POSTPARTUM TAXATION: 
THE INTERNAL REVENUE CODE AND THE OPT OUT MOM 
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ABSTRACT

Legislation seeking to ensure that women receive equal pay for equal work has been on the books for decades. Nevertheless, the average American woman still receives less than eighty cents for every dollar earned by the average American man. Happily, the gender pay gap between men and childless women is narrowing over time. Meanwhile, the gap between mothers and others continues to widen. Career interruptions contribute significantly to this disturbing trend—nearly half of mothers opt out of the workforce at some point in their lives, most often to care for young children. Faced with too-short (or non-existent) maternity leaves, inflexible work schedules and the soaring costs of childcare in the United States, this opt out phenomenon is hardly surprising. But with the decision to opt out comes grave cost. Over 90% of opt out moms want to return to the workforce several years after off ramping. Unfortunately, many discover that they are unable to do so. A mother that does manage to reenter the workforce will find that even a short off ramp results in a sizeable and disproportionate reduction in her annual earnings that will persist for every year of her remaining life.

Given this dismal reality, experts that study the biases faced by women in the workplace encourage mothers who want to maintain careers to resist opting out during their children’s preschool years (and to incur the many high costs of doing so) in order to protect their most valuable economic asset—their lifelong earning capacity. Surprisingly, these insights are under- (if not completely un-) utilized in tax scholarship considering the taxation of women and the family. Incorporating these critical insights, this Article shows that the tax laws are already well suited to provide new mothers the encouragement urged by so many non-tax scholars. This Article first proposes several reforms to ensure the postpartum earnings of new mothers are not over-taxed. It then discusses existing mechanisms used by the tax laws to encourage long-term investment and identifies two

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mechanisms that could be easily fashioned to help new mothers remain in the very imperfect workforce that exists today.

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SHANNON WEEKS MCCORMACK  

INTRODUCTION  

Recently, the White House reported that “[o]n average, full-time working women earn just 78 cents for every dollar a man earns.”¹ Thus, the average woman would “have to work approximately 60 extra days, or about three [additional] months” each year to make up the annual difference.² When discussing the gender pay gap, members of the media, lawmakers and politicians tend to focus on these statistical averages.³ But the significant role that motherhood plays in creating and widening the gap is often lost in


³ Catherine Hill, The Simple Truth about the Gender Pay Gap, THE AM. ASS’N OF UNIV. WOMEN, 5 (Fall 2015), http://www.aauw.org/files/2015/09/The-Simple-Truth-Fall-2015.pdf [hereinafter Hill, The Simple Truth] (explaining the need to delve beyond the surface of the how much less the average woman earns when compared to the average man, Hill writes: “You’ve probably heard that men are paid more than women are paid over their lifetimes. But what does that mean? . . . AAUW’s The Simple Truth about the Gender Pay Gap succinctly addresses these issues by going beyond the widely reported 79% statistic.”). Politicians tend to begin discussions of the pay gap by stating the most current average statistic to show the existence of a pay gap. For a typical example of how this average statistic is featured, see, e.g., Your Right to Equal Pay, supra note 1 (providing average statistic as key figure in introduction of “the basics” of the pay gap, followed by discussion of how average statistic varies based on a woman’s race); But see, Kirsten Gillibrand, The American Opportunity Agenda, Equal Pay for Equal Work, KRISTEN GILLibrAND, U.S. SEN. FOR N.Y., http://www.gillibrand.senate.gov/issues/equal-pay-for-equal-work (last visited Dec. 4, 2015) (providing average statistic and then discussing effect of motherhood on wage gap). The media also tends to lead discussions of the pay gap with these average statistics. For recent articles, see, e.g., Lisa Quast, The Gender Pay Gap Issue is Fixable But It May Require Bolder Actions to Overcome, FORBES: LEADERSHIP (Nov. 22, 2015, 8:00 AM) http://www.forbes.com/sites/lisaquast/2015/11/22/the-gender-pay-gap-issue-is-fixable-but-may-require-bolder-actions-to-overcome/ (leading with the most current average statistic).
these discussions. And these statistical averages do not account for the many women who are completely unable to enter (or re-enter) the workforce after they become mothers.

At the beginning of their respective careers, men still earn slightly more than their female counterparts. Women just entering the workforce are estimated to earn “90 cents to a man’s dollar.” And for the 10% of females that do not have children, the gap will not widen much more as her career (and life) progresses. To be sure, childless females still suffer from some pay gap, which may be explained in part by the “glass ceiling

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4 See infra Section I.
5 See infra Section III.
9 WILLIAMS, *UNBENDING GENDER*, supra note 8, at 2 (“Though the wage gap between men and women has fallen, the gap between the wages of mothers and other has widened in recent years. As a result, in an era when women’s wages are catching up with men’s, mother’s lag behind.” (emphasis added)).
effect”\textsuperscript{10}—\textit{i.e.}, “the persistent failure of women to climb as far up the corporate ladder as might be expected from their representation in the working population as a whole”\textsuperscript{11}—and by the fact that the small subset of women \textsuperscript{12}that “reach the highest levels of corporate management . . . do not receive the same pay as men for the same job.”\textsuperscript{13} Nevertheless, the gap between the wages of males and childless females is far narrower than the average gender pay gap and is steadily closing.\textsuperscript{14}

The situation for the remaining 90\% of women who have children,\textsuperscript{15} however, is so dramatically different that one expert divides the economy into “mothers and others.”\textsuperscript{16} Specifically, as the wage gap between childless females and males shrinks, “the gap between the wages of mothers and others has [actually] widened in recent years.”\textsuperscript{17} As one might expect, the reasons for this “motherhood pay gap” are varied. For instance, a mother may be more likely than a non-mother to forego monetary compensation in exchange for nonmonetary benefits, such as flex-time options and generous (or at least existing) family leave policies\textsuperscript{18} that help her balance the demands of working motherhood.\textsuperscript{19}


\textsuperscript{11} \textit{The Glass Ceiling}, \textsc{Economist} (May 5, 2009), http://www.economist.com/node/13604240.

\textsuperscript{12} The Pew Research Center found that in 2015 “26 women are serving as CEOs of Fortune 500 companies (5.2\%) [and the] share serving as CEOs of Fortune 1000 companies is virtually the same (5.4\%).” \textit{Chapter 1: Women in Leadership}, \textsc{Pew Res. Ctr.: Soc. & Demographic Trends} (Jan. 14, 2015) [hereinafter \textsc{Pew Chapter 1: Women in Leadership}], http://www.pewsocialtrends.org/2015/01/14/chapter-1-women-in-leadership/.

\textsuperscript{13} \textit{Id}.

\textsuperscript{14} \textsc{Williams, Unbending Gender, supra} note 8, at 2.

\textsuperscript{15} \textit{Id}.

\textsuperscript{16} \textit{Id}.

\textsuperscript{17} \textit{Id}. (“Though the wage gap between men and women has fallen, the gap between the wages of mothers and other has widened in recent years. As a result, in an era when women’s wages are catching up with men’s, mother’s lag behind.” (emphasis added)).

Nevertheless, some lawmakers and commentators have been quick to exaggerate the extent to which the gender pay gap is driven by these “lifestyle choices.” But despite what the rhetoric might lead one to believe,

Maternity Leave System: Why U.S. Maternity Leave Policies still fail Women and Children, BLOOMBERG BUSINESS (Jan. 27, 2015) http://www.bloomberg.com/news/features/2015-01-28/maternity-leave-u-s-policies-still-fail-workers (“Unless you work for a company that voluntarily offers it, or in one of three states, paid maternity leave doesn’t exist in the U.S. A law called the Family and Medical Leave Act (FMLA) grants up to 12 weeks of unpaid leave every year, but it applies only to full-time workers at companies with 50 or more employees. About half of all working Americans are covered by FMLA. The other half—freelancers, contract workers, entrepreneurs, people who work at small businesses—are on their own. Paid leave is even rarer: Only 12 percent of American workers have access to it in the U.S., according to [a pre-2014 version of a report by the] Bureau of Labor Statistics.”)


20 Ana Marie Cox, Obama's equal-pay myth is one thing. The GOP's Chauvinism is a Problem, THE GUARDIAN: OPINION (Apr. 16, 2014, 7:30 AM), http://www.theguardian.com/commentisfree/2014/apr/16/obama-equal-pay-myth-77-cents-gop-bill. Most recently, Republican lawmakers have used this rhetoric to dismiss legislation that would address the gender pay gap as a solution in search of a problem. Iron Carmon, Why the GOP is Wrong About the Pay Gap, MSNBC (Apr. 7, 2014, 9:16 PM) [hereinafter Carmon, Why the GOP is Wrong], http://www.msnbc.com/msnbc/why-the-gop-wrong-about-the-pay-gap (“As President Barack Obama issues two executive actions intended to bolster pay equity for women, while encouraging the Senate to pass the Paycheck Fairness Act, you’re likely to hear the following defenses from Republicans: The pay gap is a myth, largely determined by women’s choices, paying women less for the same job is already illegal, and these laws will only encourage frivolous lawsuits. Just ask Texas Gov. Rick Perry, who recently called the focus on equal pay ‘nonsense,’ or Wisconsin Gov. Scott Walker, who called it ‘bogus.’ Or Kentucky Sen. Mitch McConnell, who said, after every single Senate Republican opposed the Paycheck Fairness Act in 2012, ‘We don’t think America has any problems related to too little litigation.’”). Others have pointed out that these “choices” are not purely a product of natural endowment but more likely an inevitable result of the unexamined persistence of heterosexual gender norms. See, e.g., Cox (“But here's where Republicans are wrong: they believe that a gender pay gap due to "lifestyle choices" is somehow OK, or inevitable, or—and this gets to the core fallacy of modern conservatism—that it is OK because it is inevitable.”).
statistical data squarely establishes that preference alone cannot explain away the gender—no less the motherhood—pay gap. This Article focuses on the (at least statistically) undeniable role that career interruptions play in aggravating the motherhood pay gap.

Whereas a male’s career tends to be relatively undisrupted, resulting in a steady increase in pay over his career, the income of the typical mother will not climb in this consistent fashion. Once children arrive, many new mothers look for some sort of “off ramp.” While some find less demanding (and lucrative) work, others “opt out” of the workforce entirely while their children are small. Research indicates that nearly 40% of “highly qualified” women off-ramp at some point in their lives—that is,

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21 See infra Section I.


23 Hill, The Simple Truth, supra note 3, at 9 (“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.”). See generally, WILLIAMS, UNBENDING GENDER, supra note 8.


25 Id.

26 Sylvia Ann Hewlett & Carolyn Buck Luce, Off Ramps and On Ramps: Keeping Talented Women on the Road to Success, HARV. BUS. REV., Mar. 2005, [hereinafter Hewlitt & Luce, Off Ramps and On Ramps], https://hbr.org/2005/03/off-ramps-and-on-ramps-keeping-talented-women-on-the-road-to-success (summarizing study conducted in 2004 by the Center for Work-Life Policy titled The Hidden Brain Drain: Women and Minorities as Unrealized Assets which focused on highly qualified women “defined as those with a graduate degree, a professional degree, or a high-honors undergraduate degree.”).
“they voluntarily leave their careers for a period of time”27—and most often do so in order to care for young children.28

Unfortunately, some members of the media have oversimplified the reasons for this “opt out revolution,”29 painting a monochromatic picture of new mothers gleefully abandoning their careers in order to care for their infants.30 But subsequent studies more accurately describe the complex and serious decision to off ramp one’s career, teasing out an array of “push” and “pull factors” that mothers weigh when considering whether to opt out.31 For instance, while the opt out mother’s decision to off ramp is certainly motivated by her desire to devote more time to her children, studies expose the less romantic fact that “… behind most pull factors [lurks] a highly traditional division of labor.”32 Well-known among experts as the “second shift,”33 studies have laboriously documented the way in which women disproportionately shoulder the burden of daily household tasks, resulting in a formidable “double day”34 of work once tasks internal and external to the home are aggregated.35 In addition to this already powerful combination of pull factors, the new mother will also weigh various push factors in deciding whether she can remain at work once children arrive. Faced with, to name just a few

27 Hewlett et al., The Hidden Brain Drain, supra note 24.

28 Id. at 17. Nearly half of the women who off-ramped cited children as a primary reason for doing so; another 24% cited the need to care for another, such as an elderly parent.


30 Id.

31 See infra Section I.

32 Id. at 16.

33 ARLIE HOCHSCHILD WITH ANNE MACHUNG, THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME (Penguin Books 2012) [hereinafter HOCHSCHILD WITH MACHUNG, THE SECOND SHIFT]. See also Nancy Staudt Taxing Housework, 84 Geo. L. J 1571 (1995) (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).

34 Id. at 3.

35 Id. at 3-4.
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examples, too-short maternity leaves, to too-long hours and inflexible work schedules, it is no surprise that many new mothers feel they are being pushed out of the workplace.

And this is before finances are taken into account. In order to work, a mother will frequently be faced with the task of locating dependable childcare. With this care will often come great cost—in the most expensive states, the cost of purchasing full-time day care for two pre-school aged children can easily exceed $25,000 and can reach a staggering $34,000. Moreover, the time-crunched working mother will inevitably incur a series of other costs that she would be able to avoid if she were to opt out, including the costs of commuting, outsourcing her second shift and purchasing work attire. To make matters even worse, the Internal Revenue Code [hereinafter, the “Code”] will over-tax these earnings, severely limiting the extent to which parents may deduct the exorbitant costs of childcare and completely disallowing any form of tax relief for other work-related costs.

Clearly then, the initial decision to opt out is a complicated one for new mothers. Nonetheless, one might say, perhaps once the decision is made, women and their families strike a new balance that works well for them personally. If this were true, the opt out phenomenon would be descriptively interesting but not particularly disturbing. Unfortunately, however, this is not how the story unfolds for the typical opt out mom.

A full 93% of women who off ramp their careers wish to re-enter the workforce. Sadly, these women will find it very difficult to do so. In fact, only 74% of women that seek to on-ramp will actually attain employment, and only 40% will find full-time jobs. Studies consistently show that “[e]mployers are less likely to hire mothers compared with childless women.” But the problems do not stop with re-entry. Opt out mothers that

36 See supra note 18 and accompanying text.
37 See generally, Hewlett et al., The Hidden Brain Drain, supra note 24.
40 Hewlett et al., The Hidden Brain Drain, supra note 24, at 15.
41 Id.
42 Hill, The Simple Truth, supra note 3, at 9 (citing Shelley J. Correll, Stephen Benard, & In Paik, Getting a Job: Is there a Motherhood Penalty, 112
do gain re-employment will be paid less than childless women.\textsuperscript{43} Of course, at some point long absences from the workforce will result in one’s skills becoming rusty (if not obsolete) so that a reduction in wages would be expected. Women, however, do not tend to leave the workforce for long. While the average woman only leaves the workforce for approximately two years before attempting to reenter,\textsuperscript{44} even this short off ramp results in a sizeable reduction in her annual earnings that will persist for every year of her remaining life.\textsuperscript{45} In short, “women who take a career break are penalized out of proportion to any objective deterioration of their skills.”\textsuperscript{46} Thus, while childless females may hit the glass ceiling, many mothers never get close to it and are instead stopped by the “maternal wall.”\textsuperscript{47}

This situation has grave consequences. It runs afoul of most rational concepts of gender equity.\textsuperscript{48} It heavily contributes to the disturbingly high poverty rate among single mothers, which, in turn and of course, leads to the disturbingly high percentage of children living in substandard environments.\textsuperscript{49} It causes married and co-habitant women to suffer

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\textsuperscript{43} Id.

\textsuperscript{44} Hewlett et al., \textit{The Hidden Brain Drain}, supra note 24, at 37.

\textsuperscript{45} Joan C. Williams, Reshaping the Work-Family Debate 25 (Harvard Univ. Press 2010) [hereinafter Williams, Reshaping Work-Family Debate].

\textsuperscript{46} Id.

\textsuperscript{47} 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 (2003) [hereinafter Williams & Segal, Beyond the Maternal Wall] (“We all know about the glass ceiling. But many working women never get near it; they are stopped first by the maternal wall.”). See also, Kristen Rowe Finkbeiner, Breaking Through the Maternal Wall: The Time is Now, The Shriver Report (Jan. 14, 2014) http://shriverreport.org/breaking-through-the-maternal-wall-the-time-is-now-kristin-rowe-finkbeiner/ (A Maternal Wall is standing in the way of most women ever entering a room with a glass ceiling.”).

\textsuperscript{48} Williams, Unbending Gender, supra note 8, at 2.

\textsuperscript{49} According Census Bureau, “[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.” See National Snapshot: Poverty Among Women &
psychological harms and to forfeit their senses of identity. It disrupts the perceived equality of marriages and other committed relationships. It forces dual-earner families to forego an often-needed second stream of income. It leads to the egregious underrepresentation of mothers in high-level positions, depriving the processes by which legal, corporate and other policies are formed of vital perspective.

To directly improve the plight of mothers in the workforce, the United States could follow the example of the many developed nations that provide an array of services, such as universal pre-school and affordable, guaranteed childcare, alongside legal protections for new mothers, including mandatory paid and work-protected parental leaves. But given


50 See, e.g., PAMELA STONE, OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME 145 (Univ. of Cal. Press 2008) [hereinafter STONE, OPTING OUT?] (Of opt-out moms interviewed “[m]ore than half discussed the anguish they continued to feel about having lost a vital aspect of their identity and status in the world.”).

51 Id.

52 See generally, Weeks McCormack, supra note 39.


55 Id.

56 See infra Section II.
America’s historical failure to provide even one of these benefits or protections—the United States is, for instance, the only industrialized nation that does not require any paid parental leave\(^{57}\)—the chances of a national move towards this model in the foreseeable future seem staggeringly low.\(^{58}\)

Cognizant of these realities, this Article argues that a series of well-designed tax laws could present a feasible way forward. Specifically, tax laws might be reformed to create tax savings and incentives that would help new mothers stay in the work force, which would, in turn, mitigate the disproportionate penalties that stem from even short off ramps. And it could do so without creating government-run programs or enacting employer mandates destined to cause political controversy.\(^{59}\)

The reforms proposed in this Article do not seek to change the extremely imperfect work environments mothers face.\(^{60}\) Instead this Article confines its attention to tax reforms aimed at helping new mothers remain in the workforce, such as it is. The first set of proposed reforms seek to eliminate the push factors the tax law needlessly creates. Currently, the Internal Revenue Code strictly limits the ability of parents to claim tax relief for childcare costs incurred while working.\(^{61}\) Moreover, the Code does not allow taxpayers to deduct any of the costs associated with other work-related expenses, such as the costs of commuting, outsourcing the second shift and work attire.\(^{62}\) Under fundamental principles of taxation, these limitations are too severe and cause the earnings of new mothers to be


\(^{58}\) 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, 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. For a more in depth discussion of current proposals, see infra Section II.

\(^{59}\) See infra Section II.

\(^{60}\) Indeed, one can imagine an array of tax laws that might encourage employers to create more accommodating policies and working environments. Determining the extent to which the tax law might (or should attempt to) provide employer side tax subsidies to actually alter the workplace deserves careful study and analysis that falls outside the scope of this particular Article.

\(^{61}\) See infra Section III.B.1.

\(^{62}\) See infra Section III.B.2.
over-taxed. By doing so, the tax law needlessly strains the finances of new mothers at a time when they are grappling with the increased costs of caring for new children and reduces the amount new mothers can afford to pay for childcare and other services that would help them balance their careers during the most demanding time of their children’s lives. These tax laws should be corrected immediately.

This Article then argues that these reforms constitute an absolutely necessary but not remotely sufficient response to the obstacles faced by mothers who wish to retain their careers. Today many working mothers feel “crushed” by the soaring costs of childcare and often discover that once these expenses are paid, they have very little disposable income remaining. Thus, a new mother who focuses only on present demands and financial prospects will find many reasons to opt out in her children’s preschool years even if the tax laws are reformed to correct for over-taxation.

Given current reality, however, women who wish to retain their careers after having children must be extremely wary of off-ramping. Thus, despite the stunningly meager short-term prospects of doing so, experts encourage new mothers who want to maintain careers to avoid opting out in order to protect their most valuable financial asset—their lifelong earning capacity. This critical insight is well established in scholarship studying the biases faced by women and mothers in the workplace. Yet it remains under- (if not completely un-) utilized in tax scholarship considering the taxation of women and the family.

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64 Id.

65 See infra Section III. A.

66 See infra Section III.C.

67 See BENNETTS, supra note 29, at 128-147 (encourages women to look at the work-life balance as a “15 year plan,” and remember that the challenges presented by children are most pronounced for only a portion (perhaps fifteen years) of a lifelong career (perhaps over 45 years)); S.M., A Taxing Situation, THE ECONOMIST: WOMEN IN THE WORKFORCE (Apr. 9, 2013), http://www.economist.com/blogs/democracyinamerica/2013/04/women-workforce (summarizing Joan C. Williams’ discussion found in RESHAPING THE WORK FAMILY DEBATE, supra note 45, which asks “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” if they wish to maintain their careers.) [Hereinafter S.M., A Taxing Situation].
But once one understands this reality, one can also understand that
the tax law is already well suited to provide new mothers the
encouragement urged by so many non-tax scholars. Many tax laws create
incentives for taxpayers to make investments yielding primarily long-term
benefits. Analogizing to these existing laws, this Article suggests two
reforms. First, analogizing to the often-discussed capital gains preference
(\textit{i.e.}, the lower than ordinary rates applicable to gains resulting from the sale
or exchange of property held for a sufficiently long period of time), this
Article proposes that the postpartum earnings (\textit{i.e.} income earned within a
designated period of time following a child’s arrival) of secondary earner
and single parents be taxed at preferential rates. This could be
accomplished in various ways, but could be fitted most easily into the
existing structure of the Code by allowing married mothers to file returns
separate from their spouses and by increasing the personal exemption
amounts to which both married and single new parents are entitled. Second,
analogizing to the numerous provisions of the Internal Revenue Code which
accelerate the timing by which deductions may be claimed and delay the
timing by which income must be recognized in order to encourage long-
term investment, this Article proposes that the tax laws offer new parents
interest free loans in the form of repayable tax credits. This would allow
new mothers to defray the extraordinary costs of early childcare and to
repay claimed tax credits after their children reach school age.

This Article contributes to existing scholarship in critical ways.
Currently, there is an extremely rich scholarship chronicling the ways in
which the tax laws are stacked against dual earner couples and women
generally. For instance, notable scholars have argued that the tax law should
abolish the joint return in favor of allowing married women to file single

\textsuperscript{68} 26 U.S.C. §§ 1(h) (provides for preferential capital gains rates); 163 (allows
for a mortgage interest deduction); 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); 41 (credit for increasing
research activities); 195 (allows deductions for certain start-up expenditures);
401(k) (plans, profit-sharing plans, employee stock ownership plans, money
purchase plans, defined benefit plans, Simplified Employee Pensions, Salary
Reduction Simplified Employee Pension, SIMPLE 401(k) plans for small
employers); 403(b) (tax-sheltered annuity plans for 501(c)(3) organizations and
public schools); 457(b) (deferred compensation plans for state and local
governments). Hereinafter, unless identified otherwise, all references to section
numbers and/or the Code, are to provisions of the Internal Revenue Code
(“I.R.C.”) located at Title 26 of the United States Code.

\textsuperscript{69} \textit{See infra} Section III.C.1.
returns, should not use marital status as a way of determining tax liability, should tax married males more than females, and should raise the zero percent bracket for married women (i.e., the designated amount of taxable income that is not subject to taxation). While not taking issue with these suggestions, this Article is the first to suggest tax reforms that meaningfully address the obstacles faced by working mothers specifically.

Section 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 enter into a mother’s decision to opt out of the workforce. Section II summarizes statistical data demonstrating the way in which even short off ramps result in lifelong harm to the opt out mother’s career and makes the case for intervention through the Internal Revenue Code. Section III proposes a series of reforms to change the way in which the postpartum earnings of mothers are taxed in order to help new mothers remain in the workforce and avoid the harm caused by opting out. Section IV searches existing tax laws for employer-side subsidies that could be

70 See generally, Lawrence Zelenak, Marriage and the Income Tax, 67 S. CAL. L. REV. 339 (1993) (“The only way to avoid both marriage bonuses and penalties is to abandon marital status as a tax determinant and to require that spouses file separate returns.”). Almost all married couples currently use the joint return to file their taxes.


72 See, Edward McCaffery, Slouching Towards Equality: Gender Discrimination, Market Efficiency and Social Change, 103 YALE L. J. 595, 656 (1993) (Proposing “to change significantly the system of taxation, by following an optimal, or Ramsey, taxation scheme. This proposal, long supported in the public finance literature, would result in the government's taxing married men more, possibly much more, than married women.”).

73 EDWARD, MCCAFFERY, TAXING WOMEN 36 (Univ. of Chi. Press 1997) (so that the secondary earner can “have the benefit the primary earner has of going through a range in which she's not paying positive taxes.”).
naturally expanded to help opt out mothers return to the workforce. It does so with minimal success, underscoring the critical importance of enacting reforms—such as those proposed in Section III—that help mothers avoid opting out if they want to maintain their careers after children arrive. Section V concludes.

I. THE WAGE GAP AND THE MATERNAL CAREER TRAJECTORY: CAREER, INTERRUPTED

In 1963, when the Equal Pay Act was first enacted, women earned just 59 cents for every dollar earned by men. While the gender pay gap has narrowed, the average woman still earns only 78% of what the average man earns. These statistics are a helpful way to quantify the average gender pay gap. They do not, however, capture the way in which the gap widens over the course of a woman’s life and the significant role that motherhood plays in creating the gender pay gap.

From the moment the average woman enters the workforce, she will earn less than her male counterpart. One recent study found that a woman’s earnings one year out of college represented 82% of the earnings of a comparable male. The gender pay gap will only widen from there. Ten years after graduation, women are estimated to earn only 69% of what similarly situated males are paid. Studies have also documented how the wage gap increases with age. While women between 25 and 35 years of age

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75 Your Right to Equal Pay, supra note 1,
76 Id.; Patten, supra note 2.
77 The phrase glass ceiling, which focuses on the challenges women generally face in the workplace stretches back decades. See, e.g. Zimmer, supra note 10 (The “glass ceiling” first came to wide attention in March 1986, when THE WALL STREET JOURNAL ran a special report by Carol Hymowitz and Timothy D. Schellhardt with that title.). By contrast, the term maternal wall, which is used to explain some of the deleterious effects motherhood has on a woman’s career, was not coined until 2003. See Williams & Segal, Beyond the Maternal Wall, supra note 47, at 78 (2003) (“Sociological studies show that motherhood accounts for an increasing proportion of the wage gap between men and women.”).
78 Hill & Corbett, Graduating to a Pay Gap, supra note 6 and accompanying text; see also Maatz, supra note 6.
tend to earn 90% of what their male counterparts earn, the gap widens until women reach the age of 35. From age 35 to retirement women are “typically paid [just] 75 to 80 percent of what men are paid.”

There are certainly many reasons that help explain why the gender pay gap widens in this way, but motherhood plays a particularly prevalent role. In fact, the average earning trajectories of males and childless females differ so considerably from those of mothers that one expert observes that “[o]ur economy is divided into mothers and others.”

The income trajectory of the typical American male is relatively linear and upward sloping. This is not to discount that recessions and unexpected life events can disrupt earnings to some extent. But in general, once men enter the workforce, their salaries increase steadily over time. In the early years of a woman’s career, her income rises in a similar, steady fashion. And for the ten percent of females that do not have children, this sturdy progression will continue. To be sure, childless females still suffer some pay gap, earning “90 cents to a man’s dollar.” Still, the gap between males and childless females is far narrower than the average gap and is closing over time. By contrast, “the gap between the wages of mothers and others has widened in recent years.”

The earning trajectories of the ninety percent of women who are mothers will typically diverge from the neat, upward progression of the “others.” Once children arrive, many new mothers determine that they must

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81 *Id.* at 13.
83 Ashford, ‘*High Salary Years*’, supra note 22.
84 Hill & Corbett, *Graduating to a Pay Gap*, supra note 6 and accompanying text.
85 Williams, *UNBENDING GENDER*, supra note 8, at 2 (stating that ninety percent of women become mothers during their lifetimes).
86 Rowe-Finkbeiner, *Overcoming the ‘Maternal Wall’*, supra note 7 and accompanying text.
88 *Id.* (“Though the wage gap between men and women has fallen, the gap between the wages of mothers and other has *widened* in recent years. As a result, in an era when women’s wages are catching up with men’s, mother’s lag behind.” (emphasis added)).
89 *Id.*
opt out of the workforce. In one of the most thorough studies conducted to date, researchers found that nearly 40% of “highly qualified” women voluntarily interrupted their careers, compared with the far lesser 25% of men who off-ramped. Even more telling, while “[t]he main reason that highly qualified men off-ramp is to change careers or to prepare themselves to change careers,” most women off-ramp in order to care for children and elderly parents. Nearly half of the women who off-ramped cited children as a primary reason for doing so; another 24% cited the need to care for another, such as an elderly parent. This goes a long way towards explaining why the gender wage gap widens as women approach the age of 35. As MIT economist Lester Thurow 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.”

It is, therefore, important to understand why women opt out of the workforce when children arrive and the long-term effects of doing so. Some of the reasons why women opt out of 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. But various studies have created a far more accurate and detailed picture of why women off-ramp, teasing out a series of “push” and “pull” factors that go into the important decision to leave the workforce for a time.

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90 Hill, The Simple Truth, supra note 3, at 9 (“Becoming a parent is an example of a choice that often has different out-comes 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.”). See generally, WILLIAMS, UNBENDING GENDER, supra note 8.

91 Hewlett & Luce, Off Ramps and On Ramps, supra note 26 and accompanying text.

92 Id. at 24.

93 Id.

94 Id. at 17.

95 Id. (discussing Thurow’s observation).
It is true that many women off-ramp primarily because of “pull factors”—i.e., factors external to work that pull women away from their jobs and into the home. And it is also true that women feel particularly “pulled” away from the workforce because of a desire to spend more time with their children. While nearly half of women who off-ramped reported a need to spend more time with children as a primary reason for leaving the workforce, only 12% of men left work for child-related reasons. But “[l]urking behind most pull factors is a highly traditional division of labor,” well-known among experts as the “second shift.” The pull of the second shift is far less romantic than the attraction one feels to her children.

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” working women endure and to contrast the single shift of working men. Women, she found, were typically in charge of the lion’s share of household tasks once the working day was complete. Stunningly, Hochschild found that once paid and unpaid (i.e., 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.” 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 in a rigid routine,” whereas men took on tasks, such as repairing broken items that could be performed when convenient. As a result, Hochschild found that women consistently experienced a longer working day than their male partners.

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96 Id. at 16.
97 Id. at 17.
98 Id. at 24.
99 Id. at 16.
100 HOCHSCHILD WITH MACHUNG, THE SECOND SHIFT, supra note 33.
101 Id. at 3 (discussing Alexander Szalai’s 1965-66 study documenting the working woman’s “double day”).
102 Id. at 4.
103 Id. at 3.
104 Id.
105 Id. at 9.
106 Homosexual couples tend to have more equitable sharing arrangements. Id at 5.
Since then, there have been a slew of studies documenting the way in which the second shift has (and has not) changed over time. And while it seems the second shift may have shortened for some dual earner couples as gender roles and norms have changed, it is quite clear that “the second shift is alive and well,” at least among heterosexual couples. For instance, even the most optimistic studies find that women still spend an additional five hours per week on household chores. 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. Furthermore, other studies show 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. Thus, the demands of infant care and the second shift create a powerful combination of factors that pull new mothers away from the workforce.

Nevertheless, while one must recognize these various pull factors to understand why many new mothers opt out of the workforce, these factors still represent only part of the overall picture. Women also weigh heavily “push” factors in their decision to leave the workplace. In fact, women in the business sector report that while pull factors are strong, even stronger is the feeling of being pushed away by their jobs. Faced with too-short maternity leaves, too-long hours and inflexible work schedules, many

107 Hewlett et al., The Hidden Brain Drain, supra note 24, at 18.
108 Evidence suggests that such arrangements are more equitable among homosexual couples. HOSCHILD WITH MACHUNG, THE SECOND SHIFT supra note 33, at 5.
110 Product of five and fifty three divided by eight.
112 Hewlett et al., The Hidden Brain Drain, supra note 24, at 20.
113 See supra note 18 and accompanying text.
mothers feel it is too hard to balance work with childcare duties and their second shifts.

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 budget. American parents seeking to send one infant to a day care center may find themselves spending over $18,000 per year in some states. Childcare costs for one child can regularly represent between 47.7% and 14.1% of the median salaries of a single parent and married couple, respectively. The cost for two pre-school aged children are, of course, even higher, and can easily exceed $25,000 in some states, topping out at a confounding $34,000 in the most expensive areas of Washington D.C.

Given these high costs, it is both unsurprising and extremely troubling that an increasing number of women report that even though they need additional income, they cannot find work that would even cover childcare costs.

Moreover, time-crunch working parents may find themselves wracking up costs besides those associated with childcare, perhaps hiring service providers to help them with household tasks they were once able to

114 Hewlett et al., The Hidden Brain Drain, supra note 24.
116 Kendall, High Cost of Childcare, supra note 38, at appendix 2; see also Bernard, supra note 115.
117 Weeks McCormack, Uncle Sam and the Childcare Squeeze, supra note 39, at 14-15 (“In Oregon, the state with the highest cost of childcare by reference to median salary, parents will pay $23,652 per year to provide care for an infant and pre-school aged child in a childcare center. In Washington State and New York, a daycare center for two young children costs over $30,000 and $27,000, respectively. In Washington D.C., parents with two preschool aged children will pay the highest costs in the country—around $39,000. Even in the most affordable states, care in a childcare center will cost slightly over $10,000 for an infant and toddler, and prices range between these points in other states.”).
118 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 (“[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.”).
perform themselves, such as house and dry cleaning. In the words of one expert, in order to balance a full time career and the demands of young children, working mothers may need to develop an “outsourced self.”

These soaring expenses come at the same time that new mothers feel that they must, if they are to remain working at all, scale back their working hours, resulting in reduced income. Thus, while the income of “others” is climbing, the net income of new mothers will suddenly take a precipitous drop.

And this is before taxes are taken into account. As will be discussed further in Section III, severe tax laws add several more push factors to the already formidable line up of factors new working mothers face when having children. For instance, a married mother’s salary is “tacked” onto her husband’s salary, so that her income is taxed at a higher rate than it would be were she single. Further, the tax law severely limits the ability of taxpayers to claim tax relief for the costs of childcare, even when those costs are incurred to enable parents to work. Once these limitations are applied, working parents will receive tax relief for only a small fraction of the childcare costs they actually incur. And the tax law completely disallows tax relief for any expenses associated with the “outsourced self”

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119 See generally, ARLIE RUSSEL HOCHSCHILD, THE OUTSOURCED SELF (Metropolitan Books, Henry Holt & Co. 2012) (discussing how working parents have to outsource and thus pay for various services that one traditionally performs themselves).

120 Danielle Paquette & Peyton M. Craighill, The Surprising Number of Moms and Dads Scaling Back at Work, WASH. POST (Aug. 6, 2015), http://www.washingtonpost.com/business/economy/the-surprising-number-of-moms-and-dads-scaling-back-at-work-to-care-for-their-kids/2015/08/06/c7134e50-3ab7-11e5-b3ac-8a79be44e5e2_story.html (“More than three quarters of mothers and half of fathers in the United States say they’ve passed up work opportunities, switched their jobs or quite to tend to their kids, according to a new Washington Post poll).


122 See, I.R.C. §§129, 21; see also Weeks McCormack, Uncle Sam and the Childcare Squeeze, supra note 39, at 3.

123 Weeks McCormack, Uncle Sam and the Childcare Squeeze, supra note 39, at 4.
and “second shift,” characterizing these costs as purely consumptive, personal expenses.124

Clearly then, the initial decision to off ramp is a complicated one for new mothers. Nonetheless, one might say, perhaps once the decision is made, women and their families strike a new balance that works well for them personally. If this were true, the “opt out phenomenon” would be descriptively interesting but not particularly disturbing. In fact, in 2003, a highly publicized article in the New York Times drew great attention to the so-called “Opt-Out Revolution,”125 “embracing [the opt out trend] with enthusiasm, promoting the alleged peace and comfort offered by a return to motherhood in terms of personal choice” and seemed 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.”126 If this rosy depiction were accurate, there would (at least arguably) be little reason to be concerned about women off-ramping.

But while spurring an important conversation, The Opt Out Revolution and other media articles that followed in its path127 have now been criticized for greatly oversimplifying matters,128 suggesting that opt out moms have happily and easily chosen to spend more time with their babies while giving “short shrift to the potential barriers to reentry and the economic vulnerability of women who depend on husbands to support them,”

124 I.R.C. § 263 (disallows personal, etc.).


126 BENNETTS THE FEMININE MISTAKE, supra note 29, 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, The Opt Out Revolution, supra note 125.

127 See, e.g., Claudia Wallis, The Case for Staying Home: Why More Young Moms Are Opting Out of the Rat Race, TIME, Mar. 2004; BENNETTS, supra note 29, at 34. (criticizing this Article for ignoring the economic risks mothers take when they opt out).

128 THE FEMININE MISTAKE, for instance, criticizes Opt Out Revolution and choice rhetoric generally. See BENNETTS THE FEMININE MISTAKE, supra note 29, at 35 (“whatever their individual weakness, however, news articles predicated on the idea that it’s too hard for women to combine work and family have a powerful impact, particularly when they also promote an uncritical view of the stay-at-home option.”).
let alone the long-term implications of that choice.” As Section II will show, while women will indeed find many ways to off-ramp their careers, they will find a troubling shortage of on-ramps. As at least some leaders have recognized, this situation creates an array of far-reaching problems that warrant government intervention. Section II will argue that some of this intervention can be most appropriately and effectively accomplished through a modification of the tax laws, at least if that intervention is meant to provide help in the foreseeable future.

II. UNCLE SAM AND THE MOTHERHOOD PENALTY:
THE CASE FOR GOVERNMENT INTERVENTION THROUGH THE TAX CODE

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, finding that while many of these opt out moms wanted to return to work, they were finding it exceedingly difficult to do so. Studies confirm this to be a generalizable and pervasive problem. Despite the powerful push and pull factors that combine to cause mothers to off ramp, one leading study finds that 93% of women wish to return to work.

129 Id.
130 Hewlett & Luce, Off Ramps and On Ramps, supra note 26.
132 Judith Warner, The Opt Out Generation Wants Back In, N.Y. TIMES (Aug. 7, 2013), http://www.nytimes.com/2013/08/11/magazine/the-opt-out-generation-wants-back-in.html?pagewanted=all (“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.”)
133 Many stay-at-home and part-time working mothers will eventually decide to return to the full-time workforce, and when they do they may encounter a “motherhood penalty” that extends beyond the actual time out of the workforce. Hill, The Simple Truth, supra note 3, at 10.
134 Hewlett et al., The Hidden Brain Drain, supra note 24 at 15.
Unfortunately, only 74% of women who try to on-ramp actually attain employment, and only 40% find full-time jobs.\(^{135}\)

To start, resume gaps can damage anyone’s employment prospects, especially when one is trying to return to the white-collar job market.\(^{136}\) But opt out mothers will have a far harder time re-entering the workforce than other individuals who take comparable time out of work, as studies consistently show that “[e]mployers are less likely to hire mothers compared with childless women.”\(^{137}\) To make matters worse, “…when employers do make an offer to a mother, they offer her a lower salary than they do to other women.”\(^{138}\) Other studies confirm. For instance, “[w]hen researchers gave subjects identical resumes that differed in only one respect—one, but not the other, mentioned membership in the PTA [Parent Teacher Association]—the mothers were 79% less likely to be hired and 100% less likely to be promoted.”\(^{139}\)

Furthermore, women do not tend to leave the workforce for as long as one might think. The average woman leaves the work force for only 2.2 years before attempting to reenter.\(^{140}\) But a mother that does manage to reenter the workforce will find that even a short off ramp results in a sizeable and disproportionate reduction in her annual earnings that will persist for every year of her remaining life. As Joan Williams, the director of the Center of WorkLife Law at the University of California, Hastings College of Law, explains: “[d]eciding to delay re-entry until the kids are old enough to fend for themselves entails bigger trade-offs than you might

\(^{135}\) Id.

\(^{136}\) BENNETTS, THE FEMININE MISTAKE, supra note 29, at 78 (Summarizing finding of BARBARA EHRENREICH, BAIT AND SWITCH: THE FUTILE PURSUIT OF THE AMERICAN DREAM (Holt Paperbacks 2006)). The Internet is replete with advice for how those with breaks in their employment may enter the workforce. For instance, a search on Google for resume gaps stay at home reveals an array of sources. See, e.g., The Muse, Stay at Home Parent, How to Kill it on Your Come Back, FORBES: LEADERSHIP (Jul. 8, 2013, 10:13 AM), http://www.forbes.com/sites/dailymuse/2013/07/08/stay-at-home-parent-how-to-kill-it-on-your-comeback-resume/ (“And while no one is going to argue that your job is among the hardest on the planet, your ‘at home’ time can present serious challenges as you prepare to venture back into the 9-to-5 workforce”).

\(^{137}\) Hill, The Simple Truth, supra note 3, at 9.

\(^{138}\) Id.

\(^{139}\) S.M., A Taxing Situation, supra note 67.

\(^{140}\) Hewlett et al., The Hidden Brain Drain, supra note 24, at 37.
think,” since “women who take a career break are penalized out of proportion to any objective deterioration of their skills.”

One leading study showed that mothers who left the workforce for just one year suffered a 20% penalty to her lifetime earnings. Off-ramps of two or three years resulted in a 30% penalty. Other studies found a motherhood earnings penalty even twenty years after opting out. (By contrast, fatherhood has the opposite effect on men’s earnings, creating a fatherhood premium effect). Thus, while childless females may hit the much talked about glass ceiling, most mothers never even get close to it, hit with lesser-known elements such as motherhood earnings penalties and what some experts refer to as the maternal wall.

Knowing only these statistics, one could build a compelling case for government intervention that would help new mothers. Considering that “. . . nearly 90% of women become mothers during their working lives,” the current reality faced by the opt out mom seems “wholly inconsistent with gender equity.” But once one understands the many other dangers created by the current state of affairs described in this Section, it becomes clear that government intervention is urgently needed.

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141 WILLIAMS, RESHAPING WORK-FAMILY DEBATE, supra note 45, at 25.
142 Id.
143 Id.
144 Id.
145 Id. (discussing how the study set forth in The Hidden Brain Drain, see supra note 24, “found that leaving the workforce has a significant negative effect on women’s wages even twenty years after a career interruption.”).
147 Williams & Segal Beyond the Maternal Wall, supra note 47, at 77 (“We all know about the glass ceiling. But many working women never get near it; they are stopped first by the maternal wall.”).
148 WILLIAMS & SEGAL, BEYOND THE MATERNAL WALL, supra note 47 (first coining maternal wall). The authors seemed to have coined the term maternal wall to capture the tendency of employers to perceive women as less competent than comparable non-mothers—causes women to hit what experts call “the maternal wall.” Id.
149 WILLIAMS, UNBENDING GENDER, supra note 8, at 2.
In 2014, the Census Bureau found that fully 40% of women who head families—i.e. non-married women who raise children—lived below the poverty level. This report came on the heels of a 2009 census report finding that only 18% of fathers retained sole custody of their children after divorce and a 2011 report finding that custodial parents—which are mothers a full 82% of the time—received only 63% of the child support they were owed. Obviously, government measures that would make it easier for mothers to remain in or re-enter the workforce would directly address this pitiful situation.

Furthermore, the situation described in this Section creates dangers for what some call “in tact” families as well. Women who are unable to re-enter the workforce often pay a severe emotional toll. Many describe a feeling that they have forfeited a sense of identity and equality in their marriage. But the harm extends well beyond the psychological. Deprived of a meaningful opportunity to re-enter the workplace, married and co-habitant mothers will be forced to be economically dependent on their spouses or partners, a precarious situation in a society with high divorce rates. Moreover, as costs continue to rise, a majority of two-parent families


154 Your Right to Equal Pay, supra note 1 (“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.”).

155 See, e.g., STONE, OPTING OUT?, supra note 50 and accompanying text.

156 Id.

require dual incomes just to meet their needs.\textsuperscript{158} The dire prospects the opt-out mom faces when she attempts to re-enter the workforce, therefore, often deprive families of a not only wanted but also needed stream of income.

Finally, once one absorbs the challenges faced by the opt out mom who seeks only to re-enter the workforce, it is not hard for one to understand why women are so severely underrepresented in high leadership positions. To cite one of many studies, the Pew Research Center found that in 2015 “26 women are serving as CEOs of Fortune 500 companies (5.2%) [and the] share serving as CEOs of Fortune 1000 companies is virtually the same (5.4%).”\textsuperscript{159} Some call this problem the female “brain drain”\textsuperscript{160} while others lament a gender “leadership gap.”\textsuperscript{161} 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.\textsuperscript{162}

Meaningful governmental intervention is, therefore, urgently needed to make it easier for new mothers to “maintain at least a foothold in the

\textsuperscript{158} D’Vera Cohen, Gretchen Livingston & Wendy Wang, After Decades of Decline, A Rise in Stay-at-Home Mothers, Pew Res. Ctr. (Apr. 8, 2014), [hereinafter COHN ET AL., STAY-AT-HOME MOTHERS] http://www.pew socialtrends.org/2014/04/08/after-decades-of-decline-a-rise-in-stay-at-home-mothers/ (“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.”); E.J. Dionne Jr., Two-paycheck Couples Are Quickly Becoming the Norm, WASH. POST (Apr. 18, 2012) [hereinafter Dionne, Jr., Two-Paycheck Couples], https://www.washington post.com/opinions/two-paycheck-couples-are-quickly-becoming-the-norm/2012/ 04/18/gIQALSzlRT_story.html (Discussing a report written by Sarah Jane Glynn which found that “most 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.”).

\textsuperscript{159} See PEW Chapter 1: Women in Leadership, supra note 12.

\textsuperscript{160} Hewlett et al., The Hidden Brain Drain, supra note 24.

\textsuperscript{161} See Wilson, Closing Leadership Gap, supra note 53 and accompanying text; see also Warner, Women’s Leadership Gap, supra note 53.

\textsuperscript{162} Wilson, Women’s Leadership Gap, supra note 53; Glendon, Feminism and the Family, supra note 53.
labor force even when their children are very young\textsuperscript{163} and by creating truly meaningful opportunities for opt out mothers to re-enter the workforce after off-ramping. This called-for 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 Equal Pay Act (EPA) has prohibited an employer from paying higher wages to men than women for substantially similar work.\textsuperscript{164} Since the enactment of that legislation, politicians and lawmakers have debated its enforcement, efficacy and even its necessity.\textsuperscript{165} Current events highlight how polarized this argument has become.

Recently, Democratic President Barack Obama signed an executive order strengthening enforcement provisions of the EPA.\textsuperscript{166} Further, Democratic Congresspersons, believing that the EPA was not being properly enforced, introduced the Paycheck Fairness Act which would have, among other things, increased penalties for violations of the EPA and made it more difficult for wages to be kept secret.\textsuperscript{167} By contrast, Republican lawmakers vehemently opposed the President’s order and the Paycheck Fairness Act and, with respect to the latter, successfully prevented its passage.\textsuperscript{168} In doing so, Republican leaders seemed to question whether

\textsuperscript{163} See Glendon, Feminism and the Family, supra note 53. The citation here is telling. Even extremely conservative intellectuals such as Professor Mary Ann Glendon, recognize that women need and deserve help to remain in the workforce in order to support their families.


\textsuperscript{165} See Paycheck Fairness Act, S.84, 113th Congress (2014) (Paycheck Fairness Act—Amends the portion of the Fair Labor Standards Act of 1938 (FLSA) known as the Equal Pay Act to revise remedies for, enforcement of, and exceptions to prohibitions against sex discrimination in the payment of wages.).

\textsuperscript{166} Exec. Order No. 13,665, 79 FR 20749, 2014 WL 1392044 (2014) (Non-Retaliation for Disclosure of Compensation Information, explaining executive order focused on “non-retaliation for disclosure of compensation information,” a measure which hoped to make the EPA easier to enforce by making it harder for employers to keep wages secret.).

\textsuperscript{167} Obama: It’s An Embarrassment That We Don’t Have Equal Pay, HUFFINGTON POST: POLITICS (June 12, 2014, 5:59 AM), http://www.huffingtonpost.com/2014/04/12/obama-equal-pay_n_5138757.html (President Obama, along with many Democratic Congresspersons, supported the passage of the Paycheck Fairness Act).

Democrats, in advancing this type of legislation, were creating a solution in search of a problem. Specifically, conservative lawmakers seemed to believe that the pay gap exists not because women fail to receive equal pay for equal work but because women choose careers that pay less.\footnote{See Carmon, Why GOP is Wrong, supra note 20 and accompanying text.}

It is true that a mother may be more likely than a non-mother to forego monetary compensation in exchange for nonmonetary benefits, such as flex-time options and generous (or at least existing) family leave policies that help her balance the demands of working motherhood.\footnote{Michelle J. Budig & Paula England, The Wage Penalty for Motherhood, 66 AM. SOC. REV. 204 (2001) [hereinafter Budig & England, The Wage Penalty],http://www.asanet.org/images/members/docs/pdf/featured/motherwage.pdf (mothers may trade off higher wages for “mother-friendly” jobs that are easier to combine with parenting).} But studies and statistics have time and again shown that the wage gap cannot be attributed to women’s choices alone.\footnote{See Patten, On Equal Pay Day, supra note 2; Kathleen Geier, The Gender Pay Gap: Not Only is it Real But it Seriously Underestimates Gender Based Economic Inequality Suffered by Women, WASH MONTHLY: POLITICAL ANIMAL (Apr. 5, 2014, 9:58 AM), http://www.washingtonmonthly.com/political-animal/a/2014_04/the_gender_gap_in_womens_pay_w049781.php.} Nevertheless, one does not have to enter this ideological thicket to debate the merits of the government intervention encouraged in this Article. The proposed intervention would seek to ensure that a new mother has some meaningful opportunity to continue her career after giving birth. In other words, this Article supports intervention that would ensure that mothers have the choice to maintain or re-enter a career that reflects her skill set, whatever that choice may be. This intervention, therefore, would address the pay gap—allowing mothers this opportunity would obviously increase average female earnings. But it would do so from a different angle than government measures seeking to ensure equal pay for equal work. And since this intervention merely seeks to preserve women’s choices, it sidesteps the debate about what careers women prefer.

Some leaders and lawmakers—mainly those with liberal ideologies—have at least recognized the need for additional government measures that help women protect their careers after they become mothers. But the discussion remains relatively underdeveloped when compared to the robust and long-lasting debate around equal pay for equal work. For instance, in its recent report on the wage gap, the White House focused mostly on the issue of pay equality and only generally recognized the need...
to address “discrimination against mothers and caregivers”\textsuperscript{172} and “discrimination based on stereotypes about the proper role of women and mothers . . . which continue to limit the employment opportunities of women.”\textsuperscript{173} The report did not offer specific suggestions for doing so.

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\textsuperscript{174} and provides universal, free preschool for all children starting at three years of age, which runs the entire, normal working day.\textsuperscript{175} In this way, France creates extremely affordable and guaranteed childcare options for new working mothers. Many other nations in the E.U. and around the globe provide similar programs.\textsuperscript{176}

By sharp contrast, in the United States, new parents often find themselves on notoriously long wait-lists for years before they secure a place in expensive, privately run childcare facilities.\textsuperscript{177} This is not to dismiss the small steps the United States has made in the right direction. For

\begin{itemize}
\item \textsuperscript{172} Nat’l. Equal Pay Task Force, \textit{Fifty Years After Equal Pay Act}, supra note 131 (Addressing the wage gap for women also includes addressing the problem of discrimination based on stereotypes about the proper role of women and mothers. Pregnancy and caregiver discrimination continue to limit the employment opportunities of women, and require enforcement and public education to equal employment opportunity in our nation’s workplaces.).
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Lundberg, \textit{Maybe Working Moms Can Have it All}, supra note 54 (discussing various government provided childcare options in France).
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Dan Clawson & Naomi Gerstel. \textit{Caring for Our Young: Child Care in Europe and the United States}, \textit{SELECTED WORKS OF DAN CLAWSON} (Nov. 1, 2002), http://works.bepress.com/dan_clawson/10/ (describing different European Models of Childcare).
\item \textsuperscript{177} Id.; See also Sue Schellenbarger, \textit{Day Care? Take a Number Baby}, \textit{WALL STREET J.: WORK & FAMILY} (June 9, 2010, 12:01 AM) [hereinafter Schellenbarger, \textit{Take a Number Baby}], http://www.wsj.com/articles/SB20001424052748704256604575294523680479314 (“These days, many parents are so intent on getting high-quality care for their kids, that they are signing up at popular childcare 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.”).
instance, the government makes some childcare available to certain families through the Early Head Start (EHS) program, a “federally funded, community based program . . . [which] provides comprehensive child and family development services to low-income children under age 3[.]”\footnote{Jamie Colvard & Stephanie Schmit, Expanding access to Early Head Start: State Initiatives for Infants & Toddlers at Risk, CLASP 2 (Sept. 2012), http://www.clasp.org/resources-and-publications/files/ehsinitiatives.pdf.} The EHS program, however, is available only to families that fall below the poverty line\footnote{Id.} and “[d]espite the program’s proven ability to lessen the negative effects of poverty, consistently low levels of federal funding and increasing child poverty have kept the program’s capacity low.”\footnote{Id.}

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 leaves and work-protected leaves. Canada, for instance, requires employers to provide new parents a full 52 weeks of paid leave and to reinstate parents returning from leave to work positions that are comparable to those they left.\footnote{Amber Strocel, Quick Guide to Canadian Maternity Leave, STROCEL, http://www.strocel.com/wp-content/uploads/2010/12/maternityleave-2010.pdf (last updated 2010).} By contrast, the United States is the only country in the industrialized world that does not require any paid parental leave whatsoever.\footnote{Kim, Without Paid Maternity Leave, supra note 57.} As a matter of fact, of the 183 members of the United Nations, the U.S.—along with Suriname and Papua New Guinea—make up the only three nations to completely fail to mandate any paid parental leave.\footnote{Id.} As a result, one quarter of women in the U.S. take a mere two weeks of maternity leave before returning to work.\footnote{Emily Peck, One-Quarter Of Mothers Return To Work Less Than 2 Weeks After Giving Birth, Report Finds, HUFFINGTON POST (Aug. 18, 2015, 8:01 AM), http://www.huffingtonpost.com/entry/nearly-1-in-4-new-mothers-return-to-workless-than-2-weeks-after-giving-birth_55d308aae4b0ab468d9e3e37.}

This is again not to dismiss small steps in the right direction. During the current presidential primary season, for instance, Democratic
candidates Hillary Rodham Clinton and Bernie Sanders have at least recognized the need for paid parental leave. But even in the unlikely event one of their proposals was enacted – Republican candidates have expressed no interest in these plans – paid maternity leave hardly represents a comprehensive plan to combat the complex problems faced by mothers in the workplace. Moreover, a much needed but 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 anytime soon. In addition to the United States’s historical failure to provide legal protections and services to new mothers, any meaningful move towards a more comprehensive model would seem – to put it mildly – politically infeasible in today’s polarized political climes. To cite a few examples, it would be extremely costly for the government to provide services such as universal childcare, a fact that will draw stark objections from fiscally conservative lawmakers. Further, to provide protections like paid leave, Congress would need to enact a series of employer mandates that conservative lawmakers are generally quick to criticize.

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185 Caroline Balogna, *Hillary Clinton Calls for Paid Maternity Leave In Mother’s Day Campaign Video*, HUFFINGTON POST: PARENTS (May 11, 2015, 1:57 PM), http://www.huffingtonpost.com/2015/05/11/hillary-clinton-paid-family-leave-mothers-day_n_7257370.html (Released on Mother’s Day, the video touts Clinton’s commitment to fighting for paid family leave, citing her own mother and daughter as inspirations. “At a time that should be so exciting and joyful, I see so many women who are just distraught,” she states. “They have to immediately go back to work. They don’t know how they’re going to manage.”).


This reality is obviously limiting. But it does not entirely foreclose opportunities for improving the work prospects of new mothers. A series of well-designed tax laws could present a very feasible way forward. Specifically, tax laws might be reformed to create tax savings and incentives that help new mothers stay in the workforce, which would, in turn, mitigate the disproportionate motherhood penalties that come from even short off ramps. And tax law reforms could do so without creating government-run programs or enacting employer mandates. To be clear, the latter measures may well be a better – and are surely a more direct – way to address the problems faced by mothers. But in a (perhaps far) worse than second best world, the tax laws are likely the best mechanism by default.

With this conceded, one should not wring one’s hands too tightly. It would be a mistake to underestimate the efficacy of using the tax laws to improve the plight of new mothers. The non-expert will find it tempting to point out the undeniable truth that a new mother’s decision to opt out is not exclusively—and may not even be primarily—driven by a financial calculus in order to dismiss the aid that tax law reforms could provide as slight. Ultimately, however, this reasoning is facile.

While financial factors are not the only thing a new mother considers when deciding whether to remain in the workforce, finances undeniably play a role in her determination. It is remarkably difficult for a mother to balance the demands of work and family, especially in the earliest years of her children’s lives. Thus, one can imagine that an already stretched new mother might be particularly inclined to opt out of the workforce if she believes her salary is not meaningfully contributing to her family’s economic well being.

In fact, numerous studies confirm that a new mother seriously considers her after-tax wages when deciding whether to opt out. Summarizing the research, one expert explains: “At least for males, it is fair to say most economists believe labor supply elasticities [to be] small.”

To leave, he first replied, ‘That’s a state decision.’ When pressed, he added, ‘I don’t think we need more federal rules.’”

translate, when the average male is offered an additional increment of income (or suffers an incremental reduction in pay), his working patterns do not change very much.\textsuperscript{189} By contrast, “[f]or women . . . it is fair to say that most studies find large labor supply elasticities, especially on the participation margin.”\textsuperscript{190} Put another way, “hours of market work and the formal childcare demands of mothers with pre-school aged children are highly sensitive to changes in net wages and the costs of bought-in childcare.”\textsuperscript{191} These studies, therefore, show that even small tax savings (resulting in even small increases in take home pay) can greatly increase the chances that a new mother will feel she is able to remain in the workforce (should she so desire).

These studies do not suggest that new mothers are overly focused on finances when deciding whether to opt out. This data instead exposes the flaw in viewing tax reforms as a mere method of tinkering with a taxpayer’s financial “bottom line.” This over-simplistic view assumes that a family’s behavior is immutably fixed and that the Internal Revenue Code plays the narrow role of determining how the income and costs associated with these behaviors will be taxed. In reality, however, a change in the tax laws could alter a new mother’s budget and allow her to, for instance, purchase more goods and services to help her balance the demands of her career and family. With this in mind, the next Section proposes reforms to the tax laws that would make it more feasible for new mothers to stay in the very imperfect workforce that exists today.

\textsuperscript{881} (2007) (suggesting more recently that elasticities of married women have fallen).

\textsuperscript{189} For a somewhat concise definition of elasticity, see e.g., 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 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 rates…”).

\textsuperscript{190} Keane, Labor Supply and Taxes, supra note 188, at abstract.

\textsuperscript{191} Richard A. Easterlin, Diminishing Marginal Utility of Income? Caveat Emptor, 70 SOC. INDICATORS RES. 243, 244 (2005) (Easterlin continues “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.”).
III. TAX REFORMS THAT (AT LEAST) KEEP THE NEW MOTHER’S FOOT IN THE DOOR

A. Defining the Goal

As discussed in the previous Sections, a mother’s choice to off-ramp can greatly impact her career, should she desire to have one. The lifetime earnings of opt out moms who are able to re-enter the workforce will be severely penalized.\(^{192}\) Even shorts off-ramps result in harsh motherhood penalties—the average opt out mom off-ramps for only 2.2 years, resulting in a 20% penalty to her lifetime earnings.\(^{193}\) These penalties are wholly out of proportion with any possible reduction in skills and are, therefore, unjustly punitive.\(^{194}\) In addition to this motherhood penalty, many other opt out moms find themselves completely unable to re-enter the workforce.\(^{195}\) Given this reality, women who wish to retain their careers after having children must be extremely wary of off-ramping. This Section proposes ways in which the Internal Revenue Code could be modified to make it more feasible for new mothers to avoid opting out of their careers when 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 wish to (or financially must) work should receive similar support. This Article specifically addresses these latter women. Tax laws which enable these mothers to remain in the workforce would help them avoid—at least to some extent—the motherhood penalties and maternal wall that the opt out mother confronts when she tries to opt back in. And these laws would also help poorer mothers who do not have the choice to opt out because their income is needed for basic survival.

Importantly, the reforms proposed in this Article do not seek to change the extremely imperfect work environments mothers face.\(^{196}\) Instead,  

\(^{192}\) Section I, supra.

\(^{193}\) Hewlett et al., The Hidden Brain Drain, supra note 24, at 37; Williams, supra note 45, at 25.

\(^{194}\) WILLIAMS, RESHAPING WORK-FAMILY DEBATE, supra note 45, at 25.

\(^{195}\) See Williams & Segal, Beyond the Maternal Wall, supra note 47 and accompanying text.

\(^{196}\) One can imagine an array of tax laws that might encourage employers to create more accommodating policies and working environments. For instance, new tax breaks might be created for employers that provide a designated amount of paid maternity leave\(^{196}\) or that offer flex-time opportunities to their employees.
this Article confines its attention to tax reforms aimed at helping new mothers remain in today’s workforce, such as it is. As discussed in Section I, the decision to opt out is a complicated one for new mothers, consisting of a series of “push” and “pull” factors. For some women, the pull of child rearing will outweigh any possible benefits—monetary, psychic or otherwise—of working outside of the home. The tax law should not (and in all likelihood cannot) effect these child-related pull factors. But other “push” and “pull” factors are entirely unrelated to children. As shown in Section II, the government must seek to reduce these factors. However, at present, the Internal Revenue Code needlessly adds to the already lengthy list of push factors that cause mothers to opt out. This Section, therefore, begins by proposing reforms that would eliminate this perversity.

B. Eliminating the Internal Revenue Code’s Needless Push Factors

Currently, the Internal Revenue Code strictly limits the ability of parents to claim tax relief for childcare costs incurred while working. Moreover, the Code does not allow taxpayers to deduct any of the costs associated with other work-related expenses, such as the costs of commuting and work attire. Under fundamental principles of taxation, these limitations are too severe and cause the earnings of new mothers to be over-taxed. By doing so, the tax law needlessly strains the finances of new parents at a time when they are grappling with the increased costs of caring for new children and reduces the amount working families can afford to pay for childcare and other services that help them balance careers during their children’s demanding first years. These limits should be loosened immediately to keep the tax law from pushing new mothers away from the workplace, at least so long as short opt out periods result in such severe consequences to her career.

Further, existing tax breaks such as tax credits offered to employers that provide childcare for employees might be expanded by, for instance, elevating or removing existing dollar caps. I.R.C. § 45F (2015). Determining the extent to which the tax law might (or should attempt to) provide employer side tax subsidies to actually alter the workplace deserves careful study and analysis that falls outside the scope of this particular Article.

197 See infra Section III.B.1.
198 See infra Section III.B.2.
1. The First and Critical Step: Treating Working Childcare Costs Like Other Costs of Earning Income

In order to properly tax one’s net profit, a taxpayer may generally deduct her costs of earning income. For instance, Section 162 of the Internal Revenue Code allows taxpayers to deduct all “the ordinary and necessary expenses paid or incurred … in carrying on any trade or business” and Section 212 allows taxpayers to deduct the “ordinary and necessary expenses” incurred for any “profit seeking activity” even if the activity is not quite “regular” enough to rise to the level of a trade or business. Thus, if a taxpayer earns $100,000 working at her adorable café this year, but incurs $25,000 paying storefront rent, utilities, and employee salaries, she may reduce her taxable income to $75,000.

By contrast, taxpayers are generally unable to deduct consumptive expenses, such as costs incurred to purchase clothing, a Netflix subscription or a FitBit watch. This makes a great deal of sense. When a taxpayer

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199 Traditional gender pronouns used but meant to encompass the entire gender spectrum.

200 See, e.g., I.R.C. §§ 162, 212.

201 I.R.C. § 162.

202 I.R.C. § 212

203 See, e.g., Higgins v. Comm’r, 312 U.S. 212 (1941) (stating 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.”)

204 I.R.C. § 162

205 I.R.C. § 263. 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, in THE FEDERAL INCOME TAX 1, 7 (Robert Murray Haig ed. 1921), reprinted in RICHARD A. MUSGRAVE & CARL S. SHOUP, AM. ECON. ASS’N, READINGS IN THE ECONOMICS OF TAXATION 54 (1959) (arguing that income is consumption plus accumulation); see also, e.g., 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 rom money income.”).
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.206 In some instances, the Internal Revenue Code deviates from these general principles by allowing taxpayers to deduct designated non-consumptive costs. These deductions, however, are subject to a variety of limitations.207

As briefly mentioned in Section I, instead of treating the childcare costs incurred by parents while working as deductible costs of earning income, the Internal Revenue Code treats these costs as non-consumptive expenses, subject to severe limits. Once these limitations are applied, working parents will receive tax relief for only a small fraction of the childcare costs they actually incur. Currently, the Internal Revenue Code provides two mechanisms by which a taxpayer may reduce her taxable income to reflect childcare costs that “enable her to be gainfully employed.”208

First, Section 21 allows a taxpayer to credit—i.e., subtract from her tax liability—a percentage of her working childcare expenses. For taxpayers earning over $43,000 per year—a figure that is not much greater than the poverty rate for a family of four209—the maximum credit for two or more children is $1,200.210 Second, Section 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 [hereinafter an FSA] and to exclude that amount from taxation. The maximum exclusion—i.e., the


206 Id. and accompanying text.

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


210 I.R.C. § 21 (the credit phases down to 20% at $43,000 and with the dollar limitation of $6,000 equates to at most a $1,200 credit for parents at this income level).
amount of income that can be diverted tax free into the FSA—is $5,000.\textsuperscript{211} Whether a family will glean more tax savings from claiming tax relief under Section 129 (by using an FSA) or Section 21 (by paying childcare costs directly) will depend on her marginal tax bracket. If the taxpayer’s marginal rate of taxation\textsuperscript{212} is 30\%, for instance, Section 21’s $1,200 credit equates to an exclusion of $4,000\textsuperscript{213} as compared with the $5,000 exclusion allowed by Section 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 Section 129. This structure is admittedly strange and overly complicated. But regardless of whether a taxpayer claims tax relief under Section 129 or Section 21, the point remains the same: In a world in which childcare costs can easily exceed $20,000 and can reach up to $34,000 per year, the Code allows tax relief for a shockingly small fraction of actual childcare costs.\textsuperscript{214}

These current laws have a significant effect on new mothers. Suppose that Mr. and Mrs. Smith of Washington State have just had their second child and that Mrs. Smith is deciding whether she should opt out of the workforce. At their current jobs, Mr. Smith earns $160,000 per year and Mrs. Smith earns $55,000 annually, a figure that closely approximates the median income in their (and this author’s) home state.\textsuperscript{215} Assume that if Mr. and Mrs. Smith send their two preschool aged children to day care, they will spend $20,000, the average cost in Washington State.\textsuperscript{216} Thus, Mrs. Smith’s additional income will net the family $35,000 before taxes.

Although Mrs. Smith would only earn $35,000 of net income if she were to remain at work, she will be taxed on $50,000 of that income, as Section 129 only allows her to exclude $5,000 of the $20,000 childcare expenses—a small one-fourth of total costs. Thus, at the end of the day, Mrs.

\textsuperscript{211} I.R.C. § 129

\textsuperscript{212} Marginal taxation refers to the rate at which the taxpayer’s next dollar of income will be taxed.

\textsuperscript{213} The value of the $4,000 exclusion is the product of 30\% (the marginal tax bracket) and $4,000, or $1,200.

\textsuperscript{214} For more information see, Weeks McCormack, \textit{Uncle Sam and the Childcare Squeeze}, supra note 39.


\textsuperscript{216} Kendall, \textit{High Cost of Childcare}, supra note 38, at appendix 3.
Smith’s income will be subject to roughly $14,000 in taxes.\footnote{217} If Mrs. Smith is to remain in the workforce, she can, therefore, only provide her family $21,000 additional income once childcare expenses and taxes are taken into account. If Mr. and Mrs. Smith focus only on their annual finances to determine whether Mrs. Smith should work after the birth of their second child, they will find themselves weighing the confluence of push and pull factors with which they are confronted—\textit{e.g.}, the second shift, unforgiving work conditions, and the other factors discussed at Section I—against the prospect of having $21,000 additional dollars at their disposal.

As I have argued elsewhere, the limitations found in Sections 21 and 129 are inappropriate as a matter of fundamental tax policy.\footnote{218} The existence of these limitations reflects the judgment that working childcare costs are consumptive, personal expenses rather than non-consummative costs of earning income. In 1954 and 1983, the respective years in which Sections 21 and 129 were enacted, this characterization was at least plausible. At that time, the income of secondary wage earners (which was always the wife’s) was often discretionary and one could at least make a defensible claim that the task of categorizing working childcare expenses was an unclear one.\footnote{219} Perhaps, two commentators wrote in 1972, a “working wife . . . hires a babysitter, or sends her children to a day care center . . . [to] . . . enable

\footnote{217} (28\% x $50,000) less $200 credit = $13,800.

\footnote{218} Weeks McCormack, \textit{Uncle Sam and the Childcare Squeeze}, supra note 39. Since I have made this argument at great length in this piece, a brief summary will suffice.

\footnote{219} See Grace Blumberg, \textit{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 Bittker, \textit{Federal Income Taxation and the Family}, supra note 71, at 1433 (“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.”).
herself to work” or perhaps, they continued, she “work[s] so that she can afford the luxury of . . . childcare help.\textsuperscript{220} The reality faced by today’s working family is not so murky (assuming it in fact was in past decades). Currently, a majority of two-parent families consist of dual earners that must incur soaring childcare expenses to earn sufficient income.\textsuperscript{221} Census data confirms that while most working parents incur high childcare costs, a majority of one-earner families entirely forego the expense of regular care.\textsuperscript{222} In other words, taxpayers 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 non-consumptive, costs of earning income.\textsuperscript{223} To accord with this characterization, Congress should at the very least repeal the various dollar limitations and phase-outs found in Sections 21 and 129 since the tax law generally allows all other costs of earning income to be deducted without any notable limitations. Much more appropriately, Congress should eliminate Section 21’s percentage credit and


\textsuperscript{221} COHN ET AL., RISE IN STAY-AT-HOME MOTHERS, supra note 158, at 5 (“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.”); Dionne Jr., Two-Paycheck Couples, supra note 158 (Discussing a report written by Sarah Jane Glynn which found that “most 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.”).

\textsuperscript{222} Census data shows 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 Lynda Laughlin, Who’s Minding the Kids? Child Care Arrangements: Spring 2011, U.S. CENSUS BUREAU 3-4, 10-11 (April 2013) [hereinafter Laughlin, Who’s Minding the Kids?], http://perma.cc/QW8A-W88Z (“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. at 5.

\textsuperscript{223} I have made this suggestion elsewhere. See Weeks McCormack, Uncle Sam and the Childcare Squeeze, supra note 39 at 141-3.
Section 129’s exclusion entirely and allow working parents to deduct working childcare costs under the same sections—e.g., Sections 162 and 212, discussed above—that allow taxpayers to deduct all other costs of earning income.\textsuperscript{224}

Returning to the example above, recall that Mrs. Smith would, under current law, be entitled to reduce her taxable income by only $5,000 of the $20,000 working childcare costs she would incur were she to remain at work after her second child is born. If, however, Mrs. Smith was entitled to deduct the entire cost of childcare, her tax liability would be reduced by over $4,000. This tax savings would come at a time when Mrs. Smith is grappling with the various push and pull factors that combine to cause so many new mothers to opt out of the workforce. And it would come at a time when her finances are being severely strained by the high childcare costs faced by American working parents. Thus, the substantial tax savings offered by tax laws that allow taxpayers to fully deduct working childcare costs could play a vital role in determining whether a new mother like Mrs. Smith can stay in the workforce during her children’s pre-school years.

As discussed in Section II, numerous studies show that a new mother’s decision to work is significantly driven by her after-tax wages.\textsuperscript{225} As also discussed, this does not suggest that mothers are concerned primarily with finances when deciding whether to opt out. Instead, this economic sensitivity reflects, at least in significant part, the fact that additional pay allows a mother to purchase additional goods and services to help her maintain her delicate work life balance. Building further on our example, suppose that Mrs. Smith truly enjoys her career and, understanding the difficulties of re-entering the workforce after opting out, would like to remain at her job after the birth of her second child if possible. She is not particularly concerned about her annual income and is willing to work full time if she only brings home $21,000 (her take home pay, calculated above, after childcare expenses and taxes under the current system). She is not willing, however, to work for less – after all, $21,000 already represents less than 40% of her original salary. But Mrs. Smith also harbors much more pressing noneconomic concerns: she is extremely anxious about finding a caregiver for her toddler and newborn baby with whom she feels comfortable.

Under current law and the above hypothetical, Mrs. Smith will meet her financial expectations if she can find care for $20,000. In her state of Washington, this represents the average cost of a day care facility for an

\textsuperscript{224} Id.

\textsuperscript{225} See supra Section II.
infant and four year old. But Mrs. Smith is anxious about sending an infant to a facility with multiple children and rotating caregivers. She worries that a newborn will frequently fall sick (as a newborn does in day care) and that her infant child should have just one additional nurturer at this fragile age in her development (as many mothers do).

Many of these concerns and barriers would be removed if she could hire a nanny—an individual caretaker that cares for children in the parent’s home, or that of a neighbor or family member. But the cost of hiring an individual caretaker is quite a bit higher than the cost of a day care facility. Under current law, therefore, Mrs. Smith will not work because she cannot hire a caregiver with whom she feels comfortable while maintaining the take home pay that makes working financially worthwhile to her. If, however, Mrs. Smith were able to deduct the entire cost of

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226 See discussion supra p. 34 and text accompanying note 216.

227 Sara Schaefer Munoz, Debate: Nanny vs. Day Care, WALL STREET J. (Mar. 1, 2007, 11:44 AM), http://blogs.wsj.com/juggle/2007/03/01/debate-nanny-v-day-care/ (In explaining her choice to utilize a more expensive nanny as opposed to day care, the author writes: “I do think a child should be catered to with one-on-one attention as much as possible in the early months of life.”).  

228 Anne S. Johansen, Arleen Leibowitz, & Linda J. Waite, Child care and Children’s Illness, 78 AM J PUB H. 1175 (1988), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1349388/ (We estimate a model of annual bed days for children ages six months to two and one-half years old, and separately for children two and one-half to five years old. Our results show significantly higher numbers of bed days for children in day care centers than for children at home for both age groups, controlling for confounding factors.).  


230 Care provided either in parent’s home or friend/neighbor’s home is the next most popular paid childcare option, representing 10% of arrangements. Laughlin, Who’s Minding the Kids?, supra note 222, at 10.  

childcare, the Smiths would have over $4,000 of additional income at their disposal, which might well cover the cost of hiring an individual caretaker during her infant’s early development period.

The concerns of the hypothetical Mrs. Smith only scratch at the surface. It would be hard to understate how complex it is for new mothers to cobble together dependable care for young children. For instance, mothers who feel comfortable with day care for infants (as many mothers certainly do) will often discover that daycare facilities boast long wait lists and do not even accept newborn children. A new mother will also discover that even if she is able to send her children to these facilities, she will not be able to do so when children are ill. In fact, this is such a problem for mothers that one expert has opined that some mothers are “just one sick child away from being fired.” The additional tax savings offered by tax law reforms that allow working childcare costs to be fully deducted might, therefore, be used to hire an individual caregiver until space at a desired day care becomes available (which could take years). It might be used to purchase “back up” childcare services if a mother, for instance, finds her child ill in the morning and unable to attend her normal day

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232 Schellenbarger, *Take a Number Baby*, supra note 175 (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.”).

233 This is likely due, at least 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. For instance, legally required infant to caregiver ratios are far lower than the non-infant to caregiver ratios. See, e.g., *Minimum Licensing Requirements for Child Care Centers*, ARK. DEPT’T OF HEALTH & HUM. SERVICES 14-15, http://www.arkansas.gov/childcare/licensing/pdf/Center2-06rev.pdf (requiring infant to caregiver ratio of 1:6 for infants less than 18 months; 1:9 for children between 18 and 36 months; 1:12 for ages 2 1/2 through 3 years; 1:15 for 4 years olds; 1:18 for 5 years to kindergarten; 1:20 for kindergarten and above) (last visited on Jan. 10, 2016).

234 See Johansen et al., *supra* note 228 and accompanying text.


236 Schellenbarger, *Take a Number Baby*, supra note 175.
In sum, these examples show how removing limits on a parent’s ability to deduct working childcare costs could help a new mother avoid opting out by increasing her ability to create a dependable caregiving network that meets her personal needs and expectations and assuages her individual worries and concerns.

The most significant consequence of properly treating working childcare expenses as all other costs of income is surely that all of these expenses would be fully deductible. There are, however, several other natural consequences of this proper treatment that are important to at least briefly discuss. Suppose, for instance, a new mother were to execute a loan in order to finance the costs of childcare during her children’s early years. Under current law, the interest she incurred would not be deductible, since it would be associated with non-deductible personal activities. Once, however, working childcare costs are properly characterized, the interest associated with these loans would be fully deductible like all other costs of earning income.

Further, under current law, if a mother’s working childcare costs were to exceed her wages, she would not receive tax relief to reflect these losses. Specifically, Code Section 21(a) provides that a single taxpayer may not credit expenses that exceed her earnings and that a married couple filing jointly may not credit childcare expenses that exceed the wages of the non-primary wage earner. To illustrate this “earned income limitation,”

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237 To provide one of many examples of such care in this author’s resident area of Seattle, Bright Horizons “provides families with a safety net for those days when regular daycare, child care, or elder care arrangements fall through.” Back-Up Care Programs: Emergency Child Care, Adult & Elder Care, BRIGHT HORIZONS FAMILY SOLUTIONS, http://www.brighthorizons.com/programs/back-up-care (last visited Jan. 29, 2016).

238 I.R.C. § 163

239 Id.

240 I.R.C. § 21(d) Earned income limitation

(1) In general
Except as otherwise provided in this subsection, the amount of the employment-related expenses incurred during any taxable year which may be taken into account under subsection (a) shall not exceed—
(A) in the case of an individual who is not married at the close of such year, such individual’s earned income for such year, or
(B) in the case of an individual who is married at the close of such year, the lesser of such
suppose Jack and Jill are married and filing jointly. Jack earns $100,000 this year and Jill has primary responsibility for caring for their two young children. Understanding the consequences of opting out, Jill has decided to engage in freelance work in order to prevent resume gaps that might reduce her chance of attaining desirable full time employment once their children reach school age. She and Jack have consulted the statistics and agree that they should do this even though the $15,000 Jill can be expected to earn from freelancing is actually less than the $20,000 the couple will pay to send their two children to day care while she is working. Even without the dollar limitations of Sections 21 and 129 (which this Section shows should not exist), Jill will only be able to credit $15,000 of the $20,000 expenses and the additional $5,000 (representing the loss the couple is incurring to keep Jill in the workforce) may not be used to reduce Jack’s income. And if Jill were a single mother she would not be able to claim this loss either, even if she could concoct a way of sustaining it without the additional income provided by a spouse.

But other taxpayers whose deductible business expenses exceed their income are able to reduce their taxes to reflect these “net operating losses.” For instance, a married couple may use the net operating losses of one spouse to offset the income of the other. And all taxpayers whose deductible business expenses exceed their income in a given year may either carryback and/or forward these losses to reduce taxable income in past or future years. Once working childcare costs are properly viewed as costs of earning income, it becomes apparent that the earned income limitation described above is entirely inappropriate. Instead, parents should be able to reduce their taxable income to reflect losses incurred when childcare costs exceed income.

To return to our most recent example, Jack and Jill should be able to reduce Jack’s income by the $5,000 amount by which childcare costs would exceed Jill’s freelancing income. And if Jill were single, she should be able to carry back that loss to receive a refund for overpaid taxes in previous years. Moreover, if a single Jill was unable to utilize this “carry back” because, for instance, she did not have sufficient income in previous years, she should be able to carry forward those losses to reduce taxable income by $5,000 in future years.

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

242 I.R.C. § 172(b) (allowing carrybacks and carry forwards).
It might be easy to dismiss these latter two points—i.e., that parents should be able to deduct interest on loans used to pay working childcare costs and that parents should be able to claim losses when their working childcare costs exceed current income—as having little practical importance. One might, for instance, surmise that few taxpayers actually incur debt to pay for childcare just so they can work. And one might similarly feel that few taxpayers work only to experience economic losses. This objection ultimately misses the mark. First, some women do not have the choice of whether to work and must do whatever they can to earn income. Second, the statistics laid out in Section II show that women should avoid opting out if at all possible, since even short opt out periods result in disproportionately grave consequences to the maternal career. Those women that do choose to (or that must) incur indebtedness and/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 women may be able to take steps—which may (sadly) include incurring indebtedness or loss—to protect their careers.

As this Section has shown, by properly treating working childcare expenses as costs of earning income, the tax law would eliminate some of the completely unnecessary push factors it creates. But while working childcare expenses represent the most significant costs incurred by working parents, a working mother will also incur a myriad of other expenses that she would avoid if she were to opt out, such as the costs of commuting, purchasing work attire and the expenses she incurs (or wishes she could afford to incur) to outsource her second shift. While taxpayers may generally not deduct these expenses, the next Part argues that the tax law should allow new mothers to deduct at least some of these traditionally non-deductible but work-related costs.

2. The Second Shift, *et. al*: Re-thinking the Tax Treatment of Traditionally Non-Deductible But Work-Related Costs

As discussed above, the tax law generally allows taxpayers to deduct without limitation the costs of earning income. By contrast, deductions for consumptive, personal expenses are generally disallowed. Many

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243 For instance I.R.C. Sections 67 and 68 limit only personal deductions and not deductions taken in connection with one’s trade or business. One notable exception is that investment expenses and other expenses associated with production of income deductible under Section 212 are subjected to the limitations of Sections 67 and 68.

244 I.R.C. § 263
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 clearly non-consumptive and fully deductible. And when a taxpayer chooses to purchase a new television set, toys for her children and 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, else she would not have engaged in the voluntary exchange. As a result, these expenses are purely consumptive and non-deductible.

But other expenses are not so easily categorized, and instead are partly consumptive and partly non-consumptive. The quintessential example of such an expense is the business-related meal and entertainment expense. If a lawyer pays to take her client to lunch in order 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 that 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 of satisfying her need to eat in the afternoon.

This hypothetical illustrates the difficulty in determining whether and to what extent hybrid expenses—i.e., 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

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245 I.R.C. §§ 162, 212


247 See Moss v. Comm’r, 758 F.2d 211, 212 (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 souffle au grand marnier.
expense—i.e., the lawyer “would not be able to 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—i.e., “the lawyer would deduct the . . . additional cost, if any, [s]he incurred to take the client to lunch when compared to the lunch [s]he would have eaten had [s]he not had business to which to attend.”248 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,249 while others will be able to deduct the entire cost.250 On the other hand, the tax law completely disallows taxpayers from deducting 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 travelling from one’s home to work, and vice versa. These costs of commuting are clearly avoidable expenses—one would not incur these expenses in the absence of work and these costs are, therefore, non-consumptive in (perhaps very large) part. Yet the tax law has long disallowed deductions for these costs in their entirety.251 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.”252 It is worth questioning this draconian, “all-or-nothing” approach, as it likely leads to the over-taxation of the average worker. But even if this approach is defensible when applied generally (because, for

248 Weeks McCormack, Uncle Sam and the Childcare Squeeze, supra note 39, at 24.

249 I.R.C. § 274(n).

250 Exceptions to the 50% deduction limitation are enumerated in I.R.C. Section 274(n)(2), (e).

251 DEPT OF TREASURY, INTERNAL REVENUE SERV. (“I.R.S.”), PUB. 463, TRAVEL, ENTERTAINMENT, GIFT, AND CAR EXPENSES (2014), http://www.irs.gov/publications/p463/ch04.html (Daily transportation expenses you incur while traveling from home to one or more regular places of business are generally nondeductible commuting expenses).

252 Halperin, Business Deductions for Personal Living Expenses, supra note 246, at 865.
instance, it represents a suitable compromise between accurate taxation and goals of practicality), the tax law must be exceedingly careful not to overtax the earnings of new mothers specifically and should err in their favor by allowing at least some tax relief to reflect costs that they would not incur were they to opt out.

In addition to commuting costs, there are other non-deductible, work-related costs that new mothers could avoid by off ramping. 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 “adaptable to everyday wear.”253 Once this 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 adaptable for everyday wear (and thus not deductible) because this requirement is construed objectively.254 It is, therefore, not enough that the taxpayer show 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.255 She must instead make a showing that such clothing is not reasonably adaptable for normal usage.256

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 her work as a lawyer after giving birth. She incurs the perhaps considerable expense (and emotional exhaustion) of purchasing


[255] PUB. 17, supra note 253.

[256] Id.
suits and other appropriate attire to fit her changed, postpartum body. 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) since 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 non-deductible since many people could use the clothing in their everyday lives.

To provide one more example of a non-deductible but work-related expense that a new mother will incur only if she remains in the workforce, consider the expenses a mother might incur to fulfill the responsibilities of her second shift. As discussed above in Section I, even the most conservative estimate finds that women spend an additional five hours per week on household chores when compared to their male partners, adding up to an extra month of eight-hour workdays each year. And this estimate most likely applies to dual earner couples without children, so that this drastically underestimates the new mother’s actual second shift. 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 to a new mother opting out. 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. This characterization is overly severe, however, because these expenses are partly non-consumptive. This point deserves further elaboration.

It is true, of course, that the expense of hiring household help would satisfy a personal need to keep one’s home in order, just as the lawyer who takes her client to lunch fulfills a personal need to eat. But just as the hypothetical lawyer would probably spend far less on lunch if she were not tending to work related matters, the new working mother would not need to so drastically outsource her second shift were it not for the time (and other demands) of work. But while a taxpayer may generally deduct at least 50% of her business related meal and entertainment expenses, the new mother may not deduct any of the costs of outsourcing household work. This latter rule, therefore, ignores the fact that the new working mother could partly (if

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258 Milkie et al., *supra* note 109.

259 Product of five and fifty-three divided by eight.
not largely) avoid the expenses of outsourcing were she to opt out of the workforce.\textsuperscript{260}

The expenses discussed above represent a sample of expenses that new working mothers could avoid were they to opt out of the workforce. And while this suggests that these expenses are – at least in part – non-consumptive, the tax law completely disallows deductions for these expenses, resulting in over-taxation. It may be justifiable for the tax law to err this way for taxpayers generally. But it must err the other direction for new mothers during the critical period of time in which they are determining whether they can balance the demands of work and early childcare.

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 Internal Revenue Code should enact a carte blanche deduction for new working mothers that allows them to deduct the full costs of fancy new wardrobes, private shoppers and butlers. But the discussion does strongly suggest that some limited tax relief must be granted to reflect the array of generally non-deductible but clearly work-related costs incurred by new working mothers. This is necessary to prevent the tax laws from overtaxing the postpartum earnings of new mothers and needlessly adding to the already numerous factors that weigh in favor of opting out.

To fashion rationally limited tax relief, one might naturally look to Code Section 274, which limits the deduction for business related meal and entertainment expenses, another hybrid expense to which some of the “avoidable” expenses—e.g., costs of work attire, commuting and outsourcing household work—have been appropriately compared. As discussed, in many cases, Section 274 allows taxpayers to deduct only 50\% of their meal and entertainment costs. But a percentage limitation should not be used to limit the avoidable expenses discussed in this Part (and frankly similar reasoning may well counsel against using the percentage limit in the context of meal and entertainment expenses). First, this limitation would not adequately discourage profligacy. Regardless of what percentage is chosen for a limitation, the more one spends to, for instance, outsource her second shift, the greater the percentage deduction allowed.

\textsuperscript{260} For an alternative way to account for household labor in the tax laws, see generally Nancy Staudt \textit{Taxing Housework}, 84 Geo. L. J 1571 (1995) (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).
Secondly and more troubling still, a percentage deduction for actual costs would only grant relief for a mother who can afford to, for instance, outsource her second shift while leaving the situation of the poorer working mother unimproved. In this way, basing the deduction on each mother’s actual expenditures may not help those who need it most.

Happily, the tax law has confronted these issues before and there are provisions of the Code that can be used as vehicles to provide modest and appropriately limited tax relief for all new working mothers and reward frugality in the process. For instance, Section 151 of the Internal Revenue Code allows taxpayers to exclude from their taxable income a set “personal exemption amount” for themselves, their spouse and each of their children. In 2015, the Code provided a $4,000 personal exemption amount. 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 generally does not 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.” 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. 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, since one may exclude the designated amount even if one does not actually incur those expenses. Using Section 151 as a vehicle, the tax law could 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 meant to reflect the additional expenditures that encumber their income but that are avoided by two parent families with

261 I.R.C. § 151. I have not suggested that the deduction be granted through the standard deduction as this would not help individuals who itemize.

262 PUB. 17, supra note 253, at 25.

263 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.” STAFF OF JOINT COMM. ON TAX N, 98TH CONG., 2D SESS., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 1984–1989, at 4 (1984) [hereinafter 1984–1989 ESTIMATES].

264 Id.
single earners. This reform, which need not be explicitly gendered, would have the effect of reducing the postpartum earnings of new working mothers to partially reflect the expenses she incurs to remain in the workforce but that she could avoid were she to opt out.

Alternatively, Congress might (re-)create a standalone provision that allows dual earner couples and single parents that have recently added a child to their family to deduct or credit a set amount to reflect the expenditures discussed in this Part. This idea builds off of the recent proposals of lawmakers and politicians who would add a fixed dollar “dual earner deduction” or “credit” that would also apply to single parents. Building off of these proposals, Congress might draft a standalone provision that allows for an even larger deduction or credit for dual earner and single parent families that have recently added a new child to prevent the over-taxation of postpartum earnings.

While this Article will not delve into the fine-grained analysis needed to suggest a precise dollar amount for this proposed tax relief, it is worth mentioning that recent proposals have provided rather low amounts. For instance, in his January 2015 State of the Union Address, President Obama specifically called on Congress to enact a new tax credit for dual-earner families. If a dual earner or single parent family’s marginal rate of

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265 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 AND SCI. 34, 38 (1997) [hereinafter McCaffery, *Taxing Women*] http://calteches.library.caltech.edu/3932/1/Women.pdf.

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

267 *Id.*


269 *Id.*
taxation was 30%, Obama’s proposed credit would allow tax relief equivalent to a deduction of $1,700. To provide perspective, the average American worker is estimated to spend $2,600 in annual commuting costs alone.\footnote{270} A recent survey found that one quarter of women would save over $1,000 per year if they were not required to purchase work attire.\footnote{271} And the average cost of household help is close to $16 per hour, so that one hour of household help per week would cost over $800 annually.\footnote{272}

It would, nonetheless, be a mistake to dismiss even this limited tax relief as too insignificant. In a world in which “one in four working moms cry once a week,”\footnote{273} the expanded options provided by even modest tax savings may take some sharpness off the edge of an extremely hectic schedule.\footnote{274}

3. Moving Beyond Neutral


\footnote{271} Robin Madell, \textit{What Working Moms Really Want}, \textit{U.S. NEWS & WORLD REPORT: MONEY} (Sept. 12, 2013, 8:23 A.M.), \url{http://money.usnews.com/money/blogs/outside-voices-careers/2013/09/12/what-working-moms-really-want} (the article described the effect of work attire as “not just the time that it takes to get dressed for work—it’s the cost. FlexJobs found that women’s cost-savings associated with work attire are particularly substantial when the need to work in an employer’s office is curtailed or eliminated. One-quarter of women may save more than $1,000 per year through flexible work arrangements—and 5%may save more than $5,000, the study revealed. Men too can benefit substantially, with 15% saving more than a grand a year when working from home. To working parents with stretched expenses, shaving these costs can be particularly important.”).


\footnote{273} Id.

\footnote{274} It could, to provide one of any number of examples, allow a new mother to outsource some portion of her second shift ($500 would purchase slightly over 30 hours of help at the average $16 per-hour rate). Id. One survey found that a full 73% of working mothers fail to hire household help because they believe it is too expensive even though a full 73% of mothers who did hire help found it “reduced their overall stress.” Id.
As this Part has shown, the tax law currently over-taxes the annual earnings of new working mothers by imposing inappropriately stringent limitations on their ability to claim tax relief for an array of expenses that are likely to be especially high in the first years of their children’s lives. The very least the tax law could do is treat new mothers in accord with fundamental tax principles and reform laws that needlessly push mothers out of work. To accomplish this, this Part has suggested that the tax laws be reformed to properly treat working childcare expenses like other fully deductible costs of earning income. It has also suggested that the tax law provide some relief to reflect other currently non-deductible but work-related costs which a new mother could avoid by opting out.

These reforms represent a necessary improvement over the current system. But they are nonetheless an entirely insufficient response to the problems new mothers confront in the workplace. The reforms proposed thus far would do little more than move the tax law into a neutral position—i.e., keep the tax laws from neither encouraging nor discouraging new mothers to opt out—by correcting for over-taxation. But, as Sections I and II described in detail, even when a new mother opts out for a short period of time, her career may be gravely and disproportionately harmed. And as discussed in Section II, a reform of the tax laws likely presents one of the most (if not the most) viable avenues to respond to these issues. Congress, therefore, must also explore ways in which the Internal Revenue Code can affirmatively help new mothers that want to maintain careers to remain in the workforce when their children are born. The next Part proposes reforms that could provide these incentives.

C. Tax Incentives to Protect the Maternal Career

In the years immediately after a child arrives, a new mother who chooses to remain in the workforce will typically pay an extremely high price to do so. In these postpartum years, the new working mother will incur soaring childcare expenses that may easily exceed $20,000 and reach well over $30,000, as well as various other expenses that she could avoid were she to opt out.275 A recent article in the New York Times provides three typical stories of working mothers “crushed by the cost of childcare:”276 a lawyer describes how she takes home 50 cents each pay period once she has paid for childcare; an accountant pays 87.6% of her

275 See supra Section III.B

take-home pay on childcare; and a professor explains that her family’s “entire disposable income is spent on childcare costs.”

As these anecdotes highlight, a new working mother’s postpartum years will often be financially bleak even if Congress were to enact the corrective reforms proposed in Section II.B. Thus, even if the tax laws were changed to correct for over-taxation, the new mother who focuses only on present demands and financial prospects will find many reasons to opt out of the workforce in her children’s preschool years.

But as described in Sections I and II, even a short off ramp can seriously damage a mother’s career prospects. As a result, experts implore new mothers to look beyond the initial years of their children’s lives before deciding to opt out. For instance, leading scholar Joan 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.” Similarly, expert Leslie Bennetts urges women to look at the work-life balance as a “15 year plan,” 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). Thus, despite the often meager short-term prospects of doing so, experts consistently 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. This critical insight is well established in scholarship studying the biases faced by women and mothers in the workplace. Yet it remains under- (if not

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277 Id.

278 S.M., A Taxing Situation, supra note 67 (summarizing Joan C. Williams’ discussion found in RESHAPING THE WORK-FAMILY DEBATE, supra note 45).

279 Id.


281 See BENNETTS, supra note 29, at 128-147 (encourages women to look at the work-life balance as a “15 year plan,” and remember that the challenges presented by children are most pronounced for only a portion (perhaps fifteen years) of a lifelong career (perhaps over 45 years)); S.M., A Taxing Situation, THE ECONOMIST: WOMEN IN THE WORKFORCE (Apr. 9, 2013), http://www.economist.com/blogs/democracyinamerica/2013/04/women-workforce (summarizing Joan C. Williams’ discussion found in RESHAPING THE WORK FAMILY DEBATE, supra note 45, which asks “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” if they wish to maintain their careers.) [Hereinafter S.M., A Taxing Situation].
completely un-) utilized in tax scholarship considering the taxation of women and the family.

But once one understands this reality, one can also understand that the tax law is already well suited to provide new mothers the encouragement urged by so many non-tax scholars. 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, to purchase homes, to invest in research and development and start-up businesses, and to purchase instruments that help one save for retirement. By providing tax savings, the tax laws defray the cost of purchasing these assets, thereby encouraging taxpayers to make investments that are unlikely to pay off in the short term but that hold the promise of long-term profits. Similar tax laws could, therefore, 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 when childcare (and

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282 26 U.S.C. §§ 1(h) (provides for preferential capital gains rates); 163 (allows for a mortgage interest deduction); 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); 41 (credit for increasing research activities); 195 (allows deductions for certain start-up expenditures); 401(k) (plans, profit-sharing plans, employee stock ownership plans, money purchase plans, defined benefit plans, Simplified Employee Pensions, Salary Reduction Simplified Employee Pension, SIMPLE 401(k) plans for small employers); 403(b) (tax-sheltered annuity plans for 501(c)(3) organizations and public schools); 457(b) (deferred compensation plans for state and local governments). Hereinafter, unless identified otherwise, all references to section numbers and/or the Code, are to provisions of the Internal Revenue Code (“I.R.C.”) located at Title 26 of the United States Code.

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

284 I.R.C. §§ 163 (allows for a mortgage interest deduction); 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).

285 I.R.C. § 41 (credit for increasing research activities).

286 I.R.C. § 195 (allows deductions for certain start-up expenditures).

287 I.R.C. §§ 401(k) (plans, profit-sharing plans, employee stock ownership plans, money purchase plans, defined benefit plans, Simplified Employee Pensions, Salary Reduction Simplified Employee Pension, SIMPLE 401(k) plans for small employers); 403(b) (tax-sheltered annuity plans for 501(c)(3) organizations and public schools); 457(b) (deferred compensation plans for state and local governments).
other) costs are so great that working is relatively (if not entirely) unprofitable.

The tax law uses different mechanisms to encourage taxpayers to make long-term investments. This Part discusses two mechanisms that seem particularly capable of being fashioned to help new mothers remain in the workforce.

1. Preferential Rates to Encourage Long Term Investment

The Internal Revenue Code 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.\(^{288}\) For instance, wages and other compensation for personal services are taxed at these rates.\(^{289}\) These rates are progressive, meaning that the rate of taxation increases as taxable income increases.\(^{290}\) More specifically, the Internal Revenue Code 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 couple that is married and filing jointly ranges from 10% to 39.6%.\(^{291}\) A married couple filing jointly that earns $160,000 of ordinary income will be 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 $151,000 and $74,900 and a 28% tax on the remainder of its income.\(^{292}\) A couple that earns more than $160,000 will be liable for the same tax on the first $160,000 but will then move up the stair step structure to apply higher rates to income exceeding that amount.\(^{293}\) Single taxpayers and heads of household are

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\(^{288}\) I.R.C. § 1 (a)-(c).

\(^{289}\) This derives from the fact that all income is taxed at ordinary income rates unless that income represents capital gains, defined in Internal Revenue Code Section 1222(3) 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.”

\(^{290}\) I.R.C. § 1(a)(c).


\(^{292}\) I.R.C. §1(a).

\(^{293}\) Id.
subject to a similar rate structure, though the income thresholds—i.e., the amount of earnings at which rates increase—obviously differ.\footnote{I.R.C. \S\ 1(b), (c).}

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—i.e., 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.\footnote{I.R.C. \S\ 1211. These rates also apply to the dividends and interest received by the owners of many securities held for a prescribed period of time. See I.R.C. \S\ 1(h)(11).} 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. In 2015, for instance, the capital gains rates for the average individual taxpayer ranged from 0% to 20% and consisted of three 0%, 15% and 20% brackets.\footnote{I.R.C. \S\ 1(h)(1).}

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 jointly, her spouse) has in the year at issue. In general, the zero percent bracket is reserved for taxpayers with little overall income. Suppose, for instance, a taxpayer does not have any ordinary income in a taxable year (e.g., because she has retired from her job) but sells some long-term capital assets to pay expenses. If she is single, the first $37,450 of her gain will be taxed at 0% and the remainder, if any, will move into the 15% and 20% tax brackets.\footnote{I.R.C. \S\ 1(h)(1).} If she is married and filing jointly, the rate at which her capital gains will be taxed depends also on the amount of ordinary income her spouse earns. If her spouse also fails to earn ordinary income, the first $74,900 of her capital gain will go untaxed in the zero percent bracket before moving to the higher rungs of the rate structure.\footnote{Id.} Taxpayers with larger amounts of ordinary income will jump over the zero percent bracket completely. Specifically, none of the capital gains of a married couple and single taxpayer whose ordinary income respectively exceeds $74,900 and $37,450 will be taxed in the zero percent bracket and gains in excess of these amounts will move through the 15% and 20% brackets.\footnote{Id.}
While the wisdom of retaining this “capital gains preference” is a subject of some debate, 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. Consistent with this purpose, the tax laws could use a similar preference to encourage new mothers to remain in the workforce while her children are young in order to protect her career (often her most valuable long-term financial asset). By taxing her postpartum earnings – i.e. income earned within a prescribed period of time after adding a dependent – at lower than ordinary rates, the Code could defray the early costs of childcare by increasing the post-tax returns of remaining in the workforce, thereby helping new mothers avoid opting out.

300 See 2016 Presidential Candidates on Taxes, BALLOTPEDIA, https://ballotpedia.org/2016_presidential_candidates_on_taxes (last visited Jan. 22, 2016) (this article provides a comprehensive survey of the 2016 Democratic and Republican candidates’ positions on current tax issues and demonstrates the ongoing debate over the retention of the capital gains preference by highlighting the variety of positions and proposed reforms to the capital gains preference of the candidates throughout their campaigns); Michael Hiltzik, Here’s How Obama’s Capital Gains Tax Plan Hits the 1% Where They Live, LA TIMES: BUSINESS (Jan. 19, 2015, 3:39 PM), http://www.latimes.com/business/hiltzik/la-fi-mh-capital-gains-20150119-column.html (this article analyzes the issues involved in the capital gains preference debate in the context of President Obama’s proposed reform to the capital gains rate in the 2015 Sate of the Union Address); See also Citizens for Tax Justice Staff, Would Repealing the Tax Break for Capital Gains Raise Revenue?, TAX JUSTICE BLOG (Oct. 17, 2012, 2:56 PM), http://www.taxjusticeblog.org/archive/2012/10/would_repealing_the_tax_break.php#.VqJ0CfkrLIU (this article analyzes the debate between two non-partisan congressional research agencies regarding the potential consequences and benefits of eliminating the preferential rates on capital gains).

This discussion has thus far demonstrated the appropriateness of applying preferred rates—i.e., rates that are lower than the generally applicable ordinary income rates—to the new mother’s postpartum earnings. Once one absorbs this point, there are various ways in which the tax law could achieve the desired result. Most obviously, the Code could tax postpartum earnings using a preferential rate structure that is the same as (or similar to) the structure that applies to long-term capital gains. The preference could be achieved with a non-gendered law that, for instance, allows secondary earners and single parents to apply a preferential rate to income earned within a certain number of years after a child is added to his/her family.

To illustrate, recall the hypothetical situation of the Smiths. Recall that Mr. Smith will earn $160,000 this year and Mrs. Smith is deciding whether to work after the birth of a second child. If she chooses to work, she will earn $55,000 (the median salary in her hypothetical home state of Washington) and spend $20,000 to provide childcare for her two preschool aged children (the average cost of daycare for two children in Washington State). Under current law, Mrs. Smith’s income is subject to ordinary income tax rates.\textsuperscript{302} If Mrs. Smith were not married, her taxable income would move through the lowest ordinary income brackets applying to either single taxpayers or heads of households, resulting in an effective tax rate of approximately 10.4\% or 8.4\%, respectively.\textsuperscript{303} By contrast, because Mrs. Smith is married, her income will be “tacked” onto Mr. Smith’s substantial income, and would, therefore, be taxed at a relatively high 28\%, due to the fact that Mr. Smith’s income already moved the couple’s earnings through the lower ordinary income brackets.\textsuperscript{304}

But imagine now an Internal Revenue Code that incorporated the corrective reforms proposed in Section III.B so that if Mrs. Smith were to remain at work, she would be able to deduct all working childcare expenses. Imagine also that the postpartum earnings of certain taxpayers – i.e. secondary earner and single parents – were taxed at the current preferential rates applicable to capital gains. If Mrs. Smith were single, so that her parents.

\textsuperscript{302} This calculus assumes that Mrs. Smith claims the standard deduction amount and does not itemize her deductions. A single filer and head of household will use rates provided in I.R.C. § 1(b) and § 1(c), respectively. A single filer will be entitled to a personal exemption amount and standard deduction of $4,000 and $6,300, respectively. Heads of household are entitled to a personal exemption and standard deduction of $9,250 and $4,000 respectively. Rev. Proc. 2014-61, available at https://www.irs.gov/pub/irs-drop/rp-14-61.pdf

\textsuperscript{303} I.R.C. § 1(b).

\textsuperscript{304} I.R.C. § 1(a).
family did not earn any additional income, her net earnings of $35,000 would not be taxed at all, as she would not move beyond the zero percent bracket.\textsuperscript{305} In this case, of course, Mrs. Smith is married and Mr. Smith’s $160,000 earnings (which constitute ordinary income) would be tacked onto hers. Her $35,000 earnings, therefore, would jump over the 0% bracket and move into the 15% bracket. Because Mr. and Mrs. Smith do not earn over $452,000, none of her income would cross over to the 20% bracket.\textsuperscript{306} This obviously would create substantial tax savings for Mrs. Smith, reducing her effective tax rate substantially. By increasing her post-tax postpartum earnings, the tax law would make it more feasible for a new mother such as Mrs. Smith to invest in her long-term career despite the relatively meager short-term prospects (childcare costs alone represent over one-third of her pre-tax earnings, a typical figure for American working families) of doing so.

As this Section has shown, it would be entirely appropriate and consistent with the purposes of the tax laws to create a different, preferential rate structure that applies to the postpartum earnings of at least secondary earners and single parents. Nevertheless, some will argue that this would drastically expand the capital gains preference beyond its historic reach. Happily, there are other ways to achieve the desired result of taxing postpartum earnings at lower than ordinary rates which would fit even more comfortably into the existing structure of the Internal Revenue Code.

For instance, the tax rate applicable to the postpartum earnings of married mothers could be drastically reduced by allowing dual earning parents to file separate (as opposed to joint) returns and by applying the same rates, standard deduction and personal exemption amounts used by single filers. By abolishing the joint return, a secondary earner would move through the lower rates of the Internal Revenue Code’s progressive, ordinary income rate structure, which range from 10% to 39.6% (as described above) in 2015. Furthermore, the secondary earner would not be taxed on any income falling below the personal exemption and standard deduction amounts, which in 2015 add up to $10,300.\textsuperscript{307} Thus, returning to our hypothetical, the first $10,300 of Mrs. Smith’s $35,000 net income would go untaxed and her remaining income would be taxed in the 10% and 15% tax brackets, as compared with the far higher 28% rate of taxation to which her postpartum earnings would be subject under current law.

\textsuperscript{305} I.R.C. § 1(h)(11).
\textsuperscript{306} Id.
\textsuperscript{307} See McCaffery, Taxing Women, supra note 264.
This Article is far from the first to suggest that Congress abolish the joint return. Many notable scholars, including Professor Edward McCaffery in his 1997 book *Taxing Women*, have 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.”308 Similarly, Professor Lawrence Zelenak argued over two decades ago that “American society at the end of the twentieth century would best be served by separate returns.”309 The discussion in this Section provides an additional and very strong justification for abolishing the joint return.

But to meaningfully respond to the plight of new mothers in the workplace, Congress must do much more than abolish the joint return. This Section has argued that the Internal Revenue Code could, consistent with the general purpose of the capital gains preference, tax certain postpartum earnings at preferential rates to help new mothers remain in the workforce to protect their careers. Thus, in addition to abolishing the joint return, Congress should substantially raise the personal exemption amount used to reduce postpartum earnings (which, in 2015, was $4,000) to something closer (though not necessarily congruent)310 to the zero percent bracket...

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308 *Id.* at 38.

309 See Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 at 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 generally, Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEXAS L. REV. 1 (1980).

310 There are other reasons for granting a preferential rate to long-term capital gains that do not so easily apply to the new mothers postpartum earnings. For instance, some argue the preference is needed to reflect the fact that some of the gain recognized when one sells an asset held over a long period of time represents inflation that should not be taxed. On the other hand, many argue that the reason for granting the preference are exceedingly weak and so it could be argued that the zero bracket amount for new mothers should be even higher since the justification...
amount applicable to the long-term capital gains of single filers (which, in 2015 was over $35,000). Further, unlike reforms confined to abolishing the joint return, which would only benefit married parents, an increased personal exemption could (and should) reduce the postpartum earnings of both single and married filers.

In sum, the postpartum earnings of new mothers should be taxed at preferential rates. This reform could be fitted most easily into the existing structure of the Code by allowing married parents to file returns separate from their spouses and by increasing the personal exemption amounts to which both married secondary earners and single parents are entitled during some prescribed period after the birth of a child. By providing needed tax relief, such a reform would enable some new mothers that would not otherwise be able to remain in the workforce to do so.

And still, it is essential to recognize that given today’s extremely high childcare expenses, many new mothers would be unable to benefit from the tax savings offered by this reform. Childcare costs in the United States are so high that many new mothers, while needing additional income, cannot even afford the costs of childcare that they would have to incur to stay in the workforce. A new mother that barely breaks even after taking these costs into account – or who does not break even at all – can draw little (if any) assistance from a preferential tax rate or a raised personal exemption amount, since she has little (if any) taxable income to which to apply these benefits.

A final proposal would address this unfortunate reality. By analogizing to the numerous provisions of the Internal Revenue Code which accelerate the timing by which deductions may be claimed and delay the timing by which income must be recognized in order to encourage long term investment, the next Part proposes that the tax laws offer new mothers interest free loans in the form of repayable tax credits. This would allow new mothers to defray the extraordinary costs of early childcare and to repay claimed tax credits once their children reach school age.

2. Interest Free Loans

for granting a preferential rate to postpartum earnings is far stronger than the justification for granting a tax preference to long term capital gains.

311 See, e.g. Alissa Quart, Crushed by Cost of Child Care, N.Y. TIMES (Aug. 17, 2013, 2:30 PM), http://opinionator.blogs.nytimes.com/2013/08/17/crushed-by-the-cost-of-child-care/?_r=0. (providing examples of working mothers who barely break even once they have paid working childcare costs).
There are a number of tax provisions which change the timing by which a taxpayer must recognize income or may take deductions in order to encourage taxpayers to make investments whose gains will be mostly (if not entirely) enjoyed in the long (as opposed to the short) term. For instance, many provisions of the Code allow designated taxpayers to deduct certain expenditures sooner than they ought to under generally applicable tax principles. 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 would generally allow, delaying the time at which tax is levied.

Consider first a few of the many Internal Revenue Code 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 many “start up expenditures”—i.e., costs paid to investigate the creation of a new business or other profit seeking venture—far sooner than these expenditures would ordinarily be recovered. Specifically, the tax law allows a taxpayer to 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 three years. Without Section 195, these costs could not be recovered (i.e., used to reduce taxable income) until the business is sold, an event that may take place in the rather distant future. Similarly, Section 194 allows taxpayers to elect to deduct immediately “research and experimental expenses”—e.g., “reasonable costs incurred in one’s trade or business for activities intended to help eliminate uncertainty in developing or improving products, such as patents and inventions”—which could not ordinarily be deducted until future years. And, to provide one final example, Sections 167 and 168 together allow many taxpayers to accelerate the time by which a taxpayer may deduct the costs of purchasing many assets that will

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313 See, e.g., I.R.C. §§ 72, 1031, 1033.


315 Id.


contribute to the future earnings of her business. 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 at which gains from certain investments are taxed. Section 72, for instance, encourages taxpayers to invest in certain instruments for retirement—e.g., “annuit[ies], endowment[s], or life insurance contracts.” 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 provided in Section 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 at which 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.

By this point, the way in which these tax laws relate to the postpartum earnings of new mothers should be obvious. The tax law encourages taxpayers to invest in all sorts of instruments and ventures that are likely to pay off only in the long run and could use similar laws to encourage new mothers to incur the many costs needed to invest in their careers during the relatively (if not entirely) unprofitable postpartum years. What is less obvious is how the mechanisms described above—namely, accelerating cost recovery and delaying income recognition—could actually help new mothers. For instance, if the corrective reforms this Article proposed were adopted, all childcare expenses associated with work would already be deducted when incurred and there would be no need for an accelerated method of recovery. And by the time some new mothers deducted these costs from their earnings, they would have little net income remaining, rendering laws which delay recognition relatively insignificant. Many new mothers cannot afford the upfront costs of

319 I.R.C. § 72.
320 Id.
321 See supra Section III.A.
322 See supra Section I (discussing high costs of care).
childcare for young children and thus cannot actually afford to invest in their careers, even if they wish to.\textsuperscript{323} Thus, the tax laws described in this Part do not seem particularly helpful to new mothers at first glance.

But while not always obvious to the untrained eye, each of the laws described in this Part provides relief that is equivalent to an interest free loan. Consider, for instance, Section 175, 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 the business is sold. Suppose now that Ernie Entrepreneur, whose marginal tax bracket is 30\%, incurs $5,000 of these costs and will not sell his business until ten years after it begins operations. By allowing Ernie to deduct the $5,000 expense today, Section 175 allows Ernie to receive $1,500 in tax savings (the product of 30\% and $5,000) ten years earlier than he ought to under general tax principles. This is equivalent to the government loaning Ernie $1,500 for ten years free of interest. 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.

This insight is critical. While the new working mother seems unlikely to benefit from tax laws which accelerate cost recovery or delay income recognition, they would benefit greatly from receiving an interest free loan which could provide them needed cash flow in the especially costly postpartum years. One might initially wonder how the tax laws could provide this loan. It has already been done. For instance, as part of the American Recovery and Reinvestment Act of 2009, known as the Economic Stimulus Package, Section 36 of the Internal Revenue Code provides a first time homebuyer credit. In 2008, for instance, a taxpayer was entitled to claim a tax credit, capped at $7,500, to reflect the cost of purchasing her first home.\textsuperscript{324} A taxpayer claiming this credit in 2008 was then responsible for repaying $500 per year (in the form of additional taxes) until the claimed credit amount was repaid.\textsuperscript{325} 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 new parents in order to

\textsuperscript{323} Id.


\textsuperscript{325} I.R.C. § 36(f)(1) (requires recapture of 6 and 2/3\% of the amount of the credit in each taxable year during the recapture period, which applied to the 2008 max credit of $7,500 amounts to $500 annual recapture).
defray the costs of early childcare and allow new mothers to invest in their careers.  

This Section has proposed reforms that would change the way in which the postpartum earnings of new parents are taxed. As discussed in Section II, nearly 40% of “highly qualified” women\(^{326}\) “voluntarily leave their careers for a period of time.”\(^{327}\) Of these women, a full 93% wish to return to work.\(^{328}\) Unfortunately, however, only 74% of women who try to on-ramp will actually attain employment, and only 40% will find full-time jobs.\(^{329}\) The reforms proposed in this Section would help mothers remain in the workforce and avoid this grim reality.

Nevertheless, it would be foolish not to recognize that some mothers will off-ramp even if these reforms are adopted. In light of this, the final Section of this Article searches existing tax laws for employer-side subsidies that could be naturally expanded to help opt out mothers return to the workforce. It does so with minimal success, underscoring the critical importance of enacting reforms—such as those proposed in this Section—that help mothers avoid opting out if they wish to maintain their careers after children arrive.

IV. Helping the Opt Out Mother Back In

Even mothers whose careers lack any time gaps are far less likely to be hired and promoted when compared to similarly qualified non-mothers.\(^{330}\) Numerous studies have exhibited the barriers mothers face in the workplace, even before they opt out. Leading expert Joan Williams, for instance, found “[w]hen researchers gave subjects identical resumes that differed in only one respect—one, but not the other, mentioned membership in the PTA [Parent Teacher Association]—the mothers were 79% less likely to be hired and 100% less likely to be promoted.”\(^{331}\) A mother who off-ramps, therefore, confronts not only these realities but the additional reality

\(^{326}\) Highly qualified women defined as “those with a graduate degree, a professional degree, or a high-honors undergraduate degree.” Hewlett et al., The Hidden Brain Drain, supra note 24, at 11.

\(^{327}\) Id. at 16.

\(^{328}\) Id. at 15.

\(^{329}\) Id.

\(^{330}\) S.M., A Taxing Situation, supra note 67 (summarizing Joan C. Williams’ statistics found in Reshaping the Work-Family Debate, supra note 45).

\(^{331}\) WILLIAMS, REDEFINING THE WORK-FAMILY DEBATE, supra note 45, at 28.
that small gaps in one’s resume drastically reduce her prospects of being hired, particularly into white collar jobs.\textsuperscript{332} Thus, even though the resume gaps of the opt out mother are often small—recall from Section II that the average woman leaves the work force for only 2.2 years before attempting to return\textsuperscript{333}—these off ramps cause the probability of her reemployment to take a precipitous fall beyond the already large drop experienced by mothers generally. In short, “women who take a career break are penalized out of proportion to any objective deterioration of their skills.”\textsuperscript{334}

To combat these irrational practices, one might wonder whether the Internal Revenue Code contains laws that could be easily extended to provide employers incentives to hire mothers that have opted out. The United States does, along with many other countries, provide “employer side wage subsidies . . . to reduce the costs to employers of employing [certain] target group[s] of workers [to] stimulat[e] demand for these workers and rais[e] their employment rates and earnings.”\textsuperscript{335} These subsidies, when combined “… with job development, training and job search assistance efforts” are thought by experts to be at least “somewhat successful in improving the employment and earnings of specific targeted disadvantaged groups.”\textsuperscript{336} The Internal Revenue Code’s most notable wage subsidy is provided in Section 51, which grants employers a so-called work opportunity credit when they hire members of certain groups.

More specifically, Section 51(a) of the Code allows employers to credit (rather than deduct) a designated percentage of “first year qualified wages,” up to a prescribed dollar limitation.\textsuperscript{337} To illustrate the tax savings this work opportunity credit offers, suppose that an employer paid a particular employee $6,000 in first year qualified wages (to be described below) this year. Generally, the employer would be entitled to deduct the $6,000 wages as an ordinary and necessary business expense, reducing its taxable income.\textsuperscript{338} If the employer were in a 35% marginal tax bracket, this

\textsuperscript{332} BENNETTS, THE FEMININE MISTAKE, supra note 29, at 78 (summarizing finding of Barbara Ehrenreich, “Bait and Switch: the Futile Pursuit of the American Dream.”).

\textsuperscript{333} See Section II supra.

\textsuperscript{334} WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE, supra note 45, at 25.


\textsuperscript{336} Katz, Wage Subsidies, supra note 333, at abstract.

\textsuperscript{337} I.R.C. § 51(a).

\textsuperscript{338} I.R.C. § 162(a)(1).
deduction would reduce her tax liability by $2,100 (the product of 35% and $6,000) so that the after-tax cost of hiring the employee would be $3,900. If, however, the employer were allowed a work opportunity credit equal to 40% of these wages, she would be able to claim a credit—i.e., a full dollar reduction in her actual tax liability—equal to $2,400 and could also deduct $3,600, the remaining 60% of the employee’s wages that were not creditable. Thus, the employer’s tax savings with the work opportunity credit would be about $3,660—the sum of the value of the credit ($2,400) and the value of the deduction (35% of $3,600)—and the after tax cost of hiring the employee would be reduced to about $1,340.

Creditable first year qualified wages are defined as “wages paid or incurred by the employer during the taxable year to individuals who are members of a targeted group,” which include groups such as veterans, ex-felons, and minors that have (or, in the case of minors, are from families that have) received food stamps within the last year. While the legislative history of many tax laws (like all laws) are often murky, the purpose behind Section 51(a) is relatively clear: Congress wished, through Section 51(a)’s credit, to provide tax savings to employers that hire “individuals from certain . . . groups who have consistently faced significant barriers to employment” and to lift these groups out of poverty.

Opt out mothers certainly face barriers to employment like the other groups identified by Section 51. In fact, it is not even clear that the challenges face by ex-felons—a group one might intuitively think would experience extremely severe discrimination in hiring practices—are greater than the challenges faced by opt out moms seeking to re-enter the workforce. Studies have found (not even opt-out) mothers are 75% less likely to be hired than non-mothers. By contrast, another extremely well-regarded study estimated that “a criminal record . . . reduce[d] the probability of receiving a callback [interview] by [only] 50%.”

339 I.R.C. § 51(b)(1) (defines qualified wages), (d) (enumerates members of targeted) groups).


341 Id.

342 WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE, supra note 45, at 25.

Thus, providing wage subsidies to employers that hire opt out mothers who have recently received government assistance such as food stamps would seem consistent with Section 51(a)'s overall policy goals of helping disadvantaged groups emerge from poverty. This is an entirely worthwhile reform that should be enacted immediately. As discussed extensively in Sections I and II, however, the government must focus on improving the situation of mothers generally and not just those in (at least near) poverty.

It would certainly be worthwhile to explore the wisdom of using tax subsidies to more broadly encourage employers to hire mothers who have opted out. But current tax laws do not seem to offer mechanisms that can be naturally extended to accomplish this purpose. Instead, lawmakers would need to start anew, a process likely to be controversial and slow moving even in the most cooperative of Congressional environments. This news is not cheery. It does, however, underscore the vital importance of enacting reforms such as those proposed in Section III, which would help new mothers avoid opting out in the first place.

### CONCLUSION

In 2015, three delegates from a United Nations working group on discrimination against women visited the United States. They described
"[t]he lack of accommodation in the workplace to women's pregnancy, birth and post-natal needs” as both “shocking” and “[u]nthinkable in any society . . . [no less] . . . one of the richest societies in the world.”  

Given these conditions, it is unsurprising that many mothers in the United States opt out of the workforce when their children are young. Unfortunately, however, the nearly ninety percent of women who try to re-enter the workforce will discover that even a short off ramp can significantly and irreversibly damage her career. Many mothers will hit the maternal wall and find themselves completely unable to re-enter the workforce; the wages of those that do succeed in re-entering will be subject to severe motherhood penalties.

As a result, experts that study gender biases in the workforce encourage new mothers to avoid opting out if they want to maintain their careers.

Hopefully, women in the United States will not always be confronted with these harsh realities. Perhaps the U.S. will someday ensure that women are guaranteed some form of paid maternity leave, like every other industrialized nation in the world. Perhaps the U.S. will someday provide women affordable and accessible childcare options, such as universal preschool, instead of allowing childcare costs to represent one of the highest household costs in the American working family’s budget.

Perhaps one day the U.S. will address the systemic biases that help to build the maternal wall and to allow motherhood wage penalties to exist. Until that much pined for time, this Article has identified several concrete ways in which the tax laws could be reformed to help those mothers that want to retain their careers to avoid opting out (and to thereby avoid the irreparable harms that follow). These reforms would help new mothers protect their careers in the extremely imperfect work environment that exists today.

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346 Id.
347 See Section II, supra.
348 See supra note 85 and accompanying text.
349 See Section II, supra.
350 Id.
351 See supra note 67 and accompanying text.
352 See supra notes 57, 177-178 and accompanying text.
353 See Section I and text accompanying note 115, supra.