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# HEAL THE SUFFERING CHILDREN: FIFTY YEARS AFTER THE DECLARATION OF WAR ON POVERTY

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**Abstract:** Fifty years ago, President Lyndon B. Johnson declared the War on Poverty. Since then, the federal tax code has been a fundamental tool in providing financial assistance to poor working families. Even today, however, thirty-two million children live in families that cannot support basic living expenses, and sixteen million of those live in extreme poverty. This Article navigates the confusing requirements of an array of child-related tax benefits including the dependency exemption deduction, head of household filing status, the Earned Income Tax Credit, and the Child Tax Credit. Specifically, this Article explores how altering the definition of a qualifying child across these tax benefits might provide financial relief for working families. The Article concludes that the elimination of outdated citizenship or residency requirements would reduce taxpayer confusion and result in more effective tax benefits to help lift working families out of poverty.

## INTRODUCTION

Commemorating the fiftieth year anniversary of the War on Poverty, the Article revisits the past with poetic, visual imagery of the movement leaders. This Article is a nontraditional mix of reflection on the past, portrayal of the present, and a practical tax prescription for the future. The Article lays the foundation for the current state of poverty in America by describing movement leaders and the present demographics of the poor, focusing on children. Next, the Article takes an unexpected, but practical turn into tax law to address and

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resolve one small problem in the increasing antipoverty tax puzzle. By examining the historical origin of a steadfast, but now troublesome requirement for child-related tax benefits, the Article describes a front line challenge for working poor families. Once presented, the World War II requirement is shown to be outdated and redundant. Moreover, Congress has an easy remedy with its complete elimination given several other provisions that address any remaining government concerns. Finally, the Article proposes a reworking of the requirements for child-related tax benefits that are increasingly burdensome on working poor families. This Article challenges Americans to face the scandal of poverty and commit to healing the suffering children now—fifty years after declaring the War on Poverty.

## I. THE PICTURE OF POVERTY: PAST & PRESENT

Leaders new and old have shaped both policies and public perception regarding poverty. Although important figures since President John Fitzgerald Kennedy have denounced the injustice of poverty, the present picture of poverty in America is far from perfect.

### A. *The Past: The War on Poverty*

President John Fitzgerald Kennedy, Dr. Martin Luther King, Jr., and President Lyndon Baines Johnson were all vocal in their concerns that freedom and poverty cannot coexist. Although President Johnson succeeded in launching the War on Poverty, it is clear that the efforts of these past leaders did not win it.

#### 1. 1961: President John F. Kennedy

On a snow-filled, frigid, but sunlit day in late January of 1961, a tall and confident John F. Kennedy, just 43 years young, stood beside our beautiful First Lady and his elegant wife, Jacqueline Kennedy.<sup>1</sup> Jackie was just 32 years young and a new mother to a precious baby boy they called “John-John” and a beloved three-year-old toddler named Caroline.<sup>2</sup> In his inaugural address, President Kennedy told his fellow Americans, “ask not what your country can do for you—ask what you can do for your country. My fellow citizens of the world: ask not what America will do for you, but what together we can do for

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<sup>1</sup> See *Historic Speeches*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, <http://www.jfklibrary.org/JFK/Historic-Speeches.aspx> (last visited Apr. 14, 2014) (describing the day as frigid and notable because Kennedy was the youngest president and the first Catholic).

<sup>2</sup> See *id.*

the freedom of man.”<sup>3</sup> President Kennedy reminded us that “[i]f a free society cannot help the many who are poor, it cannot save the few who are rich.”<sup>4</sup>

Coming from a family that embodied service and represented wealth then and today, Kennedy had already served his country as a Navy commander of torpedo boats.<sup>5</sup> During his tour of duty he saved several lives by swimming for hours after he had been injured and his torpedo boat had been destroyed. For his outstanding courage, endurance, and leadership, Kennedy earned the Purple Heart, three Bronze Stars, a World War II Victory Medal, and the Navy and Marine Corps Medal.<sup>6</sup>

## 2. 1963: Reverend Dr. Martin Luther King, Jr.

On a stifling, steamy Washington, D.C. day in August of 1963, Reverend Dr. Martin Luther King, Jr., just 34 years young, stood tall and confident at the Lincoln Memorial.<sup>7</sup> Before almost 300,000 passive resisters demanding jobs, equality, and justice, Dr. King told his fellow Americans about his hopes, ambitions and dreams:<sup>8</sup>

I say to you today, my friends, so even though we face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day this nation will rise up and live out the true meaning of its creed: “We hold these truths to be self-evident, that all men are created equal.”<sup>9</sup>

Coming from a family that embodied faith and cherished freedom, Dr. King was a brilliant student who studied sociology at Morehouse College at age fifteen and graduated as valedictorian of his theology class.<sup>10</sup> At age twenty-five, he earned a Ph.D. in Systematic Theology from Boston University.<sup>11</sup>

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<sup>3</sup> *Inaugural Address, 20 January 1961*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, <http://www.jfklibrary.org/Asset-Viewer/BqXIEM9F4024ntF17SVAjA.aspx> (last visited Mar. 7, 2014) [hereinafter *Inaugural Address*].

<sup>4</sup> *Id.* President Kennedy appointed Robert Frost as the United States’ first presidential inaugural poet in late 1960. Mr. Frost composed a poem titled “The Preface,” but was unable to read it off of the page he held because of intense sunlight reflected off of the heavy snow blanketing the city. Mr. Frost recounted a poem from memory titled “The Gift Outright.” See Aberjhani, *Text and Meaning in Robert Frost’s Dedication: For John F. Kennedy*, EXAMINER, Nov. 24, 2013, <http://www.examiner.com/article/text-and-meaning-robert-frost-s-dedication-for-john-f-kennedy-part-1-of-2>.

<sup>5</sup> See *Inaugural Address*, *supra* note 3.

<sup>6</sup> See *id.*

<sup>7</sup> See *Martin Luther King Jr. Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/martin-luther-king-jr-9365086> (last visited Apr. 2, 2014) [hereinafter *MLK Bio*].

<sup>8</sup> See *id.*

<sup>9</sup> Dr. Martin Luther King, Jr., *I Have a Dream Speech* (Aug. 28, 1963) (transcript available in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 81, 85 (Clayborne Carson et al. eds., 2002)) (omitting audience reaction).

<sup>10</sup> See *MLK Bio*, *supra* note 7.

<sup>11</sup> See *id.*

At thirty-four, Dr. King was named the Time magazine person of the year.<sup>12</sup> At thirty-five, he was the youngest person to receive the Nobel Peace Prize.<sup>13</sup> Dr. King reminded the world again and again about the basic human need for dignity, the power of passive resistance, and the pernicious prison of poverty. The Sunday before his death at the Poor People's Campaign on March 31, 1968, Dr. King stood in our National Cathedral and said "if a man doesn't have a job or an income, he has neither life nor liberty nor the possibility for the pursuit of happiness. He merely exists."<sup>14</sup> Dr. King feared that America's wealth would be its salvation and its downfall. He recounted that America had the resources to end poverty, but questioned whether Americans had the will.<sup>15</sup>

### 3. 1964: President Lyndon B. Johnson & Sargent Shriver

On January 8, 1964, in his State of the Union Address, President Lyndon B. Johnson proclaimed: "This administration today, here and now, declares unconditional war on poverty in America . . . we shall not rest until that war is won. The richest nation on earth can afford to win it. We cannot afford to lose it."<sup>16</sup> Johnson wisely appointed Sargent Shriver as his top general in the War on Poverty.<sup>17</sup> A Yale Law School graduate and attorney, Shriver walked, talked, lived and breathed a full life committed to public service. Sargent Shriver founded the Peace Corps, Job Corps, VISTA, Head Start, Community Action, Upward Bound, Legal Services, and the Office of Economic Opportunity, and actively participated in the Special Olympics, which his life partner, Eunice Kennedy Shriver, orchestrated in their backyard.<sup>18</sup>

With a budget of \$1 billion, Shriver developed a multi-faceted War on Poverty, which became the flagship initiative of the Johnson Administration.<sup>19</sup> Shriver described his mission as:

a means of making life available for any and all pursuers. It does not try to make men good—because that is moralizing. It does not try to

<sup>12</sup> See *id.*

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

<sup>14</sup> Dr. Martin Luther King, Jr., Remaining Awake Through a Great Revolution Speech (Mar. 31, 1968) (transcript available at DR. MARTIN LUTHER KING, JR. RESEARCH & EDUC. INST., [http://mlk-kpp01.stanford.edu/index.php/kingpapers/article/remaining\\_away\\_through\\_a\\_great\\_revolution/](http://mlk-kpp01.stanford.edu/index.php/kingpapers/article/remaining_away_through_a_great_revolution/)).

<sup>15</sup> See *id.*

<sup>16</sup> See President Lyndon B. Johnson, State of the Union Address (Jan. 8, 1964) (video recording available at *Civil Rights, Tax Cuts, and the War on Poverty*, LBJ PRESIDENTIAL LIBRARY, <http://www.lbjlibrary.org/press/civil-rights-tax-cuts-and-the-war-on-poverty> (last visited May 2, 2014)).

<sup>17</sup> *Political Leadership*, SARGENT SHRIVER PEACE INST., <http://www.sargentshriver.org/sarges-legacy/politics-policy> (last visited May 2, 2014). Sargent Shriver was sworn in as the coordinator for the War on Poverty in February 1964. *Id.*

<sup>18</sup> See *Empowerment*, SARGENT SHRIVER PEACE INST., <http://www.sargentshriver.org/sarges-legacy/war-on-poverty> (last visited May 2, 2014).

<sup>19</sup> See *id.*

give men what they want—because that is catering. It does not try to give men false hopes—because that is deception. Instead, the War on Poverty tries only to create the conditions by which the good life can be lived—and that is humanism.<sup>20</sup>

#### 4. The End

Tragically, Camelot never materialized in America. President Kennedy was murdered while riding with his First Lady in a celebratory motorcade in Dallas on November 22, 1963.<sup>21</sup> While Shriver fought tirelessly, the War on Poverty soon lost President Johnson's financial support during the Vietnam War.<sup>22</sup> Dr. King prophetically pledged on April 3, 1968 that he had seen the Promised Land and "that we, as a people, will get to the Promised Land."<sup>23</sup> The next evening at 6:01 p.m., King was gunned down at the Lorraine Motel in Memphis, Tennessee.<sup>24</sup> While much has changed in the decades since these bold visionaries walked on American soil, much has not. Poverty, prejudice, war, and guns continue to plague and ravage lives.

#### B. *The Present: The War on the Poor*

Today, leaders worldwide deplore societal acceptance of a class of hungry and uneducated poor.

##### 1. 2013: Pope Francis

Pope Francis, Time magazine's Person of the Year in 2013, has humbly and gracefully demonstrated his passion and his mission for confronting poverty. He has focused worldwide attention on the "scandal of poverty in a world of plenty as a piercing moral challenge for the church and the whole human community."<sup>25</sup> He distresses that so many poor go hungry and uneducated despite the vast wealth and resources available in the world.<sup>26</sup> Pope Francis prays

<sup>20</sup> *Id.*

<sup>21</sup> See *JFK in History*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, <http://www.jfklibrary.org/JFK/JFK-in-History.aspx> (last visited May 2, 2014).

<sup>22</sup> See *Empowerment*, *supra* note 18.

<sup>23</sup> Dr. Martin Luther King, Jr., I've Been to the Mountaintop Speech (Apr. 3, 1968) (video and transcript available at AM. RHETORIC, <http://www.americanrhetoric.com/speeches/mlkivebeentothe-mountaintop.htm> (last visited May 2, 2014)).

<sup>24</sup> *MLK Bio*, *supra* note 7. At graveside, Reverend Abernathy proclaimed, "The grave is too narrow for his soul." HAMPTON SIDES, HELLHOUND ON HIS TRAIL: THE ELECTRIFYING ACCOUNT OF THE LARGEST MANHUNT IN HISTORY 285–86 (2011). "On his tombstone was written, 'Free at Last, Free at Last, Thank God Almighty, I'm Free at Last.'" *Id.*

<sup>25</sup> Robert W. McElroy, *A Church for the Poor*, AM. MAG., Oct. 21, 2013, available at <http://americanmagazine.org/church-poor>.

<sup>26</sup> See Pope Francis, Address of Pope Francis to the Students of the Jesuit Schools of Italy and Albania (June 7, 2013) (transcript available at LIBRERIA EDITRICE VATICANA, <http://www.vatican.va/>

that “the cry of the poor may not leave us indifferent, the suffering of the sick and the one who is in need may not find us distracted, the solitude of the elderly and the fragility of children may move us.”<sup>27</sup> When asked for what miracle he prays, the Pope responded that he prays to heal the suffering children.<sup>28</sup>

## 2. 2008–present: President Barack Obama

On December 4, 2013, President Barack Obama spoke at a town hall in southeastern Washington, D.C., an area known for its large population of impoverished citizens.<sup>29</sup> President Obama decried increasing income inequality as more pronounced in the United States than in other countries.<sup>30</sup> He said Americans should be offended that a child born into poverty has such a hard time escaping it: “[i]t should compel us to action. We’re a better country than this.”<sup>31</sup>

## 3. 1918–2013: Nelson Mandela

The very next day in South Africa, ninety-five-year-old Nelson Mandela passed peacefully into perpetual slumber.<sup>32</sup> After a lifetime of fighting for justice for the most vulnerable among us, Mandela stood up to apartheid and endured twenty-seven years of imprisonment.<sup>33</sup> He won the Nobel Peace Prize in 1993.<sup>34</sup> In 2005, a frail Mandela warmed the hearts of more than 20,000 at London’s Trafalgar Square with his effervescent smile and unparalleled pas-

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holy\_father/francesco/speeches/2013/june/documents/papa-francesco\_20130607\_scuole-gesuiti\_en.html#Dear\_Girls\_and\_Boys,\_Dear\_Young\_People).

<sup>27</sup> Deacon Leonard Lockett, *In His Light: Time’s Person of the Year . . . Humanity Servant of the Year*, TEX. CATH. HERALD NEWS, Jan. 14, 2014, available at <http://www.archgh.org/mobile/default.aspx?pid=500&hid=1864>.

<sup>28</sup> *See If Pope Francis Could Do One Miracle, He Would Heal Suffering Children*, HUFFINGTON POST (Dec. 10, 2013), [http://www.huffingtonpost.com/2013/12/10/pope-francis-miracle\\_n\\_4420560.html](http://www.huffingtonpost.com/2013/12/10/pope-francis-miracle_n_4420560.html). The Pope celebrated his seventy-seventh birthday on December 17, 2013, inviting four homeless men and their dog to join him at the Vatican. *See Pope Francis Invites Homeless to Breakfast at Vatican on His 77th Birthday*, NEWS.COM.AU (Dec. 17, 2013), <http://www.news.com.au/world/pope-francis-invites-homeless-to-breakfast-at-vatican-on-his-77th-birthday/story-fndir2ev-1226785397475>.

<sup>29</sup> *See Poverty in Southeast Washington*, EXAMINER.COM (May 23, 2010), <http://www.examiner.com/article/poverty-southeast-washington>.

<sup>30</sup> Jim Kuhnhenh, *Obama: Income Inequality Is “Defining Challenge of Our Time,”* HUFFINGTON POST (last updated Dec. 5, 2013), [http://www.huffingtonpost.com/2013/12/04/obama-income-inequality\\_n\\_4384843.html](http://www.huffingtonpost.com/2013/12/04/obama-income-inequality_n_4384843.html) (vowing to focus the last three years of his presidency on addressing the discrepancy between the wealthy and the poor).

<sup>31</sup> *Id.*

<sup>32</sup> *See The Life & Times of Nelson Mandela*, NELSON MANDELA FOUND., <http://www.nelsonmandela.org/content/page/biography> (last visited May 2, 2014).

<sup>33</sup> *See id.*

<sup>34</sup> *See id.*

sion.<sup>35</sup> Coming out of retirement to participate in the 2005 “Make Poverty History” campaign, Mandela spoke of poverty and inequality as man-made “terrible scourges,” comparable to slavery and apartheid that humankind should eradicate in the name of justice.<sup>36</sup>

### C. Poverty, Injustice & Gross Inequality

The number of Americans living in poverty has in many ways reached record levels. By perceiving how future Americans will view laws perpetuating poverty as unjust to how current Americans view past laws as unjust, it is apparent that modern tolerance of so many poor in a wealthy society is unacceptable.

#### 1. The Facts

Almost forty-seven million people live in poverty in America today (15% of the population), the largest number since the publication of poverty estimates.<sup>37</sup> Tragically, more than sixteen million children (23%) live in poverty.<sup>38</sup> The percentage of children living in poverty soars for children of color: eleven million children of color—40% of African American children and 34% of Hispanic or Latino children—live in poverty.<sup>39</sup>

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<sup>35</sup> See Nelson Mandela, Speech in Trafalgar Square (Feb. 3, 2005) (transcript available at *In Full: Mandela’s Poverty Speech*, BBC NEWS (Feb. 5, 2005), [http://news.bbc.co.uk/2/hi/uk\\_news/politics/4232603.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/4232603.stm)).

<sup>36</sup> See *id.* Excerpts from Mandela’s speech are as follows:

[A]s long as poverty, injustice and gross inequality persist in our world, none of us can truly rest . . . . Massive poverty and obscene inequality are such terrible scourges of our times—times in which the world boasts breathtaking advances in science, technology, industry and wealth accumulation—that they have to rank alongside slavery and apartheid as social evils . . . . Like slavery and apartheid, poverty is not natural. It is man-made and it can be overcome and eradicated by the actions of human beings. And overcoming poverty is not a gesture of charity. It is an act of justice. It is the protection of fundamental human right, the right to dignity and a decent life. While poverty persists, there is no true freedom.

*Id.*

<sup>37</sup> See *Income, Poverty and Health Insurance in the United States: 2011—Tables & Figures*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/poverty/data/incpovhlth/2011/tables.html> (last visited May 2, 2014).

<sup>38</sup> *Children in Poverty*, KIDS COUNT DATA CTR., <http://datacenter.kidscount.org/data/tables/43-children-in-poverty?loc=1&loct=1#detailed/1/any/false/868,867,133,38,35/any/321,322> (last visited May 2, 2014). In 2010, roughly 400 million children lived in extreme poverty (defined as living on under \$1.25 per day) or one-half of all children in low-income countries. See Pedro Olinto et al., *The State of the Poor: Where Are the Poor, Where Is Extreme Poverty Harder to End, and What Is the Current Profile of the World’s Poor?*, WORLD BANK ECON. PREMISE 1, 5 (Oct. 2013), <http://site.resources.worldbank.org/EXTPREMNET/Resources/EP125.pdf>.

<sup>39</sup> *Children in Poverty*, *supra* note 38.



For the first time in modern history, a majority of all children in public schools in the southern and western parts of the United States live in poverty, and almost 1.2 million public school children are homeless at some point during the year.<sup>40</sup> In fact, America has the greatest number of homeless women and children of any industrialized nation.<sup>41</sup> Not since the Great Depression have so many families been without homes.<sup>42</sup> On any given day more than 200,000 children have no place to live, and over the course of a year more than 1.6 million children will suffer homelessness.<sup>43</sup> In a 2013 survey of mayors of twenty-five cities, almost all expect the demand for food assistance to increase in 2014, and the majority expect homelessness to increase as well.<sup>44</sup> A recent study from Wider Opportunities for Women finds that 45% of all Americans (including 55% of all children) live in households that lack economic security—the ability to afford basic food, transportation, and medical needs, as well as modest savings for emergencies and retirement.<sup>45</sup> The majority of children in America are living in or on the precipice of poverty.

Prevention of childhood poverty tops the list of social justice issues in need of urgent attention because of the profound way in which it undermines the goal of establishing greater equality of life today and in the future. A society that deprives its youngest members the opportunities of participation fundamentally undermines its future by wasting enormous potential and by critically damaging its most vulnerable members.<sup>46</sup> In 2010, more than eleven mil-

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<sup>40</sup> See NAT'L CTR. ON FAMILY HOMELESSNESS, THE CHARACTERISTICS AND NEEDS OF FAMILIES EXPERIENCING HOMELESSNESS 1, 5 (Dec. 2011), available at <http://www.familyhomelessness.org/media/306.pdf> [hereinafter FAMILIES EXPERIENCING HOMELESSNESS]; S. EDUC. FOUND., A NEW MAJORITY: LOW INCOME STUDENTS IN THE SOUTH AND NATION 2 (Oct. 2013), available at <http://www.southerneducation.org/cmspages/getfile.aspx?guid=0bc70ce1-d375-4ff6-8340-f9b3452ee088>. While this has been true for the South since 2005, the West just hit this point in 2010. See A NEW MAJORITY, *supra*.

<sup>41</sup> FAMILIES EXPERIENCING HOMELESSNESS, *supra* note 40, at 1 (noting that on any given day more than 200,000 children do not have a home). Simply put, housing costs have outpaced fulltime wages. See *id.* at 2. There is no place in the United States that a worker working fulltime at minimum wage can afford a one-bedroom apartment priced at fair-market rent. *Id.*

<sup>42</sup> *Id.* at 1.

<sup>43</sup> *Id.*

<sup>44</sup> U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES: A 25-CITY SURVEY 12, 23 (Dec. 2008), available at [http://usmayors.org/pressreleases/documents/hungerhomelessnessreport\\_121208.pdf](http://usmayors.org/pressreleases/documents/hungerhomelessnessreport_121208.pdf).

<sup>45</sup> Shawn McMahon & Jessica Horning, *Living Below the Line: Economic Insecurity and America's Families*, WIDER OPPORTUNITIES FOR WOMEN 3 (2013), available at <http://www.wowonline.org/wp-content/uploads/2013/09/Living-Below-the-Line-Economic-Insecurity-and-Americas-Families-Fall-2013.pdf>.

<sup>46</sup> See *id.*; Charles M. Blow, *America's Exploding Pipe Dream*, N.Y. TIMES, Oct. 29, 2011, at A21. Blow writes:

We have not taken care of the least among us. We have allowed a revolting level of income inequality to develop. We have watched as millions of our fellow countrymen have fallen into poverty. And we have done a poor job of educating our children and

lion children—or almost one-half of all children under seven years old—lived in conditions that did not support basic living expenses.<sup>47</sup> Even worse is the fact that almost three million children under the age of seven lived below one-half of the federal poverty line.<sup>48</sup>

The price Americans will pay for the descent of these children into indigence will be high and persistent. According to the Ann E. Casey Foundation, “[o]n almost every measure, children who experience chronic or deep poverty, especially when they are young, face tougher developmental and social barriers to success.”<sup>49</sup> Adverse outcomes are not limited to those who spend all of their early years in poverty.<sup>50</sup> “Even brief experiences of poverty in early childhood can have lasting effects on health, education, employment and earning power.”<sup>51</sup>

America was ranked the second highest country on the scale of “relative child poverty” in the United Nation’s Children’s Fund’s (UNICEF’s) recent study of the world’s richest countries.<sup>52</sup> More than 23% of children in the United States live in households with equivalent income lower than 50% of the national median.<sup>53</sup> Among all the countries ranked only Romania had a higher relative child poverty rate.<sup>54</sup> The report notes that while some might argue that it is inappropriate to compare the United States to small, homogenous countries like Sweden and Luxembourg, it is fair to compare the United States with Canada.<sup>55</sup>

Sheldon Danziger, the director of the National Poverty Center at the University of Michigan, responded to UNICEF’s study by noting that “[a]mong

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now threaten to leave them a country that is a shell of its former self. We should be ashamed.

*Id.*

<sup>47</sup> See Taylor Robbins et al., *Young Children at Risk: National and State Prevalence of Risk Factors*, NAT’L CTR. FOR CHILDREN IN POVERTY 2 (Oct. 2012), available at [http://www.nccp.org/publications/pdf/text\\_1073.pdf](http://www.nccp.org/publications/pdf/text_1073.pdf).

<sup>48</sup> *See id.*

<sup>49</sup> ANNIE E. CASEY FOUND., 2012 KIDS COUNT DATA BOOK 8 (2012), available at <http://www.aecf.org/~media/Pubs/Initiatives/KIDS%20COUNT/123/2012KIDSCOUNTDataBook/KIDSCOUNT2012DataBookFullReport.pdf>.

<sup>50</sup> *See id.*

<sup>51</sup> *Id.*

<sup>52</sup> Saki Knafo, *U.S. Child Poverty Second Highest Among Developed Nations: Report*, HUFFINGTON POST (May 30, 2012), [www.huffingtonpost.com/mobileweb/2012/05/30/us-child-poverty-report-unicef\\_n\\_155533.html](http://www.huffingtonpost.com/mobileweb/2012/05/30/us-child-poverty-report-unicef_n_155533.html). “Relative child poverty” refers to a child living in a household where the disposable income is less than one-half of the national median income. *Id.* Critics argue that relative poverty is not equivalent to absolute poverty. *Id.* The report counters the argument by noting that poverty is a relative concept. *See id.*

<sup>53</sup> See PETER ADAMSON, UNICEF: INNOCENTI RESEARCH CTR., MEASURING CHILD POVERTY: NEW LEAGUE TABLES OF CHILD POVERTY IN THE WORLD’S RICHEST COUNTRIES 21 (May 2012), available at [http://www.unicef-irc.org/publications/pdf/rc10\\_eng.pdf](http://www.unicef-irc.org/publications/pdf/rc10_eng.pdf).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 19–21.

rich countries, the U.S. is exceptional. We are exceptional in our tolerance of poverty.”<sup>56</sup> Danzinger further explained that while Canada and the United States have a similar child poverty rate of 25.1%, Canada’s rate drops to 13.1% after government taxes, benefits, and other social programs, while the U.S.’s barely budges.<sup>57</sup> “Basically, other countries do more,” Danzinger said.<sup>58</sup> “They tend to have minimum wages that are higher than ours. The children would be covered universally by health insurance. Other countries provide more child care.”<sup>59</sup>

Even more compelling is a comparison to the United Kingdom. Jane Waldfogel, a professor of social work at Columbia University, wrote that the Labour Government’s efforts to combat child poverty in the United Kingdom have been larger and more sustained than in the United States.<sup>60</sup> She notes that, shortly after Tony Blair became prime minister in 1997, he instituted programs modeled after President Lyndon Johnson’s War on Poverty, such as the Working Tax Credit which is similar to the Earned Income Tax Credit (“EITC”).<sup>61</sup> The Labour Party spent almost one percent of gross domestic product, or more than \$20 billion per year in today’s dollars, on public support for children.<sup>62</sup> One percent of U.S. gross domestic product would provide about \$130 billion.<sup>63</sup> Within five years the number of children living in “absolute poverty” in the United Kingdom fell by 50%.<sup>64</sup> Currently, 13.4% of British children live in relative poverty, compared to 20% in the United States.<sup>65</sup>

Poverty in America is an immoral and costly social and economic injustice. Like cancer, it is pernicious and enters the scene unnoticed, but grows uncontrollably until it destroys hope, promise, and opportunities for individuals, families, and our nation. With more than one-half of our children living in financially vulnerable households, America must make meaningful and significant changes to reduce poverty and save our children. Children are our obligation and one hundred percent of our future.

<sup>56</sup> Knafo, *supra* note 52.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See Jane Waldfogel, *Investing in Our Children: The U.S. Can Learn from the U.K.*, CTR. FOR AM. PROGRESS, July 30, 2007, <http://www.americanprogress.org/issues/poverty/news/2007/07/30/3323/investing-in-our-children-the-u-s-can-learn-from-the-u-k/>.

<sup>61</sup> See *id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Randeep Ramesh, *Britain Leads in War on Poverty According to US Academic*, GUARDIAN (Mar. 23, 2010), <http://www.theguardian.com/society/2010/mar/24/britain-leads-war-on-poverty>.

## 2. America's Tolerance of the Intolerable

Why do Americans tolerate poverty? Americans may disagree on what justice is, but they generally agree when something is unjust.<sup>66</sup> Grossly unjust behaviors and laws often become painfully evident only in hindsight. But neither behavior nor laws should stand in the way of justice. Americans have been fighting against injustice since before the birth of the nation. Today, society faces intolerable economic injustices in America. Yet we tolerate these injustices and enact laws that reinforce and exacerbate them.<sup>67</sup>

In a recent essay, Professor William P. Quigley described one tool he uses to expose unjust laws.<sup>68</sup> Professor Quigley proposes a one hundred year look back and then a one hundred year look forward to view laws outside of the context of current culture, acceptance, and normativity.<sup>69</sup> Professor Quigley provided examples: In 1911, women had no right to vote and no protection from domestic violence or spousal rape; racial segregation was legal and African Americans and Latinos were commonly lynched; neither poor children nor elders had access to health care; dumping of waste into our water and air was the normal course of business; people with disabilities, child laborers, union organizers, and the criminally accused had no legal protections or rights to representation.<sup>70</sup>

The next step is to imagine a person one hundred years from now looking back at our laws through the same lens.<sup>71</sup> What laws today will look as patently unjust to those in 2114 as the foregoing examples do to us now? The list will undoubtedly include the tolerance, stigmatization, degradation, punishment, and even criminalization of the poor,<sup>72</sup> especially children, by one of the richest nations in the world.<sup>73</sup> There is no silver bullet to eradicate poverty. Never-

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<sup>66</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* 52–53 (Belknap Press rev. ed. 1999). John Rawls theorized two principles of justice that he felt would be inherently agreed to:

First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.

*Id.*

<sup>67</sup> See *Economic Opportunity for All*, RESULTS, [http://www.results.org/issues/us\\_poverty\\_campaigns/economic\\_opportunity\\_for\\_all/tax\\_policy\\_and\\_poverty](http://www.results.org/issues/us_poverty_campaigns/economic_opportunity_for_all/tax_policy_and_poverty) (last visited May 2, 2014).

<sup>68</sup> See William Quigley, *Justice and Law: The One Hundred Year Rule*, 15 CUNY L. REV. 1, 1 (2011).

<sup>69</sup> *Id.* at 2.

<sup>70</sup> *Id.* at 2–4.

<sup>71</sup> *Id.* at 4–6.

<sup>72</sup> See Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. OF CRIM. L. & CRIMINOLOGY 643, 644–48 (2011) (arguing that poverty has effectively been criminalized in the United States); Barbara Ehrenreich, *Is It a Crime to Be Poor?*, N.Y. TIMES, Aug. 8, 2009, at WK9, available at [http://www.nytimes.com/2009/08/09/opinion/09ehrenreich.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/08/09/opinion/09ehrenreich.html?pagewanted=all&_r=0).

<sup>73</sup> See Quigley, *supra* note 68, at 5–6.

theless, we must do all we can to stop the insidious and immoral growth of poverty that threatens our children and America's future.<sup>74</sup>

This Article will begin this discussion by recommending one concrete statutory change to provide better access to economic justice in our federal income tax system.

## II. THE TREATMENT OF FAMILIES WITH CHILDREN UNDER THE INTERNAL REVENUE CODE OF 1986, AS AMENDED

Child-related tax benefits have done much to relieve poverty, but they could be more effective. For tax years beginning in 2005, Congress attempted to simplify the process of claiming child-related tax benefits by enacting a more uniform definition of "child."<sup>75</sup> Definitions, however, still vary across the benefits and create taxpayer confusion resulting in fewer realized benefits for working families. This Article will first describe poverty relief under the Internal Revenue Code (the "Code") generally before it proposes a solution to mitigate this confusion.

### A. Poverty Relief Under the Code

Increasingly, Congress has turned to the federal income tax system rather than direct spending to fight poverty. The Code utilizes tax-based social benefits which take a variety of forms and designs, including income exclusions, deductions, preferred tax rates, and credits.<sup>76</sup> The Congressional Budget Office has estimated that refundable credits in particular will increase by approximately five hundred billion dollars over the next ten years.<sup>77</sup> The most significant and long-standing of these credits targeted to working poor families with

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<sup>74</sup> See Harry J. Holzer, *Penny Wise, Pound Foolish: Why Tackling Childhood Poverty During the Great Recession Makes Economic Sense*, CTR. FOR AM. PROGRESS 8–12 (Sept. 2010), available at [http://www.americanprogress.org/issues/2010/09/pdf/hit\\_childpoverty.pdf](http://www.americanprogress.org/issues/2010/09/pdf/hit_childpoverty.pdf) (discussing how high child poverty rates reduce annual economic output by several billion dollars even when the economy is relatively good and more severely when the economy is poor); Harry J. Holzer, et al., *The Economic Costs of Poverty in the U.S.: Subsequent Effects of Children Growing Up Poor*, CTR. FOR AM. PROGRESS 2 (Jan. 24, 2007), available at [http://www.americanprogress.org/wp-content/uploads/issues/2007/01/pdf/poverty\\_report.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2007/01/pdf/poverty_report.pdf).

<sup>75</sup> See Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 201, 118 Stat. 1166.

<sup>76</sup> See Lily Batchelder & Eric Toder, *Government Spending Undercover: Spending Programs Administered by the IRS*, CTR. FOR AM. PROGRESS 1–2 (Apr. 2010) available at <http://www.americanprogress.org/wp-content/uploads/issues/2010/04/pdf/govspendingundercover.pdf> (arguing that structuring tax expenditures as refundable tax credits and ensuring that they operate without regard to a claimant's marginal tax rate can address the problematic tendency of tax expenditures to function as upside-down subsidies that provide the greatest benefit to the most well-off taxpayers).

<sup>77</sup> DOUG ELMENDORF, CONGRESSIONAL BUDGET OFFICE, FEDERAL BUDGET CHALLENGES 6 (Apr. 20, 2009) available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/100xx/doc10093/04-20-harvard.pdf>.

children is the Earned Income Tax Credit (“EITC”).<sup>78</sup> The Child Tax Credit (“CTC”), a more recent refundable tax credit, is also targeted to working families.

The EITC and the CTC lift more children out of poverty than any other government program.<sup>79</sup> In 2012, Congress lifted over five million children and more than four million adults out of poverty with these refundable tax credits.<sup>80</sup> Moreover, these tax credits similarly reduce income inequality.<sup>81</sup>

While tax experts and think tanks across the country agree that the EITC and CTC are effective, but far from perfect, countless research projects and thoughtful proposals inform and supplement the growing body of antipoverty tax empirical data, scholarship, and legislative proposals.<sup>82</sup> Rather than directly add to that body of scholarship, this Article will address a very discrete problem in the Code that undermines the effectiveness of the dependency exemption deduction, head of household filing status, the EITC, and the CTC. All of these provisions refer to the definition of a “qualifying child” to provide financial relief for families.<sup>83</sup> Unfortunately, each provision has somewhat different definitions for what constitutes a “qualifying child.”<sup>84</sup> Notably, the residence or national status of the child is different for the exemption deduction than it is for the EITC and the CTC. As a result, lower-income taxpayers may fail to claim the correct benefits.<sup>85</sup> A review of the World War II historical reasoning behind this difference reveals that change is long overdue. Indeed, reverting

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<sup>78</sup> See I.R.C. § 32 (2012) (setting forth a refundable tax credit based upon earned income and qualifying children).

<sup>79</sup> ARLOC SHERMAN ET AL., CTR. ON BUDGET & POLICY PRIORITIES, VARIOUS SUPPORTS FOR LOW-INCOME FAMILIES REDUCE POVERTY AND HAVE LONG-TERM POSITIVE EFFECTS ON FAMILIES AND CHILDREN 1 (Jul. 30, 2013), available at <http://www.cbpp.org/files/7-30-13pov.pdf> (noting that federal programs lifted 9.4 million people including 5 million children out of poverty); JOHN WANCHECK & ROBERT GREENSTEIN, CTR. ON BUDGET & POLICY PRIORITIES, EARNED INCOME TAX CREDIT OVERPAYMENT AND ERROR ISSUES 1 (updated Apr. 19, 2011), available at <http://www.cbpp.org/files/4-5-11tax.pdf>.

<sup>80</sup> CHUCK MARR ET AL., CTR. ON BUDGET & POLICY PRIORITIES, EARNED INCOME TAX CREDIT PROMOTES WORK, ENCOURAGES CHILDREN’S SUCCESS AT SCHOOL, RESEARCH FINDS 9 (revised Apr. 15, 2014), available at <http://www.cbpp.org/files/6-26-12tax.pdf>.

<sup>81</sup> See Thomas L. Hungerford & Rebecca Thiess, *The Earned Income Tax Credit and the Child Tax Credit: History, Purpose, Goals and Effectiveness*, ECON. POLICY INST., Sept. 25, 2013, <http://www.epi.org/publication/ib370-earned-income-tax-credit-and-the-child-tax-credit-history-purpose-goals-and-effectiveness/> (noting that the Gini coefficient for the EITC and CTC indicates that these credits reduce income inequality).

<sup>82</sup> See Francine J. Lipman, *Access to Tax Justice*, 40 PEPP. L. REV. 1173, 1198–1207 (2013) (recounting numerous specific reports, proposals and studies to evaluate and improve the EITC); Hungerford & Thiess, *supra* note 81.

<sup>83</sup> See A “Qualifying Child,” INTERNAL REVENUE SERV., <http://www.irs.gov/uac/A-%E2%80%9CQualifying-Child%E2%80%9D> (last visited May 2, 2014).

<sup>84</sup> See *id.*

<sup>85</sup> NAT’L TAXPAYER ADVOCATE, 2012 ANNUAL REPORT TO CONGRESS 41 (2012), available at <http://www.taxpayeradvocate.irs.gov/userfiles/file/2012-Annual-Report-to-Congress-Executive-Summary.pdf> [hereinafter TAXPAYER ADVOCATE].

back to the pre-World War II definition not only simplifies these provisions for low-income working families, but will likely lift more children out of poverty by ensuring a tax policy that values families. Valuing families under the income tax system means that the income necessary to cover basic needs and child-rearing should not be taxed.

### B. *The Past: 1913–2004*

Since the first federal income tax in 1913,<sup>86</sup> Congress has allowed every taxpayer certain deductions against gross income<sup>87</sup> “to leave free and untaxed as a part of the income of every American citizen a sufficient amount to rear and support his family according to the American standard and to educate his children in the best manner which the educational system of the country affords.”<sup>88</sup> The Code currently includes a complicated array of personal and dependency exemptions,<sup>89</sup> standard deductions,<sup>90</sup> and child tax credits<sup>91</sup> as well as related tax deductions and credits to achieve Congress’s goal.<sup>92</sup>

Congress has long provided tax deductions and credits as a federal subsidy for low-income individuals and families.<sup>93</sup> Since 1917, a dependent credit or deduction has offset the cost of supporting children and other dependents.<sup>94</sup> The definition of a “dependent” has evolved: once focused on the dependent person’s age, income, and mental or physical capacity to support herself, the law since 1944 focuses on the country in which the dependent resides, regardless of the burden the U.S. taxpayer incurs to support the dependent.<sup>95</sup>

The dependency exemption debuted in the Revenue Act of 1917 and allowed a taxpayer to deduct two hundred dollars for each dependent who was either under the age of eighteen or incapable of self-support because of a mental or physical defect.<sup>96</sup> Throughout the years, the dollar amount of the deduction increased to account for the higher costs of living.<sup>97</sup> The “dependent” age

<sup>86</sup> See H.R. 3321, 63d Cong. (1st SESS. 1913).

<sup>87</sup> See I.R.C. §§ 63, 151 (2012) (setting forth the deduction for a personal exemption).

<sup>88</sup> 50 CONG. REC. 1250 (May 6, 1913).

<sup>89</sup> I.R.C. §§ 151–152 (setting forth the deductions for personal and dependency exemptions).

<sup>90</sup> *Id.* § 63 (setting forth the standard deduction which varies based upon different filing statutes including married filing jointly, married filing separately, head of household, and unmarried taxpayers).

<sup>91</sup> *Id.* § 23 (setting forth the child tax credit).

<sup>92</sup> See 50 CONG. REC. 1250.

<sup>93</sup> See TAXPAYER ADVOCATE, *supra* note 85, at 41.

<sup>94</sup> See War Revenue Act of 1917, Pub. L. No. 65-50, 40 Stat. 300.

<sup>95</sup> See Individual Income Tax Act of 1944, Pub. L. No. 78-315, 58 Stat. 231, 238–39; War Revenue Act of 1917, 40 Stat. 300.

<sup>96</sup> See War Revenue Act of 1917, 40 Stat. 300.

<sup>97</sup> See LAWRENCE H. SELTZER, SKETCH OF THE LEGISLATIVE HISTORY OF THE PERSONAL EXEMPTIONS IN THE UNITED STATES: THE PERSONAL EXEMPTIONS IN THE INCOME TAX 38–57 (1968).

and capacity tests introduced in 1917 remained intact until 1944, when Congress sought to simplify and meaningfully restrict the exemption allowance.<sup>98</sup>

The 1944 dependency exemption provision introduced a new definition of “dependent” and allowed a taxpayer an exemption for herself and her qualifying spouse as well as a “\$500 [exemption] for each dependent.”<sup>99</sup> The new law eliminated the age and capacity tests and enacted a new surtax exemption for close relatives of the taxpayer receiving more than one-half of their support from the taxpayer.<sup>100</sup> The new law further limited individuals who qualified as “dependents.”<sup>101</sup> The revised statute refined “dependent” to “not include any nonresident alien individual unless such individual is a resident of a country contiguous to the United States.”<sup>102</sup> The new test was imposed to restrict claims for dependency exemptions for Europeans affected by World War II being claimed as dependents by United States taxpayers.<sup>103</sup> The citizenship or residency requirement for dependents has persevered through the years and today, seventy years later, remains intact.<sup>104</sup>

Prior to 2005 and Congress’s adoption of the uniform definition of “child,”<sup>105</sup> an individual had to meet five requirements to properly be claimed for the dependency exemption: (1) a joint return test, where the dependent must not have filed a joint return with a spouse; (2) a citizen or resident test, where the individual must be a citizen or resident of the United States or a resident of Canada or Mexico; (3) a relationship test, where the individual must be related by blood or marriage to the taxpayer or reside with the taxpayer as a member of his household; (4) a support test, where the taxpayer must have provided more than one-half of the individual’s support for the year; and (5) a gross income test, where the individual’s gross income must be less than the exemption amount for the taxable year.<sup>106</sup> In 2004, Congress adopted a uniform definition of “child” to simplify the various child-related tax benefits and thereby changed the test for an individual to qualify as a dependent.<sup>107</sup>

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<sup>98</sup> See H.R. REP. NO. 78-1365 (1944).

<sup>99</sup> See Individual Income Tax Act of 1944, 58 Stat. at 238–39.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> *Id.*; *Gitter v. Comm’r*, 13 T.C. 520, 526 (1949).

<sup>103</sup> See *Gitter*, 13 T.C. at 526–27.

<sup>104</sup> See I.R.C. § 152 (2012).

<sup>105</sup> See Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 201, 118 Stat. 1166.

<sup>106</sup> *Id.*; see Rev. Rul. 54-567, 1954-2 C.B. 108; Timothy R. Koski, *Uniform Definition of ‘Child’ Alters Tax Benefits Eligibility*, 76 PRAC. TAX STRATEGIES 89, 89–90 (2006).

<sup>107</sup> See Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 201, 118 Stat. 1166.



### C. Congressional Simplification Through a “Uniform” Definition of a Child

Prior to 2005, the eligibility requirements for the dependency exemption,<sup>108</sup> the CTC,<sup>109</sup> the EITC,<sup>110</sup> the dependent care credit,<sup>111</sup> and head of household filing<sup>112</sup> status were not uniform.<sup>113</sup> The different criteria forced taxpayers to determine dependents’ eligibility for each benefit, according to each provision’s separate definition of “child” or “dependent.”<sup>114</sup> These different requirements for tax provisions all targeted to working families and designed to assist with the cost of raising children, led to enormous complexity, confusion, and inaccurate or incomplete claims for tax benefits.<sup>115</sup> Many professional organizations, including the American Institute of Certified Public Accountants and the Section of Taxation of the American Bar Association, as well as the Joint Committee on Taxation and the National Taxpayer Advocate, advocated for Congressional efforts to create and apply a uniform definition of “child” to reduce complexity and taxpayer confusion.<sup>116</sup>

In 2004, Congress passed the Working Families Tax Relief Act, which defined the term “qualifying child” in an attempt to create a uniform definition of “child” for the dependency exemption, the CTC, the EITC, the dependent care credit, and head of household filing status.<sup>117</sup> Under the new definition an individual is a “qualifying child” of a taxpayer if the individual meets three conjunctive tests:<sup>118</sup> (1) a relationship test,<sup>119</sup> (2) a place of abode test,<sup>120</sup> and (3) an age test.<sup>121</sup>

To satisfy the relationship test, an individual must be the taxpayer’s son, daughter, grandchild, brother or sister, niece or nephew, foster child, stepchild, or adopted child.<sup>122</sup> This new test eliminates the pre-Working Families Tax Relief Act requirement that if the “qualifying child” is the taxpayer’s sibling,

<sup>108</sup> See I.R.C. § 151(c).

<sup>109</sup> See *id.* § 24.

<sup>110</sup> See *id.* § 32.

<sup>111</sup> See *id.* § 21.

<sup>112</sup> See *id.* § 2(b).

<sup>113</sup> See 150 CONG. REC. H7479 (daily ed. Sept. 23, 2004).

<sup>114</sup> See JOINT COMM. ON TAXATION, 109TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 108TH CONGRESS 119 (Comm. Print 2005).

<sup>115</sup> See John Buckley, *Uniform Definition of a Child: Large Unintended Consequences*, 110 TAX NOTES 1345, 1347–49 (2006).

<sup>116</sup> See Ellen D. Cook, *Simplification Adds Complexity to Uniform Definition of a Child*, 77 PRAC. TAX STRATEGIES 34, 35 (2006).

<sup>117</sup> See Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, §§ 201–204, 118 Stat. 1166.

<sup>118</sup> I.R.C. § 152(c) (2012).

<sup>119</sup> *Id.* § 152(c)(1)(A), (c)(2).

<sup>120</sup> *Id.* § 152(c)(1)(B).

<sup>121</sup> *Id.* § 152(c)(1)(C), (c)(3).

<sup>122</sup> *Id.* § 152(c)(1)(A), (c)(2).

step-sibling, or a descendant of any such individual, the taxpayer must care for the child as if the child were the taxpayer's own.<sup>123</sup> Prior law defined "child" according to the common meaning of child, whereas the new term "qualifying child" encompasses a wider array of relationships.<sup>124</sup>

For the abode test, an individual must have the same principal place of abode as the taxpayer for more than one-half of the tax year.<sup>125</sup> However, the test gives special consideration to temporary absences from the abode due to "illness, education, business, vacation, military service, or a custody agreement."<sup>126</sup> Whether or not an absence is considered a "temporary absence[] from home" can be a subjective determination, particularly when a child leaves for college.<sup>127</sup>

For the age test, an individual must be under age nineteen or, if a full-time student, under age twenty-four to qualify for the dependency exemption, the EITC, or head of household filing status.<sup>128</sup> To qualify for the CTC, the individual must be under age seventeen.<sup>129</sup> For the dependent care credit, the individual must be under age thirteen.<sup>130</sup> Except for the CTC, the age requirement is waived if the individual is permanently and totally disabled.<sup>131</sup>

In addition to these tests, an individual must not provide more than one-half of her own support to be considered a taxpayer's "qualifying child,"—a modified support test that is essentially the inverse of the previous requirement that the taxpayer furnish more than one-half of the dependent's support for the taxable year.<sup>132</sup> In determining whether the individual furnished more than one-half of her support for the year, the law considers support from the taxpayer compared to support from all sources, including the individual herself.<sup>133</sup> "Support" includes "food, shelter, clothing, medical and dental care, education, and the like," and the amount of an item of "support" will reflect the amount of the expense incurred by the person who furnished the "support."<sup>134</sup>

Also, an individual must not have filed a joint return with her spouse for the taxable year, unless the return was merely a claim for a refund.<sup>135</sup> A taxpayer may still claim an individual for the dependency exemption who does not satisfy each of the "qualifying child" tests if the individual is the taxpayer's

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<sup>123</sup> Koski, *supra* note 106, at 89–90.

<sup>124</sup> See I.R.C. § 151(e) (2012); Buckley, *supra* note 115, at 1346.

<sup>125</sup> I.R.C. § 152(c)(1)(B).

<sup>126</sup> Treas. Reg. § 1.152-1(b) (1960).

<sup>127</sup> See Buckley, *supra* note 115, at 1346.

<sup>128</sup> I.R.C. § 152(c)(1)(C), (c)(3).

<sup>129</sup> *Id.* § 24(c)(1).

<sup>130</sup> *Id.* § 21(b)(1)(A).

<sup>131</sup> *Id.* § 152(c)(3)(B).

<sup>132</sup> *Id.* § 152(c)(1)(D).

<sup>133</sup> Treas. Reg. § 1.152-1(b) (1960).

<sup>134</sup> *Id.*

<sup>135</sup> I.R.C. § 152(c)(1)(E) (2012).

“qualifying relative,”<sup>136</sup> but the individual will not qualify for the other aforementioned child-related tax benefits.<sup>137</sup>

The dependency exemption incorporates the definition of “qualifying child” into its definition of “dependent” for eligibility purposes.<sup>138</sup> The dependency exemption, however, additionally uses the Code’s 1944 requirement that an individual be either a U.S. citizen or a resident of the United States, Canada, or Mexico.<sup>139</sup> In effect, the dependency exemption reinstates the 1944 anti-European resident requirement.<sup>140</sup> The CTC also incorporates “qualifying child” into its provision, but requires that the “qualifying child” be a United States citizen, national, or resident<sup>141</sup> to be eligible for the credit.<sup>142</sup> Likewise, the EITC incorporates “qualifying child” into its provision but creates further restrictions by requiring that both the taxpayer and the “qualifying child” reside in the United States<sup>143</sup> and that the taxpayer provide the Social Security numbers of her, her spouse, and any “qualifying child” on the taxpayer’s return to be eligible for the credit.<sup>144</sup> The dependent care credit and the head of household status provisions refer to the dependency exemption’s definition of “dependent,” thus also excluding non-U.S. citizens from eligibility individuals who do not reside in the United States, Canada, or Mexico.<sup>145</sup> A chart from the Internal Revenue Service (IRS) website provides an outline of this confusing array of requirements.<sup>146</sup>

While Congress’s uniform definition of “child” provides a common foundation for these child-related tax benefit provisions, clearly the mission to eliminate taxpayer confusion and inaccurate or incomplete returns due to different rules has not been successful. Taxpayers must still parse through the inconsistent requirements for each provision to determine the citizenship or residency requirements of a child or other dependent. The exceptions and additions to these child tax provisions render Congress’s “uniform definition of

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<sup>136</sup> If the individual does not meet the “qualifying child” requirements, he or she may still be a “qualifying relative” of the taxpayer, a term requiring that the individual satisfy a relationship test by meeting one of many specified relationships, have gross income less than the exemption amount for the taxable year, receive more than one-half of his or her support from the taxpayer, and not be a “qualifying child” as defined. *See id.* § 152(d).

<sup>137</sup> *See Cook, supra* note 116, at 35–36.

<sup>138</sup> *See* I.R.C. §§ 152(a)(1), 152(c).

<sup>139</sup> *See id.* § 152(b)(3)(A).

<sup>140</sup> *See id.*

<sup>141</sup> Incidentally, a nonresident alien is not entitled to a dependency deduction for a dependent residing in Canada or Mexico if the nonresident alien is not engaged in a trade or business within the United States. *See* Rev. Rul. 82-183, 1982-2 C.B. 54.

<sup>142</sup> I.R.C. § 24(c) (2012).

<sup>143</sup> *Id.* § 32(c)(1)(D), (c)(3)(C).

<sup>144</sup> *Id.* §§ 32(c)(1)(E), (c)(3)(D), 32(m).

<sup>145</sup> *Id.* § 21(b)(1).

<sup>146</sup> INTERNAL REVENUE SERV., TAX YEAR 2013: CHILD-RELATED TAX BENEFITS COMPARISON, <http://www.irs.gov/pub/irs-pdf/p5085.pdf> (last visited May 2, 2014).

child” confusing and unnecessarily complicated.<sup>147</sup> Congress could mitigate the confusion by either eliminating the various residency status requirements for children and dependents, or by making the residency status requirement *completely* uniform across all child-related tax benefit provisions.<sup>148</sup> An examination of the origin of the dependency exemption’s residency requirement is crucial in determining whether the requirement is outdated or if it should be applied to all child-related tax benefit provisions.

#### D. *The Contiguous Country Residency Requirement*

A 1943 California district court case, *Astley v. Rogan*, describes the foundation for Congress’s contiguous country dependency requirement.<sup>149</sup> During World War II, a famous Hollywood, California actress, Madeleine Carroll, joined the Red Cross and worked throughout Europe to help the war effort.<sup>150</sup> When the French government ordered that all children be evacuated from Paris due to imminent war with Germany, Carroll converted her French chateau into an orphanage and supplied all food, lodging, and clothing for fifty-one displaced orphans.<sup>151</sup> On her 1939 tax return, Carroll claimed all fifty-one French orphans as dependents.<sup>152</sup> Initially, the Tax Commissioner found a deficiency for her claimed dependency credits, so Carroll paid the deficiency and brought her refund case in a California district court.<sup>153</sup> Because the children were under the age of eighteen during the taxable year and Carroll solely and entirely provided the children with lodging and support, the court granted her dependency credits for all fifty-one orphans.<sup>154</sup> At the time of filing, the Revenue Act of 1938 treated the dependency exemption as a credit, providing four hundred dollars for each dependent.<sup>155</sup>

In its 1944 tax amendments, Congress converted the dependency credit into a surtax exemption “for every person closely related to the taxpayer in any of several specified degrees of relationship for whom the taxpayer provides over half the support.”<sup>156</sup> Additionally, Congress responded to the perceived abuse by Ms. Carroll by defining the term “dependent” to exclude “any non-

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<sup>147</sup> See Cook, *supra* note 116, at 35.

<sup>148</sup> See TAXPAYER ADVOCATE, *supra* note 85, at 41–42.

<sup>149</sup> See *Astley v. Rogan*, 43-2 T.C.M. (CCH) ¶ 9523 (1943).

<sup>150</sup> See *id.*; *War Effort*, MADELEINE CARROLL, <http://www.madeleinecarroll.com/war-effort/> (last visited May 10, 2014).

<sup>151</sup> See *Astley*, 43-2 T.C.M. (CCH) at ¶ 9523.

<sup>152</sup> See *id.*

<sup>153</sup> See *id.*

<sup>154</sup> *Id.*

<sup>155</sup> Revenue Act of 1938, Pub. L. No. 75-554, § 25(b)(2), 52 Stat. 447, 467.

<sup>156</sup> H.R. REP. NO. 78-1365, at § 10(b) (1944).

resident alien individual unless such individual is a resident of a country contiguous to the United States.”<sup>157</sup>

In 1949, the Tax Court in *Gitter v C.I.R.* explained Congress’s motivation for the more geographically restrictive dependency tests by pointing directly to Madeleine Carroll’s fifty-one dependency credits as a “spectacular example” of the increasing trend for taxpayers to claim dependency credits for Europeans they were helping to support.<sup>158</sup> In *Gitter*, Isak Gitter, a Jewish-Austrian taxpayer, claimed three dependency credits on his 1943 tax return and six dependency exemptions on his 1944 return.<sup>159</sup> In 1938, all Jews under the age of sixty-five, including Isak and his family, were ordered by the Italian government to leave Italy, where Isak and his family resided, by early 1939.<sup>160</sup> Unable to return to his native Austria due to German Reich annexation, Isak left Europe and went to the United States.<sup>161</sup> His son, Samson, and his daughter-in-law, Minna, however, were required to wait for a visa before they were allowed to enter the United States.<sup>162</sup> Consequently, Samson and Minna fled to the United Kingdom as refugees in transit.<sup>163</sup>

Samson and Minna remained in London through 1944.<sup>164</sup> In 1941, the couple had a daughter, Evelyn.<sup>165</sup> In 1943 and 1944, neither Samson nor Minna was employed, though Samson served as an air raid warden twice a week and Minna remained at home to care for the family.<sup>166</sup> Isak sent Samson and Minna approximately \$2,800 in 1943 and approximately \$2,400 in 1944.<sup>167</sup> Samson, Minna, and baby Evelyn relied totally on the money Isak sent them from the United States.<sup>168</sup> Meanwhile, Isak’s sister, Cilla, and her husband, Leone, fled to various locations throughout Europe to escape the Nazi German army.<sup>169</sup> Cilla and Leone’s constant flight from the German army rendered them destitute in 1944.<sup>170</sup> They survived on food, clothing, and cash that Isak sent them from the United States, valued at approximately \$1,600.<sup>171</sup> Isak’s other sister, Hilda, relocated to Switzerland upon expulsion from Germany in

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<sup>157</sup> *See id.*

<sup>158</sup> *See* 13 T.C. at 526–27.

<sup>159</sup> *Id.* at 520–21.

<sup>160</sup> *See id.* at 521–22.

<sup>161</sup> *Id.* at 521.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 522.

<sup>171</sup> *Id.*

1938.<sup>172</sup> In 1944, Hilda also subsisted on money Isak sent to her from the United States, approximately \$650 in checks.<sup>173</sup>

Because he had sent money to his family to ensure their survival, Isak claimed dependency credits of \$350 each for Samson, Minna, and Evelyn on his 1943 return.<sup>174</sup> On his 1944 return, Isak claimed dependency credits for Samson, Minna, Evelyn, Cilla, Leone, and Hilda for a total amount of \$3,000.<sup>175</sup> The IRS Commissioner, however, determined that Isak was not entitled to dependency credits for Samson and Minna in 1943, resulting in a \$700 deficiency.<sup>176</sup> The Commissioner further determined that Isak was not entitled to any of the dependency credits he claimed in 1944, resulting in a \$3,000 deficiency.<sup>177</sup> Accordingly, Isak filed a petition with the Tax Court defending his claimed dependency credits.<sup>178</sup> After filing his initial petition, Isak paid the determined deficiencies and filed an amended petition, seeking a refund from the Tax Court.<sup>179</sup>

The Tax Court undertook to address Isak's 1943 and 1944 returns separately, as different requirements applied to each year because of tax reforms in 1944.<sup>180</sup> The Tax Court established that under Section 25(b)(2)(A) of the 1943 Code, a person claimed as a dependent: (1) "must have received his chief support from the taxpayer"; and (2) must be under eighteen or mentally or physically "incapable of self-support."<sup>181</sup> The court conceded that both Samson and Minna received their chief support from the \$2,800 Isak sent them.<sup>182</sup> The court, however, found that Samson and Minna were not "incapable of self-support" just because they were refugees.<sup>183</sup> Even assuming Samson was prevented from finding work, the court found that "section 25(b)(2)(A) does not make involuntary unemployment in itself a ground for the status of a dependent."<sup>184</sup> The court deemed that Samson was obviously "mentally and physically capable of earning a living and would have done so if he had been unable to rely on his father's generosity."<sup>185</sup> The court also found that Minna's reason for unemployment in 1943—caring for her infant child—was not "recognized by

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 523.

<sup>175</sup> *Id.* at 522.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 520.

<sup>179</sup> *Id.*

<sup>180</sup> See Individual Income Tax Act of 1944, Pub. L. No. 78-315, 58 Stat. 231.

<sup>181</sup> *Gitter*, 13 T.C. at 523.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

the statute as grounds for dependency status.”<sup>186</sup> Consequently, the court found that neither Samson nor Minna qualified as dependents in 1943, and that Isak was not entitled to claim dependency credits for their support.<sup>187</sup>

Next, the court considered the determined deficiencies for dependent credits Isak claimed for Samson, Minna, Evelyn, Hilda, Cilla, and Leone on his 1944 return.<sup>188</sup> The new 1944 provision required a three-part test to qualify as a dependent: (1) the dependents must be a close relative of the taxpayer; (2) the taxpayer must have “furnished over half” the individual’s support during the year; and (3) a dependent cannot be a “citizen or subject of a foreign country, residing outside the United States or a country contiguous thereto.”<sup>189</sup>

The court found that every dependent Isak claimed on his 1944 return satisfied the family relationship requirement.<sup>190</sup> The court also found that Samson, Minna and Evelyn lived entirely on the \$2,400 Isak sent them from the United States, and thus satisfied the support requirement.<sup>191</sup> Likewise, Cilla and Leone satisfied the support requirement because they were “virtually penniless in 1944 and subsisted on the food, clothing and cash of a total value of approximately \$1,600” Isak sent them from the United States.<sup>192</sup> The court, however, did not conclude that the \$650 Isak sent Hilda in 1944 constituted more than one-half her support, and determined that Isak was not entitled to claim a dependency exemption for Hilda in 1944.<sup>193</sup>

All six relatives Isak claimed as dependents on his 1944 return, however, failed the residency test and thus did not qualify as his dependents.<sup>194</sup> Samson, Minna, and Evelyn did not qualify as Isak’s dependents because they resided in the United Kingdom throughout 1944, despite their refugee-in-transit visa status.<sup>195</sup> In addition, Cilla and Leone did not qualify as Isak’s dependents because they resided throughout Europe in 1944.<sup>196</sup>

In its conclusion that Isak was not entitled to any dependency exemptions for the family he supported in 1944, the Tax Court reviewed Congress’s motivations for changing the definition of a dependent from the 1938 age and support requirements<sup>197</sup> to the relationship, support, and residency tests.<sup>198</sup> The court noted that, “[s]ince the commencement of World War II there had been a

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 524.

<sup>189</sup> *Id.* (quoting H.R. REP. NO. 78-1365, § 25(b)(3) (1944)).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 525–26.

<sup>195</sup> *Id.* at 525–28.

<sup>196</sup> *Id.*

<sup>197</sup> See Revenue Act of 1938, Pub. L. No. 75-552, § 25(b)(2), 52 Stat. 447.

<sup>198</sup> See H.R. REP. NO. 78-1365 (1944).

great increase in the number of taxpayers claiming dependency credits for Europeans whom they were helping to support.”<sup>199</sup> It cited American actress Madeleine Carroll’s fifty-one dependency exemptions for French orphans she supported as a “spectacular example of this trend.”<sup>200</sup> The court reasoned that in situations where taxpayers claimed Europeans as dependents, as Carroll had, the IRS Commissioner undertook a “severe burden” to disprove a claim due to the difficulty in investigating the dependency and existence of the foreigner.<sup>201</sup>

The court determined that there was no Congressional intent to favor claims of support for foreigners who were suffering from World War II’s family separation and displacement results.<sup>202</sup> Rather, Congress intended to “exclude all nonresident aliens, citizens or noncitizens, from the status of dependents unless they resided in North America.”<sup>203</sup> Additionally, the Tax Court found no public policy justification to distinguish between claims for support of “foreigners who lost their citizenship,” such as the Gitters, and claims for support of “foreigners who retained their citizenship status,” because “both groups were suffering equally from the vicissitudes of war.”<sup>204</sup> Since the 1949 *Gitter* decision, many taxpayers claiming dependency exemptions have unsuccessfully challenged the residency requirement on grounds such as equal protection,<sup>205</sup> bill of attainder,<sup>206</sup> due process violations,<sup>207</sup> and the Helsinki Ac-

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<sup>199</sup> *Gitter*, 13 T.C. at 526.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 526–27.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 527.

<sup>204</sup> *Id.*

<sup>205</sup> See *Dumdeang v. Comm’r*, 739 F.2d 452 (9th Cir. 1984).

<sup>206</sup> See *Barr v. Comm’r*, 51 T.C. 693 (1969). David, a U.S. citizen, and his wife, Yun, a Korean applicant for U.S. naturalization, contested the Commissioner’s determination of deficiency resulting from their claim for a dependency deduction on their 1965 joint return. David and Yun claimed the deduction for Yun’s son by a different marriage, Nak Man Koo, who lived in Korea with Yun’s family his entire life until he came to the United States in early 1966. In late 1965, as Nak Man Koo was attempting to legally enter the United States, the U.S. Embassy in Korea informed David and Yun that its examining physician had diagnosed Nak Man Koo with tuberculosis. This condition rendered Nak Man Koo ineligible for a visa under U.S. immigration law. Because David, an American citizen, was Nak Man Koo’s stepfather, however, Nak Man Koo’s medical ineligibility was waived and he received a visa in 1966, indicating that he was a national of the Republic of Korea since November 25, 1965. Throughout 1965, David and Yun sent money to support Nak Man Koo in Korea. The Tax Court agreed with the Commissioner that Nak Man Koo did not qualify as David and Yun’s dependent during 1965. The 1954 Code definition of “dependent” was very similar to the 1944 definition, except the 1954 relationship test required an individual to be either related to the taxpayer or to be a member of the taxpayer’s household and to live with the taxpayer for the entire taxable year to qualify as the taxpayer’s dependent. Though David and Yun proved that they provided more than one-half of Nak Man Koo’s support in 1965, the Tax Court agreed with the Commissioner’s determination, finding that in 1965 Nak Man Koo “was not a citizen of the United States, did not reside in the United States, and did not make his home with” David and Yun, and thus did not qualify as David and Yun’s dependent because he did not meet the residency requirement under Section 152(b)(3). *Id.* at 694. David and Yun argued that the requirement was unconstitutional because it discriminated against



cords.<sup>208</sup> Nevertheless, if the requirement is no longer relevant or too burdensome for taxpayers, Congress could amend it or delete it in its entirety.

### III. THE SIMPLIFICATION OF CHILD-RELATED TAX BENEFITS

Congress requires that a child be an American citizen or North American resident to avoid systemic abuse by taxpayers claiming foreign children as de-

them, “depriving them of property without due process of law,” constituting a bill of attainder. *Id.* at 695. The court found these arguments meritless, citing Congress’s broad power to levy taxes, and further deeming that Congress’s adoption of the residency requirement in 1944 was the result of dependency deductions being claimed in “questionable situations.” *Id.* Finally, the Tax Court justified the residency restriction on grounds that “it would be impossible for the Internal Revenue Service to ascertain the total support” of dependents living abroad, especially when the claimed dependent is “living in a country with which our relationships are not amicable.” *Id.*

<sup>207</sup> See *Tien v. Goldenberg*, 96-2 T.C.M. (CCH) ¶ 50,646 (1996). In *Tien v. Goldenberg*, the taxpayer, James, was denied head of household filing status and was ineligible for his claimed dependency exemption because he claimed his mother, a Chinese citizen living in China, as his dependent in violation of the residency requirement. James challenged the requirement on grounds that disallowing claims for dependents that are “neither citizens or residents of the United States, nor residents of countries contiguous to the United States, violates the Equal Protection Clause” of the Fourteenth Amendment. In his pro se appellate brief, James asked, “Why is a resident of a contiguous country qualified to be claimed as a lawful dependent, while a resident of non-contiguous country is not?” In its opinion, the Second Circuit simply cited *Dumdeang* and two older cases as authority for its wholesale repudiation of James’s complaint in denying his dependency deduction and head of household filing status. *Id.*

<sup>208</sup> See *Pike-Biegunski v. Comm’r*, 84 T.C.M. (CCH) ¶ 219 (1984). In the Tax Court’s *Pike-Biegunski v. Commissioner* decision, Maciej, a Polish citizen, married Denise, a U.S. citizen working in Poland, in 1975. The couple had a child in 1977 while residing in Poland, and subsequently moved to the United States in 1978, where they had another child in 1980. Both children were U.S. citizens because Denise’s U.S. citizenship was conferred to their first child at birth, and the second child was born in the United States. Prior to his marriage to Denise, Maciej was married to a Polish citizen with whom he resided in Poland. The couple had two children, both Polish citizens born in Poland, and for whom Maciej was “required to deposit two hundred fifty five thousand Polish Zlotys with the Polish court to provide support” prior to his departure from Poland in 1978. Maciej claimed dependency exemptions for both of his Polish children and both of his American children on his and Denise’s 1978 and 1979 joint returns. The Tax Commissioner found deficiencies for these returns, asserting that Maciej was not entitled to dependency exemptions for the two Polish children because they did not meet the Section 153(b)(3) residency or citizenship requirements, and Maciej had not shown that he provided more than one-half the children’s support for the relevant years. Maciej argued that Section 152(b)(3) “in effect states that fatherhood applies to the two children living in the U.S., but . . . does not apply to the two children living in Poland” and therefore, “that brothers and sisters who live in different countries are no longer brothers and sisters.” He based his argument in principles from the Helsinki Accords relating to family unity, alleging that Section 152(b)(3) unlawfully “interfere[d] with his family relationships.” Rejecting Maciej’s arguments, the Tax Court noted that Section 152(b)(3) had “no effect on [Maciej’s] parenting function,” and that Maciej “made his decision to leave his children in Poland without being influenced by the Internal Revenue Code.” The Court determined that the Section 152(b)(3) requirement did “not affect filial relationships or the attendant attributes of love, loyalty and the duty of support,” and found that the Helsinki Accords were “non-binding declarations, resolutions and statements of political intent” inferior in priority to tax laws. Finding that Maciej’s Polish children did not meet the Section 152(b)(3) requirements, the Tax Court disallowed the dependency exemptions. *Id.*

pendents. As this purpose is now outdated and redundant, and the requirement in fact hinders working poor taxpayers from receiving aid due to confusingly inconsistent requirements among child-related tax benefits, Congress should eliminate this requirement.

#### A. *Justification for Section 152(b)(3): Past & Present*

Congress enacted the residency requirement of Section 152(b)(3) to counteract abusive claims and simplify government administration.<sup>209</sup> In the cases discussed earlier, however, taxpayers sought the dependency exemption for children or grandchildren that the taxpayer had demonstrably supported during the taxable year. Even Madeleine Carroll, with her fifty-one French orphans, sought the exemptions because she had supported fifty-one otherwise homeless vulnerable children.<sup>210</sup> If Congress's goal in creating Section 152(b)(3) was to support U.S. taxpayers who support family values and children, it is difficult to imagine a more appropriate beneficiary than Ms. Carroll.

Nevertheless, under current tax laws even without considering the residency of these dependents, Ms. Carroll would not be able to deduct her fifty-one dependency exemptions.<sup>211</sup> Under the alternative minimum tax ("AMT"), a parallel income tax calculation that encompasses all taxpayers even though most do not actually owe it, all taxpayers must add back all of their personal and dependency exemptions, as well as other certain other deductions.<sup>212</sup> As a result, taxpayers who deduct a significant number of dependency exemptions will lose the deduction. Hence, today Ms. Carroll would have lost any tax benefits stemming from her fifty-one dependency exemptions when determining her federal income tax liability, irrespective of the children's residency.<sup>213</sup> Thus, if the Treasury Department's concern is that one might abuse the federal income tax system by supporting too many children, the AMT is an absolute remedy for this concern.

In addition, personal and dependency exemptions as well as the CTC are phased out to zero for higher-income individuals.<sup>214</sup> Therefore, wealthier individuals under current tax law do not benefit from an abusive number of de-

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<sup>209</sup> H.R. REP. NO. 78-1365 (1944).

<sup>210</sup> See *Astley*, 43-2 T.C.M. (CCH) at ¶ 9523.

<sup>211</sup> See I.R.C. §§ 55, 56(b)(1)(E) (2012) (setting forth addback for personal and dependency exemptions for calculation of the alternative minimum tax); *Klaassen v. Comm'r*, 76 T.C.M. (RIA) 241 (1998) (demonstrating that the taxpayer had to add back all 10 of his dependency exemption amounts for his children and his two personal exemption amounts under the alternative minimum tax).

<sup>212</sup> See I.R.C. § 55(a) (imposing AMT on all taxpayers, but limiting the cost of the imposition to the excess, if any, of the tentative minimum tax over the regular tax).

<sup>213</sup> See *id.* §§ 55, 56(b)(1)(E); *Klaassen*, 76 T.C.M. (RIA) at 243.

<sup>214</sup> I.R.C. § 152(d)(1) (setting forth the provision that phases-out personal and dependency exemptions for higher-income individuals).

pendency exemptions, the CTC, or the EITC.<sup>215</sup> Congress has intentionally targeted these child tax benefits for lower- and middle-income families who need the financial subsidy. Accordingly, Congress has enacted provisions that already limit these benefits to working families with children. Finally, the financial cost of cohabitating with and supporting a child, which apply to most if not all of these targeted working families, likely far outweighs any available tax benefits. Nevertheless, additional anti-abuse provisions in the “uniform” definition of a child undermine the goal of providing a “free and untaxed . . . sufficient amount to rear and support” a family.<sup>216</sup>

### B. *Redux: Toward a More “Uniform” Definition of Child*

Congress adopted its uniform definition of “child” to simplify requirements for child-related tax benefits.<sup>217</sup> Prior to the uniform definition, each of the child-related tax benefits discussed above had its own separate qualifications for which dependents qualified for family related tax benefits.<sup>218</sup> The uniform definition, however, does not relieve taxpayers of the complexity and burden of applying separate criteria for each distinct child-related tax benefit. Rather, Congress’s changes to the definitions merely constitute a starting point.<sup>219</sup> Taxpayers must still parse through each provision’s separate definition to determine whether their children or dependents qualify for each credit, filing status, or exemption to ensure that they properly claim child-related tax benefits.

Congress could better meet its simplification goal and reduce inconsistency in child-related tax benefits by addressing the different citizenship, national, and residence status requirements among the benefits. Congress could apply the dependency exemption’s contiguous country requirement across all of the child-related tax benefits, or it could completely eliminate the citizenship, national, and residence status requirements and rely on existing age, relationship, place of abode, and support tests to achieve its stated goals.

Eliminating the citizenship or residence status requirements for qualifying children has the most potential to clear taxpayer confusion and extend intended benefits to more U.S. taxpayers raising children. In eliminating these requirements, the IRS would still have adequate restrictions to prevent taxpayer abuse. Despite the Tax and Circuit Courts’ reasoning that residence requirements ease the IRS’s investigative burden and discourage taxpayer abuse, the

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<sup>215</sup> See *id.* § 24(b) (setting forth the income phase-out for this credit); *id.* § 32(b)(2) (setting forth the income phase-outs for the EITC).

<sup>216</sup> See 50 CONG. REC. 1250 (May 6, 1913).

<sup>217</sup> See Buckley, *supra* note 115 at 1345–46.

<sup>218</sup> See, e.g., Individual Income Tax Act of 1944, Pub. L. No. 78-315, 58 Stat. 231, 238–39.

<sup>219</sup> See TAXPAYER ADVOCATE, *supra* note 85, at 508–12; Buckley, *supra* note 115, at 1134–46.

revised age, relationship, place of abode, and support tests are sufficient to achieve these goals.

The age, relationship, abode, and support tests adequately assess a taxpayer and his or her child's eligibility for Congress's child-related tax benefits. While any one test is probably insufficient to prevent abuse, together the tests present meaningful restrictions that achieve Congress's goal of providing financial assistance for taxpayers who struggle to raise and support children. Other requirements thus render the 1944 residency requirement irrelevant. For example, to address the issue of proving that dependents actually exist, in 1996 the Treasury Department began requiring all dependents to provide an identifying number on their tax returns.<sup>220</sup> The IRS has control over the issuance of individual taxpayer identification numbers to qualifying individuals not using Social Security numbers, and the application process for a taxpayer identification number requires hands-on IRS verification of original pre-specified documents.<sup>221</sup> The application process has become increasingly onerous, challenging, frustrating, and time-consuming.<sup>222</sup>

Although the age test itself is not uniform among the different child-related tax benefits, it immediately carves out a large pool of otherwise eligible children.<sup>223</sup> Though the age test alone is not enough to determine a taxpayer's child-related benefit eligibility, it is a good starting point because it is an objective test that can be easily verified with a government authorized birth certificate. Moreover, the various age thresholds create an appropriate age boundary for the various tax benefits.

Congress has expanded the relationship test over time to extend child-related tax benefits to a larger class of potential dependents.<sup>224</sup> All child-related tax benefits require a qualifying individual to be the taxpayer's son, daughter, grandchild, brother or sister, niece or nephew, foster child, stepchild, or adopted child.<sup>225</sup> The relationship test alone is inadequate for determining a taxpayer's eligibility for child-related tax benefits because the test is so broad and does not require a child's financial dependence upon a taxpayer per se. In conjunction with several other tests, however, the relationship test helps confirm the existence of a filial relationship between the taxpayer and the child and that a taxpayer is supporting the dependent.

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<sup>220</sup> See Treas. Reg. § 301.6109-1 (2012).

<sup>221</sup> See TAXPAYER ADVOCATE, *supra* note 85, at 9; NAT'L TAXPAYER ADVOCATE, REPORT TO CONGRESS: FISCAL YEAR 2014 OBJECTIVES 44–46 (2013), available at <http://www.taxpayeradvocate.irs.gov/userfiles/file/FullReport/Fiscal-Year-2014-Objectives-Report-to-Congress.pdf> [hereinafter FY 2014 OBJECTIVES]; INTERNAL REVENUE SERV., UNDERSTANDING YOUR IRS: INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER 5 (2011), available at <http://www.irs.gov/pub/irs-pdf/p1915.pdf>.

<sup>222</sup> See TAXPAYER ADVOCATE, *supra* note 85; FY 2014 OBJECTIVES, *supra* note 221, at 44–46.

<sup>223</sup> See I.R.C. § 152(c)(1)(C), (c)(3) (2012).

<sup>224</sup> See H.R. REP. NO. 78-1365 (1944).

<sup>225</sup> See I.R.C. § 152(c)(2).

While the age and relationship tests could be considered technical tests, the abode test better determines the actual and constructive costs a taxpayer incurs to support and raise a child. To satisfy the abode test, both the child and the taxpayer must occupy the same principal place of abode for more than one-half of the tax year.<sup>226</sup> Though Congress permits a child's temporary absence from the principal place of abode for circumstances like education, military service, or a custody agreement, the absence cannot exceed six months.<sup>227</sup> Satisfying the abode test does not necessarily prove that the taxpayer is bearing all of the burdens of supporting and raising the child, but it does limit potential taxpayer abuse.

In addition to the age, relationship, and abode tests, the child and taxpayer must satisfy a support test.<sup>228</sup> While the age, relationship, and abode tests do not directly address the financial relationship between child and taxpayer, the support test determines support allocated to the child from "all sources" including the taxpayer.<sup>229</sup> A taxpayer satisfies this test as long as the child does not provide more than one-half of her own support during the tax year.<sup>230</sup> If more than one parent claims the child, priority is given to the parent "with whom the child resided for the longest period of time during the taxable year."<sup>231</sup> If the child lived with both parents for an equal amount of time during the year, priority is given to the parent with the highest adjusted gross income.<sup>232</sup> The support test, like the abode test, generally provides child-related tax benefits to the taxpayer who bears the burden of supporting and raising a child. Together, the age, relationship, abode, and support tests represent sufficient eligibility criteria for child-related tax benefits because they determine whether the taxpayer has borne parenting responsibilities in connection with supporting and raising a child.

Viewed together, these tests create substantial hurdles for taxpayers intending to claim child-related tax benefits. Though they are substantial, these hurdles are purpose-driven to ensure that only taxpayers truly supporting a dependent may receive child-related tax benefits. In contrast, the taxpayer suffers an undue burden with the addition of the residency requirement; specifically, if a taxpayer seeks to contest a deficiency for an alleged improperly claimed benefit, she has the burden of proving that the IRS's determinations in its no-

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<sup>226</sup> See *id.* § 152(c)(1)(B).

<sup>227</sup> Treas. Reg. § 1.152-1(b) (as amended in 1972).

<sup>228</sup> See *id.* § 1.152-1(a)(2)(i) (as amended in 1971).

<sup>229</sup> See *id.* Support includes "food, shelter, clothing, medical and dental care, education, and the like," and the amount of an item of support will reflect the amount of the expense incurred by the person who furnished the support. *Id.*

<sup>230</sup> See I.R.C. § 152(c)(1)(D).

<sup>231</sup> *Id.* § 152(c)(4)(B)(i).

<sup>232</sup> *Id.* § 152(c)(4)(B)(ii).

tice of deficiency are in error.<sup>233</sup> The residency test undercuts Congress's century-old goal to ensure that taxpayers have access to enough resources to support and raise their children. Moreover, the citizenship/residency restriction was implemented in 1944 before Congress added the abode and support tests in response to taxpayers claiming deductions for children who would fail these tests. The requirement for taxpayer identification numbers for all child-related tax benefits further limits abuse of these provisions. In short, the citizenship/residency test is an unnecessary vestige of the past that is undermining rather than facilitating accurate tax compliance.<sup>234</sup>

### CONCLUSION

The earliest tax laws identified the enduring American value of leaving "free and untaxed . . . a sufficient amount to rear and support" a family.<sup>235</sup> One hundred years later, supporting, feeding, housing, educating, and raising a family is an enormous financial challenge in the United States. Hoping to maintain the integrity of family values for the exploding population of working poor in America, Congress has maintained, enhanced, and added various child-related tax benefits to assist the millions of taxpayers in America who are trying to raise and support our country's future. Though seemingly well intentioned, the array of child-related tax benefits has metastasized into a malignantly confusing, onerous, and inconsistent network of different requirements and restrictions that are almost impossible for the targeted families to navigate.<sup>236</sup>

While assisting families is one of its abiding goals, Congress must balance this goal with the protection of government resources and the efficient administration of laws. In 1944, Congress attempted to further both of these goals by adopting its citizenship and contiguous country residency requirement for the dependency exemption.<sup>237</sup> In 2004, Congress again attempted to further these goals by creating a "uniform" definition of child.<sup>238</sup>

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<sup>233</sup> See R. OF PRAC. & P. U.S. TAX CT. R. 142(a), 60 T.C. 1057, 1057-58 (1973); *Welch v. Helvering*, 290 U.S. 111, 115 (1933); *Gray v. Comm'r*, T.C. Summ.Op. 2013-30, 6 (U.S. T.C. Apr. 16, 2013) (stating that "[d]eductions and credits are a matter of legislative grace, and the taxpayer generally bears the burden of proving entitlement to any deduction or credit claimed"). The Treasury Regulations require "any person required to file a return of information with respect to income, shall keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information." Treas. Reg. § 1.6001-1(a) (2012). The Tax Court is not required to rely on a taxpayer's testimony in order to establish his or her position with respect to any issues presented. See *Collier v. Comm'r*, 101 T.C.M. (CCH) ¶ 58,652 (2011).

<sup>234</sup> See TAXPAYER ADVOCATE, *supra* note 85, 508-12.

<sup>235</sup> See 50 CONG. REC. 1250 (May 6, 1913).

<sup>236</sup> Indeed, almost seventy percent of these taxpayers must rely on paid tax preparers who are in some cases neither competent nor scrupulous. See WANCHECK & GREENSTEIN, *supra* note 79, at 1.

<sup>237</sup> See Individual Income Tax Act of 1944, Pub. L. No. 78-315, 58 Stat. 231, 239.

<sup>238</sup> See Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 201, 118 Stat. 1166.

The citizenship or residency requirement today hampers Congress's century-old goal to support taxpayers raising children. If a U.S. taxpayer's noncitizen children do not reside in the United States, the taxpayer is ineligible for the critical antipoverty benefits of the CTC. Moreover, if the child does not have a Social Security number, her parents do not qualify for critical antipoverty EITC. The courts have couched their defense of this provision in Congress's anti-abuse and simplicity goals, but the provision has become an outdated and redundant relic to pre-existing, substantial requirements that taxpayers must satisfy to receive any child-related tax benefits. The residency requirement further confuses the already inconsistent nature of child-related tax benefits. To accurately reflect America's position in our global economy and to reduce overall taxpayer confusion, Congress should eliminate the citizenship, national, or residency requirements for all child-related tax benefits.<sup>239</sup>

These changes will further Congress's one-hundred-year-old goal "to leave free and untaxed as a part of the income of every American citizen a sufficient amount to rear and support his family according to the American standard and to educate his children in the best manner which the educational system of the country affords."<sup>240</sup> Moreover, the simple act of eliminating the superfluous residency requirement will ensure that the antipoverty tax benefits that lift millions of children out of poverty will reach more qualifying children of taxpayers in America. The fifty-year War on Poverty must continue for our children, who truly are the future of our country. Doing so will ensure that long before fifty years from today, when our newborn children and unborn grandchildren celebrate the one hundred year anniversary of the War on Poverty, it will have been justly and richly won forevermore.

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<sup>239</sup> In addition, to eliminating the residency requirement and consistent with other child-related tax benefits, Congress should consider better focusing the Social Security number requirement for the EITC. Congress requires that every individual on a tax return qualifying for the EITC have a Social Security number that authorizes the individual to work. This requirement, however, is overbroad in that Congress only provides federal benefits for authorized work. If the worker has a valid Social Security number, then the benefits are provided for authorized work irrespective of whether or not his or her spouse or qualifying children have a Social Security number that authorizes work. If the goal is to ensure that the working poor with children receive critical antipoverty EITC benefits, then the requirement for a valid Social Security number for work purposes only makes sense for the taxpayer with earned income qualifying for the EITC. See Francine J. Lipman, *The "ILLEGAL" Tax*, 11 CONN. PUB. INT. L. J. 93, 100 (2011); Francine J. Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of "Undeserving" Poor*, 7 NEV. L. REV. 736, 745-47 (2007); Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal and Without Representation*, 9 HARV. LATINO L. REV. 1, 53-56 (2006).

<sup>240</sup> 50 CONG. REC. 1250.