The Tax Paradigm of Child Care: Shifting Attitudes Toward a Private/Parental/Public Alliance

Sharon C. Nantell

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Sharon C. Nantell, The Tax Paradigm of Child Care: Shifting Attitudes Toward a Private/Parental/Public Alliance, 80 Marq. L. Rev. 879 (1997).
Available at: http://scholarship.law.marquette.edu/mulr/vol80/iss4/1

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
THE TAX PARADIGM OF CHILD CARE: SHIFTING ATTITUDES TOWARD A PRIVATE/PARENTAL/PUBLIC ALLIANCE

SHARON C. NANTELL

TABLE OF CONTENTS

I. Introduction ................................... 883

II. Our Current Child Care System, or Lack Thereof ....... 888
   A. The Demand: The Demographics of Child Care ..... 888
      1. The Statistics .................................. 888
      2. Impact of the Recent Welfare "Reform" Legislation
         Upon the Demand for Child Care ............... 890
   B. The Supply Side of the Equation: Who's Minding the
      Kids? ........................................... 894
      1. Types of Child Care Provided ................. 897
      2. Child Care Costs ............................ 901
      3. The Disparity: What Families Can Afford ...... 902
      4. The Question of Quality ...................... 905

III. Governmental Tax Policies and Provisions Regarding
    Child Care ..................................... 906
    A. Federal ....................................... 908
       1. Direct Expenditure Programs ............... 908
          a. The Evolution of I.R.C. Section 21 and its Policy
             Legacy .................................... 910
          b. I.R.C. Section 129 and its Policy Legacy ....... 917
    B. States: Current Tax Statutes Offering Assistance .... 919
IV. Congressional Impetus and Inability to Change

Child Care Tax Policy .......................................................... 937
A. Reasons to Change I.R.C. Section 21 ..................................... 937
   1. General Shortcomings .................................................. 937
   2. I.R.C. Section 21 of Nominal Assistance—Even to Middle Class Taxpayers ...................................................... 939
   4. Its Greatest Deficiency .................................................. 944
B. Reasons to Change I.R.C. Section 129 ..................................... 944
   1. Primary Disadvantage .................................................... 945
   2. Fallout From the “Exclusively for the Benefit of Employees” Requirement ...................................................... 945
   3. Unregulated Private Child Care Firms for Profit .......... 948
C. Failed Congressional Proposals ........................................... 949
D. 1997 Congressional Activity .................................................. 952
   1. The Senate ................................................................. 952
   2. The House ................................................................. 955
   3. The Clinton Administration ............................................... 957
   4. Summary ................................................................. 958

V. General Considerations, Observations, and Recommendations ...................................................... 959
A. Child Care: Tax Provisions in Search of a Coherent Policy .......................................................... 959
   1. Assistance to the Child .................................................. 959
   2. Additional Needs of Low-Income Children ......................... 960
   3. Accessibility, Availability, Affordability, and Professionalism ...................................................... 960
B. To Code or Not to Code . . . Is That the Question? ........................ 961
   1. Tax Credits: Pros and Cons ............................................. 962
   3. Excludability: Child Care as a Fringe Benefit ..................... 965
C. Child Care: The Question Should Be Whose Responsibility Is It, Anyway? ...................................................... 967
   1. Responsibilities: A Brief Look at France and Sweden ........... 967
2. Responsibilities: An American Plan .................. 969

D. An Organized Private/Parental/Public Alliance ........ 970
   1. The Role of the Private Sector: Business .......... 970
      a. Shifting Attitudes: Child Care as an “Expense of Doing Business” ...................... 971
      b. Proposals ........................................ 971
         i. A Revised I.R.C. Section 129: Fixing What We Have ....................................... 972
         ii. A “Business Kiddie Tax”: Trying Something New ............................................ 973
         iii. Keeping the States Involved .................... 976
         iv. Flex Time, Work Shifts, and Fatherhood Initiatives ....................................... 977
   2. The Role of the Parents: Society ................. 978
      a. Shifting Attitudes: Children as the Mutual Responsibility of Parents ............... 979
      b. Proposals ........................................ 980
         i. A Revised (or Eliminated) I.R.C. Section 21 ............................................... 980
         ii. The Sliding Scale of Parental Fiscal Responsibility for Child Care ...................... 982
         iii. Back to the Basics: Teaching Parenting and Child Ecology .................................. 983
         iv. “Child-Centered” Child Care Centers .................. 984
   3. The Role of the Public Sector: Government ...... 985
      a. Shifting Attitudes: Child Care as a Governmental Responsibility ......................... 986
      b. Proposals ........................................ 987
         i. National Child Care Standards and Licensing By the States .................................. 987
         ii. Developers: Child Care Centers Required for Residential Developments and Business Centers/Complexes ........................................ 988
         iii. Revenue to the States and Municipalities .......... 989
         iv. Subsidy Per Child: A Last Resort .................. 990
   VI. Conclusion ........................................... 992
THE TAX PARADIGM OF CHILD CARE: SHIFTING ATTITUDES TOWARD A PRIVATE/PARENTAL/PUBLIC ALLIANCE

SHARON C. NANTELL*

I. INTRODUCTION

It is an obvious and painful fact of life for every working parent in America today: child care and its costs. No longer a woman’s issue, child care has grown to become a joint economic concern of parents, government and industry.

But should the care of our children be a matter of economics? By necessity, it must. The sheer number of women with children in the work force tells the story. More than 131 million Americans were employed in the United States in 1994; of that number, 54% were men and 46% were women.¹

In 1995, nearly 60% of all women participated in the civilian labor force.² In addition, the participation rate in the civilian labor force in 1995 for all “never married” women with children was 65%; for all married women with children (with spouse present) 61%; and for all

* Professor of Law, Chapman University School of Law. B.A., Cleveland State University (1973); J.D., Cleveland-Marshall College of Law (1976); LL.M., Taxation, Georgetown University Law Center (1979). The author wishes to acknowledge the research assistance of Linda Norcross, Chapman University School of Law and Linda Bass, Thomas M. Cooley Law School.


widowed, divorced or separated women with children, 57%. More than 40% of all working women in the United States in 1995 had children—nearly one-fourth had children ranging in age from 6 to 17 years and 17% had children under the age of 6. A comparison of 1994 and 1995 data reveals the following:

<table>
<thead>
<tr>
<th></th>
<th>1994</th>
<th>1995</th>
<th>Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Working Women</td>
<td>56.6 mil</td>
<td>60.5 mil</td>
<td>3.9 mil</td>
</tr>
<tr>
<td>Working Women with Children</td>
<td>22.5 mil</td>
<td>24.7 mil</td>
<td>2.2 mil</td>
</tr>
<tr>
<td>Never Married</td>
<td>1.7 mil</td>
<td>2.1 mil</td>
<td>.4 mil</td>
</tr>
<tr>
<td>Married (Spouse Present)</td>
<td>16.8 mil</td>
<td>18 mil</td>
<td>1.2 mil</td>
</tr>
<tr>
<td>Widowed, Divorced or Separated</td>
<td>4.0 mil</td>
<td>4.6 mil</td>
<td>.6 mil</td>
</tr>
</tbody>
</table>

In addition, the cost of child care is a relative constant, making it a regressive economic cost across income lines. In 1994, for example, the average percentage of family income spent on child care for preschoolers in the United States was 25% for families with annual incomes of $14,400, but only 6% for families with annual incomes of $54,000 or above. After paying rent or the mortgage, child care is the second largest monthly expense in most households.

Government has attempted to help. Historically, the bulk of the assistance has been federal, primarily in the form of a tax credit which directly reduces an individual’s federal income tax liability. The major benefactors of the federal child care credit, however, have been middle class taxpayers; the credit provides little or no federal assistance to low-

---

3. Id. The exact percentages were 65.5%, 61.1%, and 56.8%, respectively.
4. Id.
5. The exact percentage for women in the workforce with children between the ages of 6 and 17 was 23.6%. Id.
7. U.S. BUREAU OF LABOR STATISTICS, supra note 2.
8. Beth Belton & Tammi Wark, Economics of Child Care: Problems of Supply, Demand Defy Logic, USA TODAY, October 13, 1995 at B-1.
9. Id.
10. I.R.C. § 21 (1988). A tax credit reduces an individual’s income tax liability dollar for dollar; however, if the individual has no federal tax liability, a tax credit has no value unless it is either refundable or subject to carry forward for use in future taxable years.
TAX PARADIGM OF CHILD CARE

income families. This inequity is compounded by the fact that more than one-third of the states provide individual income tax relief to their residents based in some measure upon the federal child care credit.

In addition, governmental tax policy has extended beyond provisions granting tax relief to individual taxpayers who incur child care costs in order to be gainfully employed. Tax relief provisions for businesses assisting their employees with child care are also present in the federal tax code, and in many state tax codes as well. Since 1981, many employees have benefitted from "dependent care assistance programs" established by their employers. These programs were primarily generated by Congressional approval of an exclusion from an employee's gross income of an amount up to $5,000 which has been paid or incurred by the employer for dependent care assistance provided to his or her employee. This provision prompted companies to actually construct and operate numerous child care facilities exclusively for the benefit of their employees since the value of the dependent care services provided to the employees through these facilities then qualifies for the exclusion.

This federal provision is favorable to businesses since the amount paid or incurred for dependent care is excluded from the employee's gross income and, as such, is not subject to the 7.65% Social Security and Medicare taxes. Again, several states have followed the federal lead but with a more specific twist, offering credits to employers against

11. Nearly 49% of all of the returns claiming a child care credit under I.R.C. § 21 in 1993 reported adjusted gross income between $20,000 and $50,000. See U.S. DEPARTMENT OF THE TREASURY, Pub. L. No. 1304 (Rev. 3-96), INDIVIDUAL INCOME TAX RETURNS (1993), at Table 3.3 [hereinafter STATISTICS OF INCOME]. Since the child care credit is not refundable (i.e., refunding to the taxpayer that portion of the credit that exceeds the federal income tax liability, if any, due for the year), poor individuals with gross incomes below the minimums required for filing a tax return receive no benefit whatsoever from I.R.C. § 21. See infra Part III.

12. The 19 states are listed infra note 205.

13. I.R.C. § 129(e)(1) (1988). The exclusion applies for "dependent care assistance"; the payment of, or provision of, those services which if paid for by the employee would be considered employment-related expenses under section 21(b)(2) which relate to expenses for household and dependent care services necessary for gainful employment.


15. I.R.C. § 129(d)(1) (1988). The construction and operation of a child care facility is not required by the statute, but should such a facility be established its operation for the exclusive benefit of the company's employees is required by the statute. In addition, the employer's dependent care assistance program must be a written plan which cannot discriminate in favor of highly compensated employees.

income, franchise or corporate taxes for expenses paid or incurred in starting up a child care facility for their employees, operating such a facility for their employees or assisting their employees with child care expenses.\textsuperscript{17}

No additional federal statutes have been enacted in the child care tax arena since 1981.\textsuperscript{18} Numerous states have attempted to fill this void with a variety of legislative proposals (some time-honored, others imaginative) but few of the plethora of bills have survived to enactment.\textsuperscript{19} Municipalities and rural communities have even stepped into the fray, providing tax incentives to developers who build office centers for businesses with child care centers as part of the plan.\textsuperscript{20}

Industry has become a recent partner in the joint endeavor to provide child care, arguably as a consequence of the I.R.C. § 129 federal tax policy and its similar state-spawned tax statutes. In 1996, approximately 1,400 businesses provided on-site child care centers for their employees and the number is growing.\textsuperscript{21}

\begin{itemize}
\item[17.] See infra Part III.B.2 for a detailed discussion of these states.
\item[18.] A great deal of legislation addressing the child and dependent care tax credit has been introduced in Congress since 1981 with no passage rate success. However, 1997 will likely be the year in which I.R.C. § 21 is amended—for better or worse. See infra Part IV.C. & D. for an illustrative survey of proposed legislation in this area in the past decade and a discussion of the separate tax bills passed by both the House and the Senate in June of 1997.
\item[19.] More than half of the states introduced tax-related child care legislation within the last two years. In the business area, for example, see Nevada (1995 Senate Bill 254—exemption from the business tax for child care establishments); New Jersey (1996 Assembly Bill 1173—a tax credit under the N. J. Gross Income Tax of 25% of expenses incurred for employer’s costs for certain child care expenses); North Carolina (1995 House Bill 1043—employer income tax credit for constructing an on-site or near-site child care center for children of employees) and comparable proposals in Indiana (1996 Senate Bill 408), New York (1995 Assembly Bill 4156) and Pennsylvania (1995 House Bill 1365); Florida (1996 House Bill 289—to change to a tax credit rather than a deduction for child care facility start-up costs); Rhode Island (1996 House Bill 7227—to increase the current tax credit available to employers providing child care from 30% to 75% of the total amount expended by the employer for adult or child care services to its employees); and Washington (1996 Senate Bill 6377—credit against tax to employers on a $3 per square foot basis for on-site child care assistance to children of employees and up to 25% of amounts expended for off-site assistance).
\item[20.] See Millard Johnson, \textit{East Side, West Side, All Around the County}, 11 CORP. REP. Wts. 280 (Feb. 1, 1996) (examining characteristics of office park developments on the east and west sides of Madison, Wisconsin, including child care centers in the initial phase of construction to be shared by the businesses in the park); Rochelle Carte, \textit{Portland Poses Creative Plan for Child Care Woes}, \textit{THE TENNESSEAN}, May 27, 1996, at 1-A (explaining the plans for the city of Portland, Tennessee to build a day-care center for the 6,000 employees working in 50 industrial plants).
\item[21.] The 1,400 number is a best estimate. The number was provided in a telephone conversation on July 10th, 1996 with Robin Hartman of Families and Work Institute of New York. In addition, 1,400 was also the number provided by Faith Wohl, Director of the Federal
Thus, child care assistance in America today is primarily provided through an uneasy private/parental/public alliance. However, an alliance usually implies consent on the part of its participants. America's private/parental/public alliance has instead proceeded rapidly through its stages of evolution, lurching to its current misshapen form more by default than by consent. Today's child care benefactors find themselves as strange bedfellows due primarily to the refusal—or, more accurately, the political inability—of Congress to provide a comprehensive child care policy with adequate financial support.

State and local governments as well as business have haphazardly stepped into the Congressional void to provide child care assistance to harried working parents. The U.S. economy essentially requires some form of child care assistance for families, either physical or financial, in order for parents to be able to both work and provide for their children. Should the tax systems, both federal and state, be: (1) the primary source of financial child care assistance to working parents, and (2) the chief motivating factors for business in the child care arena? These questions must be asked and answered. This Article examines the issues raised by these questions and proposes alternative solutions and approaches to the "problem" of child care in America today.

First, in approaching the broad issue of child care, PART II addresses the efficiency and effectiveness of the current child care system (or lack thereof) within the economic context of supply and demand.

The mixed policy considerations evidenced in the legislative histories of I.R.C. sections 21 and 129 and Congressional efforts in the area of child care over the last decade are examined in Part III of this Article. This Part also scrutinizes the governmental tax policies concerning child care at the State level.

Part IV critically examines the plethora of reasons to change (or eliminate) both I.R.C. sections 21 and 129 and the apparent inability of Congress to significantly amend its own child care tax code provisions over the past 16 years. This Part includes a summary of the private Office of Workplace Initiatives, as quoted in an Associated Press article. See Experts Worry Bombing Will Trigger 2nd Thoughts About On-Site Day Care, THE CLEVELAND PLAIN DEALER, May 17, 1995, at 2-C.

According to Work/Family Directions, a Boston-based for-profit consulting company, there are from 1,400 to 2,000 on-site child-care centers in the nation and the growth has decreased from about 300 a year to about 150 a year as employers have expanded into other types of support systems, such as referral services and flextime. Kathleen Keller, '90s Family: Who's Minding the Kids?, L.A. TIMES, Jan. 10, 1996, at E-3.

22. See supra notes 1-7 and accompanying text.
business activity that has stepped into the legislative void surrounding I.R.C. section 21, or, more accurately, has been encouraged to do so by the existing governmental policies supporting I.R.C. section 129.

Considerations, observations and recommendations to provide child care assistance beyond current federal and state tax code provisions are proposed in Part V. The analysis examines child care assistance in the context of tax policy considerations, specifies critical non-tax policy considerations and proposes an organized private/parental/public alliance as a solution to the child care crisis in America today.

II. OUR CURRENT CHILD CARE SYSTEM, OR LACK THEREOF

The need or demand for child care is obvious. The methods of satisfying the supply side of the equation are not.

A. The Demand: The Demographics of Child Care

1. The Statistics

Why is the need for child care so obvious? The proportion of dual-earner couples in the United States has risen from 42% in 1988 to 74% in 1995. Of all householders, 62% worked at full-time jobs and 9% at part-time jobs in 1993. Nearly everyone is working and the event of having children rarely alters the phenomenon.

As previously noted, in 1995, 18 million married women with children were in the civilian labor force while 6.7 million "head of household" women with children (single, widowed, divorced or separated) were so employed. This means that nearly 43 million parents with children present in the household were in the civilian labor force (18 million wives plus 18 million husbands plus 6.7 million single parents) representing more than one-third of all employees in the United States today. Thus, child care should and must be viewed as a parental issue, encompassing public as well as business concerns, and not merely as the "woman's problem."

24. U.S. BUREAU OF THE CENSUS, supra note 1, Table 728, at 472.
26. The exact percentage was 35% for 1994. U.S. BUREAU OF THE CENSUS, supra note 1, Table 626, at 399.
Nearly 70% of all married women with school age children were working in 1995. More than 60% of all mothers with preschoolers (under age 6) were in the workforce. Obviously, someone needs to, and is, taking care of the kids while both parents work or while a single parent struggles to provide. The question of "who's minding the kids?" has been frequently asked, but not adequately answered. Since only 15% of all employees have any type of flexible hour work schedule, the extraordinary responsibility of arranging for adequate child care during after-school hours or for full-time daycare services for preschoolers has been borne primarily by harried parents.

This scenario is unfairly complicated for children by the following characteristics of their parents: family income level, race and female heads of household. Statistics for 1993 are both revealing and appalling. Twenty-two percent (22%) of all American children—nearly 15 million children—were below the poverty level. Two out of every five people below the poverty level were children. The breakdown by race was startling: 40% of all Hispanic children, 46% of all Black children, and 17% of all white children were below the poverty level. More than 8 million families (12% of all families) were below the poverty level and yet more than half of the householder in these families worked during

It should also be noted that the U.S. Census Bureau does not compile and track statistics on the presence of children of men in the workforce by employment status and marital status. See generally U.S. BUREAU OF CENSUS, supra note 1.

29. Id. Of the 16.7 million women with children under the age of 6, 10.4 million were in the labor force (an exact percentage of 62%).
31. U.S. BUREAU OF THE CENSUS, supra note 1, Table 647, at 410. There are some encouraging observations regarding flex time. See Martha Groves, How the Mother Half Lives: More Firms Realize That Accommodating the Needs of New Parents and Others Can Benefit the Bottom Line, L.A. TIMES, August 12, 1996, Careers Section, at 3 (observing that there is some recognition by employers that making employee adjustments can benefit the bottom line, especially in the areas of retention and recruitment); Melissa Healy, President Urges Allowing More Time Off for Workers, L.A. TIMES, June 25, 1996, at A-1 (noting President Clinton's plan to allow employees to take as many as 80 hours of "flex time" in lieu of overtime pay and to expand use of the 1993 Family and Medical Leave Act to allow parents to take as many as 24 hours of unpaid time to attend their children's school academic functions).
32. U.S. BUREAU OF THE CENSUS, supra note 1, Table 745, at 480.
33. Of the 39.3 million people below the poverty level in 1993, 15.7 million of them were children under 18 years of age. U.S. CENSUS BUREAU, supra note 1, Table 747, at 481.
34. Id. The exact numbers for 1993 are 39.9% for Hispanic children; 45.9% for Black children and 17% for White children. Id.
the year. The median income of a female householder with children (under the age of 18) was $13,472—a figure that dropped to $10,375 if the female householder was Black and to $10,497 if the female householder was Hispanic.

2. Impact of the Recent Welfare “Reform” Legislation Upon the Demand for Child Care

While neglecting effective and efficient child care legislation, Congress turned its attention to welfare legislation. Obviously, the two issues—child care and welfare—are inextricably intertwined. Whether Congress is aware of this connection is often debatable. This Article examines the tax policies governing child care in America today, resulting in the current status of child care and its funding. But child care is just one small piece of a substantial societal pie and cannot be examined in a vacuum.

In this day and age of the ever-present, ever-growing federal deficit, it is incumbent upon lawmakers to match limited revenues with the most critical societal needs. Ironically, in its recent sweeping welfare reform legislation, Congress subjected those most in need to a limitation of resource assistance. The rhetoric is “personal responsibility”; the attitude is “tough love”; the truth is abandonment.

35. U.S. BUREAU OF THE CENSUS, supra note 1, Table 753, at 484. In 1993, 8.4 million families of all races were below the poverty level. Id. Of the 7.6 million householders of these families (16 years of age and older), 3.9 million worked during the year. Id.

36. U.S. BUREAU OF THE CENSUS, supra note 1, Table 735, at 476.

37. The Congressional Budget Office reported that the deficit was on track to total $130 billion for fiscal 1996 (1.7% of the gross domestic product), down from $164 billion in 1995. James C. Cooper & Kathleen Madigan, U.S.: The Fed Should Have a Peaceful Summer Vacation, BUSINESS WEEK, June 3, 1996, at 29.


39. The federal assistance provided to the states for child care will be grossly inadequate ($2.7 billion in 1997) in light of the tremendous increase in demand for child care as former welfare recipients enter the workforce. See infra Part III.A.1.; see also Lisa Richardson, Welfare Reform Snag: Who'll Watch Kids?, L.A. TIMES, April 13, 1997, at A-1.


41. For example, when the House of Representatives passed a version of the Contract with America’s welfare reform proposal on March 24, 1995, it was billed by its proponents as “tough love.” Projected to save $69 billion over five years, the Congressional Budget Office reported that the proposed legislation would have excluded more than half of the 5 million female-headed families then on welfare. See Charles Derber, The Politics of Triage: The Contract With America’s Surplus Populations, Tikkun, 1995 Institute for Labor and Mental
Congress' underlying legislative policy appears to assume a universal unwillingness, rather than an inability, of welfare recipients to get off of welfare. Under the new legislation, if the poor on welfare do not find employment within a twenty-four month period of time, they are to be cutoff from welfare assistance altogether—or, essentially, abandoned. Such a hardline stance might be justifiable if several conditions occurred during the two year period: (1) education; (2) job training; (3) increased opportunity to find a low-skill, minimum wage job; and (4) child care assistance. Little provision for funding of the first three

---


43. Employment in the United States today is relying more and more on one's educational status. For autoworker assembly line positions, for example, the new hires are more educated than their retiring counterparts: nearly all are high school graduates, more than a third have some college education, and they are expected to have some computer competency and good communication skills and to be team-oriented. Donald W. Nauss, Building the New Economy: Auto Makers Also Assemble Diversity, L.A. TIMES, July 28, 1996, at A-13.

44. Job training is, at least, an articulated goal of the Clinton administration as evidenced by President Clinton's acceptance speech at the Democratic National Convention in which he spoke at length about expanding educational opportunities through tax breaks, job training grants and other incentives. John M. Broder, Clinton Declares "Hope Is Back," L.A. TIMES, Aug. 30, 1996, at A-1.

45. The location of the low-income jobs must be matched with the location of the poor populations. In many instances, it is not a matter of the ability of the welfare recipient to find a job—it is often a matter of whether such a job even exists within the geographic area. For example, Philadelphia Mayor Edward Rendell recently declared that there were no jobs for single mothers who wanted to work in his city. See Derber, supra note 41, at 41. He indicated that changes in the Pennsylvania welfare system had terminated benefits for 5,500 Philadelphians in 1995, while during the same period only 355 new jobs had been created statewide. Id.

46. Even assuming minimum educational and training levels and the availability of jobs, a parent (any parent) cannot afford food, shelter, clothing and transportation plus child care costs on a minimum wage salary. See supra Part II.B.3.

Even with a future minimum wage of $5.15 an hour, the after-tax, after medical premium take-home pay only amounts to approximately $3.80 per hour. The Social Security and Medicare taxes of 7.65% ($0.40) plus a federal income tax rate of 6% ($0.31, assuming no earned income tax credit) and, in California, for example, a state income tax rate of 4% ($0.20) plus a disability insurance deduction ($0.04) all deplete the $5.15 per hour wage to a take-home pay of $4.20. Taking into account a health insurance premium deduction of approximately 7% ($0.37), the minimum wage employee is left with a take-home wage of $3.83 per hour. If day care for one child costs $13 per day, a full-time employee clears only $17 per day for rent, food, clothing and transportation. See supra Part II.B.3.

Sociologist Christopher Jencks of Northwestern University concludes that the average single working mother in 1995 needed $1,500 a month to get by without help from the
Although the welfare reform legislation is entitled The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the legislation fails to address the critical factor of how low-skilled individuals are to find "work opportunities" in order to "get off welfare." It assumes that low-wage jobs exist and are currently available throughout the United States. The punishment is specified but the means to avoid the punishment are not to be found in the legislation.

The reality is that child care assistance, either provided directly to the taxpayer or as a child care facility subsidy, must be a part of any successful welfare reform package. At present, it is nominally addressed. The new welfare legislation amends the Child Care and Development Block Grant Act of 1990 in several respects, specifying goals and authorizing appropriations and entitlements regarding child care. The stated legislative goals are: (1) to allow each State maximum flexibility in developing child care programs and policies that best suit the needs of children and parents within such State; (2) to promote parental choice to empower working parents to make their own decisions on the child care that best suits their family's needs; (3) to encourage States to provide consumer education information to help parents make informed choices about child care; (4) to assist States to provide child care to parents trying to achieve independence from public assistance; and (5) to assist States in implementing the health, safety, licensing, and registration standards established in State regulations.

Funding is provided through Title IV of the Social Security Act, requiring amounts received by the States to be used to provide child care assistance. Appropriation of funds to the States for child care
assistance starts at nearly $2 billion for fiscal year 1997 and increases annually until it reaches more than $2.7 billion for fiscal year 2002.\(^5\) This funding will likely not be adequate to address the tremendous child care demand created by the welfare reform legislation.

It is estimated that welfare parents could be searching to place as many as 3.5 million children nationwide into child care as a consequence of implementation of this legislation.\(^4\) The ability, or inability, of the states to quickly satisfy this incredible demand for child care with quality, licensed child care is the unstated challenge of this reform legislation. For example, the State of California is grappling with tremendous costs of child care as a consequence of the welfare reform work requirement.

The current total State budget proposal just for child care alone amounts to $1.3 billion.\(^5\) However, even that level of funding, enough to provide approximately 430,000 subsidized child care slots, cannot accommodate the 1.8 million California children currently living in welfare families where parents could be forced into the workplace.\(^6\)

The States may quickly learn the staggering depth of the welfare dilemma. For example, of California’s current 2.7 million person welfare population, 28% are estimated to have substance abuse problems and approximately 25% are either personally disabled or their children are disabled, thus keeping them out of the full-time workforce.\(^7\) Approximately two-thirds of California’s current adult AFDC recipients are unable to pass a basic literacy test, one-half lack a high school diploma and upward of 40% suffer from clinical depression.\(^8\) The future employment picture does not look very rosy for these current welfare recipients and California runs a great risk if it fails to employ a substantial number on its current welfare roll.\(^9\) The states will likely

\(^53\) Id. (adding § 418(a)(3) to Part A of Title IV of Social Security Act (42 U.S.C. §§ 601-617)). This $2.7 billion is not in addition to the $2 billion of direct expenditure federal program assistance previously available; rather, it represents a consolidation of funding previously provided through these programs. See infra Part III.A.1.

\(^54\) See Melissa Healy & David Lesher, Child Care Is Major Pitfall in Welfare Reform Plans, L.A. TIMES, May 4, 1997, at A-3. Approximately 1.5 million of these children will be of pre-school age. Id.


\(^56\) Id.


\(^58\) Id.

\(^59\) Id. If California is unable to meet its employment requirement under the welfare reform legislation (placing 50% of its dependent population into jobs over the next 5 years), it runs the risk of incurring $185 million in yearly penalties—a sum that could increase for
learn a costly lesson thrust upon them by Congress: for a substantial number of welfare recipients, the issue was rarely a matter of not being willing to work, it was more a matter of not being able to work.

Thus, this perceived detour into welfare reform legislation has brought the discussion full circle to the original issue at hand—namely, child care. Although the availability of quality child care is critical for mothers and fathers of families at or below the poverty level and will likely become the Achilles heel of the welfare reform legislation as it is implemented by the States, child care is a fundamental concern for millions of Americans (working or otherwise) with children.

This Article contends that an employer responsibility as well as a governmental responsibility exist in the area of child care, which leads us to the "supply side" of the child care equation.

B. The Supply Side of the Equation: Who's Minding the Kids?

The need for adequate and quality child care is thus well established by the sheer numbers of children in the United States today whose parents work. Due to the general inflexibility of employers to provide "flex time" for their employees, the primary burden of arranging for child care rests with harried mothers and fathers. Each working parent struggles mightily to satisfy a forty hour per week work schedule, one historically designed to accommodate Ozzie and Harriett—a male bread-winner and a female homemaker. These business demands relentlessly persist despite the recent phenomenon that less than ten percent of American families conform to the pattern of a single, male wage earner in the paid workforce married to a stay-at-home female spouse who performs the unpaid housework and child care.

Who should be asked to adjust, the family or the workplace? So far, the answer has been the family. Parents perform the bulk of the

---

60. See infra Part V.D.
61. See supra note 31.
62. The use of the term "working parents" is intentional. Note that the term "working mother" receives common usage yet the term "working father" would be foreign to us. Dowd, supra note 27, at 455 ("Work is primary; family must be sacrificed for work. Fathers have always been presumed to work; indeed, we have no concept of a 'working father' because such a term would be redundant.").
63. For a detailed history of the work-family relationship since industrialization, see Id. at 433-37.
64. Id. at 439, n.43.
65. Elizabeth Mehren, "Not Having It All in Washington", L.A. TIMES, Nov. 28, 1996, at E-1. The article reported that the recent resignations of Labor Secretary Robert Reich,
accommodating, resulting in severe stress in all households, particularly the single parent households. Families balance child care considerations of transportation and time demands in addition to the burdens of finding and keeping reliable and competent care-providers. A less obvious accommodation, however, is the ultimate accommodation: a tax-induced decision whereby one parent in a two parent household or a single parent decides that the best economic decision for the family is not to work outside the home at all or to work full-time when only part-time work would be preferred. Due to the fact that women in general earn

National Economic Council Chief Laura D'Andrea Tyson, and Assistant Atty. Gen. Deval Patrick were prompted by family concerns. id. Brad Googins, director of Boston University's Center for Work and Family, queried: "Why not look back at your organization, why not make the organization more responsive?" id.

See infra Part V for an examination of the factors in American society motivating the primary placement of the child care burden upon parents. This Article strongly concludes in Part V that the workplace—business—carries an equal, if not greater, responsibility in the area of child care.

66. See Edward J. McCaffery, Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code, 40 UCLA L. REV. 983, 988 (1993). McCaffery states that there are:

[F]ive factors in the current tax laws that influence familial labor supply decisions: (1) the aggregation of spousal tax rates under the income tax; (2) the disaggregation of spousal rates, with an asymmetric allocation of benefits, under the social security system; (3) the failure to tax imputed income from self-supplied labor; (4) the present treatment of mixed business-personal expenses, particularly child care; and (5) the treatment of fringe benefits.

For example, assume a husband and wife with two children in 1996 with only the husband working outside the home earning wage income of $18,000. After the standard deduction and personal exemptions, the family's taxable income amounts to $1,100 ($18,000 - 6,700 - 10,200). At the 15% tax rate, the federal income tax due is $167. However, the earned income tax credit (EITC) provides a credit of $2,205 and the family receives a refund of $2,038. (Since the husband paid $1,377 in Social Security and Medicare taxes (7.65%), the earned income tax credit serves its primary purpose in this instance of refunding these payroll taxes through the federal income tax system.) The family, prior to the imposition of any state income tax, has $18,661 of "disposable family income" for the year.

If, in our example, the wife decides to take a part-time job earning $6,000 of wage income, the family's tax picture changes dramatically. Now total earned income rises to $24,000. After the standard deduction and personal exemptions, the family's taxable income amounts to $7,100. At the 15% tax rate, the federal income tax due totals $1,069. The EITC amounts to only $941, leaving a tax due of $128. Both the husband and the wife incur the Social Security and Medicare taxes of 7.65% totalling $1,836. Thus, the total federal impact is $1,964. Assuming conservative annual costs to the family of the second worker (transportation, food and child care) amounting to $4,000, the family, prior to the imposition of any state income tax, now has only $18,036 of "disposable family income" for the year. It actually "costs" the family $625 of disposable family income for the wife to go to work even though the family's gross income picture increased by one-third!

This phenomenon is due to the collision of the five factors listed above by Professor McCaffery. First, under the tax rate structure, the secondary earner's income is taxed at a
less than men, the economic decision not to enter the workforce or to work full-time rather than part-time usually falls to the woman.

Numerous devastating social consequences flow from this intelligent and informed economic decision dictated by governmental tax policies, the indifference of the workplace and gender biases: (1) the loss to the workplace and the community of the skills of the woman who decides not to enter the workforce; (2) the loss to the woman of her opportunity to pursue her career; (3) the loss to the father of time with his family since he must increase his workplace hours rather than have his wife work outside the home; (4) the loss to the children of the father who has less time to share in their growing up; (5) the loss to the children of the mother (whether married or single) who would rather work only part-time but is economically compelled to work full-time; and (6) the stigma placed upon a poor single parent who intelligently decides to accept welfare rather than a minimum wage job which cannot provide her and her children with sufficient resources to cover the necessities of life, including medical and day care costs.

This list identifies just a few of the inequities Congress has forced upon American families. But Congress alone is not the culprit here. Laws in general are rules reflecting underlying values, policies and assumptions of our society. Tax laws are no exception. However, federal income tax rate dictated by (in this case) her husband's earnings. Since their earnings are aggregated for purposes of the tax rate, his earnings set the level and her earnings are added on top. Second, the Social Security and Medicare taxes are fixed at 7.65% on every dollar earned, with no exemption amount. Thus, she is faced with an initial marginal tax rate of 22.65% as she enters the workforce. Third, the provisions of the EITC severely penalize married couples as opposed to head of household individuals with children. For lower income couples, the impact of this provision is overwhelming.

For a sobering and detailed illustration of the collective impact of all of these factors upon taxpayers by class (lower, middle and upper), see id. at 1014-29. See generally EDWARD J. McCAFFERY, TAXING WOMEN (1997).

67. For example, the median income for a female householder in 1993 was $17,443; her male counterpart earned $26,467. U.S. BUREAU OF THE CENSUS, supra note 1, Table 737, at 477. If a child under the age of 18 was present, the median incomes dropped to $13,472 for the female householder and $22,348 for her male counterpart. U.S. BUREAU OF THE CENSUS, supra note 1, Table 735, at 476.


69. STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 13 (2d ed. 1995) ("Treating a rule as a general statement of what the law permits or requires emphasizes that a rule is normative. That is, a rule guides conduct by saying something about what people in general should or should not do").

70. Id. at 97. Burton states:
more than many other areas of the law, Americans are trained early and often in life to be sensitive to the manner in which tax laws affect their lives. Whether tax law should or should not dictate behavior can be debated; the fact that it does (and to an amazingly fundamental extent) is not debatable. Americans decide such basic human issues as whether and when to marry, divorce, buy a home, have children, work, or retire all within a tax context, usually sensitive to the tax consequences of such decisions but rarely cognizant of why a tax consequence should even be applicable.

We have rubbed the child care lantern and let a giant genie out of the bottle! Before we can get the genie back in its bottle, our responsibility is to transform it into something fair and equitable to all—fathers, mothers, children, the family. Whether complete tax law equity can be accomplished is questionable given the pervasive magnitude of gender, race and class bias in the Code. An objective of this Article is to suggest recommendations in the area of child care which, at a minimum, will render the area of child care better while not worsening the prevalent and existing family and gender inequities.

1. Types of Child Care Provided

As the statistics in this Part indicate, parental choices for child care reveal a strong preference for family or in-home arrangements. Whether this preference is due primarily to economics, availability, access or otherwise is unknown. However, federal and state tax policies and

Rules and precedents set standards of lawful conduct that are supposed to help make our world a better place in which to live. To do this, rules and precedents implement the law's vision of a better society. Put differently, laws have purposes: They implement, and should be justified by, desirable principles and policies.

Id.

71. The annual and often agonizing ritual of preparing and filing a tax return is a memorable event in the life of many American families (as well as a media event) and is likely a contributing factor to this phenomenon.

72. For example, most taxpayers know the major filing status categories of I.R.C. § 1 (married filing jointly, head of household, single, and married filing separately). But how many ever ask why marital status should be determinative of one's ultimate tax rate? See Pamela B. Gann, Abandoning Marital Status as a Factor in Allocating Income Tax Burdens, 59 Tex. L. Rev. 1 (1980).

73. See generally Dowd, supra note 27; McCaffery, supra note 66; Gann, supra note 72; Michael J. McIntyre & Oliver Oldman, Taxation of the Family in a Comprehensive and Simplified Income Tax, 90 Harv. L. Rev. 1573 (1977); Boris I. Bittker, Federal Income Taxation and the Family, 27 Stan. L. Rev. 1389 (1975).

74. See infra Part V.

75. See infra Part II.
recent political rhetoric currently encourage and promote child care at the workplace. If the workplace is to adjust to the reality of today's current family, is the answer corporate on-site day care centers? This question, and, hopefully, some answers, will be pursued throughout this Article. But before resolving who and how child care should be provided in the U.S. today (and how our tax policy might affect such a resolution), we first need to determine who, at present, is minding the kids?

Working parents in America today need to provide some form of child care assistance to nearly 10 million children under the age of 5. Whether by preference or necessity, more than 40% of these children are cared for by a parent, grandparent or other relative either in their own home or in the home of a relative. Of particular note, only 23% of the families with a working mother relied upon organized child care facilities for assistance in 1991; however, this percentage was up to 30%.


77. See also Mrs. Gore Goes to Madison; Family Values at Work; Clinton Due Today at School, Torricelli Fund-Raiser, THE RECORD, N. J., May 7, 1996, at A-03 [hereinafter THE RECORD]. Tipper Gore visited the day-care center of American Home Products, a pharmaceutical and health-care products company located in Madison, New Jersey. The center is open to the children of the company's 1,100 workers. Id. Mrs. Gore promoted the Department of Labor's "Working Women Count Honor Roll," an administration initiative to encourage employers to make the workplace better for women and their families. Id. American Home Products is among more than 930 U.S. companies that have pledged to improve their workplaces, offering a day-care center, a fitness center, and even banking and dry cleaning services. Id.

The employee may never need to go home again . . . and therein lies the rub!

78. See BUREAU OF THE CENSUS, supra note 1, Table 615, at 390; U.S. BUREAU OF THE CENSUS, Who's Minding Our Preschoolers?, supra note 30, Table 2, at 6 (Primary Child Care Arrangements Used for Preschoolers by Families With Employed Mothers: Fall 1993).

The exact percentages were 43.5% in 1991 and 41.3% in 1993 broken down as follows:

<table>
<thead>
<tr>
<th>Care in the Home</th>
<th>1991</th>
<th>1993</th>
</tr>
</thead>
<tbody>
<tr>
<td>By Father</td>
<td>20%</td>
<td>16%</td>
</tr>
<tr>
<td>By Grandparent</td>
<td>7.2%</td>
<td>6.5%</td>
</tr>
<tr>
<td>By Other Relative</td>
<td>3.2%</td>
<td>3.3%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Care in Another Home</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>By Grandparent</td>
<td>8.6%</td>
<td>10%</td>
</tr>
<tr>
<td>By Other Relative</td>
<td>4.5%</td>
<td>5.5%</td>
</tr>
</tbody>
</table>
just two years later.\textsuperscript{79}

Interestingly, until 1991, the primary child care arrangement for working mothers with children under the age of 5 had consistently been care in the home of another (with such care provided by a grandparent, another relative or a nonrelative). The following chart illustrates the percentage of children of working mothers under the age of 5 by type of child care arrangement.\textsuperscript{80}

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Care in Child's Home</td>
<td>33.9%</td>
<td>31.0%</td>
<td>29.9%</td>
<td>28.2%</td>
<td>35.7%</td>
</tr>
<tr>
<td>Care in Another Home</td>
<td>40.7%</td>
<td>37.0%</td>
<td>35.6%</td>
<td>36.8%</td>
<td>31.0%</td>
</tr>
<tr>
<td>Organized Child Care Facility</td>
<td>13.0%</td>
<td>23.1%</td>
<td>24.4%</td>
<td>25.8%</td>
<td>23.0%</td>
</tr>
</tbody>
</table>

In 1991, however, the percentages changed dramatically and shifted, for the first time, the primary child care arrangement to care in the child's home.\textsuperscript{81} Thus, in 1991, 3.5 million children of working mothers under the age of 5 were cared for in their own home while their mothers worked.\textsuperscript{82} Of note in that year, 20% of these nearly 10 million children under the age of 5 were cared for in the home by their fathers.\textsuperscript{83}

The percentages shifted significantly again in 1993, leveling out the child care choices as follows.\textsuperscript{84}

\begin{itemize}
  \item \textsuperscript{79} Id. The exact percentages are as follows:
      \begin{itemize}
      \item Organized Facilities 23\% 30\%
      \item Day-Care Centers 15.8\% 18.3\%
      \item Nursery/Preschool 7.3\% 11.6\%
    \end{itemize}
  \item \textsuperscript{80} U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: (112th ed. 1992), Table 600, at 374 (Primary Child Care Arrangements Used by Employed Mothers for Children Under 5 Years Old: 1977 to 1988).
  \item \textsuperscript{81} U.S. BUREAU OF THE CENSUS, supra note 1, Table 615, at 390.
  \item \textsuperscript{82} Id.
  \item \textsuperscript{83} Id. This statistic may be attributable to poor national economic conditions and layoffs.
  \item \textsuperscript{84} See U.S. BUREAU OF THE CENSUS, Who's Minding Our Preschoolers?, supra note 30, Table 2, at 6.
\end{itemize}
The following statistics indicate a marked and startling shift in child care arrangement choices by working parents for their preschoolers in the two year period between 1991\(^85\) and 1993\(^86\):

### Care in the Child’s Home

<table>
<thead>
<tr>
<th>Age Group</th>
<th>1991</th>
<th>1993</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 1 year</td>
<td>41%</td>
<td>34%</td>
</tr>
<tr>
<td>1 - 2 years of age</td>
<td>39%</td>
<td>33%</td>
</tr>
<tr>
<td>3 - 4 years of age</td>
<td>31%</td>
<td>27%</td>
</tr>
</tbody>
</table>

### Care in Home of Another

<table>
<thead>
<tr>
<th>Age Group</th>
<th>1991</th>
<th>1993</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 1 year</td>
<td>41%</td>
<td>40%</td>
</tr>
<tr>
<td>1 - 2 years of age</td>
<td>34%</td>
<td>37%</td>
</tr>
<tr>
<td>3 - 4 years of age</td>
<td>25%</td>
<td>24%</td>
</tr>
</tbody>
</table>

### Organized Facilities

<table>
<thead>
<tr>
<th>Age Group</th>
<th>1991</th>
<th>1993</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 1 year</td>
<td>12%</td>
<td>19%</td>
</tr>
<tr>
<td>1 - 2 years of age</td>
<td>18%</td>
<td>24%</td>
</tr>
<tr>
<td>3 - 4 years of age</td>
<td>33%</td>
<td>39%</td>
</tr>
</tbody>
</table>

Significantly, as the choice of care in the child’s home declined substantially in all three age groups, the choice of care for children in organized facilities increased proportionately in all three age groups.

---

86. See U.S. BUREAU OF THE CENSUS: *Who’s Minding Our Preschoolers?*, *supra* note 30, Table 2, at 6.
Not surprisingly, the statistics established that the older the preschooler, the greater the likelihood that the working parent would turn to an organized child care facility for assistance. The tendency of working parents to turn more often to an organized facility for child care assistance was also apparent when comparing levels of family income—the higher the income level, the greater the likelihood that the preschooler would be placed in an organized child care facility:

<table>
<thead>
<tr>
<th>Child Care in Organized Facilities</th>
<th>1991 (^87)</th>
<th>1993 (^88)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monthly Family Income</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less than $2,999</td>
<td>19 %</td>
<td>24 %</td>
</tr>
<tr>
<td>$3,000 to $4,499</td>
<td>22 %</td>
<td>29 %</td>
</tr>
<tr>
<td>$4,500 and over</td>
<td>34 %</td>
<td>39 %</td>
</tr>
</tbody>
</table>

2. Child Care Costs

The 1993 child care cost statistics are even more revealing: \(^89\)
- The average weekly cost of child care per preschooler for families with employed mothers was $60;
- The average weekly cost of child care per infant was $66 per week while such cost was $59 per week for older children;
- Larger families paid much more for child care than smaller families;
- Families with two or more pre-school-aged children paid approximately $110 per week for child care while families with one child paid only $66 per week;
- Families with two or more children also spent a larger share of their family income on child care (11% versus 7%);
- Married couple families spent approximately $78 per week to care for their children, at least $15 more per week than single-parent families spent; however, married-couple families spent a much smaller proportion of their family income on child care (7%) than did single-parent families (12%); and
- In total, 8.1 million families with preschoolers required care for their children while their mothers were at work.

---

3. The Disparity: What Families Can Afford

It is by now apparent that an American, male or female, who has at least one child and is employed requires some form of child care assistance. The problem thus becomes whether the working parent can afford the child care or, in reality, can even afford to work.

If, as previously established, the average cost of child care for an infant per week is $66 and the minimum wage is $4.75 per hour, quick and simple math establishes that the single parent earning the minimum wage must work nearly 14 hours per week just to cover the child care costs. However, the $4.75 per hour wage never reaches the parent’s pocket intact since all-too-familiar payroll deductions for Social Security and Medicare, federal and state income tax and other miscellaneous deductions (such as mandatory disability insurance) reduce the take-home amount to, on average, only $3.35 per hour. Now the single parent must work a minimum of 20 hours per week just to cover payroll deductions and child care! Food, shelter and clothing are yet to enter into the equation.90

It is not surprising that a recent study conducted by a nonprofit women’s research and advocacy organization determined that mothers must earn two to three times the minimum wage just to cover the basic needs of food, housing, child care, transportation and medical needs.91 The study focused primarily on mothers in the Southern California area and determined that, in Los Angeles, for example, a mother with a toddler would need to earn $13.07 per hour and a mother with two children would need to earn $13.43 to $17.10 per hour (depending upon the ages of the children) just to meet these basic needs.92

Dual earning couples with families do not fare much better. Sixty-nine percent of all married women with children under the age of 18 are...
The wage gender gap rears its ugly head. Women hold 67 percent of the jobs that pay less than $6 per hour in America today. Their income either supplements a family’s income, is the sole support for a family or is the sole support for them individually. In any event, not much can be accomplished with wages less than $6 per hour. In fact, many women cannot “afford” to work since it costs the family as a unit more in payroll deductions and child care costs than their income benefits the unit.

Congress has attempted to remedy inequities for low-income earning taxpayers in the form of a refundable Earned Income Tax Credit. If the employee is capable of estimating her or his earned income for the year and selects the proper number of exemptions on the W-4 Withholding Form, the take-home pay should rise substantially. In some cases, the take-home pay may actually exceed the wages per hour due to the refundability of the Earned Income Tax Credit. However, even at $4.75 per hour as a take-home wage, the child care “bite” out of a working parent’s income is still significant; married-couple families spend 7% of their income on child care while single parent families spend 12%.

The conundrums of the minimum wage and median family incomes must not be overlooked in this examination of child care. The $4.75 per hour minimum wage, effective October 1, 1996, reflects a 50 cent per hour increase and affects 4.2 million American workers. Prior to the increase, the minimum wage, adjusted for inflation, had been at its lowest value in 40 years and had not been raised since 1991. In 1994, more than 4 million Americans—6% of all workers paid hourly rates—were being paid at or below the minimum wage.

Clearly these statistics raise numerous social issues and concerns. For

---

95. See generally Dowd, supra note 27; McCaffery, supra note 66.
97. See infra Part V.B.1.
100. Richter & Gerstenzang, supra note 99 at A-1.
101. The minimum wage had been $4.25 per hour since April 1, 1991. U.S. BUREAU OF THE CENSUS, supra note 1, Table 681, at 436.
102. U.S. BUREAU OF THE CENSUS, supra note 1, Table 682, at 436.
purposes of this Part, the primary concern is child care costs in relation to wages received. For those Americans at the minimum wage end of the pay scale, child care costs of $66 to $110 per week are clearly prohibitive. In the current cultural anti-welfare climate and in light of the recent legislative emphasis toward moving individuals off of welfare and into the workforce within a two year period, the plight of poor American families may grow even more dismissal. Such a policy is destined for failure unless it is accompanied by programs and revenue fostering education, job training, job availability and child care assistance.

Even the new minimum wage of $4.75 per hour (to be increased to $5.15 per hour on September 1, 1997) lags far behind the $11.72 average hourly earnings of a production worker in all private industries. Obviously, education and skill are critical factors contributing to the income disparity. However, the difficulties and costs of child care cannot and must not be overlooked in the analysis. The question still begging to be adequately answered by the private/parental/public alliance is: To whom does the responsibility of child care belong?

Median income statistics by household type are particularly alarming. In 1993, the median family income was $37,484 for all family households. However, this figure was $43,129 for married couple households; $29,849 for male householder families; and only $18,545 for female householder families. When examined with race as a factor, the numbers are even more startling: the Black female householder family had a median household income that was more than 40% below that of the White female householder family. In addition, Black and Hispanic families lagged far behind White families in each family household median income category.

104. See supra Part II.A.2.
107. See infra Part V. for the author's attempt to answer this fundamental question.
108. U.S. BUREAU OF THE CENSUS, supra note 1, Table 727, at 471.
109. Id.
110. Id. The median family household income for the white female householder was $21,383; for the black female householder it was only $12,423.
111. Id. Median Incomes for Married Couple Households: White—$43,785; Black—$35,409; Hispanic—$28,867.
Welfare benefits are excludable from gross income and some limited child care assistance is available through the federal welfare system. Until an individual is capable of earning a decent living (which should be defined to include the cost of food, clothing, shelter, and adequate, quality child care) the decision to receive welfare benefits rather than accept minimum wage employment will continue to be the correct economic choice for many low-income families.

4. The Question of Quality

In general, a majority of American working parents place their children in some form of child care outside the home. With millions of American children requiring some form of child care on any given workday, the quality of such care should be of fundamental concern to both parents and legislators. An assessment of the quality of child care in America is revealing. There is little regulation of the child care industry thus unlicensed or illegal providers are common. Such providers offer affordable rates to parents but frequently fail to satisfy the basic safety and nutritional needs that children require.

Median Family Incomes for Male Householders: White—$31,177; Black—$22,000; Hispanic—$25,013.
Median Family Incomes for Female Householders: White—$21,583; Black—$12,423; Hispanic—$13,223.

112. See BURKE & FRIEL, TAXATION OF INDIVIDUAL INCOME (3d ed. 1994). Burke and Friel state:

Welfare-type benefits, on the other hand, tend to lack the nexus to compensation, are seemingly more in the nature of charitable gifts, and thus excludable from gross income on that basis. Moreover, to the extent benefits are based on need, treating them as income would, in any event, likely generate little or no taxable income in the great majority of cases.

Id. at 201.

113. See infra Part III.A.1.

114. In 1993, 8.1 million families with just preschoolers required care for their children while the mothers were at work. See U.S. BUREAU OF THE CENSUS: What Does It Cost To Mind Our Preschoolers?, supra note 89.

115. Only 16 states require training to obtain home-care licenses. See Belton & Wark, supra note 8.

116. The tax code fails to provide a primary impetus for the hiring of licensed child or dependent care providers since I.R.C. § 21 does not require day care payments to licensed professionals in order for the taxpayer to qualify for the tax credit.

However, most States require employers to provide child and dependent care which satisfies State licensing standards in order to qualify for State business tax benefits. See infra Part III.B.2.

117. See Belton & Wark, supra note 8 (“A nationwide survey of child-care settings rates 60% of available care as poor to dangerous, says Mary Kay Leonard, vice president of Work/Family Directions in Boston”).
professionals might be one solution to this problem, as evidenced in several European countries, but movement in this direction would require yet another significant paradigm shift in America's value culture. Of greatest sorrow, the tax code does little to motivate or encourage the hiring of licensed child care providers.

Business has begun to respond to the inadequate governmental efforts to assure quality child care. With greater frequency, employers, prompted by tax-savings motivations as well as economic self-interest, have turned to providing on-site child care centers for their employees. Will only the children of Fortune 500 employees receive quality child care? An analysis of the governmental tax policies regarding child care in America may provide an answer.

III. GOVERNMENTAL TAX POLICIES AND PROVISIONS REGARDING CHILD CARE

A tremendous need with significant social consequences is thus established when the issue of child care in America is examined in full. The governmental response to this essential need, on both the federal and state levels, has been haphazard as well as dismal. The reason for this sorry state of affairs? A fundamental confusion regarding purpose lies at the heart of our current governmental assistance.

What is the governmental tax policy driving the current child care tax credit and the dependent care exclusion "bandwagon"? The age-old quandary and debate over whether child care is a personal expense or

118. See infra Part V.C. for an examination of the child care systems of France and Sweden.

119. See infra Part IV. I.R.C. § 21 does not require that the employment-related child care expenses be paid to a licensed provider in order to qualify for the tax credit. In addition, I.R.C § 129 does not specifically require that the employer-provided dependent care satisfy State licensing standards; however, if an on-site facility is built and operated, it will necessarily be subject to State standards (and must comply with those standards in order to be eligible for the allowable State business tax credits). See also infra Part III.B.2.

120. See I.R.C. § 129 (1988); see also infra Part III.A.2.b.

121. See Lisa Genasci, Giant Firms Fund Care for Kids, Aged, SAN DIEGO UNION-TRIBUNE, Sept. 14, 1995 at A-1. Twenty-one of the nation's largest companies announced an unprecedented $100 million, 6 year effort to improve child and elder care for their employees in communities across the country. Id. Ellen Galinsky, co-president of New York's Families and Work Institute: "It is an extraordinary commitment and an important event. Not only because of the amount of money, but also because it makes a statement that it is in our economic self-interest to pay attention to the quality of dependent care." Id.; see also infra Part IV.B.2.
a business-related expense is still unresolved.\textsuperscript{122} Specific policy justification for Congressional treatment of child care in the tax code is essential for legitimacy and equity. Preferably, that policy should be consistent with already existing policy.\textsuperscript{123} But since child care does not neatly and completely fit into either a personal expense or business expense category, Congress' treatment of child care in the tax code has been mixed. A concisely stated policy must be articulated for child care, beyond the business versus personal conundrum.

Federal assistance to families incurring work-related child care costs has been provided to date in two primary forms: direct expenditure programs and income tax relief provisions. In light of the recent Congressional enactment of welfare reform legislation,\textsuperscript{124} the individual States will, by design, carry a greater burden of welfare assistance in general. To what extent this future burden will include child care assistance is yet to be determined. To date, however, many States have

\begin{itemize}
\item 122. For a thorough examination of whether child care is a personal expense or a business expense, see Brian Wolfman, \textit{Child Care, Work, and The Federal Income Tax}, 3 Am. J. Tax Policy 153 (1994).
\item 123. Of course, this assumes some logic to the already existing tax code provisions. Several logical, fundamental assumptions do lie at the heart of the Internal Revenue Code. For the broad-brush approach toward income in general, see I.R.C. § 62(a) (gross income means "all income from whatever source derived . . . "). For the policy that only net income should be subject to tax, see I.R.C. § 162(a) (1996) (deductions for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . "); see also I.R.C. § 212 (1986) (deductions for "all the ordinary and necessary expenses paid or incurred during the taxable year for the production . . . of income . . . "). For the general policy against the deductibility of personal expenses, see I.R.C. § 262 (1988) (" . . . no deduction shall be allowed for personal, living, or family expenses.").
\end{itemize}
followed the Congressional lead in offering nominal state income tax relief for child care costs.

A. Federal

1. Direct Expenditure Programs

Numerous direct expenditure programs accounted for more than $2 billion of federal assistance in fiscal year 1993. Such programs included child care provided under the Family Support Act of 1988, the At-Risk Child Care Program, the Child Care and Development Block Grant Program, various expenditures under the Social Services Block Grant Program of Title XX of the Social Security Act, and to some extent, the Head Start Program. This hodgepodge of programs and assistance reflected Congress' policy to address child care concerns with specificity (i.e., children on welfare versus children of low-income working families) rather than pursuant to an overall plan.

In addition, over the last 20 years, Congress has shifted its child care assistance focus from expenditure-based assistance to tax-based assistance. In 1977, approximately 75% of all federal spending on child care was expenditure-based; by 1993, this percentage was down to approximately 45%.

Many of these federal direct expenditure programs were either repealed or amended in the recent welfare legislation, with Congress choosing to funnel much of the prior federal child care assistance

126. 42 U.S.C. § 602(g) (1988); repealed by the Personal Responsibility Act, supra note 38, at § 103(c)(1).
128. 42 U.S.C. §§ 9858-9858(q) (1996), as amended by the Personal Responsibility Act, supra note 38, at §§ 601-615. See also infra Part V.
129. 42 U.S.C. § 1397-1397(f) (1986), as amended by the Personal Responsibility Act, supra note 38, § 908(a) & (b).
131. See Heen, supra note 125, at 181-88 (providing a wonderfully thorough analysis of each of these federal assistance programs, including policy considerations and funding).
133. See Heen, supra note 125, at 181 ($2 billion in direct-expenditures in 1993); see also infra note 137 ($2.5 billion in tax-based assistance in 1993).
through a consolidated Child Care and Development Block Grant Program to the states. However, despite the tremendous and obvious increase in demand that the work requirement aspect of the welfare reform legislation will create, federal child care appropriations to the states were not greatly enhanced. Two possible reasons may exist for this lack of appropriate federal funding: either a complete lack of foresight on the part of Congress or a shameful Congressional misunderstanding of the welfare population driven by popular political rhetoric. Either conclusion is a Congressional indictment.


The largest single source of child care assistance has historically (and surprisingly) been delivered through the federal income tax system in the form of a nonrefundable credit. In 1993 alone, a $2.5 billion I.R.C. section 21 child and dependent care tax benefit was spread over 6 million families. In 1995, the I.R.C. section 21 benefit was projected to rise to $2.7 billion and the section 129 exclusion for employer-provided child care benefits was estimated to be $600 million.

How did we arrive at such an income tax oriented “solution” to the problems of child care? As previously addressed, child care assistance has historically been offered in the federal tax code under the policy argument that the expense is not purely personal but is at least work-related in nature. This policy was solidified by a 1940 federal case which held child care costs to be nondeductible expenses caused by the personal decision to have children. In addition, a neutrality argument against deductibility existed in that all working parents incurred certain work-related costs such as child care or the expense of commuting to and from a job. And the age old imputed income conundrum

---

134. See supra notes 126-130 and accompanying text.  
135. See infra Part II.A.2.  
136. See supra note 53 and accompanying text.  
137. See STATISTICS OF INCOME, supra note 11. In 1993, the total child care credit amount claimed on 6,090,070 individual income tax returns was $2,559,319,000.  
139. Smith v. Commissioner, 40 B.T.A. 1038, 1039-1040 (1939), aff'd per curiam, 113 F.2d 114 (2d. Cir. 1940). See McCaffery, supra note 66, at 1006. For criticism of Smith, see Blumberg, supra note 90, at 63-66.  
140. Bittker, supra note 73, at 1435. As to commuting costs, Congress has provided for excludability of “qualified parking.” I.R.C. § 132(f) (1996); see also infra Part V.B.3.
had to be skirted (or quietly ignored).  

Given the tremendous legislative policy hurdles and the hostile judicial attitude toward child care costs in the past, it is somewhat remarkable that any tax relief provisions for child care costs found their way into the Internal Revenue Code at all. However, these lingering, unresolved and conflicting attitudes toward child care have contributed greatly to the current Congressional stalemate in effectuating meaningful revisions to the existing provisions. And thus arises another fundamental question begging to be answered: is utilizing the tax code the most effective and efficient remedy to the child care crisis? This question and potential answers are examined in detail in Part V. But first, brief summaries of the legislative histories behind the existing income tax code child care provisions are warranted.

a. The Evolution of I.R.C. Section 211 and Its Policy Legacy

The Internal Revenue Code of 1954 ushered in the first federal tax code provision offering deductibility of "expenses for care of certain dependents." As enacted, I.R.C. section 214 allowed gainfully employed women and widowers to deduct (as an itemized deduction) up to $600 of their expenses incurred for the care of (A) their dependent children who were under the age of 12, or (B) their dependents incapable of caring for themselves. To be eligible for the deduction, a married woman was required to file a joint income tax return and the $600 deductible amount was reduced dollar-for-dollar for each dollar of combined husband/wife income in excess of $4,500; therefore, no deduction existed for couples with adjusted gross incomes of $5,100 or above.

Thus, the policy thrust behind the initial federal tax code provision in the child care arena was to provide relief to three basic categories of

141. See Wolfman, supra note 122, at 175-181.
142. See infra Part IV.C.
143. History not only tells us where we have been but where we should be going. And we cannot determine where we should be going if we do not know where we have been—and why.
144. For a history of the deductibility of child care expenses through 1972, see Blumberg, supra note 90, at 63-80. For a current and detailed history of Congressional approaches to child care expenses, see Heen, supra note 125, at 211-214.
taxpayers incurring dependent care expenses in order to be gainfully employed: (1) single working parents (widows and widowers were primarily envisioned) with children under the age of 12 or with dependents incapable of caring for themselves; (2) women who were compelled to work because married to incapacitated husbands; and (3) women married to low-income producing husbands (combined adjusted gross income less than $5,100). When enacted, the measure was expected to affect 2.1 million taxpayers and provide $130 million of tax relief in fiscal year 1955.\footnote{150}

After a minor 1963 revision,\footnote{151} Congress amended I.R.C. section 214 in a substantial manner in 1964. Four major statutory revisions were accomplished: (1) husbands with incapacitated or institutionalized wives now qualified for the deduction\footnote{152} (it had previously only been available to working wives with incapacitated husbands); (2) the age for qualifying dependent children was raised from 12 to 13;\footnote{153} (3) in recognition of the fact that the flat limitation of $600 failed to take into account the reality that costs of caring for dependents, particularly where they must be cared for outside the home, increased as the number of dependents increased,\footnote{154} the maximum deduction allowable where there were two or more children was increased from $600 to $900;\footnote{155} and (4) the limit on the combined adjusted gross income limitation for husbands and wives was increased to $6,000\footnote{156} (from $4,500).

Only one decade after enactment, Congress was well on its way to tinkering with its policy regarding child care—a pattern that would continue for another two decades. Originally focused to primarily benefit "working wives," more men were now eligible for the deduction (widowers and husbands with incapacitated wives). Significantly, in

\footnote{150. 100 Cong. Rec. 8536 (June 28, 1954) (statement by Hon. Eugene D. Millikin, Chairman of the Senate Finance Committee, on Bringing the Bill to the Senate Floor for Debate).

151. Congress extended the benefits of I.R.C. § 214 to women who were deserted by their husbands (and thus unable to file jointly because they did not know their whereabouts) provided the women “applied to a court of competent jurisdiction for appropriate process to compel him to pay support.” I.R.C. § 214(c)(3) (1954). This amendment placed deserted women on the same footing as widows when incurring child care expenses—both the joint filing requirement and the combined adjusted gross income limitation for married women no longer applied to women deserted by their husbands.


156. I.R.C. § 214(b)(2)(B) (1954).}
recognition of the increasing median incomes of husbands and wives,\textsuperscript{157} the adjusted gross income limit was increased. The apparent Congressional policy was to extend child and dependent care tax benefits to married couples with children who were at or below the national median family income level and to unmarried individuals with children but with no income limitation. The problem of static statutory income limitations impacting inflationary income levels, however, would continue to plague this tax code provision for years to come.

By 1971 (less than a decade since the last amendment) it was time once again for Congress to "fix" I.R.C. section 214. And fix it they did. As a result of the Revenue Act of 1971,\textsuperscript{158} child care as a deductible expense became much more complicated both for Congress (from a consistent or cohesive policy perspective) and the taxpayer (from a qualifying and reporting perspective). The six most significant statutory revisions enacted in 1971 were: (1) the adjusted gross income limitation was raised from $6,000 to $18,000 and the limitation now applied to unmarried as well as married taxpayers,\textsuperscript{159} (2) the allowable deduction amount was reduced fifty cents for every dollar of adjusted gross income in excess of $18,000, now allocable by month,\textsuperscript{160} (3) the age of a qualifying dependent child was raised to "under the age of 15"\textsuperscript{161}, (4) for married couples, both spouses now had to be gainfully employed on a substantially full-time basis in order to qualify for the child care expense deduction,\textsuperscript{162} (5) a complicated limitation scheme on the amount deductible was imposed, distinguishing between household and dependent care services provided in the home (up to $400 per month) and child care expenses outside the home (one child, $200 per month; two children, $300 per month and three or more children, $400 per month);\textsuperscript{163} and (6) the definition of employment-related expenses was extended to include household service expenses and dependent care expenses incurred in order to permit the taxpayer to be gainfully

\textsuperscript{157} S. REP. NO. 830, reprinted in 1964 U.S.C.C.A.N. 1673 (cites the 1961 Department of Labor Statistics that median income of husband-wife families in which the wife worked at any time during the year was $7,050).

\textsuperscript{158} Revenue Act of 1971, Pub. L. 92-178, § 210, 85 Stat. 518 (Certain Expenses to Enable Individuals to be Gainfully Employed).

\textsuperscript{159} I.R.C. § 214(d) (1971).

\textsuperscript{160} Id.

\textsuperscript{161} I.R.C. § 214(b)(1)(A) (1971).

\textsuperscript{162} I.R.C. § 214(e) (1971). Married couples could still qualify for the deduction if a spouse was not employed full-time due to physical or mental incapacities.

\textsuperscript{163} I.R.C. § 214(c) (1971).
What prompted this major overhaul of I.R.C. section 214? Apparently many policy considerations motivated Congress: the inadequacy of the previously allowable child care deduction limits ($600 for one child and $900 for two); median family income had risen to $10,000 in 1970 and was climbing; the reduction of the child care deduction on a dollar-for-dollar basis for each dollar of adjusted gross income over the limit eliminated the child care deduction for taxpayers quite abruptly; and families needed assistance not only with respect to child care expenses but also for household help taxpayers obtained in order to be gainfully employed. The child care deduction was, by now, a growing nightmare for both Congress (legislating parameters and exceptions) and the taxpayer (understanding the provision well enough to take the deduction).

Unbelievably, just four years later, Congress revisited I.R.C. section 214 and nearly doubled the adjusted gross income limitation from $18,000 to $35,000. Interestingly, the Senate had proposed changing the deduction from an itemized deduction to an adjustment from gross income (as a "business deduction") and had also proposed an optional tax credit but these two provisions of the amendment failed in conference.

One year later, in 1976, Congress returned to the child care arena with a vengeance. The Tax Reform Act of 1976 was designed in general to improve the equity of the income tax at all levels as well as to simplify many tax provisions, continue economic stimulus and make improvements in the administration of the tax laws. In keeping with this stated mission, the existing and complicated child care deduction provision was repealed and a nonrefundable tax credit provision was

164. I.R.C. § 214(b) (1971).
168. Oh, that remedying the deficiencies and inequities of the Internal Revenue Code could happen as often as in the "good old days" of the 60's and 70's! As will be discussed (infra PART IV.C.), the current version of the child and dependent care tax credit provision has not been amended since 1981.
inserted in its place. The Act converted the child care itemized deduction into a 20-percent credit (20-percent of the employment-related expenses) so that it would be available to those taxpayers utilizing the standard deduction and provide the same tax relief to taxpayers in low brackets as to those in high brackets. The family income limitation (at that time up to $35,000), applicable in some form or other in the child care expense arena since Congress first recognized child care in the tax code in 1954, was eliminated. However, the concept of a maximum limitation on eligible child and dependent care expenses remained in the code, now limited to $2,000 per year for one dependent and $4,000 per year for two or more dependents (thus making the maximum allowable credit against taxes either $400 or $800.) In addition, the eligible expenses had to at least equal the earned income of a single parent or the earned income of the lower earning spouse in a married couple scenario.

Obviously, several major policy changes were implemented in 1976. The switch from an itemized deduction to a credit against federal income tax due was prompted by equity concerns to place the taxpayer claiming a standard deduction in parity with the itemizer. It was intended to provide similar tax relief to both low (14%) and high (70%) bracket taxpayers—20 cents for each dollar of eligible child care expense for all taxpayers. The impact of such a provision today, however, with condensed progressive rates and higher taxable income threshold levels,
is a significant aspect of this code section's legacy.\textsuperscript{177} In addition, the motives prompting the elimination of the family income limitation were laudable at the time;\textsuperscript{178} however, the impact of this provision 20 years later in the context of a much different overall tax code must not be overlooked.\textsuperscript{179} Finally, the requirement that the taxpayer work full-time was eliminated in favor of a limitation on eligible expenses equal, in the case of a married couple, to the earnings of the spouse earning the smaller amount or, in the case of a single person, his or her earnings. Thus, child care costs were only eligible for tax credit treatment if the second spouse (normally, the wife) was working outside the home. Again, this limitation is magnified today in light of other gender based inequities in the tax code\textsuperscript{180} and we are living with its legacy.

After only one revision to the new I.R.C section 44A in 1978,\textsuperscript{181} Congress revisited the child care tax credit in 1981. The credit provision was generally reformulated into the structure which survives to this date. The tax credit provision now provided for a credit against income tax due equal to 30\% of employment-related expenses with adjusted gross incomes of $10,000 or less, reduced by one percent for each $2,000 or fraction thereof of adjusted gross income above $10,000 thus capping at 20\% for taxpayers with adjusted gross incomes above $28,000.\textsuperscript{182} In addition, the maximum amount of employment-related expenses which could be taken into account in calculating the credit was increased from $2,000 to $2,400 for one dependent and from $4,000 to $4,800 for two or more dependents.\textsuperscript{183} Thus, the maximum allowable credit for taxpayers with adjusted gross income of $10,000 or less was (and, 16 years later, still is) $720 for one dependent and $1,440 for two or more.\textsuperscript{184} An

\textsuperscript{177} In 1996, for example, a head of household taxpayer with one dependent child under the age of 13 would be entitled to a standard deduction of $5,900 and personal exemptions of $2,550 each for herself and her child. Thus, she would need to earn more than $11,000 in order to be required to even file a tax return. If she incurs child care expenses of $2,400 or more for the year, she would not be entitled to the maximum applicable percentage of 30\%; since her adjusted gross income is between $10,000 and $12,000, she would only be entitled to 29\% of the $2,400 of child care expenses or $696. \textit{See infra} Part IV.

\textsuperscript{178} \textit{See} Blumberg, \textit{supra} note 90, at 70-74.

\textsuperscript{179} \textit{See infra} Part IV.A.

\textsuperscript{180} \textit{See generally}, McCaffery, \textit{supra} note 66; Gann, \textit{supra} note 72; McIntyre & Oldman, \textit{supra} note 73; Bittker, \textit{supra}, note 73.

\textsuperscript{181} Congress amended the code section to provide that payments to grandparents for care of their grandchildren may qualify for the child care credit. I.R.C. \textsection 44A(f) (1978).

\textsuperscript{182} I.R.C. \textsection 44A(a) (1981).

\textsuperscript{183} I.R.C. \textsection 44A(d) (1981).

\textsuperscript{184} If your adjusted gross income is $28,000 or higher, the maximum allowable credit is $480 for one dependent and $960 for two dependents.
additional amendment specified that costs incurred for services provided by a dependent care center not in compliance with state or local regulations would not be eligible for the credit.\textsuperscript{185}

Congress stated that the statutory increase in the amount of eligible employment-related expenses was prompted by several factors: (1) the figures had not been adjusted since 1976 even though such expenses had increased substantially since that time; (2) Congressional belief that the child care credit provided a substantial work incentive for families with children; and (3) Congressional belief that low- and middle-income taxpayers were in the greatest need of relief (thus the sliding-scale phase down of the credit).\textsuperscript{186}

After 27 years of equity and inflation motivated tweaking, adjusting, revising and transforming of the federal tax treatment of child care in the Internal Revenue Code, Congress came to an abrupt halt. The child care credit, previously recognized by Congress as being sensitive and susceptible to both rising costs of child and dependent care as well as to adjusted gross income levels, has not been substantially altered since 1981.\textsuperscript{187} It has not been for lack of trying,\textsuperscript{188} but the reality is that I.R.C. section 21 has been frozen in time, creating its own inequities and contributing to inequities existing elsewhere in the code. In 1997, however, the plot thickens.\textsuperscript{189}

\textsuperscript{185} I.R.C. § 44A(c) (1981). This qualification was only specified for care at centers. Thus, state licensed care of children in their own home or in the home of another was neither fostered nor encouraged by the tax code.


\textsuperscript{187} The credit provision was renumbered as I.R.C. § 21 in 1984. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 471(c)(1), 98 Stat. 494, 826 (1984). In addition, amounts paid for services outside the taxpayer's household at a camp where the dependent stays overnight were excluded from the definition of employment-related expenses in 1987. I.R.C. § 21(b)(2) (1987).

Finally, in the Family Support Act of 1988 (Pub. L. No. 100-485, 102 Stat. 2343 (1988)), Congress provided that the dollar limit on the amount creditable (either $2,400 for one dependent or $4,800 for two or more dependents) must be reduced by the aggregate amount excludable from gross income under section 129 for the taxable year. I.R.C. § 21(c) (1988). In addition, only employment-related expenses paid or incurred for disabled children and children under the age of 13 (rather than under the age of 15) would qualify for the credit. I.R.C. § 21(b)(1)(A) (1988).

\textsuperscript{188} See infra Part IV.C. for an illustrative survey of proposed Congressional bills and resolutions which have been introduced over the last decade but have failed to be enacted.

\textsuperscript{189} See infra Part IV.D. for an analysis of the sections (re: child credits and child care) in two separate tax bills that passed the House and the Senate in June of 1997.
b. I.R.C. Section 129 and Its Policy Legacy

In 1981, concurrently with the final revision to I.R.C. section 21, Congress decided to provide tax incentives to employers in the area of child care. A new provision, I.R.C. section 129, was added to the federal income tax code in the Economic Recovery Tax Act of 1981\textsuperscript{190} for the following reason:

Congress believed that the tax system should provide incentives for employers to become more involved in the provision of dependent care for their employees. Thus the Act provides that, under certain conditions, employer payments for dependent care assistance will be exempt from income and payroll taxes.\textsuperscript{191}

The section excluded from an employee's gross income amounts paid or incurred by an employer for dependent care assistance provided to an employee (expenses that would be deductible by the employee under I.R.C. section 44A as household and dependent care expenses necessary for gainful employment) if the assistance was provided under a statutorily defined dependent care assistance program.\textsuperscript{192} The program had to meet requirements with respect to nondiscrimination in eligibility; that is, the employer's program had to be a written plan to benefit employees who qualified under a classification set up by the employer and found by the Treasury Department not to be discriminatory in favor of employees who were officers, owners, highly compensated individuals, or their dependents.\textsuperscript{193}

For the employer, Congress intended that the amounts paid or incurred for dependent care assistance under I.R.C. section 129 would be treated as compensation deductible under I.R.C. section 162.\textsuperscript{194} In addition, such amounts were not to be treated as wages subject to withholding of Federal income tax nor as wages subject to employment

\begin{itemize}
  \item \textsuperscript{191} See General Explanation of the Economic Recovery Tax Act of 1981, supra note 186, at 1428.
  \item \textsuperscript{192} Economic Recovery Tax Act, § 124(e)(1), 95 Stat. 198-201 (codified at I.R.C. § 129 (1981)).
  \item \textsuperscript{193} Id. (codified at I.R.C. § 129(d)). Section 129 (d) (3) provided that not more than 25 percent of the amounts paid or incurred by the employer for dependent care assistance during the year could be provided for the class of individuals who were shareholders or owners (or their spouses or dependents), each of whom (on any day of the year) owned more than 5 percent of the stock or of the capital or profits interest in the employer.
  \item \textsuperscript{194} See General Explanation of the Economic Recovery Tax Act of 1981, supra note 186, at 1429.
\end{itemize}
If the employer's program met the statutorily defined criteria, the employee could exclude the benefit received from the employer from gross income, subject to an earned income limitation: the amount excludable in any taxable year could not exceed the earned income of the employee, or, if the employee was married, the lower of the earned income of the employee or the earned income of the spouse. Thus, the exclusion was generally not available to one-earner couples.

After two revisions to I.R.C. section 129 in 1982 and 1984, Congress revisited the provision in 1986. In the Tax Reform Act of 1986, Congress amended I.R.C. section 129 by limiting the exclusion for dependent care assistance provided by an employer to $5,000 per year ($2,500 in the case of a married individual filing a separate return), primarily due to the fact that Congress was concerned that the exclusion was more valuable than the credit, particularly to higher income taxpayers.

---

196. Economic Recovery Tax Act, § 124(e), 95 Stat. 198-201 (codified at I.R.C. § 129(b) (1981)).
197. If the spouse was a full-time student or was incapable of caring for himself or herself, that spouse was deemed to have $200 per month of earned income (if one dependent or spouse being cared for) or $400 per month of earned income (if two or more such individuals). Id.
198. The 1982 revision clarified that an employer was not disallowed a tax deduction for amounts the employees excluded from gross income and specified that a qualified dependent care assistance program under the statute cannot provide benefits that discriminate in favor of officers, owners, or highly compensated employees, or their dependents. Technical Corrections Act of 1982, Pub. L. No. 97-448, 96 Stat. 2365 (1983). The 1984 amendment provided that the personal income tax credits (including the dependent care credit) were to be allowable against tax before all other credits. Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984).
200. Tax Reform Act of 1986, § 1163(a), 100 Stat 2510 (amending I.R.C. § 129(a)). Subsequent to enactment of this amendment, the Internal Revenue Service published an administrative pronouncement providing the following clarification:

Cafeteria plans established by employers under section 125 of the Code often offer dependent care assistance coverage as a benefit to employees. For this assistance to be a qualified benefit, dependent care expenses must be incurred in the plan year for which coverage thereof is elected. Q & A 18 of section 1.125-1 of the Proposed Income Tax Regulations provides that dependent care expenses are treated as incurred when the dependent care is provided and not when the employee is billed or charged, or pays for the dependent care.

The Family Support Act of 1988 amended I.R.C. section 129 to provide that any amount excluded by an employee as dependent care assistance payments may not qualify for any other type of income tax deduction or credit, thus requiring a taxpayer to reduce, dollar for dollar, the amount of expenses eligible for the I.R.C. section 21 credit by the amount of expenses excludable from the taxpayer's income under I.R.C. section 129. The same year, Congress amended the provision again to clarify that the $5,000 (or $2,500) limit generally applied to the amount of dependent care services that is covered by a dependent care assistance program and that is received by a taxpayer during a taxable year, even if the taxpayer did not receive payment from the employer for any expenses paid or incurred by the taxpayer in connection with such services until a subsequent taxable year.

I.R.C. section 129, in conjunction with other economic child care factors, has played a significant but less examined role in the quest to address child care in America. Reasons to change the provision will be examined in Part IV; but first, the impact that federal child care legislation has had upon the states must be analyzed.

B. States: Current Tax Statutes Offering Assistance

Not to be overlooked is the Congressional legacy both I.R.C. section 21 and I.R.C. section 129 have left to the states. What are the children doing with their legacy? In some instances, nothing; in others, mere duplication; and, as always, some of the kids have become quite imaginative! This section analyzes current state statutory activity in the area of child care: how I.R.C section 21 has impacted state income tax decisions regarding individual taxpayers and how I.R.C. section 129 has influenced the states to offer business tax incentives in the area of child care.

1. States with Tax Code Provisions for Individual Taxpayers

At present, 19 states and the District of Columbia offer a child care
provision in their tax revenue codes for individual taxpayers. Many provide a child care tax credit against the state's personal income tax based upon a percentage of either the federal section 21 credit itself or the employment-related expenses defined under I.R.C. section 21. The disadvantages and inequities of I.R.C. section 21 are thus perpetuated at the state level, affording minimal yet distorted taxpayer benefit and nominal tax relief.

In addition to the District of Columbia, those states expressing their child and dependent care provisions in some form as a percentage of the federal credit are: Alaska, Arkansas, Colorado, Delaware, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, New Mexico, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, and Virginia. Seven of these states plus the District of Columbia provide for a state tax child care credit as a direct percentage of the reported section 21 Federal credit (ranging from 16% to 50% of the

205. The states are: Alaska, Arkansas, Colorado, Delaware, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, New Mexico, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina and Virginia.

In 1987, the Georgia legislature repealed former GA. ST. § 48-7-29 (1977) which had provided a child care credit and credit for household and dependent care expenses.

In 1993, California repealed former West's ANN. CAL. REV. & T. CODE § 17052.6 which had permitted a credit equal to 30% of the allowable Federal credit under I.R.C. § 21.

206. See supra Part IV.A.


208. ALASKA STAT. § 43.20.013 (1983). The operation of this code section was suspended from Aug. 28, 1987 until Jan. 1, 1995 by § 1, ch. 27, SLA 1987, as amended by § 78, ch. 63, SLA 1993.


220. N.Y. Tax Law § 606(c) (McKinney 1996).


federal credit):

<table>
<thead>
<tr>
<th>State</th>
<th>Direct Percentage of the Reported § 21 Federal Credit (No Limitations)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>16%&lt;sup&gt;227&lt;/sup&gt;</td>
</tr>
<tr>
<td>Delaware</td>
<td>50%&lt;sup&gt;228&lt;/sup&gt;</td>
</tr>
<tr>
<td>D.C.</td>
<td>32%&lt;sup&gt;229&lt;/sup&gt;</td>
</tr>
<tr>
<td>Kansas</td>
<td>25%&lt;sup&gt;230&lt;/sup&gt;</td>
</tr>
<tr>
<td>Kentucky</td>
<td>20%&lt;sup&gt;231&lt;/sup&gt;</td>
</tr>
<tr>
<td>Maine</td>
<td>25%&lt;sup&gt;232&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

227. ALASKA STAT. § 43.20.013(b). A resident individual is entitled to a tax credit equal to 16 percent of the tax credit claimed by the individual on the federal income tax return of the individual for household and dependent care services necessary for gainful employment.

228. DEL. CODE ANN. tit. 30 § 1114(a). A resident individual shall be entitled to a credit against that individual's tax otherwise due under this chapter in the amount of 50 percent of the child and dependent care expense credit allowable for federal income tax purposes for the same tax year. In no event shall the allowable credit under this subsection exceed the tax otherwise due under this chapter.

The percent was increased from 25% to 50% in 1988. (66 Del. Laws, c. 411, effective July 15, 1988).

229. D.C. CODE ANN. § 47-1806A(c)(1) (1990). If a return is filed for a full calendar or fiscal year beginning after December 31, 1988, an individual who incurs household and dependent care services necessary to engage in gainful employment and who is allowed a credit under § 21 of the Internal Revenue Code of 1986, shall be allowed, against the tax imposed by this chapter for the taxable year, an amount equal to 32% of the credit allowed under § 21 of the Internal Revenue Code of 1986, regardless of the amount of the credit actually used to offset federal tax liability.

Subsection (c)(3) makes the D.C. state credit non-refundable: "In no event shall the credit allowed under paragraph (1) or (2) of this subsection exceed the amount of tax otherwise due without reference to this subsection." Id.

230. KAN. STAT. ANN. § 79-32.111a (1988). The statute states in relevant part:

(a) There shall be allowed as a credit against the tax liability of a resident individual imposed under the Kansas income tax act an amount equal to 25% of the amount of the credit allowed against such taxpayer's federal income tax liability pursuant to 26 U.S.C. § 21 for the taxable year in which such credit was claimed against the taxpayer's federal income tax liability.

Id.

Subsection (b) makes the credit non-refundable: "(b) The credit allowed by subsection (a) shall not exceed the amount of the tax imposed by K.S.A. 79-32,110, and amendments thereto, reduced by the sum of any other credits allowable pursuant to law." Id.

231. KY. REV. STAT. ANN. § 141.067 (Baldwin 1990). The statute was enacted in 1990 and states in relevant part: "A resident individual may deduct from the tax computed under the provisions of KRS 141.020 a credit for household and dependent care services necessary for gainful employment. The credit shall be twenty percent (20%) of the federal credit allowed under Section 21 of the Internal Revenue Code." Id.

232. ME. REV. STAT. ANN. tit. 36 § 5218 (West 1987). The statute was enacted in 1987 and states in relevant part:

A resident individual shall be allowed a credit against the tax otherwise due under
Several states provide a slight variation on the federal section 21 theme. Since 1993, Ohio has allowed a child and dependent care credit for taxpayers with adjusted gross income of less than $40,000.\textsuperscript{235} The amount of the credit is equal to 35% of the federal credit allowable under I.R.C. section 21 for taxpayers with adjusted gross income less than $20,000 and 25% of the federal credit for taxpayers with adjusted gross income of $20,000 but less than $40,000.\textsuperscript{236} South Carolina allows the smallest child care credit percentage based upon I.R.C. section 21. Its statute permits an individual to claim a credit for expenses related to a dependent as provided in I.R.C. section 21 except that the term "applicable percentage" means only 7% (rather than the 30% through 20% levels in the federal statute), but is not reduced if a taxpayer’s adjusted gross income exceeds $10,000 for a taxable year.\textsuperscript{237} Only expenses that are attributable to items of South Carolina gross income qualify for the state credit.\textsuperscript{238} Iowa permits a child and dependent care credit (and is one of the few states to make the credit refundable\textsuperscript{239}) equal to a percentage of the

---

\textsuperscript{233} N. Y. TAX LAW § 606(c) (McKinney 1996).

\textsuperscript{234} OKLA. STAT. ANN. tit. 68 § 2357(B)(2) (West 1996). The statute states in relevant part:

2. For tax years beginning after December 31, 1975, there shall be allowed to a resident individual or part-time resident individual as a credit against the tax imposed by Section 2355 of this title twenty percent (20%) of the credit for child care expenses allowed under the Internal Revenue Code of the United States. The credit shall not exceed the tax imposed by Section 2355 of this title. The maximum child care credit allowable on the Oklahoma income tax return shall be prorated on the ratio that Oklahoma adjusted gross income bears to the federal adjusted gross income.

\textsuperscript{235} OHIo REV. CODE ANN. § 5747.054 (Anderson 1996). For tax years 1988 through 1992, the credit had applied only to taxpayers with adjusted gross income of less than $30,000.

\textsuperscript{236} Id.

\textsuperscript{237} S.C. CODE ANN. § 12-7-1230 (Law. Co-op. 1987).

\textsuperscript{238} Id.

\textsuperscript{239} IOWA CODE ANN. § 422.12C 2 (1993). The statute states in relevant part: “Any credit in excess of the tax liability shall be refunded. In lieu of claiming a refund, a taxpayer may elect to have the overpayment shown on the taxpayer’s final, completed return credited.
federal child and dependent care credit provided in I.R.C. section 21, progressively decreasing the credit as net income increases.\textsuperscript{240} Iowa thus has adopted the "capping" policy (no credit available for taxpayers with Iowa net income of $40,000 or more) which this author suggests needs to apply at the Federal level as well. However, for Federal purposes, the more appropriate adjusted gross income cut-off level should likely be $50,000 to $75,000.\textsuperscript{241}

Colorado recently enacted a state child care tax credit provision which reflects this recommended adjusted gross income cut-off level (for Colorado, federal adjusted gross income above $60,000). For taxable years beginning January 1, 1996 and thereafter, individual taxpayers are allowed a state child care expense credit equal to a percentage of the child care expense credit claimed on the individual's federal return, progressively decreasing as the individual's federal adjusted gross income increases.\textsuperscript{242} Any unused credit may be carried forward for five years.\textsuperscript{243}

to the tax liability for the following taxable year." \textit{Id.}

\textsuperscript{240} IOWA CODE ANN. § 422.12C(1) (1993). For an Iowa taxpayer, the following chart illustrates the child care credit available by net income:

<table>
<thead>
<tr>
<th>Iowa Net Income</th>
<th>Percent of the Reported § 21 Federal Credit Allowable</th>
</tr>
</thead>
<tbody>
<tr>
<td>less than $10,000</td>
<td>75%</td>
</tr>
<tr>
<td>less than $20,000</td>
<td>65%</td>
</tr>
<tr>
<td>$20,000 or more but less than $25,000</td>
<td>55%</td>
</tr>
<tr>
<td>$25,000 or more but less than $35,000</td>
<td>50%</td>
</tr>
<tr>
<td>$35,000 or more but less than $40,000</td>
<td>40%</td>
</tr>
<tr>
<td>$40,000 or more</td>
<td>0%</td>
</tr>
</tbody>
</table>

\textsuperscript{241} The decision as to what the adjusted gross income cut-off level should be for I.R.C. § 21 must be based upon policy considerations. Who should be the primary beneficiaries of the tax code provision? If Congress concludes that only the poor and not the middle class taxpayers should benefit, then Iowa's $40,000 net income cut-off limit may be appropriate. However, if Congress decides to continue to provide at least some child care credit tax relief to middle class taxpayers, then the more appropriate adjusted gross income cut-off figure may be $75,000.

Under the current I.R.C. § 21, if the child care credit had not been available to taxpayers with adjusted gross income of $75,000 or more in 1993, $328 million would have been available for distribution among more needy taxpayers. If the adjusted gross income cut-off were set at $50,000, the savings would jump to $969 million (representing 38% of the total child care credit claimed that year). \textit{See} STATISTICS OF INCOME, \textit{supra} note 11, Table 3.3.

\textsuperscript{242} COLO. REV. STAT. § 39-22-119(1)(a) (1996). In general, the statute provides:

If federal adjusted gross income is: The percentage is:

- Not over $25,000: 50%
- $25,000 - 34,999: 30%
- $35,000 - 60,000: 10%
Oregon allows a credit against the personal income tax equal to a percentage of employment-related expenses allowable under I.R.C. section 21 determined on the basis of federal taxable income. Any unused credit in a tax year may be carried forward for 5 succeeding tax years.

North Carolina goes further than the Iowa approach, tying the state child care credit to the allowable employment-related expenses under I.R.C. section 21 and limiting such expenses for state purposes based not only upon adjusted gross income but also upon filing status and the age of the dependent. For employment-related expenses that are incurred only with respect to one or more dependents who are 7 years old or older and are not physically or mentally incapable of caring for themselves, the applicable percentage of the federal employment-related expenses allowable for state purposes ranges from 7% to 9%; for employment-related expenses with respect to any other qualifying individual, the applicable percentage of the federal employment-related expenses allowable for state purposes ranges from 10% to 13%.

<table>
<thead>
<tr>
<th>Filing Status</th>
<th>Adjusted Gross Income</th>
<th>Percentage A</th>
<th>Percentage B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head of Household</td>
<td>Up to $20,000</td>
<td>9%</td>
<td>13%</td>
</tr>
<tr>
<td></td>
<td>Over $20,000 &amp; up to $32,000</td>
<td>8%</td>
<td>11.5%</td>
</tr>
<tr>
<td></td>
<td>Over $32,000</td>
<td>7%</td>
<td>10%</td>
</tr>
<tr>
<td>Surviving Spouse or Joint Return</td>
<td>Up to $25,000</td>
<td>9%</td>
<td>13%</td>
</tr>
<tr>
<td></td>
<td>Over $25,000 &amp; up to $40,000</td>
<td>8%</td>
<td>11.5%</td>
</tr>
<tr>
<td></td>
<td>Over $40,000</td>
<td>7%</td>
<td>10%</td>
</tr>
<tr>
<td>Single</td>
<td>Up to $15,000</td>
<td>9%</td>
<td>13%</td>
</tr>
<tr>
<td></td>
<td>Over $15,000 &amp; Above $60,000</td>
<td>0%</td>
<td>0%</td>
</tr>
</tbody>
</table>

If federal taxable income is: The percentage is:
Not over $5,000 30%
Over $5,000 but not over $10,000 15%
Over $10,000 but not over $15,000 8%
Over $15,000 but not over $25,000 6%
Over $25,000 but not over $35,000 5%
Over $35,000 but not over $45,000 4%
Over $45,000 0%
245. **Or. Rev. Stat.** § 316.078 (5).
247. **N.C. Gen. Stat.** § 105-15221.11(a1) (1993). For a North Carolina taxpayer, the limitations are:
However, just as on the federal level, much of the statutory gyration in the North Carolina provision becomes moot since the maximum amount of employment-related expenses which may be claimed may not exceed $2,400 if the taxpayer's household includes one qualifying individual and $4,800 if the taxpayer's household includes more than one qualifying individual.\textsuperscript{248}

The North Carolina child care credit provision appears to be an excellent example of statutory overkill with unsatisfactory results. No adjusted gross income limits are provided for in the statute so both the poor and the middle class taxpayers are disadvantaged in North Carolina. A Head of Household taxpayer with one child under the age of seven and adjusted gross income of $19,000 would receive a $312 child care tax benefit; however, a married couple filing jointly with one child also under the age of 7 but with adjusted gross income ten, twenty, or even fifty times higher would still receive a $240 child care tax benefit!

Minnesota adopted a more complicated scheme when providing for its state dependent care credit. A taxpayer and a spouse may take as a credit against the state tax due an amount equal to the dependent care credit for which the taxpayer is eligible pursuant to I.R.C. section 21, subject to numerous limitations.\textsuperscript{249} The credit for expenses incurred for the care of each dependent shall not exceed $720 in any taxable year, and the total credit for all dependents of a claimant shall not exceed $1,440 in a taxable year.\textsuperscript{250} The maximum total credit shall be reduced according to the amount of the income of the claimant and a spouse, if any, as follows: (1) Income up to $13,350, $720 maximum for one dependent, $1,440 for all dependents; and (2) Income over $13,350, the maximum credit for one dependent shall be reduced by $18 for every $350 of additional income, $36 for all dependents.\textsuperscript{251} The Minnesota

\begin{center}
\begin{tabular}{lccc}
 & up to $24,000 & Over $24,000 & \\
Married & 8\% & 7\% & 10\% \\
Filing & Up to $12,500 & 9\% & 13\% \\
Separately & Over $12,500 & & \\
 & up to $20,000 & 8\% & 11.5\% \\
 & Over $20,000 & 7\% & 10\% \\
\end{tabular}
\end{center}

\textsuperscript{248} N.C. GEN. STAT. § 105-151.11(b) (1993). Thus, the maximum credit available to a Head of Household taxpayer in North Carolina with one child under the age of 7 and adjusted gross income of $19,000 would be $312; if the child is 7 or older, the maximum credit would amount to $216. The comparable federal child care credit available to the same taxpayer would be $600 (regardless of the child's age).

\textsuperscript{249} MINN. STAT. ANN. § 290.067 1(a) (West 1995).

\textsuperscript{250} MINN. STAT. ANN. § 290.067 2 (West 1995).

\textsuperscript{251} Id.
dependent care credit statute does provide for two liberal provisions. First, the statute authorizes inflation adjustment of the dollar amount of the income threshold at which the maximum credit begins to be reduced and specifies that the credit is refundable.

Louisiana provides for one of the most nominal state nods to the child care credit concept. Louisiana's child care credit against the state income tax is the lesser of $25 or 10% of the same credit allowed on the federal income tax return for the same taxable period.

New Mexico specifies a refundable credit for dependent child care necessary to enable gainful employment to prevent indigency. The credit is equal to 40% of the actual compensation paid to a caregiver for a qualifying dependent, not to exceed $480 for each qualifying dependent or a total of $1,200 for all qualifying dependents. For purposes of computing the credit, the actual compensation shall not exceed $8 per day for each qualifying dependent. An additional limitation requires that taxpayers claim from the state not more than the difference between the amount of the state child care credit and the federal credit the taxpayer is able to deduct for the same taxable year. If the credit exceeds the taxpayer's state income tax liability, the excess is refunded to the taxpayer.

Arkansas offers yet another variation on the I.R.C. section 21 theme. In general, the Arkansas statute allows a child care credit equal to 10% of the allowable federal credit determined under the old I.R.C. section 44A as amended and in effect on January 1, 1983. A new section was added to the provision in 1993, allowing an alternative, refundable credit equal to 20% of the federal child care credit allowed under I.R.C. section 21 to qualified individuals. The alternative credit requires that the expenses be incurred at a state approved child care facility providing a state specified early childhood program.

252. MINN. STAT. ANN. § 290.067 2b (West 1995).
253. MINN. STAT. ANN. § 290.067, 3 (West 1995). The statute states in relevant part: "If the amount of credit which a claimant would be eligible to receive pursuant to this subdivision exceeds the claimant's tax liability under chapter 290, the excess amount of the credit shall be refunded to the claimant by the commissioner of revenue." Id.
257. Id.
259. Id. § 26-51-502(c) (Michie 1993).
260. Id.
The only non-credit state is Virginia. Its statute allows taxpayers to deduct from federal adjusted gross income, in order to compute Virginia taxable income, an amount equal to the "employment-related expenses upon which the federal credit is based under §21 of the Internal Revenue Code for expenses for household and dependent care services necessary for gainful employment".\(^{261}\)

Interestingly, the New Jersey credit provision is applicable to commuters only, providing a credit against the Commuter's Income Tax for certain household and dependent care services necessary for employment equal to 20% of the federal I.R.C. section 21 credit.\(^{262}\)

What does all of this mean? More than one-third of the states currently provide some form of assistance to working parents struggling with the demands of child care and its costs. The vast majority of these states utilize I.R.C. section 21 as the starting point, or at least as a reference point, for their statutory provisions. Thus, many of the inequities and limitations of I.R.C. section 21 (to be addressed in full in Part IV) are perpetuated at the state level: (1) poor taxpayers with no federal tax liability receive no benefit from the child care credit at the federal level due to the lack of refundability—only three states (Iowa, Minnesota and New Mexico) make their state child care credits refundable; and (2) wealthy taxpayers continue to benefit from the child care credit at the federal level since no maximum adjusted gross income cap applies—only three states (Colorado, Iowa and Ohio) provide an adjusted gross income cap at the state level.

In order to remedy these established inequities, Part V of this article addresses specific recommendations States should follow in enacting legislation in the area of child care benefits. Principally, in providing child care assistance to working parents, the focus must be upon a much more efficient and equitable benefit-delivery mechanism than the taxpayer's individual state income tax return.

2. States with Tax Credit Incentives for Businesses

The states are on the "credit bandwagon" when it comes to providing tax incentives to employers who furnish child care assistance (either facilities or benefits) to their employees. Seventeen states (34% of all states) offer some form of tax relief from a business' income, corporate


or franchise tax liability for various efforts in the child care arena.  

Arizona authorizes a credit to employers and corporations providing day care facilities or services to employees without profit. The credit is equal to either of two amounts: (1) the lesser of $15,000 or 50% of the costs incurred to acquire, construct, renovate or remodel dependent day care facilities or property for such facilities (taken in lieu of depreciation deductions); or (2) the lesser of $5,000 or 30% of the net costs incurred to operate a dependent care facility for employees, to reimburse employees for such care or to inform and refer employees to obtain such care. 

For corporations operating child care facilities for profit, amortization of the startup costs is available ratably over a period of sixty months or, at the election of the entity, over a period of twenty-four months (to be taken in lieu of depreciation deductions or the credit for day care facilities).

California authorizes credits to employers who provide a variety of child care assistance to their employees. For taxable years beginning on or after January 1, 1988 and before January 1, 1998, the California Revenue and Taxation Code provides for a tax credit (not to exceed $50,000 for any income year) equal to 30% of any of the following three costs:

(A) start-up expenses of establishing a child care program or constructing a child care facility in California to be used primarily by the taxpayer’s employees (including a child care facility established by two or more taxpayers if the facility is to be used primarily by children of employees of each of the taxpayers);

(B) For each taxable year beginning on or after January 1, 1993, the cost paid or incurred by the taxpayer for the start up expenses of establishing a child care program or constructing a child care facility in California, to be used primarily by children of employees of tenants leasing commercial or office space in a building owned by the taxpayer (including a child care facility established by two or more taxpayers if the facility is to be used primarily by the children of the employees of tenants of each of the taxpayers);

263. The states with statutory tax relief for child care facility or benefit expenses are: Arkansas, Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Maine, Maryland, Mississippi, Montana, New Mexico, Oregon, Rhode Island, South Carolina, and Virginia.


265. Id. § 43-1163.

266. Id. §§ 43-1075 B. & 43-1163 B.


268. Id. § 43-1130.
(C) contributions to California child care information and referral services, including, but not limited to, those that identify local child care services, offer information describing these resources to the taxpayer's employees, and make referrals of the taxpayer's employees to child care services where there are vacancies.  

California "start-up expenses" include, but are not limited to, feasibility studies, site preparation, and construction, renovation, or acquisition of facilities for purposes of establishing or expanding on-site or near-site centers by employers. In instances where two or more taxpayers share in the costs eligible for the credit, each employer may share in the credit in proportion to its costs. Regarding depreciation, the taxpayer may elect to take depreciation in lieu of the tax credit and may take depreciation for the cost of the facility in excess of the amount of the tax credit claimed. The facility must be used for 5 years after completion and, if the amount of the credit exceeds the employer's tax liability, the credit may be carried forward to reduce the tax liability in the following year, and succeeding years if necessary, until the credit has been exhausted.

In addition, for each taxable year beginning on or after January 1, 1995, and before January 1, 1998, the California Revenue and Taxation Code allows employers a credit of 30% of their contributions to a "qualified care plan" (essentially a plan providing short-term illness care) made on behalf of any child of a California employee under the age of 12. The maximum amount of the credit is $360 per child (not per employee) and if the duration of the child care received is less than 42 weeks, the employer may only claim a prorated portion of the allowable credit (the number of weeks of care received divided by 42 weeks).

---

269. CAL. REV. & TAX CODE §§ 17052.17(b) & 23617(b) (West 1995).

270. Id. §§ 17052.17(c) & 23617(c).

271. Id. §§ 17052.17(d) & 23617(d).

272. Id. §§ 17052.17(g) & 23617(g).

273. Id. §§ 17052.17(j)(2) & 23617(j)(2). If the child care facility is "disposed of or ceases to operate within 60 months after completion, that portion of the credit claimed which represents the remaining portion of the 60 month period shall be added to the taxpayer's tax liability in the income year of that disposition or nonuse." Id.

274. Id. §§ 17052.17(e)(1) & 23617(e)(1). Subsection (e)(2) of each code section goes on to provide that, after carrying over the credit to succeeding years, the aggregate credit in any one year still may not exceed $50,000. Id. § 17052.17(e)(2) & 23617(e)(2).

275. Id. §§ 17052.18 & 23617.5.

276. Id. §§ 17052.18(b)(2) & 23617.5(b)(2).

277. Id. §§ 17052.18(e) & 23617.5(e).
California was one of the first states to pass legislation in this area. However, the state is hesitant to make the credits permanent; as noted, both types of credits have automatic expiration dates (January 1, 1998) built into their statutory provisions.

The most common state tax incentive afforded to business is either a credit for start-up expenses (similar to the California provision just discussed) or a credit for a percentage of the cost of operation of an employer provided child care facility. Georgia provides an example of the latter provision. For all taxable years beginning on or after January 1, 1994, employers who provide or sponsor child care for their employees are entitled to a tax credit against the state income tax "equal to one-half of the cost of operation to the employer less any amounts paid for by the employees." The child care eligible for the credit may be offered either on the employer's Georgia premises or pursuant to a contractual arrangement with a child care facility that is paid for by the employer. The state tax credit may not exceed 50% of the employer's income tax liability for the year and any unused credit may be carried forward for five years.

Mississippi is a little less generous in that its credit, enacted in 1989, is equal to 25% rather than 50% of the employer's cost of providing child care for employees during the employee's work hours. However, the costs eligible for the credit (net of reimbursement) include "the cost of any contract executed by an employer for another entity to provide child care or, if the employer elects to provide child care itself, to expenses of child care staff, learning and recreational materials and equipment, and the construction and maintenance of a facility." No deduction is allowed for any expenses which serve as a basis for the income tax credit; plus a facility must be a licensed Mississippi child care facility and "have an average enrollment for the taxable year of no less than six children who are twelve years of age or less." Any unused credit in the first year may be carried forward for 5 years; however, if the amount allowable as a credit in succeeding years exceeds the tax liability, the amount of excess is not refundable nor may it be carried forward to any other taxable year.
Since 1991, employers in Montana are allowed a credit equal to 20% of the dependent care assistance paid or incurred by an employer to or on behalf of its employees but the credit may not exceed $1,250 of day-care assistance actually provided to or on behalf of an employee. The dependent care assistance must be furnished by a registered or licensed day-care provider and pursuant to a dependent care assistance program.

An amount paid or incurred by an employer to provide dependent care assistance to or on behalf of an employee does not qualify for the credit . . . to the extent the amount is paid or incurred pursuant to a salary reduction plan; or if the amount is paid or incurred for services not performed within [Montana].

If an amount that qualifies for the credit also qualifies for a deduction, the deduction must be reduced by the dollar amount of the credit allowed. Any unused credit in a particular year may be carried forward for five years.

Oregon provides three alternatives for employers to qualify for a business tax credit. The first is a credit for amounts paid or incurred by an employer for dependent care assistance actually provided to its employees pursuant to a program satisfying the requirements of I.R.C. section 129(d). The amount of the credit is equal to "50% of the amount so paid or incurred by the employer . . . but shall not exceed $2,500 of dependent care assistance actually provided to the employee." The second is a credit equal to 50% of the amounts paid or incurred by an employer to provide information and referral services to assist its employees within the state to obtain dependent care. In order to qualify for these two credits, the amounts paid or incurred must be for services performed within the state and must not be paid or incurred pursuant to a salary reduction plan. In both instances, any

286. Id. § 15-31-131(1). The dependent care assistance must be provided "pursuant to a program that meets the requirements of section 89(k) and 129(d)(2) through (6) of the Internal Revenue Code." Id.
287. Id. § 15-31-131(4).
288. Id. § 15-31-131(5).
289. Id. § 15-31-131(7).
290. OR. REV. STAT. § 315.204(1) (1995). If the employer is an individual, the credit is against the personal income tax; if the employer is a corporation, the credit is against the corporate income tax.
291. Id. § 315.204(2).
292. Id. § 315.204(3)(a), (b).
293. Id. § 315.204(5).
unused credit may be carried forward for five consecutive years.\textsuperscript{294} A dependent care facilities credit is also available to employers in Oregon who pay or incur costs “to acquire, construct, reconstruct, renovate or otherwise improve [Oregon] real property so that it may be used primarily as a dependent care facility.”\textsuperscript{295} The credit, however, is limited and in no event may it exceed $100,000.\textsuperscript{296} To the extent that the employer reports depreciation deductions on the facility, the deduction must be reduced by the dollar amount of the dependent care facilities credit.\textsuperscript{297}

Maine has provided a credit for employer-assisted day care for nearly a decade.\textsuperscript{298} An employer is allowed a credit against business taxes equal to the lowest of: (A) $5,000; (B) 20% of the costs incurred in providing day care service for children of employees of the taxpayer; or (C) $100 for each child of an employee of the taxpayer enrolled in day care service provided by the taxpayer.\textsuperscript{299} Providing day care services can include expenditures “to build, furnish, license, staff, operate or subsidize a day care center licensed by the [state] to provide day care services to children of employees of the taxpayer at no profit . . . or to contract with” a licensed facility to provide such services.\textsuperscript{300}

Illinois offers a very small credit (only 5%) and limits its application to taxpayers engaged in manufacturing. Beginning with tax years ending on or after June 30, 1995, Illinois provides to taxpayers primarily engaged in manufacturing a credit against the state income tax equal to 5% of the amount of expenditures claimed by the taxpayer “to provide in the Illinois premises of the taxpayer’s workplace an on-site facility dependent care assistance program under” I.R.C. section 129.\textsuperscript{301} If the amount of the credit exceeds the tax liability for the year, the excess may

\begin{itemize}
  \item 294. \textit{Id.} § 315.204(11).
  \item 295. \textit{Id.} § 315.208(1).
  \item 296. \textit{Id.} Section 315.208(2) specifies that:
  The credit allowed under this section shall be the lesser of: (a) $2,500 multiplied by the number of full-time equivalent employees employed by the employer (on the property or within such proximity to the property that any dependents of the employees may be cared for in the facility) on any date within the two years immediately preceding the end of the first tax year for which credit is first claimed; or (b) Fifty percent of the cost of the acquisition, construction, reconstruction, renovation or other improvement; or (c) $100,000.
  \item 297. \textit{Id.} § 315.208(2).
  \item 298. \textit{ME. REV. STAT. ANN. tit. 36, § 2524 (West 1989)}.
  \item 299. \textit{Id.} § 2524.1.
  \item 300. \textit{Id.} § 2524.2.
  \item 301. \textit{ILL. COMP. STAT. ANN. 35 ILCS 5/210(a) (West 1993)}.
\end{itemize}
be carried forward and applied to the tax liability of the following two taxable years.\textsuperscript{302}

An employer in New Mexico may claim as a credit against the corporate income tax an amount equal to 30% of the total expenses, net of any reimbursements, incurred and paid by the employer for child care services for dependent children of its employees or 30% of the net cost of operating a child care facility in New Mexico which is used primarily for the employees' dependent children.\textsuperscript{303} Additional requirements are that only children under twelve years of age qualify as dependent children;\textsuperscript{304} and the credit may not exceed $30,000 in any taxable year, with any unused credit capable of being carried forward for three consecutive years.\textsuperscript{305}

Rhode Island offers a similar tax credit provision for its employers who pay for or provide adult or child day care services to its employees or the employees of its commercial tenants, or who provide real property or dedicate rental space for child day care services.\textsuperscript{306} The amount of the credit is 30% of the amount:

(1) expended in the state for day care services purchased to provide care for dependent children or dependent adult family members of . . . employees or employees of commercial tenants during the employees' hours of employment;
(2) and (3) expended [by the taxpayer or in conjunction with one or more other taxpayers] in the establishment and/or operation of a day care facility in the state used primarily by the dependent children of the taxpayer's employees or employees of commercial tenants during the employees' hours of employment; . . . .
(4) foregone in rent or lease payments [the difference between fair market value and actual rental] related to the dedication of rental or lease space to child day care services.\textsuperscript{307}

The requirement that the child or adult day care facility meet state standards is not unique.\textsuperscript{308} However, the additional requirement that the facility agree to accept children whose child care services are paid in full or in part by the Rhode Island Department of Human Services is novel and a welcome statutory addition.\textsuperscript{309}

\textsuperscript{302} Id. 5/210(b).
\textsuperscript{304} Id. § 7-2A-14.C.
\textsuperscript{305} Id. § 7-2A-14.D.
\textsuperscript{306} R.I. GEN. LAWS § 44-47-1(a) (1994).
\textsuperscript{307} Id.
\textsuperscript{308} Id. § 44-47-1(b).
\textsuperscript{309} Id.
South Carolina allows credits to employers against the state income tax, bank tax or premium tax liability based upon capital expenditures incurred in establishing a child care program for its employees and for expenses to operate such a child care program for its employees. The amount of the former credit is equal to 50% of the capital expenditures but no more than $100,000. The credit for operating expenses may not exceed 50% of the payments incurred to operate a child care program for its employees or payments made directly to a child care facility in the name of and for the benefit of an employee, and are limited to a maximum of $3,000 per employee. The total credits allowed in any one tax year are limited to an amount not greater than 50% of an employer's tax liability for the year.

On April 1, 1996, Virginia became the most recent state to offer employers a day-care facility tax credit. For taxable years beginning on or after January 1, 1997, an employer is allowed a credit equal to 25% of all expenditures paid or incurred for planning, site preparation, construction, renovation, or acquisition of facilities for the purpose of establishing a child day-care facility to be used primarily by the employees' children. However, the amount of the credit must not exceed $25,000.

Two provisions are available to employers in Arkansas, offering an income tax credit of 3.9% of the annual salary of its employees.

---

310. S.C. CODE ANN. § 12-7-1260 (Law Co-op. 1989). Subsection (A) makes the amount of the credit equal to 50% of the capital expenditures but limits it to no more than $100,000. Id. § 12-7-1260(A). Subsection (B) defines such capital expenditures to include, but not be limited to, expenditures, including mortgage or lease payments, for playground and classroom equipment, kitchen appliances, cooking equipment, and real property, including improvements.” Id. § 12-7-1260(B).

311. Id. § 12-7-1260(C).

312. Id. § 12-7-1260(A).

313. Id. § 12-7-1260(C).

314. Id. § 12-7-1260(E).


316. Id. § 58.1-439.4(A). Two or more taxpayers may share in the cost of establishing the child-care facility and share the credit in relation to the respective share paid or incurred by each taxpayer.

In addition, Va. Code Ann. § 58.1-439.4.C provides that any unused credit may be carried forward for 3 consecutive tax years; and Va. Code Ann. § 58.1-439.4.B. states that the credit must be pre-approved by the Tax Commissioner, the facility must satisfy state licensing requirements, and approval of applications for the credit is limited to those that are assumed to result in no more than $100,000 of credits in any fiscal year. Id. § 58.1439.4.B.
employed exclusively in providing child service. One provision is applicable to businesses qualifying for the exemption from the gross receipts tax and the other to businesses qualifying for the refund of the gross receipts tax or compensating use tax.

The Colorado provision permits, to any person operating a child care center or family care home, a credit against the state income tax in the amount of 20% of the taxpayer's annual investment in tangible personal property used in child care centers or family care homes. If the taxpayer is a sole proprietorship, partnership, limited liability corporation, subchapter S corporation, or regular corporation providing child care facilities incidental to its business and licensed by the state for the use of its employees, the enterprise is allowed a credit against the income tax in the amount of 10% of the taxpayer's annual investment in tangible personal property to be used in such child care facilities. The credit allowed for any year cannot exceed the taxpayer's actual tax liability for the year; if it does, the unused credit can be carried over to each of the three following tax years.

Connecticut offers a credit against a variety of business taxes to business firms investing in programs operated or created for the planning, site preparation, construction, renovation or acquisition of facilities which establish a licensed child day care facility to be used primarily by children of such firm's employees. The business firm may utilize 40% of the total cash amount invested during the taxable year in such programs, with the credit not to exceed $10,000 for any

317. ARK. CODE ANN. § 26-51-507(a) (Michie 1993): "A business which qualifies for the exemption from the gross receipts tax under § 26-52-401(29) shall be allowed an income tax credit of three and nine-tenths percent (3.9%) of the annual salary of employees employed exclusively in providing child care services." Id.

318. Id. Section 26-51-508(a) states in relevant part:
A business which qualifies for the refund of the gross receipts tax or compensating use tax under § 26-52-516 or 26-53-132 shall be allowed an income tax credit of three and nine-tenths percent (3.9%) of the annual salary of its employees employed exclusively in providing child care service, or a five thousand dollar ($5,000) income tax credit for the first year the business provides its employees with a child care facility.

Id. § 26-51-508(a).

319. COLO. REV. STAT. § 39-22-517(1) (1992). In general, any person operating a child care center or family care home licensed by the State is allowed a credit against the income tax in an amount of twenty percent of the taxpayer's annual investment in tangible personal property to be used in such child care center or family care home. Id.

320. Id. § 39-22-517(2).

321. Id. § 39-22-517(3).

322. CONN. GEN. STAT. ANN. § 12-634 (West 1995).
income year.\footnote{323}

For state income tax purposes, Florida defines net income as adjusted federal income, or that share of its adjusted federal income for such year which is apportioned to the state,\footnote{324} plus nonbusiness income allocated to the state less child care facility startup costs.\footnote{325} Thus, a reduction from net income for qualified child care facility startup costs, rather than a credit, is available to Florida businesses.

The credits provided by Maryland's statutes are limited to credits applicable to a variety of taxes for wages and child care for qualified employment opportunity employees. For such expenses incurred, credits against the franchise tax for financial institutions,\footnote{326} against the public service company franchise tax\footnote{327} and against the income tax\footnote{328} are available by statute.

In summary, the states have been more ingenious in the creation and availability of tax credit provisions for businesses than in the creation and availability of such provisions for individual taxpayers. Perhaps the phenomenon is principally due to the fact that the federal statute in the business area (I.R.C. section 129) is broader-based than its individual income tax counterpart (I.R.C. section 21). For example, the states are able to offer construction as well as operation tax incentives in the area of child care and provide credit options (rather than deductibility) for startup costs. The combination of federal and state tax incentives as well as general economic incentives have motivated business in the area of

\footnote{323}{Id.}
\footnote{324}{Fla. Stat. Ann. § 220.12 (West 1995).}
\footnote{325}{Id. § 220.03(dd). The statute states in relevant part: [E]xpenditures for equipment, including playground equipment and kitchen appliances and cooking equipment, and real property, including land and improvements, used to establish a child care facility as defined by § 402.302(4) located in the state on the premises or within 5 miles of the employees' workplace and used exclusively by the employees of the taxpayer.}
\footnote{Id.}{Section 402.302(4) of the statute states in relevant part: 'Child care facility' includes any child care center or child care arrangement which provides child care for more than five children unrelated to the operator and which receives a payment, fee, or grant for any of the children receiving care, wherever operated, and whether or not operated for profit.}
\footnote{Id.}{Id. § 8-213 (1995): "A financial institution may claim a [c]redit against the financial institution franchise tax for wages paid to qualified employment opportunity employees and for child care provided or paid . . . for the children of a qualified employment opportunity employee under Article 88A, § 56."}
\footnote{327}{Id. § 8-410.}
\footnote{328}{Id. § 10-704.3.}
child care. Part V of this Article urges a continuation and enhancement of these incentives.

IV. CONGRESSIONAL IMPETUS AND INABILITY TO CHANGE CHILD CARE TAX POLICY

A. Reasons to Change I.R.C. Section 21

1. General Shortcomings

Shortcomings of the present child and dependent care tax credit system have been well documented.\textsuperscript{329} Four aspects of I.R.C. section 21 frequently mentioned as in greatest need of immediate revision are: 

\textit{Non-refundability:}\textsuperscript{330} I.R.C. section 21 provides benefits primarily to moderate- and upper-income families.\textsuperscript{331} This phenomenon is a direct result of two key features of the current child care tax credit system. First, the availability of the credit does not phase out for upper-income families. Second, low-income families not generating enough income to even warrant the imposition of a federal income tax find no use for a credit against a non-existent tax.\textsuperscript{332} Numerous legislative attempts to make the I.R.C. section 21 credit refundable have stalled miserably in Congress.\textsuperscript{333}

However, making the child and dependent care credit refundable (comparable to the current refundable earned income tax credit\textsuperscript{334}) may not necessarily be "the answer" either. Taxpayers who would otherwise not be required to file an income tax return at all would now

---

\textsuperscript{329} American Bar Association Section of Taxation, \textit{Report of the Child Care Credit Task Force}, 46 \textit{TAX NOTES} 331 (Jan. 15, 1990) [hereinafter ABA Task Force].


\textsuperscript{330} ABA Task Force, \textit{supra} note 329.

\textsuperscript{331} See \textit{infra} Part IV.A.2.

\textsuperscript{332} See ABA Task Force, \textit{supra} note 329.

\textsuperscript{333} See \textit{infra} Part IV.C.

\textsuperscript{334} I.R.C. § 32 (1996).
need to file just to receive the credit. This requirement is an inefficient waste of time and money—at both the governmental and individual taxpayer levels. A more reasonable and effective solution could be implemented at the employer level and will be addressed in detail in Part V.

No Advance Payments: Whatever benefit I.R.C. section 21 offers to eligible taxpayers is currently only available in the lump sum income tax refund at the end of the year. It has been proposed that families subject to the federal income tax could reduce their withholding to account for the credit; and, for families not subject to the federal income tax, a mechanism similar to the earned income tax credit advance payment system could be developed. However, the earned income tax credit is far from a model credit system and its advance payment system has left much to be desired in application.

Increase Amount of the Credit and Index for Inflation: The dollar limitation on employment-related expenses ($2,400 for one qualifying individual and $4,800 for more than one), when measured in constant dollars, has decreased in value by more than 45% since it was enacted in 1981. Given the steep costs of child care in America today, the maximum amount of employment-related child care expenses which may be considered in computing the credit must be increased. Once increased, these amounts should be indexed so that the value of the credit does not continue to erode by future inflation.

Adjust Credit for Family Size: The current I.R.C. section 21 provides for only two levels of credit for a household: a credit of up to $720 if there is one qualifying individual and a credit of up to $1,440 if there are two or more qualifying individuals. In light of the substantial

335. See infra Part V.B.1.
336. ABA Task Force, supra note 329, at 335.
337. Id. I.R.C. § 3507 allows EITC recipients to receive benefits ratably during the year in their paychecks.
339. ABA Task Force, supra note 329, at 335.
341. See supra Part II.B.2.
342. ABA Task Force, supra note 329, at 335.
343. Id.
child care cost increase incurred by a family with more than two children, a third or even fourth level could be added to the credit to allow for a larger credit for proportionately larger families.\textsuperscript{344}

Despite the obvious deficiencies of I.R.C section 21, these frequently proposed revisions have not been implemented to date.\textsuperscript{345} Additional drawbacks of I.R.C. section § 21 as a tax statute also warrant analysis.

2. I.R.C. Section 21 of Nominal Assistance—Even to Middle Class Taxpayers

In application, I.R.C. section 21 presents substantial drawbacks and limitations in addition to those previously mentioned. First, the number of taxpayers benefitting from I.R.C. section 21 is extremely limited. Since 1989, only slightly more than 5% of all returns filed per year have claimed a child care tax credit.\textsuperscript{346} Of the total number of returns claiming the child care credit in both 1992 and 1993, approximately 85% reported adjusted gross income of $20,000 or more; thus only 15% reported adjusted gross income under $20,000.\textsuperscript{347} A full 35% of the returns claiming the child care credit in 1992 and 1993 reported adjusted gross income of $50,000 or more.\textsuperscript{348} Clearly, the “poor” are not the targeted beneficiaries of the Code section.

Second, the average amount of the credit taken per return is quite low. In 1993, based upon all returns filed, the average child care credit claimed was $420.\textsuperscript{349} However, the average amount of the credit by size of adjusted gross income varied considerably in 1993, as illustrated

\textsuperscript{344} Id.

\textsuperscript{345} See infra Parts IV.C. & IV.D.

\textsuperscript{346} See STATISTICS OF INCOME, supra note 11 (1985-1989 Individual Income Tax Returns). Examining Table 3.3 for the period 1985 through 1989, the percentage of returns claiming a child care credit averaged slightly more than 8%. The sharp decline beginning in 1989 is likely attributable to three factors which took effect in 1989: (1) the taxpayer identification number of the child care provider was required to be reported on the return; (2) a reduction in the eligible age of the child (from 15 in 1988 to 13 in 1989); and (3) child care expenses had to be reduced by the amount of money received tax free under an employer provided dependent care assistance program.

\textsuperscript{347} Id. at Table 3.3 (1992 & 1993 Individual Income Tax Returns). In 1992, 113,604,503 individual income tax returns were filed; of that number, only 5,980,219 returns claimed the child care credit; of that number, 910,208 returns (15.2%) reported adjusted gross income under $20,000. Id. In 1993, 114,601,819 individual income tax returns were filed; of that number, only 6,090,070 returns claimed the child care credit; of that number, 930,889 returns (15.3%) reported adjusted gross income under $20,000. Id.

\textsuperscript{348} Id.

\textsuperscript{349} See Id. at Table 3.3 (1993 Individual Income Tax Returns). In 1993, the total child care credit amount claimed on 6,090,070 individual income tax returns was $2,559,319,000. Id.
by the following chart:\textsuperscript{350}

<table>
<thead>
<tr>
<th>Size of Adjusted Gross Income</th>
<th>Average Amount of Child Care Credit</th>
</tr>
</thead>
<tbody>
<tr>
<td>$1 under $5,000</td>
<td>$92</td>
</tr>
<tr>
<td>$5,000 under $10,000</td>
<td>-----</td>
</tr>
<tr>
<td>$10,000 under $15,000</td>
<td>$307</td>
</tr>
<tr>
<td>$15,000 under $20,000</td>
<td>$413</td>
</tr>
<tr>
<td>$20,000 under $25,000</td>
<td>$496</td>
</tr>
<tr>
<td>$25,000 under $30,000</td>
<td>$454</td>
</tr>
<tr>
<td>$30,000 under $40,000</td>
<td>$369</td>
</tr>
<tr>
<td>$40,000 under $50,000</td>
<td>$399</td>
</tr>
<tr>
<td>$50,000 under $75,000</td>
<td>$452</td>
</tr>
<tr>
<td>$75,000 under $100,000</td>
<td>$430</td>
</tr>
<tr>
<td>$100,000 under $200,000</td>
<td>$411</td>
</tr>
<tr>
<td>$200,000 under $500,000</td>
<td>$532</td>
</tr>
<tr>
<td>$500,000 under $1,000,000</td>
<td>$545</td>
</tr>
<tr>
<td>$1,000,000 or more</td>
<td>$632</td>
</tr>
</tbody>
</table>

Thus, the wealthier taxpayers (certainly $200,000 of adjusted gross income and above) received a greater amount of child care credit benefit than the poor (under $20,000 of adjusted gross income). Although the amount of the credit likely represented a smaller portion of the overall tax liability of the wealthy, the question remains: as a matter of tax policy, who should be assisted more in the cost of care for their children, the wealthy or the poor? At present, our tax policy permits taxpayers with adjusted gross income of one million dollars or above to receive an average child care tax credit ($632) that is twice as much as the average credit available to taxpayers with adjusted gross income between $10,000 and $15,000 ($307).

Of the total $2.5 billion child care credit claimed in 1993, only 13% benefitted families with adjusted gross income under $20,000; 38% benefitted families with adjusted gross income of $50,000 or more.\textsuperscript{351} By contrast, in 1982, 32% of the total child care credit claimed for the year benefitted families with adjusted gross income of $20,000 or less; only 7% benefitted families with adjusted gross income of $50,000 or

\textsuperscript{350}  Id.
\textsuperscript{351}  Id. The total amount of child care credit claimed in 1993 was $2,559,319,000. Id.
above. Certainly 1982 dollars cannot be directly compared to 1993 dollars. However, the numbers dramatically illustrate one of the many major deficiencies of I.R.C. section 21—an adjusted gross income cap or cut-off point is no longer provided for in the statute.353

Limited tax resources are being squandered, allowing a $2.5 billion tax benefit to be spread indiscriminately among all taxpayers in the adjusted gross income food chain. Again, this inequity could be remedied with a maximum adjusted gross income limit (i.e., $50,000 for head of household taxpayers and $100,000 for married filing joint taxpayers) in I.R.C. section 21.354

A third drawback or limitation of I.R.C. section 21 is evident when comparing child care credit benefits by marital status of the taxpayer. Of the total child care credit amount claimed by taxpayers in 1993, single parent households (head of household filing status) received only 33.5% of the total child care credit benefit while married taxpayers filing joint returns received 65% of the total benefit.355 In 1993, the average size of the child care credit for all head of household taxpayers claiming the credit amounted to $472 while the average size of the credit for married taxpayers filing jointly who claimed the credit was $397.356

The question as to whether the "wealthy" taxpayer should benefit so disproportionately from the I.R.C. section 21 child care credit is not a new query—the question has been raised by Congress before.357 However, numerous proposals addressing the child care credit have been discussed by Congress over the last decade, with absolutely no resolution.358 As noted above, the essence of I.R.C. section 21 has not been substantially altered since The Economic Recovery Tax Act of 1981.

Finally, why must a taxpayer file a return in order to receive some

352. See STATISTICS OF INCOME, supra note 11, Table 3.3, at 81 (1982 Individual Income Tax Returns).
353. See supra Part III.A.2.a., for a discussion of the evolution of I.R.C § 21 and its policy legacy.
354. See Wolman, supra note 122, at 190. But see Heen, supra note 125, at 210.
355. See STATISTICS OF INCOME, supra note 11, Table 1.3 (1993, Individual Income Tax Returns, All Returns: Sources of Income, Adjustments, Deductions, Credits, and Tax Items, by Marital Status). Of the $2,559,319,000 child care credit claimed in 1993, only $857,623,000 (33.5%) was claimed by head of household taxpayers; $1,662,675,000 (65%) was claimed by married taxpayers filing joint returns. Id.
356. Id.
358. See infra Part IV.C.
benefit for child care costs incurred? Why the tortured gyrations of tax return preparation and paid preparation assistance? This is an inherent flaw of an individual income tax credit as a solution. Clearly, a tax credit for individual taxpayers is an inefficient and ineffective mechanism to implement a child care policy.

3. What I.R.C. Section 21 Has Accomplished: NannyGate!

As evidenced by the larger average child care credit at the high adjusted gross income levels, wealthy taxpayers pay greater amounts for child care for the simple reason that they can afford to do so. Child care provided in the home (thereby requiring the payment of wages) still constitutes a significant portion of child care in America today. This scenario raises the specter of the "nanny tax"—the Social Security and Medicare taxes incurred by an employer who pays any domestic employee more than $1,000 per year.

Generally, an employer must pay half of a domestic employee’s Medicare and Social Security benefit, which amounts to 7.65% of the employee’s annual salary. In many instances, paying the Medicare and Social Security taxes (hereinafter, “household taxes”) on the domestic employee’s wages costs the employer more than the child care credit is worth. For example, a taxpayer paying $1,000 a month to a domestic employee for in-home child care would owe an additional $918 per year in federal household taxes on those wages. If the taxpayer has only one qualifying child and adjusted gross income of $30,000 or more, the maximum allowable child care credit would only amount to $480. Employers of in-home child care providers also incur the additional costs of paying a variety of employment taxes to their states as well (along with often complex reporting requirements).

It does not require a rocket scientist to predict the results. First, the higher income taxpayers are foregoing the child care credit and simply not reporting the in-home child care wages in order to avoid paying the household taxes. Despite the new 1995 disclosure requirement on the

---

359. See infra Part V.B.1.
360. See supra Part II.B.1.
362. The Social Security taxes include the OASDI applied to the first $62,700 of wages in 1995 at a rate of 6.2% and the Hospital Insurance tax on 1.45% of wages without limit. I.R.C. §§ 3101(a), (b)(6) (1996).
363. In most states, an employer would be responsible for a series of taxes including unemployment insurance and employment training taxes. In addition, a disability insurance tax may be deducted from the employee’s wages.
individual income tax return and the new annual rather than quarterly reporting requirement, non-compliance in the area of household taxes has apparently continued. Thus even though it is much more difficult for a non-complying employer to plead ignorance of the law and much easier to satisfy federal filing requirements, the bottom-line incentive does not exist for many employers to pay the household taxes of their in-home child care providers.

This leads to the second predictable result: If the employer is not reporting the wages paid for household tax purposes, then it is likely that the child care employee will not report the wages as gross income. Thus, the Federal government loses as tax revenue both the employee’s income tax and the employer’s household taxes. In addition, the employee is not receiving any quarters of Social Security credit which may lead to disastrous results for both the employer and the employee when the employee later retires and applies for Social Security benefits based upon earnings that were not, but should have been, reported.

A culture of non-compliance has thus been nurtured in otherwise steadfast Americans. Obviously upstanding citizens have been uncерemoniously and very publicly “caught” in non-compliance scenarios,


In addition, the Social Security and Medicare taxes previously had to be paid quarterly and the Federal Unemployment Tax annually. I.R.C. § 3102. Under the new law, all of these federal taxes may be paid annually on Schedule H. I.R.C. § 3102 (1994).

365. It has been unofficially estimated that more than 75,000 live-in nannies were employed in the U.S. in 1995, yet, even with the easier reporting requirements, only 20% of their employers paid their household taxes. Accountants claim they saw no significant increase in the number of clients paying household taxes in 1995. David J. Morrow, Nanny-Tax Tally of '95: Who Paid, Who Lied?, N.Y. TIMES, Apr. 21, 1996, at 3-1.


Failing to pay nanny taxes derailed the nomination of a number of President Clinton's appointees. The first one was Zoe Baird, the $507,000-a-year senior vice president and general counsel for Aetna Life and Casualty Co. who was nominated for attorney general at the start of 1993.

Baird withdrew from contention after revelations that she and her husband, Yale law professor Paul Gewirtz, needing a driver and a nanny for their infant son, Julian, had hired illegal aliens, a Peruvian couple, and had failed to pay Social Security taxes on the couple's weekly salary of $500. To make amends, the two lawyers had to pay $12,000 in taxes, penalties and interest, plus a fine of $2,900 for knowingly hiring undocumented workers. Presumably Baird, who went back to Aetna, and her husband filed amended returns for child care credits on the wages they paid for Julian's care.

Others plagued include Stephen G. Breyer, a 1994 appointment to the Supreme
but such public individuals were clearly not alone. Worse yet, the
underground economic activity in general (including child care) has
reached monumental proportions.\footnote{367}

4. Its Greatest Deficiency

Despite all of the recited drawbacks and shortcomings of I.R.C.
section 21, its main deficiency has not been adequately addressed. The
child care tax credit "does nothing to expand the amount of child care
or improve the quality of child care.\footnote{368} A small number of taxpayers
receive a nominal, in-pocket, "after-the-fact" tax benefit but this revenue
in the hands of a small number of individual taxpayers is insufficient to
impact the demand side of the equation. The benefits of the statute do
not tip the decision scale of a taxpayer toward work (which is accompa-
nied by substantial child care costs in order to be gainfully employed).
Since the thrust of I.R.C. section 21 is too nominal to increase demand,
its impact is inconsequential on the supply side of the equation. The
recent increase in supply, with the creation of on-site child care centers
by businesses, is attributable to motivations provided by I.R.C. section
129 rather than section 21.

Regarding quality, taxpayers are not required to hire state licensed
care providers in order to be entitled to the I.R.C section 21 child care
credit. In-home child care and care provided in the home of another are
largely unregulated and unsupervised at the state level; the tax code
provides no additional impetus in this area. Licensing of the individual
providing the child care, or at least minimal educational requirements for
such a provider should be a minimum requirement for eligibility of the
child care costs under any tax statute.

B. Reasons to Change I.R.C. Section 129

As for I.R.C. section 129, numerous commentators have called for its

\footnote{367. Barry Stavro, \textit{Elusive Taxpayers Sidestepping the IRS; Fraud; Unpaid Taxes Total $120 Billion Yearly}, L.A. TIMES, April 8, 1996, at B-11 ("Unreported income, bogus
deductions and people just not filing income tax returns add up to a $120-billion-a-year tax
gap—and these are unpaid taxes from legal work, not profits made in drugs or other illegal
businesses").}

repeal.\textsuperscript{369} In its current form, the provision does present significant disadvantages. However, after analyzing its drawbacks, recommended revisions rather than elimination will be recommended in Part V.

1. Primary Disadvantage

Its primary disadvantage is that the $5,000 exclusion from gross income provided to employees is worth more to the high bracket taxpayer (a tax savings of $1,980) than to the lowest bracket taxpayer (a tax savings of only $750). Thus, the employee with the greater ability to actually pay for child care costs instead receives the greater tax benefit—a tax credit provision turned on its head.

In addition, companies providing the exclusion to their employees through construction and operation of on-site child care centers are primarily the large Fortune 500 companies which can afford the capital expenditure necessary to establish and operate such centers. The wonderful benefit of quality child care centers for children of parents employed by such companies results; yet the disadvantages flowing from this phenomenon need to be examined in detail.

2. Fallout from the “Exclusively for the Benefit of Employees” Requirement

A second limitation of I.R.C. section 129 is the specification that the employer’s dependent care assistance program be exclusively for the

\textsuperscript{369} See Wolfman, supra note 122, at 192 (“Because it is structured as an income exclusion without any dollar limitations, it will allow the sheltering of income—through extravagant child care deductions—at high marginal tax rates. In fact, section 129 seems to be designed particularly for more affluent taxpayers.”). See also Gerzog Shaller, supra note 191, at 612 (“In addition, the current exclusion for Dependent Care Assistance Programs should be repealed, since the exclusion mainly benefits the higher income brackets”).

\textit{But see} Heen, supra note 125, at 215. Heen states:

Elimination of the 21 child care credit or the 129 exclusion for middle-income taxpayers would exacerbate nonneutralities that are currently substantially offset by the child care credit, and would thus increase the tendency for secondary workers in middle-income households to work full-time or not at all. Thus, on neutrality grounds, the credit and exclusion should be maintained for middle-income taxpayers.

At upper income levels, the marriage penalty and incentives favoring one-earner families become more significant because of the higher marginal tax rates on upper-income secondary earners, which are comparable to those applicable to the earnings of secondary workers in low-income families affected by the earned income credit phase-out percentages. Elimination of the child care credit or the § 129 exclusion would aggravate these nonneutralities for married, two-earner, upper-income taxpayers with children.

\textit{Id.}
benefit of the employer’s employees. This requirement sets a litany of consequences into motion: (a) only employer’s with significant capital and resources will construct and operate a child care facility for its employees; (b) these centers will be state regulated and will ensure a greater likelihood of quality child care services; (c) only children of parents fortunate enough to be employed by such major enterprises will benefit from these quality on-site child care centers; (d) the majority of these companies providing on-site child care to their employees will likely not be located in America’s inner cities; and (e) even if located in an inner city, the child care center will benefit only employees of the company, most of whom will likely not be local residents. Certainly a potential answer to quality child care outside the home may lie in the recent surge of on-site child care facilities being provided by business. However, whether corporations need to “get into the business of child care” in order to ensure quality child care to working parents is questionable at best.

These consequences are borne out by statistics. Motivated by tax savings afforded by I.R.C. section 129 and comparable provisions at the state level as well as bottom line profit concerns, businesses and privately managed child care firms have constructed and operate child care centers throughout the United States. These corporate child care centers offer working parents a viable, quality child care alternative to the choices of in-home care or care in the home of another. Anywhere from 1,400 to 2,000 on-site child care centers exist throughout the United States. At present, employers providing on-site child care include Johnson Wax, St. Paul Cos., American Home Products, and Citibank, just to name a few. In addition, a few small

371. See supra Parts III.A.2.b. & III.B.2.
372. The reason that “quality child care” may be presumed in most of these corporate on-site facilities and facilities operated by privately managed firms is due to the fact that such facilities must satisfy state licensing requirements in order to qualify for deductions or exclusions from the state income or franchise tax as specified in the state statutes. Supra Part III.B.2.
373. See supra note 21 and accompanying text.
374. See Tannette Johnson-Elie, Johnson Wax Helping Employees Cope With Stress of Fatherhood, MIL. J. SENT., June 13, 1996, at 1 (“Johnson Wax is widely known for its family-friendly programs, such as on-site child care, flexible work hours and job sharing.”).
375. See Taus, supra note 76.
376. See THE RECORD, supra note 76, at A-03.
businesses as well as medium-sized firms have invested substantial capital in an effort to provide adequate child care to their employees.

An interesting phenomenon—a consortium of 21 Fortune 500 companies—pledged, in 1995, to invest $100 million over the next six years in more than 1,000 projects in 31 states and the District of Columbia to help their employees care for children and older relatives. The consortium, formally called the "American Business Collaboration for Quality Dependent Care," includes 21 companies whose names read like a "Who's Who" list of the Fortune 500: Aetna Life & Casualty, Allstate Insurance, American Express, Amoco, AT&T, Bank of America, Chevron, Citibank, Deloitte & Touche LLP, Eastman Kodak, Exxon, GE Capital Services, Hewlett-Packard, IBM, Johnson & Johnson, Mobil, Nynex, Price Waterhouse LLP, Texaco, Texas Instruments, and Xerox.

What factors motivated the companies in the consortium, as well as other companies and employers in general, to provide on-site day care? Some predictable economic considerations existed: i.e., the investment was viewed "as an important way to improve productivity as well as to recruit and retain top workers;" plus "businesses lose an estimated $3 billion a year from employee absences for child-related reasons."

Sioux Falls' largest employer, Citibank, subsidizes a day-care center for its employees just across a grassy field from its sprawling campus. The firm's corporate culture is consciously pro-family. Supervisors try to accommodate the needs of their largely female work force, offering flexible working hours, insurance for part-timers, and a hot-line offering employees advice on everything from breast feeding to balancing career and family.

Id.

378. See Dawn Chmielewski, Small Firm Invests in Child Care: Noble's Camera Finds Day Care Necessary to Keep Employees, THE PATRIOT LEDGER, Oct. 31, 1995, at 21 (Noble's Camera Shops, a small family-owned business with a 64 person workforce, invested $50,000 to provide on-site day care when it discovered that one out of three part-time workers who left their employment left as a direct consequence of lack of affordable day care.)

379. Kelly McBride, G & B Opens Own Day Care: The First For-Profit Business in Spokane to Open a Day-Care Center for the Children of Employees, THE SPOKESMAN REV., Nov. 10, 1995, at A-1 (Goodale & Barbire Cos., which employs more than 1,300 people in more than a half-dozen businesses, opened a $50,000 facility licensed for 51 children).

380. See Diane Kunde, 21 Firms Pledge $100 Million for Family Care, DALLAS MORN. NEWS, Sept. 14, 1995 at 1-A; Genasci, supra note 121; On-The-Job Day Care Receives a Needed Boost, ATL. J., Sept. 15, 1995 (editorial), at 18A.

381. Genasci, supra note 121. Work/Family Directions, a Boston-area consulting firm that helped launch the program in 1992, is coordinating the current effort. Id. "Each company or organization decides its own level of involvement, with no maximum and no minimum contribution." Id.

382. Genasci, supra note 121.

However, a somewhat troubling rationale was articulated by Deborah Stahl, director of the Family Care Development Fund at AT&T: "If employees are distracted by care for a child or elderly relative it will interfere with their ability to serve our customers . . . . The more we can help, the more focused they will be."384 This statement raises the fundamental issue of corporate provided child care: does on-site child care serve the best interest of the child, or the employer?

Despite the allure of quality, numerous drawbacks are presented by the on-site child care alternative fostered by I.R.C. section 129 and its state tax-credit progeny. First, only a small number of all children requiring child care benefit from these quality corporate facilities; second, primarily middle and upper class children benefit from this quality corporate child care; third, an employer expectation may develop whereby an employee feels pressured or compelled to remain at work for more than the eight hour work day or to work at the office on the weekend since child care is "conveniently" provided by the employer (thus providing less child-parent quality time); and, last, the employer must enter into the "business" of child care or contract out to a third party (often for profit).385 However, with implementation of recommended revisions to remedy these drawbacks, I.R.C. section 129 could play a valuable and instrumental role in the private/parental/public alliance to be proposed in Part V.

3. Unregulated Private Child Care Firms For Profit

As a final drawback, I.R.C. section 129 and its state progeny are encouraging the establishment of private child care firms for profit—not an evil unto itself but, if unregulated, the quality of care provided by such firms could bode ill for children. For example, the kind of care to be provided (educational as opposed to warehousing) and by whom (trained and licensed professionals) must be a stated and desired goal of legislation regulating such enterprises.

384. Genasci, supra note 121.
385. See On-Site Day Care Spared in Downsizing Era, CHI. TRIB., May 1, 1995, at 7 ("Nashville-based Corporate Child Care Management Services ... manages company-sponsored day care for clients ranging from Sears, Roebuck & Co. to Toyota Motor Manufacturing USA"); see also Robert Trigaux, This Wanna-Be is a Whiz, ST. PETERSBURG TIMES, April 10, 1995, at 3 (former Presidential hopeful Lamar Alexander's initial $6,600 investment in Corporate Child Care, a day-care company that may go public in a few years, has grown into a $1 million plus stake).
C. Failed Congressional Proposals

The area of child care clearly lacks implementation of a universal underlying Congressional policy. Nowhere is this more evident than in a survey of the plethora of proposed federal legislation over the past decade. From 1987 to 1990 alone, more than 170 Congressional bills proposed various solutions to the "child care crisis." During the 101st Congress, eighteen tax credit proposals were introduced recommending revisions to the federal system of tax credits in an effort to help low-income families with children. A sampling of recent failed Congressional efforts in the area of child care (intended to be illustrative rather than comprehensive) reveals proposals to amend I.R.C. section 21; to create new tax credits; and to institute child care business incentive grant programs.

Numerous legislative efforts to render the I.R.C. section 21 child care tax credit refundable have appeared, and disappeared, over the past few years, most dying quietly in committee. In 1993, for example, Senator Rockefeller proposed amending the Internal Revenue Code of 1986 to provide for refundability of the child care credit. The following year, another refundability measure was introduced in the House of Representatives, coupled with long-suggested recommendations to phase-out the credit for higher-income taxpayers and to provide for advance payment of the credit. Several measures in the subsequent Congress also addressed refundability of the child care credit. In 1995, for example, in an effort to increase direct funding for child care and as an alternative to the Republican welfare reform initiative, the Democrats proposed making the I.R.C. section 21 tax credit refundable, phasing it out for families earning between $60,000 and $80,000 per year. Another legislative effort proposed amending the Internal Revenue Code of 1986

387. Ten proposals were introduced in the House of Representatives and eight in the Senate. See ABA Task Force, supra note 329, at 332 n.2.
388. The proposal was to be coupled with a proposed increase in the earned income tax credit for larger families to provide for a demonstration program for payments in lieu of child support payments owed by absent spouses and to encourage creation of jobs for low-income unemployed. S. 663, 103rd Cong., 1st Sess. (1993).
to increase the child care credit for lower-income working parents.\textsuperscript{391}

Proposals to provide new or additional tax credits to employers have frequently appeared over the years.\textsuperscript{392} The most recent new concept to be proposed involved the creation of an additional general business credit under I.R.C. section 38.\textsuperscript{393} The proposed legislation recommends amendments to the Internal Revenue Code of 1986 to allow employers a credit for a portion of the expenses of providing dependent care services to employees. The amount of the credit would be "passed on to the employees using the qualified day care center in the form of reduced costs;"\textsuperscript{394} and the credit per facility operated by or for the employer exclusively for providing "affordable dependent care services to a fair cross section of such taxpayer's employees" would be equal to 50\% of the excess of the employer's dependent care expenses (including depreciation) over the amount received by the employer for such services.\textsuperscript{395} Thus, the intent of the proposed measure was to reduce costs to employees for employer-provided on-site or adjacent site dependent care services by providing the incentive of a tax credit to employers for that portion of the cost of operation of such a facility not paid for by the employees.

Proposals to provide new tax credits to individual taxpayers have surfaced and re-surfaced in the child care arena over the years. For example, 1994 witnessed the introduction of legislation to provide a federal income tax credit to all families with young children.\textsuperscript{396} The following year, another proposal to amend the Internal Revenue Code of 1986 to provide a tax credit for families and to reform the marriage penalty also failed.\textsuperscript{397} Additional efforts to enact family credits or a


\textsuperscript{392} See, e.g., H.R. 1993, 103rd Cong., 1st Sess. (1993) (introduced on May 5, 1993 by Rep. Talent) (to provide a credit against tax for employers who provide on-site daycare facilities for dependents of their employees).

\textsuperscript{393} H.R. 2985, 104th Cong., 2d Sess. (1996) (introduced on February 28, 1996, by Rep. Fox-Pa.). The same day, it was referred to the House Committee on Ways & Means and to the Committee on Appropriations where it died in committee (WESTLAW - United States Bill Tracking).

\textsuperscript{394} H.R. 2985 § 2 (1996) (Credit For Employer Expenses In Providing Certain Dependent Care Services).

\textsuperscript{395} Id.


The "marriage penalty" refers to an increase in a married couple's joint income tax
proposed $500 per child tax credit met similar fates.\textsuperscript{398}

Representative Lowey has repeatedly (but to no avail) proposed to the House of Representatives a business incentive grant program to provide child care through public-private partnerships.\textsuperscript{399} The grants would be provided through the Department of Health and Human Services to businesses and consortia incurring the costs of child care services for their employees (including start-up costs). To qualify for a grant, the employer would have to expend not less than 200\% of the amount of the grant on-site child care services for its employees.

Why have hundreds of child care proposals been presented to Congress with no enactment? After creating the I.R.C. section 21 child care credit, Congress revisited it many times, amending it often between 1954 and 1981.\textsuperscript{400} It frequently tampered with I.R.C. section 129 as well after its initial introduction in 1981.\textsuperscript{401} So why the recent immense inability to pass legislation in the child care arena? Two rationales are inextricably woven together: lack of a comprehensive child care policy coupled with political reality. Congress is hesitant to put its power behind an extensive and potentially costly child care initiative without assurance of constituency approval. Capping the I.R.C. section 21 child care credit may not be politically savvy, for example, since many middle class taxpayers would lose a tax benefit (albeit small but a benefit nonetheless). Additional tax credits for employers may be appealing to business but not the individual voter. The cost of incentive grants to businesses (estimated to be $25 million in 1993 alone) may be difficult to support in this day and age of balancing the budget; plus it may be perceived in the general population as just another corporate subsidy.

Yet, in large part, the answer lies with us as individuals; if we do not value the goals of child care, we cannot expect our legislators to risk their political careers in its support. As illustrated in the Introduction, child care is no longer the "woman's problem;" it is no longer even just

\textsuperscript{398} See, e.g., H.R. 1215, 104th Cong., 1st Sess. § 101 (1995) (proposed a $500 tax credit for families with young children, to be completely phased out at incomes above $250,000); see also H.R. 2491, 104th Cong., 1st Sess., Title XI, Subtitle A, 11001 (1995) (a $500 per child tax credit to be phased out at adjusted gross incomes above $110,000 for joint returns and $75,000 for unmarried individuals).


\textsuperscript{400} See supra Part III.A.2.a.

\textsuperscript{401} See supra Part III.A.2.b.
a family issue. Child care is a societal responsibility to be borne and shared by business, parents and government. When viewed from this perspective (rather than the paradigm of the individual parent, particularly the mother), legislative support for child care initiatives should come from all three fronts.

D. 1997 Congressional Activity

Bills addressing child care or the child credit continued to be introduced in both the House of Representatives and the Senate during the first six months of 1997. Pre-July 4th recess activity culminated in House passage of The Taxpayer Relief Act of 1997\(^\text{402}\), on June 26, 1997, followed the next day by Senate passage of its amended version of the House bill, The Revenue Reconciliation Act of 1997\(^\text{403}\). President Clinton expressed immediate dissatisfaction with provisions of both bills and much is yet to be determined in conference before 1997 tax legislation becomes a reality. However, it is exceedingly likely that a tax measure of substantial proportion will emerge from Congress prior to the November elections\(^\text{404}\). What impact this tax legislation will have upon child care in America is yet to be determined.

1. The Senate

Before summarizing the child care and child credit details of the Senate tax bill, it is informative to first preview the child related 1997 Senate proposals leading up to its tax measure. Two bills introduced by Senators Harkin and Snowe were attempts to remedy many of the previously addressed deficiencies of I.R.C. § 21. Neither proposal found its way into the ultimate tax bill as passed by the Senate on June 27th. The Working Family Child Care Tax Relief Act of 1997\(^\text{405}\) proposed amendments to I.R.C. section 21 which would have increased the eligible employer related expenses from $2,400 for one child to $4,000, and from


\(^{405}\) S. 926, 105th Congress, 1st Session, introduced June 17, 1997 (Harkin).
$4,800 for two or more children to $8,000.\textsuperscript{406} In addition, the employment related expense amounts would have been reduced for taxpayers with adjusted gross income in excess of $50,000.\textsuperscript{407} The credit itself was to be increased so that the applicable percentage would be 30% reduced (but not below 20%) by 1% for each $3,000 - rather than the current $2,000 - by which adjusted gross income exceeds $50,000 - rather than the current $10,000.\textsuperscript{408} The Refundable Dependent Care Tax Credit proposed by Senator Snowe did not fare much better.\textsuperscript{409} Senator Snowe proposed a new Section 35 to the Internal Revenue Code to provide a dependent care tax credit equal to the applicable percentage of the sum of employment related expenses and respite care expenses paid during the year.\textsuperscript{410} The applicable percentage was defined to be 50% reduced (but not below 20%) by 1% for each full $1,000 by which adjusted gross income exceeds $15,000, adjusted for inflation, to be applied against a maximum $2,400 for one qualifying individual and $4,800 for two or more qualifying individuals.\textsuperscript{411} Although laudable, neither proposal has, to date, been placed in the Senate Revenue Reconciliation Act of 1997.

Regarding the child credit, the Senate considered two bills which introduced significantly different versions of the $500 per child tax credit. The American Family Tax Relief Act\textsuperscript{412} proposed the creation of a new Section 24 to the Internal Revenue Code to provide a nonrefundable child credit of $500 per child for each child under age 18, with the credit reduced $25 for each $1,000 of adjusted gross income that exceeds the threshold amount of $110,000 for joint filers, $75,000 for not married filers, and $55,000 for married filing separately filers.\textsuperscript{413} The Family Tax Fairness Act of 1997\textsuperscript{414} proposed the creation of a new Section 35 to the Internal Revenue Code providing a refundable family tax credit of $500 per child under the age of 18 (adjusted for inflation); however, if child care expenses incurred by a parent qualified for the I.R.C. section 21 child care credit, then that child would not be a qualifying

\textsuperscript{406} Id. § 2(b)(1).
\textsuperscript{407} Id. § 2(b)(2).
\textsuperscript{408} Id. § 2(a).
\textsuperscript{409} S. 654, 105th Congress, 1st Session, introduced April 25th, 1997 (Snowe).
\textsuperscript{410} Id. § 1(a).
\textsuperscript{411} Id.
\textsuperscript{412} S. 2, 105th Congress, 1st Session, introduced Jan. 21, 1997 (Roth).
\textsuperscript{413} Id. § 101.
\textsuperscript{414} S. 98, 105th Congress, 1st Session, introduced Jan. 21, 1997 (Grams).
child for purposes of the new §35 credit. In addition, the credit would be limited - it could not exceed the excess of: (1) the sum of (A) the tax imposed reduced by credits allowable (other than refundable credits) and (B) the taxes imposed by §§ 3101 and 3111 on wages; over (2) the allowable earned income credit.

The ultimate version of the child tax credit as it passed the Senate on June 27th would allow a full credit of $500 per child for each child under the age of 17 (under the age of 18 for taxable years after 2002) for families with adjusted gross income up to the threshold amount. The $500 amount must be reduced by $25 for each $1,000 or fraction thereof by which adjusted gross income exceeds the threshold amount. In addition, parents with children ages 13 to 16 would be required to place the $500 amount per child in a tax-sheltered education investment account. No provisions interplay this child tax credit with the I.R.C. section 21 dependent care credit (as will be seen in the House tax bill) and, contrary to the House bill, the Senate child credit would be available to a number of taxpayers claiming the earned income tax credit. The Senate version of the child tax credit allows earned income credit recipients to calculate their tax liability by applying half of their EITC, then their child tax credit, and then the remaining half of their EITC.

The Child Care Infrastructure Act of 1997 once again proposed a business related credit for employers who provide child care for their employees. The provisions of this bill did, in fact, make their way into the Revenue Reconciliation Act as passed by the Senate. The provision would create a federal business tax credit similar to business credits currently offered by numerous States for employers who furnish

---

415. Id. § 2.
416. Id.
417. See Revenue Reconciliation Act, supra note 403, § 101(a). The threshold amount is $110,000 for joint filers, $75,000 for unmarried individuals, and $55,000 for married filing separately taxpayers.
418. Id.
419. Id.
420. Id.
421. A Senate Finance Committee aide "explained that the provision is a 'baby splitting' compromise between those who wanted taxpayers to use up the refundable EIC before reducing any remaining tax liability with the nonrefundable child credit and those who wanted taxpayers to be able to claim the child credit first." John Godfrey, Senate Finance Passes Tax Bill; Action Moves to Both Full Houses, TAX NOTES, June 23, 1997, p.1567.
422. S. 82, 105th Congress, 1st Session, introduced Jan. 21, 1997 (Kohl).
423. See Revenue Reconciliation Act, supra note 403, § 103.
child care for their employees. A new section 45D. of the Internal Revenue Code is proposed which would allow an employer a credit (not to exceed $150,000 in any taxable year) in an amount equal to 50% of the qualified child care expenditures of the employer. Qualified child care expenditures would include not only the construction of a qualified child care facility for employees but also its operating costs. In addition, expenditures incurred to contract out for such child care services as well as to contract out for resource and referral services for employees would also qualify. Recapture of the credit is provided for in the event the child care center ceases operation and, in the event of acquisition, construction, rehabilitation or expansion of a qualified child care facility, the basis of the property must be reduced by the amount of the credit. Significantly, a qualified child care facility must meet laws and regulations of State or local governments in order to qualify for the credit.

The Senate tax bill does not remedy any of the current deficiencies of the I.R.C. section 21 dependent care credit. Apparently, the new child tax credit is intended to provide additional funds to families to cover, in their discretion, such costs as child care. As previously noted, however, $500 per year for a child is a wholly inadequate figure when average child care costs for a child amount to more than $3,000 per year. In addition, the attempt by the Senate to limit the availability of this new child tax credit for low-income wage earner families indicates an indifference on the part of the legislators for the children of these low income families struggling just above the poverty level.

2. The House

Three of the six child care or child credit bills introduced in the House in the first six months of 1997 mirrored bills introduced in the Senate and have previously been discussed. Representative Fox

424. See supra, Part III.B.2.
425. See Revenue Reconciliation Act, supra note 403, § 103(a).
426. Id.
427. Id.
428. Id.
429. Id.
430. See supra Part II.B.2.
431. H.R. 1667, 105th Congress, 1st Session, introduced May 20, 1997 (Johnson) is comparable to S. 654, Refundable Dependent Care Tax Credit, supra note 409. In addition, the child credit proposal contained in H.R. 1327, 105th Congress, 1st Session, introduced April 15, 1997 (Camp) is comparable to the credit provision in S. 2, American Family Tax Relief Act of 1997, supra note 412. Finally, H.R. 1706, 105th Congress, 1st Session, introduced May 22,
reintroduced a bill to allow employers a credit for a portion of the expenses of providing dependent care services to employees. Rep. Solomon again proposed amending I.R.C. section 21. The bill proposed an increase in the amount of qualifying employment related expenses from $2,400 for one child to $3,600, and from $4,800 for two or more children to $5,400. In addition, the credit would be denied to taxpayers with adjusted gross income above $50,000. The final child related tax bill introduced in the House in the first six months of 1997 was the Child Care Availability Incentive Act. Rep. Pryce also proposed that a new I.R.C section 45D. be added to the Internal Revenue Code to provide a credit to employers for expenses incurred in providing certain dependent care for their employees. This bill differs from the Senate-approved proposal contained in the Revenue Reconciliation Act in that the credit would only be available for 50% of the excess of expenses incurred in providing dependent care for employees over the aggregate amount received by the employer for such services. In addition, a day care center would have to be operated exclusively for the purposes of employees, be located on or adjacent to the business premises, comply with all State or local regulations, and be part of a dependent care assistance program (as defined in section 129(d).

At the House level, what actually survived into H.R. 2014, the Taxpayer Relief Act of 1997, as passed by the House on June 26th, 1997? Basically, a child tax credit of $500 per child and an inflation adjustment of limits and other modifications to the I.R.C. section 21 dependent care credit. In general, if a child is under the age of 17, the House version of the $500 nonrefundable child tax credit per child would be available in full to families with adjusted gross income up to the threshold amount but not to families with adjusted gross income

1997 (Maloney) is comparable to S. 82, Child Care Infrastructure Act of 1997, supra note 422. 432. H.R. 1809, 105th Congress, 1st Session, introduced June 5, 1997 (Fox). For a discussion of previous versions of this bill see supra notes 393-395 and accompanying text. 433. H.R 315, 105th Congress, 1st Session, introduced Jan. 7, 1997 (Solomon). 434. Id. § 2(a). 435. Id. § 2(b). 436. H.R. 988, 105th Congress, 1st Session, introduced March 6, 1997 (Pryce). 437. Id. § 2(a). 438. Id. 439. See Taxpayer Relief Act, supra note 402. 440. Id. § 101. 441. Id. § 102. 442. $110,000 if married filing joint; otherwise, the limitation is $75,000 if not married and $55,000 if married filing separately. Id. § 101.
of $30,000 or less who qualify for the Earned Income Tax Credit under I.R.C. section 32 (since the EITC would be calculated before the child tax credit).\textsuperscript{443} The credit must be reduced by $25 for each $1,000 or fraction thereof by which adjusted gross income exceeds the threshold amount.\textsuperscript{444} In addition, the child tax credit must be reduced by an amount equal to 50% of the I.R.C section 21 dependent care credit.\textsuperscript{445} Neither the child tax credit nor the adjusted gross income phaseout ranges are indexed for inflation.

The Taxpayer Relief Act also proposes to amend I.R.C. section 21.\textsuperscript{446} However, the amendments fail to address the longstanding shortcomings of the code section—the credit would still not be refundable; no advance payment is provided for (although the proposed amendment would allow for less withholding of income tax due to a child care credit amount); the amounts of qualifying employer related expenses ($2,400/$4,800) are not increased but in the future would be indexed for inflation; and no adjustment of the credit for family size is addressed. Notably, the aggregate amount of the child tax credit and the section 21 dependent care credit must be reduced (but not below zero) by $25 for each $1,000 (or fraction thereof) by which adjusted gross income exceeds the threshold amounts of $110,000/$75,000/$55,000.\textsuperscript{447}

3. The Clinton Administration

In a quick response to the House and Senate tax bills, President Clinton offered his own plan to cut taxes by the required $85 billion over the next 5 years.\textsuperscript{448} His child related tax provisions would provide a child tax credit for every child under the age of 17 through the year 2002 and would extend the credit to children under the age of 19 thereafter.\textsuperscript{449} Significantly, the President proposed that the child tax credit be available to working Americans earning lower salaries—that is, the child tax credit should be calculated before the earned income tax credit is

\textsuperscript{443} Id.
\textsuperscript{444} Id.
\textsuperscript{445} Id.
\textsuperscript{446} See Taxpayer Relief Act, supra note 402, § 102.
\textsuperscript{447} Id.
applied and the child tax credit should be partially refundable.\textsuperscript{450} The President's income limitations for the child tax credit differ markedly from the limitations reflected in the House and Senate tax bills. Specifically, the President proposes that the child tax credit be phased out for families making $60,000 to $75,000 until the year 2000, and then $80,000 to $100,000 thereafter.\textsuperscript{451} In addition, the Clinton proposal includes a savings incentive feature whereby the child tax credit plus $500 per year could be set aside in an account exempt from tax on its earnings, with limitations as to its use.\textsuperscript{452} Treasury Secretary Rubin stated that the current House tax bill would deny the child tax credit to 4.8 million low-income working families; the Senate tax bill would deny the child tax credit to 3.8 million of those families.\textsuperscript{453}

4. Summary

Again, it remains to be seen which provisions of these two tax bills will survive the conference process and how the provisions will evolve after Clinton administration input. Given the fact that a promise of a child tax credit was included in the 1995 Contract with America\textsuperscript{454}, one can be relatively assured that a child credit of some variety will be enacted in 1997 tax legislation. Whether a child credit directly improves the quality of child care or furthers the objective of a comprehensive child care policy in America today is questionable.\textsuperscript{455} Revisions to I.R.C. section 21 may ultimately find their way into the final tax legislation; perhaps the more thoughtful and effective Senate bills proposed this year will be considered in conference rather than the provision currently reflected in the House bill. It can only be hoped that the House will be receptive to the Senate's business credit proposal for employer provided child care, particularly in light of the tremendous

\textsuperscript{450} \textit{Id.} "A family will get a child credit for their income taxes plus the extent to which their out-of-pocket (employee share) payroll taxes exceed their EITC." \textit{Id.}
\textsuperscript{451} \textit{Id.}
\textsuperscript{452} \textit{Id.}

Taxpayers who are entitled to a child credit would be given the opportunity to contribute their child tax credit plus an additional $500 each year to a Kidsave Account for the child's education, first time home purchase or the taxpayer's retirement. Earnings would accumulate tax-free in the account and no taxes would be due upon withdrawal for an approved purpose.

\textit{Id.}

\textsuperscript{454} \textit{See infra note 477.}
\textsuperscript{455} \textit{See infra Part V.}
increase in child care demand placed upon the current child care system by implementation of the welfare reform legislation work requirement provision.\textsuperscript{456}

V. GENERAL CONSIDERATIONS, OBSERVATIONS, AND RECOMMENDATIONS

A. Child Care: Tax Provisions in Search of a Coherent Policy\textsuperscript{457}

The child care issue is inextricably tied to immutable fundamental tax premises\textsuperscript{458} as well as family and gender biases\textsuperscript{459} already prevalent in the Internal Revenue Code. Obviously, the "trick" to a successful solution to the child care crisis in America today is to articulate a policy which does not contradict any fundamental policy but, in addition, does not aggravate and contribute to existing detrimental family and gender biases. In actuality, the formulation of such a policy requires a trip through a landmine field which is exactly the reason Congress has failed so miserably in its ability to enact reform legislation in this area in recent history.

1. Assistance to the Child

Clearly stated goals are essential when it comes to child care. First, the concept of child care must not be limited to, nor be the equivalent of, day care. Rather, America needs a children's policy, not geared solely toward assistance to the parents but toward assistance to the child.\textsuperscript{460} For this reason alone, it should be clear that the Internal Revenue Code is not the best vehicle for accomplishing this goal. A tax expenditure policy which serves as a hidden subsidy may be a politically

\textsuperscript{456} See supra Part II.A.2.

\textsuperscript{457} A concept reminiscent of Luigi Pirandello's SIX CHARACTERS IN SEARCH OF AN AUTHOR.

\textsuperscript{458} For example, for a discussion of the personal v. business expense premises see McCaffery, supra note 66, at 1005-10; for the imputed income premises see McIntyre & Oldman, supra note 73, at 1607-24.

\textsuperscript{459} See generally Blumberg, supra note 90; Bittker, supra note 73; McCaffery, supra note 66; Gann, supra note 72.

\textsuperscript{460} See Thomas R. Marton, CHILD-CENTERED CHILD CARE: AN ARGUMENT FOR A CLASS INTEGRATED APPROACH, 1993 U. CHI. L. SCH. ROUNDTABLE 313, 333-34.

Instead of looking to child care as a means to either a work-enabling, gender-equalizing, or poverty-combating end, we must come to view child care as an end in itself. That is, our focus must be child-centered, with child care seen first and foremost as an essential investment in our children.

\textit{Id.}
expedient vehicle but is not necessarily the most efficient or effective means to a child assistance end. To connect access, adequacy and availability of child care to either the income level of the parents or the Fortune 500 status of the parents' employer is not only ludicrous but inequitable when the goal of child care is appropriately viewed as benefitting the child.

As previously stated, two out of every five individuals at or below the income poverty level in America today are children. These children suffer the burdens of poverty—malnutrition, illiteracy, poor medical care, and inadequate child care. As more individuals are forced off of welfare, their children will face even greater needs. It should not matter whether parents of a child are welfare recipients, employed or disabled. At a minimum, the child has a right and is entitled to accessible, available, quality child care which business, society and government together can afford (not just what the parents can afford). Beyond "just day care," quality child care could provide and assist in the delivery of complete services to children—education, nutrition, and medical referrals. Exactly how this goal might be accomplished is the objective of the organized private/parental/public alliance proposed in Part V.D.

2. Additional Needs of Low-Income Children

Second, America must be willing to admit and agree that a stated goal of any child care assistance is to benefit low-income families more. The justification for this facet of the policy is obvious: the child care needs of low income families are great while the supply side of the equation is limited. On the demand side, child care is just one of many factors a low income family must balance and consider when work is at issue; other concerns include minimum wage versus child care costs as well as transportation costs for the working parent and the child (when adequate child care is unavailable near home or work). In addition, in light of the recently enacted Personal Responsibility and Work Opportunity Act of 1996, more individuals will be required to work regardless of whether they are adequately skilled for the job market or whether such a decision makes economic sense. On the supply side, when two out of every five people at or below the poverty level are children, it can generally be conceded that their parents are not the beneficiaries of the current supply of 1,400 plus employer-provided child care facilities.

3. Accessibility, Availability, Affordability, and Professionalism

Parents need ready access to quality child care, whether located close to work, near the home or in the home. The roles of business and
government need to substantially increase in order to accomplish this goal. Accessibility and availability necessitate a major capital expenditure commitment for facilities and services. Specifics about who should provide such capital and possible governmental incentives for business to expend such capital on the welfare of children is the topic of subpart D.

Not to be overlooked here is the concept that child care is to be accessible and available to all parents, not just to working parents. We must abandon our forty year marriage to the premise that parents are entitled to a child care tax benefit only if they incur the expenses in order to be gainfully employed. Quality child care is a right to which the child is entitled. It matters not whether the parents are working, in school, disabled or at home. What matters is that the child is entitled to accessible, available, affordable child care provided by skilled professionals.

Affordability of quality child care is primarily a funding issue. At present, parents bear the costs of child care with nominal assistance from business and government. The cost of child care needs to be spread over all three sectors of society, with business, parents and government each shouldering a significant portion of the financial burden. Instead of the 70-80% governmental child care assistance found in European countries, the proposed private/parental/public alliance recommended for the United States takes a more balanced fiscal approach, in recognition of the capitalistic as well as democratic principals of our society.

Quality must be assured through the professional training of all licensed child care provider personnel. National child care standards and the licensing of child care providers will go far in accomplishing the goal of professionalism.

B. To Code or Not to Code... Is That The Question?

At present, child care is at the nexus of several cascading inequities of the Internal Revenue Code—the I.R.C. section 32 Earned Income Tax Credit; the I.R.C. section 21 Child Care Credit; and the I.R.C. section 129 Dependent Care Exclusion. The cumulative impact of these provisions is compounded by the fact that many states have enacted

---

461. If the cost of child care is not to be recognized as a legitimate business expense, then the tax treatment of its cost should not be tied to any gainful employment criteria.
462. See Baker, supra note 368, at 274-275.
463. An example of the inter-relationship of I.R.C. § 32 and I.R.C. § 21 is warranted. Let's take a single mother of two making minimum wage income of $9,880 per year (assuming
comparable provisions at the state level. All of these provisions must be examined as a whole in evaluating the effectiveness of proposals to "fix" child care.

In addition to the web of difficulties already presented, a fundamental aspect of the proposed private/parental/public alliance to be neither overlooked nor underestimated is the role of the Social Security tax. A base exemption from the Social Security tax should be implemented (not hidden in the I.R.C. section 32 Earned Income Credit), coupled with a progressive Social Security rate structure and a high income cap threshold.

1. Tax Credits: Pros and Cons

The tax system as a solution, particularly the tax credit solution, adds a level of complexity not mandated by the problem nor warranted by the goals. A brief examination of the Earned Income Tax Credit (EITC) is illustrative of the tax credit syndrome.

Primarily enacted by Congress in 1975 to provide low-income taxpayers with relief from the regressive effect of their Social Security taxes, I.R.C. section 32 has been amended over the years to now serve as a substantial mechanism for assistance to the poor.

It the $4.75 per hour minimum wage effective October 1, 1996). The taxpayer could be Kathy Wilkinson, the West Liberty State College student and single mother of two, introduced by President Clinton at the Minimum Wage Legislation signing ceremony on August 20, 1996. See Richter & Gerstenzang, supra note 99, at A-1.

Under present law, if Kathy filed as head of household and claimed three exemptions, she would have no federal income tax liability in 1996. The 1996 standard deduction for head of household was $5,900 and the personal exemptions (three: one for herself and each child) were worth $7,650. If she took advantage of the refundable Earned Income Tax Credit and paid after-school child care expenses of $3,000, Kathy's 1996 tax picture would change as follows: (1) she would receive no federal tax benefit for the $3,000 of child care expenses because, as previously presented, I.R.C. § 21 is not a refundable credit (since no tax liability existed, no credit against the tax was available to her); and (2) her federal EITC would amount to $3,142 which would be refunded to her or received "before the fact" by so electing on her W-4 Form. In effect, her EITC refund pays for her child care expenses for the year. In addition, Kathy must always pay the Social Security and Medicare Taxes of $756. Thus, her total disposable family income would be $12,936 (not taking state issues into account).

464. At present, no exemption from Social Security is provided by statute. One immediate benefit of a base exemption amount would be a reduction in or elimination of the NannyGate problems addressed supra Part IV.A.3.

465. See infra Part V.D.1.b.ii.

466. See Caballero, supra note 338, at 437; see also Yin et al., supra note 338 at 230.


468. In 1996, it is estimated that 21 million households will be eligible for the credit with a federal revenue cost of $24 billion. JOINT COMMITTEE ON TAXATION, Present Law and
remains the only federal tax credit payable to filers with no income tax liability.\textsuperscript{469} These features of the EITC are not the problem—so far, so good. The fundamental difficulty that arises with the EITC is a drawback inherent in any tax credit scheme—a tax return must be filed by eligible taxpayers in order to receive the benefits of the provision. For the EITC in particular, individuals who would not otherwise be required to file a return (due to income below the taxability threshold level) must file in order to receive the subsidy.\textsuperscript{470} A recent Government Accounting Office report stated that half of EITC recipients used paid preparers in order to file their income tax returns.\textsuperscript{471}

Arguments for refundability of the I.R.C. section 21 credit\textsuperscript{472} face the same burdensome and complex drawback as the EITC—eligible taxpayers would have to file tax returns in order to receive the refund. This requirement is, at the least, an inefficient method of providing assistance to children.\textsuperscript{473} And providing for an advance payment option similar to the EITC would be yet another unwarranted layer of complexity.\textsuperscript{474}

In addition, the EITC perpetuates its own version of a rather severe marriage penalty.\textsuperscript{475} The credit thus provides yet another disincentive for a potential second earner spouse to leave the household and seek

\textit{Analysis Relating to the Earned Income Credit and the Child Tax Credit, as contained in H.R. 2491 Conference Agreement, JCX-57-95 (1995).}

\textsuperscript{469} The General Accounting Office reports that “of the $21.2 billion the [EITC] cost the federal government in 1994, $4.5 billion, or 21%, offset taxes owed by EITC recipients; the other $16.7 billion was a subsidy.” See Sheppard, supra note 94, at 1596.

\textsuperscript{470} I.R.C. § 32 does provide for advance payment of 60% of the base credit amount to which the taxpayer is entitled (provided his or her employer is willing to calculate income estimates for the employee and file the appropriate paperwork). I.R.C. § 3507(c)(2)(B). However, the advance payment option does not seem to be very popular with the EITC-eligible or their employers. See Ryan J. Donmoyer, \textit{Few Taxpayers Taking Advantage of Advance Earned Income Credit}, 66 \textit{Tax Notes} 1765 (Mar. 20, 1995).

\textsuperscript{471} See Sheppard, supra note 94, at 1599.

\textsuperscript{472} See supra Part IV.A.1.

\textsuperscript{473} But see Sheppard, supra note 94, at 1599.

As inefficient as it is, however, there is a case for running a welfare program for the working poor through the tax system, even if it means collecting taxes that are going to be paid back with a large subsidy. Everyone participates. Everyone who works in the paid labor force has tax withheld and files a tax return. It is inefficient, but the symbolic message conveyed by return filing is important.

\textit{Id.}

\textsuperscript{474} Supra note 470.

\textsuperscript{475} See Caballero, supra note 338, at 459-460. As illustrated, a two-earner married couple with two children would have been entitled to an EITC of $1,820.30 in 1994. \textit{Id.} The same couple if not married or living apart for the last six months of the taxable year would each have been entitled to an EITC of $2,250 (a total of $4,500 for the taxable year). \textit{Id.}
employment. At a minimum, a tax credit, as a matter of policy, should neither aggravate nor entrench gender biases already existing in the code.

The tax credit frenzy continues in our current political rhetoric with proposals calling for enactment of a $500 per child tax credit. The concept of a tax credit per child first originated in 1991 and has evolved over the last 6 years into its current nonrefundable proposed state. If nonrefundable, the benefit does not reach every child—it only reaches parents of children with tax liabilities. Once again, middle and upper income taxpayers with children would benefit and not the poor. Since two out of every five people below the poverty level in America today is a child, a federal child tax credit policy that does nothing to benefit them is an unconscionable tax expenditure. In addition, the credit is based only upon the existence of the child in the home and benefits the parent(s) with no guarantee of any benefit directly to the child.

2. An “Above-the-Line” Adjustment to Gross Income?

If child care expenses are incurred in order for an individual to be gainfully employed, the argument can be made that such expenses should qualify as an above-the-line adjustment to gross income. Granted, the controversy over whether such expenses are business or personal has currently been resolved in favor of the personal classification. However, if consistency is of any consequence in the tax code, does the cost of child care as an above-the-line adjustment to gross income provide any more of a stretch than alimony as an adjustment to gross income?

Most of the statutory adjustments to income are business related or

476. See McCaffery, supra note 66.
477. See supra Part IV.D. See also H.R. 1215, (The Contract With America Tax Relief Act of 1995), H. R. No. 84, 104th Cong., 1st Sess. at 10-11 (1995) (providing taxpayers with a maximum $500 credit against income tax liability to be phased out ratably for taxpayers with AGI over $200,000 and fully phased out at AGI of $250,000).
479. See Lawrence Zelenak, Children and the Income Tax, 49 TAX L. REV. 349, 389 (1994) (“Proposals for a universal child tax credit do not premise the credit on proof of any actual expenditures on the child; parents would receive the credit even though they spend little or none of it on the child”). For a thorough analysis of child allowances as tax expenditures including a design of a child credit provision, see id. at 388-97.
480. See supra notes 122-143 and accompanying text.
investment oriented with the exception of alimony.\textsuperscript{481} Alimony was switched from an itemized deduction to an adjustment to gross income in 1976, the same year the child care deduction became a credit.\textsuperscript{482} Congress' apparent motivation was to make a deduction for alimony available to taxpayers who did not itemize deductions but instead utilized the standard deduction.\textsuperscript{483} An examination of the inequities of alimony as an adjustment to gross income is beyond the scope of this Article; the issue is raised here only to illustrate that a much more legitimate argument exists for child care expenses as an adjustment to gross income than for alimony.

Despite the arguments in favor of child care expenses as a legitimate business expense (or sufficiently business-related to warrant qualifying as an adjustment), several drawbacks prevent this option from becoming a viable proposal. The primary difficulty with this argument is that, similar to the non-refundable tax credit scenario presented by the current I.R.C. section 21 provision, only those taxpayers with a tax liability (or the potential of a tax liability) would benefit. Thus, the goals of benefitting all children and low-income children even more are not addressed by this option. Second, the change to an adjustment to income might provide an incentive for more individuals to expend greater amounts on child care but does not ensure that the goals of accessibility, availability, affordability and professionalism will be satisfied. In effect, switching child care costs to an adjustment from income rather than a tax credit would be yet another example of misutilization of the tax code for supposed policy purposes.

3. Excludability: Child Care as a Fringe Benefit

Perhaps the strongest tax argument is for excludability of child care costs as a fringe benefit.\textsuperscript{484} Certainly the argument to include child care in this category is no more difficult to make than the argument for

\textsuperscript{481} Statutory adjustments to gross income are defined in I.R.C. § 62 and include such costs as trade or business expenses (I.R.C. § 162); moving expenses (I.R.C. § 217); deductions attributable to rents and royalties (I.R.C. §§ 212, 611, 161 and following); individual retirement account contributions (I.R.C. § 219); and pension, profit-sharing and annuity plans of self-employed individuals (I.R.C. § 404).


\textsuperscript{483} H.R. REP. No. 94-658, 93rd Cong., 2d Sess. 13 (1975) ("The alimony deduction is moved from an itemized deduction to a deduction in determining adjusted gross income, so that it can be used by people who take the standard deduction.").

\textsuperscript{484} See, e.g., I.R.C. § 132 (1996) ("Certain Fringe Benefits").
excludability of: parking costs; 485 free airline travel by airline employees plus their parents, spouses, and dependent children; 486 the value of any on-premises athletic facility provided by an employer to employees, their spouses and dependent children; 487 and tuition reduction provided by an educational institution employer to employees, their spouses and dependent children. 488 These Congressionally hand-picked items of excludability are motivated by policy justifications. 489

Excludability of up to $5,000 of wage income is already available for those employees whose employers comply with the I.R.C section 129 criteria for dependent care assistance programs (and the employer is exempt from paying employment taxes on these wages). 490 Certainly, the above stated child care goals warrant such an exclusion and are at least as justifiable as those supporting the above items currently receiving Congressional exclusion treatment. Plus, exclusions in general are "cleaner;" they carry none of the negative administrative burdens of a credit and none of the tax return filing requirements necessary to implement either a credit or an adjustment to gross income.

One motivation behind an exclusion from gross income for child care

485. Employee parking costs are excludable as a qualified transportation fringe under I.R.C. § 132(f) (1996). Parking must be provided to the employee on or near the business premises of the employer, and the amount of qualified parking which may be excludable to the employee must not exceed $155 per month. I.R.C. §§ 132(f)(5)(C) & 132(f)(2)(B) (1996).

486. To the extent seats are available, they will fly "free". The "no-additional-cost service" exclusion of I.R.C. § 132(b), coupled with the broad definition of an "employee" under I.R.C. § 132(h) which includes spouses, dependent children, and parents (in the case of air transportation only), thus provides a significant excludability benefit to a narrowly targeted population.

487. I.R.C. § 132(j)(4) (1996). The gym or other athletic facility must be located on the employer's premises, operated by the employer, and its use must be substantially by employees, their spouses, and dependent children. Id.

488. I.R.C. § 117(d) (1996). Any tuition provided by an educational institution to its employees, their spouses and dependent children for education below the graduate level at it or another section 170(b)(1)(A)(ii) educational institution is excluded from gross income. The tuition reduction must not discriminate in favor of highly compensated employees. I.R.C. § 117(d). (It does, however, in application, discriminate against unmarried and/or childless employees.)

489. Nothing makes its way into the tax code without a reason—good or bad. However, a detailed examination of the justifications for the excludable items previously mentioned is beyond the scope of this Article.

490. See generally supra Part III.A.2.b. It should be noted again that I.R.C. § 129 (1996) provides excludability for child and dependent care expenses. This Article has, by design, only focused upon the child care aspects of the provision. In addition, it should be noted that employees, in conjunction with I.R.C. § 125 (1996), may apply their $5,000 exclusion to a variety (cafeteria plan) of qualifying costs including child care as well as out-of-pocket health care costs.
costs is to put money directly into the hands of taxpayer/parents thereby arguably allowing supply and demand to operate (with assistance from national child care standards and state licensing requirements). Another motivation is that employers are encouraged to provide quality child care for their employees. Difficulties with such an exclusion policy immediately arise, however—i.e., the benefits only flow to parents who are employed; the benefits may be greater (as at present) for upper-income taxpayer/parents than for low-income taxpayer/parents, and the amount of the benefit is nominal in comparison to the actual cost of child care.

Yet, the exclusion route is still the preferable avenue for governmental child care assistance, provided the I.R.C. section 129 exclusion is revised as proposed in Part V and is not viewed as the sole solution to the child care crisis. The current exclusion from gross income provision for employer-provided or employer-reimbursed child care costs has encouraged both significant business and state participation in the area of child care. As revised, the I.R.C. section 129 exclusion, coupled with the private/parental/public alliance proposals to be outlined in subpart D, will assist in equitably effectuating the stated child care goals of benefitting the child; additional assistance to low-income children; and accessibility, availability, affordability, and professionalism of child care in America.

C. Child Care: The Question Should Be Whose Responsibility Is It, Anyway?

We are not asking the right question; instead, we are trapped in a tax paradigm. The question of child care should not be an issue of work-related versus personal expense; nor employer deductibility versus employee nondeductibility. Rather, the fundamental question should be whose responsibility is it, anyway? Only then may tax considerations and consequences enter into the equation.

Keeping in mind the articulated child care goals of assistance to the children; additional assistance to low-income children; and accessibility, availability, affordability, and professional, the issue now becomes how best to implement these goals? The answer lies in a joint, organized effort of the private, parental and public sectors of our economy.

1. Responsibilities: A Brief Look at France and Sweden

The concept of child care as a joint effort is a relatively untravelled avenue in the United States today. Governmental participation (particularly municipal participation) is common, however, in such countries as France and Sweden and must be a viable aspect of an
American solution to our child care problems in the context of a private/parental/public alliance. A brief analysis of the French and Swedish child care systems is warranted for the express purpose of determining their respective national child care goals and whether the funding and administration of their child care systems appropriately and adequately furthers their nationally stated goals. If so, valuable lessons may be learned as we embark upon our private/parental/public alliance.

The mission of the French child care system embraces child health, development and preschool educational concerns provided by trained professionals. In furtherance of these goals, the French child care system offers two primary means of assistance to parents: creches for infant-toddlers under the age of three and ecole maternelles or preschools for children through age seven. Creches for infant-toddlers are available at centers or through licensed home-based caregivers; are administered and partially funded by local municipalities; and are primarily paid for by parents on a means-based sliding scale (approximately 14% of the parents' yearly income). In contrast, the French preschools are universally available; serve nearly 90% of all children ages three to five; are centrally funded and administered; are provided at no direct cost to parents; and are considered an integral part of the public education system.

Of particular interest and importance is the issue of who pays for the combined French child care systems. National agencies cover approximately 39% of the annual expense, funded by value-added sales tax revenue; municipalities pay for 36% of the annual expense raised primarily from local land taxes; parental spending covers 20% of the annual child care systems' expenses; and employers through payroll taxes make up the 5% balance. Thus governmental resources provide 75% of the funding; parents provide 20%; and business only 5%.

The Swedish child care goal is also educative in nature and requires services to be rendered by trained professionals; however, much of the emphasis of the child care system is to promote the participation of

491. See Marton, supra note 460 at 334-345; see generally Jane Zemel, Let's Talk About Day Care: French 'Creches' Pioneered Day Care, PIT. POST-GAZ., May 10, 1995, at D-4.
492. See Marton, supra note 460 at 336-37, (citing Gail Richardson & Elisabeth Marx, A WELCOME FOR EVERY CHILD—HOW FRANCE ACHIEVES QUALITY IN CHILD CARE: PRACTICAL IDEAS FOR THE UNITED STATES (The French American Foundation, 1989)).
493. Id. at 337.
494. Id. at 338.
495. Id. at 337-39.
496. Id. at 339.
women in the workforce (rather than a child-centered focus). In general, a three-part child care system is available in Sweden: family day care in a licensed caregiver’s home for children ages one to twelve; leisure time centers for children ages seven to twelve whose parents work and need child care assistance for their children either before or after school; and part-time group day care centers serve children ages four to six, track the school year and provide child care assistance for three hours per day in the morning or the afternoon. Preschools are also available.

Funding for the Swedish child care system is primarily provided by municipalities from general tax revenue. For family day care, the state provides 23% of the assistance; the municipalities 62%, and the parents only 15%. For the leisure time centers, the state covers 31% of the expense; the municipalities 59%; and the parents only 10%. The part-time groups are funded only 17% by the state and 83% by the municipalities; the parents pay nothing for this child care assistance.

2. Responsibilities: An American Plan

Much of the attention paid to the French and Swedish child care systems has focused upon their nationally stated goals. Given the tremendous cultural differences between these European countries and the United States, it is perhaps unrealistic to expect that these goals and systems would be readily accepted and adopted in the United States. However, given our now clearly stated national child care goals, European aspects of administration and funding may prove helpful in our American implementation process through our private/parental/public alliance. America needs to develop a unique, completely functional child care system that is compatible with a capitalistic, democratic society.

As we have seen, child care in America is currently considered a predominantly parental responsibility (if not a woman’s responsibility). Business participation has increased over the years in the establishment of on-site child care centers and government has provided direct tax expenditures plus a variety of child care programs within the context of other systems. However, America needs an organized approach to child care.

497. Id. at 340-345 (citing Nancy E. Dowd, Envisioning Work and Family: A Critical Perspective on International Models, 26 HARV. J. ON LEG. 311, 316-23 (1989) and CHILD CARE IN SWEDEN, FACT SHEETS ON SWEDEN 1 (The Swedish Institute, May 1992)).
498. Id.
499. Id. at 343.
care. When we ask the child care question "Whose responsibility is it, anyway?," the answer must be that quality child care is the responsibility of business, parents and government. What role each plays and to what degree each participates will be determined by how successful each sector is in accomplishing attitudinal shifts toward child care. As proposed, the American system will differ significantly from the European systems in that business will play a significant role. It is time to examine the realm of possibilities.

D. An Organized Private/Parental/Public Alliance

Two facts mentioned in the Introduction to this article need to be restated: child care (for better or worse) is a matter of economics and there exists today an uneasy private/parental/public alliance in the area of child care created more by default than by design. It is the hope of this subpart to outline an organized alliance which implements the stated comprehensive child care goals, recognizes economic and social factors and motivations, and includes proposed sources of possible funding.

1. The Role of the Private Sector: Business

The private sector financial contributions to child care assistance have grown substantially in recent years as evidenced by the recent surge in on-site corporate day care centers and significant monetary consortium commitments. As with all matters of business, the private sector has been motivated to pursue the child care concerns of its employees as a matter of economics—the needs of the market will prevail. This is not to say that business is somehow "bad" for following the rules of economics in the area of child care. On the contrary, the point is simply to make certain that everyone understands the rules of the business survival game. A social policy reason alone is not a sufficient enough force to compel most business entities to act in a capitalistic society. Unless all business competitors must also satisfy the same social goal or unless complying provides a market advantage, a sufficient economic motivation does not exist to warrant the expense.

500. See supra Part IV.B.2.
501. Dowd, supra note 27, at 498 ("The impetus for those with power to reform the work-family structure is largely economic.").
502. For example, the early private sector resistance to environmental regulations and consumer protection laws.
503. For example, witness the attempts of business to utilize their voluntary compliance with social policies as an advertising advantage ("We Recycle!" and "Animal-Free Product Testing!").
However, the current level of business contribution and commitment to child care is not adequate to address the stated goals of assistance to all children; additional assistance to low-income children; and accessibility, availability, affordability and professionalism. More is required of the private sector, much more.

a. Shifting Attitudes: Child Care as an “Expense of Doing Business”

However, the fact not to be overlooked here is that child care is an expense of doing business. Under current law, when an employer decides to provide child care services or actually builds and operates a child care facility, the expenses are “ordinary and necessary expenses paid or incurred in the carrying on of a trade or business.”\textsuperscript{504} To encourage business to expend great amounts of capital in this child care arena, many states have joined in to offer a variety of tax credit “start-up” incentives.\textsuperscript{505} The point is that the responsibility of business to assist in the area of child care should not be optional, prompted largely by tax considerations, the cost of employee absenteeism or the intangible value of “happy” employees. By virtue of the hiring of humans as employees, child care is a responsibility of business.

By taking workers out of the family environment, the private sector owes more than a wage responsibility back to the family unit and the community. If “family” is to be valued, then the family as a unit has to be valued. Anything that detracts from the family unit should be devalued. Lack of child care assistance from an employer detracts from the family unit. How this employer assistance is to be provided is addressed in the following proposals.

b. Proposals

Many alternative solutions to the child care crisis could be proposed in the business arena. Keeping in mind both viability and political acceptability, only four recommendations to be pursued by the business sector are examined in any detail in this Article.

As previously stated, employers have a child care responsibility by virtue of hiring people. This responsibility is an overlooked responsibility in the laundry list of social responsibilities currently borne by business. Child care is no less legitimate than the governmentally-imposed

\textsuperscript{504} I.R.C. § 162 (1996).

\textsuperscript{505} See supra Part III.B.2.
employer responsibilities to provide safe environments for workers, to comply with environmental regulations, to match employee Social Security contributions, to pay federal unemployment taxes for employees, and to create and contribute to employee pension plans.

It is not just a matter that a business' employees have children who are in need of child care in order to work. The issue is much larger: it is the recognition of a business responsibility to implement the previously stated comprehensive child care goals. If, as proposed, child care can evolve from just day care into a child-centered educational system then business (as well as government and parents) will be investing in children. Business will benefit, recognizing that it has a vested interest since these children constitute the pool of future employees. The next question becomes, how is this investment to be accomplished?

i. A Revised I.R.C. § 129: Fixing What We Have

In light of the numerous drawbacks and limitations of I.R.C. section 129 and its burgeoning state progeny, at a minimum at least five amendments should be enacted to the current I.R.C. section 129. Again, if the goal is to benefit all children; provide additional assistance to low-income children; and enhance access, availability, and affordability of quality child care for all, then I.R.C. section 129 needs to specifically address and implement these policy concerns.

First and foremost, the exclusion should remain in the Code but not at a static $5,000 exclusion level for all. The provision should be amended to provide for a phase-out of the exclusion at upper-income levels coupled with a greater exclusion for low-income employees. The exclusion amounts should be adjusted for inflation in order to avoid the historical difficulties encountered with I.R.C. section 21. In addition, the benefit should be available to part-time as well as full-time employ-

---

511. See supra Part IV.B.
512. See supra Part III.B.2.
513. See supra Part III.A.2.a.
ees. For employers providing on-site child care facilities, creation of the facility would still be encouraged by the provision and on-site child care would be available to all employees; however, those employees who are able to pay for such a benefit would now be required to pay. The employer would continue to be exempt from employment taxes on wage income qualifying for the exclusion.

Second, the provision should not be in conjunction with employee elections under I.R.C. section 125, but should be mandatory for all employees with children for the stated purpose of child care. All employers would be required to participate in child and dependent care programs as specified by the statute (but not necessarily in the form of construction and operation of on-site child care). Reimbursement for child care expenses incurred, up to the exclusion amount for that employee’s level of income, would continue. Thus, in-home child care or child care in private or non-profit facilities would also be encouraged.

Third, the current exclusivity requirement of the provision needs to be addressed. Instead of requiring that the employer provide the on-site child care services solely to its employees, the provision should be amended to require that a certain percentage of the children (i.e., 15%) at any business-created child-center be from the community. If the parental ability-to-pay of these community children is nominal, then the provision should call for a small percentage of children (i.e., 5%) to be provided for on a pro-bono basis. This recommendation benefits low-income and welfare children, provides them with quality child care and offers class diversity to all children at the center.

Fourth, the statute should specify the kind of child-centered activities and programs to be promoted at the centers\(^5\) as well as the requisite training and qualifications of professional staff personnel.

Last, but not least, the earned income limitation of I.R.C. section 129 (b) needs to be eliminated. At present, the exclusion is denied to a one-earner married couple (unless the non-earning spouse is a student or disabled) and this provision is incongruous with the presently stated goal of benefitting the child or children. It should not matter whether one or both spouses work nor how much either spouse earns. What matters is the benefit provided to the child or children. Thus, the benefit should be available in relation to the number of children the employee has and the child care expenses incurred per child (not necessarily in order to be gainfully employed but to nurture and educate the child).

\(^5\) See infra Part V.D.2.b.iv.
ii. A "Business Kiddie Tax": Trying Something New

Proposing a tax in this day and age, and in this current political environment, may seem futile (if not suicidal), but it is proposed nonetheless. As proposed, the tax would be an additional business cost as a new portion of the employment taxes due, 515 but accompanied by a trade-off in a revised Social Security tax system. Since much of the current child care assistance is presently funded through the Social Security system, it appears to be a logical, primary choice for funding the needs of the proposed alliance.

The so-called "Business Kiddie Tax" portion of the employment taxes would be paid by every business with one or more workers, whether full-time or part-time (so as to include partnerships and sole proprietorships). As envisioned, it would be a flat fee 516 to be paid solely by the employer per month for each worker of a business, regardless of their wage or part- or full-time status. 517

The Business Kiddie Tax should be accompanied by the following reforms in the Social Security tax: 518 (1) the wages excluded from gross income under the revised I.R.C. section 129 would continue to be exempt from employee liability for Social Security and Medicare taxes; 519 (2) employers would be exempt from the Social Security and Medicare taxes but only on wages at or below a nominal wage figure

515. The child care or child welfare assessment would be similar to the additional Medicare assessment (the I.R.C. § 3101(b)(6) (1988) hospital insurance tax imposed upon 1.45 percent of wages without any limit) paid by employers as part of their employment tax responsibilities.

516. A flat fee is recommended due to the fact that the costs of quality child care do not rise with a parent's wage but rather with the number of children requiring such care. See supra Part II.B.2.

517. The tax would not be assessed solely for employees who are parents or capable of becoming parents (a very large age bracket, for both male and females, these days). The concern would be that employers might have a tax avoidance incentive to hire only employees without children thus discriminating in their hiring practices against both men and women who have children.

518. The Social Security tax system is only addressed here in the context of proposals for business participation in the area of child care and such proposals are in no way intended to exacerbate the recognized current financial crisis of the Social Security system. However, the recommendations would increase the financial stability of the system; yet a detailed discussion of the Social Security tax is beyond the scope of this Article.

519. See supra Part III.A.2.b. See also Caballero, supra note 338, at 465 (proposing, in the context of the EITC, a system of graduated Social Security taxes for employees with a base exemption at the lowest levels of income. Rather than imposing and collecting the Social Security tax for low-income taxpayers and then refunding it through the EITC, the author recommends not imposing the Social Security tax in the first place).
(i.e., $3,000 per year); (3) progressivity would be added to the Social Security tax rates rather than the current flat 7.65% rate for all; and (4) a higher income cap (or no income cap at all) should be instituted. Implementation of these recommendations would present a coordinated effort to remedy numerous tax code inequities surrounding child care, the EITC and the marriage penalty as well as inequities in the Social Security tax system.

Businesses would be exempt from the Business Kiddie Tax portion of the Social Security tax if they provide their own on-site child care. In addition, businesses would pay a reduced Business Kiddie Tax per employee if the business provides flex time and work shift schedules for their employees (thus accommodating fathers as well as mothers).

This proposal is meant to provide a possible avenue for business to financially support child care without necessitating that business actually get into the business of child care. An assessment separate and apart from the Social Security system is certainly an option (i.e., an increase in the corporate tax rate or an assessment against partnerships and other

---

520. If, for example, the Social Security and Medicare taxes were not required to be paid by employers on wages under $3,000 (assuming average weekly child care costs of $60 per week for one child times 50 weeks), and the employee's portion was not required as well, two immediate benefits would be realized: (1) an increase in the annual take-home of low-income taxpayers (currently $229.50 for a $3,000 or more per year salary); and (2) many taxpayers would be allowed the option of in-home child care without running afoul of the Nanny Tax dilemma. See supra Part IV.A.3.

521. See Caballero, supra note 338, at 465-67 (recommending replacing the current flat rate structure with a graduated rate structure similar to the I.R.C. § 1 rate structure for federal income tax purposes). This recommendation would balance the revenue lost from implementation of the proposed employee and employer exemptions just addressed. It must be noted however that the filing status issues of I.R.C. § 1 need to be adjusted in light of the marriage penalty issue. See supra note 397.

522. See Caballero, supra note 338, at 466. It seems absurd that an entertainer, for example, earning $10 million per year would pay his or her entire annual Social Security contribution for the year out of his or her first pay check of the year (losing only .04% of gross income) while a worker earning only $20,000 per year must pay into the system all year (losing a full 7.65% of his or her gross income).

523. It must be recognized that if the child care lever is "pushed" to remedy inequities, then the EITC, the marriage penalty and the Social Security tax levers all "pop up," demanding to be addressed as well. See generally McCaffery, supra note 66. Keep in mind that these recommendations will operate in conjunction with the revised I.R.C § 129 provision just discussed.

524. The child care provided at these centers must be the child-centered care to be proposed infra in Part V.D.2.b.iv and must satisfy the national child care standards and State licensing requirements proposed infra in Part V.D.3.b.i.

525. A stigma currently exists for fathers requesting or demanding flex time or parental leave time. See Bass, supra note 23. This proposal could make the employee demand for such time more socially acceptable as well as provide an incentive to the employer.
unincorporated enterprises), but would not remedy the inequities of the Social Security system. However, as proposed, the recommendation encourages businesses to provide on-site child care, I.R.C. section 129 benefits, and/or flex time and work shift schedules in order to avoid or lessen the impact of the Business Kiddie Tax. All of these consequences further the comprehensive child care policy and compel business to play its part in implementing the policy.

Not all children will benefit from this proposal since not all parents work. And the goal is to provide quality child care to all, not just the children of employed parents. Therefore, additional proposals to implement the private/parental/public alliance must be pursued.

iii. Keeping the States Involved

The following proposal for the states could have been placed in the section addressing public sector recommendations, but is discussed here due to the perceived crucial role state tax code provisions should play in creating incentives for businesses to establish and operate (or collaborate to do so) on-site child care centers. The variety of existing state tax credit incentive provisions for businesses in the area of child care have previously been presented.526

The proposal is that, for states offering substantial tax credits or deductions to businesses for the establishment and/or operation of a child care center, federal funds be sent to the states matching their lost state tax revenues. These matching funds would be earmarked for utilization by the states to provide for assistance to children of parents not employed by such companies. The matching funds could be funneled: (1) to municipalities to build child care centers where the participating businesses are not located (i.e., the inner cities) or to municipalities for distribution to schools, church groups and private firms willing to operate quality child care centers; (2) to the states to assist with the administrative costs of regulating the centers and licensing the personnel; and (3) to states and/or municipalities to provide professional child care training at either level. It is anticipated that this proposal will provide a significant incentive so that more states will be motivated to enact child care expense tax relief legislation for businesses.

Current legislation proposed and passed by the Senate527 would create a federal business tax credit comparable to many of the state

526. See supra Part III.B.2.
527. See Revenue Reconciliation Act, supra note 403.
credits for costs incurred by employers providing child care for their employees. This federal provision, coupled with the existing state provisions, might provide enough of an incentive for businesses to be able to afford the tremendous capital outlay necessary to construct and operate a dependent care facility. In addition, many states without a current business tax credit may provide for such a state tax credit based upon a percentage of the allowable federal credit (witness the similar state code phenomenon regarding the I.R.C. section 21 dependent care credit). The preferability of the proposed federal credit versus the individual state credits is truly dependent upon the adequacy of the credit—is sufficient tax relief provided to the employer to clearly enhance the employer's ability to construct and operate such a facility.

iv. Flex Time, Work Shifts, and Fatherhood Initiatives

Child care assistance from an employer could be provided in many forms. Every employer need not be required nor even encouraged to build its own child care facility. Business does not need to get into the business of child care—at a minimum, it needs to recognize child care as a cost of doing business. Providing adequate flex time, for example, to employees so that all parents could coordinate and accommodate the school and after-school schedules of their children would go far in this regard. More aggressive would be the availability of thirty or thirty five hour per week work shifts for all employees. Instead of one parent, for example, working sixty hours per week while the other parent stays-at-home to care for the family, both parents could work thirty hours per week for a more accommodating schedule. This recommendation attacks the labor-sacred forty hour per week work schedule but certainly is reflective of the current state of working family structures in our society today. Each parent could pursue a fulfilling career and contribute to the family (what a novel concept). But, true to our alliance, employee/parents must demand such options, the workplace must shift its attitudes to recognize the validity and benefits of such

528. See McCaffery, supra note 66, at 1050 ("Encouraging families to specialize between market and nonmarket production—for example, to make a fifty/zero rather than a thirty/thirty division of hours worked—perpetuates gender-based stereotypes and contributes to the difficulties of evolving greater part-time labor market options").

529. Of course, this recommendation assumes that both spouses together could earn as much as the male sole provider, which ignores the current wage gender-gap issues. In 1993, women working full-time only earned 66% of what their male counterparts earned. U.S. BUREAU OF THE CENSUS, supra note 1, Table 742, at 479. Much needs to be done on the gender and equality side of the equation to render this recommendation viable.
demands, and government must encourage such options.

What benefits would the employer receive, or in other words, what’s in it for the employer? Not just happy employees but economic factors such as maximum utilization of facilities should drive such work schedule considerations. Work shifts should not be relegated to the blue-collar paradigms of manufacturing or factory jobs. Such shifts would work well in law firms, insurance companies, and even schools, plus numerous other service industries covering a wide variety of personnel positions.

But encouraging or even mandating that an employer provide flex time or work shifts for employees neither states nor addresses the fundamental attitudinal shift required of business that lies at the heart of the role of the private sector in the area of child care. As previously addressed, business must look at each employee as a member of a family and value that family unit (regardless of its traditional or non-traditional structure). This value would be reflected in a humane attitude toward work requirements and schedules, recognizing that business has a social responsibility when it comes to the family.  

In addition, business needs to pursue fatherhood initiatives in the workplace. Programs and seminars that assist working fathers who have decided to shoulder the daily joys, burdens and stresses of parenting should be encouraged. Business benefits in that providing male employees with such resources helps make the fathers better dads and better employees and can keep the employer competitive in an increasingly tight labor market.  

2. The Role of the Parents: Society

The attitudinal shift required at the parental level is likely the most

---

530. See Dowd, supra note 27, at 494. Dowd states:
Public and private must be rethought in a different sense with respect to individual and social responsibility. Family has been overwhelmingly viewed and experienced as a realm of individual responsibility, despite its acknowledged social value and connection. That ideal of individual responsibility hampers collective action and the development of public policy which recognizes family as a social responsibility as well as a social value.  

Id.

531. Johnson Wax has instituted such a free program for its employees, and more than 100 fathers and grandfathers have participated. See Johnson Elie, supra note 374, at 1. Texas Instruments, Chase Manhattan Bank and Marriott have also instituted fatherhood programs. See Maggie Jackson, Dads Get into Job-Family Programs, L.A. TIMES (June 11, 1997) at D-6.  

532. See Johnson Elie, supra note 374, at 1. ("There are a lot of good companies out there," said Mary Kay Carr, director of diversity programs at Johnson Wax. "This and other work/life initiatives help set us apart from other companies and help us recruit the best talent.").
difficult of the three to effectuate. Monumental issues such as gender bias, "acceptable" family structures, the role of parents and parenting skills, plus workplace values must be examined and prevailing attitudes must be changed and overcome.

a. Shifting Attitudes: Children as the Mutual Responsibility of Parents

Nearly 25 million women with children are in today's workforce and seventy-four percent of them are "married with children."\(^{533}\) If women accept the premise often thrust upon them by society that child-rearing responsibilities are the sole or at least primary realm of women (as the nurturing ones), then women reinforce gender biases that permit business, government and especially fathers to opt-out of their requisite responsibilities to children.\(^{534}\)

Society in general and the workplace in particular must be willing to recognize the diversity of family forms in America today. Employees live in a variety of family units or structures: all manner of single, never married individuals; dual-earning couples with children, including children from prior marriages; single or divorced parents (both male and female) with children; same-sex couples with children; and adult children providing for parents and dependents other than children. Each unit is a unique family environment, but few are recognized as legitimate in the workplace other than the single employee and the male primary earner with a stay-at-home female spouse who provides the child care.\(^{535}\) The workplace must recognize and adjust to the societal changes in family and the respective needs of each family structure. Otherwise, the current parental lot in life will continue unabated—constant conflict as parents are perpetually forced to choose between work and family.

The concept of parenting as a skill is somewhat revolutionary. Since having children is a natural, biological phenomenon, the role of a parent has historically been undervalued. As a society, we take for granted that every human being knows or understands how to perform this most crucial and difficult task. But being a good parent is neither a God-given nor an inherited talent. We all need training to be good parents and assistance in building quality relationships with our children—after all,

---

533. See U.S. BUREAU OF LABOR STATISTICS, supra note 2.
534. A complete discussion of gender bias and the impact of attitudes toward women and their "proper" social role upon federal as well as workplace policies is beyond the scope of this article. See Sylvia A. Law, Women, Work, Welfare, and the Preservation of Patriarchy, 6 U. PA. L. REV. 1249 (1983).
it is by far the most important job we will ever accept. The frightening rise of child abuse; the increasing numbers of children having children; the alarming number of grandparents raising grandchildren due to the death, disability, incarceration or addiction of their child—all of these scenarios represent major societal concerns that cry out for assistance to children from all sectors of society.

Fatherhood has been largely relegated to an economic function and this concept of parenting has long dominated the American workplace without protest or challenge. Our cultural paradigm teaches that the wife is to choose the family and the husband is to choose work. However, this limited view of parenting cheats absolutely everyone involved—the mother, the father, the children, and business. It forces millions of working women into a lifetime role of super-Woman or super-Mom. It compels men to accept the subordinate role of family in their lives and the superior role of the workplace. Children lose out on the benefits of daily parental involvement in their lives. And business fails to benefit from the employment pool of all adults, male or female, parents or not.

If we, as a society, tolerate men not participating in the child-rearing responsibilities, not altering their lives substantially upon the event of having children (other than working more hours) then they will not. More importantly, if we, as a society, tolerate business only adjusting to men missing one day of work for the birth of their babies but never-more after that, then business will never accommodate the family with flex time or thirty hour per week work schedules. Lessening the rigidity of the workplace, frozen in time with the 1950s attitude of a male breadwinner and a female child care provider that no longer prevails in our society, must be an essential priority so that both men and women may succeed in giving the family its proper place in society.

b. Proposals

i. A Revised (or Eliminated) I.R.C. Section 21

As it presently exists, I.R.C. section 21 fails to accomplish our stated comprehensive child care goals: it fails to provide benefits to all children;

536. Id. at 437.
537. See Bass, supra note 23 ("Corporate America still sees the juggling of work and family as a women's issue, researchers say. And men who see things differently are subtly penalized.") See also Jackson, supra note 531 ("Men are scared, often justifiably, that their careers will be hurt if they make their families a priority. While that's a reality for women too, men have felt more unwilling to take a risk because often they earn more then their spouse.")
it fails to benefit low-income children at all; and it fails to increase accessibility, availability, and affordability of quality professional child care. Recommendations to make the child care credit refundable, to provide for advance payment of the refund, to increase the amount of the credit and index it for inflation, and to adjust the credit for family size have been previously addressed. The question now becomes, if revised, is the provision salvageable?

The answer is no. In 1993, the $2.5 billion tax expenditure provided by I.R.C. section 21 was spread out inequitably over six million families. My contention is that this revenue should be directed into the Child Care or Child Welfare Fund as the source for the matching funds to be funneled to the states providing business tax credit incentives for child care. Eliminating I.R.C section 21 from the tax code will not be politically popular since it is basically a tax subsidy to middle class taxpayers (who vote), but if the proposed private/parental/public alliance is implemented as a package, inequities should be at a minimum.

However, elimination of I.R.C. section 21 without the complete implementation of the proposed private/parental/public alliance is not recommended. Instead, revisions “to make the best of it” should be implemented. Given the dismal recent Congressional history of failed attempts to “fix” I.R.C. section 21, however, I am not hopeful that a fix-it solution is attainable. A comprehensive plan such as the proposed alliance (comparable to the major overhaul of the welfare system in the last Congress) may prove to be a more successful political route. Yet, in an effort to revise I.R.C. section 21, at a minimum the

538. For a complete analysis of the drawbacks of this code section, see supra Part IV.A. 539. See supra Part IV.A.1.
540. See supra Part IV.A.1. The reasons for this recommendation have been previously addressed at length in this Article: i.e., the overly complex administrative drawbacks of refundability; the fact that middle- and upper-class taxpayers are the primary beneficiaries of the provision; the nominal number of families (only 5% of all returns filed claim a credit) benefitting from the provision; the nominal size of the credit per return; and the disparity that the average size of the credit for upper-income taxpayers is twice that for low-income taxpayers.
541. See supra Part V.D.1.b.iii.
542. Not to be overlooked is the impact that elimination of I.R.C. § 21 would have at the state level because so many states have provisions in their tax codes offering nominal relief to individual taxpayers based in some manner upon the federal child care tax credit. See supra Part III.B.1.
543. For example, the repeal of the child care credit alone, without implementation of any other proposals presented in this Article, could result in a tax bias in favor of a parent (mother) staying home due to the imputed income exclusion. See Zelenak, supra note 479, at 415-416.
544. See supra Part IV.C.
revisions must address each of the reasons to change the code section itemized earlier in Part IV.A. but not aggravate already existing inequities in the code.545

I.R.C. section 21 presents fundamental tax policy contradictions as well. For example, if the benefits provided by I.R.C. section 21 were intended to be subsidy-based,546 then the provision should call for income phase-outs and ceilings; on the other hand, if the benefits provided were based upon a business expense theory, then the provision should not call for a limitation of the expense for deduction or credit purposes.547 The old I.R.C. section 214 combined these two concepts or rationales in an incoherent manner resulting in an expensing of child care costs with cost limitations available to a small proportion of middle-income taxpayers. Its transformation into a credit in 1976 did little to remedy this historical confusion.548

Hopefully, it has been adequately established at this point that child care should not continue to be viewed in its current tax paradigm; it should be viewed neither as a pure tax-expenditure subsidy (a personal consumption expenditure) nor a completely deductible business expense to employees (a cost of producing income). Child care is, instead, an investment in our children549 that is the joint responsibility of business, society and government. If the alliance as proposed is implemented, it should alleviate many of the existing inequities in the tax code’s current approach to child care.550

ii. The Sliding Scale of Parental Fiscal Responsibility for Child Care

As mentioned throughout this Article, child care is a joint concern of the private/parental/public sectors. If one of the stated goals of our

545. Note Professor Heen’s caveat that the recommendation to phase-out the child care credit for middle- and upper-income taxpayers by implementing an income cap for I.R.C. § 21 must be examined in light of other inequities in the code, particularly the “marriage penalty”. See Heen, supra note 125, at 210-211; see also supra note 397.

546. For a thorough discussion of tax expenditures as a subsidy, see STANLEY S. SURREY, PATHWAYS TO TAX REFORM (1973).

547. See I.R.C. § 162, 212; see also Blumberg, supra note 90, at 64-66.

548. See supra Part III.A.2.a.

549. Basically, my argument is an externality argument: well-raised, educated children become valuable members of society, producing important positive externalities for society at large. See Zelenak, supra note 479, at 388.

550. It must be noted that the proposal to enhance the exclusion under I.R.C § 129 (1996) is still a tax expenditure with tax incentive motives. However, it is simply building upon a provision that is already effective under the code, permitting I.R.C. § 162 (1996) deductions and exempting the employer from the employment tax responsibilities on the excluded wages. See supra Part III.A.2.b.
comprehensive child care policy is to provide for all children but to benefit low-income children even more, then child care must be provided on a sliding scale, ability-to-pay basis. It makes no sense for business or government to directly benefit children whose parents are able to pay with any form of a subsidy or tax expenditure benefit; however, such children should still benefit from the accessibility, availability and professional quality of the child care provided. Even if the upper-income parent chooses to provide in-home child care at their own expense, some benefit of the alliance will still be available in that the child care provider will be a trained professional licensed by the state.

iii. Back to the Basics: Teaching Parenting & Child Ecology

Back in the "Dark Ages" of my high school experience,1 "Home Economics" was still offered in the curriculum. I am not proposing that the course as it existed then be reintroduced. What I am proposing is that Life and Parenting Skills be a required portion of every high school student's curriculum, male and female. Such basic skills as how to manage a budget, balance a checkbook and file a tax return should be fundamental components of a civics class, for example. How to be a good parent should be taught in the classroom as well, complete with role-playing scenarios, decision-making exercises, compromise and negotiation sessions, fiscal responsibility discussions, etc. We might argue that these principles should be taught in the home but our now infamous Catch-22 rears its ugly head: if our economy requires that two parents work or a single parent must work in order to adequately provide for children (and the recent welfare reform legislation dictates that poor parents must work), the reality is that less time is available to parents to foster such principles in the home. We cannot have it both ways—someone must pick up the ball and run with it. The schools are best equipped to provide comprehensive coverage throughout the child population.

In addition, beyond high school, a new curriculum should be developed at colleges and universities throughout the United States: a Child Ecology major.2 Such a curriculum would cross over numerous

---

552. The term "ecology" is not new but it is new in the context of children. Webster defines "ecology" as a branch of science concerned with the interrelationship of organisms and their environments; the totality or pattern of relationships between organisms and their environment. WEBSTER'S NINTH COLLEGIATE DICTIONARY, Merriam-Webster Inc. (1985). "Human ecology" is defined as a branch of sociology concerned especially with the study of the spatial and temporal interrelationships between men and their economic, social,
disciplines (at a minimum, psychology, political science, sociology and economics) and would be the preferred (or even required) major for child care providers in licensed facilities. Certification in Child Ecology for in-home child care providers could also be required and accomplished through adult education courses at community colleges or even through private institutions. Continuing education requirements, comparable to teacher and attorney requirements, should also be imposed to keep one’s license. As the demand for quality child care rises, the supply of trained professionals must rise with it. Such a proposed curriculum could provide the necessary quality child care providers required to implement the alliance.

It is time for society to admit the need for professional parenting assistance. For years, women entering the workforce have been criticized for the strain they place upon a household; the wife/mother who is not in the home on a daily basis must provide alternatives for maid, chauffeuring, and child care services. An unfair dichotomy is thrust upon women: “family values” supposedly means a mother should stay at home and raise the kids; but this ridiculous premise presumes that the father’s presence is not equally important and fails to recognize the economic realities of a family unit. In reality, the absence of parents, not the mother, places the greatest strain upon a family unit. And what is missed by the family unit the most is not the cooking, cleaning and chauffeuring activities of a parent but parental involvement, guidance and educational assistance. A greater sophistication of life necessitates professional parenting skills. A trained Child Ecology professional, valued by society as more than a nanny, could be of tremendous assistance to parents struggling with child responsibilities of the 21st century.

iv. “Child-Centered” Child Care Centers

If the child care providers are trained and certified, then the next step is to make certain that the child care center is not just a video arcade or holding center. The current cultural concept of “day” care needs to be eliminated. To be “child-centered,” the licensed child care centers must be primarily viewed as preschools and continuing education centers which are staffed by trained personnel and provide stimulating

and political organization. *Id.*

It should be noted that a very popular “Social Ecology” major has been developed in the last decade at the University of California, Irvine.
educational environments.\textsuperscript{553}

At present, more than 60\% of all child care for preschoolers is provided in the home or in the home of another. This phenomenon has been fueled by many factors including the fact that the child care tax code provisions do not require that the child care provided be rendered by licensed professionals in order to qualify for the tax savings benefits. In addition, an individual choice motivation exists which prompts politicians to support providing child care tax credits and exclusions in order to place funds (inadequate though they may be) into the hands of individual taxpayers to pay for their own choice of child care. The premise is that if armed with adequate financial resources, working parents will prefer the choice of child care in the home. However, the inadequacy of these tax benefit funds has accomplished little in enhancing an individual parent's choice of child care.

The proposed child-centered child care centers would not eliminate a parent's individual choice to provide care in the home. If such care in the home or in the home of another is affordable, such parental choice is still available to them. Some governmental and business financial assistance could still be available for in home care but the primary focus would be upon the child-centered child care centers. A cultural shift to such centers providing quality education rather than day care only may not be as difficult as one might think. As organized child care facilities have become more available and accessible over the years, for example, the percentage of children receiving care in such centers has grown from 13\% in 1977 to 30\% in 1993.\textsuperscript{554} The premise should be "if you build it, they will come"—if quality child care is accessible, available and affordable, American parents will consider such centers a viable choice for their children's care.

For this quality type of child-centered child care, community and cooperative efforts must be encouraged if not required. Our societal values must be reflected in the regulations governing such licensed centers.\textsuperscript{555} Thus we turn to the crucial role of the public sector to ensure proper funding, administration and implementation of our master child care alliance.

\begin{itemize}
  \item \textsuperscript{553} As envisioned, the centers would focus upon the old-fashioned basics of language, reading, writing and arithmetic and would include museum trips, safety sessions, and nutrition and health classes. This focus could professionally address such problems as illiteracy and language skills for children of immigrants.
  \item \textsuperscript{554} See supra Part I.B.1.
  \item \textsuperscript{555} See infra Part V.D.3.b.i.
\end{itemize}
The lack of a clearly stated national child care policy by the federal government is the greatest single deficiency in the area of child care. The current, fragmented approach to child care assistance has proven ineffectual in making a significant difference in the availability and benefits of quality child care in America today. The federal government provided more than $4.5 billion of child care assistance in 1993 without a comprehensive, clearly stated underlying Congressional policy supporting such expenditures. The confusion at the national level has complicated child care assistance being offered by the states. Many of the states have simply chosen to follow the federal tax policy lead by implementing tax credit legislation for both individual and business taxpayers. This trickle-down approach to child care has thus perpetuated the federal tax inequities at the state level as well. Municipalities are financially pressed to provide the necessary capital for child care assistance in their communities.

a. Shifting Attitudes: Child Care as a Governmental Responsibility

The fact that government must play a role in the child care arena is obvious for social as well as moral reasons. Rather than resorting to a tax credit system as the primary method of providing child care assistance, the federal government needs to shift its attitude and focus its attention upon the goals, including valid, effective methods of implementing those goals. First, the benefit needs to be to and for the child (and, therefore, not necessarily in the form of a tax credit to the child’s parents). As previous commentators have recommended, child care needs to have the children themselves as the primary focus and not “a work-enabling, gender-equalizing, or poverty-combatting end.” Second, additional assistance must be both available to and affordable for low-income taxpayers for their child care needs. This could be accomplished through a combination of incentives targeting both business and the states. Third, the accessibility, availability, affordability and professionalism factors of child care must be driven by the cumulative economic, social and political efforts of the private/parental/public alliance.

Next, we must admit that governmental involvement is essential to

556. See supra Part III.B.
557. See supra Parts IV.A. & IV.B.
558. See Marton, supra note 460, at 333-34.
the success of any American child care system. Government needs to provide financial assistance, but not necessarily to the same degree as provided in France and Sweden. As previously presented, the financial burdens of child care in France are distributed as follows: 39% national; 36% municipal; 20% parents; and 5% employers. The financial burdens of child care in Sweden range from 17% to 31% at the national level; 59% to 83% at the municipal level; and 10% to 15% for the parents (employers directly provide no funding). In our capitalistic and democratic society, a balance of business, parental and governmental child care financial participation would be a more palatable solution. As previously proposed, business must carry a greater burden than the 5% or less financial participation witnessed in France and Sweden. Another valuable lesson we can learn from the French and Swedish systems is that governmental participation need not be restricted to primarily federal or national participation. Funding and administration must be shared by all governmental layers, with particular involvement at the state and municipal levels.

Finally, it must be recognized that "attitudes towards women and their proper social role have a profound influence on federal policy."\(^{559}\) We must be ever vigilant that federal policies regarding child care neither perpetuate nor reinforce already prevalent gender bias aspects of the federal tax code and beyond.

\section{b. Proposals}

\subsection{i. National Child Care Standards and Licensing By The States}

A first step towards implementation of a universal policy for child care in America would be Congressional approval of national child care standards. Despite two failed efforts in the past,\(^{560}\) Congress must once

\footnote{559. See Law, supra note 534, at 1252. An example of such federal policies at work would be the federal Social Security Act of 1935 which limited federally supported welfare to the "unemployables"—defined to include women and children without men to support them. Thus, defining women with children as unemployable reinforced the social and legal expectation that women were to work in the home and allowed wagework to be structured on the assumption that each worker had a wife to care for him and his children. \textit{Id.} at 1253.}

\footnote{560. In 1968, the Department of Health, Education and Welfare (HEW) formulated Federal Interagency Day Care Requirements (FIDCR) which proposed uniform quality standards of health, nutrition, safety and group size limits. However, confusion ensued as a result of poor drafting and inadequate enforcement provisions; Congress repealed the standards in 1982. See Baker, supra note 368, at 249-250.}

In 1971, President Nixon vetoed the Congressionally approved Comprehensive Preschool Education and Child Day Care Act which was to "provide every child a full and fair opportunity to reach his full potential," in part through a federal child care system. \textit{Id.} at 250
again grapple with the establishment of national standards. The current hodgepodge of varying state standards fosters an imbalance in the demand and supply equation\(^{561}\) and leaves parents and children at risk.

National child care standards for the care provided as well as the facilities would guarantee parents a minimal level of safe and supportive care for their children, regardless of their state of residency. Federal proficiency standards for child care providers would also guarantee a nationally recognized level of training for personnel employed by the facility or providing care in the home.\(^{562}\) If children and child care are to take a prominent role in today's society then implementation of national child care standards must be the starting point.

At present, to be eligible for the I.R.C. section 21 child care credit, the expenses paid by parents for child care do not need to be paid to licensed child care providers. Granted, many individuals pay grandparents or other relatives for in-home or in the home of another child care. However, even these child care providers should be required to satisfy minimal licensing standards (i.e., emergency medical service training, safety standards in the home, minimal nutrition training, etc.) as well as annual reporting requirements.

The states would then be the enforcers of the federally mandated child care standards. Enforcement through licensing (of both the facility and the providers) is an expensive proposition and the states will need financial assistance to make proper regulation a reality. Applications, scrutiny of the facilities, verification of qualifications of personnel, follow-up visitations; all of these activities require a state enforcement agency, personnel and accompanying administrative expenses. However, if sufficient financial incentives exist for the states (as will be proposed), this licensing requirement may prove to be more palatable.

ii. Developers: Child Care Centers Required for Residential Developments and Business Centers/Complexes

Governmental regulations at the federal, state, and municipal levels must be coordinated to require developers to include child-centered child care centers in their construction plans. This requirement would apply,

\(^{n.48}\)

561. See supra Part II.

562. The Child Ecology major or specialized subjects within the degree requirements could be utilized as the standard skills to be required of child care providers. See supra Part V.D.2.b.iii. A standardized national examination prepared and graded by a nationally recognized Association of Child Care Providers could also guarantee minimal health, safety, emergency, nutrition and teaching proficiency.
for example, to future residential developments of 50 or more units and to business center/complex developments in excess of a specified square footage. Again, child care is a cost of doing business—these developments at present could not be constructed without satisfying safety, fire, and utility standards for potential residents or employees. Child care is no less essential. In fact, offering child care centers has proven to be a competitive edge factor in the business arena today. Government involvement would simply ensure that minimum child care quality standards are satisfied. In Portland, Tennessee, for example, the city officials should not have to “hope” that the local businesses would assist with the cost of child care; it should be required of them.

iii. Revenue to the States and Municipalities

A most interesting phenomenon is presently occurring at the municipal or community level. For example, with supply and demand operating at full swing, the city of Portland, Tennessee, in May of 1996, announced plans to construct a $700,000 day-care center.\textsuperscript{563} The low 3.3% unemployment rate caused keen competition for unskilled, low-wage workers and local factory owners were complaining that they could not keep or attract workers.\textsuperscript{564} City officials responded with the day-care announcement, hoping that help in funding the day-care center would come from the 50 area plants which employ 6,000 workers.\textsuperscript{565}

This child care impetus at the local level is encouraging but is currently not an organized solution to the child care problem. Child care assistance at the local level could be enhanced by implementation of the proposals that developers construct child care centers as an integral part of a business center/complex plan and that employers either operate their own child care centers or be required to contribute to a child welfare fund through the Business Kiddie Tax. The stated goals of accessibility, availability, affordability and professionalism could easily be accomplished with a resulting increase in the number of licensed centers supported by adequate funding.

In addition, the revenue raised by the proposed “Business Kiddie

\textsuperscript{563} Portland Day Care Aims at Stabilized Workforce, Follows Sundquist’s Idea, THE COMMERCIAL APPEAL, Memphis, Tenn., May 28, 1996, at B-6. The center would operate 24 hours per day, 7 days a week and care for 160 children from 6 weeks to 12 years in age in each of three 8 hour shifts. A private firm would operate the center and rates for child care would be set for the city to break even. \textit{Id.}

\textsuperscript{564} \textit{Id.}

\textsuperscript{565} \textit{Id.} “Portland’s approach is the kind of partnership Gov. Don Sundquist’s task force on child care identified as necessary to help get people off welfare.” \textit{Id.}
"Tax" could be made available to states as a block grant based upon a combination of such factors as the number of children in the state and the number of low-income children in the state (consistent with the child care goal to benefit all children and in particular to benefit low-income children). This funding must carry with it the same stipulated uses itemized above for the matching fund incentive program.

iv. Subsidy Per Child: A Last Resort

If the goal is to benefit the child, what kind of assistance could flow to a child without tax expenditure assistance directly to the parents through either I.R.C. section 21 or section 129 or through the currently proposed nonrefundable child tax credit? Primarily an annual subsidy per child that schools, municipalities or even private child care centers could qualify to receive for construction and operation after satisfying specified criteria. The child (not the parent) would be the one entitled to the subsidy, to be available to the child in-kind rather than in cash.

The subsidy per child could be administered in one of three ways: (1) the subsidy per child could be greater for children at or below the poverty level than for children of middle or upper income parents and parents would then be required to pay a flat fee; or (2) the subsidy per child could be a flat subsidy with parents paying on an ability-to-pay, sliding scale basis (since children do not have a say as to who their parents are or how poor or wealthy they happen to be); or (3) a combination of (1) and (2) whereby the subsidy per child could be greater for low-income children and progressively decline as the parental income increases coupled with nominal parental payments by low-income

566. Ultimately, the child care provided would still need to meet the national child care standards and state licensing requirements.

567. Additional types of allowances have been proposed, i.e., the tax-internal recommendation of Professor Zelenak to enhance the dependency exemption based on the cost of subsistence. See Zelenak, supra note 479, at 359-387.

568. For example, assume two children, one from a low-income family and the other from an upper-income family, with child care costs of $250 per month per child. The total child care costs for the two children for the month would amount to $500. The subsidy for the low-income child could be the full $250 with the parent(s) paying $100 and the subsidy for the upper-income child could be $50 with the parent(s) also paying $100.

569. Assuming the same factual scenario as in the previous footnote, the subsidy per child payable to the child care provider could be $150 each. The low-income parent(s) would then pay only $50 per month while the upper-income parent(s) would be required to pay $150 per month.
parents and higher payment responsibilities for upper-income parents. 570

A subsidy in any form is controversial and carries with it a plethora of tax policy considerations. 571 Again, the stated goal is that children of all parents, rich or poor, should be entitled to accessible and available quality child care. Regarding affordability, those able to afford child care should pay based upon their ability to pay. Although the amount of actual cash subsidy to a child care provider might be small, the subsidy still would be provided to children of upper-income parents by virtue of the fact that quality, educational child care offered by trained professionals would be both accessible and available. Upper-income parents would simply be required to pay more since they are able to pay more.

Alternatively, a subsidy could be provided by increasing the already existing I.R.C. section 32 Earned Income Tax Credit. Such a proposal, however, would magnify the substantial existing drawbacks of the EITC, 572 only reaching the low-income wage earner and only providing a nominal, indirect benefit to the child.

In any form, the organized subsidy approach is the least politically palatable proposal. Contrary to the European tradition, a per child subsidy would not be compatible with our cultural history. The subsidy approach requires a tremendous emphasis upon federal government involvement which is clearly contrary to the current decentralization climate (witness the recent welfare reform legislation eliminating federal Aid to Families with Dependent Children and replacing it with the system of block grants to the states).

In addition, funding such a subsidy program would require monumental federal revenue. It is not at all clear that the governmental child care responsibility belongs solely to the federal government—in fact, this Article has argued that the governmental responsibility must be shared by the federal, state and municipal governments. Tax revenue through

---

570. Assume the same factual scenario as footnote 568. Under this proposal, the subsidy payable to the child care provider could be $250 for the low-income child and $50 for the upper-income child; parental payments would then be nothing for the low-income parent(s) and $200 for the upper-income parent(s).

571. A subsidy encounters head-on the tax policy debate between child care as a cost of earning income or child care as a subsidy. Underlying this debate are fundamental issues regarding the concept of income as well as the tax norms of ability-to-pay versus neutrality. For a thorough analysis of this debate and the application of these tax norms in the child care arena, see Heen, supra note 125, at 203-09; and Zelenak, supra note 479, at 388-400.

572. See supra Part V.B.1.
the federal individual income tax as well as the Business Kiddie Tax would likely not be sufficient to support such a subsidy program. Companies could be given a tax benefit for contributing to the child subsidy fund but the business incentive to actually create and provide on-site child care would likely be reduced or eliminated. Thus, the subsidy approach may be an acceptable means of attaining the stated comprehensive child care goals but is truly not a realistic alternative at this time.

VI. CONCLUSION

My father was a professor at the local university for more than 20 years.573 A required first year course in the business curriculum (developed by my father) was Business, Society and Government.574 The course focused upon the interrelationship and interdependence of all three sectors from political, social and economic perspectives. It is obvious to me now (and, perhaps, to you as well) that he taught this course not only at school, but at the family dinner table as well.

Every lawyer understands that the first step to a "right answer" is to ask the right question. To me, the questions to be asked and answered in the area of child care have always been: (1) What is the clearly stated goal, and (2) How do we get there? This article has argued for the goal of a comprehensive federal child-centered policy toward child care (not day care) implemented through a business, society and government cooperative effort—my so-called "private/parental/public" alliance. When we answer the question "How do we get there?" with this alliance it brings to the attention of all Americans the fact that the responsibility for children and child care belongs squarely in all three camps.

Acceptance of this joint responsibility of business, society and government and implementation of the alliance would represent attitudinal and fiscal recognition of everyone's responsibility to children. It is the responsibility of all to provide adequate child care to children regardless of how rich or poor their parents happen to be, whether they live in an urban ghetto or a gated suburban community, whether their parents work for a Fortune 500 corporation or for the local family-run restaurant. Also, gender, race and class should be irrelevant in the area of child care; children are entitled to child care on the basis of being a

573. John P. Nantell (1913-1995) was an attorney, professor, soldier and poet—but mostly he was a wonderful parent. His actions and philosophy influenced me greatly—and much of this Article as well.

574. The students referred to the course as "B.S. & G." Fortunately, Dad had a sense of humor.
This is not to say that the proposed alliance is the perfect solution. As Professor Dowd so eloquently stated:

Our way of thinking about work and family is particularly important with respect to two issues: defining and relating important parts of any new structure, and avoiding a single model of a transformed workplace. The conceptualization of work, family, parenting, and the best interests of children involve fundamental moral and social issues that lie at the heart of work-family issues. The rethinking of those core elements, and the vision of what could be, need not be limited to one "right" view; indeed, that is precisely what should be avoided. New ideas, constant discourse, and dreams are critically and equally important. In the area of child care, it is time to abandon the old restraints of tax policies and the tax paradigm and to think about child care in its fullest context of business, society and government. There is nothing wrong with dreams—visions of what could or should be. It is time for all of us to put the foundations under them.

575. Perhaps "entitled" is a poor choice of words in this current political environment but it is an accurate (if unpopular) statement nonetheless.

576. Dowd, supra, note 27, at 475-476.

577. See Henry David Thoreau, Walden 562-63 (1854). Thoreau states:

I learned this, at least, by my experiment; that if one advances confidently in the direction of his dreams, and endeavors to live the life which he has imagined, he will meet with a success unexpected in common hours . . . . If you have built castles in the air, your work need not be lost; that is where they should be. Now put the foundations under them.

Id.