

## **Who Counts as an American Family?**

**Stephen D. Sugarman**  
**Roger J. Traynor Professor of Law**  
**University of California, Berkeley (Boalt Hall)**

In the early 21<sup>st</sup> century, American law and policy contain complex and inconsistent visions of who qualifies as a family, and American society, as reflected in both its norms and rules, is divided over what a family should be.

At the outset, there is considerable ambiguity as to what is to be meant by the word “family.” There are several possibilities. “Family” might refer to those who are legally considered family members. Or it might refer to those who, as a matter of social norms, are understood to be families, whether or not they are so recognized by the law. Or it might refer to those who consider themselves a family whether or not the society at large accepts them as a family.

As a general matter, the word “family” here will refer to those who live together in an intimate relationship. This means that those who think of themselves as family members might or might not be “legally” related as a matter of private law; that is, the laws of marriage, divorce, child custody and support, inheritance and so on may or may not treat them as a “family.” The main inquiry here is not concerned with private law, however.

Rather, the goal here is to explore whether household members who are likely to view themselves as a family are treated as though they are a family by a variety of public programs – Social Security, Food Stamps, welfare, tax, public housing and immigration.

It should be further emphasized at the outset that, even if different household groupings are treated as families for purposes of any public program, they may not all be treated the same. Therefore, “counting” as an American family has at least two meanings: (1) Are you and those you consider to be part of your family treated as a family unit by the program being examined? And, (2) even if so, how well is your family treated by the program, as compared with other families?

Yet an additional qualification is that, in a few instances, public law’s recognition of “extended” families will be discussed in settings in which all members of the “family” may not actually be sharing the same household. Also, although much of the attention here will be devoted to families that currently contain minor children, it should be clear that the notion of the family here is not so limited, so that, for example, a married couple with no children is clearly also a “family”.

To re-emphasize the conclusion here: different American public programs treat households very differently. Some family configurations are recognized as families by all programs, and certain families are clearly advantaged by several programs. At the same time, some public programs are much more expansive than are others in what sort of families they recognize in determining eligibility for benefits. Moreover, since American social norms about the family are changing at different rates in different parts of the country, a program with national standards is not likely to be

in harmony with social norms everywhere.

## I. Changing Social Norms

About fifty years ago, American law and policy largely centered on a single vision of the “ideal” family, comprised of a married man, who worked in the paid labor force, and his wife, who spent most of her time in their home caring for their biological children. Americans were strongly encouraged to conform to that norm. Other groupings of adults and children – even if they were considered as families in some quarters – were generally disfavored by the predominant social values (and by the public programs) of the time.

To be sure, if we look back throughout American history, it has been long understood that not everyone’s lives conformed to this “ideal” family. For example, and most dramatically, during times of slavery in America (i.e., before the 1860s), married slaves were often split up and separated from their children. While both mothers and fathers worked, they were plainly not in the paid labor force. Even for white families, it has been recognized for ages that sometimes the man of the house died young, say, in a farming or industrial accident, leaving his wife and children behind. Sometimes the young mother died, perhaps in childbirth, and was survived by her husband and children. Widowers were generally expected to remarry, if possible, thereby creating a new stepfamily with the parents still playing traditional roles. Widows were encouraged to remarry as well, although this was understood to be less likely to occur.

Moreover, in earlier days in America, when so many people were recent immigrants, a majority of the population was poor, and vast numbers lived on farms or were employed in factories. In those families, many women worked at jobs beyond child-rearing at home. In addition, multigenerational living arrangements were common, with sons or daughters bringing their spouses into the family home to live with those who would become the grandparents of their children. Furthermore, as sharp downturns frequently struck the economy, often there were many desperately poor families with no regularly employed members. And in some eras these families were consigned to live in communal “poorhouses” or “workhouses,” rather than their own homes.

Joblessness aside, throughout the first half of the 20<sup>th</sup> century, candid observers recognized that considerable deviance from the preferred societal norm was a reality. For example, some fathers simply abandoned their families, leaving their wives and children in miserable conditions. Some couples divorced, often to the considerable detriment of wives and children. Some unmarried women became mothers and lived with men who may or may not have been the fathers of their children. But all of these “broken” families were viewed by mainstream society as failures.

Single women having children outside of marriage were highly stigmatized, and their children were disparaged as “bastards.” Unmarried couples living together “in sin” were scandalous. Homosexual couples were closeted, and the very idea of same-sex relationships was generally abhorred.

Hence, notwithstanding the reality of this considerable variation in family structure, by the middle of the 20<sup>th</sup> century there remained a strong societal preference for the idealized nuclear family. This preference was broadly reinforced by American laws and policies. For example, on the private law

side, divorce was somewhat difficult to obtain and widely disfavored; and inheritance laws generally failed to recognize children born out of wedlock. On the public side, the Social Security system was structured to favor the two-parent family with the dad working for wages and the mom at home raising the kids. Tax laws favored married couples over singles, and, among married couples, financial advantages flowed to single-breadwinner households. Although the welfare system somewhat grudgingly provided financial help to poor single mothers of young children, it was based on the assumption that recipients were unlucky widows. (Despite this, by 1950 divorcees and never-married moms were already outpacing widows as the main claimants.)

Today, things are very different. Certainly, many Americans who self-identify with what is termed the “family values” crowd still idealize the stable nuclear family in which dad works for wages and mom stays at home and cares for the children. On the other hand, many have challenged this narrow vision of who counts as a family, disputing the notion that this sort of family is morally superior or necessarily best for children and for society in general. Nowadays there seems to be much more social acceptance of many other types of families.

First as a result of both “women’s liberation” and the higher cost of maintaining what are now often viewed as the material requirements of a middle class lifestyle, more and more couples find that both of the parents are in the paid labor force. Today, a majority of mothers work, even if they work fewer years and hours (and are paid less) than dads. And while there is considerable anguish even among feminists about how women are to balance their roles as wage earners and mothers, it is simply no longer the case that the clearly preferred social norm is for women to retreat from the workplace for so long as they have young children.

Second, divorce today is both far more common and much more accepted than it was in 1950, and, in turn, because of remarriage, stepfamilies are now so frequent as to be “normal.”

Third and fourth, both having a child out of wedlock and cohabiting without marrying are much less stigmatized and far more common than before (especially among white Americans).

Fifth, and perhaps most surprisingly, there seems to be growing support for legal and societal recognition, particularly in fairly liberal urban centers, of stable, loving relationships formed by gay and lesbian couples. Further, there is increasing acceptance of the fact that gay and lesbian parents, whether “domestic partners” or truly “married couples,” can successfully raise children together (even if the children are not their joint biological creation). Indeed, apart from their homosexual character, many of these families are touted as exemplifying the norms of 1950s family life, with one predominant earner and one predominant child raiser.

## II. Policy Responses to the Changing American Family

Some American public programs recognize and accommodate these changing social norms, and the changes in family structure they reflect. Other programs remain, or have become, hostile to these changes. To illustrate these points, this section will focus on six different public program areas.

### A. Social Security

Adopted in 1935, the U.S. Social Security system was designed to enable those with a lifetime in the paid labor force (with the focus on men) to earn suitably appropriate pensions that would be paid to them on retirement at age 65.

In 1939, however, the plan was amended to also provide benefits to somewhat narrowly defined members of the worker's family at the time the worker retired or at his death. Basically, a married couple would get a 50% boost in their retirement pension when he and his non-working wife both reached age 65. When a worker died, his widow would receive a pension if she was either elderly or raising their minor children. Children, too, would qualify for pension benefits if they were minors when their father died or retired.

A few specific additional points should be noted about the 1939 family benefits provisions. First, if a wife had also earned a retirement pension on the basis of her own paid wages, then her own pension benefit would reduce, dollar for dollar, the amount of the pension benefit paid because she was a spouse. This meant that women who worked in the paid labor force generally received pensions that were no larger than what they would have received had they remained in the home. These rules, in any event, clearly favored the stay-at-home wife. Second, if the spouses had divorced before the man retired or died, no benefit would be paid to the divorced woman – thereby favoring long-intact marriages. Third, if the couple was not recognized as married under state law, then the woman would not qualify for benefits as a spouse – even if the couple had lived together and she had been long-dependent upon the man's income. Fourth, generally speaking, the children's benefits were reserved for the couple's legitimate biological children and legally adopted children. Overall, then, the initial parameters of the family benefit features of Social Security plainly favored the “ideal” family described earlier.

Since 1950, however, the scheme has been amended to recognize some, but by no means all, of the now more openly tolerated family types. For example, spousal benefits were extended to divorced women, first for those who had been married for twenty years, and later for those who had been married for ten years. In addition, more and more children were added to the list of those who qualified as “dependents” and hence eligible for children's benefits through Social Security. Perhaps most importantly, by now most children born out of wedlock will qualify.

On the other hand, domestic partners (that is, unmarried couples whether gay or straight) still do not qualify for spousal benefits, and the scheme's benefit structure continues to favor single-earner married couples.

## B. Food Stamps

America's Food Stamps program, which was adopted in its current form in the 1960s, is in sharp contrast to the Social Security scheme. Food stamps provide funds to low-income households who must spend them on approved food items. It is important to acknowledge at the outset that this is a “means tested” program, in comparison to Social Security's “universal” approach which is not restricted to those with financial need. But the theme to be emphasized here is the considerable difference between the two programs in terms of what sorts of families they recognize.

Because the Food Stamps program is structured around “household” eligibility, this means that many groups who are not treated as families by Social Security can obtain food stamps as a unit. These include families headed by unmarried cohabitants, and that category covers both heterosexual couples as well as homosexual couples. Single mothers qualify for food stamps just as readily as couples, and indeed, the largest category of food stamps claimants is the single-adult, female-headed household. Moreover, families can obtain food stamps for all of the children living with them regardless of formal legal relationship. In this sense, then, the Food Stamps scheme is remarkably tolerant in determining who counts as a “family.”

It almost didn’t turn out this way. In 1971, the U.S. Congress passed a law that was designed to sharply restrict food stamps eligibility. Congress had in mind “hippie” communes. These were understood to be groups of adults (some of whom might have children) who lived together and rejected many traditional American values. They were viewed as uninterested in traditional paid labor, often politically radical, and perhaps committed to nontraditional sexual unions as well. Some Congressmen were angered by the ability of hippie “families” to claim food stamps. To put an end to that, the new law, broadly speaking, denied food stamps to households comprised of adults who were not married to each other.

This provision was challenged in court, and the parties who did so were, most importantly, poor women with children who lived with other poor adults out of financial or other necessity. Perhaps the most emotionally appealing of the challengers were separate poor families who joined together in one apartment to share the rent, and who would now be cut off from aid that they and their children desperately needed. Other attractive claimants included a single mother who brought another woman into her household to help care for her children, and a single mother who had taken in an emotionally troubled 20-year-old girl.

In *USDA v. Moreno*, 413 U.S. 528 (1973), the U.S. Supreme Court found this law unconstitutional, on the ground that it was intentionally aimed at harming a politically unpopular group – that is, hippies. The case was generally portrayed as meaning that both hippies and separate, low-income families forced to share one apartment could continue to claim benefits. But for purposes of this analysis, the critical thing to understand is that the statute would also have cut off food stamps to cohabiting couples who considered themselves (and their children) a single family – including both heterosexual and homosexual partners.

The upshot today is that the Food Stamps program remains essentially indifferent to family structure and tolerant of any family type so long as the family lives together in the same household. Indeed, in the rather rare instance in which adult family members live together but do not eat together – such as when one holds an all-night job – the Food Stamps program rules may actually favor formally unrelated parents over married couples. This is because the former may file for benefits as separate claimants, and under the right circumstances the household can wind up with more food stamps than had it claimed as a single unit. On the other hand, because the Food Stamps program is means tested, it must also be appreciated that a wide definition of who counts as the applicant can actually be harmful to claimants. If all of those who live and eat together apply together, then the incomes of all adults in the unit count in determining both whether the applicant household is eligible and how

much assistance the household can receive.

### C. Welfare

In the early years of the 20<sup>th</sup> century, individual American states began to adopt “welfare” programs to provide monetary assistance to low-income, single-parent families – which were politically understood to be impoverished households headed by widows. This financial help was designed to allow mothers to live with their children in their own apartments, rather than having to move their family into some communal institution like the poorhouse which housed many families together.

In 1935, the national government began financially to underwrite these means-tested schemes. When, as noted above, the Social Security system was amended in 1939 to provide survivor benefits for widows and their children, many envisioned that this change would, over time, largely eliminate the need for means-tested welfare. And, indeed, widows today account for a tiny share of the welfare rolls.

But changes in family structure produced all sorts of new poor, single-parent families who obtain welfare benefits. Today these families are mainly comprised of either divorced or never-married mothers and their children.

On the one hand, therefore, the continued existence of the welfare system suggests continued social support for family structures other than the idealized two-parent family. Yet, this is somewhat misleading because, from the start, the public has been dubious about the worthiness of single mothers seeking assistance, as evidenced by the intrusive regulation of their lives while on the rolls.

Three aspects of their behavior have attracted special attention: their sexual conduct, their work outside the home, and their eventual marriage (or remarriage).

Early on the welfare system sought to enforce the norm that “proper” women do not have sex outside of marriage, and it monitored the conduct of welfare recipients and threatened to cut off aid to misbehaving beneficiaries. Moreover, it was well understood that if single mothers had sexual relations, then some of them would have more children, thereby increasing the cost of the program. This cost increase was undesired by those in power and hence to be discouraged. Besides, those extra children would likely be born out of wedlock, and that was seen as highly unfavorable for the children themselves. Finally, if single women could be prevented from having sex while on welfare, some hoped this would encourage them to marry, which was expected to have several additional benefits for the woman, her children, and society at large.

Starting during the 1960s, however, and coincident with the sexual revolution in America generally, it became difficult to maintain a strong policy of prying into the private sexual lives of women on welfare, and the midnight raids in which welfare officials searched for evidence of a “man in the house” were roundly condemned as inappropriate invasions of privacy. Moreover, it became clear that stripping the welfare rolls of families with children born out of wedlock would have a vastly disproportionate impact on African-Americans – a politically difficult strategy at the height of America’s civil rights movement. Indeed, in the course of the civil rights reforms of the 1960s, the number of African-American single mothers on the welfare rolls exploded, as previously high legal

barriers (both formal and informal) long-faced by racial minorities were finally at least partially eliminated.

Nonetheless, even today, as a matter of social norms, single motherhood is still not viewed as an equally acceptable or desirable family type as the “ideal” family. Rather, the typical mainstream view is that this is a form of family structure that unfortunately has occurred and will be tolerated and helped for the sake of the children (at least so long as the mother properly behaves). The transition from aid-recipient to married-woman status remains a typically welcomed development.

This acceptance, but not embrace, of single motherhood is also evidenced by the growing concern over the course of the second half of the 20<sup>th</sup> century that welfare was having the perverse behavioral effect of encouraging more such households. Welfare critics asserted that public assistance permitted women to remain on aid instead of marrying; prompted women to abandon (or kick out) the men they were living with; and encouraged pregnant unmarried women to keep their babies and go on assistance (especially teen moms) rather than either marrying the children’s fathers or giving up the child for adoption (or, later on, having an abortion).

In that light, it is perhaps not altogether surprising that the 1996 welfare reform statute included the funding of social-services programs designed to promote sexual abstinence, especially among teens; tough financial restrictions intended to preclude teens from having babies and then going on welfare, using the money to fund their own apartments; and various measures that seek to discourage claimants from having more children while on aid. Efforts to achieve the last objective include denying extra assistance to children born to women already receiving welfare and rewarding states that decreased their out-of-wedlock birth rate.

As for working outside the home, starting in the 1970s and as a result of altered social norms in society at large, political attitudes changed concerning the employment obligations of welfare mothers. Before that, the general understanding was that these claimants would be stay-at-home moms, raising their children in parallel to married moms whose husbands went out to work. The government, in effect, would be the “man.” But this outlook shifted, and over the next thirty years increasingly tough work requirements were imposed on welfare claimants.

By the time of the welfare reform of 1996, however, work requirements seemed totally unremarkable. If so many middle class and professional women were in the paid labor force, how could American society justify allowing low-income women to remain at home living on the “dole?” Conservatives suggested that too many welfare mothers were lazy women, who sat around watching TV, perhaps doing drugs and having sex, and these critics forcefully argued that instead those women should be “working.” The reality was often very different from what this image conveyed. In fact, many welfare claimants were actually working for money, at least part time. These women worked if for no other reason than because they could not reasonably support their children and themselves on the meager funds provided by government. But they took black market, sometimes illegal and often dangerous jobs, because they had to keep their earnings secret from the welfare office (even though this was a crime). Otherwise, their earned income would primarily have the effect of reducing their aid. Liberals were generally unwilling to admit that welfare claimants might be engaged in this sort of fraud, and hence they tended to portray these women as staying at home

and devoting themselves to being the best mothers they could be under the circumstances.

Now that work requirements are tougher, many women find themselves financially no better off and sometimes worse off. They take officially recognized jobs at government's insistence, but in turn they receive reduced aid – in contrast to their prior state of illicitly combining aid with unreported earnings. In any event, the social norm is now clear that it is quite all right to force these single mothers out of the home and into the job market since that is the situation in which so many other working class (and even financially better off) mothers find themselves. (Ironically, this policy of coercing labor force participation by welfare claimants does not exist in the Social Security system. There, a younger widowed mother caring for children can still claim benefits without having to make any effort to take a paid job, and if she does so, her benefits are reduced much more slowly than they are in the welfare program.)

It has always been understood that, beyond getting a well-paid job, another way for women to exit the welfare rolls is to marry. Earlier, as noted, welfare programs counted on beneficiaries to wish on their own to marry, possibly encouraged by rules that sought to shepherd poor mothers into marriage if they wished to continue to enjoy sexual relations. But since the 1996 welfare reform act, several new provisions have been proposed, and some enacted, that are more explicitly aimed at promoting marriage. For example, one program sends unmarried couples in which the woman is pregnant to psychologically-based parenting/marriage classes or therapy.

The bottom line is this. Although the surrounding social norms have changed, for nearly 100 years providing financial aid to single mothers has always been a second-best solution – a way for society to try to help children get a decent start to life, which (unless the nation were to resort to the dramatic alternative of widespread orphanages) inevitably means aiding their mothers as well. But aid to this form of family was certainly not meant to put that type of family on the same social footing as the “ideal” family.

Outside of the context of welfare programs, however, single motherhood today seems far more socially acceptable than in the past. Divorced mothers of young children who do not quickly remarry are not considered outcasts. Even unmarried single women are not disparaged as before – so long as they have jobs, provide for themselves and their children and don't seek public assistance.

#### D. Housing, Tax, and Immigration

Turning to three other areas of public policy, one sees similar ambiguities to those already canvassed in Social Security, Food Stamps, and welfare policies.

(1) Housing. America has two major public housing programs. In one, government owns housing and makes units available at low cost to needy people; in the other, commonly known as Section 8, government subsidizes the rental of privately-owned housing. In both of these public housing programs there is, at least formally, a great tolerance for all sorts of family structures. This parallels Food Stamps.



Single mothers and their children qualify for public housing units (whether the mothers are widows, divorcees, or never-married moms). So, too, unmarried cohabiting couples with children qualify for public housing slots, at least so long as they are poor enough to be eligible. Indeed, there is nothing in official housing policies that would make gay and lesbian applicants ineligible, provided they otherwise qualify. And, it is considered altogether appropriate to award apartment units with an adequate number of bedrooms to poor families who are raising children who are neither their biological nor adopted children (including, for example, nephews and nieces).

This is not to say that there are no difficulties faced by non-“ideal” families connected to public housing. For one thing, many low-income families have fluid (that is, unstable) family structures, and housing authorities have difficulties with these arrangements. After all, moving people from one apartment to another as family structure changes is cumbersome and often practically impossible. Moreover, it can be especially problematic if a single woman with a public housing unit wants to bring a man into her apartment. Then the authorities want information regarding his income, how much will he contribute to the rent, and so on. If the woman’s relationship with the man is fairly new, she might well be unsure how long it will last and how much of a contribution he will reliably provide. This tempts some women to bring the man into the home without telling the authorities, which, if discovered, risks eviction.

Moreover, even if she plans to marry this man, what if he has a criminal record? In many public housing facilities, those with serious criminal records are formally excluded (ostensibly to protect the safety of other residents and to give higher priority to those on the waiting list who have not been lawbreakers in the past). Such rules put those women in public housing to extremely difficult choices: drop the man, move out with him (often not practical), or cheat.

At the same time, more recently enacted national government programs designed to encourage and enable some public housing occupants to purchase their units are typically financially out of reach to single-parent families

Despite the disproportionate problems faced by public housing claimants with non-“ideal” family structures, in its formal terms at least, American public housing policy can be said to be generally accepting of changes in family structure.

In the private housing arena, certain nontraditional families may face considerable hurdles to living where they wish (money aside) because public zoning laws often contain rules that effectively restrict occupants to conventional nuclear families. These rules tend to be adopted in response to pressures of local communities that seek to maintain a “family” environment in the neighborhood, with locals seeking to prevent substantial numbers of unrelated adults (like groups of students, or today’s hippie communes) from living in “family” housing. Such policies often have spillover effects that also fence out “group homes” for troubled youths or adults with mental disabilities or substance abuse problems who are sharing housing together in at least some semblance of family life.

(2) Tax. Much of tax law continues to be much like Social Security. To gain the financial advantages of filing a joint return, couples must be legally married; cohabitants, regardless of sex,

are ineligible. Furthermore, the benefits of joint return filing continue to accrue essentially to old-fashioned couples in which one earns all (or at least most) of the income (and that is still typically the husband).

On the other hand, tax law isn't entirely hostile to non-"ideal" family types. For example, single parents with children can file as "heads of households" and gain benefits somewhat like those of married couples. And, ironically, unmarried couples who have equal incomes and file as single taxpayers currently benefit as compared with what they would pay if they married (although this outcome is the result of legislative efforts to help truly single taxpayers, rather than cohabitants).

Substantial tax law changes have been adopted since the 1950s that help taxpayers with children. For example, when parents pay for child care, a modest tax credit is now available (unless the couple's combined income is very large). This benefit is primarily aimed at two-earner couples, rather than families with stay-at-home moms who are far less likely to pay for child care (although employed single mothers who pay for day care can also benefit from the credit). Somewhat as a backlash to that provision, a general Child Tax Credit is now provided to (non-high-earner) parents including those who care for their own children.

Perhaps the most important change with respect to families has been the adoption of the earned income tax credit (EITC), which primarily provides income to parents with quite modest earnings. This is a "refundable" credit, which means that claimants are eligible for the credit even if they otherwise owe no taxes. Both married and single taxpayers may claim the EITC. In either case, they have to have earned income to qualify, and hence, at least for single parents, this provision (like welfare) plainly encourages people to take paid work. Ironically, and sharply at odds with current welfare policy, low-income couples can face a marriage penalty because of the way the Earned Income Tax Credit is structured. (Low-wage earners without children are eligible for a very small EITC.)

Finally, although the main tax benefits attached to having children (the Child Tax Credit and the Earned Income Tax Credit) define the family relationship somewhat narrowly, even these provisions include children born out of wedlock. Moreover, longstanding tax exemptions that may be claimed for "dependents" are even more tolerant of atypical families since they are available with respect to any child (even if legally completely unrelated to the taxpayer) so long as the child lives with, and is financially supported by, the claimant.

Hence, when it comes to couples, tax law is, broadly speaking, like Social Security in its favoritism of "ideal" families. And yet, also like Social Security, it has come some way in acknowledging the changing nature of American families.

(3) Immigration. Lastly, it is important to appreciate that immigration law (like welfare law) is internally conflicted in its attitude towards the family. On the one hand, American immigration policy strongly favors family reunification. This means that bringing a qualifying relative into the country as a legal alien (and eventual citizen) is the most common way for immigrants to become Americans. Inside this general category, however, family is narrowly and conventionally defined – with the reunification benefits primarily available to spouses, parents and young children of the adult

applicant. Clearly, cohabitants are excluded from the preferred category, as are others who may qualify as “family” in their own country but not under American law. Additional wives are the best example of this; that is, women who are legally married to the man in their home nation are viewed as invalid add-ons to illegal polygamous families so far as the U.S. is concerned, and therefore they are ineligible to immigrate as wives.

It is also worth noting that, although immigration law uses a traditional definition of the family for purposes of deciding who is entitled to immigrate on the basis of family reunification, a different feature of immigration law contains an expanded family notion. Usually, would-be immigrants must have “sponsors” who guarantee that the immigrant will not become a “public charge,” and these sponsors are often extended family members. Hence, for these purposes, relatives beyond the narrow nuclear family are clearly understood to be family members with a legal duty to support their more-distant relations that is otherwise unheard of in 21<sup>st</sup> century America. Fifty years ago, if elderly poor people were to seek means-tested benefits (whether cash, medical care, or nursing home help), American states and localities typically pushed them to call on their own adult children first, and if those children were not forthcoming and government did provide the benefits, those children were then pursued to reimburse the state. Outside of the immigration context, however, these “adult child” responsibility provisions have been abandoned.

### III. Taking Stock

Well-established middle class and richer Americans typically don’t have anything to do with the Food Stamps program, welfare, public housing, or immigration law. But they do pay taxes, and they eventually claim Social Security benefits. For these families, the relevant law decidedly continues to favor long-married couples in which only one (typically the man) works in the paid labor force.

For low-income families, who turn to a variety of means-tested programs, it is increasingly mandatory that at least one member of the claimant’s family enter the workforce as a condition of benefits. This is true not only for welfare claimants but also for food stamps recipients, for example. Since so many of the beneficiaries of these programs are single mothers, this means coercing moms to work instead of staying at home with their children.

Of course, most single mothers not on welfare also find themselves practically required to work for wages. Indeed, even in financially comfortable middle and professional class marriages, wives are more frequently in the paid workforce today, even when they have young children.

All of this pressure on women to work (whether social, economic or legal) suggests that the existing tax and Social Security benefits for one-earner couples might become a thing of the past. This could come about simply because fewer and fewer will find themselves in this category and in a position to benefit from this status. Or, it is possible that these current advantages will actually be legally phased out.

Indeed, there is already considerable talk of reforming Social Security by creating a system of personal retirement accounts that would effectively do away with the bonus now provided to the nonworking spouse. So, too, there is increased talk of requiring separate filing by those who now

jointly file their income tax returns. This change would bring the U.S. more into line with the many other wealthy nations that require couples to file separately. That would not only end the advantage now enjoyed by one-earner American couples (as compared with two-earner couples), but it would also end the disadvantage now faced by married couples with equal incomes (as compared with unmarried couples).

The discussion so far has focused primarily on public programs and the family. But it is important to note that, quite recently, America's private law of the family, in at least some jurisdictions, is becoming increasingly accepting of nontraditional families. For example, several states now accept domestic partner status for various legal purposes, and we are beginning to see some states recognize gay marriage.

As state-level private law more widely treats such households as "families," it may follow that national public programs will do so as well. To be sure, at present, the Defense of Marriage Act explicitly rejects a gay marriage as a marriage for federal tax and Social Security purposes regardless of its status under state law, and several states themselves have recently made clear that, for state law purposes, cohabitants are not to be thought of like married couples. But this might just be a temporary backlash.

After all, at the same time more and more couples are sharing employer-provided health insurance benefits whether or not they are married, cohabitants including gays and lesbians are increasingly permitted to legally adopt children as a couple, and stepparents are gaining more rights and responsibilities with respect to children they live with but do not adopt. All of this change means that what more and more counts for private law purposes is whether people are living together as an intimate unit that shares its resources.

Were private law to become even more welcoming of all of these "families," then it is possible that national programs like Social Security and tax might be reformed to become more like the Food Stamps program and public housing policy. This reform would mean that self-defined families who live in the same "household" would routinely count as families for law and policy purposes. And if so, public programs would more readily treat all families on the same terms as they treat the "ideal" family of 1950.

For now, however, a different reality needs to be recognized. Merely "counting" as an American family does not necessarily mean being treated well by current law and policy. Poor families with no earned income, even if they qualify for food stamps, welfare and public housing, often must suffer materially impoverished lives (by American standards) because benefit levels are simply too meager. If families combine their modest earnings, the EITC, and means-tested benefits, they might climb slightly above the official poverty level. However, the working poor still live very much as second-class citizens in terms of the goods and services they can enjoy. Even with government benefits, many low-income families continue to lack decent and sanitary housing, adequate transportation, sufficient food, funds to pay for after-school extras for the children, adequate medical care, and so on.

At the other end of the income spectrum, much wealthier American families have been substantially

assisted by recently changed national policy, especially tax policy. The rates at which both their earned income and their capital gains are taxed are now sharply lower than before, and the national estate tax is set to disappear in 2010, thereby making it easier than ever to pass on substantial family wealth to the children and grandchildren of the well-to-do. From this perspective, it seems fair to conclude that under our current law and policy, “rich” American families count more than do “poor” ones.