. See Danielle Paquette, *The Shocking Number of New Moms Who Return to Work Two Weeks After Childbirth*, WASH. POST (Aug. 19, 2015), https://www.washingtonpost.com/news/work/wp/2015/08/19/the-shocking-number-of-new-moms-who-return-to-work-two-weeks-after-childbirth/?utm_term=.895296113922 [<https://perma.cc/QZT6-LXH6>].

179. See DONALD J. TRUMP FOR PRESIDENT, CHILD CARE REFORMS THAT WILL MAKE AMERICA GREAT AGAIN (2016), https://assets.donaldjtrump.com/Childcare_Reform.pdf [<https://perma.cc/WX9H-SFUR>]; PAID FAMILY AND MEDICAL LEAVE, HILLARY CLINTON FOR PRESIDENT, <https://www.hillaryclinton.com/issues/paid-leave> [<https://perma.cc/H3J8-A3CC>]. The Clinton campaign also released a video on Mother’s Day which touted Clinton’s commitment to fighting for paid family leaving, citing her own mother and daughter as aspirations: “At a time that should be so exciting and joyful, I see so many women who are just distraught. . . . They have to immediately go back to work. They don’t know how they’re going to manage.” See Caroline Balogna, *Hillary Clinton Calls for Paid Family Leave In Mother’s Day Campaign Video*, HUFFINGTON POST (May 11, 2015, 1:57 PM), http://www.huffingtonpost.com/2015/05/11/hillary-clinton-paid-family-leave-mothers-day_n_7257370.html [<https://perma.cc/U3ZF-66W4>].

how tax laws might be changed to help some new mothers who wish or need to stay in the workforce to avoid taking time off when their children first arrive.

There are reasons to be optimistic that tax reforms could be successful in doing this. Studies on labor supply elasticities—that is, studies that examine how a change in income affects a person’s workplace participation—suggest that a new mother seriously considers her after-tax wages when deciding how or whether to work outside the home. Summarizing the research, one expert explains: “At least for males, it is fair to say that most economists believe labor supply elasticities are small.”¹⁸⁰ Thus, when the average male is offered an additional increment of income (or suffers an incremental reduction in pay), studies suggest that his working patterns do not change very much—that is, his labor supply elasticity is low.¹⁸¹ By contrast, “[f]or women . . . it is fair to say that most studies find large labor supply elasticities, especially on the participation margin.”¹⁸² Put another way, “hours of market work and the formal childcare demands of mothers with preschool-aged children are highly sensitive to changes in net wages and the costs of bought-in childcare.”¹⁸³ These studies, therefore, suggest that even small tax savings (resulting in even small increases in take-home pay) might increase the chances that a new mother will feel she is able to remain in the workforce, should she so desire.

III. TAX REFORMS THAT KEEP THE NEW MOTHER’S FOOT IN THE DOOR

As discussed in the previous Parts, a mother’s choice to leave the workforce can result in financial and personal costs that extend well beyond the income foregone during her intended time out. This Part considers ways in which the IRC could be modified to make it more feasible for some new mothers to

180. Michael P. Keane, *Labor Supply and Taxes: A Survey*, 49 J. ECON. LITERATURE 961, 961 (2011) (surveying studies finding that women have far greater elasticities of income and labor than men); see also MARK R. KILLINGSWORTH, *LABOR SUPPLY* 205 (1983) (“[R]esearch indicates that structural responses (income and substitution effects) are considerably greater for women than for men.”); James J. Heckman, *What Has Been Learned About Labor Supply in the Past Twenty Years*, 83 AMER. ECON. REV. 116, 117 (1993) (acknowledging that traditionally women are considered to have higher income and wage elasticities than men). But see Bradley T. Heim, *The Incredible Shrinking Elasticities: Married Female Labor Supply, 1978–2002*, 42 J. HUM. RESOURCES 881, 905 (2007) (suggesting more recently that elasticities of married women have fallen).

181. For a somewhat concise definition of elasticity, see, for example, Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1921–22 (1987) (“The responsiveness of individuals to changes in their wage rates (with total wealth held constant) is measured by the compensated elasticity of the labor supply. A high compensated elasticity indicates that the wage rate has a substantial effect on work effort so that individuals will work fewer hours if their effective wage rate is reduced by an income tax. A low compensated elasticity indicates that work effort is only slightly affected by changes in the wage rate” (footnote omitted)).

182. Keane, *supra* note 180, at 961.

183. Patricia Apps et al., *Labor Supply Heterogeneity and Demand for Child Care of Mothers with Young Children* 3 (Institute for the Study of Labor (IZA), Discussion Paper No. 7007, 2012) (“A policy simulation suggests that labor force participation and hours of market work would increase substantially in a fiscal system based solely on individual rather than joint taxation.”).

remain at work when their children are born. To be clear, in doing so, this Article does not make the judgment that it is better for mothers to work. Women who wish to be home with their children should be fully supported in making this personal decision, and mothers who want or need to work should receive support, too. This Article specifically addresses these latter women.

As discussed in Part I, the decision to leave the workforce is an extremely complicated one for new mothers, consisting of a series of push and pull factors. At present, the IRC perversely *adds* to the already lengthy list of push factors that make it difficult for new mothers to remain in the workforce by overtaxing them on their postpartum earnings. The next section proposes modifications to the Code that would allow new parents to recover more of their work-related childcare expenses than the tax law currently allows. Section III.B considers whether new parents should be allowed to recover other traditionally nondeductible but work-related costs of earning income.

It is important to recognize the limitations of these proposals. Families that do not have sufficient taxable income or tax liability will be unable to fully benefit from the corrections proposed in this Part, unless tax relief measures are made refundable. This situation may be especially true for single mothers. This does not change the fact that new mothers with sufficient income should not be overtaxed on their postpartum earnings. But nothing in this Article is meant to suggest that lawmakers should not also focus on the even more dire situations of these other parents—it most certainly should and with extremely high priority. Section III.C addresses the situation of new mothers in lower income classes.¹⁸⁴

Section III.D concludes this Part by looking at current tax laws that encourage long-term investment and imagining what the Code might look like were Congress to take seriously the goal of encouraging new mothers to invest in their careers the way it encourages other taxpayers to make other long term investments.

A. TREATING WORKING CHILDCARE COSTS LIKE OTHER COSTS OF EARNING INCOME

Currently, the IRC strictly limits the ability of parents to claim tax relief for childcare costs incurred while working. This section argues that under fundamental principles of taxation, these limitations are too severe and cause the earnings of new mothers to be over-taxed. It explores ways to loosen these limitations and reduce the extent to which the tax laws push new mothers out of the workplace.

1. Allowing Greater Recovery of Working Childcare Costs

To properly tax her net profit, a taxpayer may generally deduct her costs of earning income. For example, § 162 of the IRC allows taxpayers to deduct all of

184. Reflecting this organization, the hypotheticals in sections III.B and III.C involve married families that do not qualify for the Earned Income Tax Credit (EITC), discussed more fully in section III.D.

“the ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business,”¹⁸⁵ and § 212 allows taxpayers to deduct the “ordinary and necessary expenses” incurred for any profit seeking activity,¹⁸⁶ even if the activity is not quite “regular” enough to rise to the level of a trade or business.¹⁸⁷ Thus, if a taxpayer earns \$30,000 working at her café this year, but incurs \$18,000 paying storefront rent, utilities, and employee salaries, she may reduce her taxable income to \$12,000.

By contrast, taxpayers are generally unable to deduct consumptive expenses, such as costs incurred to purchase clothing, a Netflix subscription, or a FitBit watch.¹⁸⁸ This makes sense. When a taxpayer chooses to engage in these latter exchanges, she simply transforms cash (or other property) into goods or services that she believes are worth the revenue she has foregone. A deduction for the purchase price, therefore, would be inappropriate, as she has not suffered a decrease in wealth as a result of the purchase. In some instances, the IRC deviates from these general principles by allowing taxpayers to deduct designated non-consumptive costs, but it generally subjects these deductions to a variety of limitations.¹⁸⁹

Instead of treating the childcare costs incurred by working parents as deductible costs of earning income, the IRC treats these costs as personal, consumptive expenses, subject to severe limits. Once these limitations are applied, working parents will often receive tax relief for only a small fraction of the childcare costs they actually incur. Currently, the IRC provides two mechanisms by which a taxpayer may reduce her taxable income to reflect childcare costs

185. I.R.C. § 162 (2012).

186. I.R.C. § 212 (2012).

187. *See, e.g.,* *Higgins v. Comm’r*, 312 U.S. 212 (1941) (applying general rule that a taxpayer may be engaged in a trade or business if his activities are extensive, regular, continuous, and undertaken with the intent to earn a profit.).

188. I.R.C. §§ 262, 274 (2012). This tenet derives from the Haig-Simons definition of income, which generally provides that income is the sum of one’s consumption (for example, costs of purchasing goods for personal enjoyment) and accumulation (for example, savings). *See* Robert Murray Haig, *The Concept of Income—Economic and Legal Aspects*, in *READINGS IN THE ECONOMICS OF TAXATION* 54 (Richard A. Musgrave & Carl S. Shoup eds., 1959) (arguing that income is consumption plus accumulation); *see also* William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 *HARV. L. REV.* 309, 330 (1972) (“The adjustments by which taxable income can be made to give a more refined reflection of aggregate personal consumption and accumulation may be positive or negative. If a substantial item of personal consumption is enjoyed without any cash expenditure, then the appropriate adjustment is to add the value of that item to money income. On the other hand, if the concept of consumption is elaborated in a way that does not include some items for which money is spent, then the appropriate adjustment is to deduct the amount of those expenditures from money income.”); Boris I. Bittker, A “*Comprehensive Tax Base*” as a Goal of Income Tax Reform, 80 *HARV. L. REV.* 925, 929 (1967) (recognizing that economists have traditionally defined income as consumption plus the net increase of assets).

189. *See, e.g.,* I.R.C. § 67 (2012) (limiting deductions for a host of consumptive expenditures to those that exceed a 2% adjusted gross income (AGI) floor); *id.* § 68 (providing an overall limitation on deductions for various personal expenditures).

that “enable her to be gainfully employed.”¹⁹⁰

First, § 21 allows a taxpayer to credit (that is, subtract from her tax liability) a percentage of her working childcare expenses.¹⁹¹ The percentage starts at 35% and begins to phase down once income reaches \$15,000, which is well below the poverty level for a family of four.¹⁹² For taxpayers earning over \$43,000 per year, the maximum credit is \$600 for one child and \$1,200 for two or more children.¹⁹³ Second, § 129 allows a taxpayer to divert, for the purposes of paying working childcare expenses, a portion of her salary into a Dependent Care Flexible Spending Account (FSA) and to exclude that amount from taxation.¹⁹⁴ The maximum exclusion—that is, the amount of income that can be diverted tax-free into the FSA—is \$5,000.¹⁹⁵

Whether a taxpayer will glean more tax savings from claiming tax relief under §§ 129 (by using an FSA) or 21 (by paying childcare costs directly) will depend on her marginal tax bracket. If the taxpayer’s marginal rate of taxation¹⁹⁶ is 30%, for instance, § 21’s \$1,200 credit equates to an exclusion of \$4,000¹⁹⁷ as compared with the \$5,000 exclusion allowed by § 129. By contrast, if a taxpayer’s marginal rate of taxation is only 20%, the credit equates to an exclusion of \$6,000, which exceeds the tax savings allowed by § 129. This structure is admittedly strange and overly complicated. But regardless of whether a taxpayer claims tax relief under § 129 or § 21, the point remains the same: given the high costs of childcare in America, the Code often allows tax relief for only a fraction of the actual childcare costs many working families incur.¹⁹⁸

The following example shows how current laws can affect a new mother’s decision to remain in the workforce.¹⁹⁹ Suppose Mr. and Mrs. are about to have their second child. At their current jobs, Mr. earns \$50,000 and Mrs. earns

190. Treas. Reg. § 1.21-1 (2007). I.R.C. § 32 (2012) also provides an EITC that benefits working parents in designated lower income tax brackets. The Code provides other relief that reflects the expenses of caring for children that are not dependent on whether a parent works. I.R.C. § 24 (2012) provides a \$1,000 credit per child for all parents that are not phased out. I.R.C. §§ 151, 152 (2012) provide a personal exemption amount that increases for minor children for all parents that are not phased out.

191. I.R.C. § 21 (2012).

192. *Id.* In 2017, the poverty level for a family with two children was \$24,600. Annual Update of the HHS Poverty Guidelines, 82 Fed. Reg. 8,831, 8,832 (Jan. 31, 2017). This family will be entitled to other relief, however, including the EITC and perhaps the Additional Child Care Credit, discussed in section III.C.

193. *See* I.R.C. § 21 (the credit phases down to 20% at \$43,000, and, with the dollar limitation of \$3,000 and \$6,000 for one and multiple children, respectively, equates to at most a \$600 and 1,200 credit for parents at this income level).

194. I.R.C. § 129 (2012).

195. *Id.*

196. Marginal taxation refers to the rate at which the taxpayer’s next dollar of income will be taxed.

197. The value of the \$4,000 exclusion is the product of 30% (the marginal tax bracket) and \$4,000, or \$1,200.

198. *See generally* Shannon Weeks McCormack, *Overtaxing the Working Family: Uncle Sam and the Childcare Squeeze*, 114 MICH. L. REV. 559 (2016).

199. This example will use rates and limitations in effect for tax year 2015.

\$30,000.²⁰⁰ Suppose that if Mr. and Mrs. send their two preschool-aged children to day care, it will cost \$18,000—the cost one survey estimated to be the national average cost for two children²⁰¹ and a cost that is lower than the estimated average cost for the ten most expensive states in America.²⁰² As a result, Mrs. will earn \$12,000 of additional income net of childcare costs but before taxes are taken into account.

Assume it is tax year 2015. If Mrs. remains at her job, Mr. and Mrs. are entitled to claim a credit of \$1,200 under § 21.²⁰³ With this credit, Mrs. will pay about \$3,300 in federal income taxes on her \$30,000 income.²⁰⁴ She will also pay a total of \$2,715 in Medicare, Social Security²⁰⁵ and Unemployment taxes²⁰⁶ on these wages. Mrs.'s salary might be further whittled away by state and local income taxes.

Thus, if Mr. and Mrs. focus only on their annual finances to determine whether Mrs. should work after the birth of their second child, they will find themselves weighing the prospect of having (perhaps, depending on state and local income taxes, even less than) an additional \$5,985,²⁰⁷ about one-fifth of Mrs.'s pre-tax salary, at their disposal against the confluence of push and pull factors with which they are confronted—for example, unforgiving work conditions, the emotional burdens of the second shift, balancing full-time work and parenting, and childcare, commuting, and other work-related costs.

The listed push and pull factors do not even consider Mrs.'s (perhaps fervent) preference to care for her very small children, her (perhaps intense) anxiety

200. Using 2015 phaseouts, this hypothetical assumes that the Earned Income Tax Credit will not apply even if Mrs. were to leave the workforce. *See* Rev. Proc. 2014-61, 2014-47 I.R.B. 10 (providing complete phaseout amount in 2015 for couple married filing jointly with two children: \$49,974).

201. Smith, *supra* note 86.

202. The cost to send both children to day care in the ten most expensive states exceeds \$18,000. *CHILDCARE AWARE OF AM.*, *supra* note 6, at 27.

203. Under § 21, Mr. and Mrs.'s applicable percentage is phased down to 20%, and they may take a credit of 20% x \$6,000, because \$6,000 represents the dollar limitation for expenses for two children. I.R.C. § 21(a), (d) (2012). This dollar-for-dollar credit is worth \$1,200. Because Mr. and Mrs. are in a 15% marginal tax bracket, the exclusion to which they would be entitled under § 129 would be worth less than the credit (15% x \$5,000).

204. Mr.'s income, after taking the 2015 personal exemptions amounts (4 x \$4,000) and standard deduction (\$12,600) is about \$21,400. Rev. Proc. 2014-61, *supra* note 200. Mrs.'s income will, therefore, be taxed at 15% using 2015 tax rates, so that federal taxes will be \$30,000 x 15% = \$4,500, less \$1,200 credit or \$3,300. They will also be entitled to a childcare credit under I.R.C. § 24 (2012). This, however, is available regardless of whether Mrs. works, and therefore is not added into the calculation of additional taxes levied on Mrs.'s income.

205. Employees and employers must pay Social Security and Medicare hospital insurance taxes (collectively known as FICA) taxes at a rate of 7.65%. Taxpayers pay Social Security at a rate of 6.2% for wages up to \$118,500. I.R.C. §§ 3101(a), 3111(a) (2012). Taxpayers pay Medicare at a rate of 1.45%. *Id.* §§ 3101(b), 3111(b). There is an additional tax for income over \$200,000 of 0.9%. IRS, PUBLICATION 15: (CIRCULAR E), EMPLOYER'S TAX GUIDE 23–24 (2016). Thus, Mrs.'s Social Security and Medical Taxes are \$1,860 and \$435, respectively.

206. *See* IRS, INSTRUCTIONS FOR FORM 940, at 4 (2016). The Federal Unemployment Tax Act (FUTA) tax rate is 6.0%. The tax applies to the first \$7,000 you paid to each employee as wages during the year. The \$7,000 is often referred to as the federal or FUTA wage base. Thus, Mrs. pays \$420 in FUTA taxes.

207. \$30,000 - \$3,300 - \$2,715 - \$18,000 = \$5,985.

about whether her children should be in non-parental care, and her apprehension about whether she can secure a spot in one of America's limited, high-quality facilities. And, as mentioned above, Mrs. might, due to basic behavioral biases, overestimate the risks of day care and other perceived risks of not being with her children,²⁰⁸ while discounting the future gains of remaining in the workforce and future risks of not doing so. In short, one can see how Mrs. may believe it is not worth working.

As I have argued elsewhere, the limitations found in §§ 21 and 129 are inappropriate as a matter of fundamental tax policy²⁰⁹ and result in many working parents being overtaxed on their income. The existence of these limitations reflects the judgment that working childcare costs are consumptive, personal expenses rather than non-consumptive costs of earning income. In 1954 and 1983, the respective years in which §§ 21 and 129 were enacted, this characterization was at least plausible. At that time, the income of the secondary wage earner (which was almost always the wife) was often discretionary and one could at least make a defensible claim that the task of categorizing working childcare expenses was an unclear one.²¹⁰ Perhaps, two commentators wrote in 1972, a "working wife . . . hires a babysitter, or sends her children to a day care center . . . to enable herself to work" or perhaps, they continued, she "work[s] so that she can afford the luxury of household and childcare help."²¹¹

But the reality faced by many of today's working parents is not so murky. Today, many single parents and dual-earning, two-parent families (which today is the majority of two-parent families)²¹² must incur soaring childcare expenses to earn sufficient income. Census data confirms that working parents incur high childcare costs, whereas a majority of one-earner, two-parent families entirely

208. See *supra* note 133 and accompanying text.

209. See Weeks McCormack, *supra* note 198, at 563. Because I have made this argument at great length in this prior piece, I will endeavor to only summarize it here.

210. See Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 *BUFF. L. REV.* 49, 49 (1971) ("The Code will be examined in its current social context. Thus, the observation that American working wives are predominantly secondary family earners is not intended to express a social ideal. It merely reflects a contemporary social reality. Women workers generally earn substantially less than their male counterparts. Working wives earn less than their employed husbands. The American wife's working career is likely to be broken by child-bearing and rearing. Unless prompted by economic necessity, her return to work is generally considered discretionary. Even when she is earning a substantial salary, her husband is unlikely to view his employment as discretionary." (footnotes omitted)); see also Boris I. Bittker, *Federal Income Taxation and the Family*, 27 *STAN. L. REV.* 1389, 1433 (1975) ("These burdens on the two-job married couple are often castigated as a deterrent to the employment of married women outside the home. In theory, of course, the burden arises whether the 'secondary' wage-earner is the husband or the wife, and hence falls on the couple jointly. In a society that takes the husband's job for granted and views the wife as the secondary wage earner, however, it is reasonable to describe the existing state of affairs as biased against women.").

211. Daniel C. Schaffer & Donald A. Berman, *Dissents and Concurrences: Two Cheers for the Child Care Deduction*, 28 *TAX L. REV.* 535, 536 (1972).

212. COHN, LIVINGSTON & WANG, *supra* note 18; see also sources cited *supra* note 142.

forego the expense of regular care.²¹³ In other words, today's parents are not working to purchase leisure time away from their children; they are working to earn additional income that meets the needs of their families. Working childcare expenses, therefore, should be characterized as (at least in great part) non-consumptive costs of earning income.²¹⁴

As I have argued before, to most accurately reflect working childcare expenses as costs of earning income, Congress could eliminate § 21's percentage credit and § 129's exclusion entirely and allow working parents to deduct working childcare costs under the same sections—for example, §§ 162 and 212, discussed above—that allow taxpayers to deduct all other costs of earning income.²¹⁵ Returning to the example above, recall that Mrs. would, under current law, be entitled to a credit of \$1,200 to reflect working childcare costs. In their 15% marginal tax bracket, this is the equivalent of an \$8,000 deduction,²¹⁶ less than half of her \$18,000 in childcare costs. If, however, Mrs. was entitled to deduct the entire cost of childcare, her tax liability would be reduced by an additional \$1,800²¹⁷ (10% of expected childcare costs and 6% of her pre-tax income).

As discussed in Part II, studies suggest that a new mother's decision to work is affected by even relatively small additions to her after-tax wages. This does not suggest that mothers are concerned primarily with finances when deciding whether to leave the workforce. Instead, this economic sensitivity may reflect, at least in significant part, that additional pay allows a mother to purchase additional goods and services to help her maintain her delicate work-life balance. Thus, the tax savings offered by allowing a new mother like Mrs. to fully deduct working childcare costs could play a vital role in determining whether she stays in the workforce during her children's preschool years, avoiding the costs of taking time out. It might allow her to afford a childcare situation with which she feels more comfortable or expand the limited childcare options available to her.

There are, however, important objections to allowing working childcare costs to be deducted without significant limitation. First, parents at very low income levels may not have enough taxable income to benefit from an expanded deduction. The situation of these parents will be discussed further in section III.D. Even for parents with income sufficient to fully claim a full deduction for

213. Census data show that, in families in which the mother is employed and children are younger than five years of age, roughly 88% of families require some regular childcare. *See* LYNDIA LAUGHLIN, U.S. CENSUS BUREAU, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 2011, at 5 (2013), <https://www.census.gov/prod/2013pubs/p70-135.pdf> [<https://perma.cc/2JFD-2GF9>] ("In the spring of 2011, 88 percent of the 10.9 million preschoolers of employed mothers . . . were in at least one child care arrangement on a regular basis."). Only 28.2% of single-earner families with preschool-aged children used any form of regular childcare. *Id.*

214. I have made this suggestion elsewhere. *See* Weeks McCormack, *supra* note 198, at 593.

215. *Id.* at 580, 594.

216. $15\% \times \$8,000 = \$1,200$.

217. $\$12,000 \text{ deduction} \times 15\% \text{ marginal tax bracket}$.

childcare expenses, allowing a deduction for working childcare expenses will create an “upside-down subsidy effect,” whereby parents in higher marginal tax brackets benefit more from deducting the same amount from their income than would parents of lower marginal income tax brackets. I have argued before that this objection reflects a misunderstanding of tax policy.²¹⁸

Costs of earning income are often deductible and, as a matter of mathematics, these deductions benefit those of higher income brackets more than those in lower brackets.²¹⁹ From a tax purist’s standpoint, then, if one objects to deducting working childcare costs, one should also object to the entire host of deductions allowing taxpayers to deduct costs aimed at earning a profit. For instance, one should be troubled that the wealthy lawyer that deducts \$100 to maintain his lavish office space benefits more than the solo practitioner that deducts the same \$100 from his much lower income. But the fact that deductions for costs of earning income benefit higher-income taxpayers more than lower-income taxpayers is generally accepted as inevitable because deductions for costs of earning income are necessary to accurately measure net profit, the ultimate goal of any income tax.²²⁰

Nevertheless, the upside-down-subsidy effect could be mitigated by using a credit (a dollar-for-dollar reduction in tax liability) as opposed to a deduction (a reduction in one’s taxable income) because the tax savings offered by a credit would not depend on marginal tax bracket. I have identified in other work what I believe to be some significant risks in singling out working childcare costs to be recovered through a credit when most costs of earning income are deductible.²²¹ Doing so, I believe, has led lawmakers to mistreat working childcare costs as personal costs for some time, which has, in turn, lead to the recovery of these costs being so severely and inappropriately limited.²²²

Nevertheless, Congress could at least move the tax law’s treatment of working childcare costs towards the treatment of many other costs of earning income by preserving the percentage credit found in § 21 and repealing or drastically altering its various limitations and phase-outs. This change would at least move the needle in the right direction, since many other costs of earning income are recoverable without stringent limits.²²³

218. See Weeks McCormack, *supra* note 198, at 568.

219. *Id.* at 568 (“The Code provides for many deductions, each of which, as a matter of mathematics, inevitably results in this upside-down-subsidy effect.”)

220. See, e.g., Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 724 (1970) (explaining how the tax law must allow a deduction for “expenses and costs incurred in the process of producing or earning the gross income” to “produce the net income base”).

221. See Weeks McCormack, *supra* note 198, at 598.

222. *Id.*

223. See, e.g., I.R.C. § 161 (2012) (allowing deduction for ordinary and necessary business expenses without limitations). Section 212 allows deduction for “ordinary and necessary expenses” for profit-seeking activities, subject to a 2% AGI floor under § 67 and overall limitation under § 68. Even these limitations are not remotely as stringent as limitations found in §§ 21 and 129. Further, other personal

Additionally, however, it is important to see that even a percentage credit for actual expenditures would likely benefit wealthier mothers more because they can afford more expensive care than mothers of lesser means. Again, it is at least important to point out that all costs of earning income suffer from this problem. The wealthy lawyer deducts the costs of lavish client lunches, whereas the solo practitioner can only deduct the costs of the modest fare he shares with a potential client in a desperate attempt to drum up business.²²⁴ And these facts are typically deemed unobjectionable because the deductions are needed to accurately measure taxable income.

Yet a dollar cap could ameliorate this problem in the context of working childcare costs. Congress might, for instance, allow a percentage credit only up to the average cost of day care in the taxpayer's state of residence, providing a ceiling on the costs that can be recovered. Recent presidential candidate Hillary Rodham Clinton aspired to "[s]ignificantly increase child care investments so that no family in America has to pay more than 10 percent of its income to afford high-quality child care."²²⁵ Similarly, the tax law might enact a floor, which would allow recovery of expenses exceeding 10% of income.²²⁶ But, although this would move the tax law in the right direction, it is important to see that it would also keep us rather far from the goal of treating working childcare costs like many other costs of earning income, which is what they (at least primarily) are.

As this section has shown, regardless of the ultimate mechanism or limitations implemented, the tax law should be revised to not so drastically limit the extent to which new mothers can recover childcare costs needed to keep them in the workforce. This would be the most obvious consequence of properly treating working childcare expenses as all other costs of income. But there are other potential consequences of treating these costs properly, to which the next section turns.

2. Other Consequences of Treating Working Childcare Costs Properly

As discussed in Part II, even given the financial (not to mention personal and emotional) costs of doing so, new mothers that need or want to remain in the workforce are encouraged to be wary of taking time out and to view the high costs of childcare as investments in their long-term earning potential.

expenses are subject to §§ 67 and 68 and additional limitations. *See, e.g.*, I.R.C. § 165(h) (2012) (limiting casualty loss deduction to expenses exceeding 10% of AGI).

224. *See* I.R.C. § 274(a) (2012) (providing rules for deducting meal and entertainment expenses); *see also id.* § 274(n) (providing 50% limitation on those expenses).

225. *Early Childhood Education*, HILLARY CLINTON FOR PRESIDENT, <https://www.hillaryclinton.com/issues/early-childhood-education/> [<https://perma.cc/URY7-LU38>].

226. Other sections of the Code use this mechanism, but are not for costs of earning income. *See, e.g.*, I.R.C. § 165(h) (2012) (providing 10% floor for casualty losses), *id.* § 213 (providing same floor for medical expenses).

When a business invests in a venture with high initial costs and relatively low gains, it will often bear expenses by incurring debt. Along similar lines, it is not difficult to see that the new mother might help herself remain at work during her children's early years by executing a loan to cover the high costs of early childcare.²²⁷ When a business takes on additional debt to further its needs, it is able to deduct the interest associated with that indebtedness because these interest charges are deductible costs of earning income.²²⁸ But, currently, if a working mother executes a loan to finance the costs of early childcare to enable her to work, she may not deduct a penny of the interest associated with these loans. This is because, under current § 163, interest is only deductible if it does not qualify as "personal interest,"²²⁹ and interest on debt to sustain working childcare costs is interpreted to fall within this excluded category. However, if the Code were to move towards characterizing working childcare costs as costs of earning income, it would allow at least some of the interest associated with these loans to be deducted.

As before, there are important concerns about allowing these childcare-related expenses to be deducted without limitation—for example, an upside-down-subsidy effect is created and higher income parents can afford to take out larger loans than parents of lesser means, meaning they would be able to deduct larger interest costs. A percentage credit and proper dollar cap could respond to these concerns.²³⁰

There are other issues to grapple with. A rule allowing "childcare interest" to be deductible would admittedly be subject to manipulation. For instance, under this rule, a family that wished to finance the purchase of a new car (the interest of which is personal and thus nondeductible) could instead execute a loan to finance childcare and use freed-up funds to purchase the car. But this is just one more manifestation of a well-known problem with § 163's rule, which forces one to "trace"²³¹ the way in which loaned funds are used,²³² and mechanisms are thus already in place to deal with these issues.²³³ It is not clear why one should be more concerned about the potential abuse of § 163 in the context of

227. In fact, in a recent survey, one quarter of families said they did just that, reporting that they had "put themselves in debt—or further debt—to pay for child care." Bugbee, *supra* note 88.

228. I.R.C. § 163(a), (h) (2012).

229. *Id.*

230. Though these, as before, do so at the cost of moving away from treating working childcare expenses like other costs of earning income.

231. JOSEPH BANKMAN, DANIEL N. SHAVIRO, & KIRK J. STARK, *FEDERAL INCOME TAXATION* 379 (16th ed. 2012) (discussing general tracing problem in § 163).

232. *See, e.g., id.* at 380 (providing example in which "Jennifer has \$50,000 in a savings account. She uses the \$50,000 to purchase a Mercedes and the next day borrows \$50,000 to finance a fast food franchise she intends to operate," and asking "Will the interest on the \$50,000 loan be deductible?" to illustrate that, under this particular plan, she may deduct the interest but if she had just used the loaned funds for the Mercedes and the freed-up funds for the business, she could not).

233. *See, e.g.,* Treas. Reg. § 1.163-8T (as amended in 1997) (providing method for allocating interest expenses for purposes of determining deductibility).

allowing parents to deduct costs of working childcare than in the myriad other contexts in which these issues emerge.

There are ways in which the laws might try to curtail this potential for abuse (though, again, it is not clear why it should do so only in this particular context). For instance, the law might allow parents to deduct interest only on loans taken for childcare costs that exceed a certain percentage of that family's income. Alternatively, the deduction might be limited to those in low- and moderate-income classes to better ensure that the loan is genuinely needed to finance high childcare costs.

Along similar lines, to remain in the workforce, our so-called "economically rational" new mother might incur annual childcare expenses that exceed her annual income, thereby sustaining economic losses. When a taxpayer has deductible business expenses that exceed her income, she may sometimes reduce her taxable income to reflect these "net operating losses."²³⁴ And taxpayers whose deductible business expenses exceed their income in a given year may either carry back and/or forward these losses to reduce taxable income in past or future years.²³⁵

But, under current law, if a mother's annual working childcare costs were to exceed her annual wages, she would not receive tax relief to reflect these losses. Specifically, § 21(d) provides that a single taxpayer may not credit expenses that exceed her earnings and a married couple filing jointly may not credit childcare expenses that exceed the wages of the non-primary wage earner.²³⁶

To illustrate this "earned income limitation," let's return to our example of Mr. and Mrs. Recall that Mr. earns \$50,000 taxable income this year and Mrs. earned \$30,000 taxable income before giving birth to her second child. Understanding the consequences of leaving the workforce, Mrs. has decided to scale back to part-time work and pay in hopes of mitigating these costs. Mr. and Mrs. have consulted the statistics and agree that they should do this even though Mrs. will earn only \$10,000, which is less than the day care costs she will incur to keep her foot in the workplace. Even without the dollar limitations of §§ 21 and 129 (which section I.A of this Article argued are inappropriately stringent), Mrs. would only be able to credit \$10,000 of childcare expenses. The additional costs (representing the loss the couple is incurring to keep Mrs. in the workforce) may not be used to reduce Mr.'s income. Nor may the loss be carried backward or forward to reduce tax liability in other years.

But, once working childcare costs are properly viewed as costs of earning income, the earned income limitation seems to require further examination. It seems that parents should be able to reduce their taxable income to reflect at

234. I.R.C. § 172(a), (c), (d) (2012) (allowing and defining net operating loss deduction).

235. *Id.* § 172(b).

236. *Id.* § 21(d) ("[T]he amount of the employment-related expenses . . . shall not exceed . . . in the case of an individual who is not married[,] . . . such individual's earned income for such year, or . . . in the case of an individual who is married[,] . . . the lesser of such individual's earned income or the earned income of his spouse . . .").

least some of the losses incurred when childcare costs exceed income. To return to our example, perhaps Mr. and Mrs. should be able to reduce Mr.'s income by the amount their childcare costs exceed Mrs.'s scaled-down income. And, if Mrs. were single, perhaps she should be able to carry back that loss to receive a refund for overpaid taxes in prior years. Moreover, if a family was unable to utilize a "carryback" because, for instance, it did not have sufficient income in previous years, perhaps it should be able to carry forward those losses to reduce taxable income in future years. And, as before, the tax law could allow recovery of losses through a capped, percentage-based credit to preserve progressivity and fairness (with compromises that have been noted).

Like the expansion of the interest deduction, eliminating the earned income limitation is not without its challenges. Before the earned income limitation was enacted, married couples were only able to claim the § 21 credit if they worked full time.²³⁷ As explained in the legislative history: "The purpose of the full-time earnings test was to prevent one spouse from working part time, perhaps in a nominal capacity, in order to obtain the benefits of [the then] deduction" for working childcare expenses.²³⁸ The earned income limitation was meant to allow married couples to claim some tax relief, even if one or both spouses worked part-time, while preventing this possible abuse.

But realities have changed quite a bit in the more than three decades since the earned income limitation was enacted, and it is worth considering whether there are better ways to respond to potential issues. Today, childcare costs are so high that it is not surprising that a family might go into debt or incur losses to keep a parent in the workforce. For all the reasons discussed in the first two Parts of this Article, women that need or want to stay in the workforce should be wary of leaving because even short interruptions can be costly. Those women that do choose to (or that must) incur indebtedness or losses to keep a foot in the workforce should be taxed properly. And, by taxing working childcare expenses as costs of earning income, more mothers may be able to take steps—which (sadly) might include incurring indebtedness or loss—to protect their lifelong earning capacity.

Given these realities, it makes sense to at least reconsider whether there is a better way to tease out the perceived abuses to which the earned income limitation is meant to respond. Without attempting to fully solve the problem here, Congress might, for instance, not apply the earned income limitation to new mothers that continue with the same or similar work after their children are born. Thus, the schoolteacher or social worker that continues to engage in work that uses similar skills, albeit on a scaled-down basis, might not be subject to

237. JOINT COMM. IN INTERNAL REVENUE TAXATION, 94TH CONG., DECISIONS ON THE TAX REFORM BILL OF 1975 CORRESPONDING TO SECTIONS OF DRAFT BILL 12 (Comm. Print. 1975) ("The committee also agreed to extend the credit to married couples, where the husband or wife, or both, work part-time. (Presently, both are required to work full-time).").

238. JOINT COMM. ON INTERNAL REVENUE TAXATION, 94TH CONG., RETIREMENT INCOME CREDIT, CHILD CARE DEDUCTION, QUALIFIED STOCK OPTIONS, AND SICK PAY EXCLUSION 5 (Comm. Print 1975).

the limitation, whereas the limitation might apply were she to stop her previous work entirely to open an Etsy shop. These are issues that deserve further consideration.

This section has examined the tax treatment of working childcare expenses, which often represent the most significant cost incurred by working parents. But a working mother will also incur other expenses that could be avoided if she were not in the workforce, such as the costs of commuting and purchasing work attire. Although taxpayers generally may not deduct these expenses, the next section considers whether the tax law should allow new parents to recover at least some of these traditionally nondeductible but work-related costs to ensure that postpartum earnings are not overtaxed.

B. RETHINKING THE TAX TREATMENT OF TRADITIONALLY NONDEDUCTIBLE BUT
WORK-RELATED COSTS

As discussed above, the tax law generally allows taxpayers to deduct, without significant limitation, many costs of earning income.²³⁹ By contrast, deductions for consumptive, personal expenses are generally disallowed.²⁴⁰ Many expenses may be easily categorized as consumptive or non-consumptive. When a taxpayer incurs costs to produce a widget, to pay the rent of her storefront property, or to pay the salaries of employees that work in that store, the expenses are definitively non-consumptive and fully deductible.²⁴¹ And when a taxpayer chooses to purchase a new television set, toys for her children, or guitar lessons, we can safely assume that she has paid a price that is no greater than the value she places on those goods and services, or else she would not have engaged in the voluntary exchange. As a result, these expenses are purely consumptive and nondeductible.

But other expenses are not so easily categorized and are instead partly consumptive and partly non-consumptive. One example of such an expense is the business-related meal and entertainment expense.²⁴² If a lawyer pays to take her client to lunch to discuss her client's pending case, the costs of doing so are partly consumptive—the lawyer has provided herself a meal, satisfying her personal need to eat and may have enjoyed the restaurant she selected. On the other hand, it is quite possible that the lawyer does not value the meal at its full cost, so the lunch expense is not purely consumptive. For instance, in the absence of legal work to discuss with her client, the lawyer may have chosen to eat a peanut butter sandwich at her desk, constituting a far less expensive way

239. See *supra* notes 42–45 and accompanying text.

240. See I.R.C. § 262 (2012).

241. See I.R.C. §§ 162, 212 (2012).

242. Expenses associated with business-related travel, meals, and entertainment are often cited as classic examples of expenses that are difficult to categorize. See Daniel I. Halperin, *Business Deduction for Personal Living Expenses: A Uniform Approach to an Unsolved Problem*, 122 U. PA. L. REV. 859, 888–90 (1974).

of satisfying her need to eat.²⁴³

This hypothetical illustrates the difficulty in determining whether and to what extent hybrid expenses (expenses that are both consumptive and non-consumptive) may be deducted. Ideally, a taxpayer would not be able to deduct the consumptive portion of a given hybrid expense—that is, the lawyer “could not deduct the portion of the meal cost that represents the sustenance and enjoyment [s]he derived from eating”—but would be able to deduct the non-consumptive portion—in other words, the lawyer “could deduct the . . . additional cost, if any, [s]he incurred to take the client to lunch compared to the lunch [s]he would have eaten otherwise.”²⁴⁴ Lacking the ability to execute this impractical ideal, the tax law’s approach to hybrid expenses is best characterized as *ad hoc*.

For instance, under current tax law, many taxpayers will be able to deduct 50% of their business-related meal and entertainment expenses,²⁴⁵ and others will be able to deduct the entire cost.²⁴⁶ On the other hand, the tax law does not allow taxpayers to deduct an array of other costs that could be avoided in the absence of work, under the theory that these “avoidable expenses” are nonetheless partly consumptive. In other words, with respect to these latter expenses, the tax law errs in favor of Uncle Sam and at the expense of the taxpayer.

To provide an initial example of this approach, consider the cost of traveling from one’s home to work and vice versa. These costs of commuting seem to be avoidable expenses—one would not incur these expenses in the absence of work, making these costs non-consumptive in (perhaps large) part. Yet the tax law has long disallowed deductions for these costs in their entirety.²⁴⁷ This treatment “is probably not caused by any doubt that these expenses are business related, but by the belief that they are based on [the] underlying personal decision[]” of where to live, “which give[s] rise to personal satisfaction.”²⁴⁸

In addition to commuting costs, there are other nondeductible, work-related costs that new mothers could avoid by leaving external work. For instance, taxpayers in the workforce must purchase and maintain work-appropriate attire. But under current application of the tax laws, a taxpayer may not deduct costs of work attire unless she can show that the clothing is worn “as a condition of . . . employment” and is not “suitable for everyday wear.”²⁴⁹ Once this

243. See *Moss v. Comm’r*, 758 F.2d 211, 213 (7th Cir. 1985), in which Judge Posner presents the problem colorfully as follows: “Suppose a theatrical agent takes his clients out to lunch at the expensive restaurants that the clients demand. Of course he can deduct the expense of their meals, from which he derives no pleasure or sustenance, but can he also deduct the expense of his own? He can, because he cannot eat more cheaply; he cannot munch surreptitiously on a peanut butter and jelly sandwich brought from home while his client is wolfing down tournedos Rossini followed by soufflé au grand marnier.”

244. Weeks McCormack, *supra* note 198, at 581–82.

245. See I.R.C. § 274(e), (n) (2012).

246. Exceptions to the 50% deduction limitation are enumerated at I.R.C. § 274(n)(2).

247. IRS, PUBLICATION 463: TRAVEL, ENTERTAINMENT, GIFT, AND CAR EXPENSES 14 (2016).

248. Halperin, *supra* note 242, at 865.

249. IRS, PUBLICATION 17: YOUR FEDERAL INCOME TAX 201 (2016).

stringent and narrowly construed two-pronged test is applied, many—if not most—taxpayers will find themselves unable to deduct clothing expenses.

For instance, even if a taxpayer can show that purchased attire is a condition of employment, many clothing items will be considered suitable for everyday wear (and thus not deductible) because this requirement is construed objectively.²⁵⁰ It is, therefore, not enough that the taxpayer shows that she does not, in fact, wear the clothes outside of work or even that the work clothes would be inappropriate to wear given the general nature of her personal life. She must instead make a showing that such clothing is not reasonably suitable for normal usage.

One can understand the desire to have a generally applicable standard that is objective. Doing so keeps the Internal Revenue Service from having to consider each taxpayer's alleged situation. Indeed, one can imagine a parade of taxpayers claiming odd and interesting lifestyles that supposedly render even the most ordinary work attire unfit for their personal lives. The inquiry would be both thorny and expensive, and an ordinary person standard avoids the thicket.

But, for new mothers, the ordinary person standard may be particularly far from her current, extraordinary reality of caring around the clock for a new infant when she is not at work. Consider a new mother who is returning to work as a lawyer after giving birth. She incurs the perhaps considerable expense (and emotional exhaustion) of purchasing suits and other appropriate attire to fit her changed, postpartum body.²⁵¹ She would not dream of wearing the suits at home while caring for her infant—which is what she does with the lion's share of her non-working day—because every mother knows, or will soon find out, that this will result in her attire being dirtied almost immediately. Nonetheless, the expense of this work clothing will be nondeductible because many people could use the clothing in their everyday lives.

To present a third, and admittedly more controversial, example of an avoidable but currently nondeductible expense, consider the costs a mother might incur to fulfill the responsibilities of her second shift. As discussed above in Part I, recent studies found that women spend considerably more time each week on household chores when compared to their male partners,²⁵² estimated in one study to add up to an extra month of eight-hour workdays each year.²⁵³ Add this work to infant care and a full-time external workload, and one can easily see how the second shift can create a tipping point that leads a new mother to leave the workforce.

250. See, e.g., *Pevsner v. Comm'r*, 628 F.2d 467, 470–71 (5th Cir. 1980) (“An objective test . . . provides a practical administrative approach . . .”).

251. See Catherine Pearson, *9 Things Nobody Ever Tells You About Post-Pregnancy Bodies*, HUFFINGTON POST (July 31, 2013, 4:04 PM), http://www.huffingtonpost.com/2013/07/31/post-pregnancy-body_n_3659565.html [<https://perma.cc/7K7P-LM36>].

252. Milkie et al., *supra* note 10, at 487.

253. HOCHSCHILD ET AL., *supra* note 8, at 4.

Of course, a new mother might temporarily lighten the burden of her second shift by hiring household help of some nature. Under current law, these expenses are not deductible. It could be argued that this characterization is overly severe because these expenses are partly non-consumptive. The rule disallowing all deductions associated with outsourcing the second shift might be seen as ignoring that the new working mother could partly (if not largely) avoid the expenses of outsourcing if she were to exit the external workforce.²⁵⁴

The expenses discussed above represent a sample of expenses that could be avoided if a taxpayer were not working. It is perhaps worth questioning this draconian, all-or-nothing approach because it seems to lead to the over-taxation of the average worker.²⁵⁵ But even if this approach is defensible when applied generally (because, for instance, it represents a suitable compromise between accurate taxation and goals of practicality), the tax law should be careful not to overtax the earnings of new mothers specifically. It seems to make far more sense for the Code to err in the other direction for new mothers so that it is not needlessly adding to the push factors that make it difficult for new mothers to remain at work when their children are young.

The question, then, is how the tax law should implement this type of relief. The preceding discussion is certainly not meant to suggest that the IRC should have a carte blanche deduction for new working mothers that allows them to deduct the full costs of fancy new wardrobes, private shoppers, and butlers. Some, for instance, will find the idea of allowing any relief to reflect expenses of outsourcing the second shift controversial.

But one does not have to agree that every avoidable expense should be recovered to agree that some limited tax relief should be granted to reflect the array of generally nondeductible but work-related costs new working mothers incur. This would keep the tax laws from both overtaxing the postpartum earnings of new mothers and needlessly adding to the numerous factors that weigh in favor of her leaving work when her children are young.

To fashion some limited tax relief, one might look to § 274, which limits the deduction for business-related meal and entertainment expenses, another hybrid expense to which some of the “avoidable” expenses—for example, costs of work attire, commuting, and outsourcing household work—might be compared. As discussed, in many cases § 274 allows many taxpayers to deduct only 50% of their meal and entertainment costs.²⁵⁶ But a percentage limitation would not adequately discourage profligacy—regardless of what percentage is chosen for a limitation, the more one spends to, for instance, commute to work, the greater the percentage deduction allowed. (Similar reasoning may well counsel against using the percentage limit in the context of meal and entertainment expenses.)

254. For an alternative way to account for household labor in the tax laws, see Staudt, *supra* note 8.

255. See, e.g., Mary Louise Fellows & Lily Kahng, *Costly Mistakes: Undertaxed Business Owners and Overtaxed Workers*, 81 GEO. WASH. L. REV. 329 (2013) (discussing ways in which workers are overtaxed).

256. See *supra* notes 245–46 and accompanying text.

But there are other sections of the Code that could be used as vehicles to provide modest and appropriately limited tax relief for many new working mothers and reward frugality in the process. For instance, § 151 of the IRC allows taxpayers to exclude from their taxable income a set “personal exemption amount” for themselves, their spouse, and each of their children.²⁵⁷ In 2015, the Code provided a \$4,000 personal exemption amount.²⁵⁸ Thus, a childless couple filing jointly could reduce its taxable income by \$8,000, and a married couple with two children could reduce its taxable income by \$16,000.

Even though the tax law does not generally allow a taxpayer to deduct (or exclude) expenses to obtain personal necessities, the personal exemption amount is meant to “approximate the level of income below which it would be difficult for an individual or a family to obtain minimal amounts of food, clothing and shelter.”²⁵⁹ By increasing the personal exemption amount for each additional dependent, the tax law recognizes that the larger one’s family, the larger the expenses incurred for minimum necessities.²⁶⁰ And by allowing each family to exclude a set dollar amount, rather than basing the tax relief on actual expenditures, the tax law rewards the thrifty over the extravagant spender, because one may exclude the designated amount even if one does not actually incur those expenses.

The personal exemption amount does not currently differentiate between the situations of the single-earner, two-parent family on the one hand and dual-earner, two-parent and single-working-parent families on the other. But § 151 could be modified to allow secondary earners and single parents who have added a dependent within a certain number of years to increase their personal exemption amount by a set figure designed to reflect the additional expenditures that encumber their income but that are avoided by two-parent families with single earners.²⁶¹ This reform, which need not be explicitly gendered, would have the effect of reducing the postpartum earnings of many new working mothers to partially reflect the expenses she incurs to remain in the workforce but that she could avoid if she were to leave.

257. See I.R.C. § 151 (2012). I have not suggested that the deduction be granted through the standard deduction because that would not help individuals who itemize.

258. IRS, *supra* note 249, at 1.

259. JOINT COMM. ON TAXATION, 98TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 1984–1989, at 4 (Comm. Print 1984).

260. See *id.*

261. I am by no means the first academic to suggest this. This Article offers additional and powerful reasons for doing so. In one of his many works on the topic, Professor Edward McCaffery states: “[A] typical second earner enters the work force at a 50 percent tax rate. She doesn’t have the benefit that a primary earner has of going through a range in which she’s not paying positive taxes. An obvious thing to do would be to give her some deduction to account for various work-related expenses and to replicate the effect of having her own zero bracket.” Edward J. McCaffery, *Taxing Women*, 60 ENGINEERING & SCI. 34, 38 (1997).

Alternatively, and to better address progressivity concerns, Congress might (re-)create²⁶² a standalone provision that allows dual-earner couples and single working parents that have recently added a child to their family to credit (as opposed to deduct or exclude) a set amount to reflect some of the avoidable expenditures discussed in this Part. Ideas similar to this have been discussed recently. In the President's Fiscal Year 2016 Budget Proposal, President Obama proposed to "provide two-earner married couples [who file their taxes jointly with] a nonrefundable credit equal to a percentage of the lower earner's earned income up to \$10,000," resulting in a maximum tax credit of \$500 that would phase out for higher income earners.²⁶³

Before declaring the proposal dead on arrival, Congress should at least consider providing this credit to dual-earner and single-parent families that have recently added a new child to their family.²⁶⁴ In a world in which it has been reported that "[a]t least once a week, one in four working moms cry by themselves,"²⁶⁵ the expanded options provided by the tax savings proposed in this Part could provide some needed relief. And, less anecdotally, studies on income elasticities suggest that a mother's labor participation may be significantly affected by even small changes in her post-tax income.²⁶⁶ A fixed-dollar credit that reflects some of the expenses discussed in this section could, therefore, help new mothers remain in the workforce while their children are young.

The proposals advanced so far would help prevent the tax laws from overtaxing the postpartum earnings of new mothers. They would, however, also result in forgone tax revenue. The next short section provides some thoughts on this matter.

C. A NOTE ON COSTS

To perhaps state the obvious, the measures proposed in sections III.A and III.B will result in the government forgoing (not insignificant) tax revenue. This

262. In various times in our history, the Code has included a dual-earner deduction. *See, e.g., id.* at 38–39 (summarizing history).

263. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2016 REVENUE PROPOSALS 150 (2015). Under the proposal "[t]he credit rate would be five percent and would phase down at a rate of one-half of a percentage point for every \$10,000 [that the couple's] AGI [exceeds] \$120,000." *Id.* at 151.

264. This Article will not delve into the fine-grained analysis needed to suggest a precise dollar amount for this proposed tax relief. But to provide several figures, the average American worker is estimated to spend \$2,600 in annual commuting costs alone. Kathryn Vasel, *We Spend \$2,600 a Year Commuting to Work*, CNN MONEY (June 17, 2015, 12:54 PM), <http://money.cnn.com/2015/06/17/pf/work-commute-time-and-money/> [<https://perma.cc/LGU7-6TLF>]; *see also* Eric Jaffe, *Do Long Commutes Discourage Married Women from Working?*, CITY LAB (Apr. 23, 2013), <http://www.citylab.com/commute/2013/04/do-long-commutes-discourage-married-women-working/5370> [<https://perma.cc/73KA-ADJ4>].

265. Press Release, Care.com, Care.com Survey Finds One in Four Working Moms Cry Alone At Least Once a Week (Oct. 23, 2014), <https://www.care.com/press-release-carecom-finds-1-in-4-moms-cry-alone-once-a-week-p1186-q49877680.html> [<https://perma.cc/TK3E-PMH6>].

266. *See supra* notes 180–83 and accompanying text.

is certainly true even though the proposed measures would be designed to help new mothers remain in the workforce and thus could expand the tax base to some extent. This Article will offer a few thoughts. At the outset, it is not generally appropriate to criticize tax laws that allow taxpayers to properly compute net income as being too expensive. Because working childcare costs are predominantly costs of earning income, they should be, as a theoretical matter, mostly insulated from these claims. Thus, although the proposals above might be costly, readers should not forget that these costs arguably represent (at least in large part) the amount of revenue the government should not be collecting from working families under general tax principles.

Nevertheless, for the reforms proposed in the previous sections to be considered, Congress will have to do the necessary and hard work of reexamining its spending priorities. To start, Congress might reexamine existing tax expenditures offered to parents. The Joint Committee on Taxation (JCT) estimated that, in 2017, the tax relief provided by §§ 21 and 129 would result in the government forgoing \$4.8 billion of revenue to allow working parents to recover childcare expenses that should be mostly recoverable as costs of earning income.²⁶⁷ By contrast, the JCT estimated that § 24—which allows a (sometimes refundable)²⁶⁸ \$1,000 credit per child for families that are not phased out²⁶⁹—will result in the government forgoing a far larger \$55.8 billion in 2017.²⁷⁰ This “child tax credit” (as opposed to § 21’s working childcare credit) is available regardless of whether families work or incur any work-related childcare expenses.²⁷¹ Although one may believe that the Code should provide general relief for parents, unless these costs are connected with work, relief is not required under general principles of tax law. It is worth considering whether this reflects a sensible way to allocate tax relief, at least for parents within certain income classes.

Consider, for instance, parents earning income approaching § 24’s threshold phase-out amount of \$110,000²⁷²—in other words, the income amount at which parents begin to lose part (and at some point all) of the \$1,000 credit per child. The JCT estimated that in 2014, working parents earning between \$50,000 and \$75,000 would receive collective tax relief from §§ 21 and 129 of \$570 million and those earning between \$75,000 and \$100,000 would receive tax relief of \$549 million.²⁷³ This is the aggregate tax savings offered by the Code to reflect the costs of childcare needed by these parents to work.²⁷⁴ By contrast, families

267. STAFF OF THE JOINT COMM. ON TAXATION, 114TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2015–2019, at 37 (2015) [hereinafter 2015–2019 JCT ESTIMATES].

268. I.R.C. § 24(d) (2012).

269. See I.R.C. § 21 (2012).

270. 2015–2019 JCT ESTIMATES, *supra* note 267.

271. The refundable portion, however, depends on work. I.R.C. § 24(d).

272. I.R.C. § 24(b).

273. 2015–2019 JCT ESTIMATES, *supra* note 267, at 47.

274. In previous work I have explained at length why §§ 21 and 129 should not be deemed to be tax expenditure provisions. Weeks McCormack, *supra* note 198, at 607–17.

earning \$50,000 to \$75,000 were estimated to claim tax relief under § 24 of approximately \$10.5 billion and those earning \$75,000 to \$100,000 were estimated to claim \$7.1 billion of tax relief.²⁷⁵ And, again, this latter relief was provided to parents regardless of whether they were in the workforce, so that some of this relief was in no way connected to costs incurred while working. It is at least worth considering whether the government should forgo fifteen times more revenue by allowing these moderate-income parents credits that might be entirely unrelated to work than it foregoes by allowing families to recover expenses that should be mostly recoverable under general tax principles, irrespective of how much revenue is forgone.²⁷⁶

But, far more appropriately, Congress must look more globally at the many tax expenditures embedded in the Code that have little or nothing to do with accurately measuring income tax. For example, in 2015, between granting the home mortgage interest deduction and excluding some of the gains from the sale of personal residences, the government was estimated to forgo over \$100 billion of tax revenue.²⁷⁷ The JCT further estimated the government forwent approximately \$45 billion in 2015 by allowing taxpayers to deduct their charitable contributions.²⁷⁸ Although one might believe the Code should encourage home ownership²⁷⁹ and charitable giving, these goals are almost entirely (if not entirely) unrelated to tax collection.²⁸⁰ By contrast, the JCT estimated that President Obama's proposed second-earner credit (discussed above), a credit that would reflect work-related expenses that arguably should be recoverable as a matter of principle, would result in approximately \$2.5 billion of forgone revenue in 2017 and \$8.5 billion of foregone revenue in 2018.²⁸¹ The spending allowed by the numerous provisions of the Code that serve goals almost entirely

275. 2015–2019 JCT ESTIMATES, *supra* note 267, at 49.

276. Of course, the families claiming relief under §§ 21 and 129 presumably also claimed relief under § 24. Approximately one million families with income between \$50,000 and \$75,000 and 893,000 families with income between \$75,000 and \$100,000 claimed relief under §§ 21 or 129. *Id.* at 47. By contrast, approximately 5,913,000 million families with income between \$50,000 and \$75,000 and 4,095,000 families with income between \$75,000 and \$100,000 claimed relief under § 24. *Id.* at 49.

277. *Id.* at 32 (\$71 billion for deduction for mortgage interest on owner-occupied residences and \$24.1 billion for exclusions of capital gains on sale of principal residence).

278. *Id.* at 36, 38.

279. For criticism of this policy, see Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329 (2009) (discussing how home mortgage interest deduction does not even serve its goal of encouraging home ownership well).

280. See, e.g., John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 682 (2001) (“[T]he most widely accepted rationale for the [charitable] deduction remains that the deduction helps subsidize the activities of charitable organizations.”); see also Peter J. Wiedenbeck, *Charitable Contributions: A Policy Perspective*, 50 MO. L. REV. 85, 91 (1985) (“[T]he better view is that the charitable deduction is not a proper allowance in measuring disposable income.”). But see William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972) (providing one of the more robust defenses of charitable deduction as necessary adjustment to the tax base).

281. JOINT COMM. ON TAXATION, ESTIMATED BUDGET EFFECTS OF THE REVENUE REVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2017 BUDGET PROPOSAL 6 (2016), <https://www.jct.gov/publications.html?func=startdown&id=4902> [<https://perma.cc/Z2XR-R8YZ>].

unrelated to tax could be curtailed to advance the (at least predominantly) tax-related goal of keeping the postpartum earnings of new mothers from being overtaxed.

Aside from costs, the proposals advanced in the previous two sections have other significant limitations. As flagged at the beginning of this section, some mothers will not have sufficient taxable income or tax liability to benefit from the measures discussed in the preceding sections. This does not take away from the fact that new mothers with sufficient income should not be overtaxed on their earnings. It simply recognizes that the plight of some new mothers cannot be properly addressed by correcting for over-taxation. Moreover, it is important for lawmakers to understand that mothers in different socioeconomic circumstances face different challenges, which cannot all be addressed in the same manner.²⁸² Reforms that help one segment of mothers need not—indeed must not—foreclose the opportunity to also address the problems faced by other subsets. The next section turns briefly to the situation of families that are unable to fully benefit from the changes proposed while by no means attempting to address all possible issues.

D. FAMILIES LACKING SUFFICIENT INCOME TO FULLY BENEFIT FROM THE PROPOSALS

An obvious way to respond to some new parents not benefitting fully from the measures outlined in this Part would be to make the proposed deductions or credits refundable—that is, new parents might be allowed a rebate of unrecovered expenses. Indeed, in a 1976 hearing before the Senate Committee on Finance, which considered the merits of the proposed working childcare credit now found in § 21, Senator Edward Kennedy found the bill “seriously deficient” in its failure to make the credit refundable.²⁸³ He lamented: “[T]he one group that is excluded from any assistance for necessary childcare costs is the group that is most in need of federal financial aid—those parents who are presently below the poverty level income figures and are trying to work to get out of poverty.”²⁸⁴

To illustrate, suppose that Miss is single and has two preschool-aged children and only earns \$30,000 (therefore, she does not have the benefit of our hypothetical Mrs. who could rely on Mr.’s \$50,000 additional income). Assume a 2015 tax year. After claiming the personal exemption²⁸⁵ and standard deduction amounts to which she is entitled as a “head of household,”²⁸⁶ Miss has taxable income of \$8,750. Before taking the credits to which she is entitled,

282. See, e.g., HOOKS, *supra* note 47; Crenshaw, *supra* note 46; Harris, *supra* note 46.

283. *Tax Reform Act of 1975: Hearings Before the Comm. on Finance*, 94th Cong. 227 (1976).

284. *Id.*

285. Her personal exemption would be \$4,000 for her, and an additional \$8,000 for her dependents, following the 2015 numbers. See I.R.C. § 151 (2012) (allowing for the exemption); Rev. Proc. 2014-61, *supra* note 200, at 16.

286. The standard deduction for head of household in 2015 was \$9,250. Rev. Proc. 2014-61, *supra* note 200, at 13.

Miss will have a “pre-credit” tax liability of \$875.²⁸⁷

Even setting aside the Earned Income Tax Credit, Miss is entitled to a credit under § 24, which allows any taxpayer, regardless of work, to credit \$1,000 for each custodial child and includes phase-outs that do not apply to Miss.²⁸⁸ Her tax liability (\$875) is more than consumed by this credit (\$2,000).²⁸⁹ Now suppose that, to earn this income, Miss managed to find care for \$10,000 for the year (far less than the average cost of day care for two preschool-aged children in many states).²⁹⁰ Under current law, Miss is also entitled to a credit under § 21,²⁹¹ which would be increased if the changes proposed above were to be adopted. But, under either current or proposed law, Miss could not benefit fully from the credit because she has insufficient tax liability and current § 21 does not provide a refund mechanism.

To allow parents such as Miss to benefit, the tax law might make tax benefits that reflect working childcare costs refundable, entitling Miss to a cash refund of her unused benefits. Parents such as Miss certainly deserve additional relief, and lawmakers should consider their situations to be of high priority. Lawmakers should design this relief to be, among other things, effective, consistent, and coherent.

In doing so, lawmakers must also consider that the Code currently contains other refundable credits that help working parents. For instance, § 24’s credit is now partly refundable²⁹² and often referred to as the “Additional Child Tax Credit” (ACTC).²⁹³ Although the nonrefundable portion of the § 24 credit does not depend on whether a parent works, the refundable portion is available only to those earning over a specified amount.²⁹⁴ Thus, in deciding whether § 21’s credit should be refundable, one would have to consider how the ACTC fits into the overall picture.

Furthermore, through the Earned Income Tax Credit (EITC), the Code provides another refundable credit mechanism that is designed to benefit working parents in lower income brackets.²⁹⁵ It might, therefore, make more sense to use

287. *Id.* at 5 (providing head of household rates of 10% for income less than \$13,150).

288. *See* I.R.C. § 24(b)(1), (2)(B) (2012).

289. Part of this credit is refundable to certain taxpayers that earn sufficient income. It is not necessary to make the point in this hypothetical to know the exact way in which this refundable portion is calculated. *See* I.R.C. § 24(d) (2012).

290. *See supra* notes 85–86 and accompanying text.

291. Under current law Miss should be entitled to a credit of \$1,620. Specifically, I.R.C. § 21(c)(2) specifies a \$6,000 cap for individuals with two or more qualifying dependents. I.R.C. § 21(a) then provides that the rate of the credit is calculated by starting from 35% (of the allowable cap, here \$6,000) and reducing it by 1% for each \$2,000 (or fraction thereof) of the taxpayer’s AGI above \$15,000. Here, that results in reducing Miss’s percentage credit to 27% $(\$30,000 - \$15,000) / \$2,000 = 7.5; 35\% - 8\% = 27\%$). Twenty-seven percent of \$6,000 is \$1,620.

292. *See* I.R.C. § 24(d) (2012).

293. *See, e.g.*, IRS, PUBLICATION 972: CHILD TAX CREDIT 1 (2016).

294. *See* I.R.C. § 24(d) (2012); *see also* IRS, PUBLICATION 972, *supra* note 293, at 7.

295. *See* Kerry A. Ryan, *EITC as Income (In)Stability?*, 15 FLA. TAX REV. 583, 586 (2014).

the existing EITC rather than create an entirely new refund mechanism to benefit working parents of lesser means. Future work might explore whether the EITC appropriately reflects the high costs of early childcare. Although the earned income credit amount adjusts upwards based on number of children, it does not base the credit on the age of those children. Thus, the EITC may not properly reflect that childcare costs are by far the highest in the early childhood years and might be adjusted to account for that fact.²⁹⁶

To highlight several more issues, one should also consider whether tax refunds represent the best way to help lower-income families such as Miss's family. Miss, for instance, earns only \$30,000, so she likely cannot afford childcare at high market rates. Nor does it seem likely that any feasible tax refund amount will get her much closer to doing so. Yet, because Miss's \$30,000 income does not fall below the poverty line for a family of three,²⁹⁷ she may well not be eligible to receive childcare through many federally funded programs, such as Head Start.²⁹⁸ And, if she were, recent government surveys show that even eligible participants have difficulty accessing these programs.²⁹⁹ Perhaps, then, families in lower income brackets might be better helped by investment in or expansion and improvement of affordable, accessible, and quality childcare alternatives rather than a refundable credit that does not inch them much closer to being able to afford care at current market rates.

Turning to another fundamental question, this Article has discussed the many reasons why mothers that wish or need to work should resist leaving the workforce and has proposed reforms that would provide them financial incentives to so resist. But low-income mothers may well face different considerations when deciding whether to work outside the home. Professor Nancy Staudt has, for example, pointed out that it might be particularly important for mothers in marginalized communities to maintain their caretaking roles inside the home, given heightened dangers and limited childcare options. Professor Staudt writes: "Many women of color . . . believe that in light of health hazards disproportionately suffered by communities of color, caretaking services that ensure the family's survival can be personally satisfying and politically important."³⁰⁰

On a different note, in questioning the premise of the EITC, which ties tax benefits to work, Professor Anne Alstott points out that "frequent spells of job disruption due to unemployment, disability, and family needs . . . are common among low-wage workers."³⁰¹ Given that low-income workers have far less

296. I.R.C. § 32 (2012).

297. The guideline is \$20,420 for a family of three in 2017. Annual Update of the HHS Poverty Guidelines, 82 Fed. Reg. 8,831, 8,832 (Jan. 31, 2017).

298. HHS FAQ, *supra* note 174.

299. *See supra* note 175.

300. Staudt, *supra* note 8, at 1573.

301. Anne L. Alstott, *Why the EITC Doesn't Make Work Pay*, 73 L. & CONTEMP. PROBS. 285, 288 (2010).

control over work interruptions, it may not make sense to tie aid to work for these earners (as the proposals in this Article and the EITC do).³⁰²

These are just some of the considerations that must be weighed before deciding how the tax laws might properly aid mothers in the poorest income classes as well as whether tax law reform is the most appropriate means of change.

Before concluding, the final section of this Article will push more on the core idea that some new mothers should be wary of leaving the workforce when children are young despite the high costs (and thus lower gains) of doing so, and they should view high childcare (and other) costs as investments in their long-term earning potential. Many tax laws create incentives for taxpayers to make investments yielding primarily long-term benefits. To provide just a few examples, current tax laws encourage taxpayers to purchase and hold onto stocks and other assets for more than a year,³⁰³ to purchase homes,³⁰⁴ to invest in research and development³⁰⁵ and start-up businesses,³⁰⁶ and to purchase instruments that help one save for retirement.³⁰⁷ By providing tax savings, the tax laws defray the cost of purchasing these assets, thereby encouraging taxpayers to make investments that may not have high short-term payoffs but that hold the promise of long-term profits. This next section imagines how similar tax laws might be used to encourage new working mothers to incur the high expenses needed to invest in their careers during the initial years of their children's lives.

In doing so, the next section does not aim for politically feasible solutions. Even the reforms proposed in sections II.A and II.B, which arguably only correct for over-taxation, would represent a drastic change to the IRC. Instead, the next section engages in a thought experiment, picturing what the Internal Revenue Code might look like if it were to view the new mother's career as a long-term asset and were to treat the early costs of childcare as an investment in that asset.

302. *Id.* For more discussion on the EITC, see Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867 (2005).

303. I.R.C. § 1(h) (2012) (provides for preferential capital gains rates).

304. *Id.* § 163 (allows for a mortgage interest deduction); *id.* § 121 (allows taxpayers to escape gain recognition on the sale of a personal residence, excluding \$250,000 of gain from tax liability if single, \$500,000 if married filing jointly).

305. *Id.* § 41 (provides credit for increasing research activities).

306. *Id.* § 195 (allows deductions for certain start-up expenditures).

307. *Id.* § 401 (addressing treatment of 401(k) plans, profit-sharing plans, employee stock ownership plans, money purchase plans, defined benefit plans, Simplified Employee Pensions, Salary Reduction Simplified Employee Pension, and SIMPLE 401(k) plans for small employers); *id.* § 403(b) (tax-sheltered annuity plans for 501(c)(3) organizations and public schools); *id.* § 457(b) (deferred compensation plans for state and local governments).

E. IMAGINING TAX INCENTIVES TO PROTECT THE MATERNAL CAREER

1. Preferential Rates to Encourage Investment

The IRC encourages long-term investment in many assets by taxing the gains associated with these investments at lower rates than other forms of income. To provide necessary background, a taxpayer's income will generally be taxed at what are known as ordinary income rates.³⁰⁸ For instance, wages and other compensation for personal services are taxed at these rates.³⁰⁹ These rates are progressive, meaning that the rate of taxation increases as taxable income increases.³¹⁰ The IRC creates a stair-step structure in which increasingly large increments of income are taxed at increasingly high rates.

In 2015, for instance, the ordinary income rates for a married couple that filed jointly ranged from 10% to 39.6%. A married couple filing jointly that earned \$160,000 of ordinary income would have been liable for a 10% tax on the first \$18,450 of this income, a 15% tax on income between \$18,450 and \$74,900, a 25% tax on income between \$74,900 and \$114,500, and a 28% tax on the remainder of its income. A married couple that earned more than \$160,000 would have been liable for the same taxes on the first \$160,000, but would then have moved up the stair-step structure, applying higher rates to income exceeding that amount.³¹¹ Single taxpayers and heads of household are subject to a similar rate structure, though the income thresholds—the income level at which rates increase—obviously differ.³¹²

In addition to the ordinary income tax rates, the tax law has long offered a different set of rates for so-called “long-term capital gains”—gains associated with the sale or exchange of most assets—so long as the taxpayer has held those assets for a sufficiently long period of time.³¹³ Like the ordinary income tax rates, these capital gains rates are progressive. But the capital gains rates are far lower than the ordinary income rates. Most recently, the capital gains rates for the average individual taxpayer ranged from 0% to 20% and consisted of three brackets (0%, 15%, and 20%).³¹⁴

The way in which a taxpayer's capital gains move through these preferential brackets is mechanically complicated and depends both on the amount of ordinary income and capital gains the taxpayer (and, if married and filing

308. See I.R.C. § 1(a)–(c) (2012).

309. All income is taxed at ordinary income rates unless that income represents capital gains, defined in I.R.C. § 1222(3) (2012) as “gain from the sale or exchange of a capital asset held for more than 1 year, if and to the extent such gain is taken into account in computing gross income.”

310. *Id.* § 1(a)–(c).

311. *Id.* § 1(a); see also Rev. Proc. 2014-61, *supra* note 200, at 5 tbl.1 (adjusting certain 2015 items for inflation).

312. See I.R.C. § 1(b), (c) (2012); 2014 Rev. Proc., *supra* note 200, at 5–6 tbls.2–3.

313. I.R.C. § 1211 (2012). These rates also apply to the dividends and interest received by the owners of many securities held for a prescribed period of time. See *id.* § 1(h)(11).

314. *Id.* § 1(h)(1). Taxpayers in higher income classes may also be subject to an additional 3.8% tax through § 1411.

jointly, her spouse) has in the year at issue. Suppose, for instance, in 2015 a taxpayer did not have any ordinary income in a taxable year (for example, she has retired from her job), but sold some long-term capital assets to pay expenses. If she was single, the first \$37,450 of her gain would have been taxed at 0% and the remainder, if any, would have moved into the 15% and possibly the 20% tax brackets. If she was married and filed jointly, the rate at which her capital gains would have been taxed depended also on the amount of ordinary income her spouse earned. If her spouse also failed to earn ordinary income, the first \$74,900 of her capital gain would have gone untaxed in the 0% bracket before moving to the higher rungs of the rate structure.³¹⁵ Taxpayers with larger amounts of ordinary income would have jumped over the 0% bracket completely. Specifically, in 2015, none of the capital gains of a married couple nor a single taxpayer whose ordinary income exceeded \$74,900 and \$37,450 respectively, would have been taxed in the 0% bracket and gains in excess of these amounts would have moved through the 15% and 20% brackets.³¹⁶

The wisdom of retaining this “capital gains preference” is a subject of vociferous debate.³¹⁷ But one of the main purposes of granting the preference is clear. Through this preference, Congress hopes to “encourage saving, investment and risk taking by increasing the after-tax return” on long-term investments.³¹⁸ Engaging in our thought experiment, one could imagine a non-gendered tax law that allows secondary earners and single working parents to apply a preferential rate to income earned within a certain number of years after a child is added to his or her family. This is not the first time a reform of this kind has been proposed in tax scholarship. Professor Edward McCaffery, in his often cited article in *The Yale Law Journal*, proposed “to change significantly the system of taxation” in a way that “would result in the government’s taxing married men more, possibly much more, than married women.”³¹⁹

There are various ways this large-scale change might be executed. Congress could create a different rate structure for new parents that are secondary earners or single working parents. It could further lower the head-of-household rates that apply to single parents with custodial children. It could

315. *Id.* For inflation-adjusted rates for both married and unmarried filers, see 2014 Rev. Proc., *supra* note 200, at 862 tbls.2–3.

316. See I.R.C. § 1(h)(1); 2014 Rev. Proc., *supra* note 200, at 5–6 tbls.1, 3.

317. See, e.g., Walter J. Blum, *A Handy Summary of the Capital Gains Arguments*, 35 TAXES 247 (1957) (providing summary of arguments for and against capital gains preference); Noël B. Cunningham & Deborah H. Schenk, *The Case for a Capital Gains Preference*, 48 TAX L. REV. 319 (1993) (finding most arguments favoring a capital gains preference to be unpersuasive).

318. Ronald H. Jensen, *Can You Have Your Cake and Eat It Too?: Achieving Capital Gain Treatment While Keeping the Property*, 5 PITT. TAX REV. 75, 84 (2008); see also William D. Popkin, *The Deep Structure of Capital Gains*, 33 CASE W. RES. L. REV. 153, 155–61 (1983) (discussing the history of the capital gains preference as an economic incentive through a comprehensive analysis of its legislative history); Ajay Mehrotra & Julia C. Ott, *The Curious Beginnings of the Capital Gains Preference*, 84 FORDHAM L. REV. 2517 (2016) (tracing history of the capital gains preference).

319. Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 656 (1993).

allow married mothers to choose to file returns separate from their spouses, which would allow them to apply the same rates, standard deductions, and personal exemption amounts used by single filers.³²⁰ With respect to this last point, other scholars have seriously questioned the wisdom of the joint return. For example, Professor McCaffery has supported the idea of abolishing the joint return so that the secondary earner could “have the benefit that a primary earner has of going through a range in which she’s not paying positive taxes.”³²¹ Similarly, Professor Lawrence Zelenak long ago argued that “American society at the end of the twentieth century would be better served by separate returns.”³²² Finally, without changing rate structures, the personal exemption or standard deduction amounts to which each taxpayer is entitled could be raised for new single and secondary-earner parents. Alternatively, an additional credit might be provided that preserved progressivity and that credit might be made refundable.

Of course, the capital gains preference is not the only way in which the IRC encourages long-term investment. To conclude this thought experiment, the next section considers tax provisions which change the timing by which a taxpayer must recognize income or may take deductions to encourage taxpayers to make investments whose gains will be primarily enjoyed in the long (as opposed to the short) term.

2. Timing Preferences as Interest-Free Loans

Many provisions of the Code allow designated taxpayers to deduct certain expenditures sooner than they ought to under generally applicable tax principles.³²³ In tax parlance, these tax laws allow certain taxpayers to deduct immediately certain expenditures that should be capitalized. Other tax provisions allow taxpayers to recognize certain types of income later than the tax law

320. By abolishing the joint return, a secondary earner would move through the lower rates of the IRC’s progressive, ordinary income rate structure, which ranges from 10% to 39.6%. I.R.C. § 1(a) (2012). Furthermore, the secondary earner would not be taxed on any income falling below the personal exemption and standard deduction amounts, which in 2016 added up to \$13,350. *See IRS, supra* note 249, at 5.

321. McCaffery, *supra* note 261, at 38, 42.

322. *See* Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 342 (1993). Professor Zelenak also explains: “The current system strongly discourages married woman from seeking employment by stacking her income on top of her husband’s, so that even her first dollar of income is taxed at a high marginal rate. The system thus appears to take sides on one of the most divisive of current social issues by pushing couples towards the traditional family model and away from the two-earner model. Separate returns would let each spouse begin at the bottom of the rate schedule, thus removing the work disincentive effect on wives.” *Id.* at 343; *see also* Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1 (2000) (providing other methods besides abolishing the joint return to provide marriage penalty relief). For more on the questionable wisdom of using marital status as a method of determining tax liability, *see* Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEXAS L. REV. 1 (1980).

323. *See, e.g.*, I.R.C. §§ 195, 194, 167, 168 (2012).

would generally allow, delaying the time at which tax is levied.³²⁴

Consider first a few of the many IRC provisions that encourage long-term investment by allowing taxpayers to accelerate the time at which they may take deductions to reduce their taxable income. Section 195, for instance, allows taxpayers to deduct some “start-up expenditures” (costs paid to investigate the creation of a new business or other profit-seeking venture) sooner than these expenditures would ordinarily be recovered.³²⁵ Specifically, the tax law allows a taxpayer to immediately deduct a certain amount of these costs in the year in which her business begins operation and to deduct the remainder of these costs ratably over the next fifteen years.³²⁶ Similarly, § 174 allows taxpayers to elect to immediately deduct “research and experimental costs,” such as “reasonable costs [she] incur[s] in [her] trade or business for activities intended to provide information that would eliminate uncertainty about the development or improvement of a product,” which could not ordinarily be deducted until future years.³²⁷ And, to provide one final example, §§ 167 and 168 together allow many taxpayers to accelerate the time for deducting the costs of purchasing assets that will contribute to the future earnings of her business.³²⁸ Each of these provisions (along with many other provisions not mentioned) encourages taxpayers to make investments that produce long-term benefits by defraying the upfront costs of doing so.

In addition to allowing taxpayers to recover costs of long-term investments sooner than would otherwise be allowed, the tax law also encourages such investment by delaying the time when gains from certain investments are taxed. Section 72, for example, encourages taxpayers to invest in certain instruments for retirement, such as “annuit[ies], endowment[s], or life insurance contracts.”³²⁹ While a taxpayer who places his money in a simple bank account will be taxed on the interest accrued on that account each year, the interest earned by taxpayers that have invested in the instruments listed in § 72 will not be taxed until that interest is received (perhaps many years after the investment is made), thereby allowing the interest on those instruments to accrue tax free. By delaying the time when income is recognized, the tax law, in effect, defrays the upfront cost (in the form of tax savings) of investing in assets that provide income (and thus financial security) to the taxpayer in the later years of his life (perhaps after retirement) or, in the case of life insurance, provide income to his beneficiaries after death.

324. *See, e.g., id.* §§ 72, 1031, 1033.

325. *Id.* § 195.

326. *Id.*; *see also* IRS, PUBLICATION 525: BUSINESS EXPENSES 24 (2016) (“Business start-up and organizational costs are generally capital expenditures. However, you can elect to deduct up to \$5,000 of business start-up and \$5,000 of organizational costs paid or incurred after October 22, 2004. The \$5,000 deduction is reduced by the amount your total start-up or organizational costs exceed \$50,000. Any remaining costs must be amortized.”).

327. *Id.* at 23.

328. I.R.C. §§ 167, 168 (2012).

329. *Id.* § 72.

Although not always obvious to the untrained eye, the just-described laws provide relief that could be viewed as an interest-free loan.³³⁰ Consider, for example, § 195, which allows a taxpayer to deduct certain start-up expenses in the first year of her business's operation, even though those expenses cannot usually be recovered until later years.³³¹ Suppose now that Ernie Entrepreneur, whose marginal tax bracket is 30%, incurs \$5,000 of these costs. By allowing Ernie to deduct the \$5,000 expense today, § 195 allows Ernie to receive \$1,500 in tax savings (the product of 30% and \$5,000) earlier than he generally would. Similar reasoning can be applied to all of the sections discussed above and indeed applies to each section of the Code, which allows taxpayers to deduct expenses from their taxable income sooner than they ordinarily could or allows income to be recognized later than is generally required.

Tax laws that took seriously the goal of encouraging new mothers to invest in their careers might grant interest-free loans that provide needed cash flow in the costly postpartum years and could do so through repayable, refundable tax credits. For example, as part of the Housing and Economic Recovery Act of 2008, § 36 of the IRC was revised to provide a first-time homebuyer credit.³³² In 2008, a taxpayer was entitled to claim a tax credit, capped at \$7,500, to reflect the cost of purchasing her first home.³³³ A taxpayer claiming this credit in 2008 was then responsible for repaying this amount over the next fifteen years.³³⁴ Thus, in order to defray the costs of purchasing a first home, the government extended interest-free loans to taxpayers. A similar loan could be provided to some new parents (perhaps those in lower- to middle-income classes) to defray the costs of early childcare and thereby help new mothers invest in their careers. These repayable credits might be made refundable to enable new parents in the lower income classes to claim them.

Of course, these solutions would require a fundamental reordering of spending (not to mention normative) priorities. And it would require the government to highly prioritize the goal of preventing some new mothers from being squeezed out of the workforce. But imagining how the Code might use existing mechanisms that encourage long-term investment to help new mothers invest in their careers hopefully expands (at least for some readers) the range of possibilities that are—and should be—deemed possible. For if we fail to engage this

330. Stanley S. Surrey, *The Tax Reform Act of 1969—Tax Deferral and Tax Shelters*, 12 B.C. L. REV. 307, 310 (1971) (analogizing provisions that allow immediate deductions of expenses that would generally be capitalized as “interest-free, non-recourse loan[s] without collateral”).

331. *See id.* § 195.

332. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 3011, 122 Stat. 2654 (2008).

333. I.R.C. § 36(b)(1)(A) (Westlaw through P.L. 114-327) (amended 2009).

334. *Id.* § 36(f)(1). In 2008, taxpayers were required to repay income over a period of 15 years, paying at least one-fifteenth of the claimed credit each year. In certain later years, taxpayers were able to claim the credit without repaying any amounts. *See First-Time Homebuyer Credit Questions and Answers: Repaying the Credit*, INTERNAL REVENUE SERV., <https://www.irs.gov/uac/first-time-homebuyer-credit-questions-and-answers-repaying-the-credit>.

way, we run the grave risk of allowing our thinking on such matters to stagnate and become entirely dependent on the paths history has wound for us.

CONCLUSION

In America, the new mother confronts many challenges when trying to stay in the external workplace. Given an array of push and pull factors that include the extremely high costs of childcare, many women temporarily leave work when their children are born. But even short periods out can cost (sometimes far) more than the revenue foregone during a mother's intended time away. Given these realities, women are encouraged to remain in the workforce when their children are born and to view the high costs of doing so as an investment in their long-term earning potential. This Article suggests ways in which the tax laws could be modified to help prevent some new mothers from being squeezed out.

This Article has shown that there are several ways in which the tax laws might be seen to overtax the earnings of working mothers, actually adding to the factors that push women out of the external workplace. Most critically, working childcare costs are mistreated as personal, consumptive costs. As a result, the Code imposes limitations on the working parent's ability to recover these expenses which are much more stringent than limitations imposed on many other costs of earning income. This Article argues that the Code should be changed to allow (at least) new working parents to recover far more of their childcare costs than is currently allowed. To accomplish this, the Code should allow parents to recover not only more of their annual childcare expenses, but also at least some interest on debt incurred to bear these expenses and losses that result if annual childcare costs exceed annual income.

Additionally, this Article argues Congress should consider adding a fixed dollar credit for dual-earning and single new working parents to reflect that these families incur work-related expenses that single-earner, two-parent families do not. The benefits provided by these various changes could be made refundable to allow new mothers in lower income brackets to also benefit, though there are other issues that must be considered before deciding that this is the most effective, appropriate, and cogent way of addressing the plight of mothers in lower income brackets. This Article concluded by looking at current tax laws that encourage long-term investment and imagining what the Code might look like were Congress to take seriously the goal of encouraging new mothers to invest in their careers the way it encourages taxpayers to make other long-term investments.

The United States falls far behind its peers when it comes to protecting mothers in the workplace. This Article has offered several ways in which the tax laws could be modified to help some new mothers protect their earning potential in the extremely imperfect work environment that exists today.