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THE BURDENS OF BENEFITS*

EDWARD J. MCCAFFERY**

I. INTRODUCTION

FAIRY tales typically have happy endings, and these typically involve the creation or recreation of a stable, patriarchal nuclear family. The Prince rescues the Damsel in Distress, the two get married, and everyone lives happily ever after—the no-longer distressed damsel to stay home and bear children, the Prince to ascend to the throne and perform his regal duties. Along the way bad things have happened, of course; these typically have to do with some disturbance of the happy home—the death of a mother, for example, and the attendant introduction of an evil stepmother.[1] In the warm glow of the final scene, it is easy enough to forget these ominous underpinnings. But in the dawn of a new day, members of the target audience—our children—are left with a haunting fear of the nontraditional family.

Many of us find ourselves living today not in the bright light of the core case of an Ozzie-and-Harriet style family but somewhere in its shadows. One-half of all American marriages now end in divorce;[2] one-fourth of all American children live in single-parent households, most of them poor;[3] over two-thirds of two-parent households with young children

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1. *See* MARINA WARNER, FROM THE BEAST TO THE BLONDE: ON FAIRY TALES AND THEIR TELLERS 202, 218 (Farrar Straus & Giroux eds., 1995) (discussing absent mothers, wicked stepmothers and their relationship to men). *See generally* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) (illustrating various disturbances that affect families).

2. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, THE NATIONAL DATA BOOK tbl.145 (117th ed. 1997) [hereinafter STATISTICAL ABSTRACT].

3. *See* STATISTICAL ABSTRACT, *supra* note 2, tbl.82, at 67 (noting number of American children that live in single-parent households); Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 21-22 (1995) ("Single-parent families now constitute twenty-six percent of all families with minor children and are the most rapidly growing family form in America.").

include working mothers;[4] same-sex couples with children are increasingly common.[5] Yet our benefits programs—in many ways the crowning glory of our "better angels," to use Lincoln's marvelous phrase[6]—are still pitched at paradigms. Social security, welfare, workfare and other government assistance programs have dark sides—burdens—that either fall on nontraditional households or stigmatize and perpetuate them, in poverty and on the fringes.

It seems to be a fashion of the political left to criticize the status quo and its reigning powers—to see the State as a bastion of prejudice, patriarchy and greed and to damn all of its projects in one fell swoop. But there is much that is commendable in modern democratic states such as America, and much that is lost—including the possibilities of better exchange and collaboration among all who aspire to make our social world better and fairer—when its critics neglect to give credit for this. Although, for example, our welfare programs are not as generous as they could be, they still exist, reflecting some degree of care and concern for our least fortunate sisters and brothers. We should build them up—not tear them down.

Nonetheless, like fairy tales, the good news of modern benefits programs often comes packaged with a dark side. Like fairy tales, both the good and the bad more often than not has to do with images of the family. Benefits programs are designed with the core case somewhere in mind—to enhance and entrench, to aid in the restoration of, or to provide a plausible replacement to, the preferred model of the patriarchal family. This leaves the benefits programs creating burdens on non-preferred, nontraditional families. More often than not, these darker sides are unintentional—or their status as "intentional" or not is complex, contested and, ultimately, unimportant.[7] What matters is that the burdens exist.

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4. *See* EDWARD J. MCCAFFERY, TAXING WOMEN 12 (1997); *see also* STATISTICAL ABSTRACT, *supra* note 2, tbl.631 (noting number of working mothers in two-parent households).

5. *See generally* Patricia A. Cain, *Same Sex Couples and the Federal Tax Law*, 1 LAW & SEXUALITY 97 (1991).

6. *See* Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-1865 215, 224 (Library of Am. ed., 1989).

7. *See* Lawrence Zelenak, *Tax and the Married Woman*, 70 S. CAL. L. REV. 1021, 1021-48 (1997) (discussing burdens on nontraditional families). Zelenak's informative review of my book, TAXING WOMEN, *supra* note 4, accuses me of overstating the extent to which Congress intended the pattern of gender bias in the tax laws. Although I think that there is indeed good reason to believe that the bias was intended—putting aside the usual problems with assigning "intent" to a group—my main response to this charge is that it does not matter much. Either Congress intended to generate a pattern of disincentives for working wives and two-earner families, or they failed to notice and respond as the burdens grew in intensity. Either way, the burdens exist, and society bears responsibility for them.

A. *Two Models*

There is a familiar dynamic. When a benefits program is first put in place, it is motivated or at least informed by a paradigm of the ideal, Ozzie-and-Harriet style family, which has a father who works outside the home and a mother who works inside it.[8] There are two broad archetypes.

In the first of these, what I shall call the Core Model, the benefits program is set up directly to assist the patriarchal core case. Its beneficiaries are one-earner, two-parent families, and its burdens fall on all else, especially working mothers. The State makes sure that the non-working woman/mother is protected. In doing so, it penalizes any attempt she might make to work outside the home. In the beginning, this is all done in explicitly gendered language; the benefits go to stay-at-home mothers, not fathers, and widows, not widowers, are protected.[9] Eventually, the explicit gendered dimension is replaced with a "gender neutral" structural bias—one-earner families are benefitted and two-earner families are burdened. Ironically, this facial gender neutrality is subsequently used to defend the status quo. But the brute reality is that one-earner, two-parent families overwhelmingly feature working fathers and stay-at-home mothers; there are few full-time, non-working, stay-at-home married fathers in America.[10] The paradigm thus remains patriarchal in fact if no longer in name. At least as important, a bias towards one-earner families is still a bias, after all, and one that has deepened over time even as two-earner families have become the statistical norm. The persistence of the core paradigm is not only gendered in its roots; it is also set against flexibility and freedom for modern families of all non-core sorts.

We can understand the benefits in the Core Model as helping Ozzie to be Ozzie—as privileging, entrenching and perpetuating the patriarchal model, the "happily ever after" image of the fairy tale.

In the second set of cases, what I shall call the Displaced Model, it is the failure of a patriarchal household to form or to persist that generates the perceived need for a benefits program. The animating conception is

8. Women have always worked, of course. *See generally* ALICE KESSLER-HARRIS, WOMEN HAVE ALWAYS WORKED: AN HISTORICAL OVERVIEW (1981) (reminding us that women—including stay-at-home mothers—have always worked); *see also* Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1619-20 (1996) (discussing possibility of empowering women by taxing women's household labor). The stereotypical family that I am after has a father who engages in paid market work outside the home and a woman who stays home and engages in unpaid housework.

9. *See* Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264, 272 (1989) (discussing scenario in which widowers are "entitled to survivors' retirement benefit only if they showed dependency on their deceased wives, whereas widows were automatically entitled to survivors' benefits"). Further, "most widowers are not eligible for spouses' benefits, regardless of whether they can show dependency, because one can claim as a spouse of a deceased covered worker only if one's owns benefits as a covered worker are less than the deceased spouse's benefits." *Id.* at 273.

10. *See* STATISTICAL ABSTRACT, *supra* note 2, tbls.629, 632.

that the absence of a traditional one-earner, two-parent household both constitutes the major problem and justifies some State largesse. We help Cinderella in her period of living outside the privileged core case. The State steps in and plays the role of the absent father/provider, disbursing benefits. The recurrent image is of a poor abandoned mother who needs some social support. Once again, the initial programs are explicitly gendered. The social beneficence is limited to lower-income custodial mothers and looks to a restoration of the "normal" state of the core case—it typically ceases on marriage. Over time, things change in the Displaced Model—both the benefits programs and the very conception of the problem—as we shall see below.

We can understand the benefits in the Displaced Model as filling in for Ozzie.

B. *Two Paths*

The two models play themselves out in starkly different ways despite the common beginning. In all cases, the benefits program starts small. Promulgators of the benefits do not notice the inevitable flip-side, the burdens, which are in any event minor in their incidence, or somehow do not count them as "bad" if they do notice. Because the program is so closely tied to deep social stereotypes and expectations of family life, it is not perceived as "social engineering." Over time the benefits program grows. At this point, the two Models split off in very different directions.

In the Core Model, the benefits program comes to generate a sense of entitlement. Reform efforts concentrate on protecting the core beneficiaries who assume that continued protection is a given. The benefits lose their identification as "benefits" and become instead part of a new status quo or baseline.[11] The burdens on nontraditional families and individuals outside the core case continue to be little noticed. These burdens never form a central focus of reform efforts although the expansion of the program has made them more severe. Society continues not to perceive any "social engineering" because it attributes the program's design to neutral rules and policies. The pattern is one of Humble Beginnings/Growth/Entrenchment.

In the Displaced Model, the program also grows over time. As it does so, its burdens also become more constricting. The failure to extend the reach of the program to a wider range of settings becomes more noticeable. The various "traps" laid by the rigidity of the system—for example, poverty traps, anti-marriage traps—become more problematic. Rather than leading to any sense of entitlement, however, the growth of the benefits program in the Displaced Model only leads members of the privileged core to complain more vehemently about the burdens imposed on them

11. *See* Duncan Kennedy & Frank L. Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 711-20 (1980) (discussing determination of 'baselines').

and to begin to doubt the necessity or wisdom of continuing to benefit non-core cases at all. The benefits never get accepted into a reconstituted status quo; they continue to be seen as optional acts of largesse. Reform efforts concentrate on dismantlement and retrenchment. The fact that the paradigm in the Displaced Model is of a nontraditional family comes back to haunt it. Why should the "we" of the Core Model be protecting a "them" who exist in non-core cases? A moral language is invoked to blame the beneficiaries for their very non-core status. Why aren't "they" married? Why do "they" have children? Why can't "they" earn their own keep? The benefits themselves become yet another burden on the recipients leading to stigma, blame and, ultimately, abandonment or weakening of the program.

Somewhere along the way an even more surprising turn takes place. A dramatic reconception of the paradigmatic non-core family comes about. In the beginning, the point of benefits in the Displaced Model was to assimilate certain sympathetic non-core cases—Cinderella stories—into the core by replacing Ozzie with the State. The custodial mother was seen as caught between two worlds: the happy one of the core Ozzie-and-Harriet style family and the netherworld of non-core cases where wicked stepmothers and other villains permanently dwell. The initial benefits program attempted to rescue Cinderella from this state of limbo by bringing her into the core with the State as the surrogate husband/father. But as the program grows and becomes more expensive, the burdens it imposes on the core families who perceive themselves as being taxed to provide the benefits become more manifest. This motivates a reconception.

It becomes first accepted, then mandated, that the custodial single parent in the Displaced Model engage in some productive work; welfare is born again as workfare. This is not seen, as it was initially, as threatening the core case, because the woman at the center of the Displaced Model has come to be viewed as permanently outside the core, as a part of a "they" that is not "us." The custodial mother is sometimes seen as herself harmed by the benefits (trapped in a "cycle of dependence"), so that the reconception is for her own good;[12] at other times she is viewed as bad for accepting the State as her groom (a "welfare queen"), and the reconception is for the sake of the good itself.[13] In either event, it is now seen as fitting and proper for Cinderella to work, at least if the alternative is living on the public dole. This reconception thus banishes Cinderella to a life permanently outside the core. Mainstream society has given up on her.

12. *See* Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 719-20 (1992) (stating traditional view that recipients are "dysfunctional mothers incapable of fitting into mainstream society, and they are economically and emotionally atrophied because of their 'dependence' on welfare").

13. *See id.* at 719 (stating traditional view that welfare recipients are responsible for their own poverty); *see also* Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 419-20 (1999).

Or, as one scholar has put it, the model continues to be one of encouraging a woman's dependence—but only on men, not on the state writ large.[14]

The wider society sees the programs in the Displaced Model, in contrast to those in the Core Model, as acts of "social engineering." This becomes either a catch-phrase for arguing against the benefits programs at their root and in toto, or else is a given, accepted fact of the matter—a legitimate, even necessary, accompaniment to the State's largesse. Technocratic debates over just *how* to socially engineer come into play to redirect the program. The metric for continuance of the benefits is their consequences for the wider society and its core cases—whether or not the beneficiaries in the Displaced Model come over time to be less dependent on, or burdensome to, society; what "bang for the buck" "we" all get. These kinds of questions are never asked in the Core Model, where the benefits are taken as a matter of right that finesses the need for, or trumps the impact of, any analysis of consequential effects. The pattern in the Displaced Model is one of Humble Beginnings/Growth/Retrenchment.

C. *One End*

Not surprisingly, there is a strong political perceptual dimension to all of these stories and their effects. Psychologists and other social theorists have long known that there is a "status quo bias"—a tendency to be averse to change, to view any disruption to the way things are with suspicion and fear.[15] The benefits stories show that there is also a strong political and ideological dimension to what, exactly, is taken to form the status quo in the first place—what we might call an "assimilative bias" in what we take to be part of the way things are "meant to be."[16] In the Core Model, the "benefits" early on lose their status as benefits in the popular psyche—they become assimilated into the core. Their burdens are not noticed and their perpetuation is taken for granted, as a precondition for any subse-

14. *See* Twila L. Perry, *Family Values, Race, Feminism and Public Policy*, 36 SANTA CLARA L. REV. 345, 361 (1996) ("Because we live in a patriarchal society, it is considered acceptable for women to be economically dependent, as long as that dependency is on a man. . . . On the other hand, many people would feel that the mother on public assistance is lazy and should take any job.").

15. *See generally* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMICA 263 (1979). I discuss the status quo bias in Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861 (1994) [hereinafter McCaffery, *Cognitive Theory*] and in Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341 (1995) (noting that people acting under pervasive influence of status quo bias are averse to change) [hereinafter McCaffery et al., *Framing the Jury*]. For a classical conservative's general arguments against revolution and change, see generally EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, 1790 (Conor Cruise O'Brien ed., 1987).

16. *See generally* Martha Alberston Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL'Y REV. 89 (1998) (arguing that all individuals in our society receive some form of subsidy).

quent change or reform. In the Displaced Model, in contrast, the salience of the "benefits" only grows over time as the benefits increase in magnitude. This growth serves to draw attention to the ways in which benefits to some (non-core families) pose a burden on others (the core families). Benefits to non-core members of society remain deviations, and the larger they are, the more objectionable they become. Society is consistently selective in what programs and policies are assimilated into the status quo.

The status quo and assimilative biases are followed by and related to two other political perceptual biases. First, there is a "neutrality bias"—a tendency to support policies, programs and procedures that can be defended in "neutral" terms.[17] But just as with the status quo and assimilative biases, there is a bias in what is taken as neutral in the first place. Programs that benefit core cases seem neutral; those that benefit non-core cases do not. Finally, and again relatedly, there is a "consequentialism" bias.[18] Programs within the core are not justified on consequential grounds; we use instead the language of neutrality and fairness, rights and entitlement. Programs outside the core, in contrast, are evaluated in terms of the results they produce and are altered or abandoned if these outcomes are not satisfactory to the core.

What is consistent in all of this is that benefits are taken for granted to the core and left tenuous to the non-core and that burdens on the core are noticed while burdens on the non-core are not. In all cases, the core wins—in both ultimate outcome and in the psychological framing and understanding of the very issues at stake.

In what follows, I sketch out four examples to illustrate these points. I hasten to add that many scholars operating in many disciplines—many of them feminist-oriented ones—have done important work exploring in great depth the programs I discuss, necessarily briefly, below. My aim is not to add to this considerable body of work as it is to collect various pieces of it together and summarize it in a way that emphasizes the central connections across benefits programs.

The first two examples fall into the Core Model. The first is a classic "benefits" program—social security.[19] The second is a structural aspect of our tax system—the pattern of joint filing and marriage bonuses under the income tax.[20] The next two examples fall into the Displaced Model. Once again the first, welfare, is a classic "benefits" program.[21] The sec-

17. *See* Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1035 (1993).

18. *See generally* Jonathan Baron & Ilana Ritov, *Intuitions About Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17 (1993).

19. For a discussion of social security, see *infra* notes 23-61 and accompanying text.

20. For a discussion of marriage bonuses, see *infra* notes 62-123 and accompanying text.

21. For a discussion of welfare, see *infra* notes 124-65 and accompanying text.

ond, the earned-income tax credit, is a structural feature of our tax laws.[22] Aside from illustrating the ideas sketched out above, these examples also illustrate that the line between "benefits" and "burdens" is very thin indeed and that our social, economic and legal institutions contain many examples of each.

II. THE CORE MODEL: HELPING OZZIE BE OZZIE

A. *Social Security*

1. *Humble Beginnings*

The great Social Security Act of 1935,[23] embracing both the social security and the welfare systems as we have come to know them, sprung to life in the midst of the Great Depression and Franklin Roosevelt's first term as president.[24] The old age assistance and retirement program that is my subject in this section was originally intended to be an actuarially-funded system. In other words, the taxes or "contributions" collected from workers were to be set aside and invested so that these precise funds could later be drawn down by the same pool of workers that contributed them.[25] Rates were low—a 1% "contribution" from each worker matched by an equal share from the employer.[26]

By 1937, the advent of Keynesian economics had changed the government's thinking.[27] Building up a large reserve during a time of general under-consumption was no longer seen as a good idea. The Roosevelt Administration decided to switch over to a "pay as you go" model, in which current workers would make contributions into a system that would then immediately be paid out to current beneficiaries. This meant in practical

22. For a discussion of the earned-income tax credit, see *infra* notes 166-212 and accompanying text.

23. Social Security Act, ch. 531, §§ 1-2110, 49 Stat. 620 (1935) (current version at 42 U.S.C. §§ 301-1397jj (1998)).

24. *See generally* MCCAFFERY, *supra* note 4, at 98-101 (discussing social security and welfare systems during Great Depression).

25. *See* Connie Chang, *Immigrants under the New Welfare Law: A Call for Uniformity, A Call for Justice*, 45 UCLA L. REV. 205, 280 (1997) ("The steady, reliable, contributing workers were included in the retirement program, and the marginal workers, domestics and agricultural laborers were relegated to state old-age assistance and local relief.").

26. *See* Patricia E. Dilley, *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security*, 30 LOY. L.A. L. REV. 1063, 1123 (1997) (noting that stated purpose of both 1935 Act and 1939 Act was "preventing dependency in old-age"). The goal of the contributory social security program was to "enable younger workers, with matching contributions from their employers, to build up a more adequate old-age protection than it is possible to achieve with noncontributory pensions based on a means test." *Id.* at 1123-24.

27. *See* Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1148 (1998) (recognizing how Keynesian Economics led to growth in size of government and "lent intellectual support for augmented government intervention into domestic affairs"). *See generally* JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1936).

terms that the reserve would be spent now, providing a beneficial stimulus to the economy.[28] It also meant that, by deviating from actuarial principles, there would be windfall "winners" from the government's action. In other words, a benefits program was being born. Roosevelt appointed a commission to decide exactly how to spend the surplus, and this led to eventual changes in the statute in 1939.[29]

Alice Kessler-Harris has done wonderful archival research to give us a glimpse into the thinking of the Social Security Advisory Council.[30] This distinguished panel, consisting mainly of men drawn from politics, academia and business, considered two main proposals. The first looked to extend benefits to agricultural workers, which included largely African-Americans.[31] This was opposed by Southern Democrats, and the plan went nowhere.[32] Instead, the panel chose another benefits program—the extension of social security benefits to women as wives of retirees or as widows.[33] After much discussion, the Council agreed to give a retired man with a wife present in the household 150% of the benefits that he would get as a single man.[34] On his death, his widow would get a "widow's share" of 75% of his benefits—one-half of the communal whole.[35]

The initial law was explicitly sexist in that it referred to widows and wives—a feature subsequently dropped by a court ruling that ironically favored men.[36] What the 1939 change did in essence was to provide a retirement and death protection benefit for every wife of a working man. It was as if the government had bought an annuity and life insurance pol-

28. *See* Lucy A. Williams & Margaret Y.K. Woo, *The "Worthy" Unemployed: Societal Stratification and Unemployment Insurance Programs in China and the United States*, 33 COLUM. J. TRANSNAT'L L. 457, 478-79 (1995) (explaining that President Roosevelt established Committee on Economic Security in 1934 with mandate to "'stimulat[e] . . . private employment and provid[e] . . . public employment for those able-bodied workers whom industry cannot employ at a given time'") (citations omitted).

29. *See id.* at 478-81 (outlining formation of Committee on Economic Security, as well as its goals and actions).

30. Alice Kessler-Harris, *Designing Women and Old Fools: The Construction of the Social Security Amendments of 1939, in* U.S. HISTORY AS WOMEN'S HISTORY: NEW FEMINIST ESSAYS 87 (Linda K. Kerber et al. eds., 1995) (discussing rationale behind recommendations of Social Security Advisory Council).

31. *See id.* at 103 (outlining historical debate surrounding Committee's initial proposal to cover African Americans).

32. *See id.* ("Discussion of the issue continued when the Advisory Council's recommendation went to Congress, but the resistance of southern congressman prevailed.").

33. *See id.* at 91-92 (stating that Congress "added dependent wives and aged widows to shore up the legitimacy of a system in trouble").

34. *See id.* at 98.

35. *Id.*

36. *See* Becker, *supra* note 9, at 272-76 (discussing case of *Califano v. Goldfarb*, 430 U.S. 199 (1977), where plaintiffs challenged provisions under which widowers were entitled to survivors' retirement benefits only if they showed dependency on their deceased wives, whereas widows were automatically entitled to survivors' benefits).

icy on every married man in America. This is, of course, what a good Ozzie or male provider ought to have done anyway: as one federal judge put it in 1950, it was a "highly natural and indeed burning desire of most men of middle age to obtain security for their old age and for their widows at death."[37] The law was simply making sure that Ozzie played out his role.

What was barely noticed was the burden that the benefits decision imposed. This fell not just on unmarried men, who failed to get the expanded benefit given to married men, but, worse, on working married women. The law provided that a woman would get the greater of her own benefit, which was based on a weighted index of her earnings profile over a thirty-eight year history, or her spousal share.[38] For the overwhelming majority of married women who engaged in some paid work, this meant claiming the latter.[39] But this meant, in turn, getting *no* benefit from her own social security "contributions." When this effect was seen by the Advisory Council, it was considered to be a positive aspect of the overall benefit plan.[40] The implicit penalty on working married women would "take away the urge to go back and compete with the single woman," as a leading member of the Council put it.[41] Note the double sexism of this attitude. First, married women should not work in the first place. Second, if they did, they were assumed to be competing with single women for the scant jobs in the "woman's sphere" of the economy. Harriet should stay home, for women's sakes.

2. *Growth*

Three sets of facts propelled the social security story just sketched out from its humble beginnings. First, the overall system grew enormously. In part because social security was a better disguised tax system, it has grown far more since World War II than has the income tax.[42] Starting around 1950, rates under the combined social security/medicare system were raised at the fairly steady rate of 3% per decade until they reached their current level of 15.3% in the 1980s—a 750% increase over their initial 2%

37. United States v. Drescher, 179 F.2d 863, 867 (2d Cir. 1950) (Clark, J., dissenting in part).

38. *See* Kessler-Harris, *supra* note 30, at 100 (describing generally woman's choice of benefits between own earnings and husband's).

39. *See id.* ("The Advisory Council fully expected that married women would work occasionally and that their contributions . . . [would] help sustain its financial health without yielding any direct benefit to the female contributor.").

40. *See id.* at 101 ("The effect of this policy on women was unclear, but the hopeful anticipation of the architects was not: it might . . . have the advantage of discouraging wives from returning to industry.").

41. *Id.*

42. *See* Edward J. McCaffery, *Cognitive Theory, supra* note 15, at 1877 ("This social perception [of contribution versus tax] seems to be breaking down a bit, as the social security system has grown in size to account for 85% as much annual revenue intake as income tax . . . .").

level.[43] Today, social security accounts for almost 90% of the dollars that the personal income tax system collects;[44] most Americans, with the proper understanding of economic incidence, pay more in these so-called payroll "contributions" than they do in income taxes.[45] Social security and medicare combined act like a flat 15.3% tax on the first $70,000 or so of a person's earnings—there are no personal exemptions, "zero brackets," accommodations for family size or the like.[46] Figure 1 shows the growth of social security contributions as a percentage of total federal revenues, compared to the relative stagnation of the income tax in the same percentage terms, during the post-War era.[47]

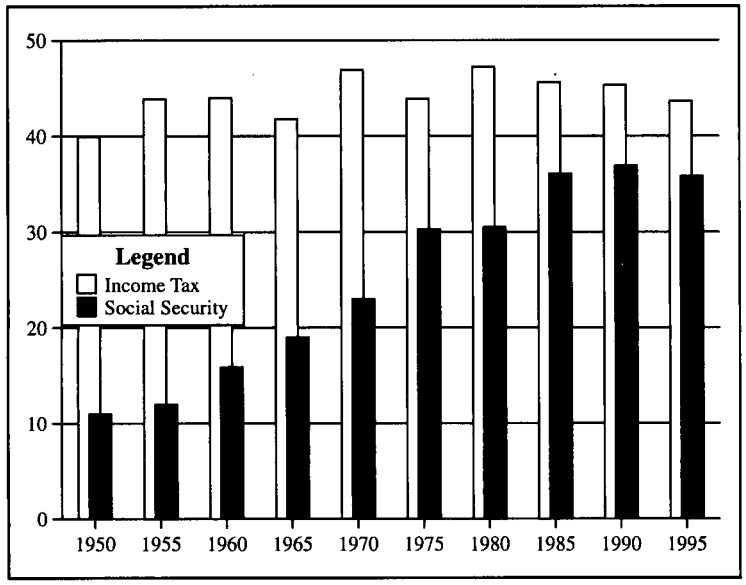

FIGURE 1: SOCIAL SECURITY AND THE INCOME TAX, 1950-1995

Second, at the same time that the overall social security system was growing, the widow's benefit also expanded. It grew from its initial 75%,

43. *See generally* COMMERCE CLEARING HOUSE, 1998 U.S. MASTER TAX GUIDE 49 (1998) (stating that current earner will pay full 15.3% social security contribution on approximately first $70,000).

44. *See* McCaffery, *Cognitive Theory*, *supra* note 15, at 1877 n.33 (noting that although income tax has progressive structure designed to "raise revenue from higher income taxpayers, most tax payers will pay more under the social security tax").

45. *See* U.S. MASTER TAX GUIDE, *supra* note 43, at 49 (noting that there are no personal exemptions or accommodations under Internal Revenue Code for social security contributions).

46. McCaffery, *Cognitive Theory*, *supra* note 15, at 1881 (discussing effect of social security and medicare on personal earnings).

47. *See* MCCAFFERY, *supra* note 4, at 97 (providing statistics to prove how "social security laws rather dramatically favor only single-earner families that stay together, until death do them part").

first to 82.5% in 1961, then to 100% in 1972.[48] Today a married woman, at her husband's retirement, gets the larger of her own social security share or one-half of his share and again, on his death, the larger of her own or 100% of her husband's share.[49] This is no small matter. Social security is a major source of income for elderly Americans.[50] The benefits structure first set in 1939 has led to a bizarre phenomenon of "marriage penalties" among the elderly, with various seniors living "in sin" rather than forfeiting their large social security contributions. This situation exists because a widow receiving a 100% share of her late husband's social security benefits would drop down to receiving a 50% share of her new husband's on remarriage—a fact that many seniors know quite well.[51]

Third, of course, the incidence of married working women expanded greatly. Whereas fewer than 10% of married women with young children worked outside the home in 1940, at the outset of World War II—and at the time that the spousal and widow's shares provisions were being created—nearly 70% of such women now do, as Figure 2 shows.[52] But the social security law has not changed one wit to accommodate these working married women.

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48. *See* Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1532 (1998) (explaining how "a married woman who has paid no Social Security tax of her own is entitled to old-age benefits equal to 50% of her husband's [primary insurance] benefits . . . . If her husband has died, she is entitled to monthly old-age benefits equal to 100% of his [benefits] . . . .").

49. *See* Dilley, *supra* note 26, at 1086 (describing historical development of social security as that of "[a] major federal entitlement program"); *see also* Nancy J. Altman, *The Reconciliation of Retirement Security and Tax Policies: A Response to Professor Graetz*, 136 U. PA. L. REV. 1419, 1420 (1988) (stating that "old-age and survivors portion of Social Security is [America's] primary public retirement program out of variety of public, private, and publicly-encouraged private sources of retirement income").

50. *See* Karen C. Burke & Grayson M.P. McCouch, *Women, Fairness and Social Security*, 82 IOWA L. REV. 1209, 1219 (1997) (discussing Professor McCaffery's theory that current system undermines incentive for wife to enter work force, reinforces traditional notion of family, and bias, and goes against "optimal tax" principles); *see also* John B. Forman, *What Can Be Done About Marriage Penalties*, 30 FAM. L.Q. 1, 6-19 (1996) (discussing problem of "marriage penalties" associated with Social Security system) [hereinafter Forman, *Marriage Penalties*]; John B. Forman, *Promoting Fairness in the Social Security Retirement Program: Partial Integration and a Credit for Dual-Earner Couples*, 45 TAX LAW. 915, 933-34 (1992) (same) [hereinafter Forman, *Promoting Fairness*].

51. *See* Zelenak, *supra* note 48, at 1532 (discussing "marriage penalty" for elderly).

52. *See* MCCAFFERY, *supra* note 4, at 21; *see also* STATISTICAL ABSTRACT, *supra* note 2.

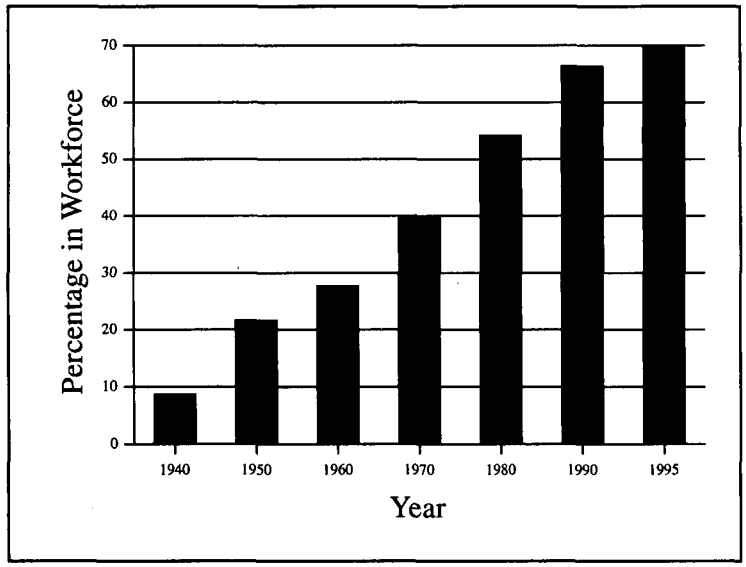

FIGURE 2: PARTICIPATION RATES FOR MARRIED MOTHERS, 1940-1995

These three growth factors work together to make the social security system a very large example of the Core Model, helping Ozzie be Ozzie. One-earner families are the big winners; two-worker families and, in particular, working mothers, are the big losers. Consider a basic example: a wife whose husband makes $30,000 might accept a part-time job paying $10,000. Because of her work, $1,530 will be contributed to the social security system—$765 out of her pocket and another $765 out of her employer's.[53] (This latter is money that she was "worth," in an economic sense; it was money that her employer could have paid out in child-care benefits, for example, instead of to her distant Uncle Sam.) How much will the wife benefit from this $1,530 contribution? The shocking answer is not one penny. Because she will claim under the spousal share, her own contributions bring no additional benefits.

Social security is a complicated system and its precise payouts are individualized. But the two-earner penalty is pervasive. Indeed, it is always present in a two-worker household, because even if the wife earns nearly as much or more than her husband, and works just as long outside the home—such that she will claim under her own share—it is still the case that she has received no marginal payback for her first dollars of social security contributions. This is money that only replaced her deemed share of her husband's wages. One pair of economists has shown that a

53. *See* I.R.C. § 3101(a)-(b) (1994) (requiring 6.2% tax on wages for "old-age, survivors, and disability insurance" and 1.45% tax on wages for "hospital insurance," totaling 7.65% tax on wages from each employer and employee); MCCAFFERY, *supra* note 4, at 91 (noting that "social security operates like flat-rate wage tax" with percentage rate of 15.3 currently in effect).

family's social security contributions might increase by nearly 50% on the wife's working, while their benefits will go up by a mere 1%.[54] Another pair has shown that social security is a poor investment for two-worker households and a reasonably good one for one-earner ones.[55] This is no surprise. It was the point of the 1939 changes.

3. *Entrenchment*

The social security saga perfectly illustrates the general themes discussed in Part I. It is particularly interesting in the way that it has tracked the welfare story to be discussed in Part III throughout its history. Social security and Aid to Dependent Children (ADC), discussed below, each began as part of the Social Security Act of 1935.[56] As with welfare, discourse about reforming social security is now in the political air, six decades later.[57] But the urging for reform is where the similarities end. The focus of reform efforts in social security is not on lessening its burdens; it is most certainly not on the secondary-earner bias, which has been noticed only by a handful of academics and technocratic commissions. Social security re-

54. *See* EUGENE C. STEUERLE & JON M. BAKIJA, RETOOLING SOCIAL SECURITY FOR THE 21ST CENTURY: RIGHT AND WRONG APPROACHES TO REFORM 210-11 (1994) (illustrating very low returns working wives receive on social security taxes they pay). According to Steuerle and Bakija:

> [In] a family where the husband earns at least the maximum wage subject to Social Security tax in every year. . . . [and] the wife earned the average national wage every year for 46 years, the family's lifetime Social Security contributions would increase by about 43 percent. The value of the family's [Old-Age and Survivors Insurance] benefit, however, would only increase by 1 percent compared to what would be received if she never worked at all. Almost exactly the same story holds true in a family where the husband earns the average national wage and the wife earns low wages.

Id.; *see* MCCAFFERY, *supra* note 4, at 97-98 (providing statistics, adapted from Steuerle and Bakija's book, that show how "[f]amilies can easily see their contributions go up by one-half or even double, all for a negligible increase in their benefits").

55. *See* MICHAEL J. BOSKIN & DOUGLAS J. PUFFERT, SOCIAL SECURITY AND THE AMERICAN FAMILY 7-11, 25 tbl.1 (National Bureau of Econ. Research Working Paper No. 2117 (1987)) (revealing how "moving from single-earner households to an identical earnings stream split between the couple reduces the expected present value of benefits and the expected present value of transfers"). In their study of single-earner versus two-earner couples, Boskin and Puffert conclude that "[u]ntil the married woman's own earnings history (if any) is sufficient to produce benefits beyond the spouse's benefit, the entire Social Security payroll tax is a pure tax, with no corresponding presumption of future incremental Social Security benefits." *Id.* at 9.

56. For a discussion of the Social Security Act of 1935, see *supra* notes 24-27 and accompanying text. For a discussion of the Aid to Dependent Children (ADC) program and its successors, Aid to Families with Dependent Children (AFDC) and Temporary Aid to Needy Families (TANF), see *infra* notes 124-65 and accompanying text.

57. *See* President William Jefferson Clinton, State of the Union as Prepared for Delivery (Jan. 19, 1999), 1999 WL 18084, at *2 (proclaiming that "first and above all, we must save Social Security for the 21st Century").

form focuses instead on assuring the actuarial soundness of the system, indexing its benefits or privatizing the program—all steps to ensure that the benefits go on, unchecked.[58]

Indeed, there is not a general awareness of the fact that there even is a benefits dimension to social security. The system is thought of and described in the language of entitlement.[59] This might be harmless insofar as the imputation of one's own earnings to himself or herself goes. But it is far more dubious in the case of the spousal and widow's share provisions. Here a man is entitled to an added bonus on account of having a non-working spouse; the same man, if unmarried or if married to a working spouse, would not so benefit. To be perfectly clear, this benefit may itself be good because it is a way of protecting and rewarding homemakers.[60] But what is problematic—and what is not generally noticed—is the gratuitous burden that such a benefits program has put on modern, two-worker families. In such households, the "second" worker pays a pure tax, with no return, as we have seen. If society noticed that burden more, it could address it without necessarily cutting back on the stay-at-home spouses' benefits. We could, for example, provide for a secondary-earner exemption under social security, exempting the first $10,000 of the second worker's earnings from the payroll tax. But to do that, we would have to notice the burden in the first place. We do not notice these burdens, however, because we do not even recognize the benefits dimension built into the system. This all strikes us as neutral—a part of the way things are. In any event, it is part of the way we assume that things must be.

There are many other problems in the social security system. For example, the rules for divorced spouses or the failure to extend any of the benefits to same-sex couples also reflect the power of the patriarchal paradigm.[61] But the basic story sketched out above suffices for present pur-

58. *See id.* (acknowledging that senior women are almost twice as likely as elderly men to be poor, but not proposing any structural reforms to Social Security). Instead, President Clinton focused on the fiscal soundness of the program by proposing "that we commit sixty percent of the budget surplus for the next 15 years to Social Security, investing a small portion in the private sector just as any private or state government pension would do." *Id.*; *see* MCCAFFERY, *supra* note 4, at 101 (noting that few changes have been made to structure of social security system, but "[m]uch more attention has been paid to the fiscal solvency of the system, its budgeting procedures, the contribution and payout levels, and so on").

59. *See, e.g.*, MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 268 (1986) (commenting that 1969-72 amendments made social security "a 'retirement wage'" and referring to these benefits as "entitlements").

60. *See generally* Staudt, *supra* note 8, at 1597 (discussing how payroll taxes provide citizens with important benefits during periods of disability or retirement and that "[b]ecause household labor is not taxed, women's access to these critical resources is greatly restricted").

61. *See* Becker, *supra* note 9, at 282 (discussing problems that social security structure poses for divorced women). Professor Becker explains that "[t]he treatment of divorced wives is rather different from the treatment of wives and widows." *Id.* A divorced wife is only entitled to benefits under her ex-husband's social secur-

poses. Social security helps Ozzie be Ozzie, it pushes Harriet to stay Harriet, and nobody seems to mind.

B. *Marriage Bonuses*

1. *Humble Beginnings*

The modern personal income tax dates back to 1913.[62] Generally speaking, the United States had a system of separate filing for the income tax until 1948.[63] Under separate filing, men and women file separate tax returns whether married or not, paying taxes on earned income under their own, individual rate schedules.[64] Because there is no distinction between individuals based on marital status, there is only one rate schedule for natural persons.[65] A separate filing system, as most developed Western nations now have, is thus "marriage neutral"—marriage is more or less irrelevant for tax purposes.[66]

Separate filing posed a particular problem for the patriarchal core case. A family with two earners would get "two rides up the rate bracket," whereas the traditional Ozzie-and-Harriet style family would get only one. To illustrate this point in a relatively simple fashion, I have constructed a series of examples that use contemporary dollar amounts and a "flat" tax—actually a tax system with two brackets, 0% and 20%.[67] All of the

ity if the marriage lasted for a minimum of ten years. *See id.* at 282-83 n.94 (contrasting divorced women with wives, who are eligible when married over one year, and widows, who are eligible if married nine months prior to husband's death) (citing 42 U.S.C. §§ 402(b)(1)(G), 416(b)(2),(c)(5) (1994)). Under this scheme, "[a] full-time homemaker who is divorced after nine years of marriage walks away with no social security credit for that period." *Id.*

62. *See* U.S. CONST. amend. XVI (making personal income tax possible in 1913); MCCAFFERY, *supra* note 4, at 29 (noting that Sixteenth Amendment, ratified in 1913, made income tax possible, but it was not until 1916 that "a much broader income tax was enacted").

63. Actually, the story is more complicated than this. For a more complete history of filing status under the income tax before 1948, see MCCAFFERY, *supra* note 4, Ch. 2 and the sources cited therein.

64. *See id.* at 16 (noting that separate filing treats husbands and wives as individuals, each paying tax under individual rate schedule and noting that this is not same thing as "[m]arried, filing separately," which is possible under current law, but rarely used because it would actually cause couples to pay higher taxes).

65. For a contrast to the one rate filing system, see I.R.C. § 1(a)-(d) (1994) (providing different tax rate schedules for married individuals filing jointly and surviving spouses; heads of households; unmarried individuals; and married individuals filing separately).

66. *See* Joseph A. Pechman & Gary V. Engelhardt, *The Income Tax Treatment of the Family: An International Perspective*, 43 NAT'L TAX J. 1, 9 (1990) (noting that, out of 11 developed countries, France, Germany and United States are only countries to not have separate filing systems); *see also* MCCAFFERY, *supra* note 4, at 16, 27-28, 68 (noting that "most advanced democracies" now adhere to system of separate filing and this neutral system is one way to resolve problem of "marriage penalty" in United States).

67. *See* EDWARD J. MCCAFFERY, THE NEXT GREAT AMERICAN TAX REVOLT (forthcoming 2000) (discussing popular flat-rate tax plans featuring this structure).

relevant ideas about marriage penalties and bonuses can be captured by looking at such a basic two-rate tax system.

To begin, consider a simple separate filing rate structure, like America had before 1948:

INCOME	TAX RATE
$0 to $10,000	0%
above $10,000	20%

TABLE 1: SIMPLE SEPARATE FILING RATE SCHEDULE

Under this schedule, a family with two workers who each earned at least $10,000 would get $20,000 of income tax-free. But if Ozzie alone earned $20,000, he would have to pay tax at the 20% rate on his "second" $10,000, for a total tax of $2,000. In fact, there was a "married man's exemption level" before 1948 that allowed married men whose wives did not file their own tax returns to get this favorable result, but this was limited to the bottom 75% or so of the income distribution.[68] Wealthy Ozzies were still taxed more heavily than wealthy two-earner couples—although few, if any, of these latter types of families existed.

To get the benefits of "income splitting"—the lower taxes that would obtain for a household with two equal earners—many wealthy, one-earner couples engaged in sophisticated tax planning to make it *look* as if they were two-earner families.[69] Of course, they did not really want to be such. The law got complicated in trying to police these manipulations, which were made worse after a series of 1930 Supreme Court decisions that made the benefits generally available to spouses in community property states.[70]

68. *See* MCCAFFERY, *supra* note 4, at 30-31 (revealing how 1913 and subsequent rules provided tax break to married couples filing jointly in which only husbands worked and earned less than $20,000, by placing them in zero bracket; however, for singles, zero bracket only extended to $10,000).

69. *See* Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259, 259 (1988) (citing various income-splitting techniques used in common law states such as placing income-producing property in joint tenancies or family trusts and converting businesses from proprietorships or corporations into family partnerships); MCCAFFERY, *supra* note 4, at 35 (noting that couples would shift income-generating property to wives to make it appear as if wives were earning income).

70. *See* Hoeper v. Tax Comm'n, 284 U.S. 206, 218 (1931) (holding that Wisconsin statute was unconstitutional because it taxed husbands for both their own and their wives' income); Lucas v. Earl, 281 U.S. 111, 114-15 (1930) (holding that, despite written agreement between husband and wife that all income would be held jointly, husband earned income and therefore, under individual system, should be taxed on it); Poe v. Seaborn, 282 U.S. 101, 118 (1930) (holding that in community property states husbands and wives are entitled to file separate returns, each claiming one-half of community property as his or her own income, regardless of which spouse earned income); *see also* MCCAFFERY, *supra* note 4, at 37-49 (discussing *Hoeper*, *Lucas* and *Seaborn*).

In 1948, as part of a large post-War "peace dividend," Ozzie got his way: the United States adopted joint filing for married couples.[71] The initial joint filing rate structure simply doubled the rate brackets in effect for single taxpayers—so that the zero and all other rate brackets would extend twice as high for married couples as for single taxpayers.[72] Table 2, with obviously simplified numbers, illustrates:

UNMARRIED PERSONS		MARRIED PERSONS	
INCOME	RATE	INCOME	RATE
$0-$10,000	0%	$0-$20,000	0%
above $10,000	20%	above $20,000	20%

TABLE 2: 1948-STYLE RATE SCHEDULES

Under this schedule, Ozzie now had a $20,000 zero bracket, whether or not Harriet worked. There were no "marriage penalties," only "marriage bonuses" under this system. A marriage in which each spouse earned the same amount of income would be indifferent to joint filing because they were, in essence, doubling their rate brackets by filing separately; they got a $20,000 zero bracket no matter what. In contrast, a couple where one spouse, like Ozzie, was the dominant or exclusive wage earner would now see their taxes go down because this dominant earner could take advantage of the wider, lower rate brackets. It was no longer necessary to pretend to be equal for tax purposes, and shortly this tax game ceased.

The move to joint filing was justified on the basis of a "neutral" principle—namely, that all equal-earning couples should pay equal taxes.[73] This "norm" has informed subsequent tax policy discussion.[74]

71. *See* Jones, *supra* note 69, at 294 (noting that Congress overrode Presidential veto in order to introduce joint return); *see also* MCCAFFERY, *supra* note 4, at 15, 51-52 (describing how, in 1948, "joint filing emerged once more, like a phoenix from the ashes" seven years after mandatory joint filing proposal was first rejected).

72. *See* MCCAFFERY, *supra* note 4, at 54-55 ("The 1948 Act set rates on married couples equal to twice what a single person earning one-half the total family income would pay.").

73. *See* H.R. REP. No. 80-1274, at 1, 21-22 (1948) (citing equalization between states as reason behind joint filing option).

74. *See* Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2009-10 (1996) (noting that, under joint filing, "a single-earner couple and a two-earner couple with equal *total* incomes pay the same tax liability"); *see also* Michael J. McIntyre, *Individual Filing in the Personal Income Tax: Prolegomena to Future Discussion*, 58 N.C. L. REV. 469, 472 (1980) (favoring joint filing for married couples because it allows for "married couples with equal income to pay equal tax," which would not be possible under individual filing system). Professor McIntyre asserts that married couples, especially two-earner couples, pool their financial resources and that this is the first premise for joint filing. *See id.* at 469-70, 472 (noting that pooling is almost unavoidable and

The actual, historical reality is that the particular 1948 reform was only one way to effect this norm. A proposal in 1941 for mandatory joint filing at the singles rate schedules would have had all equal-earning married couples pay equal tax too, but at a higher rate.[75] This plan was wildly unpopular.[76] The "equal-earning couples" norm is also only one among several "neutral" norms, including that each person should pay tax based on his or her own income whether married or not—a procedure of separate filing that would be "marriage neutral." Most importantly, however, the "equal-earning couples" norm is selective in its understanding of the economic facts of life. One-earner couples have a larger economic income in the form of the valuable household services that stay-at-home parents provide.[77] Correspondingly, two-worker couples have greater work-related costs than Ozzie and Harriet do. A perfectly fair—and "neutral"—income tax policy would give two-earner families some deduction for their greater work-related costs, which would also serve as an effective proxy for getting at the greater real income that one-earner families, with their valuable untaxed self-supplied domestic services, have.[78] We didn't do that. Instead, the *particular* neutral principle we adopted in 1948 was one that created a windfall gain for wealthy Ozzie-and-Harriet style families.

At the same time, there was a very large hidden burden in the 1948 move to joint filing and its many marriage bonuses. Joint filing created a secondary-earner bias, because a potential second worker—at the margin

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benefits from expenditures are not likely to favor one spouse over other). The second premise is that marital pooling alters an individual's economic circumstances and this "should be reflected in determining a married person's taxable capacity." *Id.* Under the joint filing system, couples are taxed on their aggregate income (without regard to individual contributions), which arguably reflects the "taxable capacity of each partner" and supports the policy that "requires married couples with equal income to pay equal tax." *Id.*; *see* Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573, 1589-92 (1977) (noting that it is "a well-established feature of our tax structure since 1948, that couples with equal income should be taxed equally" and discussing conflict between this feature and suggested reform to marriage neutral taxation).

75. *See* MCCAFFERY, *supra* note 4, at 49 (discussing Roosevelt administration's "proposal to tax all married couples as if they were a single unmarried person").

76. *See* RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 273-75 (1954) (discussing opposition to 1941 provision requiring that husbands and wives file joint returns); *see also* MCCAFFERY, *supra* note 4, at 49-51 (noting "death" of 1941 proposal and that same fate occurred for identical proposal in 1942).

77. *See* CLAIRE M. RENZETTI & DANIEL J. CURRAN, WOMEN, MEN, AND SOCIETY 139 (2d ed. 1992) (noting that, despite modern conveniences and labor-saving devices, "the 1980s homemaker spent about as much time on household chores as the 1780s homemaker did"); Staudt, *supra* note 8, at 1580 ("Sociological studies indicate that despite labor-saving appliances and women's move into the market, the number of hours women work in the home has remained constant.").

78. *See* MCCAFFERY, *supra* note 4, at 133-34 (suggesting that providing subsidies to second income earners or allowing child-care deductions may solve problem of disparate tax treatment for two-earner families).

of the household earning decision—would now enter the income tax rate structure in a rate bracket dictated by the primary earner's salary.[79] This secondary-earner bias is conceptually distinct from the question of the marriage penalty and can be seen as discouraging women's paid work.[80] Indeed, there is evidence that this effect was intentional—that Congress was attracted to a policy that would generate incentives for women to return to the homes that they had left, at least briefly, during World War II.[81] As Stanley Surrey, a prominent government official and later Harvard Law Professor, put it, in commenting on the 1948 change with approval: "Wives need not continue to master the details of the retail drug business, electrical equipment business, or construction business, but may turn from their partnership 'duties' to the pursuit of homemaking."[82]

Harriet could go home again, tax-free.

2. *Growth*

The secondary-earner bias of the income tax with joint filing increased over time as "bracket creep"—the failure to adjust the tax rate schedules for the effects of inflation—brought more and more middle and lower-middle income households into the income tax system.[83] Under joint filing, Harriet, should she decide to go into the paid workforce, would enter the labor market at a tax rate dictated by Ozzie's salary. This bias simply added to the bias under the social security system because Harriet would also start paying social security contributions although, as we have just seen, she would get no personal benefit from them.[84] Still at the same time, the tax laws made no general provision for the costs of having two workers. As a matter of general "neutral" principles, a court case decided in 1939 ruled that child-care costs were not generally deductible as a "business" expense because they were caused by the "personal" decision to have children—although the decision of the caregiver to work was the actual proximate cause of the need for third

79. *See id.*, at 19 (noting that unlike marriage penalty, secondary-earner bias is important at all income levels).

80. *See generally* Jane H. Leuthold, *Income Splitting & Women's Labor-Force Participation*, 38 INDUS. & LAB. REL. REV. 98 (1984) (discussing effect of income splitting on labor-force participation of wives and concluding that "elimination of income splitting would probably increase significantly the labor-force participation of married women").

81. *See* MCCAFFERY, *supra* note 4, at 99-100 (noting strong social norm within United States that women's work outside home be marginal or secondary); *see also* Zelenak, *supra* note 7, at 1021-48 (same).

82. Stanley S. Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1111 (1948).

83. *See generally* Grace Ganz Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1972) (discussing income splitting and other elements of taxation of working wives in United States compared to other countries).

84. For a discussion of the effect of making social security contributions, see *supra* notes 53-55 and accompanying text.

party care.[85] All of these burdens conspire to make it increasingly financially difficult to be a two-worker household. In a wide range of cases, married mothers lose money by working outside the home;[86] on average, two-earner families see two-thirds of their second income go to taxes and additional work-related expenses.[87]

At the very same time, of course, the number of two-earner households was escalating dramatically, as married women continued to enter the workforce as shown in Figure 2, above. Still, the secondary-earner bias of the tax and social security systems was barely noticed. The resulting gap between images of the core family built into the tax and other socio-economic systems, on the one hand, and reality, on the other, meant that women everywhere were facing hard and stressful choices. The precise effects varied with economic class. Poor women found themselves alone as single heads of households, at least in part because two-worker couples were not viable among the working poor. Middle-class women confronted hard choices between working full-time inside the home, or inside *and* outside the home for scant, if important, financial gains.[88] Upper-class women saw that their work outside the home was poorly rewarded and so continued to live out the core lifestyle of Harriet.[89]

It was not the secondary-earner bias but an altogether different burden of the 1948 joint filing benefits decision that drew attention and ultimate action. Joint filing had created what came to be known as the "singles penalty."[90] This was the precise converse of the "marriage bonus": by forswearing a possible marriage bonus, high-earning singles could be seen as incurring a penalty.[91] An unmarried Ozzie making $20,000 would envy an equal-earning Ozzie who had found a Harriet to stay home, cook dinner, rear the kids—and lower the household taxes. It is not hard to

85. *See* MCCAFFERY, *supra* note 4, at 111-14 (discussing *Smith v. Commissioner*, 40 B.T.A. 1038 (1939), *aff'd*, 113 F.2d 114 (2d Cir. 1940), in which Board of Tax Appeals ruled childcare expenses were nondeductible because they were caused by personal decision to have children).

86. *See generally* Edward J. McCaffery, *Taxing Women: How the Tax Code Discriminates Against Women and Families*, 17 CAL. LAW. 39 (Apr. 1997).

87. *See generally* MCCAFFERY, *supra* note 4, at 137-62 (focusing on tax consequences for working women in low, middle and high income families).

88. *See generally* ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989).

89. *See* Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 625 (1993) (noting that because women get lower wages, many cut back on education and employment opportunities); *see also* MCCAFFERY, *supra* note 4, at 20-23 (noting that secondary-earner bias is main problem).

90. *See* Nancy E. Shurtz, *Taxing Women: Thoughts on a Gendered Economy*, 6 S. CAL. REV. L. & WOMEN'S STUD. 485, 499 (Spr. 1997) (concluding that "singles' penalty" led to "adoption by Congress in 1969 of a new tax schedule for single persons fixing their federal income tax liability at a level no more than 20% of that of an equal-income married couple").

91. *See id.* (noting that single taxpayers could pay as much as 42.1% more than married couple with same total income).

imagine what demographic group was most hurt by the singles penalty—wealthy unmarried men. Congress rushed to *their* rescue, and lowered the rate brackets for joint filing by 20% in 1969.[92]

In our continuing simplified example, the rate structure now looks something like:

UNMARRIED PERSONS		MARRIED PERSONS	
INCOME	RATE	INCOME	RATE
$0-$10,000	0%	$0-$16,000	0%
above $10,000	20%	above $16,000	20%

TABLE 3: 1969-STYLE RATE SCHEDULES

Ozzie and Harriet now have a $16,000 zero bracket—better than they had before 1948, but worse than they had for the years from 1948 to 1969. This adjustment lowered the "singles penalty," by reducing the disparity between the married and single person zero bracket level from 2 times to 1.6 times. The resulting "married filing jointly" rate structure has persisted to this day. It features two potentially offsetting effects. On the one hand, married couples receive a *benefit* of implicit income-splitting, where each spouse is presumed to earn an equal amount, brought about by joint filing.[93] Ozzie and Harriet get a $16,000 zero bracket, just as if they had each earned $8,000, even if Harriet does not in fact engage in paid work outside the home. On the other hand, married couples suffer the *burden* of a less favorable rate structure, brought about by the 1969 change. A truly egalitarian couple would get $20,000 worth of tax-free income if unmarried, but only $16,000 if married. Because the "married, filing separately" rate structure is set at one-half of the joint filing one, it contains only the detriment of the adverse rates without the benefits of the deemed income-splitting. (That is, its zero bracket extends only to $8,000). Separate filing under the current system is thus rarely a viable option, with more than 97% of married couples—quite rationally—filing jointly.[94] For roughly equal-earner couples, the harms outweigh the benefits, and these couples pay a "marriage penalty." For largely one-earner couples, the converse is true, and these couples continue to receive a benefit or "marriage bonus."

92. *See id.*

93. *See* H.J. Cummins, *Catch 1040 Joint Returns Mean Joint Liability—And In Some Cases, That Means Trouble*, NEWSDAY, Jan. 30, 1994, at *2, *available in* 1994 WL 7442627 (reporting that "outside researchers say that up to 99 percent of American couples file jointly because there is almost always a tax savings").

94. *See* MCCAFFERY, *supra* note 4, at 31 (noting that historically 97.2% of married couples filed joint tax returns).

The secondary-earner bias has existed since at least 1948 and yet it has never drawn much attention.[95] It affects principally women. "Marriage penalties," in contrast, have existed only since 1969, and they have drawn a lot of attention.[96] Such penalties fall on *all* married couples, including the core, Ozzie-and-Harriet style families. This may seem counterintuitive at first—it may seem as if only two-earner couples pay a penalty because only their taxes actually increase on marriage. Yet the core families were hurt just as much as the newly emergent two-earner families were in 1969. Their taxes went up, too, and their taxes would go down if we returned to the 1948-style schedules. This is an important social fact for the rest of the story.

By the late 1990s, approximately 50% of all married couples were paying a marriage penalty of up to $4,000 per couple.[97] Approximately 40% of couples, typically consisting of a working man and a stay-at-home woman, were receiving marriage bonuses.[98] The prevalence of marriage penalties was directly caused by the increase in working, married women. Following the inclusion of rather limited marriage penalty relief in the 1994 *Contract with America*[99] and other events, the "marriage penalty" attained a high degree of political salience in the mid to late 1990s.[100] Stories about the penalty ran on the front pages of major metropolitan newspapers, in leading popular magazines and on television and talk radio shows across the country.[101]

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95. *See id.* at 34, 58-59 (discussing secondary earning bias).

96. *See id.* at 34, 64-66 (articulating drawbacks of marriage penalties on women).

97. Richard B. Malamud, *Allocation of the Joint Return Marriage Penalty and Bonus*, 15 VA. TAX REV. 489, 493 (1996) (noting that "one recent study reports that 52 percent of the taxpayers who file a joint return pay a marriage penalty while 38 percent receive a marriage bonus").

98. *See* Daniel R. Feenberg & Harvey S. Rosen, *Recent Developments in the Marriage Tax*, 48 NAT'L TAX J. 91, 91 (1995).

99. *See* CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION (Ed Gillespie & Bob Schellhas eds., 1994); *see also* CONTRACT WITH THE AMERICAN FAMILY: A BOLD PLAN BY CHRISTIAN COALITION TO STRENGTHEN THE FAMILY AND RESTORE COMMON-SENSE VALUES (1995); MCCAFFERY, *supra* note 4, at 205-25 (same); Edward J. McCaffery, *Tax's Empire*, 85 GEO. L.J. 71, 128-37 (1996) (discussing two Contracts and their talk of tax).

100. *See* MCCAFFERY, *supra* note 4, at 19 (noting that from 1980 to 1995, phrase "marriage penalty" appeared in more than 350 articles in New York Times and Washington Post combined).

101. *See id.* (discussing entrance of phrase "marriage penalty" into national consciousness).

3. *Entrenchment*

The marriage penalty finally became a salient political issue and there have been numerous proposals to eliminate or lessen it.[102] But the ongoing, unfolding story of marriage penalty reform only underscores the principal themes of this essay. Marriage bonuses to the core cases have come to be taken for granted—a fixed point in all political discussions. This political fact has shaped and limited any meaningful attempt to help women or modern, two-earner families—in other words, non-core cases.

To understand this point, consider four broad approaches for dealing with the problem of marriage penalties:

- One, the law could abandon joint filing and move to separate filing, as most advanced democratic nations have done.[103] Such a system would be marriage neutral—it would have neither marriage penalties nor bonuses in it. It would eliminate the secondary-earner bias under present income tax law. It would benefit two-earner families and hurt one-earner ones.
- Two, the law could give spouses the *option* to file separately, as if unmarried. This would differ from the current, almost always unfavorable option to be "married filing separately" today, because it would allow separate filers to have the benefits of the more favorable single person's rate schedules. That is, in the example I have been using, each spouse could get a $10,000 zero bracket, not an $8,000 one. This system would get rid of marriage penalties while leaving marriage bonuses in place. It would lessen, though not eliminate, the secondary-earner bias under existing income tax law. It would benefit two-earner couples and leave one-earner ones unaffected.
- Three, the law could revert to 1948-style joint filing rate brackets. This would eliminate marriage penalties and would also *increase* marriage bonuses for families receiving them. It would leave the secondary earner bias largely unaffected. This would benefit all married couples whether two-earner or not.
- Four, the law could provide ad hoc and partial relief to two-earner families by giving better child-care relief or providing for a secondary-earner deduction or credit.

In the early 1980s, marriage penalty relief had been briefly discussed in Congress as the increasing number of working married women made their concerns salient.[104] There was talk of Options One or Two, separate

102. *See, e.g.*, Mervin M. Wilf, *Planning Techniques for Large Estates*, SD33 A.L.I.-A.B.A. 1677, 1722 (Nov. 16, 1998) (discussing two bills introduced in Congress that are designed to eliminate marriage penalty).

103. *See* J.D. Bryce, *A Critical Evaluation of The Tax Crits*, 76 N.C. L. REV. 1687, 1725 (1998) (concluding that while mandatory individual filing would eliminate marriage penalty, it is "full of complexity").

104. *See* MCCAFFERY, *supra* note 4, at 74-78 (discussing hearings held before enactment of section 221). At the hearings before Congress, several experts testi-

or optional separate filing.[105] But because neither of these plans would help core Ozzie-and-Harriet families and because Option One would actively hurt them by raising their taxes, there was little enthusiasm for them.[106] Instead, Option Four carried that particular day, with a limited secondary-earner deduction, put in place in 1981.[107] This law gave two-earner families a deduction of 10% of the lesser earner's salary, up to a maximum deduction of $3,000—the latter a provision continuing a long-standing theme in the tax laws that such relief be limited to lower and middle-income households. For most two-earner families who qualified, the benefit was worth less than $450, about $9 a week.[108] Pamela Gann noted that this secondary-earner relief was a limited attempt to address the structural problems disfavoring working wives, but accepted it as a helpful first step.[109] In fact, it turned out to a be a last step. Congress repealed the law in 1986 as a general rate reduction effectively moved the law in the direction of Option Three—the one and only option benefitting core families as well as non-core ones.[110]

The marriage penalty returned to center stage in the mid to late 1990s, beginning with the *Contract with America*'s drawing attention to it as part of the immoral and corrupt government system.[111] There is good reason—starting with the extreme stinginess of the *Contract*'s marriage

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fied about the marriage penalty, including Pamela Gann and economist June O'Neill. *See id.* at 74.

105. *See id.* at 74-75 (discussing proposed filing options). Representative Fenwick proposed that couples be given the option of filing jointly or separately. *See id.* at 74. This proposal would have allowed both the working married women and non-working women to benefit from the best tax treatment because working women could take advantage of the single filer's schedule. *See id.* The problem, in the eyes of Congress, was that the net result would be less taxes collected. *See id.*

106. *See id.* at 75 (discussing return to pre-1948 mandatory single filing). The obvious result of mandatory single filing is that traditional married couples would lose the benefits of joint filing, thus raising their taxes. *See id.*

107. *See id.* When adopted in 1981, section 221 read in relevant part:

(a) Deduction Allowed.—,

(1) In general.-In the case of a joint return under section 6013 for the taxable year, there shall be allowed as a deduction an amount equal to 10 percent of the lesser of—,

(A) $30,000, or

(B) the qualified earned income of the spouse with the lower qualified earned income for such taxable year.

Tax Reform Act of 1981, Pub. L. No. 97-34, § 103(a), 95 Stat. 172 (repealed 1986).

108. *See* Pamela B. Gann, *The Earned Income Deduction: Congress's 1981 Response to the "Marriage Penalty" Tax*, 68 CORNELL L. REV. 468, 478-81 (1983) (containing tables breaking down amounts under section 221, broken down by income).

109. *See id.* at 485-87 (noting that true separate filing is best solution, but accepting section 221 as starting point).

110. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 131(a), 100 Stat. 2113 (1986) (repealing section 221).

111. *See* MCCAFFERY, *supra* note 4, at 205 (noting that taxes and morality have long been linked and that Republicans in CONTRACT WITH AMERICA used this in arguing for lower taxes for "traditional" families). Conservative Republicans were

penalty relief itself — to believe that Republicans were being disingenuous.[112] Social conservatives liked the rhetoric of complaining about the "marriage tax" more than the reality of helping two-worker families. Talk that the tax system was anti-marriage helped to fuel a more general Republican agenda to reduce and to radically reform taxes altogether. But, perhaps to their chagrin, Republicans soon found out that marriage penalty relief was indeed a popular issue.

In this environment, in 1997, Representatives David McIntosh and Jerry Weller, both Republicans, proposed a "Marriage Tax Elimination Act"[113] that would have given couples the option to file separately and singly, as if they were unmarried—Option Two above.[114] This proposal would have eliminated the marriage penalties prevailing under present law while leaving unchanged the marriage bonuses. In other words, it would have helped the 50% or so of two-earner couples who would make the election to file separately, but do nothing for the 40% of one-earner couples benefitting from lower taxes under joint filing.[115] McIntosh-Weller I, as it came to be known, was estimated to cost about $20 billion in

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arguing for both lower taxes and "family values." *See id.* at 205-06. In the Contract with America, the Republicans stated:

> Our *Contract with America* recognizes families for what they are—the basic building block of society. Renewing the American Dream is our goal, and renewing that dream starts at home, with the family. To help families reach their American Dream, our *Contract* calls for [a] $500-per-child-tax-credit to make raising children a little more affordable. . . . Then we'll begin to repeal the marriage tax penalty. The government should reward, not punish, those who enter into the sacred bonds of marriage.

CONTRACT WITH AMERICA, *supra* note 99, at 85.

112. *See* MCCAFFERY, *supra* note 4, at 217-18. The fact is that the relief proposed by the CONTRACT WITH AMERICA would be at most $145 per year per family. *See id.* at 217 (comparing this small amount of relief to much larger relief for families with children, $500 per child). Even this amount would only be available to couples with a large disparity in earnings, not couples who were equal in earnings. *See id.*

113. *See* H.R. 2456, 105th Cong. (1997); *see also* S. 1285, 105th Cong. (1997) (containing Senate version of same proposed act).

114. The proposed section was to read, in relevant part, as follows:

> SEC. 6013A. Combined return with separate rates.
>
> a) GENERAL RULE.-A Husband and wife may make a combined return of income taxes under Subtitle A under which-
>
> (1) a separate taxable income is determined for each spouse by applying the rules provided in this section, and
>
> (2) the tax imposed by section 1 is the aggregate amount resulting from applying the separate rates set forth in section 1(c) to each such taxable income.

H.R. 2456, 105th Cong. (1997).

115. *See* DEPARTMENT OF THE TREASURY, INDIVIDUAL INCOME TAX RETURNS 1995 § 3, at 33 (1995) [hereinafter 1995 RETURNS] (containing table breaking down all tax returns in 1995). Of these, approximately 49 million were returns filed jointly by married couples, and only 2.8 million were separate returns filed by married individuals. *See id.*

foregone revenues each year.[116] President Clinton and his fellow Democrats failed to endorse the bill, instead preferring deficit reduction and social spending programs, and it more or less died on the vine.[117]

Let us pause for a moment and notice the dog that is not barking. There is a strong intellectual case to be made for Option One, true separate filing, which would eliminate the marriage bonuses now prevailing and thus would be less expensive than Option Two. Democrats and feminists concerned with the general budget situation but eager to do something for women and modern, two-earner families could have advanced this proposal. Separate filing is "marriage neutral," has precedence in our American past (pre-1948) and is now widely used around the world.[118] Yet no serious American politician proposed such mandatory separate filing, and for a fairly obvious reason: It would have been political suicide. So firmly have the marriage bonuses created by the implicit benefits program of 1948 been accepted into the status quo that their repeal would certainly be portrayed as a tax increase on traditional families and an assault on "family values."

Meanwhile, socially conservative Republicans such as Phyllis Schafly criticized McIntosh-Weller I for not helping one-earner families.[119] Representatives McIntosh and Weller then proposed another Marriage Tax Elimination Act, popularly known as McIntosh-Weller II.[120] This act

116. *See* 143 CONG. REC. H8574-01 (daily ed. Oct. 7, 1997) (statement of Rep. Blunt) (observing that dual-income couples who file jointly pay greater taxes because they fall in higher income bracket). Representative Blunt estimated that by allowing truly separate returns, the Federal Government would lose about $30 billion in income. *See id.*

117. This is not to say, however, that the topic is completely dead. In fact, Representative Weller continues to push for the adoption of a recent version of the Marriage Tax Elimination Act on the floor of the House. *See* 145 CONG. REC. H1271-02 (Mar. 16, 1999) (statement of Rep. Weller) (commenting that with solid financial condition of country, some money could be sacrificed in allowing true separate filing for dual-income couples). For further discussion of subsequent versions of the Marriage Tax Elimination Act, see *infra* notes 120-23 and accompanying text.

118. *See* MCCAFFERY, *supra* note 4, at 27 (noting that most countries use separate filing). A 1990 survey revealed that of eleven developed countries, only three—the United States, Germany and France—still use a system of joint filing. *See id.* The remaining eight countries "consider the individual as the tax unit, reflecting the world-wide trend in developed countries away from joint taxation of married couples." Pechman & Englehardt, *supra* note 66, at 22.

119. *See, e.g.*, Phyllis Schlafly, *Watch Out for Marriage Tax Reform* (visited March 23, 1999) <http://www.eagleforum.org/column/1998_columns.html> (discussing how McIntosh-Weller I discriminates against one-earner families by providing no tax benefits to them).

120. H.R. 6, 107th Cong. (1999) (proposing to "eliminate the marriage penalty by providing that the income tax rate bracket amounts, and the amount of the standard deduction, for joint returns shall be twice the amounts applicable to unmarried individuals"). For example, under this most recent version, the tax rate for joint returns would be 15% for a combined income of up to $51,500, twice the income of a single tax payer in the 15% bracket. *See id.*

would expand the marriage "penalty" relief to all married couples by doubling the rate brackets; that is, it would be a return to 1948-style rate brackets.[121] This is Option Three above—the one plan that would eliminate marriage penalties and *also* benefit the core, Ozzie-and-Harriet style model. McIntosh-Weller II differed from McIntosh-Weller I principally by increasing marriage bonuses for one-earner couples; equal-earner couples were treated the same under the two versions.[122] Republicans thus responded to Democratic inertia on the first version of marriage penalty relief by upping the stakes: McIntosh-Weller II was estimated to cost $30 billion a year.[123]

The saga of marriage penalty relief nicely illustrates this Article's principal themes. In 1948, Congress created a benefits program specifically to reward and entrench the core patriarchal model of the family. No one much noticed the burdens that the benefits decision put on non-core cases, especially working wives and two-earner couples. Only when these burdens also reached out to touch core cases was there any serious attempt to redress them. But by this point in time, the initial "benefit" had lost its status as such and was taken as part of the status quo. Always defended in neutral terms—however contestably these terms ought to have been—the marriage bonuses built into the law have now become a fixed point on which all future reform must build. We cannot help modern-style, non-core cases without increasing the largesse we have already shown to Ozzie and Harriet, who can go on living happily ever after.

C. *Common Ground*

The social security and marriage bonus stories have much in common. In both cases, one-earner, two-parent families are the big winners and two-earner families are the big losers. Yet neither program is perceived as a "benefits" one. This is also true of the broader systems in which they operate: social security is still widely thought of as an entitlement, and no one in his or her right mind would consider the tax system, writ large, as a government assistance program. Still the structure of marriage and one-earner family bonuses under both social security and the income tax system is very much a benefits program—a conscious, struc-

121. *Compare id., with* MCCAFFERY, *supra* note 4, at 16, tbl.2.

122. *Compare* H.R. 2456, 105th Cong. (1997), *with* H.R. 6, 108th Cong. (1999) (noting differences in proposals). The former aids working couples by allowing them to be treated as individual taxpayers, thus not bringing them into a higher tax bracket by combining their incomes. *See* H.R. 2456, 105th Cong. (1997) ("[A] husband and wife may make a combined return of income taxes . . . [in which] a separate taxable income is determined for each spouse . . ."). This does nothing for one-earner families. *See id.* The latter, on the other hand, by doubling tax brackets benefits both the dual-income and the single-income families by allowing each to file in a lower tax bracket. *See* H.R. 6, 105th Cong. (1999).

123. *See* Dori Meinert, *Weller Renews Marriage Penalty Repeal Effort*, COPLEY NEWS SERVICE, Feb. 10, 1999, at 1, *available in* LEXIS, News Library (stating that Weller's bill would cost $30 billion in lost revenue).

tural decision that rewards traditional, core families. Yet both are defended, when they are noticed at all, as being "neutral." Reform efforts take the benefits for granted. There is no consequentialist talk here—of "bang for the buck" and so forth. The provisions, again when they are noticed at all, are defended as being neutral, fair or matters of right. In short and in sum, Ozzie and Harriet win—simply, quietly, efficiently and eternally.

III. THE DISPLACED MODEL: OZZIE DOESN'T LIVE HERE ANYMORE

A. *ADC/AFDC/TANF*

1. *Humble Beginnings*

In turning to the Displaced Model, we confront immediately a terminology problem in discussing the classic benefits program, "welfare." Acronyms tell a good deal of the story. The program began as Aid to Dependent Children (ADC)[124] in 1935, part of the same Social Security Act that instituted the old age assistance and retirement program discussed above. But whereas the benefits structure of social security has remained both obscure and impervious to change—the steady trend as we have seen has been to increase the bonus given to Ozzie-and-Harriet style core families—"welfare" has been both highly visible and vulnerable to shifting political currents.[125]

As initially set up, welfare focused on children, as suggested by the acronym "ADC" itself. The mother was an invisible phenomenon in this label, presumed in the fact of there being a child who needed aid. ADC was motivated by a sense of the sympathetic non-core case or Cinderella story. The benefits substituted rather explicitly for an absent father without affecting the mother's role: she would stay at home, as in the core case.[126] Linda Gordon and other scholars have done fine work to expose the various assumptions in play during the creation of welfare.[127] These included a mix of some good intentions with a good deal of racism, elitism

124. 49 Stat. 620, 627 (1935).

125. *See* CONTRACT I, *supra* note 99, at 65-77 (asking "[i]sn't it time for the government to encourage work rather than rewarding dependancy?"). The Republicans' CONTRACT WITH AMERICA goes on to vow to change the welfare state by encouraging responsibility and reducing illegitimacy. *See id.* at 66-77.

126. *See* 49 Stat. 620, 629 (1935) (requiring that state plans provide for children who have been deprived of support by reason of death, absence or incapacity of parent).

127. LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935 42 (1994) (noting how welfare involved racist and elitist assumptions); *see also* MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 63 (1988) (discussing good and bad effects of welfare); Brito, *supra* note 13 (discussing welfare and assumptions regarding women); Fineman, *supra* note 16, at 101 (noting racism and elitism associated with welfare); Williams, *supra* note 12, at 720 (discussing bad assumptions underlying welfare).

and other forms of prejudice.[128] But patriarchy and the patriarchal core family concern us most in this essay, and gendered stereotypes were plainly present in the genesis of ADC.

The initial ADC program was designed with the core model in mind, to assimilate certain "worthy" non-core cases into the Ozzie-and-Harriet core model. The idea was to keep the custodial mother at home with her children, where she belonged. ADC was, in the words of one of its charter documents, "designed to release from the wage-earning role the person whose natural function is to give her children the physical and affectionate guardianship necessary not alone to keep them from falling into social misfortune, but more affirmatively to make them citizens capable of contributing to society."[129]

The history of the early efforts to get ADC up and running reveals the program as a highly constrained set of compromises, enacted in the face of an often reluctant political system more concerned with aiding the core cases falling under traditional social security.[130] Welfare has always been limited in both its dollars and its reach. Framers of the program requested initial funding meant to serve only a portion of the then-known female-headed families with children, thereby "express[ing] their desire to make this an elite assistance program, to serve only the deserving, perhaps even the exemplary."[131] The primary mechanism for selectivity was the structural decision to give states discretion through various explicitly normative standards to limit benefits to cases deemed "worthy" or where there was a "suitable home" or some such thing.[132]

Open-ended concepts such as "worthiness" acquired a rather specific meaning, befitting the general intent behind ADC.[133] It was, in essence, those non-core cases that might plausibly become core ones—those "displaced" from the patriarchal paradigm by the trying times of the Great

128. *See* Fineman, *supra* note 16, at 101.

129. ABRAMOVITZ, *supra* note 127, at 318-19 (quoting *The Report of the Committee on Economic Security*).

130. *See id.* (noting how ADC was created to help non-core cases).

131. GORDON, *supra* note 127, at 257.

132. *See id.* (noting limitations on candidates); *see also* ABRAMOVITZ, *supra* note 127, at 1320 (discussing selectivity for program).

133. *See* Roger J.R. Levesque, *The Role of Unwed Fathers in Welfare Law: Failing Legislative Initiatives and Surrendering Judicial Responsibility*, 12 LAW & INEQ. J. 93, 98 (1993) (discussing intention behind enactment of ADC to provide support only to those considered "worthy," namely, white widows with children). A major vehicle for defining "worthy" was the discretion given to the states to consider the morals of a mother in determining whether she was eligible for assistance. *See id.* States seized on this discretion and used morality-based restrictions to enforce social constructs of who constituted worthy poor. *See id.* For example:

> Children were disqualified because their homes were not "suitable" (e.g., illegitimate children were considered as proof of the mother's immoral behavior and unsuitability), because their mothers were employable (black women were considered able to work), or because they had "substitute parents" in the form of their mothers' amorous relationships with men.

Depression—that got the goods. The explicit consequentialism in the above-quoted passage goes hand-in-hand with this theme. ADC was consciously designed to help those children "capable of contributing to society." It was, in short and in sum, an investment by the core in some, but not all, non-core cases. A standard for subsequent evaluations and reevaluations of the program was set.

The broad idea behind ADC, as in the Social Security Act generally and other pieces of early New Deal legislation, was to deal on an emergency basis with the dislocations that a free market economy was imposing on civil society.[134] The Great Depression had disrupted normal life, and there was a rise of fatherless children, white children in particular, to consider.[135] The pattern of legislation and other elements of the historical record suggests that the intent behind ADC was to help those potentially core families temporarily thrown outside the core.[136] Other families were never meant to be part of the core to begin with; they were not seen as displaced, but rather misplaced.[137]

Id.; *see* WINIFRED BELL, AID TO DEPENDENT CHILDREN 3-19 (1965) (discussing intent of ADC to assist worthy poor); MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 237 (1986) (same).

134. *See* Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990's Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POL'Y & L. 3, 96-97 (1996) (discussing federal government response to economic crisis of Great Depression by redistributing cost of poverty through New Deal legislation). The authors explain the political and economic underpinning of the New Deal programs:

> The Great Depression's exacerbation of the chronic structural problems of unemployment and poverty relief generated massive political support for legislation establishing a federal role. All of the Social Security Act's programs created federally administered mechanisms for redistributing the costs of poverty relief by directly subsidizing state programs, creating national reserves or contingency funds, and organizing the efforts of wage earners, employers, and states to reduce the effects of competition that would otherwise undermine provision on a subnational scale.

Id.

135. *See generally* FREDERICK E. HOSEN, THE GREAT DEPRESSION AND THE NEW DEAL 37 (1992) (discussing New Deal legislation directed toward economy and data reflecting actual conditions during Great Depression); *see also* Brad S. Sears, *Rounding Out the Table: Opening an Impoverished Poverty Discourse to Community Voices*, 30 HARV. C.R.-C.L. L. REV. 299, 332 (1995). Sears explains the rise of fatherless white children after the Depression and the government's response:

> Welfare came into being in 1935 to assist widows and their children. Why was that? Not because we wanted to support or assist African American females, but because of the Great Depression and the national economic crisis of the 1930s, when a lot of white businessmen threw themselves from their office windows and left widows and kids. That's why we have the system we have today.

Id.

136. *See* Kost & Munger, *supra* note 134, at 97 (discussing intent of ADC to help those outside core).

137. *See* GORDON, *supra* note 127, at 227 (noting how some families were never seen as core families).

Blacks were particularly suspect. "Blacks were systematically deprived of access to ADC benefits: In 1937-40 only 14-17 percent of recipients were black, far below their proportion of need."[138] Contemporary scholarship has done much to show the "accommodations with racism" built into the very foundations of welfare.[139] To limit government largesse to core—white—cases, the system gave local bureaucracies much discretion, to be exercised under explicitly normative standards that made reference to the consequentialist spirit of the program.[140] The civil servants played their parts. As a field supervisor reported in the late 1930s, near the dawn of ADC:

> The number of Negro cases is few due to the unanimous feeling on the part of the staff and board that there are more work opportunities for Negro women and to their intense desire not to interfere with local labor conditions. The attitude that they have always gotten along, and that "all they'll do is have more children" is definite . . . . There is hesitancy on the part of lay boards to advance too rapidly over the thinking of their own communities, which see no reason why the employable Negro mother should not continue her usually sketchy seasonal labor or indefinite domestic service rather than receive a public assistant grant.[141]

The shocking racism of this description underscores what ADC was and was not. It was a limited program meant to get those cases that looked like core ones through the Great Depression, and nothing more. It was designed to protect Cinderella's children, in part by keeping their mom at home, until things got better—at which time the kids could pay back their Uncle Sam.

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138. *Id.*

139. *See* JILL QUANDANGO, THE TRANSFORMATION OF OLD AGE SECURITY: CLASS POLITICS IN THE AMERICAN WELFARE SYSTEM 16 (1988) (discussing how ADC enabled racist distribution by empowering states with discretionary powers). Quandango notes:

> With regard to ADC in particular, allowing states to set their own benefits has been called a "compromise with racism," as it permitted the Southern states to continue unequal treatment of blacks and whites through its differential funding of the various Social Security programs.

Id.; *see* Williams, *supra* note 12, at 719-22 (discussing perpetuation of racism in ADC framework).

140. *See* JILL QUANDANGO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY 21 (1994) (explaining how states exploited discretion granted in federal welfare provisions to exclude African-Americans from government entitlement programs). The federal system specially excluded agricultural and domestic workers from coverage, leaving it to the states to provide assistance for those toiling in these professions. *See id.* This provision was included in response to the lobbying efforts of southern Congressmen. *See id.*

141. ABRAMOVITZ, *supra* note 127, at 318-19 (quoting MARY S. LARABEE, UNMARRIED PARENTHOOD UNDER THE SOCIAL SECURITY ACT, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF SOCIAL WORK 447-49 (1939)).

From the very start, there were burdens associated with ADC's welfare benefits. They fell on three distinct groups. First, there was stigma and a continued lack of assistance for the non-core cases who did not make it—the blacks who were denied benefits lest they go out and "have more children."[142] Second, there were incentives for the qualified non-core Cinderellas to stay at home and on welfare, rather than to work.[143] Third, there were burdens of a fiscal sort on the core cases who thought of themselves as paying for ADC through their taxes.[144]

In the humble, limited beginnings of ADC these burdens were not much noticed—or, better put, were not considered net burdens at all. The first burden was, after all, part of the point—ADC's benefits were never meant to extend to the outer regions of the non-core model.[145] So, too, the second incentive, which would be a "perverse" one in modern lights—a "poverty trap"—was also part of the point of ADC. The plan was precisely to keep qualified non-core mothers at home until their Prince Charmings came along, as the above passages indicate.[146] Finally, the costs to the core were considered acceptable because the core was making an investment; it was spending its money now to keep certain promising non-core children out of delinquency and to prepare them for future contributions to core society.[147]

As the system grew and became a more transparent burden on the core this would all change, in part because the core was compelled to extend the largesse more broadly than it had hoped in order to address the first burden.[148] At that point, the incentives to the qualified non-core—

142. *See* Williams, *supra* note 12, at 722 (noting problem with lack of assistance to non-core cases).

143. *See* ABRAMOVITZ, *supra* note 127, at 315-18 (stating that early welfare programs accepted and perpetuated ideology that women should mother in home while men should labor in market); GORDON, *supra* note 127, at 135-36 (same).

144. *See, e.g.*, Goldberg v. Kelly 397 U.S. 254 (1970) (discussing state's asserted interest in limiting costs and burdens placed on taxpayers in support of redistributive welfare programs). In *Goldberg*, the state argued that it had a compelling interest in removing unqualified recipients from the welfare rolls because of the costs such a program imposes upon the core families. *See id.* at 258.

145. *See* Williams, *supra* note 12, at 722 (discussing lack of assistance to non-core cases).

146. *See* Joel F. Handler, *Ending Welfare as We Know It—Wrong for Welfare, Wrong for Poverty*, 2 GEO. J. ON FIGHTING POVERTY 3, 4 (1994) (discussing how aid was distributed to mothers deemed "fit and proper" in order to enable worthy women to stay home and raise children and provide stable home environment). Handler explains that the welfare program was structured so that "poor mothers of young children could stay at home." *Id.* at 4. "Morally, excused from work, they now became the 'deserving' poor and were no longer in conflict with the domestic code." *Id.*

147. *See* Jill Duerr Berrick, *From Mother's Duty to Personal Responsibility: The Evolution of AFDC*, 7 HASTINGS WOMEN'S L.J. 259, 271 (1996) (discussing justification for aid to single mothers that suggested it was unhealthy for children if mother was forced out of home and into workplace by economic hardship).

148. *See* GWENDOLYN MINK, THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917-1942 182 (1995) (noting demographics of ADC recipients

the second burden—got noticed and labeled perverse, so that the ultimate retrenchment of welfare could be described as for "their" own good.[149] This just so happened, as it turned out, to alleviate the third burden—the cost to the core.

2. *Growth—and Retrenchment*

The big problem, from the perspective of those who resisted the welfarist spirit of ADC, was that nothing really improved. The Great Depression came and went, and so did World War II. But times proved that single parent, female-headed—and poor—households were here to stay. Over time, ADC grew. In 1940, ADC covered 372,000 families at a cost of 133 million dollars; by 1960, the numbers had risen to 803,000 and a cost of 994 million dollars.[150]

At the dawn of the 1960s, the sheer magnitude of the ADC program fueled a rethinking and reconception.[151] The program's very size had begun to overwhelm the bureaucratic administration that had always been central to the de facto limitation of the program's reach and cost.[152] At the same time and in addition, a growing civil rights movement spread to the courts and legal aid, making it hard to continue to monitor and curtail ADC through discretionary, normative provisions.[153] ADC began increas-

had changed radically: non white recipients rose from 14% of rolls up to 46% by 1967); Sonya Michel, *A Tale of Two States: Race, Gender, and Public/Private Welfare Provisions in Post-War America*, 9 YALE J.L. & FEMINISM 123, 129 (1997) (noting that precipitants of welfare reform were expansion of public assistance and changes in racial composition of welfare recipients).

149. *See, e.g., Public Welfare Amendments of 1962: Hearings Before the House Comm. On Ways and Means*, 87th Congress 63 (1962) (paraphrasing Abraham Ribicoff). Testifying in favor of altering the ADC program to include incentives to work, Abraham Ribicoff— President Kennedy's Secretary of Health, Education and Welfare—indicated that work requirements served the best interests of welfare recipients. *See id.* Ribicoff argued that self-sufficiency and rehabilitation should become paramount objectives of the welfare program, not just simple relief. *See id.*

150. *See* ABRAMOVITZ, *supra* note 127, at 319 (noting families and cost in dollars).

151. *See* Michel, *supra* note 148, at 129 (detailing explosion in size of ADC program). In 1940, there were 1.2 million ADC recipients. *See id.* By 1960, that number grew to 3.1 million. *See id.* Likewise, the costs of the program skyrocketed. In 1940, the program cost $133 million. *See id.* By 1960, the cost increased sevenfold to $994 million. *See id.* (citing U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, SOCIAL SECURITY PROGRAMS IN THE UNITED STATES 96 (1968)).

152. *See* Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 480 (1987-88) ("AFDC became massive and appeared out of control. It was popularly referred to as an 'administrative nightmare.'"). The rising size and cost of the program attracted popular attention and thrust reform to the forefront. *See id.*

153. *See* Silvia M. Menendez, *AFDC Beneficiaries and the Automobile Equity Limit*, 12 LAW & INEQ. J. 529, 532 (1993) ("Court forced expansion of the pool of eligible recipients, together with the inclusion of previously excluded groups steadily increased the bureaucracy associated with AFDC."). For example, in 1968 the Supreme Court invalidated the "man in the house" restriction that denied benefits

ingly to cover nonwhite families. Whereas welfare families had once been 86% white, the percentage had fallen to 54% by 1967.[154] No longer could the program be sold to members of the core as a temporary, minor, cost-effective one designed to bring sympathetic Cinderella stories back into the core. Welfare had become a form of "redistribution," of the government playing "Robin Hood"; it had become a net transfer from the core to the non-core, shorn of its consequentialist aspirations. From the perspective of the Ozzie-and-Harriet style family, it was time for a change. It came.

Almost right from its inception in 1935, the story of ADC was a simultaneous story of growth and retrenchment. The growth came as a brute fact of the matter, as caseloads swelled under the weight of demographic changes and legal and bureaucratic pressure on what one author has called the policy of "regulation by exclusion."[155] Retrenchment came at the same time as the core fought back. Legal and regulatory changes attempting to stem the swelling tide of welfare were common throughout the post-war period.[156] They reached something of a high point in 1962, when ADC was reborn as Aid to Families with Dependent Children (AFDC).[157] Later changes were made in 1967 that attempted to stem the growth of children born out of wedlock, and on and on throughout the 1970s and 1980s.[158]

This story of simultaneous growth and retrenchment has been well told, by Linda Gordon, Mimi Abramovitz and many others—most recently by Tonya Brito in this volume.[159] I will not repeat this large, important and generally sad story here. Rather, I mean to set the story of the welfare benefits program, aimed at non-core cases, in the context of this Article's primary themes. In welfare, we see a small program designed to benefit certain sympathetic non-core cases. But as it grew, its burdens on the core became more salient and objectionable. This is precisely the opposite of the dynamic sketched in the case studies of Part II. There, small benefits programs were designed to benefit the core. As those programs grew,

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if the mother was co-habitating with a man inside or outside the house. *See* King v. Smith, 392 U.S. 309, 319 (1968). This, of course, increased the number of qualified recipients.

154. *See* Gwendolyn Mink, *Welfare Reform in Historical Perspective*, 26 CONN. L. REV. 879, 891 (1994) (discussing political backlash caused by clash of "liberalism" and "racism" as number of non white, ADC recipients continued to grow at explosive rates).

155. ABRAMOVITZ, *supra* note 127, at 318.

156. *See id.* (discussing changes in regulatory schemes).

157. *See* The Public Welfare Amendments of 1962, Pub. L. No. 97-543, 76 Stat. 185 (codified as amended in scattered sections of 42 U.S.C.); *see also* ABRAMOVITZ, *supra* note 130, at 318 (discussing change from ADC to ADFC); MINK, *supra* note 151, at 880 (discussing policy changes encompassed by enactment of AFDC: welfare was expanded, barriers to eligibility were removed and moral supervision was relaxed).

158. *See* Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821.

159. *See generally* ABRAMOVITZ, *supra* note 127 (discussing simultaneous growth and retrenchment); GORDON, *supra* note 127 (same); Brito, *supra* note 13 (same).

their status as "benefits" became *less* salient and objectionable, and the burdens on the non-core continued to be ignored.

By the 1960s, the idea or hope that there was a manageable number of non-core cases, brought on by trying times and that could assimilate into the core, was no longer realistic. Core society had come to see that female-headed households of all races and sorts were here to stay and had lost its ability to pick and choose the potential Cinderella stories among them. Rather than continue trying to assimilate all cases into the core and perhaps even expand the reach of ADC to other, non-core cases, welfare reform went in a different direction. Society tried to write off all non-core cases as permanently outside the core, Ozzie-and-Harriet style ideal. Society reconcieved single-parent households of all races as somehow undeserving of largesse. The pivotal 1962 changes introduced the concept of work incentives into welfare and planted the seeds for the ultimate dismantlement of the program and its rebirth as "workfare."[160] The hope was that single-parent households—even if they were doomed to stay single-parent households—could at least stop burdening the state. Cinderella was told to go to work. As the program had grown more expensive and burdensome on the core, it laid the foundation for a reconception of the non-core paradigm, such that the custodial single mother could now be expected—even required—to share part of the load.

Of course, as most of us know by now, the reforms of the 1960s, 1970s and 1980s did not succeed in curbing the growth of welfare. The program continued to grow, just as social security did. The move from ADC to AFDC did, however, successfully shift the focus of welfare from children to the mothers who bore and supported them. Society found it easier to blame these adults and to cut them loose; the non-core cases could be spun off and relegated to the netherworld. All the while, consequentialist talk abounded. Initially, the idea of ADC was to help tide over the select non-core, in the hope that they would not remain non-core—that they would one day "contribute" back to society. As the program swelled and started to include more and more cases that looked solidly non-core, the focus continued to be on how to make "them" "productive."[161] Welfare has never been seen in this country as a matter of entitlement or right in a thick sense—as part of what a fair and decent society owes, at a minimum, to all of its members. Instead, it is viewed as a matter of economics and dollars and cents—what "bang for the buck" we get.

Perhaps this cost-effective focus sounds logical—or fair or efficient or even "neutral"—to some. Yet it marks a striking contrast with the benefits programs given to one-earner families under the social security and in-

160. *See* GORDON, *supra* note 127, at 10-11 (indicating that claims to welfare have been justified on wage earning, or return for service, basis).

161. *See* Jonathan Barry Forman, *Improving the Earned Income Credit: Transition to a Wage Subsidy for the Working Poor*, 16 FLA. ST. U. L. REV. 41, 43-44 (1988) (noting that few poverty geared programs are designed to help working poor and arguing that such help is appropriate).

come tax systems. There, as we have seen, society gave large bonuses to wealthy one-earner families. In those cases, we don't ask what "bang for the buck" we get; we don't consider whether or not the funds transferred to Ozzie and Harriet help make such families more likely, more stable or more productive. If we did ask those questions, we would be forced to confront more openly an apparent absurdity. Why are we trying to reward and encourage wealthy one-earner families, who constitute an increasingly small percentage of our people, and who do not obviously seem to need any help? Instead, we talk of consequences and investments among the poor; rights and neutral policies among the rich—a social logic that a dispassionate outside observer, concerned only with social justice, might well think precisely backwards.

By the 1990s, a full-scale attack on welfare recipients in the form of a pattern of blaming the beneficiaries took hold. President Clinton, a Democrat, vowed to "end welfare as we know it."[162] Unlike other vows, Clinton stuck to and acted on this one. The significantly named Personal Responsibility and Work Opportunity Reconciliation Act of 1996[163] abolished AFDC. In its place came a new acronym, befitting a seriously curtailed federal commitment to welfare: Temporary Aid to Needy Families, TANF.[164] At the exact same time that the significant bonuses to Ozzie-and-Harriet style families were being ensconced in the tax and social security systems, welfare "reform" was making it abundantly clear that aid to the non-core cases would never be assimilated into the status quo.[165]

B. *Earned-Income Tax Credit*

1. *Humble Beginnings*

The earned-income tax credit (EITC) story, for the most part, simply continues the story of welfare. The EITC was first put in place in 1975, a time of relative political moderation with Gerald Ford as president and the Congress in Democratic hands. It was also a period of economic hard times.[166] Senator Russell B. Long of Louisiana, Chairman of the Senate

162. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

163. *See id.*

164. *See id.* (explaining nature of program funded by federal grants to states).

165. For a further discussion of these systems, see *supra* notes 23-122 and accompanying text.

166. *See* Michael J. Caballero, *The Earned Income Tax Credit: The Poverty Program That Is Too Popular*, 48 TAX LAW. 435, 438 (1995) (noting that earned income tax credit was enacted during "time of economic struggle"); *see also* Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 533 (1995) (arguing that earned income tax credit plays key role in social welfare policy); Forman, *supra* note 161, at 50 (stating that earned income tax credit was designed to stimulate stagnating economy).

Finance Committee, championed the idea for the EITC.[167] This was ironic, given the late Huey Long's role in supporting the initial welfare program in 1935.[168] The EITC has always been linked, in fact if not in theory, with the war against welfare; it has been a key component in making the move from "welfare to workfare."[169] The very rise of the EITC has been a large part of the fall of AFDC.

The initial motivation behind the EITC was to eliminate some of the work disincentives facing poor households with children.[170] This continued a theme of welfare reform found in the 1950s and 1960s that had led to the change from ADC to AFDC; once again, burdens on the intended beneficiaries get noticed only when they happen to coincide with burdens on the core. But the benefits structure of the EITC was also connected to the tax structure of social security, a system growing in importance throughout the whole period and one that made no accommodation for family size, need or anything else. Unlike the income tax, which has always had a range of income immune from tax, social security "contributions" are due on the very first dollar of earned income.[171] We can readily understand the EITC as creating a "zero bracket" under social security for lower-income households, as its framers in fact intended.[172]

It is therefore not obvious—and it is far from "neutral"—to conclude that the EITC, as initially enacted, was really a "benefits" program at all, as opposed to relief from the burden of the regressive social security contribution system. The social security system was growing ever larger during the 1950s and 1960s, in part to help subsidize Ozzie-and-Harriet style families. Prior to the EITC, workers earning minimum-wage levels were actually paying a tax in part to help pay for wealthy, non-working Harriets. Of course, we have never quite brought ourselves to think of the EITC that

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167. *See* Caballero, *supra* note 166, at 438 (noting that Long wanted to "'reward work and parents supporting their children'").

168. *See* GORDON, *supra* note 127, at 229-30 (noting that Long's proposed welfare program was based upon statistics that were either "extremely outmoded or fabricated," was called Share Our Wealth and included such promises as employment for "'every American man'").

169. *See* Alstott, *supra* note 166, at 534 (noting that proponents of earned income tax credit claim it "promotes work and family responsibility among the poor, unlike traditional welfare programs").

170. *See* Forman, *supra* note 161, at 44 (indicating that earned income tax credit is federal program "geared to help the working poor"). *But see* Alstott, *supra* note 166, at 534 (contending that earned income tax credit advocates "exaggerate the program's effectiveness in encouraging work").

171. *See* Caballero, *supra* note 166, at 435 n.1 (providing rate at which social security taxes are imposed on wages and noting that Internal Revenue Code provides for no personal exemptions or standard deductions as with federal income tax).

172. *See* Forman, *supra* note 161, at 51 (stating that proposed earned income tax credit used income tax system to alleviate impact of social security taxes on low-income individuals and families).

way. In any event, the initial program was passed with wide and bi-partisan support.[173]

Like the pattern of marriage bonuses and penalties discussed above, the EITC works through the tax system. It is a "refundable credit."[174] A credit is a straight dollar transfer from the government to the taxpayer. This differs from a deduction, which subtracts from taxable income and thus saves a taxpayer at her marginal tax rate—meaning that deductions are worth more to higher bracket taxpayers.[175] Credits, in contrast, are worth the same at any marginal rate bracket. Most credits in the tax law are "non-refundable," meaning that they can reduce a taxpayer's total tax owed to zero but not below.[176] The refundability of the EITC means, in contrast, that this particular credit can indeed bring a family's tax below zero—the government will actually mail some families a check or find some other way to get money into their hands.[177]

When the EITC began in 1975, the credit was set at 10% of a taxpayer's earned income up to $4,000—a maximum credit of $400.[178] To qualify, one had to have at least one dependent child at home.[179] The credit was then "phased out," again at a 10% rate, beginning at the first

173. *See* Alstott, *supra* note 166, at 537 (stating that earned income tax credit has found "secure niche" in welfare approach by responding to strong theme of "bipartisan consensus on work-based welfare reform"); *see also* Caballero, *supra* note 166, at 436 (providing reasons for both conservative and liberal support of earned income tax credit).

174. *See* Forman, *supra* note 161, at 44 (noting that earned income tax credit is refundable and explaining that if credit amount exceeds income tax liability, Treasury will refund balance); *see also* I.R.C. § 6401(b) (1998) (explaining refundability of credit).

175. *See* JAMES J. FREELAND ET AL., FUNDAMENTALS OF FEDERAL INCOME TAXATION 957 (David L. Shapiro et al., eds., 10th ed. 1998) (explaining that credit is better than deduction for taxpayer because it "reduces tax liability dollar-for-dollar, whereas a deduction reduces only taxable income with a corresponding but smaller reduction in tax liability"). Deductions create increased tax savings for taxpayers in higher tax brackets, but credits create the same tax savings for all taxpayers. *See id.*

176. *See id.* (explaining that even if nonrefundable tax credit exceeds computed tax, taxpayer receives no refund). The four groups of nonrefundable tax credits are personal credits, general business credits, certain miscellaneous credits and the minimum tax credit. *See id.*

177. *See* I.R.C. §§ 32(g), 3507 (1998) (providing that in receiving earned income tax credit, eligible family may receive advanced payment of expected credit, rather than waiting for refund); *see also* FREELAND, *supra* note 175, at 967 (explaining interaction of two sections).

178. *See* Alstott, *supra* note 166, at 537 (providing analysis of earned income tax credit's growth from enactment in 1975 to 1996).

179. *See* Caballero, *supra* note 166, at 440 (indicating that requirement in 1975 of at least one dependent child was effort to "target benefits" and stating that this requirement effectively excluded young and old taxpayers whose income levels often fell within EITC range). *But see* I.R.C. § 32(c)(1)(A) (1998) (indicating that individuals may now be eligible for EITC without dependent child).

dollar earned in excess of $4,000.[180] The "phaseout" meant that a family would have to "pay back" its EITC benefit as it ascended into the lower-middle class. So a family that made $5,000, for example, would get a credit of $400 on its first $4,000 of earned income but would then *lose* the credit at the rate of 10% of its next $1,000 of income—the income that moved the family from $4,000 to $5,000—for a reduction of $100 and a net credit of $300.[181] By the time a family reached $8,000, the credit was gone.[182]

This phaseout combined with other restrictions kept the initial cost of the EITC within humble bounds. Congress went even further in limiting the EITC by making it temporary—it was only to apply to the calendar year 1975.[183] The revenue cost was estimated at a relatively modest 1.5 billion dollars.[184] This was a classic humble beginning for a benefits program.

The EITC's placement within the income tax laws has always given it both advantages and disadvantages.[185] One advantage is that the EITC doesn't require a separate bureaucracy to watch over it. But the complexity of the income tax law has also deterred many legitimate beneficiaries from claiming the credit, which also does not extend to those who fail to file altogether, for whatever reason.[186] The EITC's structure as an income tax provision has also made its connection to social security taxes less visible. Rather than seeing it as a "zero bracket" under the increasingly important social security tax system—arguably a more "neutral" characterization—critics have seen the EITC as a special provision, an act of largesse, under the income tax system.

Aside from its burdens on the fisc, many of which are actually born by the near-poor under the phaseout tax, there are two large burdens under the EITC. The first is a marriage penalty brought on by the fact that the

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180. *See* Caballero, *supra* note 166, at 439-40 (explaining "phaseout" reduction of 1975 version of EITC); *see also* I.R.C. § 32(b) (1998) (providing current credit percentages and amount and phaseout percentage and amount for three types of eligible individuals).

181. *See* FREELAND, *supra* note 175, at 966. It may be important to note that the phaseout procedure depends on the greater of the eligible individual's earned income or modified adjusted gross income. *See id.*

182. *See* I.R.C. § 32(b) (setting forth phaseout amount and percentages for eligible individuals). These amounts have, of course, changed since 1975.

183. *See* Caballero, *supra* note 166, at 441 (noting that EITC was enacted on temporary basis but later extended to cover future tax years).

184. *See id.*

185. *See* Alstott, *supra* note 166, at 535 (arguing that advantages of EITC's inclusion in tax law are lower cost and less social stigmatization than traditional welfare, but disadvantages include "significant institutional contraints").

186. *See* Caballero, *supra* note 166, at 461 (noting that taxpayers whose income is less than available standard deduction and personal exemptions are not required to file, are likely to be those people most in need of EITC and are likely to be unaware of EITC because of not filing).

credit has never made any provision for marriage or joint filing.[187] If Ozzie alone earned $4,000 in 1975, his family would qualify for the full $400 credit. But if Ozzie and Harriet each worked for $4,000, their family would get nothing at all. Yet again, we see that two-earner households are punished, even among the poor, and even at a time when they form the vast majority of two-parent households.[188]

The second burden created under the EITC is the work disincentive brought about because of the "phaseout" range. This phaseout, combined with both the lowest income tax bracket and social security contributions, initially meant that lower-middle class workers could face marginal tax rates of 33% and higher.[189] Today, with a phaseout in excess of 20%, the number can easily approach 50%.[190] It is worth pausing and noting that phaseouts are neither necessary nor obviously justified. They stem from the idea that the near poor should pay back the benefits of the poor; that is, that the core should be kept out of this as much as possible. If we eliminated the phaseout, tax rates would increase across the spectrum to pay for the relief given to the working poor. Why shouldn't this be the case? If we view the EITC as some relief from the tax and other costs of the working poor, it is not at all obvious why it should be "paid back" by the near poor. If, in contrast, we view it as a matter of largesse, the "payback" rationale becomes more compelling. This latter frame is, of course, consonant with the psychological perspective and self-interest of the wealthy core.

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187. *See* MCCAFFERY, *supra* note 4, at 81-84 (noting that some current bills, which have not garnered much support as of this writing, have been introduced to alleviate this problem).

188. *See* U.S. Bureau of the Census, Current Population Reports 20-515, *Household and Family Characteristics: March 1998* (Update) (visited Mar. 9, 1999) (last modified Feb. 22, 1999) <http://www.census.gov/population/socdemo/hh-fam/htabMC-1.txt>. (providing statistical data connecting two-earner to two-parent households). In fact, in 1998, 56% of all the married couples in the United States have both the husband and the wife in the workforce. *See id.* That figure rises to 62% for all couples with children under the age of six and 68% for all married couples with children under the age of 18. *See id.*

189. *See* I.R.C. § 32(b) (1998) (eligible individual with two or more qualifying children qualifies for maximum EITC equal to 40% of $8,890). For example, consider a one-income family earning $12,000 per year and qualifying for the maximum EITC. Such a family is subject to a 15% income tax rate and pays 7.65% in social security taxes. As noted in the text, the maximum amount of EITC that any qualifying taxpayer can receive is $3,556. When the taxpayer earnings exceed $11,610, the EITC is slowly phased out at an initial rate of 21.06% of total income. *See id.* Because the family earned more than the threshold amount, they are disallowed $2,527 (21.06% of $12,000) of EITC.

In total, the family's marginal tax rate is the sum of their federal tax, their social security tax and the amount of EITC to which they no longer qualify (15% + 7.65% + 21.06% = 43.71%). Without considering additional amounts which would be owed in local or state taxes, the lower family is paying an effective tax rate of 43.71%.

190. For families in the lowest tax brackets, the effective tax rate can easily approach 50% when state and local taxes are included in the equation.

As with each of the benefit programs we have examined, the initial EITC was small and its burdens were not much noticed. Once again time would change both facts.

2. *Growth—and Retrenchment?*

The EITC proved popular. Congress renewed it to cover the tax years 1976 and 1977.[191] In 1978, the credit was made permanent and its size was extended, to cover 10% of the first $5,000 of income.[192] The law also introduced a "plateau," or a range in which neither a credit nor a phaseout applied—a feature of the EITC that persists to this day.[193] Thus, a qualifying family would get a credit of 10% of its first $5,000 of income; nothing would happen for its next $1,000; and the family would enter a phaseout range starting at $6,000, when they would lose the credit at a 12.5% rate.[194] Procedural changes were also introduced in 1978 allowing taxpayers to get their credit ratably over time, through a system of "negative withholding" in paychecks.[195]

More changes—involving both expansion and restructuring—occurred in 1984, 1986 and 1990.[196] By far the greatest expansion of the EITC came in 1993 under the Clinton Administration.[197] At the same time that the Administration was sponsoring a potentially regressive en-

191. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1556-1558 (amending tax code relating to Earned Income Tax Credit and changing expiration date of January 1, 1977 to January 1, 1978).

192. *See* Revenue Act of 1978, Pub. L. No. 95-600, § 104(f), 92 Stat. 2763, 2773 (amending tax code related to Earned Income Tax Credit, eliminating language referring to expiration date, allowing for maximum EITC of $500 instead of $400); *see generally* Caballero, *supra* note 166, at 441-44 (discussing legislative development of Earned Income Tax Credit and elimination of expiration date from statutory scheme).

193. *See* Caballero, *supra* note 166, at 442 (noting that phaseout "plateau was introduced, from $5000 to $6000, where the credit remained constant even though income increased").

194. *See id.* (noting that after $6000 plateau, EITC phased out at rate of 12.5% of adjusted gross income and credit eliminated completely when household incomes reached $10,000).

195. *See id.* (noting that EITC was amended to permit taxpayer to receive EITC payments throughout tax year rather than wait for refund); Forman, *supra* note 161, at 54 (noting that Revenue Act of 1978 permitted employees to "elect to have advance payments of the earned income credit added to their paychecks each pay period through the normal withholding mechanism").

196. *See generally* Caballero, *supra* note 166, at 443-46 nn.52-83 and accompanying text (discussing legislative evolution of EITC as result of 1984 through 1990 legislative amendments). Among other things, the 1984 amendment increased the EITC to $550 and changed the phaseout rate to 12-2/9% with a complete phaseout at $11,000. *See id.* at 443. The 1986 amendment changed the phaseout rate to 14% and permitted a maximum EITC of $800. *See id.* at 444. The 1990 amendments made allowances for qualifying dependents, with a maximum EITC of $1,511 for taxpayers with two or more qualifying dependants. *See id.* at 445.

197. *See id.* at 451 (noting that Clinton administration sought to increase maximum EITC from 19.5% to 31.59%, from maximum EITC of $1,511 to $3,371 for total increase of 123%).

ergy or Btu tax, and in the midst of an economic recession, it advocated EITC expansion estimated to cost twenty-eight billion dollars over five years.[198] Once again, it is a matter of historical record that part of the point of the EITC was simply to offset other, regressive, taxes, so that our very poorest working citizens might face an actual, effective tax rate of zero.[199] But this characterization has been quickly forgotten.

The ultimate proposal enacted in 1993 was somewhat more modest, but the EITC had still become very large indeed.[200] As it now stands, a family with two or more qualifying dependents gets a credit of 40% of its first $8,890, indexed for inflation, for a potential credit of $3,556.[201] Meanwhile, the phaseout range and amount also increased, to a 21.06% rate starting at $11,610.[202] The EITC had almost overnight become the major federal assistance program, costing $28.8 billion by 1996.[203]

In and of itself, this might have been good for the cause of greater justice among the poor, but the expansion of the EITC went hand-in-hand with the dismantlement of AFDC, discussed in the prior section. Thus the EITC, originally meant as relief from one regressive tax system and expanded to include relief from another, soon became the dominant "entitlement" program in America and a reason for dismantling welfare.[204] Of course, the EITC is conditioned on work and, indeed, on filling out tax forms.[205]

198. *See id.* at 448 (noting that Clinton administration introduced broad-based Btu energy tax to raise revenue to reduce budget deficit; changes sought to EITC were intended to offset perceived regressive impact of Btu tax on poor; and estimated cost of revised EITC program would have been $28.3 billion).

199. *See generally* Forman, *supra* note 161, at 45-47 (discussing origin of EITC and tracing development as result of President Lyndon B. Johnson's "War on Poverty").

200. *See* Caballero, *supra* note 166, at 456 (noting that Revenue Reconciliation Act of 1993 contained most of increased benefits in original Administration proposal, but total amount of revenue expended under program was projected to be $20.8 billion over 5 years versus Administration's original proposal of $28.5 billion over 5 years).

201. *See* I.R.C. § 32(b)(1)(A) (1998) (indicating that EITC percentage is 40% for eligible individual with 2 or more qualifying children where earned income amount is $8,890).

202. *See id.* § 32(b) (indicating that EITC phaseout rate for eligible individual with 2 or more qualifying children is 21.06% and that phaseout amount is $11,610).

203. *See* White House Office of Management and Budget, *Fiscal 2000 Budget Part V, Chapter 4—Supporting Working Families*, TAX NOTES TODAY (Feb. 2, 1999) (announcing officially that under Clinton Administration's new budget "[t]he EITC will provide $167 billion of tax benefits over the next five years to low-income working families"); *see also* George K. Yin et al., *Improving the Delivery of Benefits to the Working Poor: Proposals to Reform the Earned Tax Income Credit Program*, TAX NOTES TODAY, (Mar. 3, 1994) (estimating that annual cost of EITC would be almost $25 billion by 1998).

204. *See generally* Forman, *supra* note 161, at 46 (noting that EITC developed out of concern in early 1960s regarding economic welfare of poor Americans).

205. *See* Robert J. Barro, *Workfare Still Beats Welfare*, WALL ST. J., May 21, 1996, at A22 (noting that "the earned income tax credit . . . actually helps the working

At the same time that the EITC has expanded, its burdens have become more severe. The marginal tax rate facing a worker earning as little as $12,000 a year can now be perilously close to 50%, considering the EITC phaseout of 21.06%, the income tax rate of 15%, social security taxes of 7.65% and state and local taxes of various sorts. The brute social facts can be shocking when set in a comparative context. For example, a married couple must have taxable income over $250,000 to be in a marginal income tax bracket higher than a single mother earning $12,000.[206]

The story of marriage penalties under the EITC is similar in both its magnitude and in the general social quiescence about it. Today, lower-income, two-earner, married couples face extremely high marriage penalties. By 1994, a two-earner family where each spouse earned $10,000—roughly $200 a week, approximately minimum wage—would pay a marriage penalty of over $3,700, nearly one-fourth of their pre-tax income.[207] In contrast, a couple where each spouse earned $25,000 would pay a marriage penalty of only $727, one-fifth of what their poorer fellow citizens paid.[208] The reason for this extreme disparity is that the EITC has continued to make no accommodation for marriage. It thus has a penalty structure akin to what joint filing at the singles tax rate would have—an option that America roundly rejected in 1941.[209]

In practical and moral terms, the EITC's marriage penalty is perverse. Because society constructed a system on the assumption that it would apply to single mothers, it actually discouraged such women from marrying. At the same time that core society continued to exalt and reward Ozzie-and-Harriet style families at the top of the income scale, it made two-parent families of any sort less likely among the lower reaches. It also laid the

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poor in a way that promotes work and discourages welfare"). Of concern is the fact that many in the lowest income bracket are not required to file any income tax return and therefore, are unable to take advantage of the EITC program. *See* Caballero, *supra* note 166, at 461.

206. *See* I.R.C. § 1(a)(2) (1998) (stating that 39.6% bracket for married couples begins at $250,000). Before that, commencing at $140,000, they are in the 36% bracket. The individual, in contrast, is in the 15% income tax bracket (I.R.C. § 1(c)), and the earned income tax credit phaseout of 21.06% (I.R.C. § 32(b)(1)), for a combined federal income tax marginal rate of 36.06%.

207. *See* Feenberg & Rosen, *supra* note 98, at 94, tbl.2 (indicating marriage taxes of $3,717 for hypothetical couple having two children and where each spouse earns $10,000). The marriage tax is based on key elements of the tax law which depend on a family's situation: the applicable rate schedule, the standard deduction and the EITC. *See id.* at 92. For example, the standard deduction for a single individual is $3,800, but the standard deduction for a couple filing jointly is $6,350. *See id.* at 93. Based upon the standard deduction alone, the couple loses $1,250 of the standard deduction which they would have realized if they had filed as single. *See id.* This lost $1,250 is one element of the marriage tax. *See id.* at 92.

208. *See id.* at 94 tbl.2.

209. *See* MCCAFFERY, *supra* note 4, at 49-52 (discussing mandatory joint filing proposal developed by Congress in 1941 that was subsequently rejected due to massive unpopularity). For a further discussion of the rejected 1941 mandatory joint filing proposal, see *supra* notes 73-78 and accompanying text.

groundwork for social conservatives to criticize continued aid to the poor on the grounds that "their" unstable family structures showed that "they" were immoral—echoes of the "worthy" and "suitable home" provisos in the original ADC program.

As the burdens of the EITC to the non-core cases it was meant to serve grew—we can understand the problems as being poverty and marriage "traps" deterring accession to the middle class—scholars and others began focusing on the disincentives in explicitly consequentialist logic.[210] Did the EITC really deter work effort or marriage? By and large, the literature has been rather sanguine, finding that the actual effects of the EITC's burdens are not terribly severe.[211] I happen to believe that there are good reasons to be skeptical of these answers. Both persistent poverty and unstable family structures among the lower classes are over-determined social phenomena. The marriage penalties among the working poor are enormous, as we have seen. It doesn't particularly matter whether or not individuals or families understand these biases in crisp intellectual form—it is a frequent mistake of defenders of the status quo to point to the complexity of the EITC and other transfer programs as arguments against their disincentive effects. Cognitive understanding of the law is not a prerequisite to its behavioral affects: what we do not know definitely can hurt us.

Standard models of the effects of welfare and workfare take a narrow view. They typically look at the elasticity of marriage rates among the poor across limited time periods and on either side of incremental changes in the tax and transfer systems. There is a far larger problem and context of culture. The narrow view, conveniently enough, fails to take into account the ways in which a dominant culture—the core—shapes the realities and possibilities of a nondominant culture—the non-core.

The stories of welfare and workfare reform and their analysis illustrates this point. Marriage among the poor has not been supported by a wider society—a society that only seems to pay attention to the poor when they are a source of trouble and cost. Meanwhile, the EITC, welfare, and other perhaps well-meaning programs only add additional injury via their

210. *See, e.g.*, Robert Greenstein et al., *Earned Income Credit Works, CBPP Finds*, TAX NOTES TODAY, (Mar. 27, 1998) (noting that research indicates EITC increases work efforts among single mothers, and moderates gap between wealthy and working poor); *see also* Alstott, *supra* note 166, at 534-35 (discussing views of EITC work incentives held by proponents and opponents of EITC and criticizing both because work incentive debate is too narrowly framed); Robert Moffitt, *Incentive Effects of the U.S. Welfare System: A Review*, 30 J. ECON. LITERATURE 1, 16, 30-31 (1992) (noting that economic evidence tends to indicate that welfare programs increase number of single parent households and cause reductions in employment but that estimates of effect vary considerably and are difficult to explain); Timothy J. Eifler, Comment, *The Earned Income Tax Credit As a Tax Expenditure: An Alternative to Traditional Welfare Reform*, 28 U. RICH. L. REV. 701, 714 n.56 (1994) (discussing disagreement among scholars regarding work incentive aspect of EITC).

211. *See, e.g.*, Greenstein, *supra* note 210 (noting that research found that EITC increases employment rates of single mothers from 72.7% in 1984 to 82.1% in 1996).

marriage penalties. Whether or not working poor two-earner families know it, they are losing thousands of dollars that they can ill afford. This puts stress on the family and may lead to its breakup or nonformation. At the same time, a potentially solid two-earner, two-parent family notices that there are few other families around following its model. They might even notice that the "best" families are especially likely to have a stay-at-home parent, a Harriet. They are trying to make do, and it is not working. Social norms and expectations break down. Meantime, core society comes to take unstable family structures among the poor for granted. It continues to set up benefits programs with single-parent households in mind. It doesn't even notice the marriage penalties at first. As the programs grow and the penalties become very large it can no longer ignore them. At this point, liberal defenders of the benefits programs are drawn to argue that the disincentive effects are not severe, as a way of fighting off a socially conservative movement to abandon the poor altogether, precisely because of their lack of work effort and stable family structures.

There is thus good reason to question the answers given to the question of behavior and incentive effects. But more to the point, there is reason to question the questions themselves. Why are we asking consequentialist questions about benefits programs for the non-core cases? Among the poor, and the poor alone, society continues to expect a "bang for our buck." We cannot bring ourselves to view what we are doing as merely compensating for regressive economic policies elsewhere; much less can we come to see aid to the poor as part of a basic system of democratic decency, an entitlement to the minimal prerequisites of a decent existence.

Most strikingly, we do not ask these questions in the core model cases. There, marriage bonuses or rewards to one-earner families are not meant to be measured by their results. They are indeed matters of right or entitlement. In parallel fashion, we ought to be asking the question of whether marriage bonuses effectively keep women like Harriet at home. Of course, this question, if made explicit, would only serve to make more transparent the burdens that those benefits confer—helping Harriet to stay at home is the same thing as punishing her for trying to work—and how out of step our major benefits programs have gotten with contemporary times and mores. So we do not ask these questions, and we hope that no one of any importance will notice.

It is too early to tell what will happen to the EITC over time. We are still too close to the "death of welfare" as we had come to know it for there to be a large-scale effort to dismantle EITC. There has indeed been talk of reform, grumbling about costs, and attention to error rates—meant selectively to refer to over, not under, inclusion.[212] This Article gives us much

212. *See id.* (discussing error rate and estimated budget costs of EITC). The major criticism against the EITC is the high error rate reported by the IRS. *See id.* Nevertheless, the error rate has dropped considerably from approximately 35% in the 1980s to 20.7% in 1997. *See id.* Moreover, the 1997 study was based on 1994

reason to be skeptical about the long-term fate of the EITC. The benefits under social security and the marriage bonuses under the income tax could grow over time and thereby become only more and more entrenched. But welfare was fated to march to a different drummer. As it grew, its costs became more noticeable. Then, and only then, attention was paid to its behavioral effects. These were next used as part of the argument against it.

Today, thanks in ironic part to the EITC, we have killed welfare and replaced it with workfare. This has made EITC the largest "entitlement" program—the largest one that our public accounting conventions track, that is—and thus put it on the hot seat. Armies of consequentialist scholars and researchers are now beginning to descend on the program, and their very questions pose a haunting paradox for the prospects of continued aid of some sort, any sort, to the poor. If, on the one hand, the EITC's burdens do not affect work or marriage incentives, can it really be that the benefits have positive effects? On the other hand, if the burdens do bind, should we not discontinue the benefits for the good of the poor themselves? Once we start looking hard enough at any benefits program, and see that it inevitably poses burdens, can "tough love" or a "good swift kick in the pants"—as our exclusive social policy for the poor—be far behind?

C. *Common Ground*

Welfare and workfare share much in common. Both are seen as non-neutral deviations from the expected way of doing things—self-sufficiency. Both are seen as acts of social largesse. This need not obviously be so. The EITC, in particular, can easily be seen as compensating for social security and other regressive tax systems. But because they are seen as non-neutral, these benefits programs are vulnerable to change. They are constantly measured out and evaluated in consequential terms. A politically liberal welfarist norm would certainly support the idea of a basic entitlement for all citizens. But not here, not now. Welfare has never been seen in these terms. It is evaluated as if it were an investment that society were making, and the payers expect results.

What is also common is that, in all these regards, welfare and workfare are *not* like the benefits in the core model cases discussed above. There, the benefits inured to the core and the burdens fell outside, and both were ignored while they grew and grew.

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rates and is therefore believed to overstate the current error rate of EITC returns. *See id.* The EITC is also criticized for its growing cost to the economy. *See id.* Despite this criticism, current projections show that the EITC is expected to grow at a slower rate than the Gross Domestic Product. *See id.* These same studies also indicate that the EITC is the slowest growing entitlement program currently available. *See id.* The Congressional Budget Office projects that the EITC will grow at a rate of 2.5% through 2003 compared to 4.5% average nominal growth rate projected for the national economy. *See id.*

IV. CONCLUSION: WHAT IS TO BE DONE?

Times today are good for the most fortunate of us—life is a fairy tale, as they say. The wealthiest Americans are wealthier than ever by almost any measure. This material flourishing has gone along with a general complacency and even an aversion of sorts to social movements of yore, like civil rights or feminism. We are living happily ever after—always the last words in fairy tales—in a land we want never to change.

But these happy times abound largely at the top of our income ladder, in the castles where princes and their damsels dwell. The vast middle classes labor outside the castle walls, facing the manifold stresses of a newly emergent two-parent, two-worker family model with little in the way of ancient role models or sympathetic laws to guide them. These families do not even exist in the fairy tales.

The poor, of course, have it worst of all. This has always been true, rather by definition, but what is striking and sad about modern times is that the poor are getting poorer while the rich are getting richer. The opportunities for life to improve for Cinderella are getting fewer and harder to come by. Poor families do exist in fairy tales, of course, but they do not always make it to the "happily ever after" part.

Perhaps this is just the way things ought to, or have to, be. Perhaps a free market system is the best of all possible worlds, and the inducements of lavish luxury are needed to make the rich more productive in the best interests of all. Perhaps the princes in their castles will turn out to be benevolent in the end. The best thing that those unfortunate souls outside the castle walls can learn to do, meanwhile, is to fend for themselves in the hope that through hard work, good morals and sound discipline, they or some family member can climb the walls. The poor can read the fairy tales and hope. Until that day, a rising tide must suffice to lift all boats. That is the best we can do. In the language of modern social policy, markets work, welfare does not.

But the analysis of this essay suggests that this account is simply another fairy tale. The fortunate few in their castles have not gotten there by dint of their own hard work and industry alone. Instead, they have benefitted at many turns from a socio-economic system that they or people like them set up, with their cases in mind. These benefits to the core cases create burdens for the non-core ones, yet we notice neither. The tables turn, perfectly, completely, only when we look to the poor. *Their* benefits, such as they are, are constantly scrutinized, and the burdens that they impose on the core are constantly noticed.

It is almost certainly too much to ask that we throw open the doors to the castle and let all in, showing a much greater solicitude for our neediest brothers and sisters, that we realign our policies to make them significantly more redistributive. Maybe, in the end, that isn't even the right way to go. But we can at least be honest. Today benefits and burdens abound. But the benefits that benefit the core cases rarely get noticed and are gen-

erally entrenched, while the ones that benefit non-core cases are constantly noticed and are constantly at risk. That is wrong—it is inconsistent, unfair and hypocritical—and it should stop. We should know better who and what we are.

In closing, I want to say a few words about the late Mary Jo Frug, in whose honor this Symposium has been held. Frug was one of the first legal scholars to merge feminism and critical legal studies—a "femcrit," as she and others identified themselves. In preparing for this Symposium, I pulled up each of Frug's published articles and read or re-read them.[213] To modern sensibilities, this work can seem a bit dated—written in a time when "trashing" was a norm in scholarly fashion and when feminism was alive with prospects and possibilities for transforming society and its modes of discourse.[214] What remains striking and most relevant about Frug's work today, however, is its constantly critical, questioning spirit, and the fact that a decade later its questions have not been answered. Frug insisted on social honesty, devoting much of her effort to revealing the hidden biases and predilections of our laws. It seems as if we have lost some of that edge in legal scholarship of late, and I wonder if the legal academy is not in too many ways a mirror of our times—too complacent, too enamored of the market and its metrics.

Mary Jo Frug's scholarly corpus was left incomplete when she was senselessly, brutally murdered by some man who has never been caught. Her too brief life did not end in fairy tale fashion. But she has left us all with a valuable gift: a set of questions and a means of asking them, both to haunt us and to hold out hope of better times—ever after.

213. *See, e.g.*, Mary Jo Frug, *Sexual Equality & Sexual Differences in American Law*, 26 NEW ENG. L. REV. 665 (1992) (tracing development of feminist legal doctrine and indicating that postmodern Feminist Doctrine offers most promise for feminist cause) [hereinafter Frug, *Sexual Equality*]; Mary Jo Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992) [hereinafter Frug, *Manifesto*] (discussing role of legal system in creating gender identities); Mary Jo Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029 (1992) (applying feminist theories to common law contract doctrines to highlight how conventional analytical devices are based on current gender biased system) [hereinafter Frug, *Rescuing Impossibility*]; Mary Jo Frug, *Law & Postmodernism: The Politics of a Marriage*, 62 U. COLO. L. REV. 483 (1991) (offering criticism and identifying contradictions found in article by Professor Wicke which suggested that postmodernism should not become too influential in law while simultaneously suggesting that such influence would not be negative) [hereinafter Frug, *Law & Postmodernism*].

214. *See, e.g.*, Frug, *Manifesto*, *supra* note 213, at 1047 (noting that "flip, condescending and mocking tones" often characterize post modern writing).