

The New Family Values Agenda: Renewing Our Social Contract

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Nine years ago, a *National Review* cover story proclaimed, “Thanks Mom! The Case Against Working Mothers.”¹ During the last election, the same magazine fiercely defended Sarah Palin’s right to run for Vice President as a working mother.² In 1989, Bob McDonnell wrote a Master’s thesis entitled, “The Republican Party’s Vision for the Family: The Compelling Issue of the Decade,” labeling working women as detrimental to the family.³ In 2009, McDonnell, then the GOP candidate for Governor of Virginia, dismissed his own thesis as merely an “academic exercise” and claimed his views were better reflected in his recent efforts to expand child care.⁴ Even politicians who once thought vilifying working mothers was a good way to win votes seem to have woken up to the fact that the overwhelming majority of American families now depend on a mother for some or all of their income.⁵

It’s about time.

The American family and economy have changed dramatically in the last few decades. Today, a full seventy percent of American families are “juggler families” in which both parents work or a single parent works.⁶ In contrast, in the mid-1930s, the vast majority of families fit the “breadwinner-homemaker” mold of a working father and a homemaking mother.⁷

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¹ Richard Lowry, *Nasty, Brutish, and Short: Children in Day Care and the Mothers Who Put Them There*, NAT’L REV., May 28, 2001, at 36.

² Michelle Malkin, *Sarah & the Sorority Sisters: Sisterhood of the Protected Female Liberal Journalists*, NAT’L REV. ONLINE, Sept. 10, 2008, <http://article.nationalreview.com/370391/sarah—the-sorority-sisters/michelle-malkin#more> (on file with the Harvard Law School Library).

³ Amy Gardner, ‘89 Thesis a Different Side of McDonnell: Va. GOP Candidate Wrote on Women, Marriage and Gays, WASH. POST, Aug. 30, 2009, at A02.

⁴ *Id.*

⁵ See Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Employment Characteristics of Families in 2008, at 2 (May 27, 2009), available at <http://www.bls.gov/news.release/pdf/famee.pdf>.

⁶ Karen Kornbluh, *Families Valued*, DEMOCRACY, Fall 2006, at 34, 38.

⁷ See Edward D. Berkowitz, *Family Benefits in Social Security: A Historical Commentary*, in SOCIAL SECURITY AND THE FAMILY: ADDRESSING UNMET NEEDS IN AN UNDERFUNDED SYSTEM 19, 26 (Melissa M. Favreault et al. eds., 2002).

About fifty percent of marriages end in divorce,⁸ and a quarter of children are living in single-parent families.⁹ At the same time, no longer can the breadwinner rely on being a “company man,” working for a single paternalistic employer for forty years, forty hours a week, and counting on that employer to provide a salary that supports a family and increases steadily over time, as well as generous health and retirement benefits. Today, workers are global free agents, changing jobs every five years, often working as temp or contract workers, and competing with workers around the world for wages and benefits.¹⁰ Parents who are working more and more hours just to pay the bills need the mother’s earnings.

Yet for the most part, despite their increasing awareness of today’s family conditions, over the past few decades politicians and policymakers have been unable to make things better. Although American women and families enjoy opportunities envied by others around the world, they still lack the most basic social services—from child care to family leave to flexible work hours—that families in other industrialized countries have come to expect.¹¹ U.S. government benefits for families are almost half as generous as the industrial country average (1.3% versus 2.3% of gross domestic product).¹² Yet, since mothers in the workforce are not offered any dispensation to raise their children or care for sick or elderly family members, they are often forced to work part time, take pay cuts, sacrifice job security, and lose government-provided or -subsidized social insurance benefits. This contributes to the fact that women today continue to earn less than men, on average seventy-nine cents on the dollar,¹³ and are poorer in old age than men.¹⁴ In

⁸ See CTRS. FOR DISEASE CONTROL & PREVENTION, DEP’T OF HEALTH & HUMAN SERVS., NATIONAL VITAL STATISTICS REPORTS 1 tbl.A (2009), available at http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_19.pdf.

⁹ See Press Release, U.S. Census Bureau, U.S. Dep’t of Commerce, Majority of Children Live With Two Biological Parents (Feb. 20, 2008), available at <http://www.census.gov/Press-Release/www/releases/archives/children/011507.html>.

¹⁰ See *Involuntary Part-Time Work on the Rise*, ISSUES LAB. STAT. (U.S. Bureau of Labor Statistics, Wash., D.C.), Dec. 2008, available at <http://www.bls.gov/opub/ils/pdf/opbils71.pdf>; Sharon Brown & James Spletzer, Labor Market Dynamics Associated With the Movement of Work Overseas (Nov. 2, 2005) (unpublished manuscript), available at <http://www.oecd.org/dataoecd/0/17/35592064.pdf>; Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Employee Tenure in 2008 (Sept. 26, 2008), available at <http://www.bls.gov/news.release/pdf/tenure.pdf>.

¹¹ See generally MARIA SHRIVER ET AL., CTR. FOR AM. PROGRESS, THE SHRIVER REPORT: A WOMAN’S NATION CHANGES EVERYTHING (Heather Boushey & Ann O’Leary eds., 2009), available at http://www.americanprogress.org/issues/2009/10/pdf/awn/a_womans_nation.pdf (discussing the challenges and opportunities that American women experience).

¹² See Org. for Econ. Cooperation & Dev. Family Database, Public Spending on Family Benefits (Dec. 18, 2008), <http://www.oecd.org/dataoecd/45/46/37864391.pdf> (on file with the Harvard Law School Library). Federal cash, services, and tax measures for child payments and allowance, parental leave benefits, and child care support are included in the calculation of U.S. federal and state government spending on benefits for families. The data do not include health and housing expenditures.

¹³ INST. FOR WOMEN’S POLICY RESEARCH, THE GENDER WAGE GAP: 2008, at 1 (2009), available at <http://www.iwpr.org/pdf/C350.pdf>.

¹⁴ U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, CURRENT POPULATION SURVEY (CPS): ANNUAL SOCIAL AND ECONOMIC (ASEC) SUPPLEMENT (2008) tbl.POV01, <http://>

addition, nineteen percent of American children today live in poverty,¹⁵ and millions of children are left in inadequate child care each day.¹⁶

To be sure, American women enjoy civil rights that provide them great opportunities in the workplace. Today, women make up 49.9% of the U.S. workforce.¹⁷ However, neither the workplace nor the policies that undergird it have adjusted to the fact that many women have different needs than the traditional worker who was a breadwinner with a full-time caregiver at home.

The failure of policy to keep up with economic and family changes may result from the fact that many people still see these problems as upper-income, women's, work-family balance, social issues, rather than serious economic concerns. Moreover, many see solutions such as child care, flex-time, and paid leave as imposing either a high federal price tag, a burden on business, or both. Many consider the design of our major social contract programs to be largely neutral to family structure and fixed in stone.

In this Article we seek to challenge this basic view. First, the lack of a full-time caregiver in most families cannot be ignored as a private family matter or feminist concern. When families can no longer rely on a steadily increasing family wage to support children and a full-time caregiver, when parents can be fired for staying home to care for a sick child, when workers become temps without health benefits in order to gain the flexibility to pick up children from child care, and when child care costs as much as college tuition, children wind up neglected and families stressed. These factors make it tough for poor families to lift themselves into the middle class and all too easy for middle-class families to fall out of it. This is an economic challenge demanding a public response.

Second, addressing the needs of today's families cannot be accomplished simply through a series of piecemeal, need-based programs; it requires modernizing our existing social contract programs—universal entitlement programs, workplace rules, the education system, and the tax code—for the new families confronting the new economy. Today's families pay a hefty bill for programs meant to support them in times of need—hundreds of billions of dollars, or almost seventy percent of the federal government's non-defense outlays in social insurance.¹⁸ Yet the programs' design means that although the costs of the programs are increasing, today they fail to fully provide what they once guaranteed middle-class families with

pubdb3.census.gov/macro/032008/pov/new01_100_01.htm (on file with the Harvard Law School Library).

¹⁵ VANESSA R. WIGHT & MICHELLE CHAU, NAT'L CTR. FOR CHILDREN IN POVERTY, BASIC FACTS ABOUT LOW-INCOME CHILDREN, 2008: CHILDREN UNDER AGE 18, at 1 (2009), available at http://www.nccp.org/publications/pdf/text_892.pdf.

¹⁶ Cf. FED. INTERAGENCY FORUM ON CHILD & FAMILY STATISTICS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING, 2009, at 98 (2009), available at http://www.childstats.gov/pdf/ac2009/ac_09.pdf.

¹⁷ Press Release, Inst. for Women's Policy Research, For Many, 2010 Is Not Off to a Great Start (Jan. 8, 2010), available at <http://www.iwpr.org/pdf/Pressreleaseunempjan2010.pdf>.

¹⁸ See CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: INTRODUCTION TO THE FEDERAL BUDGET PROCESS 1 (2008), available at <http://www.cbpp.org/files/3-7-03bud.pdf>.

children: health and retirement security, an education adequate to obtain a middle-class job, assurance against destitution if income is lost, and the ability to control one's work hours.

Third, the system we have today is not inevitable. It reflects historical choices made when the breadwinner-caregiver model was predominant, and it was intended to perpetuate that model. The system includes social insurance entitlement programs that provide benefits linked to one's income, job tenure, and full-time work, so those who sacrifice earnings to care for their children wind up as their spouses' dependents and with far less in benefits.¹⁹ It includes little workplace flexibility for working parents and leaves the high costs of child care and maternity and paternity leave to individual families. The United States chose this structure to encourage work, marriage, and stay-at-home mothers. However, today, when incomes have stagnated and mothers often have no choice but to work, this approach leaves juggler families stressed, discourages caregiving, and punishes those who nonetheless take time away from work to care for children. We can learn from other countries (just as they can learn about our equality laws) which have found ways adjust to the new juggler families, providing child care, flexible work arrangements, and generous universal entitlements, including child benefits, paid family leave, sick leave *and* vacation, universal health insurance, and retirement insurance subsidies for caregivers.

Here we put forward an agenda for the reform and modernization of the American social contract to meet the economic security needs of today's families. The programs that constitute the social contract were forged during the New Deal and after World War II to blunt the harsh edges of the market. We argue that they are needed in today's economy at least as much as they were then. We strongly support these programs. Our proposals would not privatize them or scale them back but would strengthen them so that they will provide the support they promise for women and families.

The Obama Administration has already committed to tackling health care, which until now has been the most important gap in the social contract. The Administration has also indicated interest in reforming the tax code, private pensions, and Social Security.²⁰ If done in the wrong way, these well-intentioned reforms could fail to help the most needy families and could inadvertently cause serious harm in the attempt to cut costs. In comparison, the changes we propose here would help address the gaps in the current system. In addition, our renewal agenda also would knit together

¹⁹ These effects were first caused by the Aid to Families with Dependent Children program and later by the Child Tax Credit and the Earned Income Tax Credit, which tie support to the number of children in a family.

²⁰ See, e.g., Jackie Calmes, *Democrats Resisting Obama on Social Security*, N.Y. TIMES, Feb. 23, 2009, at A15; Jeanne Sahadi, *Obama Tax Panel on Treasure Hunt*, CNNMONEY.COM, Mar. 27, 2009, http://money.cnn.com/2009/03/26/news/economy/obama_tax_reform_task_force/index.htm (on file with the Harvard Law School Library); Matt Spetalnick & Richard Cowan, *Obama: Social Security, Medicare Reform on Agenda*, REUTERS, July 22, 2009, <http://www.reuters.com/article/idUSTRE56M00O20090723> (on file with the Harvard Law School Library).

these disparate efforts with a straightforward narrative and finally put the bulk of government back in the service of both economic security and family values.

Elsewhere, we have proposed a women's economic agenda and new family policies that dovetail with many of the proposals here.²¹ In this Article, we expand on those previous efforts to lay out the history and impact of the many moving parts of the federal government's entitlement, workplace, education, and tax policies. Here we also demonstrate the need for a true renewal of the overall social contract to help strengthen American families, giving parents the financial security and flexibility to spend more time with their children, and honoring the important unpaid work they perform.

We present our argument in three parts. First, we will examine how we got here, considering the origins and development of our current social contract programs. Second, we will examine who pays for these programs and why we should care. Here we will argue that these policies fail to provide today's families with the tools they need to care for their children in the new economy. Finally, we will propose five broad suggestions for a smart, compassionate family policy for the new millennium.

A Note on Gender

As part of our renewal agenda, we focus a significant amount of attention on gender. In fact, a key contribution we hope to make is to inject gender—specifically the critical issues that arise because mothers are working and often raising children alone—into the decisions about how to address economic security and poverty. These issues are too often left out of the economic security and poverty debates and discussed separately as women's issues. At the same time, we wish to put forth a positive agenda for the family debate, which is often a negative and gendered debate in which mothers are blamed.

Women are disproportionately affected by the gaps in the social contract programs we discuss. Vulnerable mothers mean vulnerable families. Ninety percent of children live with their mothers, and often children live with only their mothers.²² Women continue to sacrifice time at work to care for family members. And women earn less than men per hour.²³ As a result,

²¹ See, e.g., Ann O'Leary & Karen Kornbluh, *Family Friendly for All Families*, in THE SHRIVER REPORT, *supra* note 11, at 75, 79; KAREN KORNBLUH, NEW AM. FOUND., WIN-WIN FLEXIBILITY 6–7 (2005), available at http://www.newamerica.net/files/nafmigration/archive/Doc_File_2436_1.pdf; Kornbluh, *supra* note 6, at 40–45; Karen Kornbluh & Rachel Homer, *Paycheck Feminism*, Ms., Fall 2009, at 28, 30–33, available at <http://www.msomagazine.com/Fall2009/paycheckfeminism.asp>.

²² See ROSE M. KREIDER, U.S. DEP'T OF COMMERCE, LIVING ARRANGEMENTS OF CHILDREN: 2004, at 4 (2008), available at <http://www.census.gov/prod/2008pubs/p70-114.pdf>; PRESS RELEASE, U.S. Census Bureau, *supra* note 9 (data as of 2004, with "children" defined as under eighteen years of age and "mother" as biological mother).

²³ INST. FOR WOMEN'S POLICY RESEARCH, *supra* note 13, at 1.

women are poorer at every age than men,²⁴ and fifty-three percent of all families in poverty are headed by a woman.²⁵

However, our effort to highlight gender should not obscure the fact that male caregivers and low-income men pay a price for our outdated social contract as well. Our proposals are gender neutral and would benefit men as well as women. In addition, this agenda would reduce the disincentives for caregiving, hopefully allowing fathers to spend more time with their children. In contrast to the punitive family values agendas of the past, our proposals would provide families with the tools and ability to select options that make the most sense for them, rather than attempting to turn back the clock.

I. HOW DID WE GET HERE?

At the beginning of the last century, many American families worked on farms.²⁶ Women worked alongside men to support the family and care for children. But by the 1930s, many American families had moved to cities and typically depended on a male breadwinner's wages to support wives, children, and elderly parents.²⁷ These wages were vulnerable to the business cycle as well as the breadwinner's health and age. In 1935, the federal government took action to address the family's new vulnerabilities. Beginning with the Social Security Act and the Fair Labor Standards Act, and followed by tax incentives for employer-provided health care and pensions, and later Medicare, the government put in place a patchwork system that, as President Franklin D. Roosevelt explained, was meant to protect Americans from "the major hazards and vicissitudes of life."²⁸

Today, the civilian social insurance programs at the heart of our social welfare system—the programs into which workers make mandatory paycheck contributions and to whose benefits they are then entitled—collectively account for fifty-three percent of the total federal budget and sixty-seven percent of non-defense federal spending. Adding the tax benefits for employer-provided health care and pensions brings the total up to sixty-three percent of the federal budget.²⁹

²⁴ ALEXANDRA CAWTHORNE, CTR. FOR AM. PROGRESS, THE STRAIGHT FACTS ON WOMEN IN POVERTY 2 (2008), available at http://www.americanprogress.org/issues/2008/10/pdf/women_poverty.pdf. This study looks at adult men and women. Poverty among children does not vary by the child's gender.

²⁵ See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CURRENT POPULATION SURVEY (CPS): ANNUAL SOCIAL AND ECONOMIC (ASEC) SUPPLEMENT (2008) tbl.POV03, http://www.census.gov/hhes/www/cpstables/032009/pov/new03_100_01.htm (on file with the Harvard Law School Library).

²⁶ Kornbluh, *supra* note 6, at 36.

²⁷ *Id.*

²⁸ President Franklin D. Roosevelt, Annual Message to the Congress (Jan. 4, 1935), in RICHARD D. POLENBERG, THE ERA OF FRANKLIN D. ROOSEVELT: 1933–1945, at 47, 49 (2000).

²⁹ See CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 18, at 1. The percentages do not include federal expenditures on civil service and military pensions, or on needs-based programs (such as food stamps) to which recipients do not contribute.

The trouble is that these programs were designed for the mid-twentieth century American family and economy. In 1930, only 11.7% percent of married women were in the paid workforce, while the rest performed the unpaid work of caregiving and homemaking.³⁰ At the same time, industrial workers expected to spend their entire working lives with a single employer. The programs designed then have been enormously successful in softening the hard edges of the market for countless Americans. However, they fail to address many of the new challenges that families face in today's economy. In this section, we draw on the historical work of the University of Maryland's Sonya Michel, Columbia University's Alice Kessler-Harris, and the University of Southern California's Edward McCaffery to show how this state of affairs came to be.

*A. Social Security Act: Entitlement for the Breadwinner,
Vulnerability for the Caregiver*

From the beginning, the Social Security Act of 1935³¹ relied on two completely different mechanisms for solving what looked like two different problems. The principle programs for the majority of families with a breadwinner were social insurance programs intended to provide insurance for the breadwinner's income in the event he retired, was injured, or was left without work when the assembly line closed. These programs included Old Age, Survivors, and Disability Insurance (OASDI),³² Unemployment Insurance (UI),³³ Social Security Disability Insurance (SSDI),³⁴ and later Medicare.³⁵ Under these programs, workers make mandatory contributions known as payroll taxes that are deducted from their paycheck by their employer, and benefits are calculated based largely on work history. These are "entitlements"—benefits to which people have a right and that the federal budget must pay out automatically according to a formula unless there is a change in law.³⁶ By making these programs automatic and tying them not only to

³⁰ U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 133 (1975), *available at* <http://www2.census.gov/prod2/statcomp/documents/CT1970p1-05.pdf>.

³¹ Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

³² Pub. L. No. 74-271, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 401–34 (2006)).

³³ Unemployment Insurance was also created as part of the Social Security Act. *See* Pub. L. No. 74-271, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 501–504 (2006)). It is funded in part federally and in part by states. *See* 42 U.S.C. § 502 (2006).

³⁴ Pub. L. No. 74-271, 49 Stat. 620 (codified as amended at 42 U.S.C. § 423 (2006)).

³⁵ Pub. L. No. 89-97, 79 Stat. 286 (codified as amended at 42 U.S.C. §§ 1395–1395iii).

³⁶ Subsidized housing and food stamps are also technically entitlements because people receive benefits automatically. *See* STAFF OF H. COMM. ON WAYS & MEANS, 108TH CONG., 2004 GREEN BOOK, at iv (2004), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_green_book&docid=f:wm006_30.pdf. However, these programs are not "social insurance" in the sense that recipients have not made contributions and are not considered to have earned them. Civil service and military pensions are entitlements as well, but we have been excluded from the current discussion.

contributions but also to past work, FDR ensured that they would become the large, politically sacrosanct programs they are today. Indeed, FDR famously stated that he created the payroll tax so that “no damn politician can ever scrap my social security program.”³⁷

The only jobs originally covered by the entitlement programs were industrial jobs, which were performed primarily by white men. Not covered were agricultural laborers, domestic workers, government employees, and many teachers, nurses, hospital employees, librarians, and social workers—jobs dominated by women and minorities.³⁸ Just over half of all women employed and nearly two-thirds of all African Americans in the labor force—seventy to eighty percent in some areas in the South—were not covered by Social Security.³⁹ Accordingly, the NAACP protested the Social Security Act, describing it as “a sieve with holes just big enough for the majority of Negroes to fall through.”⁴⁰

Although Social Security was expanded in the 1950s to include the job categories noted above,⁴¹ caregiving was never included. The law’s architects also limited eligibility to those with a long, steady work history, effectively keeping out many women and minorities, who were more likely to have gaps in their employment records. To qualify for benefits under one’s own name, a worker needed at least ten years of work over his or her lifetime, and the level of Social Security benefits was (and still is) calculated based on the workers’ thirty-five highest-earning years.⁴² Medicare eligibility was also folded into this framework when it was created in the 1960s.⁴³ Similarly, UI and SSDI were only available to those who had worked full time and were looking for full-time work.⁴⁴ Many states adopted (and still have) a minimum earnings requirement or minimum hours requirement for eligibility.⁴⁵ Social Security Act benefits originally were keyed to pay not

³⁷ 2 ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* 309 (1959).

³⁸ See JILL QUADAGNO, *THE COLOR OF WELFARE* 20–21 (1994); see generally JILL QUADAGNO, *THE TRANSFORMATION OF OLD AGE SECURITY* (1988).

³⁹ See IRA KATZNELSON, *WHEN WELFARE WAS WHITE* 43–48 (2005); ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY* 146 (2003).

⁴⁰ See KATZNELSON, *supra* note 39, at 43–48.

⁴¹ See Social Security Act Amendments of 1950, Pub. L. No. 81-734, 64 Stat. 477 (codified as amended in scattered sections of 42 U.S.C.). The 1956 Amendments are also relevant. See Social Security Act Amendments of 1956, Pub. L. No. 84-880, 70 Stat. 807. For a discussion of the effects of both these amendments, see generally CARMEN D. SOLOMON, *MAJOR DECISIONS IN THE HOUSE AND SENATE CHAMBERS ON SOCIAL SECURITY* 25–30, 37–40 (1986), available at <http://www.socialsecurity.gov/history/pdf/crs86193.pdf>.

⁴² See SOC. SEC. ADMIN., *YOUR RETIREMENT BENEFIT: HOW IT IS FIGURED* (2009), available at <http://www.ssa.gov/pubs/10070.pdf>.

⁴³ See Berkowitz, *supra* note 7, at 32; EDWARD BERKOWITZ & KIM MCQUAID, *CREATING THE WELFARE STATE* 212 (1992).

⁴⁴ See KESSLER-HARRIS, *supra* note 39, at 97–99.

⁴⁵ See INST. FOR WOMEN’S POLICY RESEARCH, *WOMEN AND UNEMPLOYMENT INSURANCE* 1–2 (2008), available at http://www.iwpr.org/pdf/A132_WomenandUI.pdf; KESSLER-HARRIS, *supra* note 39, at 97–99.

just to avoid creating a disincentive to work, but also to preserve racial and gender income disparities.⁴⁶

Further, when these programs were created, there was no need to offer workers paid time off to care for an ill relative or a new child. It was assumed that mothers would be home to do that. And so social insurance replaced income for retirement, disability, and factory shut-downs, but not for caregiving.

In 1936, before the OASDI program had paid out its first benefits, a commission was established to decide how to spend accumulated surpluses.⁴⁷ Instead of expanding eligibility for benefits directly to mothers who were raising children, the commission expanded the breadwinner's benefits to help him support his wife and children.⁴⁸ Married couples were provided 150% of the benefits of a single worker (whether they had children or not), and children and widows received benefits in the event of the breadwinner's death.⁴⁹ This decision was openly acknowledged at the time as a way to give additional funding to married husbands.⁵⁰

Make no mistake, these benefits have provided essential support to spouses and their children over the years. But benefits were not provided directly to caregivers, rather only to wives and children as dependents of a breadwinner.⁵¹ Furthermore, civil marriages of same-sex couples have never been recognized for spousal benefits.

The second type of aid provided by the Social Security Act was need-based programs for those families without a breadwinner, such as Aid to Families with Dependent Children (AFDC); Supplemental Security Income (SSI) for the poor, elderly, and disabled persons; and later Medicaid. Individuals and families qualified for these programs on the basis of their income, assets, and/or marital status.⁵² These are discretionary programs and therefore compete with other programs for budget appropriations each year. They lack the payroll contribution and basis in earnings from work that FDR carefully provided for his Social Security program. It should be no surprise that eventually, especially as more middle-class mothers worked, AFDC's criteria for support were criticized for providing disincentives to work and to

⁴⁶ See KESSLER-HARRIS, *supra* note 39, at 146–47; Edward J. McCaffery, *Taxing Women*, ENGINEERING & SCI., Spring 1997, at 34, 36, available at <http://eands.caltech.edu/articles/McCaffery%20Feature.pdf>.

⁴⁷ McCaffery, *supra* note 46, at 36.

⁴⁸ See KESSLER-HARRIS, *supra* note 39, at 134–35.

⁴⁹ See Melissa M. Favreault et al., *Social Security Benefits for Spouses and Survivors: Options for Change*, in SOCIAL SECURITY AND THE FAMILY, *supra* note 7, at 177, 178–79.

⁵⁰ See KESSLER-HARRIS, *supra* note 39, at 137, 139.

⁵¹ Although later the explicitly gendered aspect of the law was changed so that wives as well as husbands were able to earn benefits for spouses and survivors, the underlying structure of benefit entitlement for the breadwinner and dependence for the caregiver persisted. See EDWARD J. McCAFFERY, *TAXING WOMEN* 99 (1999).

⁵² See Office of the Assistant Sec'y for Planning & Evaluation, U.S. Dep't of Health & Human Servs., Aid to Families With Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF): Overview, <http://aspe.hhs.gov/HSP/abbrev/afdc-tanf.htm> (on file with the Harvard Law School Library).

marry. Under the Personal Responsibility and Work Opportunity Act of 1996,⁵³ AFDC was replaced by Temporary Assistance for Needy Families (TANF),⁵⁴ which provided time-limited assistance to poor families seeking employment through state programs. Child care funding for the children of these families increased but has continued to be underfunded.⁵⁵

The Social Security Act programs were thus structured from the beginning so that those with higher-paying, steady careers “earned” and were “entitled” to substantial benefits directly from the government, while caregivers and children were treated as dependents. They were dependent on either the breadwinner for a share of his benefits or on government “welfare” programs for limited and uncertain support. This structure has resulted in vastly unequal outcomes, causing economic vulnerability for caregivers and for the most needy families as the economy and family structure changed.

*B. “Private” Health Insurance and Pension Benefits:
Only for Those with Good Jobs*

Voluntary, employer-provided health insurance and pensions are another piece of the American social contract that was structured to serve a particular historical purpose. During World War II, employers were prohibited from offering wage increases, so they enticed scarce employees with health insurance and private pension plans.⁵⁶ These “fringe benefits” received federal support in the 1950s when Congress made employer contributions to health and pensions tax-exempt (as opposed to wages, which were taxable income).⁵⁷ The result was the entrenchment of voluntary employer-provided health insurance and pensions as a key characteristic of the U.S. system. Existing alongside these private benefits, public health benefits include the social insurance program for seniors, Medicare (\$452.1 billion in fiscal year 2008); the poverty program, Medicaid (\$201.4 billion); and the children’s poverty program, Children’s Health Insurance Program (\$6.9 billion).⁵⁸

⁵³ See Office of the Assistant Sec’y for Planning & Evaluation, U.S. Dep’t of Health & Human Servs., The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (1996), <http://aspe.hhs.gov/HSP/abbrev/prwora96.htm> (on file with the Harvard Law School Library) (summarizing the PRWO Act). For the full text of the PRWO Act, see Pub. L. No. 104-193, 110 Stat. 2105.

⁵⁴ See Admin. for Children & Families, U.S. Dep’t of Health & Human Servs., About TANF, <http://www.acf.hhs.gov/programs/ofa/tanf/about.html> (on file with the Harvard Law School Library).

⁵⁵ NAT’L WOMEN’S LAW CTR., SLIP-SLIDING AWAY: THE EROSION OF HARD-WON GAINS FOR WOMEN UNDER THE BUSH ADMINISTRATION AND AN AGENDA FOR MOVING FORWARD 20–22 (2004), available at <http://www.nwlc.org/pdf/AdminRecordOnWomen2004.pdf>.

⁵⁶ See TED HALSTEAD & MICHAEL LIND, THE RADICAL CENTER 66 (2001); Karen Kornbluh, *The Parent Trap*, ATLANTIC MONTHLY, Jan./Feb. 2003, at 111, 114.

⁵⁷ See McCaffery, *supra* note 51, at 126–28.

⁵⁸ CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP’T OF HEALTH & HUMAN SERVS., MONTHLY TREND REPORT FOR MEDICARE, MEDICAID AND SCHIP 7 (2008), available at <http://www.cms.hhs.gov/MedicareMedicaidTrendsHCS/downloads/200809.pdf>; see also FIRST FO-

C. *Work Rules: The Fair Labor Standards Act*

The Fair Labor Standards Act of 1938 (FLSA) created a new framework for regulating the relationship between workers and employers. It prohibited child labor, created the minimum wage, and required time-and-a-half pay for hours an employee worked above forty in a week.⁵⁹ However, the FLSA did not give workers the ability to decline hours, nor did it guarantee them a minimum number of sick or vacation days. At the time, of course, most families had a full-time caregiver at home, so the ability to turn down hours or have sick days was less important than the need for a breadwinner to be fairly compensated for his overtime work. Given the predominant breadwinner-caregiver model, women were expected to leave the workforce by the time they had children, and the majority did. The FLSA did not provide maternity (or paternity) leave.⁶⁰ Family and medical leave was not protected until 1993 when the Family and Medical Leave Act (FMLA) amended the FLSA, allowing workers in companies with fifty or more employees to take up to twelve weeks of leave—unpaid—to care for a new child or an ill family member.⁶¹

D. *Education: For the Children of Stay-at-Home Mothers*

As public schooling became widespread in the nineteenth and twentieth centuries, first with the common school movement and then the high school movement, Americans dramatically increased their educational attainment.⁶² As Harvard economists Claudia Goldin and Larry Katz have pointed out, such growth in relative educational attainment strongly links to growth in U.S. economic competitiveness.⁶³ The Obama Administration has recognized this important relationship and has taken up the charge by setting college graduation targets, reforming student loans, and dedicating serious money to aid and reform.⁶⁴

CUS, CHILDREN'S BUDGET 2009, at 69, 74 (2009), available at <http://www.firstfocus.net/Download/CB2009.pdf>.

Note, when this article went to press, health insurance reform was ongoing. The lack of a more comprehensive discussion here does not indicate a lack of importance. Health insurance reform would help families more than any other reform discussed here.

⁵⁹ See Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LAB. REV., June 1978, at 22, 28. An abridged version of the article is available at <http://www.dol.gov/oasam/programs/history/flsa1938.htm>.

⁶⁰ See KESSLER-HARRIS, *supra* note 39, at 99–100.

⁶¹ See Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–2654 (2006)).

⁶² See generally CHARLES LESLIE GLENN JR., THE MYTH OF THE COMMON SCHOOL (1988) (describing the development of the American public school system).

⁶³ See CLAUDIA GOLDIN & LAWRENCE F. KATZ, THE RACE BETWEEN EDUCATION AND TECHNOLOGY 22 (2009), available at http://www.economics.harvard.edu/faculty/katz/files/Chapter8_NBER_1.pdf.

⁶⁴ For the full text of the budget proposal, see OFFICE OF MGMT. & BUDGET, A NEW ERA OF RESPONSIBILITY (2009), available at <http://www.gpoaccess.gov/USBudget/fy10/pdf/fy10-newera.pdf>. For a more detailed breakdown of the budget, see TOM BOWMAN ET AL., NAT'L

But today there is another educational horizon: educational attainment of younger children. By the beginning of the twentieth century, there was widespread public adoption of a mandatory or voluntary year of kindergarten as an important extension of education for five- to six-year-olds.⁶⁵ In the Depression, the federal government sponsored Works Progress Administration nursery schools, and during World War II the government invested in Child Care and Protection Programs so that women could work as part of the war effort.⁶⁶ But after the war, the U.S. Children's Bureau claimed that stay-at-home mothers were best for children. So when other countries began investing in early education, the United States chose to leave it to the private market.⁶⁷

The exception was for poor families. In the 1960s, the Head Start program for poor young children was created,⁶⁸ and over time subsidies for poor children increased, though never to a level where they were universally available to even qualified families.⁶⁹ In 1971, Congress passed the Comprehensive Child Development Act, authorizing federal funding for child care programs for even younger children.⁷⁰ However, President Nixon vetoed the bill, saying it "would commit the vast moral authority of the national Government to the side of communal approaches to child rearing [rather than] the family-centered approach."⁷¹ Recently, however, the Obama Administration dramatically expanded early education funding for low-income children with the American Recovery and Reinvestment Act—the stimulus package.⁷²

In addition, child care, unlike all other business expenses, is not tax deductible.⁷³ In 1939, the U.S. Board of Tax Appeals ruled that child care expenses were nondeductible personal expenses.⁷⁴ In 1954, small child care

PUB. RADIO, INSIDE OBAMA'S FIRST BUDGET (2009), <http://www.npr.org/news/specials/2009/budget/> (on file with the Harvard Law School Library).

⁶⁵ See ELIZABETH ROSE, *A MOTHER'S JOB: THE HISTORY OF DAY CARE, 1890–1960*, at 101 (1999).

⁶⁶ See SONYA MICHEL, *CHILDREN'S INTERESTS/MOTHERS' RIGHTS* 118, 127–28, 133 (1999).

⁶⁷ See *id.* at 148–49, 182–83.

⁶⁸ See EDWARD ZIGLER & SUSAN MUENCHOW, *HEAD START: THE INSIDE STORY OF AMERICA'S MOST SUCCESSFUL EDUCATIONAL EXPERIMENT* 8 (1994).

⁶⁹ See Michel, *supra* note 66, at 277.

⁷⁰ See Abby J. Cohen, *A Brief History of Federal Financing for Child Care in the United States*, *FUTURE CHILDREN*, Summer/Fall 1996, at 26, 32–33, available at http://www.princeton.edu/futureofchildren/publications/docs/06_02_01.pdf; see also SALLY SOLOMON COHEN, *CHAMPIONING CHILDCARE* 36–38 (2001) (describing the legislative politics surrounding the passage of the Comprehensive Child Development Act in the House of Representatives).

⁷¹ *The Nation: Child Care Veto*, *TIME*, Dec. 20, 1971, available at <http://www.time.com/time/magazine/article/0,9171,878957,00.html>.

⁷² Fact Sheet, U.S. Dep't of Educ., *American Recovery and Reinvestment Act of 2009: Education Jobs and Reform* (Feb. 18, 2009), <http://www.ed.gov/policy/gen/leg/recovery/fact-sheet/overview.html> (on file with the Harvard Law School Library).

⁷³ McCAFFERY, *supra* note 51, at 111–14; see also IRS.gov, *Business Expenses*, <http://www.irs.gov/businesses/small/article/0,,id=109807,00.html> (on file with the Harvard Law School Library) (defining "business expense" for IRS purposes); see generally McCAFFERY, *supra* note 51, at 106–21.

⁷⁴ See *Smith v. Comm'r*, 40 B.T.A. 1038 (1939), *aff'd*, 113 F.2d 114 (2d Cir. 1940).

deductions were put in place,⁷⁵ but those deductions are minimal, not refundable, and therefore not available to low-income families earning too little to pay income tax.⁷⁶

With parents working, the early-afternoon close of the school day and the three-month-long summer vacation are additional antiquated monuments to the agricultural age. This conventional school schedule assumes that all families have a stay-at-home mother and burdens families that do not conform.

E. Taxation: Penalties for Working Parents

Taxation plays a large role in determining work and family choices through overall marginal tax rates, exemptions, and credits. Indeed, “the combined value of just the . . . Personal Exemption for Dependent Children, the Child Tax Credit (CTC), the Earned Income Tax Credit (EITC), and the Child and Dependent Care Tax Credit (CDCTC) . . . is about \$117 billion annually.”⁷⁷ In comparison, in 2007 Head Start funding was \$6.8 billion and TANF program funding was \$17.1 billion.⁷⁸

For the first thirty-five years after the modern income tax was created in 1913, the U.S. government taxed all adults as individuals. As a result, marriage did not affect one’s tax burdens; men and women paid the same amount whether or not they were married. However, in 1948, Congress changed the law to tax married couples as a unit.⁷⁹ Our progressive tax system taxes higher incomes at increasingly higher rates, dividing taxpayers into brackets based on income. As a result, simply stacking a husband’s and wife’s incomes on top of each other would increase the couple’s effective tax rate. To avoid this, Congress made the brackets twice as wide for a married couple as for individuals.⁸⁰ This created a large marriage bonus for married couples, but increased the marginal tax rate for married working women, whom the law’s architects thought should return home after World War II. Indeed, the Treasury’s Legislative Counsel at the time remarked: “Wives need not continue to master the details of . . . business, but may turn . . . to the pursuit of homemaking.”⁸¹ Joint taxation created a distinction between the primary earner (who brings in more income) and the secondary earner. The primary earner’s income was now subject to a lower effective tax because of the wider brackets. But the secondary earner, whose income was

⁷⁵ McCAFFERY, *supra* note 51, at 114–15.

⁷⁶ See generally IRS.gov, The Hows of Taxes: Module 8: Claiming Child Tax Credit, http://www.irs.gov/app/understandingTaxes/teacher/how_mod08.jsp (on file with the Harvard Law School Library) (distinguishing “refundable” and “nonrefundable” tax credits).

⁷⁷ FIRST FOCUS, FAMILY TAX POLICIES: WHAT THEY ARE AND WHY THEY MATTER 1 (2007), available at <http://www.firstfocus.net/Download/TPB.pdf>.

⁷⁸ *Id.*

⁷⁹ McCAFFERY, *supra* note 51, at 54–55.

⁸⁰ *Id.* at 55.

⁸¹ *Id.* at 57.

added to the primary earner's and taxed at the higher bracket of his last dollars earned, was subject to a larger effective tax.⁸²

In 1969, to lessen the tax bonus accorded to married couples, Congress limited the brackets of married couples to 1.6 times that of individuals.⁸³ This created both marriage bonuses and penalties—bonuses for single-earner families and penalties for two-earner families. With the dramatic increase of the two-earner household over the last thirty-years, most other countries with a comprehensive tax system have recognized the secondary earner bias and have moved away from joint filing. In 1979, Italy reverted to separate filing, and in 1990, England followed.⁸⁴ But the United States has preferred to edge back to the double bracket system. Under President George W. Bush, the marriage penalty was reduced for many families, but not by providing a tax break for the two-income families that pay the penalty. In opposition to this proposal, which was included in the original tax bill, conservative political activist Phyllis Schlafly wrote: "Giving a tax cut only to two-earner couples would send the radical feminist message that the government sees no value in a homemaker's work at home."⁸⁵ The final plan raised the standard deduction and increased several brackets for married couples, solving the marriage penalty for many families. But the plan also increased the marriage bonus for single-earner families and, because of cost constraints, still failed to eliminate the penalty for many two-earner families.⁸⁶

The structure of payroll taxes, which fund Social Security, Medicare, and UI, penalize juggler families further. These payroll taxes are a disincentive to work because they kick in at the first dollar earned.⁸⁷ Workers are required to pay them even if they never receive their own earned benefits, for example if they do not qualify for UI or SSDI, or if they earn so little in OASDI benefits that they opt for the spousal benefit they would have received if they had never worked and paid taxes. (These taxes are not paid by spouses who do not work, who are still entitled to OASDI spousal benefits.) This effect was not significant when the payroll tax was first implemented because it was only a tiny portion of income. Today, however, Social Security taxes amount to 12.4% of a worker's pay up to the first \$106,800 earned, if one includes both the employer and the employee portions;⁸⁸ Medicare taxes are 2.9%; and unemployment tax is another 0.8%. Adding these

⁸² See Interview by U. Chi. Press with Edward J. McCaffery (1997), <http://www.press.uchicago.edu/Misc/Chicago/555577.html> (on file with the Harvard Law School Library).

⁸³ See McCaffery, *supra* note 51, at 63–64.

⁸⁴ McCaffery, *supra* note 46, at 37.

⁸⁵ Edmund L. Andrews, *A Marriage Penalty, Except When It Isn't*, N.Y. TIMES, Jan. 19, 2003, at BU4.

⁸⁶ Jobs and Growth Tax Relief Reconciliation Act, Pub. L. No. 108-27, 117 Stat. 752 (codified as amended in scattered sections of 26 U.S.C.).

⁸⁷ McCaffery, *supra* note 51, at 91.

⁸⁸ Office of the Chief Actuary, Soc. Sec. Admin., Contribution and Benefit Base, <http://www.ssa.gov/OACT/COLA/cbb.html#Series>.<http://www.ssa.gov/OACT/COLA/cbb.html#Series> (on file with the Harvard Law School Library).

figures together, payroll taxes consume a stunning 16.1% of a worker's income today.⁸⁹

To offset some of the expenses for families with children, the tax code includes a number of exemptions and credits. The personal exemption for dependents was once the largest single source of federal spending on children. In 1960, it provided sixty-five percent of all monies spent on children.⁹⁰ In recent years, however, it has declined to sixteen percent.⁹¹ On the other hand, child-related tax provisions such as the EITC and the child credit have expanded significantly. The EITC provides a refundable credit to low-income workers depending on the number of children they have. It is now the largest single source of federal spending on children, lifting almost five million children out of poverty each year, encouraging work, and supporting parenting.⁹² The partially refundable per child tax credit created in 1976 provides additional help.⁹³ However, these tax provisions can be difficult for taxpayers to navigate, applying to different groups of taxpayers depending on their incomes and even employers.

Workers can also save money on child care and health expenses with pre-tax flexible spending accounts. However, these accounts are only available to those workers whose employers choose to offer them, and they are not refundable.⁹⁴ As a result, these accounts are not available to low-income families and are worth more the higher a family's income is.

II. WHO BENEFITS, WHO PAYS, AND WHY WE CARE

Caregivers (usually women) sacrifice earnings in several ways to raise the next generation of Americans. They take time out of the work force or take jobs that allow more flexible schedules. These are often lower paying or nonstandard jobs, such as temp, self-employed, part-time, or contract work. Such work frequently offers less access to employer-provided benefits and less stability and job security.

It is well understood that women make these trade-offs. What is less well understood is how our safety net programs, while seemingly gender neutral, magnify this inequality so that caregivers wind up with fewer government benefits, children are more vulnerable, and parents are punished for caregiving.

⁸⁹ See Tax Policy Ctr., Tax Topics: Payroll Taxes, <http://www.taxpolicycenter.org/taxtopics/Payroll-Taxes.cfm> (on file with the Harvard Law School Library).

⁹⁰ ADAM CARASSO & C. EUGENE STEUERLE, TAX POLICY CTR., PERSONAL EXEMPTION NOT WHAT IT USED TO BE 1 (2003), available at http://www.urban.org/uploadedPDF/1000480_TaxFacts.pdf.

⁹¹ *Id.*

⁹² Internal Revenue Service, About EITC, <http://www.eitc.irs.gov/central/abouteitc/> (on file with the Harvard Law School Library).

⁹³ McCaffery, *supra* note 51, at 115.

⁹⁴ INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, HEALTH SAVINGS ACCOUNTS AND OTHER TAX-FAVORED HEALTH PLANS 15 (2009), available at <http://www.irs.gov/pub/irs-pdf/p970.pdf>.

To be sure, we are not arguing that government policy should mitigate all the sacrifices made by parents who take time out to care for family members. But neither should that government policy add to the economic penalties families pay when they take time off for childrearing.

A. *Social Security Act*

Social Security's OASDI program, the largest expenditure in the federal budget,⁹⁵ has been enormously successful. The official poverty rate for people aged sixty-five and over dropped to ten percent by 2003, from thirty-five percent in 1959, the first year the federal government kept records using a standardized measure of poverty.⁹⁶ Among Social Security beneficiaries aged sixty-five or older in 1996, about half of all married couples and two-thirds of unmarried men relied on Social Security for at least half of their retirement income. Unmarried women, who account for almost half of all beneficiaries over age sixty-five, depend on Social Security even more. Three-quarters of these women rely on Social Security for at least half of their retirement income, and the other quarter relies on the benefits for their entire retirement income.⁹⁷ Furthermore, twenty-three percent of OASDI and SSDI spending goes to spouses and children of retired, disabled, and diseased workers.⁹⁸

Similarly, UI has allowed people to start new companies or switch jobs knowing that if the business failed, their families would not be destitute. Indeed, fully fifty percent of the families of unemployed workers would be below the official poverty level if it were not for UI.⁹⁹

Social Security, UI, SSDI, and Medicare have rightly been heralded as among the great political achievements of the twentieth century in the United States. They are at least as important in the twenty-first century economy as they were in the twentieth. However, they must be updated for new challenges.

⁹⁵ Martin Feldstein, *Rethinking Social Insurance*, 95 AM. ECON. REV. 1, 15 (2005).

⁹⁶ Nat'l Bureau of Econ. Research, *Social Security and Elderly Poverty*, <http://www.nber.org/aginghealth/summer04/w10466.html> (on file with the Harvard Law School Library).

⁹⁷ *Social Security Reform: Implications for Women: Hearing Before the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 106th Cong. (1999) (statement of Barbara D. Bovbjerg, Associate Director, Income Security Issues, U.S. Gen. Accounting Office), available at <http://www.gao.gov/archive/1999/he99052t.pdf>.

⁹⁸ CONG. BUDGET OFFICE, U.S. CONG., *THE LONG-TERM BUDGET OUTLOOK 39* (2009), available at <https://www.cbo.gov/ftpdocs/102xx/doc10297/06-25-LTBO.pdf>.

⁹⁹ *Implementation of Unemployment Insurance Provisions in the Recovery Act: Hearing Before the Subcomm. on Income Security and Family Support of the H. Comm. on Ways and Means*, 111th Cong. (2009) (statement of Maurice Emsellem, Nat'l Employment Law Project), available at <http://waysandmeans.house.gov/Hearings/transcript.aspx?NewsID=10389#Emsellem>.

1. *Social Security's Old Age, Survivors, and Disability Insurance (OASDI)*

The structure of Social Security exacerbates the lost income of workers who take time out of work to care for children or elderly relatives by reducing benefits for those who earn less pay and foreclosing the ability to earn benefits through caregiving. As already noted, Social Security benefits are calculated based on a worker's thirty-five highest-earning years of work. As a result, adults who begin work at age twenty-five and work forty years incur a penalty in retirement if they reduce their earnings for more than five years.¹⁰⁰ For example, if a young mother spends six years outside of the paid workforce while her children are young, and then finds that she must take three years off to care for her elderly mother, she may average four years of zero income into her Social Security earnings calculation. This is not a small problem: on average, women spend eleven and a half years out of the paid workforce during their adult lifetimes.¹⁰¹ In addition, because benefits are tied to earnings, all low-income workers receive less in Social Security OASDI benefits than higher income workers. So those who sacrifice earnings to care for family members receive less in retirement benefits.

Given these calculation methods, we should not be surprised that a full fifty percent of people receiving Social Security benefits actually collect those benefits as a spouse, rather than as an individual receiving Social Security benefits based on his or her employment history.¹⁰² In other words, half of all women have earned so little that their own earned benefit is less than half that of their husband's.¹⁰³ Unmarried and gay caregivers who sacrifice earnings to care do not even have the option of the spousal benefit. Even married caregivers (usually women) who take the spousal benefit are more economically vulnerable than their spouses: if they divorce before ten years of marriage they receive no spousal benefit.¹⁰⁴

The outcome for women is stark. The average annual Social Security income received by all women is \$11,544, compared to \$15,288 for men.¹⁰⁵ The poverty rate for women over the age of sixty-five is 12.0%, compared to 6.6% for men.¹⁰⁶ In addition, juggler families pay a price. Eugene Steuerle, one of the nation's leading experts on family benefits, explains that a single head of household who earns \$20,000 a year for forty years and raises her

¹⁰⁰ See Soc. Sec. Admin., Estimating Your Social Security Retirement Benefit, <http://www.ssa.gov/pubs/10070.html#estimate> (on file with the Harvard Law School Library) (explaining how to calculate social security benefits).

¹⁰¹ VANESSA SUMMERS, GET IN THE GAME 37 (2001).

¹⁰² INST. FOR WOMEN'S POLICY RESEARCH, WOMEN AND SOCIAL SECURITY: BENEFIT TYPES AND ELIGIBILITY 4 (2005), available at <http://www.iwpr.org/pdf/D463.pdf> (noting that 36% of women chose spousal benefit over their own; 15% are only eligible for a spousal benefit).

¹⁰³ *Id.* at 4-5.

¹⁰⁴ See Favreault, *supra* note 49, at 181.

¹⁰⁵ OFFICE OF RETIREMENT & DISABILITY POLICY, SOC. SEC. ADMIN., FAST FACTS & FIGURES ABOUT SOCIAL SECURITY, 2009, at 19 (2009), available at http://www.socialsecurity.gov/policy/docs/chartbooks/fast_facts/2009/fast_facts09.pdf

¹⁰⁶ See U.S. CENSUS BUREAU, *supra* note 14.

children will receive \$95,000 in lifetime benefits and pay \$50,000 in taxes.¹⁰⁷ By contrast, a non-working spouse who does not raise children but happens to marry someone making \$100,000 a year will get about \$250,000 in lifetime benefits and pay nothing in taxes.¹⁰⁸ To take another example, if each spouse in a couple earns \$15,000 per year, the couple's total lifetime benefits will be \$177,000. But a couple with one non-working spouse and one spouse earning \$30,000 will receive lifetime benefits of approximately \$273,000 despite paying the same in taxes as the first couple.¹⁰⁹ That is an astounding fifty-four percent more.

A compassionate society should support those who in turn care for the most vulnerable. A smart society cannot afford to penalize those who work and invest in our nation's human capital.

2. *Unemployment Insurance and Disability Insurance*

Women, in particular working mothers who take part-time jobs to gain scheduling flexibility, are frequently excluded from UI and SSDI. This happens in several ways. First, UI and SSDI replace income for those who are laid off due to a factory closing, downsizing, or disability. However, no income replacement is available for those who leave the workplace for family reasons, such as parents who take part-time jobs or who refuse to work the graveyard shift so that they can pick up their children from child care.¹¹⁰ Second, UI is tied to both wage levels and to uninterrupted periods of work.¹¹¹ Workers in lower paying jobs and those who work fewer hours may be ineligible for UI regardless of why they leave their job.

When determining whether a worker is eligible for UI coverage, most states look at a twelve-month period ending three to six months prior to unemployment.¹¹² If a worker has been employed steadily during that period, then UI is calculated as a percentage of earnings during that time. Given that UI is a percentage of wages earned prior to unemployment, it provides very little support for low-wage workers. In addition, it excludes workers who have recently started work, resumed work after an interruption, or changed to a higher paying job. Such workers have not been employed for long enough to be eligible for UI. Moreover, many part-time workers are

¹⁰⁷ *Alternatives to Strengthening Social Security: Hearing Before the H. Comm. on Ways and Means*, 109th Cong. (2005) (statement of C. Eugene Steurle, Senior Fellow, Urban Instit.), available at <http://waysandmeans.house.gov/Hearings/transcript.aspx?NewsID=10134#Steurle> [hereinafter Steurle Statement].

¹⁰⁸ *Id.*

¹⁰⁹ See Favreault et al., *supra* note 49, at 185–87; see also Steurle Statement, *supra* note 106.

¹¹⁰ See *Hearing on Modernizing Unemployment Insurance to Reduce Barriers for Jobless Workers Before the Subcomm. on Income Security and Family Support of the H. Comm. on Ways and Means*, 110th Cong. (2007) (statement of Vicky Lovell, Director of Employment & Work/Life Programs, Inst. for Women's Policy Research), available at <http://waysandmeans.house.gov/Hearings/transcript.aspx?NewsID=10306#Lovell> [hereinafter Lovell Statement].

¹¹¹ See *id.*

¹¹² See *id.*

ineligible for UI, regardless of how many hours they work or how much they earn.¹¹³

Women bear the brunt of these design features. They are more likely to hold the sort of job that is ineligible for UI, given that 24.7% of employed women are employed part time, versus 10.5% of men.¹¹⁴ Overall, women account for 67% of all part-time workers.¹¹⁵ In short, everyone pays for UI and SSDI, but women disproportionately cannot benefit from it.

3. *Paid Family and Medical Leave*

The United States is the only industrialized nation that does not offer even partial income replacement for workers on maternity leave.¹¹⁶ For families juggling to make ends meet and dependent on a mother's income, time taken off to care for a sick child or a new baby can result in devastating income interruptions. Just like they did before the passage of the Social Security Act, the states have begun experimenting on their own. Five states require employers to have temporary disability programs, which pay benefits to pregnant women.¹¹⁷ A few others offer low-income families subsidies for infant care.¹¹⁸ In 2002, California became the first state to expand its disability insurance system to provide paid family and medical leave,¹¹⁹ and New Jersey has followed suit.¹²⁰

4. *Employer-Provided Health and Pension Benefits*

Until health insurance reform finally arrives, tax-subsidized employer-provided health insurance will only be available to those with good jobs, and tax subsidies will continue to favor those with higher incomes. Today, caregivers often sacrifice these benefits in order to gain a flexible schedule. Women overall are twenty-four percent less likely to have health insurance

¹¹³ *See id.*

¹¹⁴ U.S. DEP'T OF LABOR & U.S. BUREAU OF LABOR STATISTICS, *WOMEN IN THE LABOR FORCE: A DATABOOK* 70, 72 (2008), available at <http://www.bls.gov/cps/wlf-databook-2008.pdf>.

¹¹⁵ This statistic is as of 2007. *See* Lovell Statement, *supra* note 109.

¹¹⁶ *See* REBECCA RAY ET AL., *CTR. FOR ECON. AND POLICY RESEARCH, PARENTAL LEAVE POLICIES IN 21 COUNTRIES: ASSESSING GENEROSITY AND GENDER EQUALITY* 6–7 (2008), available at http://www.cepr.net/documents/publications/parental_2008_09.pdf; *see also* JODY HEYMANN ET AL., *INST. FOR HEALTH & SOC. POLICY, THE WORK, FAMILY, AND EQUITY INDEX: HOW DOES THE UNITED STATES MEASURE UP?* 1–2 (2007), available at <http://www.mcgill.ca/files/ihsp/WFEI2007.pdf>. Australia, which used to be the only other industrialized nation that did not offer paid family leave, instituted the policy in 2009. *See* AUSTRALIAN GOV'T, *AUSTRALIA'S PAID PARENTAL LEAVE SCHEME: SUPPORTING WORKING AUSTRALIAN FAMILIES 1* (2009), available at <http://home.deewr.gov.au/Budget/documents/PPLBooklet.pdf>.

¹¹⁷ Kornbluh, *supra* note 6, at 43

¹¹⁸ *Id.*

¹¹⁹ *See* Cal Unemp. Ins. Code §§ 3301–3306 (Deering 2009).

¹²⁰ *See* N.J. Dep't of Labor & Workforce Dev., *Family Leave Insurance*, <http://lwd.state.nj.us/labor/fli/fliindex.html> (on file with the Harvard Law School Library).

through their own jobs.¹²¹ Health insurance reform, by lowering the cost of group coverage and making coverage available to all, including lower-paid and nonstandard workers, could do more than any other policy change for working families.

B. *Work Rules*

Despite advances since the passage of the Fair Labor Standards Act, our workplace rules fail to provide sufficient job protection, flexible work hours, and leave time for workers who need to care for sick family members or a new child, or for those who are sick themselves. While the Family and Medical Leave Act (FMLA) of 1993, an amendment to the Fair Labor Standards Act, protects the right of some workers to take time off to care for sick family members or new children, it only covers workers in workplaces with over fifty employees, excluding forty percent of working adults.¹²² Workers who have been in their jobs for less than one year are also excluded.¹²³

In addition, U.S. workers have no legal claim to a minimum number of vacation or sick days. As a result, nearly half of all women working in the private sector do not have a single paid sick day to recover from illness or to care for a sick family member.¹²⁴ Low-wage workers—those least able to risk losing their job or afford unpaid leave time—are particularly vulnerable. Fifty-seven percent of women working in the ten lowest paying occupations do not have a single paid sick day.¹²⁵ The lack of flexibility pushes parents, particularly women, into lower paying, less secure temp, contract, part-time, self-employment, or other nonstandard jobs so that they can gain better work schedules.

Some efforts are being made to address this problem. Many local governments are now looking into mandatory sick days. The New York City Council, for example, has considered extending sick day benefits to allow a worker to take a sick day to care for a spouse.¹²⁶ Senator Chris Dodd is also championing a bill to provide sick day protection to workers with swine flu.¹²⁷

¹²¹ See HENRY J. KAISER FAMILY FOUND., *WOMEN'S HEALTH INSURANCE COVERAGE 1* (2007), available at http://www.kff.org/womenshealth/upload/6000_05.pdf.

¹²² See Nat'l P'ship for Women & Families, *Family and Medical Leave Act*, http://www.nationalpartnership.org/site/PageServer?pagename=ourwork_fmlla_FamilyandMedicalLeave (on file with the Harvard Law School Library).

¹²³ U.S. Dep't of Labor, *Leave Benefits—FMLA*, <http://www.dol.gov/dol/topic/benefits-leave/fmlla.htm> (on file with the Harvard Law School Library).

¹²⁴ See VICKY LOVELL, INST. FOR WOMEN'S POLICY RESEARCH, *WOMEN AND PAID SICK DAYS: CRUCIAL FOR FAMILY WELL-BEING 1* (2007), available at http://www.iwpr.org/pdf/B254_paid sick days FS.pdf.

¹²⁵ See *id.* at 2–3.

¹²⁶ See Amy Traub, *Paid Sick Days Boost Health of Workers and Business*, *GOTHAM GAZETTE*, Nov. 16, 2009, <http://live.gothamgazette.com/article//20091116/213/3103#pro> (on file with the Harvard Law School Library).

¹²⁷ See Press Release, Sen. Chris Dodd, *Dodd Announces Emergency Legislation in Response to H1N1 Pandemic* (Nov. 10, 2009), available at <http://dodd.senate.gov/?q=node/5323>.

But families without either flexibility or access to affordable, quality child care are caught in a Catch-22, especially families with single parents. It is not hard to see how pulling yourself up by your bootstraps becomes particularly difficult.

C. *Early Education and Child Care*

Today, thanks to researchers and economists such as the University of Chicago's James Heckman, we know that quality early childhood education is more cost effective and provides much higher economic returns than later interventions. Yet, child care can cost more than tuition at many state colleges. We still have no comprehensive policy for certifying child care facilities in this country, and as of 2005, fewer than twenty-four percent of American children with a working mother are placed in licensed child care facilities.¹²⁸ The United States is practically alone among developed countries in leaving daycare almost entirely to the private market and giving only limited subsidies to low-income families.¹²⁹

True, the federal government provides critically important funding for Head Start (approximately \$7 billion per year), Child Care and Development Block Grants (\$2.1 billion), and the Child Care Entitlement Fund for states (\$2.9 billion), and approximately \$3.4 billion of TANF funds are spent to subsidize child care.¹³⁰ But this funding covers only a small portion of even low-income families, causing stress and worse for too many American families of all income levels. For families earning less than the federal poverty level, child care costs often represent over twenty percent of family income.¹³¹ To avoid these costs, many low-income families rely on informal networks of child care, such as relatives and older siblings. But these informal networks can break down, leaving children without care and parents without the job flexibility to care for them. Low-income parents are more than twice as likely to be absent from work because they need to care for a sick child or because their child care arrangements fall apart.¹³²

Alan Krueger of Princeton has written of the importance of summer school for lower income children, yet it is still largely unavailable.¹³³ After-school care is also far from universally available. The 21st Century Community Learning Centers program currently funds nearly ten thousand after-

¹²⁸ See FED. INTERAGENCY FORUM ON CHILD & FAMILY STATISTICS, *supra* note 16, at 101 tbl. FAM3.A.

¹²⁹ See *generally* ORG. FOR ECON. COOPERATION & DEV., *BABIES AND BOSSES: RECONCILING WORK AND FAMILY LIFE: A SYNTHESIS OF FINDINGS FOR OECD COUNTRIES* (2008).

¹³⁰ See FIRST FOCUS, *supra* note 58, at 31–33, 95.

¹³¹ See JANE KOPPELMAN, NAT'L HEALTH POLICY FORUM, *FEDERAL CHILD CARE FUNDING FOR LOW-INCOME FAMILIES: HOW MUCH IS NEEDED?* 7 (2002), available at [http://www.nhpf.org/library/issue-briefs/IB780_ChildCare\\$7-22-02.pdf](http://www.nhpf.org/library/issue-briefs/IB780_ChildCare$7-22-02.pdf).

¹³² See PROGRAM ON GENDER, WORK & FAMILY, AM. UNIV., *LOW-INCOME WORKERS STRUGGLE TO BALANCE WORK AND FAMILY 1* (2002), available at http://www.uchastings.edu/site_files/WLL/low-income2-factsheet.pdf.

¹³³ See *generally* ALAN B. KRUEGER, *EDUCATION MATTERS* (2000).

school programs across the country, serving nearly one million students.¹³⁴ Over fifteen million young people would participate in after-school programs if they were available to them.¹³⁵ Unfortunately, almost half of parents say that their communities lack high-quality, affordable after-school programs.¹³⁶ Clearly, today's education policies are out of date for the children of today's juggler families.

D. Taxation

Tax expert Edward McCaffery's *Taxing Women*¹³⁷ will make any woman want to throw her own Boston Tea Party. In the name of helping the traditional family, our seemingly neutral tax system overtaxes women and juggler families. The secondary earner penalty in the income tax and the payroll tax create a high effective tax rate for secondary earners (who are usually wives). After paying federal and state income taxes, payroll taxes, and child care expenses, many secondary earners or single parents barely break even when they enter the workforce.

In addition, the child-related tax breaks are complicated, with different eligibility rules, income phase-outs, and complicated definitions. These complexities make it hard for families to claim the credits they are due. The credits also are unevenly available to lower- and middle-income families, subjecting them to hardships that might not occur if the United States provided a universal per-child payment independent from one's income tax status, as many other countries do.

These features of the social contract not only put pressure on the family budget, but they also put pressure on mothers not to work and fathers to work more. In addition, they create disincentives for parents who do work to take time off for the type of child-rearing activities recommended by doctors and poverty experts, including bonding of mothers and fathers with new babies, breastfeeding of infants, and active involvement in children's schools.¹³⁸

In the year 2010, when women comprise 49.9% of the work force,¹³⁹ the structures of our government benefits, workplace rules, education poli-

¹³⁴ FIRST FOCUS, *supra* note 58, at 26.

¹³⁵ *Id.* at 27.

¹³⁶ *Id.*

¹³⁷ MCCAFFERY, *supra* note 51.

¹³⁸ We do not argue for the elimination of the spousal benefit at this time. It has been hugely important in keeping elderly women out of poverty. Eliminating it without a replacement that provides sufficient support could hurt women who, as we have noted, earn less per hour than men; live longer than men; and, especially among current recipients, work fewer years and hours in the paid workforce because of their efforts as caregivers. However, supporting spouses is no longer equivalent to supporting caregivers. The former leaves out single parents and discourages work. For further reading on social security and payroll taxes, see Maureen Anne Griffin, *Federal Payroll Tax*, in THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY 320 (Joseph J. Cordes et al. eds., 1999), available at <http://www.taxpolicycenter.org/UploadedPDF/1000540.pdf>.

¹³⁹ Press Release, Inst. for Women's Policy Research, *supra* note 17.

cies, and taxes still stack the deck against parents trying both to raise a child and participate in the workforce. Outdated policies place such parents in a real bind.

III. MOVING TOWARD A FAMILY POLICY FOR THE NEW MILLENNIUM

In this section, we propose a set of reforms to renew the social contract in a way that values families. Given current budget constraints, we do not anticipate that these would be done in the short term, unless incorporated in other reforms. They are based on the following principles:

1. We should rely on progressive, universal programs to provide hard-working families additional tools to stay out of poverty, shoulder the costs of raising children, and provide their children with safe care and education.
2. Full inclusion in social insurance programs should not be dependent on employer participation or marital status and should:
 - Include a minimum benefit to keep those who worked hard out of poverty.
 - Cover twenty-first century challenges, for example by providing family leave.
 - Allow caregivers to earn credit toward future benefits.
3. Workers should have some control over their work hours without sacrificing economic security.
4. In an economy where knowledge is the most valuable asset, world-class educational opportunities, beginning with early childhood education, should be available to all, not just the wealthy.
5. Taxes should exempt initial dollars earned and should not impose secondary earner or marriage penalties. Tax subsidies should be refundable, progressive, and transparent.

A. *Social Insurance Reforms*

A modern set of social insurance policies should provide *more* security for those who have lower earnings or who have sacrificed earnings for caregiving, not *less*. In addition, real support for today's families requires treating all work—part-time, full-time, sporadic, steady, high-paid, low-paid, and even unpaid caregiving work—as grounds for benefits. Social insurance should be available for new needs such as paid family and medical leave as well as retirement, disability, or a layoff.

What would a social insurance policy for today's families look like?

Social Security's OASDI program would provide a caregiving credit for parents looking after sick family members, raising children or caring for elderly parents—the same way paid work earns credit towards Social Security benefits. It would include a minimum benefit in addition to earnings-related benefits. And it would exempt from retirement benefit calculations some of the years parents spend out of the workplace caring for young children. In the case of divorce, the underlying Social Security benefit would be shared jointly.

UI would be available to temporary and low-paid workers. Employees who leave jobs for family-related reasons would be eligible for UI just like those who are laid off. UI would also include a flat benefit as well as an earnings-related benefit.

The Obama Administration also has proposed that group health insurance and pensions be available to all adults, not just those with good jobs.¹⁴⁰ In the Administration proposals, subsidies would also be progressive.¹⁴¹

True reform of our safety net would assure American families that their income will be replaced not only as a result of retirement, disability, or unemployment, but also for care of a new child or an ill relative. Paid family and medical leave—call it “family insurance”—could be implemented on the state level (like UI and, in some states, disability insurance) or at the federal level (like Social Security). The benefits could replace partial earnings if workers take part-time work instead of full-time leave.

This new, universal system would not eliminate the costs of having and rearing children. Parents who cut back on work would still receive less in wages, and they would still have to pay for housing, clothes, and education. But this system would prevent some of the catastrophic economic disruptions that too often send today's families to bankruptcy court.

B. Workplace Policy Reforms

We need to adjust the way we approach work. Too often, employees in low-level jobs have no say in the hours they are assigned, and employees in high-level jobs are expected to be available 24/7. Employers consider it irresponsible to leave work early to pick up a child. In contrast, since 2003 workplace policies in the United Kingdom have allowed workers to request flexible hours.¹⁴² Employers retain discretion over hours; they are only required to formally consider the request. Employees must file a written proposal to account for any stress put on the company by their flexible schedule. The program has been enormously successful. Approximately a fourth of eligible workers have successfully rearranged their schedules. Eighty-six percent of all proposals filed have been granted in some part. The

¹⁴⁰ See President Barack Obama, Remarks at a Town Hall Meeting in Green Bay, Wisconsin (June 11, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Town-Hall-Meeting-on-Health-Care-in-Green-Bay-Wisconsin/).

¹⁴¹ *Id.*

¹⁴² See KORNBLUH, *supra* note 21, at 3.

result has been increased productivity and a success for both businesses and parents.¹⁴³ Lawmakers and the U.S. business community should adopt a similar policy.

In addition, policymakers should extend the FMLA to those working at companies with fewer than fifty employees, to those who have worked less than a year or less than full-time, and to domestic partners. Similarly, workers should be able to earn up to seven sick days, which could be used when they or a family member are ill. In addition to benefits for individual workers, such reforms would have public health benefits, such as preventing the spread of disease by enabling sick people to stay home.

C. *Expanded Education and Child Care*

Any set of programs for early childhood education must provide a range of options that meet the needs of both working parents and young children. U.S. daycare facilities must be held to higher, uniform standards. As we continue our record of increasing educational attainment at the higher level, we must remember the importance of extending access to the youngest children as well. The Obama Administration has begun this work by dramatically expanding early education funding for low-income children with the American Recovery and Reinvestment Act.¹⁴⁴ Early education, after-school programs, and summer school should be as universally available as kindergarten.

D. *Equal Tax Treatment*

There are a number of options for eliminating the secondary earner bias in the U.S. tax code without creating any marriage penalty. These options include taxing individuals rather than married couples or allowing a secondary earner tax deduction. For payroll taxes, ideally the first dollars earned should be exempt. This would make payroll taxes less regressive and further reduce tax rates for women entering the workforce.

In addition, to simplify and make both more progressive and helpful the various child provisions in the tax code, a refundable unified child tax credit combining the EITC, child tax credit, and child exemption has been proposed.¹⁴⁵ We prefer a refundable unified parent account that parents could use for child-related expenses. Such accounts would also replace today's regressive flexible spending account and could be matched by the govern-

¹⁴³ See *id.* at 3–4. The data indicate that seventy-seven percent of requests were granted in full, nine percent in part. *Id.* For further reading on the U.K. law, see JODIE LEVIN-EPSTEIN, CTR. FOR LAW AND SOC. POLICY, HOW TO EXERCISE FLEXIBLE WORK: TAKE STEPS WITH A “SOFT TOUCH” LAW (2005), available at <http://www.clasp.org/admin/site/publications/files/0229.pdf>.

¹⁴⁴ FIRST FOCUS, *supra* note 58, at 125.

¹⁴⁵ See, e.g., ADAM CARASSO ET AL., URBAN INST., A UNIFIED CHILDREN'S TAX CREDIT? (2005), available at <http://www.urban.org/uploadedpdf/1000790.pdf>

ment and employers for low-income workers, like the proposed saver's credit for pensions for low-income workers.¹⁴⁶ To offset the expense of these reforms, they should be combined with overall reforms that either reduce credit levels, phase them out for taxpayers at higher income levels, or eliminate other credits.¹⁴⁷

CONCLUSION

A smart, compassionate family agenda to renew the social contract would support American families. It would ensure that workers do not lose their jobs or face poverty in old age as a result of the choice to have and raise children. Renewing the social contract requires championing reforms that will make today's programs more relevant to the real problems of real families in a changing economy.

Modernizing a social contract does not require a radical departure from what we as a country already support: FDR's vision of a simple, effective set of programs to protect and assist families in their most vulnerable times. America's social contract programs, which make up the lion's share of our government spending, must reflect the fact that women are now 49.9% of the workforce,¹⁴⁸ and must respond to the new challenges this brings for families.

We live in a time of opportunity but also of challenge. It is essential that we turn away from the distractions of past ideological battles and address ourselves to the challenges facing our families and the next generation of Americans.

¹⁴⁶ See, e.g., William G. Gale et al., *Improving the Saver's Credit*, BROOKINGS INSTITUTION POL'Y BRIEF, July 2004, at 1, available at http://www.brookings.edu/~media/Files/rc/papers/2004/07saving_gale/pb135.pdf.

¹⁴⁷ See Kornbluh, *supra* note 6.

¹⁴⁸ See Press Release, Inst. for Women's Policy Research, *supra* note 17.