

WHY THE EITC DOESN'T MAKE WORK PAY

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I

INTRODUCTION

Since 1975, the earned income tax credit (EITC) has transformed from a small, obscure provision of the federal tax code into one of the largest programs in the U.S. social-welfare system. Today, the EITC stands as the largest cash-transfer program for low-income workers with children, providing \$47 billion in benefits each year to 24 million families.¹

Politicians, advocates, and scholars have praised the EITC. President Bill Clinton famously called the EITC “a cornerstone of our effort to reform the welfare system and make work pay.”² Steve Holt of the Brookings Institution (among others) argues that the EITC “has proved remarkably successful in reducing poverty . . . , [lifting] more children out of poverty than any other social program or category of programs.”³ And, as often noted, support for the EITC spans the political spectrum.⁴

Among its other attributes, the EITC is a political winner, as well: Congress has legislated major increases in funding while spending on other cash transfers has remained flat. Figures 1 and 2 illustrate the growth of the EITC as a percentage of GDP since 1975, alongside declines in federal spending on unemployment insurance and Temporary Assistance for Needy Families (TANF).

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1. JOINT COMM. ON TAXATION, 110TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2008–2012, at 73 (Comm. Print 2008).

2. Memorandum on the Earned Income Tax Credit, 1 PUB. PAPERS 413 (Mar. 9, 1994), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=49779>.

3. STEVE HOLT, THE EARNED INCOME TAX CREDIT AT AGE 30: WHAT WE KNOW 13 (Brookings Inst., 2006), available at http://www.brookings.edu/~media/Files/rc/reports/2006/02childrenfamilies_holt/20060209_Holt.pdf.

4. JOEL F. HANDLER & YEHESKEL HASENFELD, BLAME WELFARE, IGNORE POVERTY AND INEQUALITY 81 (2007) (noting bipartisan praise for the EITC).

Figure 1: Federal Social-Welfare Spending as a Percentage of GDP, 1975–2009⁵

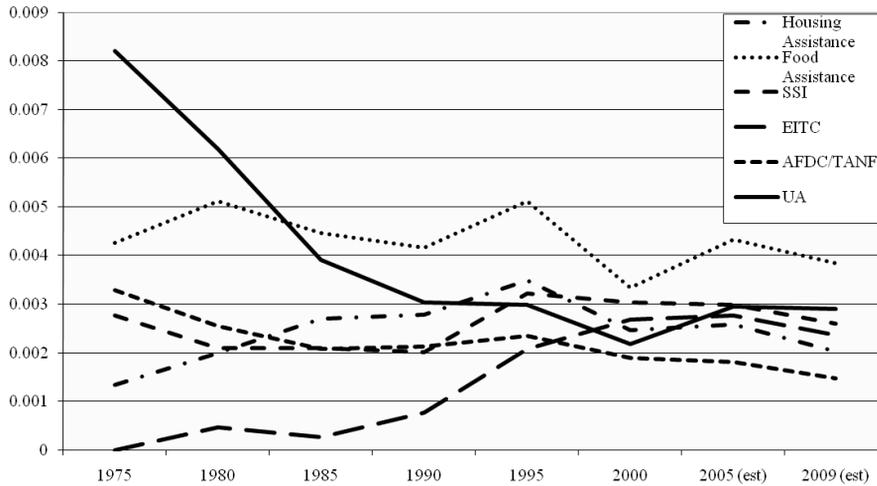
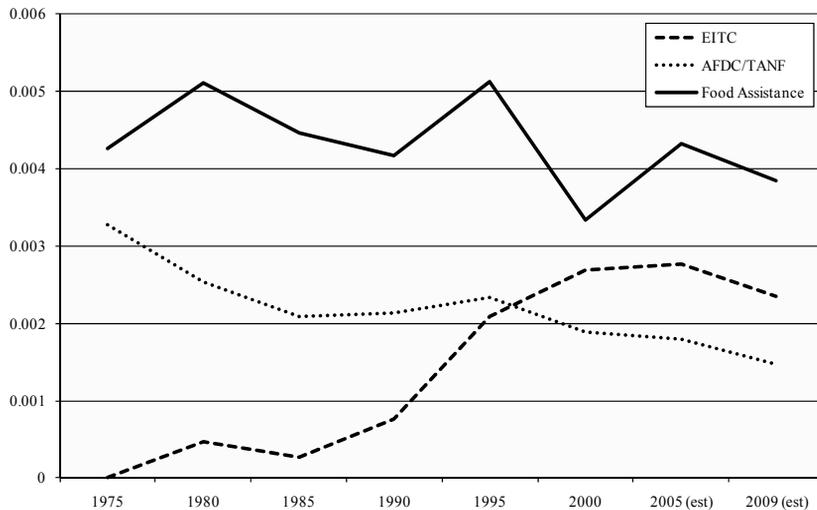


Figure 2: Federal Spending on the EITC, AFDC/TANF, and Food Assistance as a Percentage of GDP, 1975–2009⁶



5. Budget of the U.S. Gov't., Historical Tables tbl.11.3, available at <http://www.whitehouse.gov/omb/budget/fy2009/pdf/hist.pdf>. TANF was formerly known as the AFDC (Aid to Families with Dependent Children).

6. *Id.*

The political history of the EITC—the story of how the credit came to occupy its current position in the U.S. social-welfare state—has been ably told by others.⁷ In this article, I offer an evaluation of the significance of the credit and, in a historical spirit, hark back to an earlier, critical perspective on the EITC—a perspective rarely heard in recent years. The EITC arose from the ashes of the negative income tax in the mid-1970s.⁸ From its earliest days, the EITC prospered politically because it appeared to promote and reward paid work—helping answer the charge that a negative income tax would support the idle. Still, remaining supporters of the negative income tax sounded a cautionary note: they worried that the EITC did too little to address poverty, unemployment, and eroding wages.⁹

Here, I argue that these concerns remain apt, despite the expansion of the EITC and oft-repeated praise for its importance as an antipoverty program. My thesis is that the EITC—in anything like its present form—does not, and cannot, “make work pay,” because it operates in a legal context that creates deep disadvantage for low-wage workers and their children.

Like any good political slogan, “making work pay” is ambiguous: it has multiple meanings that appeal to different constituencies.¹⁰ Here, I interpret the phrase in its distributive sense; I assume that the goal is to make a meaningful improvement in the wellbeing of low-income families and workers. Still, the phrase defies precise definition: “making work pay” might connote only an effort to improve incentives, that is, to induce individuals to work, whether or not their wellbeing improves by much. The same normative ambiguity pervaded the last decade’s welfare reforms in the United States: some believed that work could improve the wellbeing of low-income families, while others supported work as a moral matter or as a means of reducing the welfare rolls. Obviously, if one takes the view that formal employment is the primary goal of the EITC program, and family wellbeing is irrelevant, the analysis here will be of no interest. Similarly, if one understands the EITC as aiming at nothing more than a reduction in the marginal and average tax rates facing low-income families, then its failure to make work pay (in the distributive sense) will not be troubling.

The analysis here highlights three features of U.S. law that constrain the effectiveness of the EITC in improving the wellbeing of low-income workers and their children: labor and employment laws that structure markets that produce low wages and harsh working conditions, laws that condition access to primary goods on market earnings, and a social safety net with gaps through

7. See Dennis J. Ventry, Jr., *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit*, in MAKING WORK PAY 15, 26–30 (Bruce D. Meyer & Douglas Holtz-Eakin eds., 2001); see also CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE* 64–74 (1999).

8. See Ventry, *supra* note 7, at 16–25.

9. *Id.* at 25–26.

10. See, e.g., GREGORY ACS & MARGERY AUSTIN TURNER, MAKING WORK PAY ENOUGH: A DECENT LIVING STANDARD FOR WORKING FAMILIES (Urban Inst., New Safety Net Paper 1, 2008), available at http://www.urban.org/UploadedPDF/411710_work_pay.pdf.

which low-income workers often fall. In comparison to other developed countries, the United States is exceptional in its laissez-faire markets and minimal social insurance regime.

Along the way, I highlight—and challenge—two assumptions that underlie conventional praise for the EITC. First, analysts often adopt the official poverty line as the metric for success in “making work pay,” despite its inadequacy as a measure of economic distress and social exclusion. Adopting a more realistic version of the poverty line reveals how little the EITC accomplishes—or, put another way, how ambitious a program would have to be to make work pay.

Second, discussions of the EITC typically focus on the situation of workers while they hold jobs, ignoring the frequent spells of job disruption due to unemployment, disability, and family needs that are common among low-wage workers. This limited perspective may be appropriate for technocratic discussions of EITC program design, because the EITC, like any wage or earnings subsidy, is designed only to assist the employed. It is, thus, a shortcoming of wage subsidies in general, and not the EITC in particular, that gaps in the social safety net leave low-income workers vulnerable to involuntary work disruption. But the contours of complementary programs should inform claims about the success of the EITC in “making work pay”—that is, in assuring a decent standard of living to those willing to work, even if (like many low-income workers) they do not succeed in working full-time, year-round.

My focus here is not on the design of the EITC program. A large literature examines the structure of the EITC and proposes a reform to improve work incentives and compliance. This article does not contribute to that project.¹¹ Nor is my claim, here, that the EITC improperly limits social assistance to those devoting their time to paid employment (although I have raised that point in other work).¹² Instead, I accept, *arguendo*, the ideal of lifting willing workers out of poverty—in order to explore whether the EITC does so.

Progressive praise for the EITC may reflect the political assumption that a modest wage subsidy is the best that U.S. politics can produce for low-wage workers. The ongoing debate over health-care reform stands as a reminder of

11. For discussions of EITC design, see Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995); David Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955 (2004); Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867 (2005). For proposed reforms, see, for example, JASON FURMAN, CTR. ON BUDGET & POLICY PRIORITIES, TAX REFORM AND POVERTY 1 (2006), <http://www.cbpp.org/files/4-10-06tax.pdf> (proposing to expand the EITC for larger families and for the childless); Janet McCubbin, *Noncompliance with the Earned Income Tax Credit: The Determinants of the Misreporting of Children*, in MAKING WORK PAY 237–73 (Bruce Meyer & Douglas Holtz-Eakin eds., 2002) (examining noncompliance and considering reforms to improve compliance); JOHN KARL SCHOLZ, EMPLOYMENT-BASED TAX CREDITS FOR LOW-SKILLED WORKERS 10–16, (Brookings Inst., Hamilton Project Discussion Paper No. 2007–14, 2007) (advocating an increased EITC for the childless and exploring its effects on work, crime, and marriage).

12. In other work, I have criticized wage subsidies (including the EITC) for adopting a work condition. See Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967 (1999).

how difficult it can be for U.S. political institutions to enact redistributive measures. But it seems to me important to make political assumptions explicit in our discussions and to understand that the EITC is part and parcel of the harsh and meager U.S. welfare state. It pays a wage subsidy that is too small to lift workers to a decent living standard, and it conditions payments on continuous employment—an aspiration that is unrealistic for many in the low-wage workforce. Despite political rhetoric, the EITC does not—and, given its legal context, cannot—“make work pay” in a meaningful sense.

To provide empirical support for my analysis, I make extensive use of data from secondary sources. Although I believe the presentation is useful, it is constrained by data availability and the choices of the original researchers. The result is a heterogeneous presentation. For example, at some points I present data for low-income workers and at other points for low-wage workers, even though the two groups are different (many low-wage workers do not come from low-income families). Similarly, I use data for families and children, and at times I make use of data using the official poverty level (or versions of it), even though one of my central points is the deep inadequacy of that measure.

II

WHAT WOULD IT MEAN TO MAKE WORK PAY?

Among the EITC's accomplishments, advocates say, are major reductions in poverty: according to the Center on Budget and Policy Priorities, for example, “the EITC lifts more children out of poverty than any other single program or category of programs.”¹³ But such statements typically adopt the official U.S. poverty level as their benchmark, even though its shortcomings as a measure of social inclusion and economic wellbeing are well known. According to more appealing and realistic measures of poverty, the EITC has a small effect.

To see why, begin with the normative question: What *should* poverty mean?

A. Absolute and Relative Poverty Standards

A key distinction is whether poverty should be measured in absolute or relative terms.¹⁴ Absolute poverty standards, in principle, define a standard of living (below which one is poor) that remains unchanging for all time. Taken to its limits, this construct would imply that the standard of living considered adequate in the Paleolithic era should be sufficient today. But virtually no one has suggested that the poverty level today requires only a twice-weekly meal of roasted squirrel, access to creek water, and a bed of leaves in the corner of a cave, even though human life could be sustained for some time under such conditions.

13. CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: THE EARNED INCOME TAX CREDIT (2008), <http://www.cbpp.org/cms/?fa=view&id=2505>.

14. See JOHN ICELAND, POVERTY IN AMERICA 21–28 (2006).

Instead, advocates of absolute poverty thresholds typically adopt a shorter time frame. Nicholas Eberstadt, for example, points out that in 2001, only 27% of Americans had no natural teeth, down from 47% in the early 1970s.¹⁵ Less outlandishly, Eberstadt also points out the gains in welfare from technological progress. For instance, in 2001, 95% of poor households had a telephone, up from only 70% in 1970.¹⁶ Over that same period, the percentage of poor households lacking plumbing dropped from 17.5% to 2.5%.¹⁷

Eberstadt's position highlights the normative issue: an absolute poverty measure abstracts from the social experience and social meaning of poverty. Lacking a telephone in 1970 had a different social meaning than it does today, when lacking a cell phone with texting capability might better demarcate social deprivation—or not, depending upon whether the person in question is eighteen or seventy, since the social importance of texting varies by age group. The social meaning of toothlessness today depends on the availability of dentures and cosmetic dentistry; without these corrective measures, the toothless person might be excluded from many social venues,¹⁸ while with them, the person might suffer no detrimental impact on her life at all.

Imagine a family of four in 2009, living in a dry tent in Central Park, drinking clean water purchased at a store, each consuming a loaf of whole-grain bread per day, and each owning one full set of modern clothes. This family might have been well-off by medieval European standards (Clean water! Comfortable synthetic fibers!), but would be terribly poor by modern American standards. The members of such a family would be minimally comfortable (in a physical sense) but would be excluded from many social interactions.¹⁹

Lee Rainwater and Timothy Smeeding put the point this way: “Without a requisite level of goods and services, individuals cannot act and participate as full members of their society, and it is this participation in social activities that confers utility, not consumption [by itself].”²⁰ With Amartya Sen, they endorse the idea that community standards and conventions must be foundational to any measure of poverty.²¹

Stepping back, we can see that any interpretation of “making work pay” rests on two critical normative moves. First is the nature of the poverty threshold. A low or absolute standard for poverty would make it easy for the

15. NICHOLAS EBERSTADT, *THE POVERTY OF “THE POVERTY RATE”* 93 (2008).

16. *Id.* at 86–87.

17. *Id.* at 85.

18. See David K. Shipler, *A Poor Cousin of the Middle Class*, N.Y. TIMES, Jan. 18, 2004, at 22, available at <http://www.nytimes.com/2004/01/18/magazine/a-poor-cousin-of-the-middle-class.html> (describing the work experience of Caroline Payne, a low-wage worker lacking front teeth, who often found herself relegated to back-office jobs).

19. Cf. ADAM SMITH, *THE WEALTH OF NATIONS* 288–89 (1776).

20. LEE RAINWATER & TIMOTHY M. SMEEDING, *POOR KIDS IN A RICH COUNTRY* 10 (2003).

21. *Id.* at 11. See also AMARTYA SEN, *THE IDEA OF JUSTICE* 254–57 (2009) (emphasizing that the measurement of poverty in resource terms depends on the characteristics of each person and of the society in which she lives).

EITC and other programs to succeed, while a high or relative standard would raise the bar. Here, I adopt a relative measure, construing “making work pay” as aiming to provide working-age adults and their children with a decent, minimum standard of living, judged by prevailing social standards. This is not the only possible standard, as I have suggested, and I have by no means made a full normative argument to support the choice. But it is a plausible interpretation and may be what people believe they are being told when it is announced that the EITC lifts millions out of poverty.

A second interpretive choice with normative content is whether “making work pay” implies a commitment of social assistance to adults willing but unable to work.²² Construed narrowly, “making work pay” might exclude such people: no work, no pay. But that interpretation would make harsh distinctions among individuals based on a circumstance beyond their control. A willing worker holding a job would receive social assistance, while a willing worker unemployed through no fault of her own would receive nothing.

Here, I treat “making work pay” as including the willing-but-unable worker. The implied ideal is something like the norm of reciprocity others have described: when individuals contribute work to the extent they are able, society responds by ensuring that they can live at a minimally decent standard.²³ Once again, the political slogan admits of multiple interpretations. But without making a full normative argument, it seems to me that the inclusion of willing-but-unable workers will strike many people as normatively appealing. All work carries the risk of unemployment; all workers bear the risk of illness, disability, and accident; and children bear the risk of having a parent out of work, all without any fault on the part of the individual.

Thus, to “make work pay” according to the standards adopted here, the EITC must provide a decent minimum standard of living for all members of the family and must provide (either directly or by coordination with other social-welfare programs) for the continuation of that standard when adults’ work is disrupted due to involuntary unemployment.

With these refinements, we can turn to the empirical question: Does the EITC, together with other social-welfare programs, guarantee a decent minimum standard of living to willing workers and their children?

B. The Shortcomings of the Official Poverty Measure

Most discussions of the EITC answer that question—or something like it—by reference to the official U.S. poverty line, but as many scholars have pointed out, the official statistics incorporate an unreasonably low standard of living, meaning that they treat as “poor” only those families in extreme distress.

22. I assume that “making work pay” *does* imply that work for pay is properly the condition for the decent minimum. See *supra* text accompanying note 12.

23. E.g., Stuart White, *Freedom, Reciprocity, and the Citizen's Stake*, in *THE ETHICS OF STAKEHOLDING* (Keith Dowding, Jurgen De Wispelaere & Stuart White eds., Palgrave Macmillan 2003).

Today's official poverty statistics adopt a low poverty threshold, but the nature of the measure is hidden by its methodology and its aura of "official" quality.

In the early 1960s, Mollie Orshansky, a government economist, sought to measure poverty in the United States using data on hand. Studies had established that, at the time, most families spent about one-third of their income on food. And the Agriculture Department published the cost of a diet that would meet basic nutritional needs at the lowest cost. Cleverly, Orshansky put these two items together: she created poverty thresholds for families equal to three times the cost of the basic food plan for each family size.²⁴

Incredibly, the official poverty figures today are based on Orshansky's original measures, updated for inflation.²⁵ The official statistics do not reflect today's food costs or other budget needs; nor do they reflect the cost of a modern market basket of consumer items. They are literally Orshansky's back-of-the-envelope calculations, updated for inflation.

These facts are well known to experts, who have offered sustained criticism of the official poverty measure.²⁶ Because the official measure has not been updated to reflect current needs, it has failed to keep up with the rising standard of living in the United States. For example, in the 1960s, the official poverty threshold was about half the median income. By 2000, it had dropped to 28% of the median income.²⁷

But any measure of poverty based on income still remains at some distance from the real question: at what level of income can people gain access to the goods and services they need to participate in social life?

The official poverty line brings little information to bear on that question. In recent years, even families living at twice the official poverty line have faced significant hardships. For instance, a 2001 study using 1996 data found that 31% of families living below the official poverty line experienced critical hardships (defined as failures to meet basic needs), while 58% experienced serious hardships (defined as lacking the "goods, services, and financial ability to maintain employment and a healthy home environment"). (See Figure 3.) Hardships were also strikingly high among families living below 200% of the poverty threshold, however, with 19% experiencing critical hardships and 42% encountering serious hardships.²⁸

24. See Mollie Orshansky, *Children of the Poor*, 26 SOC. SEC. BULL. 3 (1963); Mollie Orshansky, *Counting the Poor: Another Look at the Poverty Profile*, 28 SOC. SEC. BULL. 3 (1965).

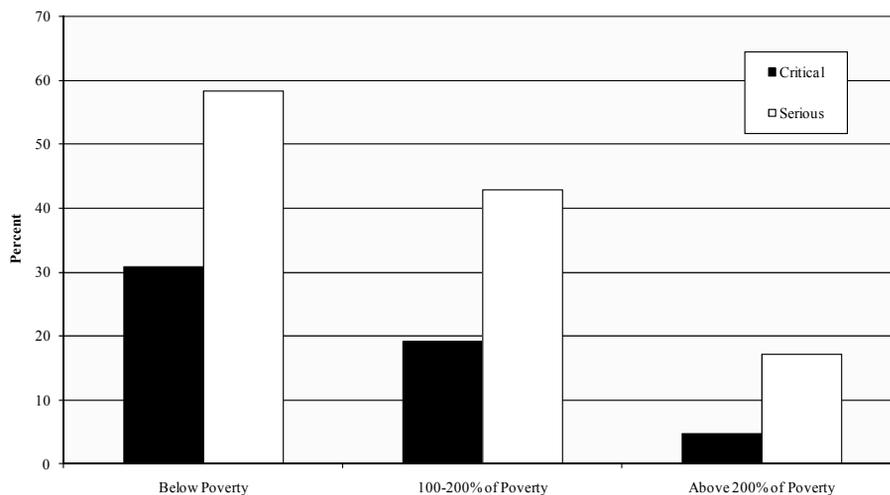
25. See HANDLER & HASENFELD, *supra* note 4, at 19–30; ICELAND, *supra* note 14, at 22–25.

26. For analysis and alternative proposals, see generally PATRICIA RUGGLES, *DRAWING THE LINE* (1990); *MEASURING POVERTY: A NEW APPROACH* (Constance F. Citro & Robert T. Michaels eds., Nat'l Acad. Press 1995).

27. HANDLER & HASENFELD, *supra* note 4, at 20.

28. *Id.*; see also JARED BERNSTEIN ET AL., *ECON. POLICY INST., HARDSHIPS IN AMERICA* (2001), http://www.epi.org/publications/entry/books_hardships (finding high rates of critical and serious hardship among families living under 200% of the poverty line).

Figure 3: Critical and Serious Hardships Experienced by Families at and Above the Official Poverty Line, 1996²⁹



Along similar lines, research has established that low-income families continue to experience food and housing insecurity even with high levels of work effort. Low-income, high-work families have higher incomes and experience less food and housing insecurity than their low-work counterparts. Still, nearly 30% of even the high-work families report food and housing insecurity.³⁰

As a rough cut at a more realistic poverty measure, consider Figure 4, which shows poverty rates for families and children at 100% and 200% of the poverty line.³¹ The poverty threshold for a family of three in 2007 was \$16,530,³² while median family income was \$62,359.³³ Half of median family income, which many researchers (including Rainwater and Smeeding) adopt as a relative measure of poverty,³⁴ would be about \$31,000, or roughly twice the poverty line. Figure 4

29. HEATHER BOUSHEY & BETHNEY GUNDERSEN, WHEN WORK JUST ISN'T ENOUGH: MEASURING HARDSHIPS FACED BY FAMILIES AFTER MOVING FROM WELFARE TO WORK (Econ. Policy Inst. 2001), http://epi.3cdn.net/1e8ed164a4f6790a04_gpm6bxuig.pdf.

30. GREGORY ACS & AUSTIN NICHOLS, WORKING TO MAKE ENDS MEET 7-8 (Urban Inst. 2005), http://www.urban.org/UploadedPDF/311243_make_ends_meet.pdf.

31. U.S. CENSUS BUREAU, PEOPLE IN FAMILIES BELOW 200% OF POVERTY (2008), http://www.census.gov/hhes/www/macro/032008/pov/new02_200.htm; U.S. CENSUS BUREAU, PEOPLE IN FAMILIES BELOW 100% OF POVERTY (2008), http://www.census.gov/hhes/www/macro/032008/pov/new02_100_01.htm.

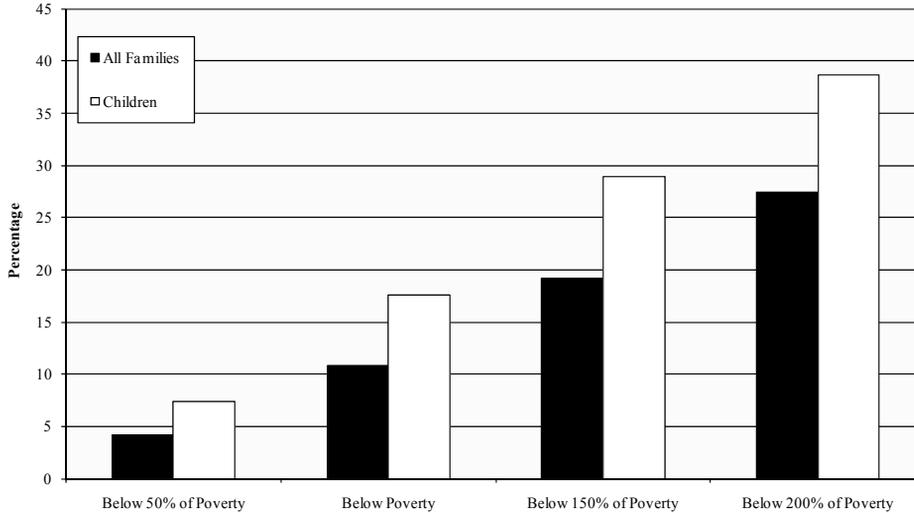
32. U.S. CENSUS BUREAU, POVERTY THRESHOLDS FOR 2007 (2008), <http://www.census.gov/hhes/www/poverty/threshld/thresh07.html>.

33. See CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007, at 8 (2008), <http://www.census.gov/prod/2008pubs/p60-235.pdf>.

34. Median income, of course, varies from year to year as incomes rise or fall in the society as a whole. Half of median income rises and falls with the median, and hence, it constitutes a "relative" measure of poverty.

shows that adopting the 200% of poverty measure more than doubles the poverty rate among children from 17.6% to 38.7%.

Figure 4: Families and Children in Poverty, 2007³⁵



To be sure, the official poverty threshold is also flawed in ways that tend to overstate poverty.³⁶ For instance, the official measure uses money income before taxes, thus understating income and overstating poverty for recipients of the EITC and in-kind transfer payments. In 2007, for instance, the U.S. Census Bureau reported that 17.0% of children were poor if measured using the official income definition, but only 12.8% were poor if measured using disposable income, which adds back the EITC, food stamps, and certain other transfer payments.³⁷

Even so, the official statistics likely understate poverty on net because the official measure remains an absolute threshold set in the early 1960s and thus disregards improvements in incomes and living standards (above the rate of inflation) since then.³⁸ Rainwater and Smeeding, for instance, adopt *both* an expanded income measure and an explicitly relative measure of poverty—half

35. U.S. CENSUS BUREAU, *supra* note 31; U.S. CENSUS BUREAU, PEOPLE IN FAMILIES BELOW 100% OF POVERTY (2008), http://www.census.gov/hhes/www/macro/032008/pov/new02_100_01.htm.

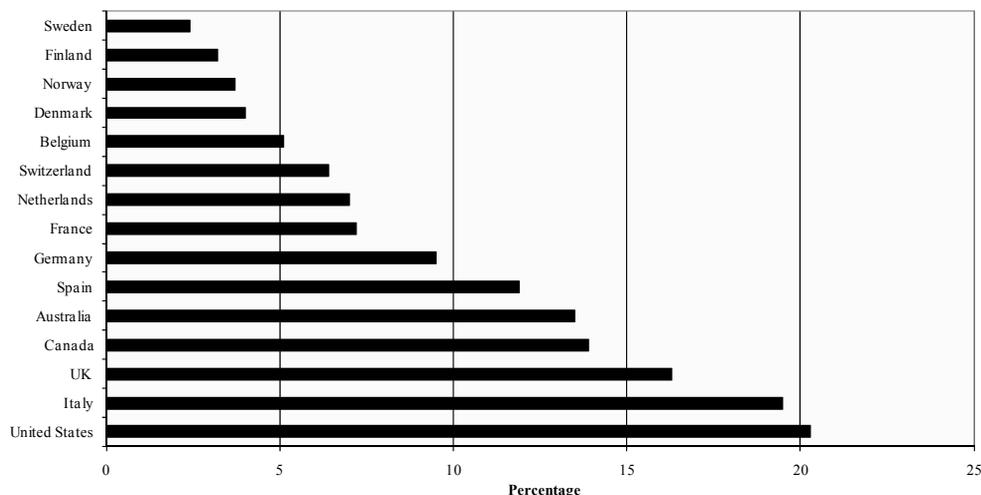
36. Other criticisms include the inflation measurement used (which arguably overstates poverty) and the exclusion of taxes (which understates by excluding payroll taxes and overstates by excluding the EITC). See Douglas J. Besharov, Measuring Poverty in America: Testimony Before the Subcommittee on Income Security and Family Support (Aug. 1, 2007), available at http://www.welfareacademy.org/pubs/poverty/Pov_Meas_House_testimony_07_0801.pdf.

37. U.S. CENSUS BUREAU, THE EFFECT OF TAXES AND TRANSFERS ON INCOME AND POVERTY: 2006 (2007), http://pubdb3.census.gov/macro/032007/altpov/newpov01_001.htm.

38. See also ICELAND, *supra* note 14, at 35 (fig.3.2) (comparing poverty rates based on different poverty measures, including the official poverty line and a relative measure of half median income).

the median income in each country.³⁹ According to their data, drawn from the Luxembourg Income Study (LIS), the United States has relatively high rates of child poverty. Figure 5 illustrates that, among the “mostly high-income countries” included in the LIS, the United States has a notably high rate of child poverty. Along with Russia and Mexico, the United States falls among the three countries with the highest rates of child poverty—more than 20%.⁴⁰

Figure 5: Child Poverty in Fifteen Countries, 1997⁴¹



Importantly, the Rainwater and Smeeding estimates also address the possible objection that high rates of child poverty in America are a function of demographics—that U.S. children are poorer because their parents are younger or because more of them live in single-parent families. They conclude that the effects of demographic variables like these, on cross-national poverty measurement, are “very small.”⁴² Instead, they attribute the higher rate of child poverty in the United States to legal institutions, including labor markets and social-welfare provisions. When they conduct the experiment of simulating other countries’ poverty rates with U.S.-type institutions, they find a “powerful effect”: simulated child-poverty rates average three times the actual rates in those countries.⁴³

39. RAINWATER & SMEEDING, *supra* note 20, at 18–19, 21 (fig.1.1). Their measure includes cash and near-cash benefits but excludes in-kind transfers such as health insurance and publicly provided child care. *Id.* at 18. This omission probably tends to overstate the wellbeing of children in the United States *relative* to those in countries, such as the Scandinavian countries, which provide generous noncash benefits.

40. Janet Gornick & Markus Jantti, *Child Poverty in Upper-Income Countries: Lessons from the Luxembourg Income Study 6* (Lux. Income Study, Working Paper No. 509, 2009), available at <http://www.lisproject.org/publications/liswps/509.pdf>.

41. *Id.* at 21.

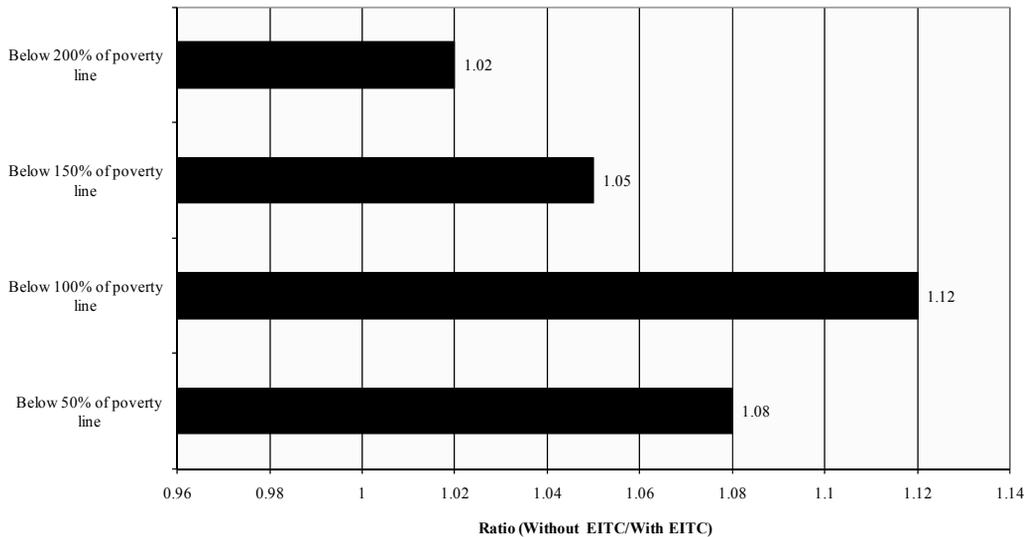
42. RAINWATER & SMEEDING, *supra* note 20, at 51.

43. *Id.*

Put another way, both pre- and post-transfer poverty in the United States are high by international standards—and so is the poverty gap (the distance between actual family incomes and the poverty level).⁴⁴ Among children in single-mother families, the situation is especially dire: 64% are poor before transfers, and more than 50% remain poor (by the Rainwater and Smeeding measure) after transfers.⁴⁵

Even by the official poverty measure, the EITC has a small effect on poverty. The EITC is not included in the official poverty measure because the Census Bureau does not include the effect of taxes on income (whether positive or negative).⁴⁶ But if the EITC were included, poverty would be reduced only modestly. Figure 6 shows that the 2004 official poverty figure is 12% higher without the EITC than if it were included in the income base.

Figure 6: The Effect of the EITC on Poverty, 2004⁴⁷



To be sure, the EITC alters the official poverty status of nearly a million families and about three-and-one-half million people.⁴⁸ Still, this is a strikingly modest achievement for a program that, advocates say, “lifts more children out of poverty than any other single program or category of programs.”⁴⁹

44. *Id.* at 131.

45. *Id.* at 118, 131.

46. U.S. CENSUS BUREAU, HOW THE CENSUS MEASURES POVERTY (2009), <http://www.census.gov/hhes/www/poverty/povdef.html>.

47. The data are taken from Bruce D. Meyer, *The U.S. Earned Income Tax Credit, Its Effects, and Possible Reforms* tbl.4, (Harris School Working Paper No. 07-20, 2007), available at http://harrisschool.uchicago.edu/About/publications/working-papers/pdf/wp_07_20.pdf.

48. *Id.*

49. CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 13.

Measured by a more realistic benchmark (200% of the official line), poverty is only 2% higher without the EITC than with it, as Figure 6 shows.⁵⁰ This effect may be deliberate. Analysts note that the EITC concentrates assistance near the official poverty line,⁵¹ and it hardly seems accidental that the program's parameters produce the largest political bang for the buck: the program maximizes the perception of helping the poor, without helping many families achieve a level of wellbeing that ensures social participation. Clearly, then, the EITC does not reduce poverty significantly, despite advocates' claims.

III

WHAT WOULD IT TAKE TO MAKE WORK PAY?

Three features of U.S. law create and perpetuate disadvantage for low-income workers and their children. Taken together, these legal structures constrain the capacity of the EITC—or any earnings or wage subsidy—to assist even those willing to work.

Put another way, the EITC operates within existing labor markets, within existing rules for the distribution of primary goods, and within the existing social-welfare system. The EITC does not address the conditions that lead to extremely low wages and frequent unemployment among low-income workers. Nor does it alter the market pricing of goods like health care, housing, and child care. Nor does it fill gaps in the social safety net through which low-income workers tumble.

A. Labor Markets and Low-Wage Work

The EITC aims to improve families' well-being by supplementing low wages. But the laws that shape U.S. labor markets tolerate deep disadvantage for low-income workers and their children—a situation that sets the bar very high for any program with the ambition of “making work pay.”

Since the enactment of the EITC in 1975, four features of U.S. labor markets that create poverty have persisted or deepened. First, already low wages have declined and working conditions have remained exceptionally poor. Second, unemployment has remained high for low-wage workers. Third, an increasing percentage of children live with single mothers, whose market earnings are especially low. And fourth, many low-wage jobs have poor working conditions, which make it difficult for workers to meet family responsibilities—and make job turnover and job disruption more likely. Taken together, these features of U.S. labor markets produce a degree of disadvantage for low-income families that is high by international standards.

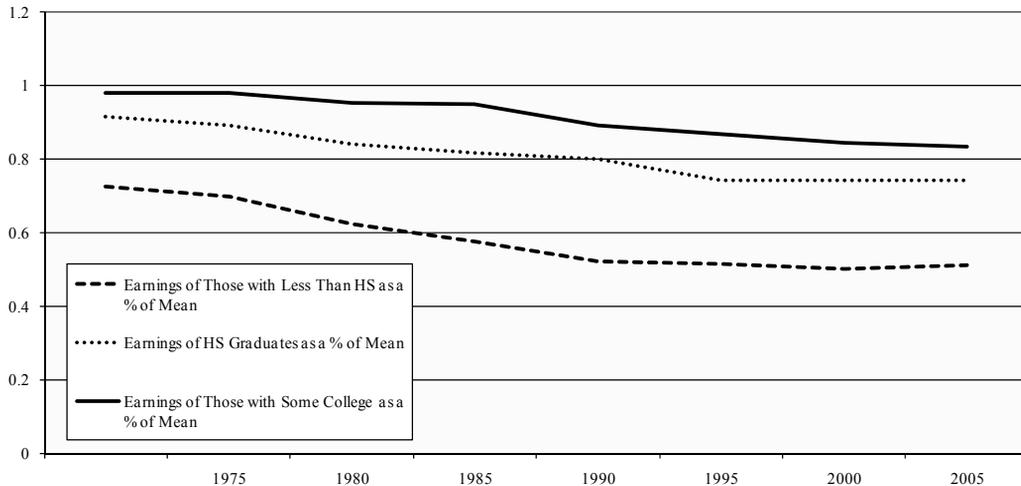
Begin with wages. Since 1975, real wages have increased only modestly or have fallen for low-skilled men, and wage levels remain low for less-educated

50. Meyer, *supra* note 47.

51. *Id.* at 5.

women as well.⁵² In 2001 dollars, for instance, wages at the tenth percentile went from \$6.30 to \$6.69 from 1973 to 2001. At the twentieth percentile, wages went from \$7.61 to \$8.07.⁵³ Over the same period, actual earnings have declined for less-educated workers. (See Figure 7.)

Figure 7: Earnings Trends by Educational Attainment, 1975–2007⁵⁴



Thanks to recent legislation, the minimum wage has returned to approximately the same level (relative to the average wage) as in 1975.⁵⁵ But, as Figure 8 shows, even the new \$7.25 minimum wage remains too low to support a family of three at the 2008 official poverty line, even assuming full-time, full-year work (2000 hours). At a more realistic 1500 hours of work per year, the minimum wage just manages to support a single, childless person at the poverty level. And at a more realistic 200% of the poverty line, even a full-time, minimum-wage job is short of the poverty level *for any size household*.

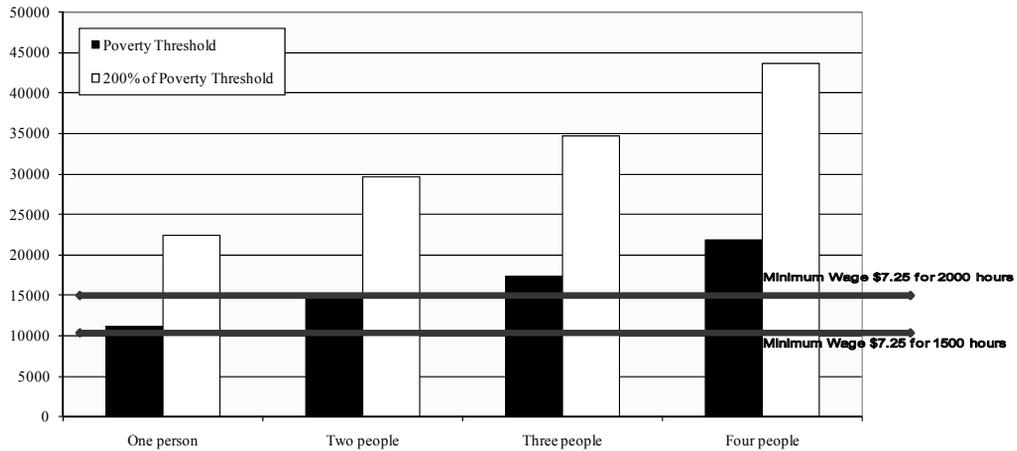
52. SCHOLZ, *supra* note 11, at 7.

53. LAWRENCE R. MISHLE ET AL., *THE STATE OF WORKING AMERICA* 128 (2002).

54. U.S. CENSUS BUREAU, *MEAN EARNINGS OF WORKERS 18 YEARS AND OVER* (2009), <http://www.census.gov/population/socdemo/education/cps2008/tabA-3.xls>.

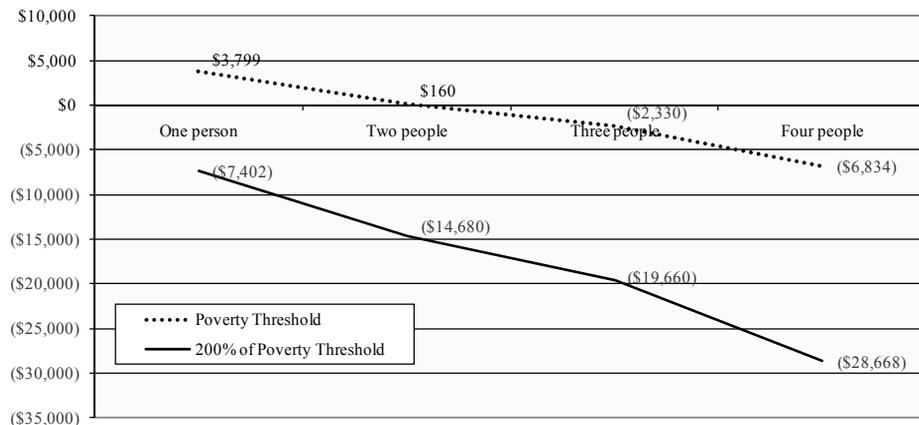
55. SOC. SEC. ADMIN., *ANNUAL STATISTICAL SUPPLEMENT: EMPLOYMENT AND EARNINGS*, tbl.3.B3, <http://www.ssa.gov/policy/docs/statcomps/supplement/2007/3b.pdf>.

Figure 8: Poverty Thresholds Compared to Minimum-Wage Earnings (2008 Poverty Thresholds and 2009 Minimum Wage)⁵⁶



The sobering fact is that the EITC does not close the gap between poverty and minimum-wage work. Figure 9 shows the gap between minimum-wage earnings and the poverty threshold.

Figure 9: The Gap Between Minimum-Wage Earnings and Poverty Thresholds, 2008 (assuming 2000 hours of work and a minimum wage of \$7.25)⁵⁷



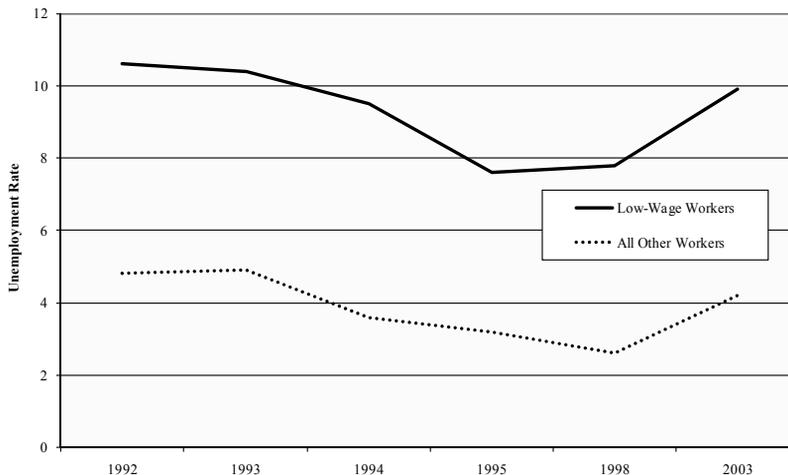
56. U.S. CENSUS BUREAU, POVERTY THRESHOLDS FOR 2008 (2009), <http://www.census.gov/hhes/www/poverty/threshld/thresh08.html>. The table uses poverty thresholds for a householder under age sixty-five, and for one child (two-person family) or two children (three- and four-person families).

57. Author's calculations based on U.S. Census Bureau data. *Id.*

Even the maximum EITC of \$5028⁵⁸ does not close the gap between minimum-wage work and 200% of poverty for any size household, even for full-time, full-year work. For less-than-full-time work, the gap is even higher. And the EITC provides maximum benefits for only those workers earning in the \$9,000 to \$16,000 range; the actual credit for families with higher incomes is smaller.⁵⁹

Compounding their disadvantage, low-wage workers face persistently high rates of unemployment. As Figure 10 demonstrates, even before the current depression, low-wage workers (identified, in these data, as those earning less than \$8.97 in 2003, roughly the bottom quarter of the wage distribution)⁶⁰ reported high rates of unemployment—and rates significantly higher than those for all other workers. And unemployment is correlated with poverty: in 2008, for instance, the population under the poverty level had a 23% unemployment rate.⁶¹

Figure 10: Unemployment Rates by Wage Level, 1992-2003⁶²



58. Rev. Proc. 2008-66 § 3.06 (2008), available at <http://www.irs.gov/pub/irs-drop/rp-08-66.pdf>.

59. I.R.C. § 32 (2006); Rev. Proc., *supra* note 58.

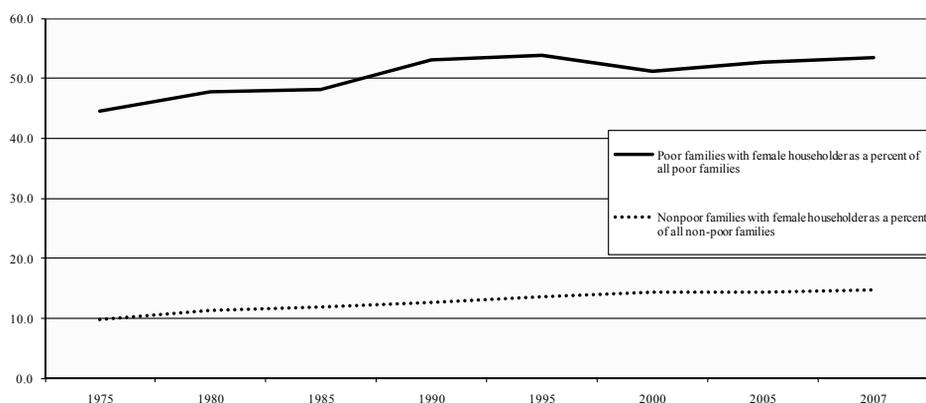
60. U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-07-1147, UNEMPLOYMENT INSURANCE: LOW-WAGE AND PART-TIME WORKERS CONTINUE TO EXPERIENCE LOW RATES OF RECEIPT 33 (2007) [hereinafter GAO-07-1147], <http://www.gao.gov/new.items/d071147.pdf>.33.

61. U.S. CENSUS BUREAU, EMPLOYMENT STATUS (2008), http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2008_1YR_G00_S2301&-ds_name=ACS_2008_1YR_G00_&-lang=en&-redoLog=false&-format=&-CONTEXT=st.

62. GAO-07-1147, *supra* note 60, at 20 (2007).

A third source of disadvantage reflects a combination of labor-market conditions and demography. Since 1975, the proportion of children living in single-mother families has increased in both the poor and nonpoor populations, as Figure 11 shows.

Figure 11: Poverty and Female-Headed Families, 1975–2007⁶³



By 2005, nearly 30% of U.S. children lived with just one parent, and the vast majority of those were mothers.⁶⁴ Women continue to earn lower wages than men, on average, and one-worker families earn less than two-worker families. In 2007, for example, men with earnings earned an average of \$45,113, while women with earnings earned \$35,102 on average.⁶⁵

The consequence is that single-mother families tend to be quite poor. Single-mother families' median income in 2007 was \$33,370, compared to \$62,359 for all families and \$72,785 for two-parent families.⁶⁶ Poverty (according to the official measure) has declined among single-mother families in the last decade, as Figure 12 shows. Still, poverty rates remain high: in 2007, the (official) poverty rate for single-mother families was 28.3%, compared to 4.9% for married-couple families.⁶⁷

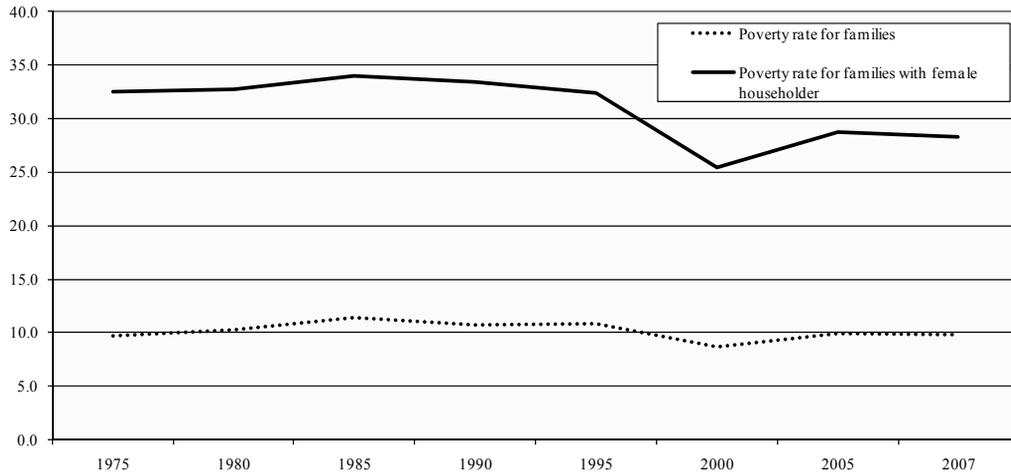
63. U.S. CENSUS BUREAU, NUMBER OF FAMILIES BELOW THE POVERTY LEVEL AND POVERTY RATE tbl.13 (2009), <http://www.census.gov/hhes/www/poverty/histpov/hstpov13.xls>.

64. U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS OLD tbl.Ch-1 (2009), <http://www.census.gov/population/socdemo/hh-fam/ch1.xls>.

65. DENAVAS-WALT ET AL., *supra* note 33, at 8.

66. *Id.* at 7.

67. DENAVAS-WALT ET AL., *supra* note 33, at 13.

Figure 12: Poverty Rates (Official Measure), 1975–2007⁶⁸

Though other industrialized countries have experienced similar trends in the growth in single-mother families, poverty for these families is comparatively deep in the United States. In a sample of fifteen countries, Rainwater and Smeeding find that (taking into account transfers and measuring poverty at half the median income) children in single-mother families in the United States are poor at a high rate (52%).⁶⁹ And, at 30%, extreme child poverty in the United States is higher than in any other country in the sample. In Germany, for example, single mothers are also quite poor (48%), but only 18% are extremely poor.⁷⁰

Finally, in addition to low wages and unemployment, low-income workers also face irregular and unpredictable hours of work, frequent unemployment, and inflexible working conditions with little or no room for workers' illness, children's routine needs, or episodes of disability. As Figure 13 illustrates, low-wage, part-time, and service-sector jobs all are less likely to offer workers access to employer-provided health insurance, pension savings, and paid vacation. In the mid-1990s, 76% of workers in the lowest income quartile lacked paid sick leave, while 58% lacked paid vacation time, and 54% had neither sick time nor vacation time.⁷¹ As a consequence, illness, disability, and sick children can mean unemployment or forced time off without pay. In principle, the Family and Medical Leave Act (FMLA) guarantees unpaid medical leave to all workers,

68. U.S. CENSUS BUREAU, NUMBER OF FAMILIES BELOW THE POVERTY LEVEL AND POVERTY RATE tbl.13 (2009), <http://www.census.gov/hhes/www/poverty/histpov/hstpov13.xls>.

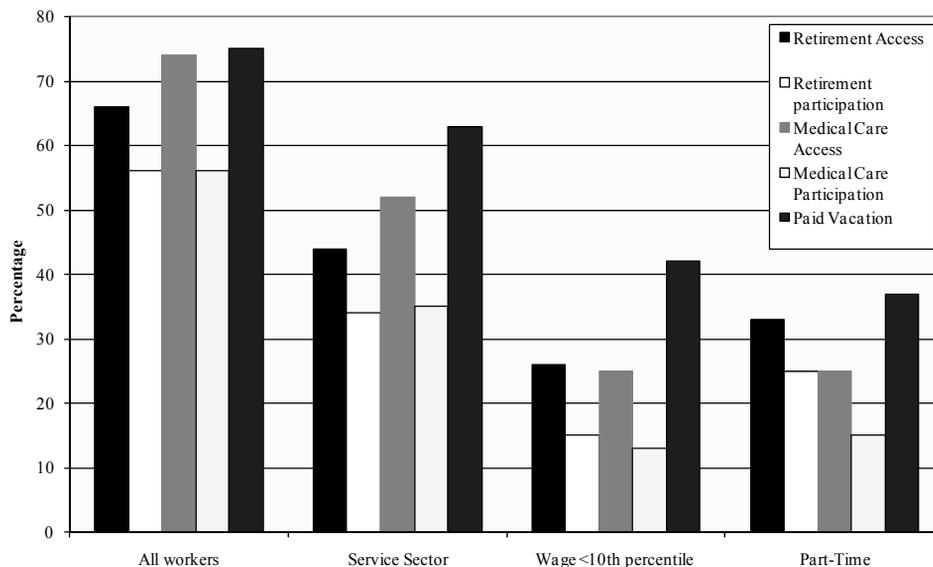
69. RAINWATER & SMEEDING, *supra* note 20, at 112 (taking into account transfers and measuring poverty at half the median income).

70. *Id.*

71. JODY HEYMANN, THE WIDENING GAP 114–15 (2000).

but restrictions on coverage mean that only 58% of workers had FMLA rights as of 2000.⁷²

Figure 13: Employee Benefits: Access and Participation, 2008⁷³



Job characteristics and personal needs combine to create a higher rate of work disruption for low-wage workers. Low-wage workers are concentrated in low-status service jobs with high turnover and involuntary change in hours and shifts. Schedule changes and personal needs can cause disproportionate stress for workers living at the economic margins, who have few financial and social resources on which to rely to remain in work when the boss assigns the night shift, transportation breaks down, or a babysitter fails to show up.⁷⁴

Viewed in comparative perspective, U.S. labor markets have several exceptional legal features. The minimum wage is low, and wages for the vast majority of workers are set in the marketplace and without collective bargaining.⁷⁵ Further, job mobility is high, and at-will employment means job

72. U.S. DEPT OF LABOR, COVERAGE OF ESTABLISHMENTS AND EMPLOYEES UNDER THE FAMILY AND MEDICAL LEAVE ACT: 1995 AND 2000 SURVEYS tbl.A1-3.1 (2000), <http://www.dol.gov/esa/whd/fmla/appendixa-1.pdf>.

73. U.S. Bureau of Labor Statistics, Retirement Benefits: Access, Participation, and Take-Up Rates tbl.1, <http://www.bls.gov/news.release/ebs2.t01.htm> (last visited Sept.6 2009).

74. See *infra*, text accompanying note 78, for data on low levels of precautionary savings among low-income families.

75. In other countries, collective bargaining institutions are more extensive, even when formal unionization is low. Richard B. Freeman & Casey Ichniowski, *Introduction: The Public Sector Look of American Unionism, in WHEN PUBLIC SECTOR WORKERS UNIONIZE 7-17* (Richard B. Freeman & Casey Ichniowski eds., Nat'l Bureau of Econ. Research 1988).

security is low by international standards.⁷⁶ These features of the labor market contribute significantly to the high rate of child poverty in the United States.⁷⁷

The EITC has a limited effect, to put it mildly, on the labor-market situation of low-wage workers. The program does address one source of disadvantage by raising earnings for low-income workers, including single mothers. But, as we have seen, the subsidy is not enough to raise one-worker families (and many two-worker families) to a realistic version of the poverty level. Further, the program cannot assist the unemployed—except to the extent that workers save their wages while working to cushion periods of unemployment. Data suggest, not surprisingly, that financial savings among low-income families are low to nonexistent. In 2004, for instance, nearly 30% of U.S. families had zero or negative financial net worth (that is, net worth excluding home equity).⁷⁸ And, of course, the EITC is not structured to make direct improvements in working conditions.

B. Market Distribution of Primary Goods

A second barrier to “making work pay” lies in the use of markets to distribute a wide array of primary goods like health care, housing, child care, and education. The United States, compared to other developed countries, relies heavily on laissez-faire markets, and its laws provide relatively little assistance to low-income families via public or employer subsidies.

For example, most working-age adults must purchase health care for themselves and their children in the marketplace. While the President and Congress are currently considering proposals to expand public subsidies for health insurance, today the largest public subsidy for those of working age is the tax expenditure for employer-provided health insurance. Although this program costs the federal government roughly \$120 billion per year, the subsidy operates by reducing taxable income and so does not benefit low-income workers, whose incomes generally are too low for them to owe federal income tax.⁷⁹

Some low-income workers have access to employer subsidies, but low-income workers are less likely to have access to employer-provided health care than other workers.⁸⁰ The State Children’s Health Insurance Program (SCHIP) and Medicaid assist many low-income children, but coverage is not universal. In 2007, 70% of poor children (by the official measure) were covered by government health insurance, primarily Medicaid. (See Figure 14.) Still, in the

76. *Id.*

77. RAINWATER & SMEEDING, *supra* note 20, at 108.

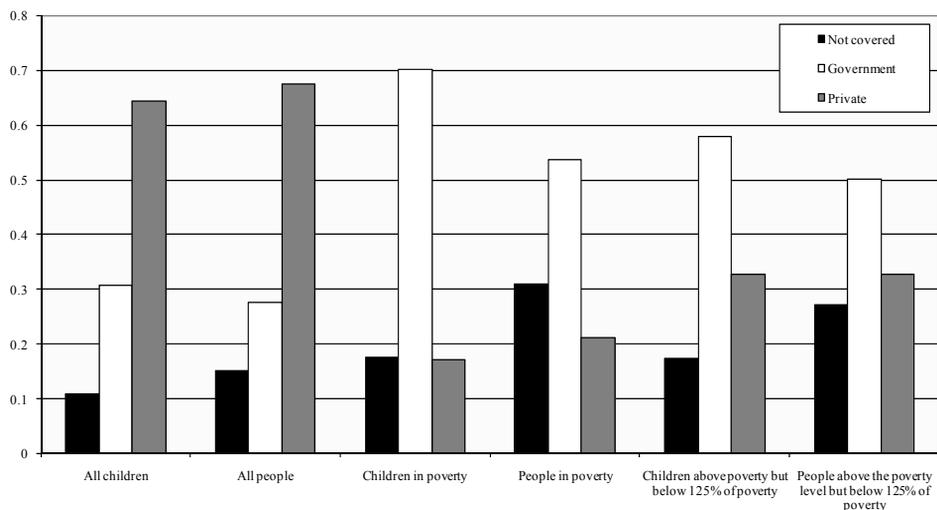
78. See Edward N. Wolff, *Recent Trends in Household Wealth in the United States: Rising Debt and the Middle-Class Squeeze* 8 (Levy Econ. Inst., Working Paper No. 502, 2007) (showing that 17% of U.S. families had zero or negative net worth, 29.9% had net worth of less than \$10,000, and 28% have zero or negative net worth if homes are excluded).

79. JOINT COMM. ON TAXATION, *supra* note 1.

80. For a description of health care and poverty, see HANDLER & HASENFELD, *supra* note 4, at 116–28.

same year, 31% of poor people (by the official measure) and 18% of poor children lacked health insurance.⁸¹

Figure 14: Health Insurance Coverage, 2007⁸²

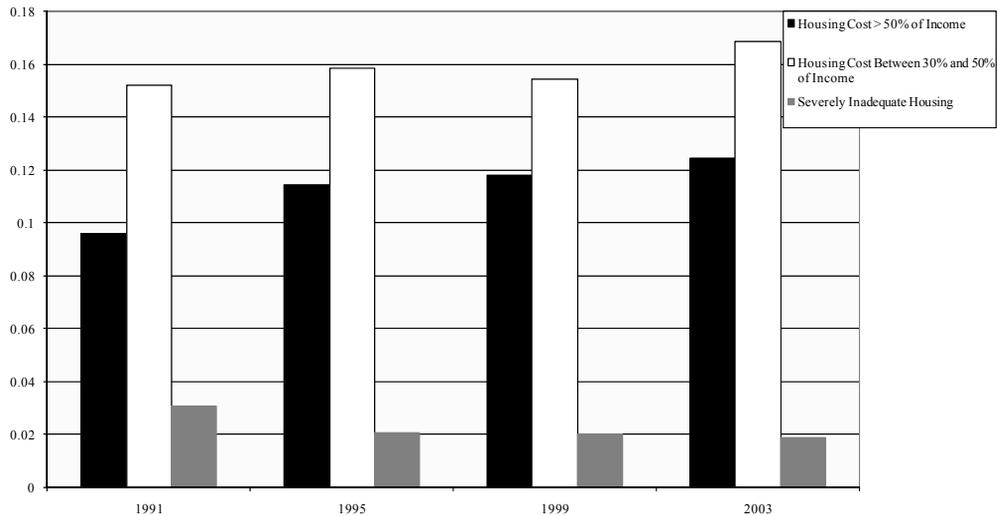


Low-income families also must buy housing and food in the marketplace, and a significant minority of households experience housing and food insecurity. A 2005 report by the Urban Institute, for example, found that “[o]ver one-quarter of low-income families with a full-time worker experience hardships related to food and housing.”⁸³ In 2003, as Figure 15 illustrates, 12% of all families spent more than half their income on housing, while another 17% spent between 30% and 50% of their income on housing.

81. U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE STATUS (INCOME-TO-POVERTY RATIO IS BELOW 100%) tbl.HI03 (2008), http://www.census.gov/hhes/www/macro/032008/health/h03_001.htm.

82. U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE STATUS tbl.HI02 (2008), http://www.census.gov/hhes/www/macro/032008/health/h02_001.htm; U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE STATUS (INCOME-TO-POVERTY RATIO IS BELOW 100%) tbl.HI03 (2008), http://www.census.gov/hhes/www/macro/032008/health/h03_001.htm; U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE STATUS (INCOME-TO-POVERTY RATIO IS BETWEEN 100 AND 125%) tbl.HI04 (2008), http://www.census.gov/hhes/www/macro/032008/health/h04_001.htm.

83. URBAN INST., LOW-INCOME WORKING FAMILIES: FACTS AND FIGURES 1 (2005), <http://www.urban.org/UploadedPDF/900832.pdf>. For statistics on housing affordability, see U.S. Dep’t of Hous. & Urban Dev., Affordable Housing Needs 2005: Report to Congress (2007), <http://www.huduser.org/Publications/pdf/AffHsgNeeds.pdf>.

Figure 15: Measures of Housing Need, 2003⁸⁴

The U.S. Department of Agriculture reports that, in 2007, 11% of U.S. households experienced food insecurity,⁸⁵ meaning “limited or uncertain availability of nutritionally adequate and safe foods or limited or uncertain ability to acquire acceptable foods in socially acceptable ways.”⁸⁶

The federal government spends roughly \$40 to 50 billion annually on the Supplemental Nutrition Assistance Program (formerly known as Food Stamps),⁸⁷ but benefits are concentrated on very poor families.⁸⁸ Though the program reduces the poverty gap, it does little to reduce poverty, even by the official measure. In 2000, for instance, including the value of Food Stamps in

84. U.S. Dep’t of Hous. & Urban Dev., *supra* note 83.

85. U.S. Dep’t. of Agric., Food Security in the United States: Key Statistics and Graphs, http://www.ers.usda.gov/Briefing/FoodSecurity/stats_graphs.htm (last visited Sept. 6, 2009).

86. U.S. Dep’t of Agric., Food Security in the United States: Measuring Household Food Security, <http://www.ers.usda.gov/Briefing/FoodSecurity/measurement.htm> (last visited Sept. 6, 2009).

87. The Food Stamp Program, now known as Supplemental Nutrition Assistance (SNAP) is a countercyclical program; with the current recession and an expansion of benefits, outlays are predicted to grow from about \$40 billion in 2008 to about \$50 billion in 2009. Budget of the United States Government, Historical Tables 235–36 (2009) (table 11.3), available at <http://www.gpoaccess.gov/usbudget/fy10/pdf/hist.pdf>.

88. For data on the distribution of Food Stamp benefits, see KENNETH FINEGOLD, FOOD STAMPS, FEDERALISM, AND WORKING FAMILIES 2 (Urban Inst. 2008), available at http://www.urban.org/UploadedPDF/411752_food_stamps.pdf. The SNAP program limits benefits to families living below 130% of the official poverty line who also meet other elements of a means test, as explained at http://www.fns.usda.gov/fsp/applicant_recipients/eligibility.htm#income.

measured income would have reduced the official measure of child poverty by only 4% (from 16% to 15.4%).⁸⁹

Expenses for child care are especially high relative to wage levels in the United States. In 1997, low-income families who purchased child care spent about 16% of their incomes to do so;⁹⁰ 27% of these low-earning families spent more than 20% of their incomes on child care.⁹¹ Though federal and state governments subsidize child care through the Child Care and Development Fund, that fund serves “only about 14% of federally eligible children.”⁹² The federal government spends \$3.1 billion per year on the dependent-care tax credit, but because the credit is nonrefundable, it provides few dollars to low-income workers.⁹³ Few low-income workers have access to employer subsidies for childcare; in 2006, for instance, 15% of private-sector workers—but only 9% of those earning under \$15 per hour—had access to employer-sponsored childcare assistance.⁹⁴

Public education would appear to be an exception to the market distribution of primary goods: after all, every child in the United States is entitled to a free public education. But the law permits the quality of public education to vary across school districts, and it permits localities to use neighborhood residence as the criterion for school access. The result is that school quality often correlates positively with housing prices, as middle-class families seek to buy or rent houses in neighborhoods with better schools, driving up the price of housing in the process. Thus, the law distributes a minimum level of education outside the market. But a “good” or even “adequate” level of education depends on market purchases of housing.⁹⁵

This legal context helps explain why the EITC does relatively little to alleviate poverty—and illustrates the challenges facing any serious effort to do so. The depth of income poverty depends on what that income must buy: in a

89. JOSHUA WINICKI ET AL., HOW DO FOOD ASSISTANCE PROGRAMS IMPROVE THE WELL-BEING OF LOW-INCOME FAMILIES? 3 (Econ. Res. Serv., U.S. Dep't of Agric., Food Assistance and Nutrition Research Report No. 26-9, 2002), available at <http://www.ers.usda.gov/publications/fanrr26/fanrr26-9/fanrr26-9.pdf>.

90. See LINDA GIANNARELLI & JAMES BARSIMANTOV, CHILD CARE EXPENSES OF AMERICA'S FAMILIES 3–7 (Urban Inst., Occasional Paper No. 40, 2000), available at http://www.urban.org/UploadedPDF/310028_occa40.pdf.

91. *Id.* at 8.

92. SHELLEY WATERS BOOTS ET AL., FAMILY SECURITY: SUPPORTING PARENTS' EMPLOYMENT AND CHILDREN'S DEVELOPMENT (Urban Inst., New Safety Net Paper 3, 2008), available at http://www.urban.org/UploadedPDF/411718_parent_employment.pdf; PAMELA WINSTON, MEETING RESPONSIBILITIES AT WORK AND HOME: PUBLIC AND PRIVATE SUPPORTS 2 (Urban Inst. 2007), available at http://www.urban.org/UploadedPDF/411537_meeting_responsibilities.pdf.

93. JOINT COMM. ON TAXATION, *supra* note 1, at 55.

94. U.S. BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, MARCH 2006 tbl.23 (2006), <http://www.bls.gov/ncs/ebs/sp/ebsm0004.pdf>; see also HANDLER & HASENFELD, *supra* note 4, at 101–04.

95. For a model of housing-market competition that rations access to schools, see generally Dennis Epple & Richard Romano, *Neighborhood Schools, Choice, and the Distribution of Educational Benefits*, in THE ECONOMICS OF SCHOOL CHOICE 227 (Caroline M. Hoxby ed., 2003).

country in which many goods and services are available at subsidized prices or outside the market entirely, a given level of income stretches farther than in a country—like the United States—in which working-age families and children must buy primary goods out of their income. Possessing half the median (cash) income, for instance, means something quite different to a family with access to subsidized child care, food, and housing than to one without. Any effort to “make work pay” in the United States must take into account the extensive—and expensive—array of primary goods that must be purchased out of earnings.

C. Job Disruptions and Gaps in the U.S. Social Safety Net

Gaps in the U.S. welfare system pose another challenge for any attempt to make work pay by ensuring U.S. workers a minimally decent living standard. The EITC supplements incomes while workers hold jobs, but low-income workers are more likely than their higher-income counterparts to experience involuntary job disruptions due to unemployment and disability.⁹⁶

In principle, U.S. welfare- and social-insurance programs protect workers against unemployment and disability, but these formal entitlements contain hidden conditions and rules that disproportionately exclude low-income workers. Ironically, low-income workers are most likely to suffer unemployment and disability—and least likely to receive public subsidies and benefits, despite the devastating consequences of job disruption for economically marginal families. Comparative data reveal that the United States, relative to other developed countries, has a welfare state that does exceptionally little to mitigate poverty among families with children.

Begin with unemployment. The major federal-state program that addresses involuntary unemployment is unemployment insurance (UI). Despite annual expenditures of more than \$40 billion⁹⁷ the program offers little aid to low-income workers, even though low-income workers are more likely than other groups to experience unemployment.

In 2006, for example, 15% of low-income families with children had an unemployed parent at some time during the year, compared to 10% of moderate-income families with children and 6% of similar higher-income families.⁹⁸ Figure 10 illustrates the stability of the relationship over time: unemployment rates for low-wage workers persist at roughly five percentage points higher than for higher-wage workers, even before the current economic crisis.

A Government Accountability Office (GAO) study documented both the disproportionate unemployment of low-wage workers (defined in that study as an hourly wage of less than \$8.97, which would support a family of four at the

96. See *infra* text accompanying notes 97–106.

97. See Budget of the U.S. Gov't., *supra* note 5.

98. MARGARET C. SIMMS, WEATHERING JOB LOSS: UNEMPLOYMENT INSURANCE 1 (Urban Inst., New Safety Net Paper 6, 2008), available at http://www.urban.org/UploadedPDF/411730_job_loss.pdf.

official poverty line).⁹⁹ The GAO found that low-wage workers were “almost two-and-one-half times as likely to be out of work . . . [but] half as likely to receive UI benefits.”¹⁰⁰ In 2003, low-wage workers reported a 9.3% unemployment rate, compared to 4.2% for higher-wage workers. But in that same year, only 13.6% of low-wage workers received UI, compared to 37.1% of higher-wage workers.¹⁰¹

The GAO found that the pattern—higher unemployment and lower UI receipt—persisted even among those who worked at least thirty-five weeks in the year preceding unemployment; among that group, 30% of low-wage workers but 55% of higher-wage workers received UI benefits.¹⁰²

What explains the differential coverage of lower- and higher-wage workers? The problem is that the rules of the UI system fit better with middle-income than low-income patterns of employment.¹⁰³ Low wage rates make it more difficult for low-wage workers to meet earnings thresholds for coverage. Limited work history and intermittent work can also disqualify workers: for instance, a worker who has worked full-time recently will find that her most recent work history is ignored, and benefits are based on past work.¹⁰⁴

Common features of low-wage work—high turnover and exit due to family circumstances—may contribute to ineligibility in the UI system.¹⁰⁵ Low-income workers are more likely to be new entrants or reentrants to the labor market. They may try and reject several jobs before finding a good fit. They also have fewer prospects for career advancement and so “have less to lose” if they leave a job to look for another. Low-income workers are also less likely to have flexible schedules and paid leave and so are “more likely to leave or lose jobs because of illness or family emergencies. Recent data indicate that a higher percentage of [low-income] women are job leavers and approximately one-third of job leavers are out of work for 15 weeks or more.”¹⁰⁶ Under typical UI rules, a worker who leaves her job due to a child’s illness, child-care disruptions, or other family emergencies is ineligible for benefits.¹⁰⁷

Disability also affects low-income workers at higher rates than higher-income workers, but disability insurance in the United States provides assistance for only the most severe and long-lasting disability. The result is that

99. GAO-07-1147, *supra* note 60, at 2; *see also* U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-01-181, UNEMPLOYMENT INSURANCE: ROLE AS SAFETY NET FOR LOW-WAGE WORKERS IS LIMITED (2000), <http://www.gao.gov/new.items/d01181.pdf>.

100. GAO-07-1147, *supra* note 60, at 3.

101. *Id.* at 21.

102. *Id.* at 22.

103. For a summary of coverage and benefits rules, see COMM. ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, 2008 GREEN BOOK, 4-4 to 4-14, *available at* <http://waysandmeans.house.gov/media/pdf/111/uc.pdf>.

104. *See* GAO-07-1147, *supra* note 60, at 3.

105. *See id.* at 31; SIMMS, *supra* note 98, at 3–5.

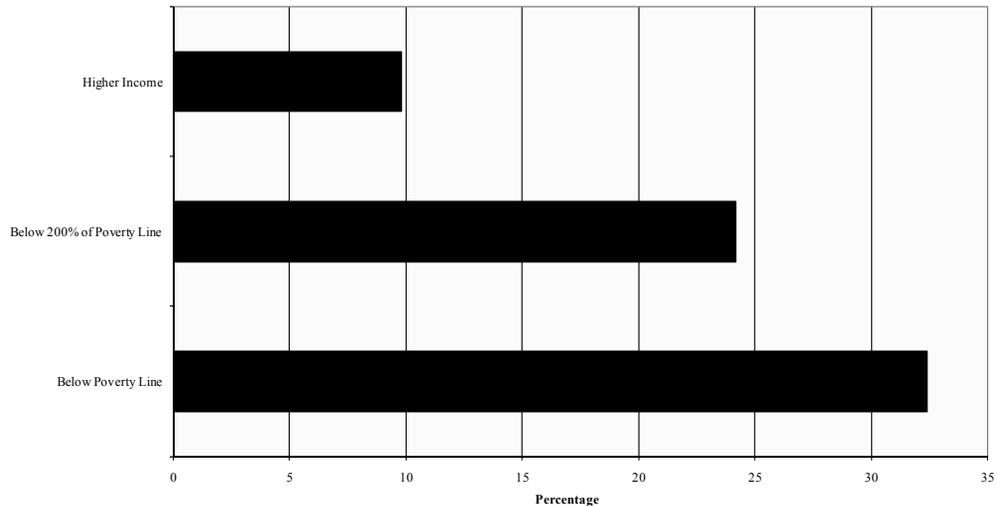
106. SIMMS, *supra* note 98, at 3.

107. *See* Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335 (2001).

a significant number of low-income workers willing to work face health limitations but have no access to Social Security Disability Insurance (SSDI) or Supplemental Security Insurance (SSI).

Researchers report that poor health is disproportionately common among low-income individuals. In 2001, for example, 24% of adults with incomes below 200% of the poverty level reported a work limitation related to health. Such limitations were almost three times as prevalent in the low-income population as in the population as a whole, as Figure 16 demonstrates.

Figure 16: Health-Related Work Limitations Among Adults, 2001¹⁰⁸



Not surprisingly, people reporting such limitations had a markedly lower rate of employment than people without them.¹⁰⁹

The Social Security system provides benefits for workers suffering work-related disability. In December 2008, SSDI paid an average monthly benefit of about \$1,000 to 7.5 million disabled workers.¹¹⁰ But SSDI eligibility conditions exclude many low-income (and indeed higher-income) workers with disabilities. Claimants must meet work-history requirements and must suffer a disability that prevents virtually any kind of work. The disability must be expected to last

108. DAVID WITTENBURG, A HEALTH-CONSCIOUS SAFETY NET? HEALTH PROBLEMS AND PROGRAM USE AMONG LOW-INCOME ADULTS WITH DISABILITIES 2 (Urban Inst. Policy Brief, 2004), available at http://www.urban.org/UploadedPDF/311065_B-62.pdf.

109. DAVID WITTENBURG & MELISSA FAVREAU, SAFETY NET OR TANGLED WEB? 4-5 (Urban Inst. Occasional Paper No. 68, 2003), available at http://www.urban.org/UploadedPDF/310884_OP68.pdf.

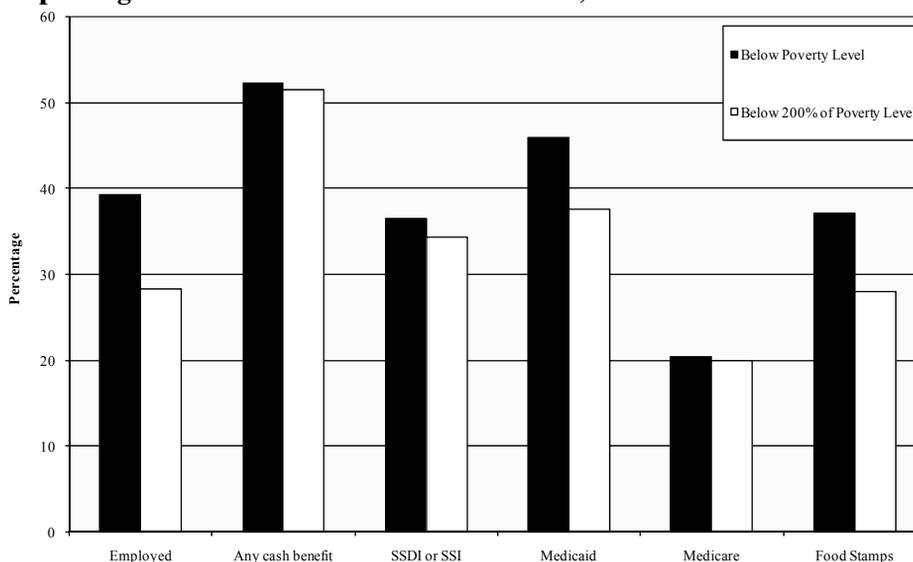
110. SOC. SEC. ADMIN., *Annual Statistical Report on the Social Security Disability Insurance Program, 2008: Beneficiaries*, in CURRENT PAYMENT STATUS, tbl.3 (2009), http://www.socialsecurity.gov/policy/docs/statcomps/di_asr/2008/sect01.html.

for at least a year (or result in death). And even those claimants who qualify for benefits must support themselves for a lag period of six months.¹¹¹

The SSI program assists very low-income individuals with disabilities. But, like SSDI, the program provides benefits based on a strict definition of disability, and, in addition, the program's income and assets requirements limit assistance to people living on very low incomes (generally those below the official poverty line).¹¹²

Figure 17 provides data on employment and program participation by low-income adults suffering a self-reported work limitation in 2001.

Figure 17: Employment and Program Participation Among Adults Reporting a Health-Related Work Limitation, 2001¹¹³



Among adults with a work limitation who are living at or below 200% of the official poverty level, only 28.3% were employed in 2001. Only about 35% collected either SSI or SSDI. Fifty percent collected a cash benefit of some type, and 30 to 40% received Medicaid and Food Stamps.

Taken together, these gaps in the U.S. safety net mean that involuntary job disruptions can leave low-income workers facing serious hardship. However blameless, workers who fall outside the legal categories of “unemployment” and “disability” must rely on Temporary Assistance for Needy Families (TANF) and state and local general assistance programs, which have both strict time limits and work and reporting rules.¹¹⁴ Many workers apparently avoid

111. See SOC. SEC. ADMIN., *supra* note 110.

112. See COMM. ON WAYS AND MEANS, *supra* note 103, at 3-4 to 3-6.

113. WITTENBURG, *supra* note 108, at tbl.2.

114. For a description of the programs available to adults with disabilities, see WITTENBURG & FAVREAU, *supra* note 109; PAMELA LOPREST & KAREN MARTINSON, SUPPORTING WORK FOR

these programs—or are ineligible. In 2007, among the 3.45 million families reporting limited or no work for one year, 46.4% had some kind of benefits including disability and TANF, meaning more than half had no benefits at all.¹¹⁵

A comparative perspective confirms that the U.S. safety net for low-income workers with children is exceptionally thin by international standards. Rainwater and Smeeding note that “the U.S. pre-transfer child poverty rate is close to the rate in several other countries—Canada, Germany, Italy, France, and Norway. But . . . the United States moves relatively few low-income children out of poverty with transfers.”¹¹⁶ Means-tested programs in the United States, they note, are much smaller than in other countries that rely on income-tested benefits. “Australia, the Netherlands, and the United Kingdom have aggregate income-tested benefits to [poor] children’s families that are from half again to almost three times larger than in the United States.”¹¹⁷

Other studies using LIS data have confirmed that the United States’ comparative position as a high child-poverty country reflects differences in legal institutions, particularly labor-market structures and taxes and transfers.¹¹⁸ U.S. social-welfare institutions reduced pre-transfer child poverty (measured as 50% of median income) in 2000 by only three percentage points compared to a fifteen-percentage-point reduction in the U.K., more than ten percentage points in the Nordic countries, and more than 16 percentage points in Israel and Poland.¹¹⁹

IV

CONCLUSIONS

Returning to an early theme, any interpretation of “making work pay” incorporates normative and empirical assumptions. My conclusion that the EITC does not make work pay can be stated more precisely in this way:

(1) The EITC does not make a large reduction in poverty, construed as a socially decent minimum measured relative to the prevailing standard of living.

(2) The EITC does not enable a minimum-wage worker to support herself and even one child at a socially decent minimum.

(3) Even together with other social-welfare programs, the EITC does not ensure a decent minimum standard of living to willing workers who suffer involuntary unemployment, health limitations, or family emergencies.

By the same token, the interpretive ambiguity implies that the EITC *can* make work pay if one sets a sufficiently low standard. For instance, these two statements are also true:

LOW-INCOME PEOPLE WITH SIGNIFICANT CHALLENGES 2–4 (Urban Inst., New Safety Net Paper 5, 2008), available at http://www.urban.org/UploadedPDF/411726_supporting_work.pdf.

115. LOPREST & MARTINSON, *supra* note 114.

116. RAINWATER & SMEEDING, *supra* note 20, at 131.

117. *Id.*

118. See Gornick & Jantti, *supra* note 40, at 32–33.

119. *Id.* at 22.

(1) The EITC makes a modest reduction in the percentage of people suffering extreme economic distress and social exclusion, as measured by the official poverty level.

(2) The EITC enables a minimum-wage worker to support herself and up to three children at a level of extreme economic and social distress, *provided that* the worker defies the profile of the typical low-income worker and manages to work full-time, year-round, without interruption due to unemployment, underemployment, disability, or family emergency.

Perhaps “making work pay” is little more than a political slogan—a cynical promise not intended to be taken seriously. Perhaps we should not be shocked that politicians claim to have achieved what they have not.

Even so, there is merit in the project of looking behind the political slogan and taking seriously the design of public institutions. A bona fide concern with the life options of low-income workers and their children suggests the need for fundamental reforms. Although this paper has a critical edge—its main agenda is to challenge the assertion that the EITC makes work pay—it also offers a structure for thinking about legal reform.

Reforming the official U.S. measure of poverty, for instance, could be an important step in establishing the need for measures to improve the well-being of low-income workers and their children. Such reforms would, of course, confront political barriers: politicians from all sides may resist a change that reveals the depth of poverty in the United States, and various constituencies will have different stakes in different methodological innovations.

The analysis here also suggests the importance of reforms in the laws governing labor markets, consumption opportunities, and the social safety net. A large literature addresses the merits of specific proposals, including (for example) paid family leave, expanded child-care subsidies, and reforms in unemployment insurance and disability insurance.¹²⁰ The design of such proposals is complex, and the politics of reform equally so. Still, the aspiration to “make work pay” requires a serious engagement with the details of the law and options for reform.

120. See, e.g., Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1 (2005) (proposing paid family leave); ACS & TURNER, *supra* note 10, at 9–12 (proposing tax credits to improve the affordability of housing and child care); MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY 202–09, 219–23, 240–44, 247–50 (1999) (proposing to expand the coverage of unemployment insurance, to expand disability benefits for temporary disability, and to expand public subsidies for child care and housing costs).