Child Care Tax Credits, the Child Tax Credit, and the Taxpayer Relief Act of 1997: Congress' Missed Opportunity to Provide Parents Needed Relief from the Astronomical Costs of Child Care

Sara J. Buehler
Child Care Tax Credits, the Child Tax Credit, and the Taxpayer Relief Act of 1997: Congress’ Missed Opportunity to Provide Parents Needed Relief from the Astronomical Costs of Child Care

Sara J. Buehler

INTRODUCTION

The way America is raising its children is changing. Gone are the days when the father goes to work outside the home while the mother tends house and raises the children. Regardless of whether the economic reality of needing a dual wage earner family or the feminist agenda for encouraging women’s roles in the paid workforce instigated this evolution, the demographics have changed. In the majority of modern households, both members of the couple work, even if there are children at home to raise. Paid child care provided by non-parents has become a central part of many American children’s upbringing.

Unfortunately, child care needs are not adequately addressed by the United States government. Affordable, quality care is not prevalent.

*The author is a member of the Class of 1998, Stanford Law School. Note Editor, Stanford Law Review. I would like to thank Professors Deborah Rhode, Joseph Bankman and Nancy Staudt for their insights, Daniel Buehler for his skillful, patient editing and Sean Berberian for his careful editing.

1. At least one scholar questions whether this ideal American family ever existed. See MARY FRANCES BERRY, THE POLITICS OF PARENTHOOD: CHILD CARE, WOMEN’S RIGHTS, AND THE MYTH OF THE GOOD MOTHER 27-28 (1993) (claiming the idea that mothers have always been the sole caregivers is “more fact than fiction,” especially in the South where African American household workers cared for white children). Government statistics show that from 1950 to 1979, the percentage of mothers in the workforce climbed from 20% to 55%. See JoAnne McCracken, Child Care as an Employee Fringe Benefit: May an Employer Discriminate?, 26 SANTA CLARA L. REV. 667, 669 n.15 (1996). These statements are not necessarily inconsistent; women in southern homes may not have been out in the workforce.


3. See BERRY, supra note 1, at 4. See also General Explanations of the Administra-
Women suffer the most from this gap. Women settle for part-time or dead-end jobs and jeopardize their careers because adequate care is unavailable. Some fail to take promotions or receive additional training, and have a higher degree of absenteeism. Others simply leave the work force altogether. All of these problems occur in the 1990s in spite of the fact that "quality" day care does not harm children. The biggest obstacle is cost.

This article explores the importance of a tax policy that enables parents to place their children in quality, affordable child care, the distributive effects of the current child care tax incentives, and methods to adjust the tax code to achieve this goal. Part I discusses the current economic trends relating to women, child care and the workforce. It places the tax credits approach to child care in the context of other solutions to the child care problem, and justifies the priority of reforming tax incentives. The current tax provisions relating to child care expenses are discussed in Part II. Next, Part III argues that the current system fails to provide enough support for any family and is woefully inadequate for those who need it the most: the working poor. Part IV assesses the success and feasibility of various solutions. Part V discusses three proposed legislative adjustments to the Dependent Care Tax Credit (DCTC) debated by Congress in 1997: making it refundable, phasing it out for wealthy Americans and indexing it for inflation. This section also assesses the Child Tax Credit which Congress enacted. Part VI briefly addresses child care tax adjustments in light of the 1998 budget process. Finally, this article concludes that Congress not only missed an opportunity to improve the system, it may have made it worse.

PART I: PAYING FOR NON-PARENT CHILD CARE IS A DAILY PART OF A WORKING PARENT'S LIFE

Social norms have changed. Women no longer stay home; they work and they still have children. In fact, approximately 70% of mothers are in

---

4. See McCracken, supra note 1, at 671.
5. See Deborah L. Rhode, Speaking of Sex: The Denial of Gender Equality 155 (1997) ("A third of all women who have 'chosen' part-time work would prefer more hours if good child care were available.").
6. See id.; McCracken, supra note 1, at 668.
7. See Edward J. McCaffrey, Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code, 40 UCLA L. REV. 983, 1033 (discussing disincentive tax policies, including how anemic child care provisions affect income earners' decisions whether to enter or return to the work force).
the workforce, including the mothers of one of every two preschoolers. Despite the contrary claims made by conservatives, “many employed mothers cannot choose to stay home with their babies.” However, some things remain the same: “child care is largely the wife’s concern—psychologically, logistically, economically—even in two-parent households.” Since most mothers cannot work and take care of their children simultaneously, they must arrange for child care for their children. Therefore, today’s form of child-rearing frequently includes some sort of arrangement for child care outside the home.

Perceptions of non-custodial child care have evolved over the past twenty years. Reports such as those by the National Institute of Child Health and Human Development (NICHD) and the Family and Work Institute indicate that children thrive in quality day care away from their mother’s watchful eye. Many parents’ fears about leaving their children in the care of another have been allayed. On another front, the actual supply of child care is no longer lacking. Parents are now more adept at recognizing quality care, and its importance to a child’s development, regardless of who provides it is well documented.

9. See U.S. House Democratic Policy Comm., 105th Cong., How the Republican Tax Bill is Harmful to Women and Their Families 2 (Comm. Print 1997). See also Berry, supra note 1, at 9 (reporting that the mothers of 32 million children, of which 9 million were under the age of five, worked in 1988); Barbara Vobejda, Child Care Initiative Triggers 'Mommy Wars,' Wash. Post, Jan. 26, 1998, at A4.
11. Berry, supra note 1, at 19.
17. See Shellenberger, supra note 8 (discussing report by Dr. Arthur Emland, Portland State University).
Unfortunately, all the problems associated with child care are not yet solved. Children are placed in substandard care, mothers must miss work when their children are sick, and mothers often settle for part-time and dead-end jobs in order to accomodate their children's daily needs. Many experts agree that an effective solution to the problems plaguing child care is multifaceted. This article focuses on tax incentives as an important piece of the solution for a number of reasons.

First, current reports demonstrate that one of the basic problems with placing children in identifiable, available, quality child care is the cost. It is simply not affordable. In 1988, middle-class families spent 6% of their monthly family income on child care—approximately $45 per week. Lower-income families (defined as having an annual income less than $13,360 for a family of four) spent about 25% of their monthly earnings on child care, an average of $32 per week. A more recent report analyzing 1995 census data determined that poor families spent 18% of their monthly income on child care, whereas non-poor families spent 7%. Census Bureau statistics indicate that the average weekly payment for child care for all American families increased from $55 (1993 dollars) in 1985 to $70 (1993 dollars) in 1993. In fact, child care expenses are the second largest expense for families after rent or mortgage.

CONFERENCE ON EARLY CHILDHOOD DEVELOPMENT AND LEARNING: WHAT NEW RESEARCH ON THE BRAIN TELLS US ABOUT OUR YOUNGEST CHILDREN (1997) (discussing research suggesting that care given during the first 3 years of a child’s life affects its brain development).

19. Telephone Interview with Elizabeth Donahue, Counsel to National Women's Law Center (July 16, 1997). The methods proscribed are diverse, addressing numerous variables. They include strengthening the regulations governing child care providers, encouraging employers to provide child care fringe benefits to their employees, providing child care referral services for area employees, improving the training of providers, the availability of off-hour and emergency care, and lobbying both the state and federal governments to increase their financial support of child care programs. Telephone Interview with Kathleen O'Brien, Staff Attorney of Child Care Law Center (July 22, 1997). The Children's Defense Fund just announced a major comprehensive campaign addressing a wide range of child care needs. See Children's Defense Fund, Child Care Now (visited Mar. 16, 1998) <http://www.childrensdefense.org>.


21. See RHODE, supra note 5, at 154-55; BERRY, supra note 1, at 11 (noting cost to send one child to a for-profit center can be "phenomenal"). As a spokesperson for the Congressional Caucus on Women's issues points out, if Zoe Baird can't afford a quality live-in nanny, how can the other 99% of Americans who aren't corporate attorneys making $500,000 a year? See BERRY, supra note 1, at 11.

22. See BERRY, supra note 1, at 9.

23. See id.


26. See Beth Belton & Tammi Wark, Economics of Child Care: Problems of Supply,
Second, some experts agree that an income tax credit would affect women’s participation in the labor force.\textsuperscript{27} The research suggests that while the current DCTC\textsuperscript{28} may not achieve government actions that facilitate a woman’s ability to choose to work in the workforce, a substantial, refundable DCTC could. One team of economists devised an economic model to test mothers’ responses to a refundable DCTC.\textsuperscript{29} They concluded that “a refundable credit would result in a more equal distribution of child care benefits by increasing the shares of subsidies received by low-income women and would induce a considerable increase in expenditures on market child care.”\textsuperscript{30} Professor Nancy Staudt, however, argues that tax incentives would often have very little impact on women’s participation in the labor market because women “make the decision to enter the market independent of the financial incentive found in the [Internal Revenue] Code.”\textsuperscript{31} While agreeing with this conclusion for the credit as configured currently,\textsuperscript{32} the National Women’s Law Center acknowledged that because the cost of child care is so high, a generous tax provision can make a difference in the amount of money a family is able to allot for child care costs.\textsuperscript{33} There is a well-founded concern that the “cost of child care must not take up such a large portion of a family’s disposable income that it would seriously diminish the benefits of working.”\textsuperscript{34}

Another reason to support individual tax incentives is that it may be the most expedient solution to the child care problem. Other solutions to the child care problem, while important, are politically disfavored.\textsuperscript{35} While hundreds of child care bills died in committee during the past few years,\textsuperscript{36}
a handful actually made it into the final House version of the 1997 Budget bill.\textsuperscript{37} Even though none of the provisions survived the final meetings between the White House and the Congress in August 1997, President Bill Clinton continues to make child care a priority.\textsuperscript{38}

Finally, another economic study found that reducing the price of care through a DCTC, as opposed to increasing the regulations on providers, would have a greater effect on a parent's choice of child care.\textsuperscript{39} This is in part because regulations make child care more expensive.\textsuperscript{40} Therefore, while regulations might improve the quality of licensed providers, availability of affordable care will be reduced. As a result, more families will choose unregulated care settings.\textsuperscript{41} In addition, tax relief would give parents the ability to afford quality child care without involving the government in their personal selection of child care programs.\textsuperscript{42}

A tragic story about the death of a four-month old child illustrates the greater importance of having adequate financing for child care than regulating providers.\textsuperscript{43} The child who died was placed with an unlicensed home provider in North Carolina.\textsuperscript{44} At the time of the infant’s death, the child care provider had left her own twelve-year old watching six children while she ran errands.\textsuperscript{45} In addition to exceeding the lawful number of children in her care, the provider would have likely flunked a criminal background check because she had spent time in jail for a DUI conviction.\textsuperscript{46} The problem was not that North Carolina had inadequate regulations; it was the parents' decision to place their infant in unlicensed care rather than aiding the authorities in enforcing the regulation. The reason


40. See Schwartz, supra note 16, at 43 (citing a study reporting that regulating the staff-child ratios would increase child care cost by an average of $350 per year).

41. There is also no guarantee the regulations will actually improve the quality of the care. As Schwartz notes in his article, none of the tragic deaths reported result from state standards being too low. \textit{Id.}

42. See id. (noting that regulation would be a “clumsy” method for ensuring parental satisfaction which ultimately boils down to personal choice). This also addresses some feminists’ concerns with the government’s over-involvement in child care, and its harmful affect on children. See Susan Prentice, The "Mainstreaming" of Daycare, 17 RESOURCES FOR FEMINIST RES. 61 (1988).

43. Ruth Sheehan, Tot's Death Draws Attention to Illegal Day Care, NEWS & OBSERVER, (Raleigh, N.C.), July 13, 1997, at B1. Regulations include physical specifications of the facility, hours of operation, training of providers, and the number of children allowed.

44. See id.

45. See id.

46. See id.
for the parents’ action was cost; unlicensed providers charge less than the amount of the tax savings available.47

The nature of the child care problem makes adjusting the child care tax credits an appealing solution. Parents are increasingly using paid child care while they work outside the home. However, quality child care is not yet available for everyone who needs it. The significant cost to parents is the greatest obstacle. A tax credit for child care expenses is one of the best means the government can use to address the problem because it gives the money directly to the parents, it has a stronger effect than simply regulating providers and there is a greater political interest in tax reform than other solutions.48

PART II: FEDERAL TAX TREATMENT OF INDIVIDUAL CHILD CARE EXPENSES

A. GENERAL TAX PROVISIONS

Several basic tax principles build our understanding of the treatment of child care expenses. First, the United States government taxes a taxpayer’s net, as opposed to gross, income.49 Second, not all expenses are deductible when calculating an individual’s net income. “Ordinary and necessary” business expenses are deductible,50 whereas personal expenses are not.51 This separation between personal and business expenses is deeply ingrained in American tax policy and theory. The standard definition of income devised by Henry Simons more than fifty years ago provides that income equals consumption plus savings.52 Under this definition, taxable income includes any amount spent on personal consumption.53 Legal tax scholar Marvin Chirelstein explains the reasoning for the differing tax treatment as follows: income is conditioned on business expenses, whereas personal expenses reflect personal consumption choices of the taxpayer.54 Thus, the question of whether child care is a taxable personal expense, rather than an excludable business expense, forms the basis of this discussion.

47. See BERRY, supra note 1, at 10 (discussing testimony of mothers who skirt law to keep good child care providers happy).
48. See id. (concluding that “enhancing the income of families with children will do more to help improve the quality of life for youngsters, and do so more effectively, than any step that can be taken by government.”).
49. See MARVIN A. CHIRELSTEIN, FEDERAL INCOME TAXATION 90 (1994).
51. See 26 U.S.C. § 262(a) (1997) (“no deduction shall be allowed for personal, living, or family expenses”).
52. This is referred to as the Haig-Simmons definition. See CHIRELSTEIN, supra note 49, at 15. See also 26 U.S.C. § 61 (defining income for purposes of the Tax Code).
53. See McCAFFREY, supra note 12, at 107.
54. See CHIRELSTEIN, supra note 49, at 90.
B. EARLY CLASSIFICATION OF CHILD CARE AS A PERSONAL EXPENSE

The only judicial interpretation of a family's child care expenses resulted in its classification as a personal, non-deductable expense. In the 1939 case, Smith v. Commissioner, the Tax Court rejected the argument that child care expenses should be a deductible business expense.\(^{55}\) In this case, the court employed paternalistic language, characterizing the woman's role as "custodian of the home and protector of its children."\(^{56}\) The court noted these services are "ordinarily rendered without monetary compensation."\(^{57}\) Some commentators mistakenly gloss over this reasoning.\(^{58}\) Although not explicitly stated as such, this reasoning is the basis of our attitudes in society\(^{59}\) and our tax policy.\(^{60}\) Child care is a gendered issue; while 30% of mothers stay home to raise young children, "almost no married men with children [do]."\(^{61}\) In economic terms, child care provided by a parent in the home constitutes imputed income.\(^{62}\) Child care is a service provided by a parent which is not part of a commercial transaction and is not counted as income for tax purposes.

Another problem with the Smith decision is the faulty logic utilized by the court.\(^{63}\) The court reasoned that the 'but for' test proposed by the Smiths would lead to a slippery slope of endless deductions, including doctor's visits, clothing and shelter.\(^{64}\) However, this syllogism is inaccurate. The expenses for the doctor and home would occur regardless of

\(^{55}\) Smith v. Commissioner, 40 B.T.A. 1038 (1939), aff'd, 113 F.2d 114 (2d Cir. 1940) (per curiam).
\(^{56}\) Id. at 1039.
\(^{57}\) Id.
\(^{58}\) See, e.g., McCaffrey, supra note 12, at 112-113 ("putting aside" sexism used by court to focus on court's reasoning).
\(^{59}\) See id.
\(^{60}\) In fact, the Republicans have diverted attention from the needs of working families to pay for child care expenses by focusing on the 'mommy wars.' See infra text accompanying notes 182-185, 222-224. Fundamentally, the court's reasoning and the Republican responses in 1997 and 1998 to expansion of the child care tax credits illustrate how assumptions of gendered family roles affect policies. Underlining these three approaches is the assumption that women belong in the home—the private sphere. All three policies create an additional incentive for women to stay home, justified on grounds that moms at home work too. See Katherine Jeghtsoonian, The Work of Caring for Children: Contradictory Themes in American Child Care Policy Debates, 17(2) WOMEN & POL. 77, 78, 80 (1997).
\(^{61}\) Jeghtsoonian, supra note 60, at 77, 78, 80.
\(^{63}\) Most commentators discuss a variation of this reasoning. See, e.g., McCaffrey, supra note 12, at 112; Klein & Bankman, supra note 62, at 577-78.
\(^{64}\) Smith, 40 B.T.A. at 1039 (1939) (The petitioners argued the court should apply a "but for" test: "but for the [child care provider] the wife could not leave her child; but for the freedom so secured she could not pursue her gainful labors; and but for them there would be no income and no tax.").
whether the wife works inside or outside the home. In contrast, the child care expenses only occur when the wife works outside the home.

Finally, the court recognized that some personal expenses are deductible as business expenses when a business reason motivated the expense.65 While the court acknowledged that "the line [between personal and business expenses] is not always an easy one to draw nor the test simple to apply,"66 it could only conclude that child care is "a personal concern."67 Child care expenses are not the only expenses that fall into one troubling category where they could be characterized as both a personal and business expense. Commuting and clothing costs, for example, also have both personal and business components.68 Unlike commuting and clothing costs, however, the personal decision to have and raise a child is not made simply on the basis of economics, job type or style.

This case has not been overruled.69 However, the tax status of child care expenses has changed. Congress enacted two provisions which are explained in the next section.

C. CURRENT TAX PROVISIONS PERTAINING TO CHILD CARE EXPENSES

The United States government currently spends $4.5 billion annually on child care through two types of financial support.70 Direct subsidies are the first type of support. Two billion dollars go to child care programs through the Aid to Families with Dependent Children (AFDC), Transitional Child Care (TCC), At-Risk Child Care (ARCC), and the Child Care and Development Block Grant (CCDBG).71 The remaining $2.5 billion goes to individual taxpayers through the two credits—the DCTC and the DCAP.72

65. See id.
66. Id.
67. Id.
68. See infra text accompanying notes 127-139 for a fuller discussion of the mixed personal and business nature of some expenses.
69. See Briggs v. Commissioner, 75 T.C. 465, 472 (1980) (noting "amounts expended by an employee to maintain his health and well being are personal expenses, even if the expenditures are helpful or even essential to his employment.").
71. See id. One author reported that the federal government provided $4.2 billion in 1994 through direct programs. See Rosanne Altshuler & Amy Ellen Schwartz, On the Progressivity of the Child Care Tax Credit: Snapshot Versus Time-Exposure Incidence, 49 Nat'l Tax J. 55, 55 (1996). However, the $2 billion number corresponds to the estimate given by Kathleen O'Brien from Child Care Law Center. She also agrees that the study of child care tax credits is important because more money is spent on them than on the direct subsidy programs. O'Brien, supra note 19.
72. See Child Care Bureau, supra note 70. According to Altshuler and Schwartz's calculation, 40% of the federal dollars spent on child care goes to individual tax credits. See Altshuler & Schwartz, supra note 71, at 55.
1. Dependent Care Tax Credit (DCTC)

Fifteen years after the *Smith* decision, Congress allowed families a tax break for a portion of their child care expenses. In 1954, Congress allowed “gainfully employed women, widowers, and legally separated or divorced men” a maximum $600 deduction for certain child care expenses.\(^73\) Between 1954 and 1976, when Congress made the deduction a credit, it made significant changes substantially broadening its applicability: in 1964, Congress expanded the deduction making husbands with incapacitated wives eligible; and in 1971, all individuals were allowed to take it.\(^74\) In 1981, Congress changed the Child Care Tax Credit to its current formula.\(^75\) The latest modification, in 1988, requires taxpayers to provide the name, address and social security number of the child care provider for a child over the age of two.\(^76\)

The current version of the DCTC provides that a certain percentage of expenses paid for any form of child care for a child under the age of thirteen living with the taxpayer will be credited to a taxpayer’s tax bill.\(^77\) Specifically, Internal Revenue Code Section 21(a)(2) limits the percentage of expenses to between 20% and 30%, decreasing with an increase in the taxpayer’s adjusted gross income (AGI).\(^78\) This inverse relationship between the percentage and the taxpayer’s income aims to benefit lower income families. Only expenses spent on child care which “enable the taxpayer to be gainfully employed” are eligible.\(^79\) These expenses are limited to a maximum of $2,400 for one child and $4,800 for two children.\(^80\)

---

77. 26 U.S.C § 21 (1997).
78. The complex language results in the following distribution:

<table>
<thead>
<tr>
<th>Adjusted gross income</th>
<th>Percentage of credit allowed</th>
</tr>
</thead>
<tbody>
<tr>
<td>below $10,000</td>
<td>30%</td>
</tr>
<tr>
<td>$10,000 - $12,000</td>
<td>29%</td>
</tr>
<tr>
<td>$12,000 - $14,000</td>
<td>28%</td>
</tr>
<tr>
<td>$14,000 - $16,000</td>
<td>27%</td>
</tr>
<tr>
<td>$16,000 - $18,000</td>
<td>26%</td>
</tr>
<tr>
<td>$18,000 - $20,000</td>
<td>25%</td>
</tr>
<tr>
<td>$20,000 - $22,000</td>
<td>24%</td>
</tr>
<tr>
<td>$22,000 - $24,000</td>
<td>23%</td>
</tr>
<tr>
<td>$24,000 - $26,000</td>
<td>22%</td>
</tr>
<tr>
<td>$26,000 - $28,000</td>
<td>21%</td>
</tr>
<tr>
<td>above $28,000</td>
<td>20%</td>
</tr>
</tbody>
</table>

These expense limits, established in 1981, reflected average costs at the time. Unlike personal exemptions, standard deductions, and the Earned Income Tax Credit, the DCTC is not indexed for inflation.

Several specific provisions affect a family’s calculations of the child care credit. First, an individual can only claim a DCTC for a child in the household where the taxpayer provides over half the cost of maintaining the household. Second, the total expenses counted cannot exceed the income of the lesser paid spouse. For example, if the wife earns $15,000 and the husband only earns $4,000, the family can only count $4,000 of child care expenses even if they spent $4,800 on child care for their two children. The Code specifically forbids expenses incurred in sending a child to overnight camp to be included in child care expenses. There are specific rules for calculating the earned income of a spouse who is a full-time student or is disabled, as well as for children of divorced or separated parents.

Several other limitations on the qualified expenses do not comport with middle to low-income reality. For example, child care expenses which enable a taxpayer to do unpaid volunteer work or work for a nominal salary do not qualify. While this originally may have sought to ensure that upper class women volunteering for the local garden club did not receive child care credit, today’s society forces many new entrants into the work force to volunteer first. In addition, expenses paid for child care while a person is home sick, even on a paid sick day, are excluded.

The numbers of families claiming the DCTC has changed over the years. In 1976, 2.7 million families claimed it, for an average credit of $206 and a total cost of $0.5 billion. In 1994, 6 million families claimed the DCTC, for an average credit of $420 and a total cost of $2.5 billion. The estimates for 1996 predicted that 6.2 million families would claim an

81. See NATIONAL WOMEN’S LAW CENTER, supra note 27, at 1.
83. 26 U.S.C. § 21(a)(1), (e)(1). Note that the 1998 Administration Proposal would eliminate this requirement for all taxpayers but those who are married and are filing separately. Instead, the taxpayer will only need to prove that they live in the same household as the child.
89. Id.
91. See id.
average credit of $450 and a total of $2.8 billion. Following the new reporting requirements enacted in 1988, the number of returns claiming the credit dropped by one-third, and the amount of credit claimed declined by $1.373 billion. In 1994, the DCTC cost $2.5 billion, whereas in 1988, it cost $3.8 billion.

2. Dependent Care Assistance Program (DCAP)

The second provision of the tax code provides that certain amounts of income from an employer can be excluded from a taxpayer’s AGI. The Dependent Care Assistance Program (DCAP) allows employees who receive up to $5,000 if married ($2,500 if single), through an approved employer program, to be excluded from income. These pre-tax dollars must be used for the same purposes as the DCTC: “relating to expenses for household and dependent care services necessary for gainful employment.” For the plan to qualify, the employer may not only offer the benefit to highly compensated employees. The savings to the taxpayer depends on the tax rate. For example, a person taxed at the maximum 40% rate would save $2,000. A person at the lowest tax rate of 15% would only save $750 in taxes.

Finally, a person is prohibited from taking both the DCTC credit and the DCAP deduction. In 1995, a taxpayer subject to the highest marginal income tax would obtain a DCAP maximum benefit of $1,980, compared with the maximum DCTC of $480 or $960 (for one or two children respectively). As a result, the middle income person who is offered a DCAP benefit will take it.

PART III: PROBLEMS WITH THE CURRENT DCTC AND DCAP

The limits on the DCTC and bureaucracy of the DCAP, combined with other income tax rules, prevent families from recovering enough money to cover their child care costs. First, because the eligible expenses are limited to amounts not indexed for inflation, the credit fails to cover the average

92. See id. at 810 (discussing legislative history of current DCTC).
93. See id. See also NATIONAL WOMEN’S LAW CENTER, supra note 27, at 2 (noting that 9 million families claimed the credit in 1988, but only 6 million claimed it in 1989).
94. See NATIONAL WOMEN’S LAW CENTER, supra note 27, at 2.
98. See Staudt, supra note 31, at 1601 (discussing fluctuating savings of DCAP depending on taxpayer’s tax rate).
child care costs. Second, the credit does not help offset even a portion of the child care expenses of the working poor because they do not earn enough money to owe income taxes. As a result, the majority of families who benefit from the credit are middle and upper income taxpayers.

A. DCTC BENEFITS LIMITED IN SCOPE AND AMOUNT

1. The limited benefits provided are significantly under actual costs

The maximum credit available under the DCTC is $720 for one child, and $1,440 for two children, for a family with an income below $10,000. This is 30% of the maximum expenses of $2,400 and $4,800 respectively. For families at the other end of the income scale, once their AGI exceeds $28,000, the maximum credit is $480 for one child, and $960 for two. This is 20% of the $2,400 and $4,800 respectively. Therefore, weekly benefits range from $13.85 to $9.23 for one child, and $27.76 to $18.46 for two.\textsuperscript{101} This is significantly under the $70 per week per child cost estimated in 1993.\textsuperscript{102}

While the tax credit was originally designed to reflect the average cost of child care, the Census Bureau reports much higher costs today.\textsuperscript{103} There are two reasons why these limits no longer represent the average amount spent on child care. First, the expense amounts are not indexed for inflation. Second, they have not been adjusted since they were enacted in 1981.\textsuperscript{104} One expert estimates that if they had been indexed for inflation, in 1992, the original $2,400 and $4,800 expense totals would have become $3,706 and $7,411, which would correspond to the estimated child care costs at the time.\textsuperscript{105}

2. No one—even lower income families—obtains full 30% benefit

However, “virtually no families” claim the full $720 or $1,440 tax credit for one of two reasons.\textsuperscript{106} Such claims are not made despite the intentions behind the inverse scale of the tax credit to benefit low income

\textsuperscript{101} This figure is calculated by dividing the annual maximum credit total by 52 weeks.
\textsuperscript{102} See supra text accompanying notes 22-26.
\textsuperscript{103} See CASPER, supra note 24, at 2 (families spent an average of $74.85 on child care per week, based on 1995 Census data); supra text accompanying notes 22-26. See also Staudt, supra note 31, at 1647 n.128 (a woman with one child below age five paid approximately $63 per week in 1990 for child care); Letter from National Women’s Law Center and 30 other organizations to U.S. Senators in the Committee on Finance 4 (July 14, 1997) (on file with author) (“average amount paid for full-time care for a child under age five in 1990 was $2,950 for family day care, $3,650 for center-based care and $5,025 for in-home care.”).
\textsuperscript{104} See Lawrence Zelenak, Children and the Income Tax, 49 TAX L. REV. 349, 413 (1994).
\textsuperscript{105} Id.
\textsuperscript{106} See A.B.A. Sect. on Tax’n, Report of the Child Care Credit Tax Force, 46 TAX NOTES 331 (Jan. 15, 1990). See also NATIONAL WOMEN’S LAW CENTER, supra note 27, at 1.
families. First, the annual budget of families with an AGI below $10,000 prohibits many from spending the maximum allowable expenses of $2,400 or $4,800.

The second cause is more problematic. Many families in that income bracket owe no income taxes. Because the DCTC is not refundable, a family cannot benefit from the credit unless they owe income taxes. In 1995, a one-parent family with one child only owed income tax once her income exceeded $11,000 and a two-parent family with one child did not owe federal income tax until their combined income reached $14,000, but the 30% maximum credit only applies to families with AGI less than $10,000. These same families do pay a significant amount of payroll taxes, including social security and Medicare taxes. Thus, these families do not get any tax relief to mitigate their average of $46.59 per month spent on child care.

Moreover, for those low income families who spend the maximum allowable expenses and earn enough money to get a tax credit, the practical realities typical of their financial situation impede their ability to obtain the full benefit. Because the credit is allotted on the following year’s taxes, the families must pay for the child care costs up front. This is problematic for the many families who cannot make this sort of up-front outlay of cash. As a result, the DCTC does not spur families into spending more on child care. The structure of the current system is not designed to accommodate the practical realities of those who need the benefit the most.

Government reports confirm that the DCTC provides tax relief mainly to the middle and upper classes. According to a House Ways and Means Committee report, families with an AGI below $20,000 received 13% of the total benefits, families with an AGI between $20,000 and $50,000 received about 46% of the proceeds, and the remaining 41% went to families with an AGI above $50,000.

107. See A.B.A. Sect. on Tax’n, supra note 106.
108. See id.
109. Heen, supra note 100, at 190 (noting that after the Tax Reform Act of 1986, the threshold for owing income tax increased, precluding many families from claiming income tax credit).
110. See NATIONAL WOMEN’S LAW CENTER, supra note 27, at 1.
111. See discussion infra concerning new child tax, section V.B.1.
112. See CASPER, supra note 24, at Table 3 (families earning below poverty level spent average of $46.59 per week on child care, comprising 17.73% of their monthly income); McCracken, supra note 1, at 671 (average single mother in California with a child under two years old must spend 49% of her income on child care).
113. NATIONAL WOMEN’S LAW CENTER, STATE CHILD CARE TAX PROVISIONS 1 (1996); O’Brien, supra note 19.
114. O’Brien, supra note 19.
115. Heen, supra note 100, at 179-180.
116. See STAFF OF THE COMM. ON WAYS & MEANS, supra note 90, at 811 (discussing effects of the provision). See also NATIONAL WOMEN’S LAW CENTER, supra note 27, at 3 (families earning under $15,000 received less than 5% of benefit compared to 40% of
B. FAMILIAR FAILINGS OF DCAP: NOT WIDELY AVAILABLE TO LOWER INCOME FAMILIES

Like the DCTC, the DCAP in practice benefits wealthier Americans more than the working poor. While DCAP provides a larger financial award to families whose employers offer a DCAP program, the program itself is not widely available. In fact, in 1989, fewer than 2% of families with children under the age of thirteen used one. And, nearly two-thirds of the families that used them had incomes above $50,000.

The bureaucracy of the DCAP is the primary culprit for inhibiting lower income families from receiving the benefits of the plan. First, it requires a ‘use it or lose it’ structure; if a parent sets aside $5,000 to go into the DCAP, but only has $3,000 of child care expenses that year, she will lose the remaining $2,000. For families who do not have very stable job situations, requiring this type of predictability at the beginning of the year precludes their involvement. Second, the paperwork to establish a DCAP is very complicated for employers. Therefore, employers will not establish a plan when their employees turnover regularly.

PART IV: POSSIBLE SOLUTIONS

A number of solutions can be employed, creating a tax credit available to all working families that covers the average cost of paying for care, or at least enough to provide an impetus to purchase quality care. The most important adjustment would be to make the DCTC refundable. Policy makers should reject a more substantial change, treating child care expenses as a regular business expense. Instead, two of the principle benefits of the business expense provisions of the Tax Code could be applied to the DCTC: allowing an unlimited amount of expenses, and allowing expenses for all children in the family. Finally, while some advocate capping any benefits received by wealthier Americans, this solution will not achieve the desired result of giving additional benefits to poorer Americans and should be rejected.

A. MAKE DCTC REFUNDABLE

As discussed in the previous section, the non-refundability of the DCTC is the greatest obstacle faced by the working poor in obtaining tax

---

117. See Altshuler & Schwartz, supra note 71, at 59; McCracken, supra note 1, at 668.
118. See McCaffrey, supra note 12, at 118. The cost to the government in forgone tax revenue was approximately $100 million in 1992. Id.
119. O'Brien, supra note 19.
120. This change, as well as indexing the expense levels for inflation, have been suggested for years. See, e.g., Zelenak, supra note 104.
121. See infra text accompanying notes 156-158.
relief for their child care expenses. Economic analysis confirms that making the DCTC refundable would enable poorer families to benefit from the DCTC.122

While a refundable tax credit would provide needed tax relief to the working poor, it is not a cure-all solution. As economists Altshuler and Schwartz note, refundability will only increase the credits of those families who use child care and are willing to report the name and identity of the provider to the government.123 The tragic story about the North Carolina infant’s death discussed earlier aptly illustrates the limits of this solution.124 As a result, an effective refundable credit must be greater than the amount saved by using unregulated care.

B. TREAT CHILD CARE AS A BUSINESS EXPENSE

When Congress created two separate provisions to address child care costs (the DCTC and the DCAP), it did not officially recognize child care as a business expense.125 One possible solution would be to treat child care expenses in the same manner as other business expenses. The economic reason to deduct business expenses from gross income before calculating the taxable income is that the expenses “do not increase welfare unless it procures additional income.”126 Providing a credit or deduction ensures that a family’s taxable income represents its actual wealth.

The current tax code provides that a certain percentage of “ordinary and necessary” business expenses are deductible.127 Business expenses are defined in two sections of the Code. Section 162 allows a deduction for those expenses which “aid or [are] incurred . . . in carrying on any trade or business,”128 while section 212 counts expenses made for the “production or collection of income.”129 “[T]raveling expenses [including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances] while away from home in the pursuit of a trade or business” are specifically included in the prior definition.130 In addition, meals and entertainment “directly related to, . . . directly preceding or following a substantial and bona fide business discussion [including business meetings at a convention or otherwise] . . . associated with . . . the taxpayer’s trade or business” may be deducted.131 The tax code currently accommodates the dual personal and business nature of some expenses by

122. See Altshuler & Schwartz, supra note 71, at 65.
123. See id.
124. See supra text accompanying notes 43-47.
125. See Staudt, supra note 31, at 1601.
126. Id. at 1600-01.
allowing only a certain percentage of expenses to be deductible. An employer can only deduct 50% of an employee’s meal and entertainment expenses while she is not traveling on business.  

One reason for allowing child care to be treated as a normal business expense is that it qualifies under the definition and rationale just explained. First, most parents rely on child care to enable them to work. Second, deducting a family’s child care expenses would make their taxable income a more accurate reflection of economic wealth, thereby aligning taxable income with the theoretical justifications discussed above. For example, one family earning $30,000 with $2,000 in child care expenses should not be considered to have the same taxable income as a family earning $30,000 with no child care expenses.

The social reality behind child care also supports this conclusion. Even in 1996, women provided the “bulk of the unwaged labor in the household, regardless of the family’s race or income level.” This is exacerbated by the fact that the type of housework typically provided by women—feeding and caring for children—is not amenable to being performed on the weekends or after the work day is done. Children cannot eat lunch at 6 p.m. However, changing the oil or mowing the lawn can wait until the business day ends. Thus, child care is a prerequisite to employment for women with children and is appropriately labeled a business expense.

In response to this argument, Chirelstein argues that child care falls in the category of “outlays which represent the special cost of being an employed person.” Just as a working person needs transportation to and from work and appropriate clothes, a working parent needs child care. According to Chirelstein, since the courts have interpreted clothing and commuting to be personal costs, child care should be as well. Chirelstein distinguishes child care and entertainment expenses (those entertainment expenses accepted by the courts as legitimate business expenses) by classifying child care as a business-related expense of the working day attempting to be claimed under section 162 and the entertainment expenses as “concededly deductible if it is a business expense.”

---

133. See NATIONAL WOMEN’S LAW CENTER, supra note 32.
134. Staudt, supra note 31, at 1603. McCaffrey concurrs, noting that “Congress has consistently viewed child care as a class matter.” McCaffrey, supra note 7, at 115.
135. See Staudt, supra note 31, at 1603.
136. CHIRELSTEIN, supra note 49, at 93.
137. See Pevsner v. Commissioner, 628 F.2d 467, 469 (5th Cir. 1980) (holding that clothing can only be deducted if required by employer and can not be worn as ordinary clothes).
139. CHIRELSTEIN, supra note 49, at 103 (using example that if executive’s trip to Europe is for company business, it is deductible; if it is for vacation, it is not).
with this point of view is the way he reasons his conclusion—from a male viewpoint. His reasoning boils down to a matter of perspective. One could simply say child care is presumptively a business expense and therefore deductible unless used for personal reasons. For example, if parents hire a baby-sitter to enable them to go out to a movie, then concededly it is a personal and non-deductible expense. The odd result of Chirelstein’s reasoning is that if some business is conducted during lunch then such lunch is deductible, but even if business is the sole motivation for child care it is not.

The second reason to include child care as an allowable deduction is to correct the current striking disparity between allowable deductions and child care. Meals at fancy restaurants, conventions at luxury resorts and entertainment preceding a business meeting are all deductible business expenses—but paying for someone to care for your child while you are physically at work is not deductible. The specific discrepancies between section 162 and the DCTC are equally outrageous. Section 162 provides a deduction for an unlimited dollar amount of “ordinary and necessary” business expenses. The DCTC only allows a 20-30% credit for a maximum of $4,800 in expenses. One scholar concludes that these differences suggest that “women are understood to work only for economic survival.” 140

The mixed business and personal nature of child care expenses is present in other expenses 141 deductible under section 162. For example, Chirelstein explains that the purpose behind only allowing a deduction of 50% of meals and entertainment expenses is to “approximate and filter out the personal consumption benefit that is inherent in any entertainment activity.” 142 Thus, the personal nature of child care could be accommodated in the current tax section addressing business expenses.

Another argument in favor of treating child care as section 162 business expenses is to achieve consistency between deductible child care expenses and personal exemptions. Currently, each have a different tax approach—one is a credit and one a deduction. However, they are both based on the view that having children is the norm in our society. 143 For consistency within the tax code, they both should be deductible expenses.

There are valid reasons to classify child care expenses as a regular

140. Staudt, supra note 31, at 1601. See also McCaffrey, supra note 12, at 111 (noting that Congress has consistently viewed child care as an economic issue).
141. The Tax Court in Smith acknowledged many expenses are of a mixed nature. See Smith v. Commissioner, 40 B.T.A. 1038, 1039 (1939), aff’d, 113 F.2d 114 (2nd Cir. 1940) (per curiam). In addition, the problem posed by mixed personal and business expenses is an important topic in law school text books and courses on federal income taxation. See, e.g., Klein & Bankman, supra note 62, at 117.
143. See Zelenak, supra note 104, at 409-10.
business deduction under section 162: recognition of the expenses for what they are, parity between relief from business meals, travel and child care, and consistency within the Code. However, there are several problems with this approach. First, as an itemized deduction, rather than a nonrefundable credit, it would fail to benefit lower income families because they frequently do not earn enough to itemize their deductions. In addition, the worth of a deduction increases with the tax rate. Therefore, wealthier families taxed at a higher tax rate benefit more than poorer families.

C. MAKE DCTC RULES AS GENEROUS AS § 162 DEDUCTIONS FOR BUSINESS EXPENSES

Instead of making child care a business expense under section 162, two basic principles behind the business deduction could be applied to the DCTC to expand its availability—removing the expense limits and allowing expenses for all children in the family to be eligible.

1. No expense limits

First, just as an unlimited amount of meals and entertainment are eligible for classification under sections 162 and 212, the DCTC could allow unlimited amounts of child care expenses. While some are concerned this would allow families to get tax breaks for "luxury" child care, the same mechanism employed in section 162 to protect against excessive expenses could be utilized, only allowing a certain percentage of the expenses to count. While it is true that wealthier Americans spend more money on child care, this is not surprising given that the more money people have the more they will spend on all aspects of living including housing, restaurants, cars, and entertainment.

The benefits of this approach would be significant. Research shows that the number of families limited by the outdated expense limits of the DCTC have climbed, from 7% two years after the limits were enacted, to 23.5% in 1988. The limits harmed both lower and upper-income families by preventing them from gaining the full benefit of the credit since both groups had expenses in excess of the limits. This solution is preferable to simply indexing the current amounts for inflation because the in-

144. A $500 deduction for a taxpayer taxed at 15% is worth less than the same deduction for a taxpayer taxed at 30%.
145. See McCAFFREY, supra note 12, at 115.
146. See Zelenak, supra note 104, at 410.
148. See McCAFFREY, supra note 12, at 110.
149. Altshuler & Schwartz, supra note 71, at 68.
150. See id.
died amounts cited earlier do not cover the average amounts of costs. 151 Such a solution would be consistent with the other business expenses under section 162, and would give parents greater flexibility in deciding what type of care to use.

2. Credits for all children in the family

Second, just as the business deduction allows for an unlimited number of business trips, the DCTC should allow deductions for as many children as there are in a family. Currently, the DCTC can only refund the child care expenses for a maximum of two children. 152 Professor Zelenak forcefully argues there is no logical reason for this restriction. 153 The recent census report supports the common sense conclusion that child care for three or more children costs more than child care for two. 154 And, the DCTC's maximum of two children is inconsistent with the dependency exemption—which allows families to claim additional exemptions regardless of the size of family. 155

D. DENY BENEFITS TO HIGHER-INCOME FAMILIES AND GIVE SAVED AMOUNT TO LOWER-INCOME FAMILIES

Some scholars suggest that high-income taxpayers should be denied tax benefits for child care because they would have purchased child care regardless of whether it was needed to enable them to work. 156 However, the current economic analysis does not support this conclusion. 157

A more persuasive reason to limit the tax benefits of wealthier families is to allow the additional benefits to be redirected to poorer families. However, this result is unlikely. As evidenced in the 1997 budget process, cutting child care benefits in higher income levels does not correlate to adding child care benefits to a lower income group. 158 In our political re-

151. See supra text accompanying notes 101-106. The indexed amount of $3,706 in place of the $2,400 allowable expenses is less than the 1990 estimates of $2,950 to $5,065 for yearly costs.
152. 26 U.S.C. § 21(c)(2).
153. See Zelenak, supra note 104, at 413-14 (arguing that economies of scale don't apply, and the notion that "additional children are somehow excessive" is offensive).
154. See CASPER, supra note 24, at 1.
155. See Zelenak, supra note 104, at 413-14. In fact, the recently enacted child credit allows families with three or more children to obtain the credit without owing income tax. See 26 U.S.C. § 24(d). The current DCTC would be inconsistent with this as well.
157. See Zelenak, supra note 104, at 410. See also MCCAFFREY, supra note 12, at 110 (noting that it appears that as wealth increases, so do child care expenses).
158. Congress limited the DCTC to families earning below $110,000, yet defeated an amendment to make the credit refundable. They justified the first on the grounds that lower-income families need the extra money, but in fact by defeating the second amendment they prohibited those same families from obtaining any credit. H.R. CONF. REP. NO. 105-220, at 330-337 (1997). Both of these provisions were deleted after the White House
ality, this cap would just have the result of reducing the benefits provided to wealthier families.


After intense debates among Congress and between Congress and the White House, on July 31, 1997 Congress passed a landmark tax bill, the Taxpayer Relief Act of 1997. President Clinton signed this bill on August 5, 1997. The politicians pledged that the bill and its counterpart, the Revenue Reconciliation Act of 1997, would both balance the budget and reward middle-income taxpayers with large tax cuts. Unfortunately, it did not include all it could for the average Americans struggling to pay the astronomical costs of child care.

Congress debated a number of provisions for possible inclusion in its 1997 budget bill that would impact a family's child care tax benefits. Congress even passed an amendment indexing the DCTC for inflation. However, the ultimate bill agreed to by the White House only included a related provision establishing a new tax credit, the Child Tax Credit. This credit, although aimed at a different problem—helping parents address the rising costs of the everyday expenses of raising children—will give some limited relief. However, the relief provided does not compensate fully for the increased costs of child care and is subject to the same failings of the DCTC and the DCAP, namely it does not provide enough support for lower income families.


163. Taxpayer Relief Act of 1997, 111 Stat. 788, 796 (to be codified as § 26 U.S.C. 24(a) and (c)).

A. PROVISIONS THAT FAILED TO BE ENACTED IN THE TAXPAYER RELIEF ACT OF 1997

1. Provision making the DCTC refundable.

Despite some politicians' recognition that making the DCTC refundable is crucial to women, Congress defeated an amendment to make it so.\(^{165}\) According to President Clinton's spokesman, he believes that lower-income families deserve the child care tax credit.\(^{166}\) The top woman in the House Democratic leadership listed this as the number one example of how the 1997 tax bill hurts women.\(^{167}\)

Opponents of the measure successfully shifted the debate away from the needs of working mothers. First, they labeled the effort as 'welfare.' House Speaker Newt Gingrich reportedly asked, "Why should people who already pay no tax get what amounts to more welfare?"\(^{168}\) Second, the Republicans suggested that the solution is the Child Tax Credit (CTC), which would allow all parents—even those without child care—to receive a $500 per child tax credit.\(^{169}\)

This solution is problematic for a number of reasons. First, the two tax credits, the CTC and the DCTC, serve different purposes.\(^{170}\) The former tax credit aids families with the general costs of raising children, whereas the latter allows families to recoup some of their employment-related expenses. Therefore, their availability should not be linked, nor should the availability of the CTC obviate the need for the DCTC's refundability. This is especially true because the Republican version of the CTC was also not refundable.\(^{171}\) Therefore, the families who would get the additional credit from the CTC are not the same families who would get the additional credit if the DCTC were made refundable. As a result, neither the

---

165. Amendments Nos. 532, 554, and 555 would have made the credit refundable. All three were defeated. See 143 CONG. REC. S6671-72, S6685-86, and S6690-91 (daily ed. June 27, 1997) (amendments of Senators Kerry and Jeffords). One economic team estimated that making the credit refundable would cost the government an additional 16% of current costs. See Michalopoulos et al., supra note 27, at 195.


168. See Lightman, supra note 167, at A11.


170. See Letter from National Women's Law Center and 34 organizations to U.S. Senators 2 (June 17, 1997) (on file with author) (arguing that "Congress should not rob Patty to pay Paula, especially if Patty has a lower income.").

171. This point has divided the President and Congress. See infra section V.B.1. The child credit actually included in the final bill was not refundable, except it created a complicated formula for families with three or more children. See 26 U.S.C. § 24(d). See also text accompanying notes 204-10.
Ctc nor the DCTC benefit the working poor.

2. Indexing the expense levels for inflation.

The only improvement to the DCTC to make it to the Conference Committee originated in the House. The House version of the Budget Reconciliation Act indexed the qualifying child care expenses for inflation. The accompanying committee report explained the credit should increase with inflation because dependent care costs also increase with inflation. However, it was not enacted in the final bill. The accompanying reports do not give an explanation.

3. Capping the DCTC by Phasing out the DCTC benefit for wealthy Americans.

Another change included in the House version of the final budget bill and the bill reported out of the Conference Committee would have phased out the DCTC for families with incomes above a certain threshold. Under this provision, a family’s DCTC would be reduced by $25 for each $1,000 over $110,000 AGI for joint returns or $55,000 AGI for individuals. The rationale expressed by the Committee Report for this amendment—the belief “that the credit should be targeted to lower and middle income taxpayers”—comports with feminist priorities.

However, the provision does not accomplish that goal. Instead, it simply decreases the tax benefit for wealthy families which is already capped at $480 for one child or $960 for two children. The tax savings are not added to the benefits provided to lower and middle-income families. The provision, therefore, appears more steeped in belief that wealthy families do not need child care tax relief.

Another problem with this provision is that “no other tax-subsidized, employment-related expense has such a limitation.” This is particularly galling in light of the more favorable tax treatment of meals and entertainment discussed above. Fortunately, it was not included in the final tax bill.

173. See H.R. REP. NO. 105-148 (1997). The act would allow the qualifying amounts to be multiplied by the cost of living adjustment for 1996. Id.
176. See id.
178. Letter from National Women’s Law Center and 30 other organizations to U.S. Senators in the Committee on Finance 4 (July 14, 1997) (on file with author).
179. See supra text accompanying notes 127-132.
B. THE $500 CTC

1. Proposal and debate over the CTC.

The CTC impacts the DCTC even though the CTC is aimed at a family’s general expenses in caring for a child, rather than those incurred in order for a parent to work. The budget negotiators debated three versions: the House, the Senate, and the Clinton Administration’s. Considered the “most divisive tax-cut issue of all,” the debate reflected important policy concerns. Unfortunately, while the most expensive tax cut enacted in 1997, the CTC still fails to provide support for many families throughout the United States.

According to the Senate and House reports, both houses offered three purposes for the CTC. First, the credit seeks to reduce the income tax burden of families whose dependent personal exemptions no longer cover the costs of additional children. Second, the new credit “will better recognize the financial responsibilities of raising dependent children,” and finally, it “will promote family values.” These goals reflect the origin of the CTC: the Republicans’ 1995 Contract with America.

All three versions provided for a $500 per child non-refundable tax credit. The proposals varied in two respects: the level at which the credit is phased out and the interaction of the tax credit with the DCTC and the EITC. The line of demarcation was whether the credit should apply to families who are working but do not earn enough to owe any income tax.

The rhetoric employed by the political leaders of both parties parallels...

the debate surrounding whether the DCTC should be refundable.\textsuperscript{187} Gingrich claimed allowing families who owe no income taxes to obtain the tax credit was a form of "welfare."\textsuperscript{188} Senator Lott explained that this welfare "has no place in a taxpayers' relief bill."\textsuperscript{189} Interestingly, the original Contract with America plan would have allowed families paying payroll taxes—but not necessarily income taxes—to claim the credit.\textsuperscript{190} On the other side of the debate, Clinton and Gore stressed the fact that low-income working families need the credit the most and should not be excluded. They also claimed that the Republicans' denial of the credit to working families in order to lower the capital gains tax proves that the Republican tax plan aimed to benefit the wealthy.\textsuperscript{191} In addition to addressing the topic in a weekly radio address and hosting several press conferences on the topic, Clinton issued a state-by-state comparison of how many families the Republican plan would deny benefits compared to those families he felt should be included.\textsuperscript{192}

The differences in the plans would have affected a significant number of lower-income families' ability to claim even a portion of the credit. Clinton was quick to call attention to the fact that if a family first considers the EITC before assessing whether there is any income tax owed (as required under the House version), about 4.8 million families who earn $30,000 or less per year would not get the credit.\textsuperscript{193} Specifically, the House version would require a two parent family with two children to earn $27,158; a family earning under $24,385 would receive none of the $500 benefit.\textsuperscript{194} A researcher with the Campaign for America's Future estimates that 43\% of families would not get the credit under the House plan; 40\% because their income is too low, compared to only 3\% because their income is too high.\textsuperscript{195} While the EITC was designed to offset the taxes owed by poor families, it does not cover all the income and payroll taxes


\textsuperscript{188} See Albert R. Hunt, Politics & People: This Republican Tax-Cut Dog Won't Hunt, WALL ST. J., June 26, 1997, at A19.

\textsuperscript{189} Chen, supra note 180.

\textsuperscript{190} See Borosage, supra note 185, at L11.

\textsuperscript{191} See Brownstein & Hook, supra note 186.

\textsuperscript{192} See Transcript of President Clinton's Weekly Radio Address, U.S NEWSWIRE, July 12, 1997; Raum, supra note 187; Administration Analysis on Child Tax Credit Impact of Tax Cut Proposal, U.S. NEWSWIRE, July 10, 1997; Chen, supra note 180; Brownstein & Hook, supra note 186.

\textsuperscript{193} See President Clinton's Weekly Radio Address, supra note 192.

\textsuperscript{194} See Brownstein & Hook, supra note 186 (citing numbers prepared by nonpartisan Center on Budget and Policy Priorities).

\textsuperscript{195} See Borosage, supra note 185, at L11.
owed. According to the non-partisan Budget and Policy Priorities, the House bill would provide “87% of its benefit to the most affluent 20% of Americans.” However, under the Clinton plan the same families would obtain partial benefits once their income exceeds $17,500 and would receive the entire amount once they earned $22,405.

Despite some Republican suggestions that the child tax would be an alternative solution to making the DCTC refundable, neither side openly debated the impact on the DCTC. However, the interactions between the two credits under the House version produced significant results. “[T]wo million working families with incomes over $50,000 who use the child care credit” would not receive the full $500 credit. For example, a family receiving $200 in DCTC could receive a maximum of $400 child credit as opposed to the full credit. The Women’s Law Center, joined by thirty other organizations, explained to the Senate Finance Committee the impact of reducing the child tax for families who also receive the DCTC, urging the Senators to drop this provision. They argued that just because a family had child care expenses they should not be denied the full child credit since the credits serve different goals. The inequality which results is best understood when comparing two families each earning $40,000 but only one having $2,000 of child care costs. The family with the child care costs and $38,000 “net” income would get $400 DCTC and $300 child credit. The family without the child care costs would get the full $500 child credit.


According to media reports, the final bill passed by Congress and signed by the President split the difference between the House and Ad-

196. See Hunt, supra note 188 (providing example of how a newly hired police officer with two children in Speaker Gingrich’s district with a salary of $23,078, would get an EITC of $1,668, owe $675 in federal taxes, $1,760 in payroll taxes, and $354 in federal excise taxes. Under the House plan, the police officer would not get the $500 child credit because her EITC would eliminate her federal tax obligation.). See also U.S. HOUSE DEMOCRATIC POLICY COMM., supra note 9, at 2-3 (describing how timing of EITC consideration impacts a low-income family’s CTC).

197. Hunt, supra note 188. According to another report, the House approach would deny the $500 credit to families earning less than $26,000 a year. Eric Pianin & Judith Havermann, House GOP Seems to Be Softening Stand on Family Tax Credit, WASH. POST, July 12, 1997, at A4.

198. See Brownstein & Hook, supra note 186 (citing numbers prepared by nonpartisan Center on Budget and Policy Priorities).


200. $500 children’s credit - ($200 DCTC x $0.50) = $400.

201. See Letter from National Women’s Law Center, supra note 178.

202. Id.

203. See id.
Families with one or two children under age seventeen, who owe income tax, can claim a $500 credit ($400 in the first year) beginning in 1998. The credit is phased out for married couples filing a joint return earning above $110,000 and singles earning more than $75,000. The credit can only be used to offset a taxpayer’s income tax and therefore is non-refundable, unless the taxpayer has three or more children. In that situation, a complicated formula applies. The formula is so complex that the Congressional and Administration briefing to Congressional staffers differed, and an experienced tax professor was also unable to decipher it. Furthermore, the Conference Report frankly states, “[t]he conferees anticipate that the Secretary of the Treasury will determine whether a simplified method of calculating the child credit, consistent with the formula described [in the committee report], can be achieved.”

PART VI: CHILD CARE TAX ADJUSTMENTS, PART II—THE 1998 BUDGET PROCESS

Fortunately, child care tax issues have not receded from national attention after last year’s budget process. In fact, the opposite is true. In his State of the Union Address, President Clinton proposed a child care tax adjustment and significantly increasing funding for child care. He has followed that up with a specific proposal to be considered by Congress. His $21.7 billion plan over five years would increase funding for the CCDBG, develop tax credits for businesses who provide child care and create new funds aimed at enhancing child care training, education, and

205. Taxpayer Relief Act of 1997, 111 Stat. 788, 796 (to be codified as § 26 U.S.C. 24(a) and (c)).
206. See id. at § 24(b). The credit is diminished by $50 for each $1,000 earned above the stated limits. Id.
207. See id. at § 24(d).
208. The negotiators announced that they reached final agreement on July 28, 1997. The legislators and their staff were briefed on the basics on July 29, 1997 by representatives of the Clinton Administration and the Republican Congressional leaders. The details explaining how the CTC would impact the EITC and how lower income families could obtain the CTC differed. Telephone Interviews with Pat Kery, Legislative Director for Congresswoman Kennelly (July 30 and 31, 1997).
209. See Philip P. Storrer, Taxpayer ‘Relief,’ A Collection of Uncollected Thoughts, 76 TAX NOTES 1115, 1116 (1997) (noting that CTC is so complicated that author, a “tax professor with 30 years of experience” could not understand it).
safety.213 In addition, his proposal would reform the DCTC, allowing up to 50% of child care costs to be included.214

While it is too early to determine how far the Administration's proposals will make it in the 1998 budget process,215 early analysis suggests the recent popularity of child care proposals will force the debate to the forefront in an election year.216 In the meantime, President Clinton issued a memorandum to the Heads of Federal Departments and Agencies on March 10, 1998 directing employers to alert employees about all child care benefits, including the DCTC.217 Additionally, the First Lady has focused a significant amount of attention on child care.218

Early legislative action confirms the pundits' predictions. The Senate passed a spending plan on April 2, 1998. It included a resolution that the CCDBG and tax relief for child care should be increased.219 However, it did not include President Clinton's specific proposals.220

Several comments can be made about the prospects for this year's budget process. First, the good news. Last year, Congress' actions failed to completely assist parents in affording child care. Because remedying that oversight is one of the centerpieces of Clinton's budget plan, the possibility that improvements will be made this year increases. In addition, Clinton's specific proposals are more comprehensive than those considered last year, or those advanced by this article as solutions to the child care problem. As a result, even if a significant part of his package is enacted it will go further towards creating a multi-faceted approach to the problem. Apparently, his proposal has the support of several national child care advocacy groups;221 this suggests that the proposals are in line with advanc-

213. See Vobejda, supra note 9, at A4.
214. See Davis Hosansky, Abundant Foes Say 'No Chance' to Clinton's Chosen Tax Breaks, CONG. QUARTERLY WEEKLY REPORT 56 (6) 242, 243 (Feb. 7, 1998).
221. See, e.g., Vobejda, supra note 9, at A4 (Child Care Action Campaign and Children's Defense Fund approved Clinton proposal).
Unfortunately, several developments spark the question of whether this process will result in a step forward. First, the Republicans are again refo­cusing the debate, from how to enable Americans to pay for quality child care while they work, to the need to affirm an individual woman’s decision to stay home to raise her children.\(^{222}\) Similar to last year when they refo­cused the debate on reforming the DCTC to creating a new CTC,\(^{223}\) this year the Republicans are stressing the need to give financial support to all families—because “all moms work.”\(^{224}\) While many feminists agree that moms at home work and should be valued for their labor, the Republican effort is conflating two distinct issues. On one hand, tax relief aimed at alleviating costs born by parents—who pay others to care for their children while they work—relates to the specific debate over mother’s ability to work outside the home. The other objective is to aid parents with the increasing costs of raising children. The latter, equally laudable goal, should be addressed by a separate provision,\(^{225}\) and a separate debate. By focusing the debate on the ‘mommy wars,’ Republicans jeopardize important advances in women’s participation in the workforce. Hopefully, the public’s interest in child care will compel the legislature to follow the lead of Clinton and child care policy advocates by providing funding that will enable women to continue working outside the home.

Second, the current Clinton proposal does not include making the DCTC refundable. As a result, lower-income families will continue to receive less than the maximum DCTC and only a small portion of the tax relief provided.\(^{226}\) Hopefully, later versions of the legislative package will correct this oversight and therefore increase the benefits received by low-income families.

Finally, the instability of the funding for the Administration’s comprehensive plan weakens its chances of passage. The President has offered to pay for these programs by revenues from the tobacco settlement.\(^{227}\) As indicated by Republican leaders, this might be problematic,\(^{228}\) especially

\(^{222}\) See id. Beginning with their response to Clinton’s State of the Union Address, Republicans have attempted to change the debate. See Text of the Republican Response, by Senator Lott, to Clinton’s Address, N.Y. TIMES, Jan. 28, 1998, at A21 (solution to child care issue includes “[giving] stay-at home parents the same tax breaks and benefits available to parents who use day care. After all, all moms work—whether at home or in an outside job.”).

\(^{223}\) See supra text accompanying notes 168-171.

\(^{224}\) See Text of the Republican Response, by Senator Lott, to Clinton’s Address, supra note 210, at A21.

\(^{225}\) For example, personal exemptions have been the standard means of accommodating a family’s everyday costs of raising a child—until last year’s CTC.

\(^{226}\) See supra text accompanying notes 106-112, 115-119.


\(^{228}\) See id. (quoting Senator John McCain as stating that it is a big "if" whether tobacco
given the precarious nature of the settlements.  

CONCLUSION

Experts agree—tax reimbursements for child care expenses do not address every problem confronting families searching for access to affordable, quality care. An ideal solution would include a multifaceted attack with income tax provisions comprising an important component of an overall plan. Tax incentives could address one of the central problems facing parents—the astronomical costs. The current tax system does provide some relief for parents. The problem is that it is not enough, especially for the families who need it the most, the working poor. Two basic changes would correct this mistake: making the DCTC refundable and allowing for unlimited expenses for all children in a family. Lower-income families as well as upper-income families would benefit from these changes.

Unfortunately, the 1997 tax bill passed by Congress and signed by the President failed to implement these basic reforms. Instead, the bill includes a complicated new credit, the CTC, which offers limited support to families. The $500 per year ($400 for the first year) will offset some of the inflationary costs that the personal exemptions have failed to keep pace with. However, it is only refundable—and thus only beneficial to the working poor—if they have more than three children in their family. This falls short of addressing the major concern among working parents—the cost of child care as a legitimate business expense. Hopefully, Congress will rectify these mistakes by including these suggestions in the new bill this year when it considers the latest Clinton proposal.