

What Is a “Family”? Conflicting Messages from Our Public Programs

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Families are changing, and law is slowly adjusting in response. Some public programs, like food stamps and public housing, acknowledge that families now come in an enormous variety of forms and formally offer aid to all who qualify on the basis of need. But other public schemes, like Social Security and tax law, are caught in something of a time warp. Their structure continues strongly to favor the “ideal” family of the 1950s in which the husband earns the money and the wife stays at home caring for their children. Welfare and immigration law fall somewhere in between these extremes, although both aspire to promote traditional family arrangements. This article examines the uneven willingness of this range of public programs to accept today’s more diverse family types, with special emphasis on two-earner couples and unmarried cohabitants, both gay and straight. In the end, a disheartening conclusion is that while programs aimed at the poor are more tolerant of family variety, they also have become more miserly at a time when the old-fashioned programs aimed at the financially better off have become more generous.

Families are changing, and our society is divided over what a family should be.¹ This article explores how different public programs treat intimate household members who are likely to view themselves as a family.

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1. See generally ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY (Mary Ann

We will see that programs such as Social Security, tax, food stamps, public housing, welfare, and immigration treat households very differently.

Put simply, programs aimed primarily at middle-class and richer families advantage the traditionally “ideal” nuclear family in which the husband goes out to work and the wife stays at home to care for the children. By contrast, at least some public programs aimed at low-income families are much more expansive in the sort of families they recognize. These include cohabitating unmarried heterosexual couples, gay and lesbian families, single-parent families, and families that include children unrelated to their caregivers by marriage, blood, or adoption.

However, even if programs aimed at low-income families are more tolerant of what constitutes a “family,” they are not necessarily more generous to those families, as compared with financially better-off families. Indeed, recent reforms—especially in tax and welfare—have largely moved in the opposite direction, providing more financial benefits to wealthier families while cutting back on support for poorer ones. One could attribute this trend to social disapproval of the wider legal definition of the family in programs aimed at the poor, or simply to social disapproval of the seemingly greater diversity in family types that we find among the poor. But this does not seem the right explanation. Rather, in my view, at the bottom of these changes is a commitment to the idea that the rich generally deserve their wealth and the poor ought to do more to help themselves. In a study of public programs such as this one, it should be self-evident that an alternative solution lies in political change that would better treat low-income families regardless of their configuration.

I. Changing Social Norms

By the 1950s, American law and policy, largely centered on a single vision of the “ideal” family, composed 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 families by some people—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.² For example, and most dramatically, during times of slavery in America,

Mason, Arlene Skolnick & Stephen D. Sugarman eds., 2d ed. 2002) [hereinafter ALL OUR FAMILIES].

2. See generally STEVEN MINTZ, *HUCK’S RAFT: A HISTORY OF AMERICAN CHILDHOOD* (2004).

slave couples were forbidden to marry. While slaves who were fathers worked, they were plainly not in the paid labor force, and mothers who were slaves were hardly allowed to remain at home to care for their young.³

Even for white families, it has been recognized for ages that the "ideal" was not always possible. Sometimes the man of the house died young, say, in a farming or industrial accident, leaving his wife and children behind.⁴ Sometimes the mother died, perhaps in childbirth, and was survived by her husband and children. Widowers generally were expected to remarry, if possible, thereby creating a new stepfamily with the parents still playing traditional roles. Widowed mothers 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 large share of the population was poor, and vast numbers lived on farms or were employed in factories.⁵ In those families, many women worked at jobs beyond childrearing 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, 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.⁶

Additionally, even putting joblessness aside, throughout the first half of the twentieth century, candid observers recognized that considerable deviance from the preferred societal norm was the reality.⁷ 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 sometimes lived with men who may or may not have been the fathers of their children.

Notwithstanding the reality of this considerable variation in family

3. See generally Lea Vandervelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997).

4. In 1900, the typical single parent was a widow. Stephen D. Sugarman, *Single-Parent Families*, in ALL OUR FAMILIES, *supra* note 1, at 14, 20 [hereinafter Sugarman, *Single-Parent Families*].

5. See Ray Baber, *Sociological Differences in Family Stability*, 272 ANNALS AM. ACAD. OF POL. AND SOC. SCI., 30–32 (1950) (discussing the shift from the rural farm family toward city residence).

6. Sugarman, *Single-Parent Families*, *supra* note 4, at 20.

7. *Id.* at 20–22. States created "mothers' pensions" to provide financial aid for single (primarily widowed) mothers. Divorce and childbearing out-of-wedlock, though generally frowned upon, were also realities of society. See generally JUDITH SEALANDER, *THE FAILED CENTURY OF THE CHILD* (2003).

structure, there remained a strong societal preference for the “ideal” nuclear family.⁸ “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.

This preference for the traditional nuclear family was broadly reinforced by American laws and policies. For example, on the private law side, divorce was not easy to obtain and was widely disfavored;⁹ and inheritance laws generally failed to recognize children born out of wedlock.¹⁰ On the public side, the Social Security system, which was put into place in the 1930s, was structured to favor the two-parent family with the father working for wages and the mother at home raising the children.¹¹ Federal income tax laws favored married couples over unmarried individuals, and, among married couples, financial advantages flowed to single-breadwinner households.¹² 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.¹³

Today, things are very different. To be sure, many Americans who self-identify with what is termed the “family values” crowd still idealize the stable nuclear family in which the husband works for wages and the wife stays at home and cares for the children.¹⁴ On the other hand, many have challenged this narrow vision of the family, disputing the notion that this sort of family is morally superior or necessarily best for children and for society in general.¹⁵ Nowadays there is much more social acceptance of many other types of families.

Perhaps most surprisingly, there seems to be growing support for legal

8. Sugarman, *Single-Parent Families*, *supra* note 4, at 22–32.

9. *Id.* at 21. Before no-fault divorce laws became more prevalent (the first one emerged in California in 1970, rapidly followed by other states), divorce could generally only be obtained for reasons of adultery, spousal abuse, or desertion. Couples sometimes engaged in fraudulent charades (often involving the husband pretending to engage in adultery) to satisfy domestic relations laws. *See generally* HENDRIK HARTOG, *MAN & WIFE IN AMERICA: A HISTORY* (2000).

10. *Id.* at 22.

11. *See infra* note 22.

12. *See infra* notes 33, 91.

13. *See infra* note 57.

14. *See generally* DAVID BLANKENHORN, *FATHERLESS AMERICA* (1995); DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* (2007); DAVID POPENOE, *LIFE WITHOUT FATHER* (1999); LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE* (2000); JAMES Q. WILSON, *THE MARRIAGE PROBLEM* (2002).

15. *See generally* STEPHANIE COONTZ, *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA’S CHANGING FAMILIES* (1997); STEPHANIE COONTZ, *MARRIAGE: A HISTORY* (2005).

and societal recognition, particularly in fairly liberal urban centers, of stable, loving relationships formed by gay and lesbian couples.¹⁶ 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.

In addition, 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 partners are in the paid labor force.¹⁷ Today, a majority of mothers work for money, even if they work fewer years and hours (and are paid less) than fathers. 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 as long as they have young children.¹⁸

Moreover, divorce today is easy to obtain, far more common, and much more accepted than it was in 1950,¹⁹ and, in turn, because of remarriage, stepfamilies are also far more numerous than before.²⁰ Furthermore, having a child out of wedlock, living as a long-term single-parent, and cohabiting without marrying are much less stigmatized and far more frequent than before (especially among white Americans).²¹

16. See Judith Stacey, *Gay and Lesbian Families: Queer Like Us*, in ALL OUR FAMILIES, *supra* note 1, at 144, 151–56; see also *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

17. The labor force participation rate of married women with children climbed from twenty-four percent in 1950, to forty percent in 1970, to seventy percent in 1999. Neil Gilbert, *Working Families: Hearth to Market*, in ALL OUR FAMILIES, *supra* note 1, at 220, 220. Millions of mothers in middle-class families must enter the workforce, not by choice to gain an economic edge, but just to make ends meet. See generally ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP* (2003).

18. See Gilbert, *supra* note 17, at 220–43. See generally ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* (2001); ANN HULBERT, *RAISING AMERICA* (2003); JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE* (2004); LINDA C. MCCLAIN, *THE PLACE OF FAMILIES* (2006); ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND* (1997).

19. See *supra* text accompanying note 9. See generally ANDREW HACKER, *MISMATCH* (2003); E. MAVIS HETHERINGTON, *FOR BETTER OR FOR WORSE* (2002).

20. About seventy percent of divorced mothers are remarried within six years. Moreover, twenty-eight percent of children are born to unwed mothers, many of whom will eventually marry someone who is not the father. Mary Ann Mason, *The Modern American Stepfamily: Problems and Possibilities*, in ALL OUR FAMILIES, *supra* note 1, at 96, 97.

21. For a discussion of changes in family structure between 1950 and 1980, see CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY*, 124–34 (1984). From 1950 to 1980, the percentage of children born to unwed black mothers increased from seventeen to forty-eight percent; and the percentage of children born to unwed white mothers increased from about two to eleven percent. *Id.* at 126–27. Between 1968 and 1980, the percentage of traditional two-par-

Given these transformations, how do today's key public programs treat the family? The next section of this article addresses that question.

II. How Public Programs Understand the “Family” and Policy Responses to the Changing American Family

Some American public programs acknowledge the just-described changing social norms and the changes in family structure they reflect, and accommodate them. That is, the “ideal” family is not specially favored, and a full range of family relationships is recognized. Other programs remain, or have become, hostile to these changes, or at least some of them, and continue to privilege the “ideal” family. As we will see, these differences generally parallel the economic class of the program's main targets. To illustrate these points, this section will focus on six public program areas.

A. Social Security

Adopted in 1935, the U.S. Social Security²² 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 sixty-five.²³ In 1939, however, Congress amended the plan to also provide benefits to somewhat narrowly defined members of the worker's “family” at the time the worker retired or at his death.²⁴ Basically, a wife would get an additional retirement pension—equal to fifty percent of her husband's—once he retired and she reached age sixty-five. And when a worker died, his widow would receive a pension based on her husband's earnings, provided that 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.

ent married families dropped twelve percent for black families (from seventy-two to fifty-nine percent), and three percent for white families. *Id.* at 129. Studies suggest that this breakdown of the traditional family is a phenomenon of both race and economic class. *Id.* at 130.

22. See generally Grace Ganz Blumberg, *Adult Derivative Benefits in Social Security*, 32 STAN. L. REV. 233 (1980) (discussing the advantages of Social Security benefits to single-earner couples and families); Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1 (1999); Stephen D. Sugarman, *Children's Benefits in Social Security*, 65 CORNELL L. REV. 836 (1980) [hereinafter, Sugarman, *Children's Benefits*]; Katina Boosalis, “*The Family*” in *Social Security: Entrenched Norms and Prospects for Transformation* (2005) (unpublished comment on which this section draws, on file with the author).

23. Social Security Act of 1935, ch. 531, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C. (2000)).

24. Social Security Act Amendments of 1939, ch. 666, tit. 2, Pub. L. No. 76-379, §§ 202, 209, 53 Stat. 1360, 1364–65 (codified as amended at 42 U.S.C. §§ 401–34 (2000)) (providing benefits to widows, wives (not divorced), children (biological, stepchildren, and children legally adopted), and dependent parents (if no widow or surviving children)).

A few specific additional points should be noted about the 1939 family benefits provisions. First, if the 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 that would otherwise be paid to her because she was a spouse.²⁵ This meant that a large proportion of 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. This rule 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.²⁶ 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 on the man’s income.²⁷ Fourth, generally speaking, the children’s benefits were reserved for the legitimate biological children, stepchildren, and legally adopted children of married couples.²⁸ 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 only some, of the now more openly tolerated family types. For example, spousal benefits were extended to some divorced women, first for those who had been married for twenty years, and later for those who had been married for ten years.²⁹ In addition, more and more children were

25. *Id.* at § 202(b)(2) (“Such wife’s insurance benefit for each month shall be equal to one-half of a primary insurance benefit of her husband, except that, if she is entitled to receive a primary insurance benefit for any month, such wife’s insurance benefit for such month *shall be reduced by an amount equal to a primary insurance benefit of such wife.*”) (emphasis added).

26. *Id.* at § 202(b)(1) (cutting off a wife’s primary insurance benefits upon divorce).

27. Social Security Act Amendments of 1939, ch. 666, tit. 2, Pub. L. No. 76-379, § 209(m), 53 Stat. 1360 (codified as amended at 42 U.S.C. § 416(h) (2000)) (“In determining whether an applicant is the wife, widow, child, or parent of a fully insured or currently insured individual . . . the Board shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled.”).

28. Prior to the 1965 amendments, illegitimate children were not entitled to children’s insurance benefits, unless state law treated such children as legitimate for intestate property law purposes. Social Security Act Amendments of 1939, ch. 666, tit. 2, Pub. L. No. 76-379, § 209(k) (1939) (defining “child” to mean a biological child, a stepchild, and a child legally adopted); *id.* at § 202(d)(1)(c) (requiring that a child must have been “dependent” on the insured individual); and *id.* at § 202(d)(3) (providing that an illegitimate child cannot be deemed dependent on the insured).

29. In 1950, Congress extended benefits to divorced mothers caring for a child of her deceased former husband. Social Security Amendments of 1950, ch. 809, § 101(a), 64 Stat. 482 (codified as amended at 42 U.S.C. § 402(b)(1) (2000)). In 1965, Congress extended “wives’ benefits” to divorced women who reached retirement age, upon three conditions: (1) that she was married for at least twenty years to the ex-husband, (2) that she was not presently married to another, and (3) that she was receiving actual support from the ex-husband or had a legal

added to the list of those who qualified as “dependents” and hence eligible for children’s benefits through Social Security. By now nearly all stepchildren and most children born out of wedlock will qualify.³⁰

On the other hand, it is important to appreciate the limited nature of Social Security reform. First, domestic partners (that is, unmarried couples, whether heterosexual or homosexual) still do not qualify for spousal benefits. That is, it does not suffice to live together, to self-identify as a “couple” and to be financially interdependent. Indeed, the Defense of Marriage Act,³¹ enacted in 1996 in response to state law changes with respect to gay and lesbian couples, explicitly denies Social Security benefits to same-sex domestic partners even if they are or were to be recognized as married under state law—a sharp departure from the program’s traditional deference to state law as the ground for deciding whether someone is a spouse. Second, and perhaps equally important, the benefit structure of Social Security still strongly favors one-earner couples (indeed the spousal benefit for widows has been enhanced over the years).³²

B. Tax

U.S. federal income tax law³³ continues to be much like Social Security. Two points stand out. First, under our progressive income tax scheme, couples who can combine and in effect average down their income gain the benefit of lower marginal tax rates than would be applied

claim to such support. Social Security Act Amendments of 1965, Pub. L. No. 89-97, § 308, 79 Stat. 286, 375 (codified as amended at 42 U.S.C. § 402(b), (g) (2000)). Congress eliminated the support requirement in 1972 and lowered the required duration of marriage to ten years in 1977. Social Security Act Amendments of 1972, Pub. L. No. 92-603, § 114, 86 Stat. 1329, 1348 (codified as amended at 42 U.S.C. § 402(b), (g) (2000)); Social Security Act Amendments of 1977, Pub. L. No. 95-216, § 337, 91 Stat. 1548 (codified as amended at 42 U.S.C. § 402(b), (g) (2000)).

30. The current version of the Social Security Act defines “child,” similar to the 1939 Amendments, to mean a biological child, a stepchild, and a child legally adopted. 42 U.S.C. § 416(e) (2000). However, in certain circumstances, it also defines a “child” to mean a person who is the grandchild or stepgrandchild of an individual covered by Social Security or his or her spouse, and in certain circumstances deems a person to be a legally adopted child or stepchild, even if the person did not have such a status before that individual died. *Id.*

31. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (defining the meaning of “marriage” in interpreting federal law to mean “only a legal union between one man and one woman as husband and wife”) and at 28 U.S.C. § 1738C (2000) (providing that no state is required to give any effect to a law that treats a “relationship between persons of the same sex as marriage”).

32. See Blumberg, *supra* note 22; Liu, *supra* note 22.

33. See generally Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1983); Blake Thompson & Grace Ho, *Taxing Families: The Family in the Internal Revenue Code and the Sometimes Mutually Exclusive Demands of Various Family Models on the Code* (2005) (unpublished comment on which this section draws, on file with the author).

if they were taxed individually and one of the two earned markedly more than the other. Functionally, this is done by permitting couples to file “joint returns” that effectively treat each person as having earned half of their joint income.³⁴ But to gain the financial advantages of filing a joint return, couples must be legally married. Cohabitants, regardless of sex, are ineligible.³⁵ This parallels the treatment of couples seeking spousal benefits from Social Security.

Second, as just noted, the benefits of joint-return filing continue to accrue essentially to old-fashioned couples in which one spouse, still typically the husband, earns all (or at least most) of the income. Simply put, there is no benefit from averaging if you earn the same as your partner. This preference for one-earner couples also parallels the structure of Social Security spousal benefits.

On the other hand, like Social Security, tax law is not entirely hostile to non-“ideal” family types. For example, single parents can file as “heads of households” and gain the benefit of lower marginal tax rates that are somewhat like those of married couples.³⁶ And, ironically, because of the so-called “marriage tax,” some unmarried couples who have equal incomes and file as single taxpayers currently benefit as compared with what they would pay if they were married.³⁷ This outcome is the result of legislative efforts designed to help truly single taxpayers, rather than unmarried cohabitants.

Substantial tax law changes have been adopted since the 1950s that generally help taxpayers with children. Significantly, when parents pay for child care, a modest tax credit is now available (unless the couple’s combined income is very large).³⁸ This benefit is primarily aimed at two-earner families, rather than one-earner families with stay-at-home moms

34. I.R.C. § 6013(a) (2000) (permitting a husband and wife to make a single return jointly of income taxes, even though one of the spouses has neither gross income nor deductions); *see also* I.R.C. § 1(a) (tax table for married individuals filing joint returns).

35. I.R.C. § 6013(a) permits joint returns between “*a husband and wife.*” *Id.* (emphasis added). Furthermore, DOMA’s definition of “marriage” as a legal union between one man and one woman applies to all interpretations of federal law, including federal income tax law. *See* DOMA, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2000)).

36. For example, the fifteen-percent tax bracket begins at \$22,100 for unmarried individuals, at \$29,600 for heads of households, and at \$36,900 for married individuals filing joint returns. I.R.C. § 1(a)–(d) (tax rate tables). “Head of household” is defined generally as an unmarried parent maintaining his or her own household (though under certain circumstances a married individual may qualify under section 7703(b)). *Id.* § 2(b).

37. McCaffery, *supra* note 33, at 991. (“Married couples now get the benefit of income splitting and the burden of a higher rate schedule.”)

38. A tax credit of \$3,000 or \$6,000 (for one dependent, or for two or more dependents, respectively) is available for “expenses for household and dependent care services necessary for gainful employment.” I.R.C. § 21.

who are far less likely to pay for child care (although employed single mothers can also benefit from the credit). Hence, this reform is a sharp break from the long-standing favoritism of one-earner couples. Partly in response to a political backlash to that provision, a general Child Tax Credit (CTC) of \$1,000 annually is now also provided to non-high-earner parents, including those who care for their own children.³⁹

Perhaps the most important change with respect to families in the past several decades has been the adoption of the Earned Income Tax Credit (EITC), which primarily provides money to working-class parents with quite modest earnings.⁴⁰ This is a “refundable” credit, which means that claimants are eligible for the credit even if they otherwise owe no taxes. Although both married and single taxpayers may claim the EITC, they have to have earned income to qualify, and hence, at least for single parents, this provision plainly encourages mothers to take paid work. Ironically, because of the way the EITC is structured, low-income couples can face a marriage penalty that is somewhat analogous to the “marriage tax” faced by married couples with higher (and relatively equal) incomes.⁴¹

Finally, there is yet another parallel to Social Security. At the level of the couple, the main tax benefits attached to having children (the CTC and EITC) narrowly define the family by requiring marriage. Yet, at the child level, these provisions are more generous as they include, for example, children born out of wedlock. Indeed, in one respect, tax law has had a longstanding tolerance as to which children may be deemed part of the family. Tax exemptions, which may be claimed for “dependents,” are

39. The Child Tax Credit was enacted as part of the Tax Payer Relief Act of 1997, Pub. L. No. 105-34, tit. 1, § 101(a), 111 Stat. 796 (1997) (codified as amended at I.R.C. § 24 (2000)). The purpose was to reduce tax liability to reflect “a family’s reduced ability to pay taxes as family size increases.” *Id.* Congress believed providing a tax credit for families with dependent children would better recognize the financial responsibilities of raising children and promote family values. H.R. Rep. No. 105-148, at 310 (1997).

40. Eligible individuals can receive a credit against their yearly taxes equal to a certain credit percentage (dependent on the number of qualifying children) of their earned income for the year, not exceeding a certain amount. Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 26 (codified as amended at I.R.C. § 32 (2000)). Nonparents also qualify, but for much smaller benefits. For instance, an individual with one qualifying child gets a tax credit equal to thirty-four percent of their income, while an individual with no qualifying children gets a tax credit equal to almost eight percent. I.R.C. § 32(b)(1)(A). For a general discussion of the EITC, see generally Ann L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995); Lawrence Zelenak, *Redesigning the Earned Income Tax Credit as a Family-Sized Adjustment to the Minimum Wage*, 57 TAX L. REV. 301 (2004).

41. Consider, for instance, an unmarried couple with two children and a married couple with two children. The unmarried couple can file their tax returns separately and each claim one qualifying child for EITC purposes. I.R.C. § 32. Comparatively, the married couple is penalized, because to claim the EITC the couple must file a joint return, which pushes up the family income and reduces the credit. *Id.* at § 32(d). Thus, in this case the EITC penalizes married couples.

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.⁴²

Thus, 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 a broader range of parent-child relationships in American families. Given the continuing political strength of well-off married couples with one main breadwinner, it is not surprising to see the ongoing bias at the couple level in both the tax and Social Security programs.

C. Food Stamps

The Food Stamp Program,⁴³ adopted in its current form in the 1960s, stands in sharp contrast to both Social Security and tax law. Food stamps provide funds to low-income households for the purchase of approved food items.⁴⁴ Unlike Social Security, which is available to anyone who works in covered employment, or tax law, which is primarily aimed at the “haves” rather than the “have-nots,” the Food Stamp Program is a “means-tested” program restricted to those with immediate financial need. The theme to be emphasized here, however, is the considerable difference between the programs in terms of what sorts of families they recognize.

Because the Food Stamp Program is structured around “household” eligibility, this means that many groups who are not treated as families by Social Security or tax law can obtain food stamps as a unit.⁴⁵ Most strikingly, these include families headed by unmarried cohabitants—both heterosexual and homosexual. Single mothers qualify for food stamp just as readily as couples, and indeed, the largest category of food stamp

42. The term “dependent” for the purpose of tax deductions (including the Child Tax Credit and EITC) is broadly defined to include a “qualifying relative,” an individual who “has the same principal place of abode as the taxpayer and is a member of the taxpayer’s household.” I.R.C. § 152(c)(1).

43. See generally Ann Rubinstein, *The Family in Food Programs* (2005) (unpublished comment on which this section draws, on file with the author).

44. See Food Stamp Act of 1964, Pub. L. No. 88-525, 84 Stat. 2048 (codified at 7 U.S.C. §§ 2011-2036 (2000)). In fact, today recipients do not get “stamps” but rather what is in effect a debit card that allows them to charge qualifying food to the card’s account balance in the way that other shoppers charge bank-account-backed debit cards or credit cards. United States Department of Agriculture, Food and Nutrition Service, Facts About the Food Stamp Program, http://www.fns.usda.gov/fsp/applicant_recipients/facts.htm (last visited June 23, 2008).

45. A “household” is broadly defined to include “a group of individuals who live together and customarily purchase food and prepare meals together for home consumption.” 7 U.S.C. § 2012(i) (2000). Participation in the program is limited to households “whose incomes and other financial resources, held singly or in joint ownership, are determined to be a substantial limiting factor in permitting them to obtain a more nutritious diet.” *Id.* at § 2014(a).

claimants is the single-mother household.⁴⁶

Moreover, families can obtain food stamps for all of the children living with them regardless of formal legal relationship.⁴⁷ This is even broader than the definition of a dependent “qualifying child” for tax-exemption purposes (since there, proof of financial support is required), and considerably broader than the Social Security definition (which requires a formal stepparent or adoption relationship to a nonbiological child, regardless of whether the child is actually dependent on the breadwinner). In this sense, then, the food stamps scheme is remarkably tolerant in determining who counts as a “family.”

It almost did not turn out this way. In 1971, Congress passed a law redefining families eligible for the program that was designed to sharply restrict food stamp eligibility, in particular to “hippie” communes.⁴⁸ 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 amended law, broadly speaking, denied food stamps to households comprised of adults who were not married to each other or otherwise not related 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 had joined together in one apartment to share the rent, and who would lose desperately needed aid under the amended law. 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 twenty-year-old girl.

In *USDA v. Moreno*,⁴⁹ the U.S. Supreme Court found this law uncon-

46. According to a 2005 study, half of all food stamp participants are children (eighteen or younger), and sixty-five percent of them live in single-parent households. United States Department of Agriculture, Food and Nutrition Service, Frequently Asked Questions, <http://www.fns.usda.gov/fsp/faqs.htm#24> (last visited June 23, 2008). The overwhelming majority of these single-parent households are headed by a single mother. *Id.*

47. *See supra* text accompanying note 45.

48. Act of January 11, 1971, Pub. L. No. 91-671, § 2(a), 84 Stat. 2048 (adding a requirement to the definition of a “household” that the individuals be “related,” thereby disqualifying any household containing an individual who was unrelated to any other member of the household).

49. 413 U.S. 528 (1973); *but see* *Lyng v. Castillo*, 477 U.S. 635 (1986) (upholding the constitutionality of legal presumptions that related recipients are a “household”).

stitutional on the ground that it was intentionally aimed at harming a politically unpopular group—that is, hippies. By striking down the “related” requirement, *Moreno* allowed both hippies and separate low-income families forced to share one living unit to continue claiming benefits.⁵⁰ But for purposes of this analysis, it is critical to understand 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 Stamp Program is essentially indifferent to family structure and tolerant of any family type (even “communes”) so long as the members live 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 Stamp Program rules actually favor formally unrelated parents over married couples. This is because the former may file for benefits as separate claimants,⁵¹ and under the right circumstances, the household can wind up with more food stamps than had it claimed as a single unit.

This rather unusual example highlights a different point, however. In Social Security, for example, it would normally benefit cohabiting couples and their children to be treated as a family. Yet because the Food Stamp Program is means-tested, a wide definition of the applicant group can in some instances be harmful to claimants. If cohabiting couples and their children apply as a single unit, then the incomes of all adults in the unit are aggregated in determining both the eligibility of the household and the amount of assistance. Generally, as more individuals are added to a household, the allotment of food stamps per person goes down. Thus, the current arrangement, although more generous to needy cohabiting couples than the amendment struck down in *Moreno*, is not as favorable as one in which cohabitants have the option to apply separately (even if they share food and eat together). In this respect, we see an odd difference with tax law. For the latter, equal-earning unmarried partners can file separate tax returns and, because of the “marriage tax,” are financially better off not being married. However, under the Food Stamp Program, the ability to file separately is an advantage denied to unmarried partners who would qualify separately for the program or for a higher allotment of food stamps.

50. See generally *id.*, but see *Lyng v. Castillo*, 477 U.S. 635 (1986) (upholding the constitutionality of legal presumptions that related recipients are a “household”).

51. As more individuals are added to a household, the allotment of food stamps per person goes down. However, spouses and relatives cannot file as separate claimants because of an irrefutable presumption that related recipients are a “household” even if they do not eat together. 7 U.S.C. § 2012(i)(2) (2000).

D. Housing

The legal structure of our public-housing schemes⁵² broadly parallels the Food Stamp Program. The United States has two major public-housing programs. In one, the government owns housing and makes units available to needy people at low cost; in the other, commonly known as Section 8, the government subsidizes the rental of privately owned housing that is rented to those in need. In both of these programs, there is, at least formally, a great tolerance for all sorts of family structures.⁵³

Single mothers and their children qualify for public-housing units (whether the mothers are widows, divorcees, or never-married). 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 the 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 that are raising children who are neither their biological nor adopted children (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 unstable family structures, and housing authorities often have difficulties with these arrangements. After all, moving people from one apartment to another as family structure changes (because of a corresponding change in the size of the housing unit for which the family would seemingly now qualify) is cumbersome and often practically impossible. Moreover, it can be especially problematic if a single woman living in a public-housing unit wants to bring a man to live in her apartment. Then the authorities want information regarding his income, how much he will 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

52. See generally Madeline Howard, *Housing the American Family: An Analysis of Subsidized Housing Policy and Its Effects on Nontraditional, Low-Income Families* (2005) (unpublished comment on which this section draws, on file with the author).

53. U.S. Department of Housing and Urban Development (HUD) regulations broadly define families eligible for federal public housing programs. Most importantly, they do not set marriage or other formal relationship requirements. Rather, the focus is on the family’s status as a low-income family. See 24 C.F.R. § 960.102 (2000) (setting low-income status as a threshold for eligible families); *id.* at (providing a nonexhaustive list of the different types of families eligible for the program); 42 U.S.C. § 1437(a)(1)(A)-(B) (2000) (declaring the policy underlying the federal public housing programs is to address the shortage of decent and safe dwellings for *low-income families*); see also *Hann v. Housing Auth.*, 709 F. Supp. 605 (E.D. Pa. 1989) (holding that state public-housing authority did not have the statutory authority, based on a belief that cohabitation was “immoral,” to define “family” to mean two or more persons “related by blood, marriage, or adoption” living together).

bring the man into the home without telling the authorities, which, if discovered, risks eviction. Moreover, even if she plans to marry the man, if he has a criminal record, he will be formally excluded from many public-housing facilities (ostensibly to protect the safety of other residents and to give higher priority to those on the waiting list with no criminal record).⁵⁴ Such rules put those women in public housing to extremely difficult choices: drop the man, move out with him (often not practical), or cheat the system.

Despite the problems faced by public-housing claimants with non-“ideal” family structures, in its formal terms at least, American public-housing policy is generally accepting of the social realities of family structure. Practically though, things might be different. Little is known about just who rises to the top of the list for programs in which, in most cities, demand far outruns supply.⁵⁵

E. Welfare

In the early years of the twentieth century, individual states began to adopt “welfare” programs⁵⁶ to provide monetary assistance to low-income, single-parent families, which were politically understood to be impoverished households headed by widows.⁵⁷ This financial help was designed to allow those mothers to live with their children in their own homes, rather than having to move into a communal institution that housed many families together. In 1935, the national government began to underwrite financially these means-tested schemes.⁵⁸ When, as noted

54. HUD regulations require public housing authorities to set standards to screen out particular offenders and require denial of admission for certain crimes, particularly drug use. 24 C.F.R. §§ 960.204-960.206.

55. *See id.*, at § 960.206 (permitting public housing authorities to adopt local preferences in deciding who is selected from waiting lists); Michael S. Fitzpatrick, *A Disaster in Every Generation: An Analysis of Hope VI: HUD’s Newest Big Budget Development Plan*, 7 GEO. J. ON POVERTY L. & POL’Y 421, 433–36 (2000) (discussing the public housing crisis).

56. *See generally* Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 VA. L. REV. 2523 (1985); Stephen D. Sugarman, *Welfare Reform and the Cooperative Federalism of America’s Public Income Transfer Programs*, 14 YALE L. & POL’Y REV. 123 (1996) [hereinafter Sugarman, *Cooperative Federalism*]; Stephen D. Sugarman, *Welfare Reform Meets Ideological Impasse*, 7 HASTINGS WOMEN’S L.J. 363 (1996); Jill Adams, *Family Reform Through Welfare Reform: How TANF Violates Constitutional Rights to Volitional Family Formation* (2005) (unpublished comment on which this section draws, on file with the author).

57. At the 1909 White House Conference on Children, it was argued that widows and their children were especially deserving of public assistance. States responded by establishing “mothers’ pensions” to provide public assistance to single mothers, understood at the time to be widows. Sugarman, *Cooperative Federalism*, *supra* note 56, at 137. *See generally* WINIFRED BELL, *AID TO DEPENDENT CHILDREN* (1965).

58. Congress enacted Aid to Families with Dependent Children (AFDC) as part of the

above, the Social Security system was amended in 1939 to provide survivors' benefits for widows and their children, many envisioned that this change would, over time, largely eliminate the need for means-tested welfare. But changes in family structure produced all sorts of new poor, single-parent families who obtain welfare benefits. Today these families are mainly composed of never-married or divorced mothers and their children.⁵⁹

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 and unlucky widowed mothers. Yet, support should not be confused with embrace. These divorced and never-married mothers are helped for the sake of their children, and government has few qualms against intrusive regulation of the lives of those on the welfare 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. Authorities monitored the conduct of welfare recipients and threatened to cut off aid to "misbehaving beneficiaries."⁶⁰ Moreover, it was well understood that if single mothers on welfare had sexual relations, then some of them would have more children, increasing the cost of the program. The likely cost increase was undesired by those in power and hence to be discouraged. Besides, those extra children would 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 sexual relations while on welfare, this might encourage them to marry, which was expected to have several additional benefits for the woman, her children, and society at large.

Social Security Act of 1935. Social Security Act of 1935, ch. 531, tit. IV, § 401, 49 Stat. 620, 627 (codified as amended at 42 U.S.C. §§ 601-619 (2000)).

59. Due to changing ideologies about poverty, rising rates of divorce, and out-of-wedlock births, there was an explosion in "absent father" cases involving recipients who were divorced, separated, or never married. By 1993, about eighty-five percent of AFDC cases fell in this category. Stephen D. Sugarman, *Reforming Welfare Through Social Security*, 26 U. MICH. J.L. REFORM 817, 826 (1993) [hereinafter Sugarman, *Reforming Welfare*].

60. *Id.* at 825. States were permitted to set moral requirements for eligibility for AFDC, which were enforced by social workers. In some states, giving birth to an "illegitimate" child was deemed to render the home "unsuitable" and was cause for denial of benefits. *Id.* at 827 n.70. Similarly, initially, states could deny benefits if the mother lived with a "man assuming the role of spouse." See *Lewis v. Martin*, 397 U.S. 552 (1970). See generally Joel F. Handler & Ellen J. Hollingsworth, Institute for Research on Poverty, *The Administration of Social Services in AFDC: The Views of Welfare Recipients* 17-20 (1969) (discussing a 1967 study revealing that about half of single-mother recipients reported having discussions with their caseworkers about their relationships with men, dating habits, or marriage plans).

Starting during the 1960s, however, and coincident with the sexual revolution in the United States, it became difficult to maintain a strong policy of prying into the private sexual lives of women on welfare. The use of midnight raids in which welfare officials searched for evidence of a "man in the house" was roundly condemned as an inappropriate invasion of privacy.⁶¹ 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 Americans⁶²—a politically difficult strategy at the height of the 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.⁶³

Nonetheless, even today, as a matter of social norms, low-income, single motherhood is not viewed as an equally desirable family type as the "ideal" family.⁶⁴ Rather, the mainstream view regards this is an unfortunate family structure that will be tolerated and financially helped for the sake of the children (at least so long as the mother properly behaves). The

61. For a discussion of home inspections of welfare recipients, *see generally* BELL, *supra* note 57 (discussing early federal efforts to combat state efforts to impose unconstitutional conditions on their AFDC programs); Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 *YALE L.J.* 1347 (1963) (discussing the constitutionality of unannounced inspections by welfare officials); *King v. Smith*, 392 U.S. 309 (1968) (invalidating Alabama's "substitute father" rule, which denied benefits to families with mothers who were cohabiting with men outside the bonds of marriage); *Lewis v. Martin*, 397 U.S. 552 (1970) (holding that, in the absence of proof of actual contribution or legal duty, the state, in computing AFDC payments, may not consider the income of a "man assuming role of spouse").

62. Sugarman, *Single-Parent Families*, *supra* note 4, at 23 ("Between 1967 and 1997, the proportion of African-American children born outside of marriage skyrocketed from around two percent to nearly seventy percent.").

63. *See generally* *Anderson v. Burson*, 400 F. Supp. 401 (N.D. Ga. 1968) (upholding the constitutionality of an "employable mother" regulation affecting eligibility of seasonal workers); *see also* Risa Kaufman, *The Cultural Meaning of the "Welfare Queen": Using State Constitutions to Challenge Child Exclusion Provisions*, 23 *N.Y.U. REV. L. & SOC. CHANGE* 301, 307 (1997) (discussing the treatment and perceptions of black welfare mothers).

64. The current federal welfare program, Temporary Assistance for Needy Families (TANF), promotes the two-parent household as the "ideal" family. Congress made the following findings: (1) that marriage is the foundation of a successful society; (2) that marriage is an essential institution of a successful society that promotes the interests of children; and (3) that promotion of responsible fatherhood and motherhood is integral to successful child-rearing and the well-being of children. Two of the stated purposes of the program are to prevent and reduce out-of-wedlock pregnancies and to encourage two-parent families. 42 U.S.C. § 601 (2000); *see also* Sara McLanahan et al., *Fragile Families, Welfare Reform, and Marriage*, WELFARE REFORM AND BEYOND: THE FUTURE OF THE SAFETY NET 152–59 (Andrea Kane et al. eds., 2002), [hereinafter McLanahan, *Fragile Families*] (discussing recent studies that show both children and adults benefit from marriage); MURRAY, *supra* note 21, at 124–34 (discussing "two indicators that almost everybody agrees are important evidence of problems with the family: illegitimate births and families headed by a single female").

transition from aid recipient to married woman remains a typically welcomed development.⁶⁵

This acceptance, but not embrace, of low-income, single motherhood is also evidenced by the growing concern over the course of the second half of the twentieth century that welfare was having the perverse behavioral effect of encouraging more such households.⁶⁶ Welfare reformers 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 mothers) rather than either marrying the child's father 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, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 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 and using the money to fund their own apartments; and various measures that sought to discourage claimants from having more children while on aid.⁶⁷ Efforts to achieve the last objective included denying extra assistance to mothers already receiving welfare who subsequently have more children and rewarding states that decrease their out-of-wedlock birth rate among aid recipients.⁶⁸

65. To further the goal of TANF to encourage the formation of two-parent families, the federal government offered \$300 million to the states for promotion of "healthy marriages" programs, including "marriage bonuses" for couples that marry before their child is born, marriage preparation courses and mentoring programs, and benefit cuts to cohabiting couples. Wendy Sigle-Rushton & Sara McLanahan, *For Richer or Poorer? Marriage as an Anti-poverty Strategy in the United States*, 57(3) *POPULATION* 509, 512 (English ed., May-June 2002). See generally McLanahan, *Fragile Families*, *supra* note 64 (proposing ways to promote marriage and "marriageability," including TANF and child-support reform).

66. See generally MURRAY, *supra* note 21. Murray argues that welfare tends to produce net harm because it provides incentives to bad behavior and not enough stimulation of good behavior. *Id.* at 218. Murray cites an ambitious and broadly validated social-science study, the Negative Income Tax experiment (NIT), beginning in 1968 and lasting in some states through 1978, this study demonstrated that a system of making payments to persons whose income falls below a certain floor results in significantly higher rates of marriage dissolution and reduction in work. *Id.* at 147-66.

67. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at 42 U.S.C. §§ 601-19 (2000)), (replacing AFDC with the current welfare program TANF); *id.* at § 912 (codified as amended at 42 U.S.C. § 701) (allocating \$50 million a year for five years in block grants to states for abstinence-only education programs); *id.* at § 408(a)(5) (codified as amended at 42 U.S.C. § 608(4)-(5)(2000) (requiring teen parents to live at home or in an adult-supervised setting and stay in school).

68. *Id.* at § 402(a)(1)(A)(v), 110 Stat. 2105 (codified as amended at 42 U.S.C. § 602)

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 mothers, raising their children in parallel to married mothers whose husbands went out to work.⁶⁹ 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.⁷⁰

By the time PRWORA was enacted in 1996, work requirements seemed totally unremarkable. If so many middle class and professional women were in the paid labor force,⁷¹ how could society justify allowing

(requiring states to submit plans establishing goals and to take action to prevent and reduce the incidence of out-of-wedlock pregnancies); *id.* at § 403(a)(2)(B) (codified as amended at 42 U.S.C. § 603) (offering a \$20 million bonus to states that decrease the number of illegitimate births by a certain amount). PRWORA also left intact the ability of states to enact "family caps" to prohibit an increase in benefits when welfare recipients have additional children. Since passage of the Act, twenty-three states have decided to continue to utilize caps already in place or to create new ones. Wendy Chavkin et al., *Sex, Reproduction, and Welfare Reform*, 7 GEO. J. ON POVERTY L. & POL'Y 380, 381 (2000).

69. See generally BELL, *supra* note 57.

70. For a discussion of welfare work requirements, see generally LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* (1986). In the mid-1960s, Congress began imposing work requirements as a condition to receiving public assistance. In 1967, Congress created the Work Incentive Program (WIN), requiring mandatory participation in work programs, regardless of gender. Pub. L. No. 90-248, § 204, 81 Stat. 884, 884-92 (repealed 1988). WIN II, created in 1971, added more conditions and restrictions. Pub. L. No. 92-223, §§ 3(b)(4)(A)-(F), § 433(a)-(b), (e)-(h), 85 Stat. 802, 806-07 (1971) (codified at 42 U.S.C. §§ 633-45 (repealed 1988)). In 1981, Congress imposed even more demanding work requirements. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 2301-2321, 95 Stat. 357, 843-60 (codified in scattered sections of 42 U.S.C. §§ 601-645 (2000)) (requiring work in public service jobs for the number of hours equal to the recipient's AFDC grant divided by the minimum wage). In 1994, the Family Support Act created the Job Opportunities and Basic Skills Training Program (JOBS), which required recipients to participate in a range of educational and work-related activities. Pub. L. No. 100-485, 102 Stat. 2342 (1988) (codified at 42 U.S.C. § 682 (1994) (repealed 1996)). In 1996, PRWORA established new requirements designed to encourage independence. Pub. L. No. 104-193, § 407, 110 Stat. 2105 (1996) (codified at 42 U.S.C. § 607) (setting mandatory work requirements ranging from twenty to thirty-five hours a week depending on composition of the family); *id.* at § 408(a)(7) (codified at 42 U.S.C. § 607) (setting a five-year time limit on receipt of benefits); *id.* at § 402(a)(1)(A)(ii) (codified at 42 U.S.C. § 602(a)(1)(A)(ii)) (requiring recipients to start working within two years of beginning of receipt of benefits).

71. The labor force participation rate of women has risen dramatically since 1970. From 1970 to 1999, the participation rate of women (age sixteen and older) increased from about forty-three percent to sixty percent. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *WOMEN IN THE LABOR FORCE: A DATABOOK*, Report 985 (2005). From 1975 to 2000, the rate of working mothers with children under age eighteen rose from forty-seven percent to seventy-three percent. *Id.* In 1996, when Congress passed PRWORA, about sixty-three percent of women were employed. *Id.* Women have also made substantial inroads into higher paying occupations. In 2004, half of all management, professional and related occupations were held by women. *Id.*

low-income women to remain at home living on the “dole?” Conservatives suggested that welfare mothers were lazy women who sat around watching TV, perhaps doing drugs and having sex. These critics forcefully argued that these women should be working. The reality was often very different from what this image implied. In fact, many welfare claimants were actually working for money, at least part-time.⁷² 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 often 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; 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,⁷³ many women on welfare find themselves financially no better off and sometimes worse off. They take officially recognized jobs at the government’s insistence, but in turn they receive somewhat reduced aid—in contrast to their prior state of illicitly combining aid with unreported earnings. In any event, it is now widely accepted as appropriate 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.⁷⁴

Ironically, this policy of coercing labor-force participation by welfare claimants still does not exist in the Social Security system. There, a younger widowed mother caring for children can claim benefits without

72. See Kathryn Edin & Christopher Jencks, *Reforming Welfare*, in *RETHINKING SOCIAL POLICY: RACE, POVERTY AND THE UNDERCLASS* 204, 204–15 (Christopher Jencks ed., 1992). Many welfare families cannot survive on welfare alone. While most single mothers supplement their welfare checks with work, many do not report it because it would reduce their benefit levels by almost the full amount of their earnings.

73. PRWORA, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended at 42 U.S.C. §§ 601-619 (2000)). For a description of PRWORA’s work requirements, see *supra* text accompanying note 69.

74. By 2000, the welfare caseload declined by more than fifty percent. Sugarman, *Single-Parent Families*, *supra* note 4, at 35. One explanation for the decline is that it resulted from “the confluence of three major factors: welfare reform, a robust economy, and a federal system of programs that support work.” *Id.* The timing of other trends—a leveling off of illegitimate births, a declining teen birth rate, and an increasing percentage of two-parent families—suggests factors other than or in addition to welfare reform also contributed. Brookings Inst., *Welfare Reform: An Examination of Effects*, BROOKINGS, Sept. 20, 2001, http://www.brookings.edu/testimony/2001/0920welfare_haskins.aspx?media=1 (testimony of Ron Haskins before the House Committee on Education and the Workforce, Subcommittee on 21st Century Competitiveness).

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.⁷⁵

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 PRWORA, several new provisions have been proposed, and some enacted, that are more explicitly aimed at promoting marriage.⁷⁶ For example, one program sends unmarried couples in which the woman is pregnant to psychologically based parenting/marriage classes or therapy.⁷⁷

The bottom line is this: although the surrounding social norms have changed, for nearly one-hundred years 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 the aid was never meant to put this type of family on the same social footing as the “ideal” family.⁷⁸

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 (even if they have the opportunity) are not considered social outcasts. Even unmarried single women are not disparaged as before—so long as they have jobs, provide for themselves and their children, and do not seek public assistance.

One final matter to emphasize here is the long-standing political opposition to awarding welfare benefits to married couples with little or no income. That is, with modest exceptions, both Aid to Families with Dependent Children (AFDC) (in effect from 1935 through 1996) and

75. Sugarman, *Reforming Welfare*, *supra* note 59, at 817–20.

76. In February 2002, President George W. Bush proposed the Healthy Marriage Initiative to address divorce reduction, to promote healthy marriage, and to reduce out-of-wedlock births. Press Release, White House Office of Communications, Proclamation by the President: Marriage Protection Week (Oct. 3, 2003). In 2005, two welfare reauthorization bills were introduced in Congress: the Personal Responsibility, Work, and Family Promotion Act, H.R. 240, 109th Cong. (2005), and the Personal Responsibility and Individual Development for Everyone Act (PRIDE), S. 667, 109th Cong. (2005). Both bills included \$100 million of funding for marriage promotion, including public advertising campaigns, marriage skills, premarital education, and divorce reduction programs. *See supra* text accompanying note 65.

77. Katherine Boo, *The Marriage Cure: Is Wedlock Really a Way Out of Poverty?* THE NEW YORKER, Aug. 18, 2003.

78. For recent accounts of the lives of the poor while on (and off) welfare, see generally NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER* (2001); FOX BUTTERFIELD, *ALL GOD’S CHILDREN* (1995); JASON DEPARLE, *AMERICAN DREAM* (2004); KATHRYN EDIN & MARIA KEFLAAS, *PROMISES I CAN KEEP* (2005); ADRIAN NICOLE LEBLANC, *RANDOM FAMILY* (2003); MICHAEL SHAPIRO, *SOLOMON’S SWORD* (1999).

today's Temporary Assistance for Needy Families program (TANF) (post-1996 welfare reform) target unmarried parents (mostly, although not exclusively, mothers).⁷⁹ This policy reflects the underlying moral value that where there is a husband, he should be the provider—the “ideal” family again. But unlike the tax and Social Security benefits enjoyed by such families higher on the socioeconomic spectrum, here that ideal is promoted by minimizing aid to families that seem structurally capable of self-support, for fear that substantial social assistance would undermine the man's willingness to perform his traditional role. As a result, the core structure of the welfare system financially discourages marriage for men who cannot clearly perform the breadwinner role and is harsh on families in which an able-bodied husband suddenly fails in that duty.⁸⁰

To be sure, single mothers who do marry are often financially considerably better off than before because the husband's earnings may well exceed the woman's welfare grants. But where the man's current earnings or future prospects are slim, the structure of welfare law encourages cohabitation without marriage, especially secret cohabitation in which the government is unable to identify financial support from the partner.

F. Immigration

Lastly, like welfare law, immigration law⁸¹ is internally conflicted in its attitude towards the family. On the one hand, U.S. immigration policy today strongly favors family reunification.⁸² This means that bringing a

79. Social Security Act of 1935, tit. 4, § 406, 49 Stat. 620 ch. 531 (codified as amended in scattered sections of 42 U.S.C. (2000)) (defining a “dependent child” for purposes of AFDC to mean a child “deprived of parental support or care” whether by death, continued absence from the home, or physical or mental incapacity of a parent). In the earliest years, more than half of the cases involved deceased father claims. Stephen D. Sugarman, *Roe v. Norton: Coerced Maternal Cooperation*, in *IN THE INTEREST OF CHILDREN* 365, 371 (Robert H. Mnookin ed., 1985). By 1996, about sixty percent of welfare recipients were mothers of children born out of wedlock. Sugarman, *Single-Parent Families*, *supra* note 4, at 20.

Because of concerns that AFDC incentivized recipients to remain unmarried or divorced in order to be eligible for benefits, Congress experimented with giving AFDC benefits to “intact families” (defined as two-parent families with an unemployed parent). In 1988, Congress passed the Family Support Act of 1988, which required all states to provide assistance to intact families through the AFDC Unemployed Parent program (AFDC-UP). Pub. L. No. 100-485, 102 Stat. 2342 (codified at 42 U.S.C. § 682 (1994) (repealed 1996)); *see also* U.S. GEN. ACCOUNTING OFFICE, BRIEFING REPORT TO THE CHAIRMAN OF THE COMMITTEE ON FINANCE, U.S. SENATE, UNEMPLOYED PARENTS: AN EVALUATION OF THE EFFECTS OF WELFARE BENEFITS ON FAMILY STABILITY, GAO/PEMD-92-19BR (1992) (evaluating state implementation of AFDC-UP programs in eight states and the effects on family stability and use of AFDC-Basic).

80. This is in contrast to the Food Stamp Program, where such households are eligible regardless of marital status.

81. *See generally* Minal Hasan, *Immigrant Families in Public Policy* (2005) (unpublished comment on which this section draws, on file with the author).

82. In 1965, Congress amended the 1952 Immigration and Nationality Act to establish a

qualifying relative into the country as a legal alien is the most common way for immigrants to become U.S. citizens.⁸³ 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.⁸⁴

Perhaps most importantly for our purposes here, if you enter into a bona fide marriage with a foreign-born noncitizen, usually you can eventually bring that spouse to be with you in the United States. This pro-marriage feature has its exclusionary aspect as well. Clearly, cohabitants (both heterosexual and homosexual) are excluded from the preferred category, as are others who may qualify as “family” in their own country but not under U.S. law. Additional wives are the best example of this; that is, some women who are legally married to a man in their home nation are viewed as invalid add-ons to illegal polygamous families as far as U.S. law is concerned and, therefore, they are ineligible to immigrate as wives.⁸⁵

Notice that “family” for immigration purposes clearly includes older parents of adult children—what one might call a multi-generational family. This provision ties into another special feature of immigration law. Would-be immigrants typically must have “sponsors” who guarantee that the immigrant will not become a “public charge,”⁸⁶ and these sponsors are

visa allocation system based on reunification of families, abolishing the previous system based on national-origin quotas. Hart–Celler Act, Pub. L. No. 89-236, 79 Stat. 911 (1965) (current version at 8 U.S.C. §§ 1101-1537 (2000)).

83. Family-based admissions (as opposed to employment-based or diversity-based admissions) make up seventy-five to eighty percent of lawful immigrants to the United States. Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511, 535 (1995). For instance, in 1993, there were 147,012 employment-based admissions, 33,468 diversity-based admissions (for immigrants from countries with low rates of immigration to the United States), and 539,209 family-based admissions. *Id.* Furthermore, an even greater number of admissions may be characterized as “family-based,” because many spouses and children are admitted under the employment and diversity categories. *Id.*

84. 8 U.S.C. § 1151(b)(2)(A)(i)(2000) (defining “immediate relatives” of U.S. citizens, who are able to obtain permanent resident status without a waiting period, as spouses and minor unmarried children, plus the parents of citizens); *id.* at § 1153 (setting the order of preference as follows: unmarried sons and daughters of citizens, spouses and unmarried sons and unmarried daughters of permanent resident aliens, married sons and married daughters of citizens, and brothers and sisters of citizens).

85. DOMA’s definition of “marriage” as a legal union between *one man and one woman* applies to all acts of Congress, including federal immigration law. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2000)); *see also* Adams v. Howerton, 673 F.2d 1036, 1039 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982) (holding that gay marriage is not recognized under the Immigration and Nationality Act). *Id.*

86. An alien applying for a visa is inadmissible if, in the opinion of the consular officer or Attorney General, he or she is likely at any time to become a “public charge.” 8 U.S.C. § 1182(a)(4) (2000). A sponsor’s affidavit of support may be considered in making this determination. *Id.* The sponsor must execute a legally binding affidavit documenting that the sponsor’s income or assets are sufficient to provide a meaningful level of support should the alien at

often extended family members who may well live separately from the relatives they sponsor.⁸⁷ Hence, for these purposes, relatives beyond the household are clearly understood to be “family members” with a legal duty to support their relations.

This legal duty is otherwise largely unheard of in the United States today. Fifty years ago, if elderly poor people were to seek means-tested benefits (whether cash, medical care, or nursing home help), states and localities typically pushed them to call on their own adult children first. If those children were not forthcoming and the government provided benefits, those children were often pursued to reimburse the state.⁸⁸ Outside of the immigration context, however, these family-responsibility rules have been repealed or abandoned.⁸⁹

Under family reunification rules, if you left behind a biological child in another country when you immigrated to the United States, you could later bring that child to the United States, even if you were and have remained a single mother. So, too, if you adopt a child abroad, you could normally arrange for that child to come and live with you in the United States. But you cannot bring a nonadopted child to live with you, even if you previously lived with and financially supported that child elsewhere (and continued to send money to support that child once you arrived in the United States).⁹⁰ This policy mimics Social Security and much of tax law,

some point in the future rely on public benefits. *Id.* at § 1183a.

87. “Sponsor” is defined broadly to include citizens, nationals, or lawfully admitted aliens of the United States, who are at least eighteen years old, are domiciled in the country, and demonstrate a certain level of income. *Id.* at § 1183a(f).

88. For a discussion of family responsibility laws, see FLOYD BOND ET AL., *OUR NEEDY AGED* 152 (1954); Daniel R. Mandelker, *Family Responsibility Under the American Poor Laws II*, 54 MICH. L. REV. 607 (1956). Before 1965, many states had family responsibility laws, requiring adult children to care for their elderly parents. BOND *et al.*, *supra*, at 152–157. All of these states provided a judicial mechanism for collecting future payments or reimbursement, and some even imposed criminal penalties. *Id.* See generally *Swoap v. Super. Ct.*, 516 P.2d 840 (Cal. 1973) (upholding the constitutionality of state statutes requiring contribution and reimbursement from adult children of persons receiving public aid); *Los Angeles County v. La Fuente*, 119 P.2d 772 (Cal. Ct. App. 1941) (holding that the county is entitled under California’s “Old Age Security Law” to recover public-aid money spent on defendant’s parents). When Congress created Medicaid in 1965, which generally prohibited states from considering whether adult children had financial responsibility for applicants, some states repealed their family responsibility laws, though the vast majority allowed them to remain in effect. Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J.L. & POL’Y 709, 714–15 (2001). Today, thirty states have civil or criminal family responsibility laws. However, few actively enforce these laws, and eleven states have laws that have never been enforced. Matthew Pakula, *A Federal Filial Responsibility Statute: A Uniform Tool to Help Combat the Wave of Indigent Elderly*, 39 FAM. L.Q. 859, 862 (2005).

89. See *supra* text accompanying note 87.

90. 8 U.S.C. § 1101(b)(1) (2000) (defining “child” for immigration purposes as a biological child, a child born out of wedlock, or a child adopted).

in contrast to the more tolerant rules of means-tested programs such as food stamps and public housing described above.

III. The Family in the Future

A. Richer Families

Well-established middle-class and richer Americans typically have nothing to do with the Food Stamp Program, welfare, public housing, or immigration law. But they do pay taxes and they eventually claim Social Security benefits. For these families, as we have seen, the relevant law at the couple level decidedly continues to favor long-married spouses in which only one (typically the man) works in the paid labor force.

Because of this bias, both the tax and Social Security rules face pressure from spouses who behave as though marriage is a partnership in which both the husband and wife work in the paid labor force and earn broadly equivalent salaries. Advocates for such couples increasingly attack (1) the existing “marriage tax” that forces equal-earning, well-off married couples to pay more income taxes than they would pay were they cohabitants who remained unmarried, as well as (2) Social Security’s extra spousal benefits for one-earner families.⁹¹ Stay-at-home women who marry high-earners and then find themselves divorced before achieving ten years of marriage also object to Social Security’s failure to provide them access to spousal benefits. Cohabiting couples with one main earner object to the other partner’s exclusion from Social Security spousal benefits and to tax law’s denial of their right to file a joint return; yet, cohabitants with roughly equal earnings are not so harmed and, if anything, are advantaged by current tax law.

To some observers, there is a simple solution to all of these objections: Social Security and tax law should be individually based, not family-based, at least at the adult level. Were that so, today’s roughly equal-earning partnership couple (whether married or not and whether heterosexual or not) would no longer be disfavored, and all such couples would be treated the same, regardless of their marital status.

91. Critics argue that, while not the intention of legislators, marriage penalties unfairly punish and discourage marriage. For example, in 1996, more than twenty-one million married couples paid an average of nearly \$1,400 in additional taxes. In total, marriage penalties in 1996 equaled \$29 billion. CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX, 27–36 (1997), <http://www.cbo.gov/ftpdocs/Oxx/doc7/marriage.pdf#index=7&sequence=2> [hereinafter CONGRESSIONAL BUDGET OFFICE]. For a discussion of the criticisms of marriage penalties and proposed relief measures, see generally Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1 (2000). For a discussion of Social Security benefit inequality between one and two-earner families and proposals for change, see generally Blumberg, *supra* note 22; Liu, *supra* note 22.

With respect to Social Security, there has already been considerable talk, mainly by Republicans, of reforming the system in that direction. This reform is being led by those who generally oppose our “public” Social Security system and want to “privatize” it, modeling the new scheme after the increasingly popular structure used in private-sector pension schemes.⁹² These so-called 401(k) plans permit employees (matched by employer contributions) to set aside money for their retirement in a tax-advantaged way.⁹³ Employees control the investment of their pension money (and bear the investment risks). If fully embraced, this new system of “personal retirement accounts” would effectively do away with the Social Security bonus now provided to the nonworking (long-enough married) spouse.

On the face of it, Republican support of such a reform might seem inconsistent with the “family values” wing of the Republican Party that wishes for a return to the dominance of the “ideal” family of the 1950s. Yet, from another perspective, Republican support for this change is not surprising, given a broad commitment among many Republicans to the value that employee benefits should be individually earned, in contrast to the concept of socially shared burdens of retirement (plus unemployment, health care, and the like), more commonly embraced by Democrats and generally reflected in our existing social insurance plans.

On the tax side, there is also talk among academics and at least some policy-makers of requiring separate income-tax filing by those who now jointly file their returns.⁹⁴ This change would bring the United States more in line with the many other wealthy nations that require couples to file individually.⁹⁵ That change would not only end the advantage now enjoyed by married one-earner couples (as compared with two-earner couples), but it would also end the disadvantage now faced by married

92. See generally PRESIDENT’S COMM’N, STRENGTHENING SOCIAL SECURITY AND CREATING PERSONAL WEALTH FOR ALL AMERICANS: REPORT OF THE PRESIDENT’S (Dec. 2001) (discussing and recommending personal retirement accounts to strengthen the Social Security system).

93. I.R.C. § 401(k) (2000).

94. See generally Zelenak, *supra* note 91; Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994) (arguing in support of mandatory separate filing); Henry E. Smith, *Intermediate Filing in Household Taxation*, 72 S. CAL. L. REV. 145 (1998) (proposing that each spouse file a separate return, but can select any splitting ratio for how much of their combined income to include on the return of each spouse).

95. CONG. BUDGET OFFICE, *supra* note 91, at 28. The United States is among a minority of developed nations that taxes married couples. More than two-thirds of the thirty member countries of the Organization for Economic Cooperation and Development tax married couples as individuals. *Id.* Only three other developed countries tax couples jointly, and four others tax all family members as a single entity. *Id.* The trend has been moving away from joint taxation: ten countries have switched from joint to individual taxation, while no country has changed in the other direction. *Id.*

couples with equal incomes (as compared with unmarried couples).

Yet, these sorts of changes in either Social Security or tax policy seem politically unlikely so long as there are so many reasonably well-off, long-married, older couples who followed more traditional roles and financially gain in both programs from their single-breadwinner arrangement.⁹⁶ Taking away such a longstanding "entitlement" would be very difficult. Certainly on the Social Security side, legitimate claims of "reliance" would, at the least, make awkward anything other than a long-term phase-in of any new arrangement.

Hence, it may simply be that the sharply increased labor-force participation by wives will, by itself, make Social Security's spousal benefits for one-earner married couples largely a thing of the past. In short, over time fewer and fewer spouses may find themselves in a position to actually benefit from this status.

Indeed, greater pressure to reform Social Security may eventually come from briefly married (or briefly partnered) couples who seek a "community property" model. This is a reform that certain feminists have advanced. In return for ending the existing spousal benefit, all the wages earned during the marriage (or partnership) would be treated as having been half-earned by each spouse (or partner) regardless of who received the paycheck.⁹⁷ In this way, women who are not in the paid labor force would "earn" Social Security entitlements of their own on the theory that they are entitled to them in return for the contributions they make to the households that enable the men to thrive in the workplace. This change would especially help women whose marriages (or relationships) break up in fewer than ten years. Yet, it probably would not be as valuable as the existing spousal benefit for women who never enter the paid labor force.⁹⁸ Nonetheless, this sort of reform can also be viewed as individualistic in its outlook, by taking a different view as to which individual should properly

96. In 1996, a greater number of couples benefited from a marriage bonus than were penalized (under a broad definition of marriage penalties and bonuses). CONG. BUDGET OFFICE, *supra* note 91 at 49–50. Also, these couples collectively realized a total tax savings greater than the total additional taxes that penalized couples paid. *Id.* In 1996, twenty-five million married couples benefited from filing jointly, with a total reduction in income taxes of \$33 billion (an average deduction of \$1,300 per couple). *Id.* On the other hand, more than twenty-one million married couples were penalized by having to file jointly, with a total additional \$29 billion in taxes (an average of an additional \$1,400 per couple). *Id.* at 49.

97. See Blumberg, *supra* note 22, at 256–92 (discussing several variations of such a proposal, as well as state law treatment of division of pension rights upon divorce).

98. Other reformers propose giving stay-at-home mothers Social Security earnings credits for the work they do caring for their children (although it is not always clear whether anyone would "pay for" those credits). *Id.* at 271–76. Again this approach would appear most to help women whose marriages last too briefly to claim the spousal benefits available for divorced wives.

be understood to have earned the Social Security wage credits, especially when partners go their separate ways.

On the tax side, despite complaints about the “marriage tax,” it is important to understand that this “tax” only meaningfully hits higher-earning couples.⁹⁹ And, as among today’s higher-income married couples, single-breadwinner families (or those in which one earns far more than the other) still appear to have a political advantage. Hence, eliminating the disadvantage suffered by more equal-earning married couples may well have to wait until high-earning unmarried couples expand considerably in numbers and join in the chorus of complaints against the special joint-return filing benefits now provided to “ideal” married couples.

Reforming Social Security and tax law through the embrace of individualism is not the only possible direction of reform, however. Although these two public law schemes are still structured around the “ideal” family, in some jurisdictions America’s private law of the family is becoming increasingly accepting of nontraditional families. 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 over time that national public programs will do so as well. To be sure, at present, the Defense of Marriage Act¹⁰⁰ explicitly rejects gay marriage as a marriage for federal tax and Social Security purposes regardless of its status under state law. Moreover, several states themselves have recently made clear that, for state law purposes, cohabitants are not to be considered married couples.¹⁰¹ But this hostility to changing social practices might just be a temporary backlash.

After all, at the same time many couples are sharing job-based health insurance benefits whether or not they are married,¹⁰² cohabitants including gays and lesbians are increasingly permitted legally to adopt children as a couple,¹⁰³ and stepparents are gaining more rights and responsibilities with respect to their nonadopted stepchildren.¹⁰⁴ These changes indicate that increasingly what counts is whether people are living together as an

99. The marriage penalty is largest in the lower and higher income brackets. McCaffery, *supra* note 33, at 1025. However, it affects higher-income earners most because of the progressive nature of the tax rates. *Id.* Also, for the high income brackets, the marriage penalty on two-earner families becomes more significant and the bias towards one-earner families becomes stronger. *Id.*

100. DOMA, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2000)).

101. See, e.g., MICH. CONST. art. 1, § 25; KY. CONST. § 233A; COLO. CONST. art. II, § 31; ALA. CONST. art I, § 36.03.

102. See Stacey, *supra* note 16, at 152.

103. *Id.* at 146–51.

104. See generally Mason, *supra* note 20.

intimate unit that shares its resources. If private law in more states becomes even more welcoming of all of these “families,” then national programs like Social Security and tax might, in turn, be reformed.

One possible reform would be to legally recognize gay and lesbian marriages. But a broader solution would be to treat cohabitants with domestic-partner status the same as married couples. This latter approach would mean that unmarried couples with roughly equal earnings would no longer have a tax law advantage over similarly situated married couples (who do not have the practical option of filing separate tax returns). At the same time, to the extent that today’s cohabiting unmarried couples rely on a single breadwinner, they would gain the tax and Social Security advantages now enjoyed by equivalent married couples. The essential point here is that the objection to today’s treatment of cohabitants is not the same as the objection to the treatment of equal earners. “Ideal” couples are *both* married and have one prime breadwinner, but other couples might well have, not both, but only one (and either one) of those two attributes. This should make clear that, even among richer couples, there are conflicting interests in what constitutes fair treatment of the “family” by tax and Social Security law.

Notwithstanding these conflicting interests, one should not lose sight of the solidarity of interest among the rich along a different dimension. Put simply, the wealthiest American families as a group have been substantially assisted by recently changed national tax policies. Regardless of their filing status, the rates at which both their earned income and their capital gains are taxed are now sharply lower than in the past,¹⁰⁵ and the national estate tax is set to disappear in 2010,¹⁰⁶ thereby making it easier than ever for the well-to-do to pass on substantial family wealth to their children and grandchildren.

105. See Edmund L. Andrews, *Tax Cuts Offer Most for Very Rich, Study Says*, N.Y. TIMES, Jan. 8, 2007, <http://www.nytimes.com/2007/01/08/washington/tax08.html> (“Families earning more than \$1 million a year saw their federal tax rates drop more sharply than any group in the country as a result of President Bush’s tax cuts, according to a new Congressional study.”). In 2001, President George W. Bush cut income tax rates in the top four brackets and reduced estate and gift taxes. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 101-103, 501, 511, 521, 901, 115 Stat. 38, 41-45, 69-72, 150; Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, §§ 105, 303, 117 Stat. 752, 755-56, 764. In 2003, President Bush cut the tax rates on both capital gains and dividends. Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, §§ 301, 302, 117 Stat. 758-64 (codified at I.R.C. §§ 1(h)(11), 301, 302 (2000)). For a discussion of the Bush Administration’s tax policies favoring the wealthy, see Susan P. Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671, 711-24 (2006).

106. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001) (codified at I.R.C. § 2011 (2000) (slowly phasing out the estate tax by 2010, which is then reinstated in 2011 under the Sunset Provisions)). For a description of the estate tax legislation and other 2001 tax legislation, see David C. Johnston, *The Tax Bill Up Close: Some Facts, Some Tips*, N.Y. TIMES, June 3, 2001.

B. Poorer Families

For low-income families, food stamps, housing, and welfare programs reflect the social recognition that such families have long come in a great variety of forms that differ from the “ideal” family. Perhaps, since these schemes at their core are meant primarily to benefit poor children, they have largely allowed applicants to define their family as they wish by basing eligibility on the decision to share accommodation and food. This has usually permitted those who are needy and caring for children to get help regardless of their formal marital or parental relationships. Or, society’s leaders may have given up on low-income families structuring themselves around the “ideal” family structure of the upper middle class. The point to emphasize here, however, is that merely being acknowledged as a “family” does not necessarily mean being treated well by current law and policy.

Poor families with no earned income often must suffer materially impoverished lives (by U.S. standards) even if they qualify for food stamps, welfare, and public housing, because benefit levels are simply too meager.¹⁰⁷ Recent changes to welfare law put a five-year limit on the period for which most families can claim full benefits.¹⁰⁸ And even legal immigrants have had their access to means-tested benefits sharply curtailed.¹⁰⁹

Working class families that combine their modest earnings, the EITC, and perhaps some means-tested benefits, might climb a bit above the official poverty level. However, even the working poor often live as second-class citizens in terms of the goods and services they can enjoy.¹¹⁰ Notwithstanding government benefits, many low-income families continue to lack decent and sanitary housing, adequate transportation, nutritious food, funds to pay for after-school activities for the children, adequate medical care, and so on. And this is true of both nontraditional families and working-class “ideal” families headed by married couples with one

107. See generally Edin & Jencks, *supra* note 72 (discussing a study of the ability of welfare recipients in Illinois to survive on welfare benefits alone). *Id.* For example, in 1998, a single mother with one child and no outside income received \$250 per month in AFDC benefits, plus \$149 in food stamps and a Medicaid card providing some free medical services and prescription drugs. *Id.* The total amount of \$4,800 per year puts the recipient at sixty to seventy percent of the federal poverty line. *Id.* The results are similar whether there are two, three, or four children. Recipients living in subsidized public housing fared better, but similarly could not survive on welfare checks alone (only eighteen percent of welfare recipients in 1988 lived in public housing). *Id.*

108. PRWORA, Pub. L. No. 104-193, § 408(a)(7), 110 Stat. 2105 (1996) (codified at 42 U.S.C. §§ 601-619 (2000)).

109. PRWORA limited immigrant eligibility for federal and state public assistance programs and placed further restrictions, such as a five-year limit on receipt of federal means-tested benefits. *Id.* at §§ 400-423 (codified at 42 U.S.C. §§ 1601, 1611-1646).

110. See generally DAVID K. SHIPLER, *THE WORKING POOR* (2004) (exploring through interviews the lives of the American working poor).

breadwinner (whether by choice, limited employment opportunities, or disability).

Thus, the well-being of many American families depends not only on the willingness of public programs to acknowledge more than the "ideal" family of the 1950s. It also depends on public programs being effective and generous enough to allow all our families to have access to an adequate material standard of living. Put differently, even if you are recognized as a "family," you still might be a second-class one.