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## Humanizing Work Requirements for Safety Net Programs

Mary Leto Pareja

*University of New Mexico School of Law*

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## Humanizing Work Requirements for Safety Net Programs

By Mary Leto Pareja\*

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### I. Introduction

Politicians on the left have been proposing various forms of universal health care, including Medicare for All and Medicaid buy-in proposals, all of which vary greatly in their details.<sup>1</sup>

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\*Associate Professor of Law, University of New Mexico School of Law; Smith College, B.A., 1991; Georgetown University Law Center, J.D., 1996. For their insightful and helpful comments, I am grateful to the attendees of 2018 Junior Tax Workshop, especially Emily Satherwaite and Goldburn Maynard. Nathalie Martin and Jennifer Moore provided wise guidance at critical junctures. I also wish to thank Serena Wheaton for her research assistance and the University of New Mexico School of Law for its financial support of this project. Opinions expressed in this article are solely mine, as are any mistakes or omissions.

1. Austin Frakt & Aaron E. Carroll, *Build Your Own 'Medicare for All'*

Indeed, the Affordable Care Act (“ACA”) was an attempt to achieve near universal health care through a market-based approach.<sup>2</sup> At the same time, there is a counter-movement from politicians on the right to condition the receipt of much publicly financed health care on work.<sup>3</sup> This is an extension of the welfare to work movement of the 1990s and more recent welfare reform proposals such as former Speaker Paul Ryan’s *A Better Way*.<sup>4</sup> In the past, the United States has required recipients of cash assistance to work, but work requirements for safety-net health care is new.<sup>5</sup>

This Article explores the political and policy appeal of work requirements for public benefit programs and concludes that inclusion of such requirements can be a reasonable design choice, but not in their current form. This Article’s proposals attempt to humanize these highly controversial work requirements while acknowledging the equity concerns they are designed to address. Drawing on expansive definitions of “work” found in guidance published by the Centers for Medicare and Medicaid (“CMS”) and in various state waiver applications, this Article proposes that work requirements be approved for Medicaid (as well as other benefit programs) only if they encompass various forms of unpaid but intrinsically valuable activities. This Article also proposes that the requirements be converted from a punitive eligibility precondition that can result in the termination of Medicaid coverage into an incentive

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*Plan. Beware: There Are Tough Choices*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/interactive/2019/02/21/upshot/up-medicareforall.html>.

2. 42 U.S.C. § 18091(2)(D) (2018) (Congressional findings of the Affordable Care Act include that the individual mandate “achieves near-universal coverage”).

3. See *Medicaid Work Requirements*, FOUND GOV’T ACCOUNTABILITY, <https://thefga.org/solution/welfare-reform/work-requirements/medicaid-work-requirements/> (last visited Mar. 30, 2019); see also Dee Mahan, *Work Requirements in Medicaid Waivers: These Aren’t About Work*, FAMILIES USA (Mar. 6, 2018), <https://familiesusa.org/product/work-requirements-medicaid-waivers-these-arent-about-work>.

4. See Scott Wong, *Ryan Launches Agenda with Poverty Plan*, HILL (June 7, 2016 1:54 PM), <https://thehill.com/homenews/house/282511-ryan-launches-agenda-with-poverty-plan>; see also *Speaker Paul Ryan: Work is the Better Way*, FOUND. GOV’T ACCOUNTABILITY (May 15, 2018), <https://thefga.org/success-story/speaker-paul-ryan-work-is-the-better-way/>.

5. See *infra* Part III.

program. To incentivize people to engage in “work” activity, this Article proposes that any activity engaged in for purposes of Medicaid (or any other benefit program that utilizes similar work requirements) count as earned income for purposes of the Earned Income Tax Credit (“EITC”) and also count toward quarters of coverage for purposes of the Social Security and Medicare programs. This design would incentivize lower income individuals to work or engage in socially-valuable activities, could strengthen popular support for Medicaid by incorporating social insurance features, and would help address the long-standing problem of valuing socially important unpaid work such as caregiving.

Over the last two years, President Trump’s administration has made a policy sea change in the Medicaid program. For the first time ever, CMS authorized states to require work or other “community engagement” activities as a precondition for Medicaid eligibility.<sup>6</sup> Requiring work-like activities for Medicaid eligibility is a deviation from the federal mandatory rules of the program. However, federal law permits states (which administer and partially fund Medicaid) to request a waiver of the federal requirements, under certain conditions.<sup>7</sup> CMS

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6. See Letter from Thomas E. Price, Sec’y, Dept. of Health & Human Servs., & Seema Verma, Adm’r., Ctr. For Medicare & Medicaid Servs., to U.S. Governors (Mar. 14, 2017), <https://www.hhs.gov/sites/default/files/sec-price-admin-verma-ltr.pdf> (announcing the administration’s intent to approve “meritorious innovations that build on the human dignity that comes with training, employment and independence”); see also Letter from Brian Neale, Dir., Ctr. for Medicaid & CHIP Servs., to State Medicaid Dirs. (Jan. 11, 2018), <https://www.medicaid.gov/federal-policy-guidance/downloads/smd18002.pdf> (providing guidance for states interested in pursuing demonstration waivers that incorporate work or other community engagement requirements into the state’s eligibility rules).

7. Section 1115 of the Social Security Act authorizes the Secretary of the U.S. Department of Health and Human Services (“HHS”) to “waive provisions of Section 1902 of the Medicaid Act for a limited period of time to allow states to engage in innovative ‘experimental, pilot, or demonstration’ projects that are ‘likely to assist in promoting the objectives of [the Medicaid Act].’” Sidney D. Watson, *Out of the Black Box and Into the Light: Using Section 1115 Medicaid Waivers to Implement the Affordable Care Act’s Medicaid Expansion*, 15 YALE J. HEALTH POL’Y L. & ETHICS 213, 214 (2015) (quoting Social Security Act § 1115(a), 42 U.S.C. 1315(a)(1)(2012)); see also Anne McKenzie, *Section 1115 Waivers, the Future of Medicaid Expansion*, 27 HEALTH L. 12, 12 (2015) (“Upon approving a Section 1115 Waiver, HHS provides the state with Federal Financial Participation for costs which would not otherwise be covered under

granted a waiver to Kentucky on January 12, 2018, which authorized Kentucky to require work or certain other activities as a precondition for Medicaid eligibility for many Medicaid enrollees.<sup>8</sup> Since that time, CMS has authorized similar waivers for Arizona, Arkansas, Indiana, Kansas, Maine, Michigan, New Hampshire, Ohio, Utah, and Wisconsin.<sup>9</sup> Of these eleven approved waiver applications, three have been set aside by the courts (Arkansas, Kentucky, and New Hampshire), two were withdrawn or not accepted by the states (Kansas and Maine),

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the Medicaid expansion plan”).

8. See Letter from Brian Neale, Deputy Adm’r., Ctr. for Medicare & Medicaid Servs., to Adam Meier, Deputy Chief of Staff for Policy, Off. of Governor Matthew Bevin (Jan. 12, 2018), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ky/health/ky-health-cms-appvl-011218.pdf>; see also Letter from Matthew G. Bevin, Governor, Kentucky, to Sylvia Burell, Sec’y of the Dep’t of Health and Human Servs., (Aug. 24, 2016), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ky/ky-health-pa.pdf> (detailing the Kentucky Section 1115 waiver application dated August 24, 2016); Letter from Adam Meier, Deputy Chief of Staff for Policy, Off. of Governor Matthew Bevin to Brian Neale, Deputy Adm’r., Ctr. for Medicare & Medicaid Servs. (July 3, 2017), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ky/ky-health-pa2.pdf> (detailing modifications to the original Kentucky Section 1115 waiver application). The original Kentucky waiver was challenged in court and sent back to the federal government for additional review. See *Stewart v. Azar*, 313 F. Supp. 3d 237 (D.D.C. 2018). The CMS reapproved the Kentucky waiver following an additional public comment period, but the Court once again struck the approval and remanded the application to the federal government for further review. The case is currently on an expedited appeal at the United States Court of Appeals for the District of Columbia with oral arguments scheduled to occur by October 1, 2019. See *infra* note 76 and accompanying text.

9. See *Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers by State*, HENRY J. KAISER FAMILY FOUND., <https://www.kff.org/medicaid/issue-brief/medicaid-waiver-tracker-approved-and-pending-section-1115-waivers-by-state> (last updated July 30, 2019) [hereinafter *KFF Medicaid Tracker*]; see also *A Snapshot of State Proposals to Implement Medicaid Work Requirements Nationwide*, NAT’L ACAD. FOR STATE HEALTH POL’Y, <https://nashp.org/state-proposals-for-medicaid-work-and-community-engagement-requirements/> (last updated July 29, 2019) [hereinafter *NASHP Snapshot*]; see also CTRS. FOR MEDICARE & MEDICAID SERVS., *Section 1115 Demonstrations: State Waivers List*, MEDICAID.GOV <https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/index.html> (last visited Aug. 6, 2019) [hereinafter *CMS State Waivers List*] (locating details of each state’s waiver approval and application materials, filter by state (e.g., Arkansas) and waiver authority (e.g., Section 1115)).

and five have yet to be implemented (Arizona, Michigan, Ohio, Utah, and Wisconsin). Only Indiana has an approved and implemented program that has not yet fallen to a court challenge.<sup>10</sup> In addition to these eleven approved states, as of the time this Article was being finalized, seven states had work requirement waivers pending before CMS—Alabama, Mississippi, Oklahoma, South Carolina, South Dakota, Tennessee, and Virginia<sup>11</sup>

CMS guidance currently requires states to exempt certain people from work requirements, and while waiver proposals to date exempt certain populations from the requirement, such as those unable to work, much more could be done to humanize the highly controversial work requirements for Medicaid eligibility.<sup>12</sup> Currently, the proposals also allow certain forms of unpaid activity, such as attending school, to count as work.<sup>13</sup> Thus, the work required is not limited to paid labor, but encompasses other forms of intrinsically valuable activities. The correct label for the new requirements is not “work” requirements but “community engagement” requirements. It is probably even more accurate to think of them as “industry” or “social contribution” requirements.

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10. See *KFF Medicaid Tracker*, *supra* note 9; see also NASHP Snapshot, *supra* note 9; see also *CMS State Waivers List*, *supra* note 9.

11. See *KFF Medicaid Tracker*, *supra* note 9; NASHP Snapshot, *supra* note 9; see also *CMS State Waivers List*, *supra* note 9. North Carolina submitted a waiver proposal but withdrew the proposal when state enabling legislation failed to pass. NASHP Snapshot, *supra* note 9.

12. CTRS. FOR MEDICARE & MEDICAID SERVS., *1115 Community Engagement Initiative: Frequently Asked Questions*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/section-1115-demo/community-engagement/index.html> (last visited Mar. 31, 2019) (indicating that CMS will only support waiver requests that target “adult Medicaid beneficiaries that are non-elderly, non-pregnant, and that are eligible for Medicaid on a basis other than disability” and requiring that states “take steps to accommodate certain individuals that may have difficulty in meeting program requirements, such as individuals with disabilities, those with substance use disorders and those who have been certified by a medical professional as having a medical condition that would prevent them from meeting the requirements”); see *KFF Medicaid Tracker*, *supra* note 9; NASHP Snapshot, *supra* note 9; see also *CMS State Waivers List*, *supra* note 9 (detailing each state’s waiver approval and application materials).

13. See *KFF Medicaid Tracker*, *supra* note 9; NASHP Snapshot, *supra* note 9; see also *CMS State Waivers List*, *supra* note 9 (detailing each state’s waiver approval and application materials).

As they are currently structured, there has been great resistance to the new requirements. These requirements have been challenged in court,<sup>14</sup> and scholars have made convincing arguments against them.<sup>15</sup> Because health and health care is a basic human need, restrictions on health care present distinct equity and justice concerns. In practice and as implemented, community engagement requirements for social safety net programs reduce the enrollment in the programs, sometimes significantly, and often for reasons unrelated to the recipient not working. For example, Arkansas has seen a sharp decline in enrollment (approximately 20% in the first six months) and that decline appears to be attributable in large part to problems reporting qualifying activity rather than a failure to actually engage in the qualifying activity.<sup>16</sup> A recent study published in the *New England Journal of Medicine* that used a survey tool to examine the implementation of Medicaid work requirements in Arkansas found that “implementation of the first-ever work requirements in Medicaid in 2018 was associated with significant losses in health insurance coverage in the initial 6 months of the policy but no significant change in employment.”<sup>17</sup>

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14. See *infra* notes 83–100 and accompanying text.

15. See, e.g., Laura D. Hermer, *What to Expect When You’re Expecting . . . TANF-Style Medicaid Waivers*, 27 ANNALS HEALTH L. 37 (2018); Laura D. Hermer, *Medicaid: Welfare Program of Last Resort, or Safety Net*, 44 MITCHELL HAMLINE L. REV. 1203 (2018); Brief for Deans, Chairs, and Scholars as Amici Curiae Supporting Plaintiffs, *Stewart v. Azar*, 308 F. Supp. 3d 239 (D.D.C. 2018) (No. 1:18-cv-00152-JEB), <https://publichealth.gwu.edu/sites/default/files/downloads/HPM/Kentucky%20Medicaid%20Proposed%20Amici%20Curiae%20Brief.pdf> [hereinafter Amicus Brief for Deans]; see also Susannah Luthi, *Medicaid Work Requirements Violate Program’s Intent, Scholars Say*, MOD. HEALTHCARE (Apr. 9, 2018), <http://www.modernhealthcare.com/article/20180409/NEWS/180409918> (discussing the amicus brief filed health law scholars).

16. See Shannon Firth, *Report Rips Arkansas Medicaid Work Requirement*, MEDPAGE TODAY (Jan. 14, 2019), <https://www.medpagetoday.com/publichealthpolicy/medicaid/77425>; see also Harris Meyer, *Arkansas drops 3,815 more Medicaid enrollees over work requirement*, MOD. HEALTHCARE (Nov. 15, 2018), <https://www.modernhealthcare.com/article/20181115/NEWS/181119966>.

17. Benjamin D. Sommers, Anna L. Goldman, Robert J. Blendon, John Orav, & Arnold M. Epstein, *Medicaid Work Requirements—Results from the First Year in Arkansas*, NEW ENG. J. MED. (June 19, 2019), <https://www.nejm.org/doi/full/10.1056/NEJMs1901772>.

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This Article does not seek to justify Medicaid work requirements, especially as they are currently structured.

However, the desire to demand work in exchange for benefits is not new and will not fade easily. Indeed requiring work in exchange for charity dates back to the English poor laws that Charles Dickens critiqued in works like *Oliver Twist* and *A Christmas Story*.<sup>18</sup> The same attitude toward poor relief has been a part of United States society throughout its history.<sup>19</sup> The period from about 1930 until about 1980 saw a slight retreat from these policies. Poorhouses were phased out, and cash welfare through the Aid to Dependent Children program was not tied to work.<sup>20</sup>

Age-old attitudes about providing charity to the able-bodied resurfaced, however. In the 1980s, states began seeking and receiving federal waivers that would allow the state to require work in exchange for cash welfare.<sup>21</sup> In 1996, under President Bill Clinton and a Republican Congress, the federal government added a federal requirement that cash welfare be tied to work.<sup>22</sup> The food stamp program (currently called the Supplemental Nutrition Assistance Program or “SNAP”) has had a work registration requirement since 1971.<sup>23</sup> There was a

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18. See generally William P. Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73 (1996).

19. See generally William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F.L. REV. 35 (1996).

20. MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 132–33 (2 ed. 1996) (tracing the origins of the Aid to Dependent Children program to mothers’ pensions, which many states had enacted and which were targeted toward deserving widows with dependent children; mothers’ pensions carried restrictive behavioral clauses but were not tied to work).

21. Peter L. Szanton, *The Remarkable “Quango”: Knowledge, Politics, and Welfare Reform*, 10 J. POL’Y ANALYSIS & MGMT. 590, 595–97 (1991).

22. See The Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (The Personal Responsibility and Work Opportunity Act renamed the welfare program Temporary Aid to Needy Families (TANF), block granted federal funds to the states, imposed time limits on receiving benefits, and required that at least 50% of recipients be working or involved in an alternate qualifying activities). States have flexibility with respect to implementing the work requirements. See 42 U.S.C. § 607 (2018).

23. The Food Stamp Act § 2, 84 Stat. 2048 (1971) (establishing a social policy to “alleviate . . . hunger and malnutrition . . . permit[ting] low-income households to purchase a nutritionally adequate diet through normal channels



recent effort in 2018 to expand and strengthen those federal work requirements for food stamps through the reauthorization of the farm bill in the form of the Agriculture and Nutrition Act of 2018.<sup>24</sup> That effort was defeated, and the farm bill passed without the more stringent work requirements, but the effort evidences the resurging interest in requiring work in exchange for charity.<sup>25</sup> The most politically popular support programs in the United States are explicitly based on paid work. Medicare and Social Security require most people to accumulate a record of paid work before receiving benefits.<sup>26</sup> The EITC is the largest federal income-supplement program, and it is based on paid work.<sup>27</sup>

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of trade”).

24. Jeff Stein, *Deal to Pass Farm Bill Scraps House GOP Plan for New Food Stamp Work Requirements*, WASH. POST (Nov. 29, 2018), [https://www.washingtonpost.com/business/economy/congress-scraps-house-gop-food-stamp-work-requirement-plan-in-farm-bill-deal/2018/11/29/04854362-f3f7-11e8-aeaa-b85fd44449f5\\_story.html?utm\\_term=.4f2312560b08](https://www.washingtonpost.com/business/economy/congress-scraps-house-gop-food-stamp-work-requirement-plan-in-farm-bill-deal/2018/11/29/04854362-f3f7-11e8-aeaa-b85fd44449f5_story.html?utm_term=.4f2312560b08).

25. Catie Edmondson, *Senate, Rejecting Curbs on Food Stamps, Passes Compromise Farm Bill*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/us/politics/farm-bill-compromise-senate.html>. Currently, recipients of food assistance are required to register for work, not voluntarily quit a job or reduce their hours, take a job if offered, and participate in employment and training programs, if assigned by the State. *Am I Eligible for SNAP?* USDA (Nov. 16, 2018), <https://www.fns.usda.gov/snap/eligibility>. To receive food assistance for longer than three months, an individual between 18 and 49 who does not have dependents (an ABAWD, Able Bodied Adult Without Dependents) “must work at least 80 hours per month, participate in qualifying education and training activities at least 80 hours per month, or comply with a workfare program.” *Id.*; *Able-Bodied Adults Without Dependents (ABAWDs)*, USDA (July 17, 2018), <https://www.fns.usda.gov/snap/able-bodied-adults-without-dependents-abawds>. These rules do not apply to children or seniors or to people who are disabled, pregnant, or who are caring for a child or incapacitated family member. *Id.* The 2018 proposal would have expanded to all adults capable of work the affirmative requirement of working or participating in a work training program for at least 20 hours per week. Agriculture Improvement Act of 2018, H.R. 2, 115th Cong. (2018) (introduced in the House on Apr. 12, 2018).

26. See SOC. SECURITY ADMIN., *Understanding the Benefits*, Pub. No. 05-10024 1 (Jan. 2019), <https://www.ssa.gov/pubs/EN-05-10024.pdf>; see also *Who is Eligible for Medicare?*, HHS.GOV, <https://www.hhs.gov/answers/medicare-and-medicare/who-is-eligible-for-medicare/index.html> (last visited Apr. 8, 2019).

27. In 2017, the federal government spent \$59.8 billion on the refundable portion of EITC, 34% of the entire outlay for all public assistance and related programs combined (\$175.2 billion including the EITC). The second-largest needs-based cash assistance program in 2017 was the supplemental security

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Part II of this Article explores the political and policy context of work requirements in public benefit programs. It explores the stated justifications for adoption of the requirements, explores some philosophical underpinnings of the requirements, and looks at the problem of adequately valuing unpaid work. Part III of this Article looks at the specific political and legal backgrounds of work requirements in various benefit programs—from social insurance programs like Social Security and Medicare to public assistance programs like Temporary Aid to Needy Families (“TANF” or welfare) or SNAP (food stamps) to combination programs like the EITC. Part IV outlines this Article’s proposal: that work requirements only be allowed if they are broad enough to fully encompass various form of valuable unpaid activity, that work requirements not be punitive in nature but rather function as an incentive, and that any activity that qualifies for the work requirement also be credited for purposes of the EITC, Social Security, and Medicare.

## II. The Political and Policy Context of Work Requirements

There is a range of potential political justifications for the desire for work requirements in benefit programs. On the extreme end, it is unquestionable that some proponents are acting out of intentional racial enmity or class hatred. It may even be true that most proponents hold their beliefs as a result of unconscious racial bias. It is perceived truth (though not actual truth), that most recipients of social welfare benefits are black and brown people.<sup>28</sup> The image of the lazy welfare queen is alive and well in certain segments of our society. Professor Martin Gilens found in a study that the racial attitudes of white people were the biggest predictor of their attitudes toward

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income program at \$51.9 billion. In comparison, TANF payments were only \$20 billion in 2017. Other non-cash assistance programs are more expensive. For example, the federal government spent \$99.6 billion in 2017 on food and nutrition assistance programs, including SNAP. U.S. OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2019: HISTORICAL TABLES: BUDGET OF THE UNITED STATES GOVERNMENT tbl.11.3, <https://www.govinfo.gov/app/details/BUDGET-2019-TAB/BUDGET-2019-TAB-12-3> (last visited Apr. 8, 2019).

28. Jazmin L. Brown-Iannuzzi et al., *The Relationship Between Mental Representations of Welfare Recipients and Attitudes Toward Welfare*, 28 PSYCHOL. SCI. 92, 93 (2017).

welfare.<sup>29</sup> This obviously is an illegitimate basis for enacting social policy, and we cannot enact policies designed to appease these beliefs.

Also on the extreme end are those who argue that all taxation is theft, or that any taxation that supports redistribution of wealth is theft.<sup>30</sup> The extreme form of this libertarian, self-interested belief would not support social welfare programs at all. Thus, any proposal (such as this) to strengthen or improve such programs will be unable to obtain their approval. However, few fully espouse the extreme form of this view. For example, political support for Medicaid and social support programs for those clearly unable to support themselves is fairly strong. However, when it comes to those who appear able to contribute—the able-bodied—equal sacrifice principles (discussed below) become more salient. Policies requiring work in exchange for benefits is a moderation of more extreme views that use the self-interest of the taxpayer to declare that any taxation to support redistribution is government theft and illegitimate.

A strong streak of paternalism runs through the stated justifications for imposing work requirements in social welfare programs. The myth that hard work results in economic success is prevalent; if benefit recipients would only work harder, they could pull themselves out of poverty and stop being dependent on handouts.<sup>31</sup> This narrative is largely myth; too often hard

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29. See generally MARTIN GILENS, *WHY AMERICANS HATE WELFARE* (1999); see also Ashley Jardina, *Why People Love 'Assistance to the Poor' But Hate 'Welfare'*, TALK POVERTY (Jan. 29, 2018), <https://talkpoverty.org/2018/01/29/people-love-assistance-poor-hate-welfare>.

30. See MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* 63 (NYU Press 2003).

31. Horatio Alger is perhaps the best known purveyor of the “rags to riches” story. His stories commonly feature a young boy of limited means who manages to climb the social ladder and attain middle class respectability. Many people think of the Alger hero as someone who becomes a success through hard work. But most of Alger’s stories have a *deus ex machina* device—an older, well-off gentleman who takes an interest in the young hero and provides the means for the boy to rise out of poverty. The young hero does not rescue himself solely through his own hard work, thrift, and honesty. See Michael Moon, “*The Gentle Boy from the Dangerous Classes*”: *Pederasty, Domesticity, and Capitalism in Horatio Alger*, 19 REPRESENTATIONS 87, 89 (1987) (“As a number of critics have noted, Alger’s tales generally prove on inspection to be quite different from what the “Alger myth”—“rags to riches”

work does not result in economic success, and it is exceptionally difficult to climb out of poverty on the strength of only an individual's sole efforts.<sup>32</sup> That does not mean that hard work is irrelevant or dispensable. Hard work is a necessary, though usually insufficient, element of economic success, unless one wins the lottery.

There are other less objectionable or less extreme political and policy justifications for adopting work requirements that also are not paternalistic. Because social welfare programs are funded by general taxes, taxpayers legitimately question whether the imposition of taxes for this purpose is fair. Most of these political justifications (at least the legitimate ones) hinge on the definition or perception of what is fair.

#### A. A Taxonomy of Justifications

In 2006, Professor Noah Zatz outlined a taxonomy of justifications for conditioning eligibility for means-tested benefit transfers on work requirements. He suggested that most justifications (apart from explanations like racial animus or a desire to cut enrollment) fall into three categories: self-sufficiency (providing for oneself economically), self-improvement (apart from economic status), and reciprocity (providing a benefit to society in exchange for support from society).<sup>33</sup> It is instructive to use this taxonomy to analyze the

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for industrious poor boys—has prepared readers to expect. Rather than promising riches to boy readers, they hold out merely the prospect of respectability; also, rather than presenting an example of “rugged” and competitive individualism, they show boys “rising” through a combination of genteel patronage and sheer luck”).

32. See PETER TEMIN, *THE VANISHING MIDDLE CLASS: PREJUDICE AND POWER IN A DUAL ECONOMY* (2017) (arguing that the United States has a dual economy—one for the rich and one for the poor—and outlining the reasons why it is increasingly difficult to move from the poor economy into the rich economy); see also BARBARA EHERENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (2001) (detailing the author's experiences during an experiment that had the author spending a month in various locations and seeing how difficult it was to find and work a low-wage job, secure housing and saving enough money to pay a second month's rent); see also LINDA TIRADO, *HAND TO MOUTH: LIVING IN BOOTSTRAP AMERICA* (2014) (detailing the author's experience living as a working poor person and how easy it is to move downward economically).

33. Noah D. Zatz, *What Welfare Requires from Work*, 54 *UCLA L. REV.*

stated reasons for adding work requirements to the Medicaid program.

On the Federal level, Seema Verma, Administrator for CMS, gave a speech on November 7, 2017, at the National Association of Medicaid Directors 2017 Fall Conference that sheds light on the policy reasons for the federal government being amenable to state plans to require work for Medicaid eligibility. Her speech outlined reasons for requiring work from many Medicaid recipients, and her reasons fit neatly into Professor Zatz's taxonomy. In the context of discussing extending Medicaid coverage to working-age, able-bodied adults, she stated, "we should celebrate helping people move up, move on, and move out" (referencing self-sufficiency) and explained that states "want to develop programs that will help [people] break the chains of poverty and live up to their fullest potential" (appealing to self-sufficiency as well as self-improvement).<sup>34</sup> She also stated that "[e]very American deserves the dignity and respect of high expectations" (self-improvement) and that "meaningful work is vital to economic self-sufficiency, self-esteem, wellbeing and improving [the] health" of the able-bodied just as it is vital to people living with disabilities (a mixture of self-sufficiency and self-improvement).<sup>35</sup> She also explained, "we need all Americans to be active participants in their communities" (an appeal to reciprocity).<sup>36</sup>

The self-improvement and self-sufficiency appeals seem dominant here, which aligns with the paternalistic view of work requirements—a "tough love" approach to incentivize people to move themselves into the middle-class. However, the appeals to reciprocity and preserving human dignity are not insignificant. While pointless work is demeaning, work that contributes to your family or community is fulfilling. Thus, despots have forced prisoners to engage in meaningless tasks, such as moving rocks

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373, 386 (2006).

34. Seema Verma, Remarks by Administrator at the National Association of Medicaid Directors (NAMMD) 2017 Fall Conference (Nov. 7, 2017), <https://www.cms.gov/newsroom/fact-sheets/speech-remarks-administrator-seema-verma-national-association-medicaid-directors-namd-2017-fall>.

35. *Id.*

36. *Id.*

from one pile to another, as a form of punishment.<sup>37</sup> At the same time, numerous studies affirm that elders who have a sense of purpose have better health outcomes, and older people often find a sense of purpose from things other than paid work—like volunteering or caring for grandchildren.<sup>38</sup>

## B. Ability to Pay and Equal Sacrifice

In meaningful respects, the political appeal of work requirements for social safety net programs can be explained through the lens of tax policy. One of the primary principles of tax policy is that taxes should be allocated based at least in part on taxpayers' respective abilities to pay.<sup>39</sup> Thus, our tax system expects higher income taxpayers to pay a larger share of their income than lower income taxpayers. Traditional ability to pay theory does not apply directly to our problem because we are not comparing two payers of tax to fund general programs, but rather we are comparing the funders of social welfare programs with the direct beneficiaries of those programs.

At the root of one interpretation of ability to pay in tax policy, however, is the principle that all taxpayers should make an equal sacrifice for the good of the society.<sup>40</sup> The sacrifices may

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37. See Noah Lederman, *Life and Death, Side by Side*, TABLET MAG. (Jan. 27, 2017), <https://www.tabletmag.com/jewish-life-and-religion/221745/life-and-death-side-by-side> (While describing the Nazi concentration camp Majdanek, the author's "grandparents recounted stories of digging up boulders and carrying them from one side of the camp only to have to move them back to the other side of the camp the next day"); *Alabama to Make Prisoners Break Rocks*, N.Y. TIMES (Jul. 29, 1995), <https://www.nytimes.com/1995/07/29/us/alabama-to-make-prisoners-break-rocks.html> (describing an Alabama plan to have "rocks trucked to at least three state penitentiaries so that chained inmates can break the stones into pea-sized pellets," and noting that "[t]he only goal of the program is to increase the level of punishment for prisoners, since state highway officials say they have no use for the crushed rock.").

38. Judith Graham, *Seniors with Strong Sense of Purpose Often Live Stronger*, CHI. TRIBUNE (Sept. 7, 2017, 9:32 AM), <https://www.chicagotribune.com/lifestyles/health/ct-seniors-sense-of-purpose-20170907-story.html>.

39. See generally John E. Donaldson, *The Future of Transfer Taxation: Repeal, Restructuring and Refinement, or Replacement*, 50 WASH. & LEE L. REV. 539, 545 (1993).

40. See JOEL SLEMROD & JON BAKIJA, *TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES* 25 (5th ed. 2017) ("According to the ability-to-pay principle, tax burdens should be related not to what a family receives from government but rather to its ability to bear the sacrifice of material well-

not be equal in monetary terms, but are proportionally equal, meaning that each taxpayer is left in roughly the same position relative to each other. Each sacrifices an equal measure of their own welfare. This is illustrated by the New Testament parable of the *Widow's Offering*:

As Jesus sat facing the offering box, he watched how the crowd was dropping their money into it. Many rich people were dropping in large amounts. Then a destitute widow came and dropped in two small copper coins, worth about a cent. He called his disciples and told them, "I tell all of you with certainty, this destitute widow has dropped in more than everyone who is contributing to the offering box, because all of them contributed out of their surplus, but out of her poverty she has given everything she had to live on."<sup>41</sup>

The widow makes a much smaller monetary contribution, but sacrifices a much greater portion of her own welfare than those who made a larger monetary contribution.

While the *Widow's Offering*, and traditional ability to pay analysis, are concerned with relative monetary contributions, we can think about equal sacrifice in terms of non-monetary contributions as well. While our society has never adequately valued in monetary terms the enormous unpaid work of parents (most often mothers) and other caregivers, there is no question that society considers such work a high calling and a benefit to society in general. Thus, the sacrifice of caregiving is sometimes given a preference in the tax system, though in indirect ways, such as through spousal IRAs, joint tax returns and rate tables, and the income exclusion for spousal health insurance.<sup>42</sup>

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being that a tax burden entails. Reasoning from the plausible idea that giving up a dollar via tax is a lot less of a sacrifice for a billionaire than for a single mother struggling to make ends meet, an equal sacrifice requires higher tax payments from a well-to-do family.”)

41. *Mark* 12: 41–44 (International Standard Version).

42. See *Spousal IRAs*, WISER, <https://www.wiserwomen.org/images/imagfiles/spousal-iras-2018.pdf> (last visited Apr. 7, 2019) (discussing spousal IRAs

Thinking about ability to pay in terms of equal sacrifice, it becomes clear that our ideas of fairness are tied closely with relative contributions (monetary or not) made by individuals to society. Thus, the taxpaying population resists paying for programs where it is perceived (rightly or wrongly) that the beneficiaries are not making an equal sacrifice for the good of society. Public support for social welfare programs generally is high when the recipient is considered “deserving.” Indeed, welfare (now TANF) began as a program to support widows of World War II soldiers who were raising children alone, a very appealing population.<sup>43</sup> This leads the taxpaying public to demand that beneficiaries of programs funded by taxes make an equal sacrifice in the form of work requirements (or community engagement requirements). This is related to the psychological concept of equity theory; evidence shows that people feel more satisfaction when the rewards they receive are related to the efforts they have made.<sup>44</sup> As Professor Sheffrin has explained, “[e]quity theory proves a natural explanation for the ‘work tested state.’ The theory predicts that individuals will require effort in exchange for any provision of income, as they attempt to ensure that society matches outputs with inputs. In this case, the output is assistance from the state, while the input in some type of work effort.”<sup>45</sup>

### C. Endowment Taxation and the Free Rider Problem

Ability to pay in a more theoretical sense takes into account not only the actual amount of income (or value) produced by individuals, but the amount of income (or value) that individuals are able to produce. Thus, a person able to produce more is taxed more, even if he or she chooses to produce less. This is called endowment or ability taxation.<sup>46</sup> Endowment taxation lives

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and their benefits); *see also For Caregivers*, IRS, <https://www.irs.gov/faqs/irs-procedures/for-caregivers> (last visited Apr. 7, 2019); *Employee Benefits*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/employee-benefits> (last visited Apr. 7, 2019).

43. KATZ, *supra* note 20, at 245.

44. *See* STEVEN M. SHEFFRIN, TAX FAIRNESS AND FOLK JUSTICE 34, 119 (2013).

45. *Id.* at 135.

46. *See generally* Erick J. Sam, *Endowment Taxation and Equality of*



almost exclusively in theory because it is supremely impracticable to determine each individual's potential to produce. However, it underlies many of our normative judgments about fairness. Endowment taxation is related to the equal sacrifice principle and equity theory, and is also concerned with the problem of the free rider. Endowment taxation requires individuals to work to their maximum capacity. If we are working to maximize our potential, under equity theory we expect to reap the reward of that effort personally. We may be willing to share those rewards with others, or at least tolerate being forced to share, but generally speaking, only if we feel they are putting in an equal effort—a corollary to equity theory. We resent, and harshly judge, those who engage in “free riding”—who take advantage of benefits without equitably sharing burdens. This sense of fairness is, perhaps, especially strong in American society, given our historic emphasis on sobriety, thrift, hard work, and self-reliance.

There is another way to think about the interaction of endowment taxation, equity theory, and social welfare benefits. If a person is able to provide for his or her basic needs (and the basic needs of his or her family), endowment taxation theory says that the individual should be required to do so. To do otherwise would ignore the person's potential for generating income or value. The able person effectively is “taxed” by not receiving benefits. However, if a person is not able to provide for his or her needs, then endowment taxation theory provides that that person is “taxed” less or not at all; in the social welfare context, this means that the person is eligible for benefits. Thus, benefits are restricted or denied to the able-bodied, but granted to those not able to provide for themselves. This matches the current design of all of the Medicaid waivers, where community engagement requirements are waived for certain categories of individuals.

#### D. The Problem of Adequately Valuing Unpaid Work

It is especially interesting that all of the Section 1115 waivers accept certain forms of unpaid activity to fulfill the work

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*Resources*, 22 FLA. TAX REV. 243 (2018).

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requirement.<sup>47</sup> For example, attending school or job training programs or engaging in job search activities are accepted as work or give rise to an exemption under all of the Section 1115 waivers that have been approved or that are pending.<sup>48</sup> All waivers (except for Utah) accept volunteer work or community service as work worthy of granting benefits.<sup>49</sup> Most interesting of all is that multiple states count certain caregiving as work for purposes of Medicaid eligibility (the other states grant an exception to the work requirement for caregivers).<sup>50</sup> It seems clear that equal sacrifice and anti-free-riding principles are at work in these rules.

Feminist tax scholars have explored the problems inherent in market-based economies where one gender performs the bulk of the unpaid, and thus undervalued, work. Scholars also have offered proposals for better valuing such work. For example, in 1996, Professor Staudt wrote an article critiquing prior proposals that sought to achieve greater gender equity by focusing on incentivizing women to enter the paid work

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47. See *KFF Medicaid Tracker*, *supra* note 9; NASHP Snapshot, *supra* note 9; see also *CMS State Waivers List*, *supra*, note 9 (detailing each state's waiver approval and application materials). Some states (such as Mississippi) limit job search activities to participation in state-run programs; others (such as Ohio) exempt students rather than giving them credit for the education. See NASHP Snapshot, *supra* note 9; see also *CMS State Waivers List*, *supra* note 9. Utah takes an interesting approach and exempts anyone working over 30 hours per week, making others who are not otherwise exempt participate in a work registration program. See NASHP Snapshot, *supra* note 9; see also *CMS State Waivers List*, *supra* note 9.

48. See *KFF Medicaid Tracker*, *supra* note 9; NASHP Snapshot, *supra* note 9; see also *CMS State Waivers List*, *supra* note 9. Some states (such as Michigan) limit the volunteer hours that will qualify or require that the work be performed in particular settings (such as Tennessee). See *KFF Medicaid Tracker*, *supra* note 9; NASHP Snapshot, *supra* note 9; see also *CMS State Waivers List*, *supra* note 9.

49. See *KFF Medicaid Tracker*, *supra* note 9; NASHP Snapshot, *supra* note 9; see also *CMS State Waivers List*, *supra* note 9. These states (Indiana, Kentucky, and New Hampshire, and Virginia) actually give work credit for caregiving services for disabled relatives who are not dependent on the caregiver, and they exempt caregivers of children. See *KFF Medicaid Tracker*, *supra* note 9; NASHP Snapshot, *supra* note 9; see also *CMS State Waivers List*, *supra* note 9.

50. See KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES, KENTUCKY HEALTH § 1115 DEMONSTRATION WAIVER 1, 17, <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ky/ky-health-pa.pdf> (last visited Apr. 1, 2019).

market.<sup>51</sup> Rather, she proposed that unpaid domestic labor be taxed as imputed income, anticipating that taxing such labor would signal its value to the market and also would build eligibility for social security, disability, and health care benefits tied to wage history.<sup>52</sup> I agree with Professor Staudt's basic premise that any potential policy solution should recognize the dignity and importance of unpaid labor. Imposing an income tax on such labor, however, seems ill advised. Even with the devices she proposes as methods of mitigating the economic bite of taxation, politically speaking, taxing unpaid labor would surely be regarded as punitive and an attack on traditional families.

Other proposals have suggested direct credits for particular programs. For example, Professor Karen Holden proposed an explicit homemaker credit that would replace spousal benefits in Social Security.<sup>53</sup> My proposal, described in Part III of this Article, also allows the person who performs the unpaid labor of child rearing and homemaking to build credit toward retirement income through Social Security. Like Professor Holden's proposal, my proposal values unpaid labor on its own terms—not merely as protection for the vulnerable or simply for being a spouse but as a benefit earned for economically valuable activity. However, my proposal also builds credit for Medicare, taps into government programs that subsidize low-paid work like the EITC thus providing economic value before retirement for this important work, and sidesteps the imposition of taxation.

The current push for requiring work in exchange for benefits is not limited to the United States, although it is perhaps more deeply and widely held here than in Europe. Finland recently engaged in a pilot program to give a monthly cash stipend to a random sample of unemployed people, without

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51. Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996).

52. *Id.* at 1574 ("Once formally recognized, society is likely to value non-market housework activities similarly to market activities, thereby entitling women to social welfare benefits that are currently tied only to waged labor in the market").

53. Karen C. Holden, *Supplemental OASI Benefits to Homemakers Through Current Spouse Benefits, a Homemaker Credit, and Childcare Drop-Out Years*, in *A CHALLENGE TO SOCIAL SECURITY: THE CHANGING ROLES OF WOMEN AND MEN IN AMERICAN SOCIETY* 41, 52 (Richard V. Burkhauser & Karen C. Holden eds., 1982).

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eligibility requirements or limitations on how the cash is used.<sup>54</sup> If recipients found work, their cash stipends were not reduced. The program was touted as Europe's first experiment with universal income (although the stipend amount was too small to actually function as a true basic income and the pilot participants were limited in number rather than being universal). However, the Finnish government recently declined to extend funding for the program, the program ended at the end of 2018, and legislation has been introduced to condition unemployment benefits on working or engaging in training for a minimum amount of time (eighteen hours in three months, far less onerous than the proposed Medicaid waivers).<sup>55</sup>

### III. Current Community Engagement Requirements for Social Welfare Programs

#### A. Medicaid

Medicaid is a federal program that provides federal funding to states that operate an approved health care program targeted primarily at lower income individuals and people with disabilities or other special medical needs. Medicaid programs are funded partially with state and partially with federal dollars, with the federal government providing matching funds known as the federal medical assistance percentage ("FMAP"). With some exceptions, the federal match is a minimum of 50% and a maximum of 83% and varies depending on the state's per capita income, with states whose residents are poorer receiving a higher match.<sup>56</sup> For example, in 2019, the basic FMAP matching rate for Mississippi is 76.39% (the highest in the country), followed by New Mexico with an FMAP matching rate

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54. Jon Henley, *Finland to End Basic Income Trial After Two Years*, GUARDIAN (Apr. 23, 2018, 12:24 PM), <https://www.theguardian.com/world/2018/apr/23/finland-to-end-basic-income-trial-after-two-years>.

55. *Id.*

56. See ALISON MITCHELL, CONG. RESEARCH SERV., R43847, MEDICAID'S FEDERAL MEDICAL ASSISTANCE PERCENTAGE (FMAP) 5 (Apr. 25, 2018), <https://fas.org/sgp/crs/misc/R43847.pdf>.

of 72.26%.<sup>57</sup> Several states receive the minimum 50% match, such as California and Colorado.<sup>58</sup>

Participating in Medicaid is voluntary for states, but every state has chosen to participate in the program. In order to participate, states must offer a program that meets broad minimum federal guidelines with respect to eligibility and plan design. There is room for state flexibility, and there is a fair degree of difference from state to state even within the broad federal guidelines of permissible design.<sup>59</sup> For example, while states are required to cover a list of mandatory benefits, such as hospital services and physician services, states have greater latitude with respect to offering optional benefits, such as prescription drugs, physical therapy, and dental care.<sup>60</sup> States have broad latitude in deciding the scope of services that will be covered, such as the duration of medical care and the reimbursement rate for the providers. Perhaps most significantly, states have broad latitude with respect to how services are delivered, such as whether to use fee for service reimbursement or employ managed care techniques such as networks of providers and risk shifting to providers.<sup>61</sup>

In addition to the flexibility afforded by the basic Medicaid program, there is an avenue for additional flexibility. States can apply for a waiver of certain aspects of the Medicaid program under Section 1115 of the Social Security Act. The waiver is available for an “experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in

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57. Notice of Federal Matching Shares for Medicaid, the Children’s Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2018 Through September 30, 2019, 82 Fed. Reg. 55,383, 55,385 (Nov. 14, 2017).

58. *Id.*

59. See Samantha Artiga et al. *Current Flexibility in Medicaid: An Overview of Federal Standards and State Options*, HENRY J. KAISER FAMILY FOUND. (Jan. 31, 2017), <https://www.kff.org/report-section/current-flexibility-in-medicaid-issue-brief/>.

60. CTRS. FOR MEDICARE & MEDICAID SERVS., *Mandatory & Optional Medicaid Benefits*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/benefits/list-of-benefits/index.html> (last visited Apr. 1, 2019).

61. Matt Broaddus, *Medicaid at 50: For States, Flexible Rules and Reliable Funding*, CTR. ON BUDGET & POL’Y PRIORITIES (Jul. 6, 2015, 5:45 PM), <https://www.cbpp.org/blog/medicaid-at-50-for-states-flexible-rules-and-reliable-funding>.

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promoting the objectives of subchapter . . . XIX [Medicaid].”<sup>62</sup> A demonstration project is a project undertaken to promote the objectives of Medicaid and that would “result in an impact on eligibility, enrollment, benefits, cost-sharing, or financing” of the state’s Medicaid program.<sup>63</sup> By the terms of the statute, a Medicaid Section 1115 waiver may only waive a requirement found in 42 U.S.C. § 1396a (SSA Section 1902) “to the extent and for the period [the secretary of HHS] finds necessary to enable such State or States to carry out such project.”<sup>64</sup>

There are different populations that are eligible for Medicaid coverage, and states have applied work restrictions differently to different groups. Medicaid eligibility is complex, and the details are beyond the scope of this Article.<sup>65</sup> For context, however, the Medicaid statute requires states to cover certain categories of individuals, referred to as “categorically needy,” such as very low-income families, qualified pregnant women and children, individuals receiving Supplemental Security Income (SSI, a federal needs-based cash assistance program), and people who are blind or disabled.<sup>66</sup> In addition to the categorically needy, which states are required to cover, states have the option to cover additional populations, such as medically fragile individuals (individuals receiving home and community-based services), children in foster care, and qualifying pregnant women, children, and caregivers with

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62. 42 U.S.C. § 1315(a) (2018) (Waivers also are available for demonstration programs that promote the objectives of specified programs other than Medicaid, such as old age assistance, aid to the blind, aid to persons with permanent and total disability, SSI or supplemental security program, TANF (formerly known as welfare), or child support enforcement programs).

63. *Id.* at § 1315(d)(1).

64. *Id.* at §§ 1315(a)(1), 1396a.

65. For details of eligibility rules in all fifty states, see Tricia Brooks et al., *Medicaid and CHIP Eligibility, Enrollment, Renewal, and Cost Sharing Policies as of January 2018: Findings from a 50-State Survey*, CTR. CHILD. & FAMILIES GEO. UNIV. HEALTH POL’Y INST. (Mar. 23, 2018), <https://ccf.georgetown.edu/2018/03/23/medicaid-and-chip-eligibility-enrollment-renewal-and-cost-sharing-policies-as-of-january-2018-findings-from-a-50-state-survey/#heading-4>.

66. See CTRS. FOR MEDICARE & MEDICAID SERVS., *Eligibility*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/eligibility/index.html> (last visited Apr. 1, 2019).

slightly more income than is allowed under the categorically needy definitions.<sup>67</sup>

In addition, the Affordable Care Act (“ACA”) provides incentives for the states to expand eligibility for Medicaid coverage to include all adults under age sixty-five with incomes up to 138% of poverty.<sup>68</sup> Children with income 138% of poverty or less already were eligible for Medicaid prior to the passage of the ACA.<sup>69</sup> The ACA makes the Medicaid expansion mandatory for all states and provides 100% funding from the federal government for the first three years, gradually lowering each year to 90% by 2020.<sup>70</sup> However, the U.S. Supreme Court struck down the mandatory nature of the expansion, effectively making the Medicaid expansion voluntary for the states.<sup>71</sup>

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67. See Brooks et al., *supra* note 65.

68. 42 U.S.C. § 1396a(10)(A)(i)(VIII) (2018). The federal poverty figures are published by the Department of Health and Human Services in the Federal Register at the start of every year. For 2019, the poverty line for a single individual not living in Alaska or Hawaii is \$12,490. Each additional family member adds \$4,420 to the poverty line. Annual Update of HHS Poverty Guidelines, 84 Fed. Reg. 1167 (Feb. 1, 2019). Thus, for 2019, 138% of the federal poverty line for a single person is \$17,236. The poverty line is higher in Alaska and Hawaii. *Id.* While the statute pegs eligibility for the Medicaid expansion at 133% of poverty, the statute allows up to 5% of income to be disregarded; thus, the actual income limit is 138% of poverty. 42 U.S.C. § 1396a(7)(B)(i).

69. *Medicaid Expansion & What It Means for You*, HEALTHCARE.GOV, <https://www.healthcare.gov/what-if-my-state-is-not-expanding-medicaid/> (last visited Apr. 1, 2019).

70. 42 U.S.C. § 1396d(y)(1) (2018), *invalidated by* Texas v. United States, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *appeal docketed*, 340 F. Supp. 3d 579 (5th Cir. 2019), 352 F. Supp. 3d 665 (5th Cir. 2019) (the decision of the District Court invalidating the ACA has been stayed pending appeal to the Fifth Circuit).

71. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) Under the ACA, the sanction for a state not implementing the expansion was the loss of all federal funding for Medicaid, not just the funding for the expansion. The Supreme Court found that the threat of withdrawing all Medicaid funding violates the United States Constitution and struck down that part of the ACA. In a doctrine referred to as the Coercion Doctrine, the Court explained that the federal government can use incentives under its spending clause authority to entice the states to enact programs, but only if the states voluntarily and knowingly accept the terms of the program. The ACA Medicaid expansion was deemed too dramatic a transformation of the program to qualify as a mere amendment of an existing program, and the threat of loss of all funding was deemed to cross the line dividing encouragement and coercion. The Court went on to find that the provision withdrawing federal Medicaid funding was

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States that have applied for Section 1115 waivers to impose work requirements have been applying those requirements to varying Medicaid populations. Some states have sought to apply the requirements to all non-exempted Medicaid recipients. Other states have sought to apply them only to the expansion population.<sup>72</sup>

Arkansas was the first state to actually implement community engagement requirements, even though Kentucky's waiver was the first approved.<sup>73</sup> Thus, Arkansas's experience is instructive. HHS approved the Arkansas waiver on March 5, 2018.<sup>74</sup> In Arkansas, work requirements apply primarily to the Medicaid expansion population who are not eligible for an exemption. Individuals are required to have eighty hours of qualifying activity per month (which works out to about twenty hours per week).<sup>75</sup> Activities that count as work include paid work and volunteer work, education and job or vocational training, and job search activities (but only up to forty hours per month).<sup>76</sup> Exemptions include pursuing full time education (including high school, higher education, and job or vocational training), having a short term disability or being certified as physically or mentally unfit for employment, providing care for an incapacitated person or a dependent child under age 6, living in a home with a minor dependent child, and being pregnant.<sup>77</sup>

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severable from the Act as whole, meaning that a state that does not accept the Medicaid expansion may continue to operate under the prior Medicaid rules, effectively making the Medicaid expansion voluntary. *Id.*

72. See *KFF Medicaid Tracker*, *supra* note 9; NASHP Snapshot, *supra* note 9; see also *CMS State Waivers List*, *supra* note 9 (detailing each state's waiver approval and application materials).

73. CTRS. FOR MEDICARE & MEDICAID SERVS., *Arkansas Works*, MEDICAID.GOV (Apr. 1, 2019, 1:28 PM), <https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/?entry=15033>.

74. Letter from Seema Verma, Dep't. of Health and Human Servs., to Asa Hutchinson, Governor of Ark. (Mar. 5, 2018), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ar/ar-works-ca.pdf>.

75. ARKANSAS DEP'T OF HUMAN SERVS., REQUEST FOR AMENDMENT TO THE SPECIAL TERMS AND CONDITIONS FOR THE ARKANSAS WORKS SECTION 1115 MEDICAID DEMONSTRATION (June 30, 2017), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ar/ar-works-pa2.pdf>.

76. *Id.*

77. *Id.*



Arkansas's work requirements had effective dates that were staggered by age: they were effective June 5, 2018, for enrollees between ages thirty and forty-nine and became effective January 1, 2019, for those under age thirty.<sup>78</sup>

The implementation of the Arkansas work requirements has been roundly criticized as overly punitive and designed not to move beneficiaries into work but merely to cut enrollment. Valid work activity is only permitted to be reported through an online portal that has limited hours.<sup>79</sup> Arkansas touts this as cost effective. Critics point to the high percentage of households in the state that lack internet access, as well as to barriers to reporting such as a lack of literacy.<sup>80</sup> A failure to report sufficient qualifying activity for three consecutive months results in termination of Medicaid enrollment; an individual who loses coverage is locked out of Medicaid until a future open enrollment period.<sup>81</sup>

Kentucky's waiver is instructive in part because it was the first approval, but also because it is the subject of the first court challenge. A class action lawsuit—*Stewart v. Azar*—was filed January 2018 in the United States District Court for the District of Columbia by Kentucky Medicaid beneficiaries challenging the federal government's approval of the waiver.<sup>82</sup> After complete

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78. *Id.*

79. See ARKANSAS DEP'T OF HUMAN SERVS., *supra* note 75; J. Craig Wilson & Joseph Thompson, *Nation's First Medicaid Work Requirement Sheds Thousands from Rolls in Arkansas*, HEALTH AFF. (Apr. 1, 2019, 2:01 PM), <https://www.healthaffairs.org/doi/10.1377/hblog20181001.233969/full/>.

80. Louise Norris, *Arkansas and the ACA's Medicaid Expansion*, HEALTHINSURANCE.ORG (Nov. 25, 2018), <https://www.healthinsurance.org/arkansas-medicaid/>.

81. *Id.*

82. MaryBeth Musumeci, *A Guide to the Lawsuit Challenging CMS's Approval of the Kentucky HEALTH Medicaid Waiver*, HENRY J. KAISER FAMILY FOUND. (Jan. 2, 2018), <https://www.kff.org/medicaid/issue-brief/a-guide-to-the-lawsuit-challenging-cmss-approval-of-the-kentucky-health-medicaid-waiver/>; see also Susannah Luthi, *Medicaid Work Requirements Violate Program's Intent, Scholars Say*, MOD. HEALTHCARE (2018) <http://www.modernhealthcare.com/article/20180409/NEWS/180409918> (discussing an amicus brief filed in the case in support of plaintiffs by health law scholars); see also Harris Meyer, *Kentucky Medicaid Enrollees Sue To Block Work Requirement Waiver*, MOD. HEALTHCARE (Jan. 24, 2018), <http://www.modernhealthcare.com/article/20180124/NEWS/180129955>; see also National Health Law Program Team, *Stewart v. Hargan, Lawsuit*

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briefing, including several amicus briefs, the Court issued a memorandum opinion on June 29, 2018, finding that the Plaintiffs had standing to challenge the Kentucky waiver as a whole (having demonstrated injury in fact and redressability).<sup>83</sup> The Court found that the Secretary of HHS acted arbitrarily and capriciously by failing to take into account several aspects of the plan when the HHS concluded “that Kentucky HEALTH was ‘likely to assist in promoting the objectives’ of the Medicaid Act.”<sup>84</sup> The Court held the approval of Kentucky HEALTH invalid and remanded the matter to HHS to review the program again in light of the opinion.<sup>85</sup>

HHS reopened public comment on Kentucky’s Section 1115 waiver and subsequently reapproved the waiver application without change.<sup>86</sup> Reapproval by HHS triggered additional court action with Plaintiff filing an amended complaint and motion for summary judgment and Defendants filing motions in

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*Challenging Kentucky Medicaid Waiver Project*, NAT’L HEALTH L. PROGRAM (Jan. 24, 2018), <https://healthlaw.org/resource/stewart-v-hargan-lawsuit-challenging-kentucky-medicaid-waiver-project/>.

83. *Stewart v. Azar*, 313 F. Supp. 3d 237, 254 (D.D.C. 2018) (internal quotes omitted). The Secretary of Health and Human Services (“HHS”) had taken the position that under Section 701(a)(2) of the Administrative Procedure Act, his “actions are ‘committed to agency discretion by law,’ and are barred from review.” *Id.* (internal citation omitted); see Amicus Brief for Deans, *supra* note 15; see also Brief for the American Academy of Pediatrics, The American College of Physicians, The American Medical Association, The American Psychiatric Association, The Catholic Health Association of the United States, March of Dimes, and the National Alliance on Mental Illness as Amici Curiae Supporting Plaintiffs, *Stewart v. Azar*, 313 F. Supp. 3d 237 (D.D.C. 2018) (No. 1:18-cv-00152-JEB); Proposed Brief of AARP, AARP Foundation, Justice in Aging, National Academy of Elder Law Attorneys, and Disability Rights Education and Defense Fund as Amici Curiae Supporting Plaintiffs’ Motion for Partial Summary Judgment, *Stewart v. Azar*, 313 F. Supp. 3d 237 (D.D.C. 2018) (No. 1:18-cv-00152-JEB).

84. *Id.* at 259.

85. *Id.* at 272.

86. See Letter from Paul Mango, Chief Principal Deputy Adm’r., Ctr. For Medicare & Medicaid Servs., to Carol Steckel, Com’r, Dept. of Medicaid Services, Commonwealth of Kentucky (Nov. 20, 2018), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ky/ky-health-ca.pdf>; see also Joint Status Report at 1, *Stewart v. Azar*, 313 F. Supp. 3d 237 (D.D.C. 2018) (No. 1:18-cv-00152-JEB); see also Joint Motion Regarding Proposed Briefing Schedule at 1, *Stewart v. Azar*, 313 F. Supp. 3d 237 (D.D.C. 2018) (No. 1:18-cv-00152-JEB).

opposition.<sup>87</sup> The Court once again set aside HHS's approval of the Kentucky 1115 waiver and remanded the application to the HHS for further review.<sup>88</sup> The government appealed the decision and the Court granted an expedited schedule, with oral arguments scheduled to take place by October 1, 2019.<sup>89</sup> The health law world will be watching closely.

In an interesting twist, the Governor of Kentucky, acting on behalf of the State, sued the Kentucky Plaintiffs in the United States District Court for the Eastern District of Kentucky, Frankfort Division, (where Defendants in the *Stewart* case wanted that case to be heard to begin with) in an obvious bid to have the state's work requirements declared legal.<sup>90</sup> That case, *Bevin v. Stewart*, was dismissed in August of 2018 with the Court finding that the Plaintiff Commonwealth did not have standing against the Defendants and was otherwise able to protect its interest in the matter of *Stewart v. Azar* in which it had intervened.<sup>91</sup> The Court specifically identified that the Commonwealth was seeking to have the Eastern District of Kentucky find what it could not convince the D.C. District Court to find—that Kentucky HEALTH and the HHS Secretary's approval of the waiver “complied with the Medicaid Act and ‘was not arbitrary and capricious, was not an abuse of discretion, and was supported by the evidence in the record.’”<sup>92</sup> The Court declined to do so.<sup>93</sup>

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87. See First Amended Class Action Complaint for Declaratory and Injunctive Relief, *Stewart v. Azar*, 313 F. Supp. 3d 237 (D.D.C. 2018) (No. 1:18-cv-00152-JEB); Plaintiffs' Motion and Memorandum in Support of Motion for Partial Summary Judgment, *Stewart v. Azar*, 313 F. Supp. 3d 237 (D.D.C. 2018) (No. 1:18-cv-00152-JEB); Memorandum in Support of Federal Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Partial Summary Judgment, *Stewart v. Azar*, 313 F. Supp. 3d 237 (D.D.C. 2018) (No. 1:18-cv-00152-JEB).

88. *Stewart v. Azar*, 366 F. Supp. 3d 125 (D.D.C. 2019).

89. Notice of Appeal, *Stewart v. Azar*, Case No. 1:18-cv-152-JEB (D.D.C. Apr. 10, 2019); Sara Rosenbaum, *An Expedited Appeal for the 1115 Medicaid Work Experiment Cases*, HEALTH AFF. (Apr. 26, 2019) <https://www.healthaffairs.org/doi/10.1377/hblog20190425.862133/full/>.

90. *Bevin ex rel. Ky. v. Stewart*, No. 3:18-cv-00008-GFVT, 2018 WL 3973409, at \*1 (E.D. Ky. Aug. 20, 2018).

91. *Id.* at \*11.

92. *Id.* at \*10.

93. *Id.* at \*12.

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Kentucky's waiver is not the only one being challenged in court. Medicaid beneficiaries from Arkansas sued the Secretary of HHS in August 2018 in the same court and before the same judge that heard the Kentucky litigation.<sup>94</sup> Plaintiffs in *Gresham v. Azar* made similar claims as the Kentucky Plaintiffs—that HHS considered goals not allowed to be considered when approving the waiver.<sup>95</sup> Not unsurprisingly, the Court ruled the Arkansas waiver approval invalid.<sup>96</sup> The *Gresham* case has been appealed by the government and is on an expedited schedule along with the *Stewart* appeal.<sup>97</sup> The New Hampshire work requirements also were challenged in a lawsuit before the same judge that struck the Kentucky and Alabama waiver; the district court struck the New Hampshire approval down in *Philbrick v. Azar*.<sup>98</sup>

Health law scholars have critiqued the inclusion of work requirements in Medicaid, with critiques ranging from arguments that the federal government lacks authority to approve such waivers,<sup>99</sup> to critiques of the disparate impact such requirements have on minorities,<sup>100</sup> to critiques of the negative impact on health outcomes that such requirements are likely to have.<sup>101</sup> I personally agree with most of these critiques. Work

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94. *Gresham v. Azar*, No. 1:18-cv-01900, 2019 WL 1375241, at \*1 (D.D.C. 2018).

95. *Id.*; see also Wilson, *supra* note 79.

96. *Gresham v. Azar*, 363 F. Supp. 3d 165 (D.D.C. 2019).

97. *Id.*, appeal docketed, 363 F. Supp. 3d 165 (D.C. Cir. Apr. 10, 2019); Sara Rosenbaum, *An Expedited Appeal for the 1115 Medicaid Work Experiment Cases*, HEALTH AFF. (Apr. 26, 2019) <https://www.healthaffairs.org/doi/10.1377/hblog20190425.862133/full/>.

98. *Philbrick v. Azar*, No. 19-773 (JEB), 2019 U.S. Dist. LEXIS 125675 (D.C.C. July 29, 2019).

99. See, e.g., Nicole Huberfeld & Jessica L. Roberts, *Health Care and The Myth of Self-Reliance*, 57 B.C. L. REV. 1, 15–16 (2016) (stating without analysis what seemed to be black letter law at the time that “HHS cannot approve the incorporation of work requirements into a § 1115 waiver for Medicaid expansion because it is unrelated to the Medicaid Act’s provision of “medical assistance[.]”)

100. See, e.g., Heather Hahn, *Work Requirements in Safety Net Programs: Lessons for Medicaid from TANF and SNAP*, URBAN INST. (Apr. 2018), [https://www.urban.org/sites/default/files/publication/98086/work\\_requirements\\_in\\_safety\\_net\\_programs\\_0.pdf](https://www.urban.org/sites/default/files/publication/98086/work_requirements_in_safety_net_programs_0.pdf).

101. See, e.g., *Taking Away Medicaid For Not Meeting Work Requirements Harms Children*, CTR. ON BUDGET & POLY PRIORITIES (last updated Mar. 14, 2019) [hereinafter *Taking Away Medicaid*],

requirements (or community engagement requirements) are a uniquely poor fit for health care, which is a basic human need. Opinion polls also shed some light on the public's views of work requirements. Unsurprisingly, support for such requirements depends heavily on how the question is asked. People show a fair degree of support for the concept that able-bodied people should work, but support drops when the question emphasizes the punitive nature of the requirements.<sup>102</sup>

#### B. TANF and SNAP

The current TANF program began as the Aid to Dependent Children program, which was part of the Social Security Act of 1935, passed in the heart of the Great Depression. The program was intended to provide cash assistance to mothers who were not supported by men, reflecting the gender roles prevalent in the dominant society at that time. In practice, states implemented the program to exclude racial minorities and others whom local caseworkers deemed were not providing a "suitable home" for the children the program was intended to benefit.<sup>103</sup> In 1961, the program was renamed the Aid to Families with Dependent Children and certain eligibility rules were changed in an effort to expand coverage.<sup>104</sup> Civil rights lawyers brought legal challenges to discriminatory practices and sought to create rights to the cash assistance.<sup>105</sup>

This period, from the 1930s until the 1960s, is best understood as a departure from traditional poor relief, which

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<https://www.cbpp.org/research/health/how-medicaid-work-requirements-will-harm-children>.

102. Dylan Scott, *America's Medicaid Work Requirement Paradox, Explained by 2 Polls*, VOX (Feb. 5, 2018, 3:50 PM), <https://www.vox.com/health-care/2018/2/5/16975574/medicaid-work-requirement-paradox-polls> (comparing a Kaiser Family Foundation poll in which 70% of respondents supported work requirements to obtain coverage with a Center for American Progress poll in which 57% of respondents said they opposed denying Medicaid to people who fail to meet work requirements).

103. Linda Gordon & Felice Batlan, *The Legal History of the Aid to Dependent Children Program*, SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/public-welfare/aid-to-dependent-children-the-legal-history/> (last visited May 5, 2019); see also KATZ, *supra* note 20, at 24.

104. *Id.*

105. *Id.*

was either run through private charities, or which expected the recipient of the relief, including women and children, to work, often in Dickensian poorhouses.<sup>106</sup> As welfare assistance was expanded to a broader population, and as gender roles began to change in the 1960s, traditional attitudes about providing charity to the able-bodied resurfaced. In the 1980s, states began seeking and receiving federal waivers that would allow the state to require work in exchange for cash welfare.<sup>107</sup> In 1996, under President Bill Clinton and a Republican Congress, the federal government renamed the program Temporary Aid to Needy Families (TANF) and added a federal requirement that cash welfare be tied to work, in addition to other reforms that restricted benefits.<sup>108</sup>

A state must ensure that a minimum percentage of TANF benefit recipients are engaging in a certain level of work activities, or that state's federal funding will be reduced. The following activities are among those that may count toward this requirement: (1) unsubsidized employment; (2) subsidized private sector employment; (3) subsidized public sector employment; (4) work experience; (5) on-the-job training; (6) job search and job readiness assistance, including mental health and addiction treatment, generally limited to four consecutive weeks and six total weeks per year; (7) community service programs; (8) vocational educational training limited to 12 months; (9) job skills training directly related to employment; (10) education directly related to employment for those without a high school diploma or GED; (11) satisfactory high school or GED program attendance; and (12) providing child care for someone participating in community service.<sup>109</sup>

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106. KATZ, *supra* note 20.

107. Szanton, *supra* note 21, at 595–97.

108. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 104 Pub. L. 193, 110 Stat. 2105. The Personal Responsibility and Work Opportunity Reconciliation Act renamed the welfare program Temporary Aid to Needy Families (TANF), block granted federal funds to the states, imposed time limits on receiving benefits, and required that at least 50% of recipients be working or involved in alternate qualifying activities. *Id.* States have flexibility with respect to implementing the work requirements. *See generally* 42 U.S.C. § 607 (2018).

109. 42 U.S.C. § 607(d) (2018).

The food stamp program (currently called the Supplemental Nutrition Assistance Program or SNAP) has had work registration requirement since 1971.<sup>110</sup> Currently, recipients of food assistance are required to register for work, not voluntarily quit a job or reduce their hours, take a job if offered, and participate in employment and training programs, if assigned by the State.<sup>111</sup> To receive food assistance for longer than three months, an individual between eighteen and forty-nine who does not have dependents (an ABAWD, Able Bodied Adult Without Dependents) “must work at least 80 hours per month, participate in qualifying education and training activities at least 80 hours per month, or comply with a workfare program.”<sup>112</sup> These rules do not apply to children, seniors, or people who are disabled, pregnant, or who are caring for a child or incapacitated family member.<sup>113</sup> There was a recent effort in 2018 to expand and strengthen the federal work requirements through the reauthorization of the farm bill in the form of the Agriculture and Nutrition Act of 2018.<sup>114</sup> The 2018 proposal would have expanded to all adults capable of work the

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110. The Food Stamp Act of 1964, Pub. L. No. 91-671, 84 Stat. 2048, 2050 (1971) (stating that “a household shall not be eligible for assistance . . . if it includes an able-bodied adult person between the ages of eighteen and sixty-five (except mothers or other members of the household who have the responsibility of care of dependent children or of incapacitated adults, bona fide students in an any accredited school or training program, or persons employed and working at least 30 hours per week) who either (a) fails to register for employment at the State or Federal employment office . . . or (b) has refused [work].”)

111. *Am I Eligible for SNAP?*, USDA, <https://www.fns.usda.gov/snap/eligibility> (last visited April 8, 2019); *see also* 7 U.S.C. §§ 2011-2036(c) (2018).

112. *Able-Bodied Adults Without Dependents (ABAWDs)*, U.S. Dep’t Agric., Food & Nutrition Serv., <https://www.fns.usda.gov/snap/able-bodied-adults-without-dependents-abawds> (last visited April 8, 2019) [hereinafter *Able-Bodied Adults*]; *see also* 7 U.S.C. §§ 2011-2036(c) (2019).

113. *Able-Bodied Adults*, *supra* note 112.

114. Agriculture Improvement Act of 2018, H.R. 2, 115th Cong. (2018) (as introduced in the House Apr. 12, 2018); *see also* H.R. Rept. 115-661, pt. 1, at 62–81 (2018) (reported and amended by the Committee on Agriculture); Caitlin Dewey, *GOP Proposes Stricter Work Requirements for Food Stamp Recipients, a Step Toward a Major Overhaul of the Social Safety Net*, WASH. POST (April 12, 2018), [https://www.washingtonpost.com/news/wonk/wp/2018/04/12/gop-proposes-stricter-work-requirements-for-food-stamp-recipients-a-step-toward-a-major-overhaul-of-the-social-safety-net/?noredirect=on&utm\\_term=.b1d99faa0c8a](https://www.washingtonpost.com/news/wonk/wp/2018/04/12/gop-proposes-stricter-work-requirements-for-food-stamp-recipients-a-step-toward-a-major-overhaul-of-the-social-safety-net/?noredirect=on&utm_term=.b1d99faa0c8a).

affirmative requirement of working or participating in a work-training program for at least twenty hours per week.<sup>115</sup> That effort was defeated, and the farm bill passed without the more stringent work requirements.<sup>116</sup>

### C. The EITC, Social Security, and Medicare

Our most politically popular social safety net programs are based on work. Medicare and Social Security require most people to accumulate a record of work to be eligible for benefits. The EITC is the largest income-support program in the United States, and it is based on work. Work-based programs generally enjoy relatively high levels of bipartisan political support.

In order to truly understand the EITC's policy goals, one must understand the political history of its enactment and subsequent expansions. The EITC was a compromise measure in response to President Nixon's proposed "negative income tax."<sup>117</sup> Nixon's 1969 proposal, the "Family Assistance Plan," was intended to replace the Great Depression-era "Aid to Families with Dependent Children" program (commonly known as "welfare"), and was a modified negative income tax which effectively created a small guaranteed income.<sup>118</sup> Although

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115. CONG. RESEARCH SERV., R45297, *THE HOUSE AGRICULTURE COMMITTEE'S 2018 FARM BILL (H.R. 2): A SIDE-BY-SIDE COMPARISON WITH CURRENT LAW 10–11 (2018)* (the work requirements were included in Title IV, Nutrition, of H.R. 2).

116. Catie Edmondson, *Senate, Rejecting Curbs on Food Stamps, Passes Compromise Farm Bill*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/us/politics/farm-bill-compromise-senate.html>; Jeff Stein, *Deal to Pass Farm Bill Scraps House GOP Plan for New Food Stamp Work Requirements*, WASH. POST (Nov. 29, 2018), [https://www.washingtonpost.com/business/economy/congress-scraps-house-gop-food-stamp-work-requirement-plan-in-farm-bill-deal/2018/11/29/04854362-f3f7-11e8-aeaa-b85fd44449f5\\_story.html?utm\\_term=.4f2312560b08](https://www.washingtonpost.com/business/economy/congress-scraps-house-gop-food-stamp-work-requirement-plan-in-farm-bill-deal/2018/11/29/04854362-f3f7-11e8-aeaa-b85fd44449f5_story.html?utm_term=.4f2312560b08).

117. Jane Gravelle & Jennifer Gravelle, *Taxing Poor Families: The Evolution of Treatment Under the Federal Income Tax*, 7 CONN. PUB. INT. L.J. 35, 38 (2008); see also Dennis J. Ventry, Jr., *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit, 1969-99*, 53 NAT'L TAX J. 983, 984 (2000). See generally Jodie T. Allen, *Present at the Creation*, SLATE MAG. (Dec. 13, 1999, 9:56 AM), [http://www.slate.com/articles/news\\_and\\_politics/chatterbox/1999/12/present\\_at\\_the\\_creation.html](http://www.slate.com/articles/news_and_politics/chatterbox/1999/12/present_at_the_creation.html).

118. Ventry, *supra* note 117, at 987–88; see also Lawrence Zelenak, *Redesigning the Earned Income Tax Credit as a Family-Size Adjustment to the*



Nixon's proposal contained some work incentives, conservatives deemed them insufficient, and liberals were wary of the meager nature of the cash support provided.<sup>119</sup>

The family assistance plan came very close to passing Congress but was defeated in 1972.<sup>120</sup> That same year, the EITC was proposed as an alternative,<sup>121</sup> but it, too, was rejected.<sup>122</sup> The EITC continued to be debated in Congress and ultimately was adopted in 1975.<sup>123</sup> The legislative history indicates the EITC was intended as an offset for payroll taxes paid by low-income workers.<sup>124</sup> However, it also was a compromise measure born in response to obvious interest in the negative income tax as an anti-poverty tool.<sup>125</sup> In addition, the EITC responded to

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*Minimum Wage*, 57 TAX L. REV. 301, 302 (2004); see also Jodie T. Allen, *Negative Income Tax*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed., 1st ed. 1993), <http://www.econlib.org/library/Enc1/NegativeIncomeTax.html> (last visited Apr. 1, 2019) (describing negative income tax).

119. Zelenak, *supra* note 118; see also Ventry, *supra* note 117.

120. Zelenak, *supra* note 118.

121. Gravelle & Gravelle, *supra* note 117; see also V. Joseph Hotz & John Karl Scholz, *The Earned Income Tax Credit*, in MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES 141, 142 (Robert Moffitt ed. 2003), <http://www.nber.org/chapters/c10256.pdf>; Zelenak, *supra* note 118, at 304 ("Long's proposal was for a 'work bonus,' a credit equal to 10% of the first \$4,000 of earned income, with the credit phased out at the rate of 25% as earned income rose above \$4,000").

122. Ventry, *supra* note 117, at 992.

123. Tax Reduction Act of 1975, Pub. L. No. 94-12, tit. II, § 204(a), 89 Stat. 30, 30-31.

124. See H.R. REP. NO. 94-19, at 29 (1975) (explaining that the House Ways and Means Committee found that it was "appropriate to use the income tax system to offset the impact of the social security taxes on low-income persons . . ."); see also S. REP. NO. 94-36, at 33 (explaining that the Senate Finance Committee agreed that it was appropriate to offset social security taxes through an income tax system); *Id.* at 3 (1975) (explaining that the Senate Finance Committee indicated the purpose of the credit was to provide relief to earners with little or no tax liability by providing a refundable tax credit based on earned income noting that the credit amount was designed to "closely match [] the employee and employer social security tax on the first \$4,000 of income . . .").

125. See S. REP. NO. 94-36, at 33 (1975). While fully agreeing with the goal of offsetting payroll taxes for low wage workers, the Senate Finance Committee had a narrower view of the scope of the new EITC. It explained that "the most significant objective of the provision should be to assist in encouraging people to obtain employment, reducing the unemployment rate and reducing the welfare rolls." Thus, the Senate proposed an amendment increasing the amount of the credit and restricting the credit to "individuals who maintain a household." *Id.* at 34. The Senate wanted to offset payroll

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concerns about anti-work incentives of traditional welfare<sup>126</sup> and the reduced, but still present, anti-work incentives of negative income tax proposals.<sup>127</sup> Thus, the original EITC had several different apparent purposes: (1) incentivize work, (2) reduce welfare rolls, and (3) offset the burden of payroll taxes on those least able to afford them.<sup>128</sup>

Nearly every single U.S. President since 1975 has signed legislation that expanded the EITC. President Ford signed the EITC into law in 1975.<sup>129</sup> The credit was made permanent in 1978 under President Carter<sup>130</sup> and was expanded and indexed for inflation under President Reagan's 1986 Tax Reform Act.<sup>131</sup>

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taxes, but only for those individuals likely to be eligible for welfare payments if they were not working. It was a strategy for moving families from welfare to work by making work more attractive than welfare (or at least not more unattractive). The Conference Committee adopted the Senate's version of the EITC. See H.R. REP. NO. 94-120, at 58–59 (1975). It passed Congress and was signed by President Nixon. Ventry, *supra* note 117, at 992.

126. See Susan W. Blank & Barbara B. Blum, *A Brief History of Work Expectation for Welfare Mothers*, 7 THE FUTURE OF CHILDREN: WELFARE TO WORK 28, 29–30 (1997). The Aid to Families with Dependent Children (AFDC) program of the 1960s did not condition benefits on a mother working. *Id.*; see also Stephen B. Page & Mary B. Lerner, *Introduction to the AFDC Program*, 7 THE FUTURE OF CHILDREN: WELFARE TO WORK 20, 21 (1997). Also, the family's income offset their benefits, an obvious disincentive to work. See Peter Passell & Leonard Ross, *Daniel Moynihan and President-Elect Nixon: How Charity Didn't Begin at Home*, N.Y. TIMES (Jan. 14, 1973), <http://www.nytimes.com/books/98/10/04/specials/moynihan-income.html>.

127. See S. REP. NO. 94-36, at 3 (1975) (noting this legislation was, in part, a welfare-to-work initiative and that the Senate report to the original EITC legislation called the EITC a “work bonus,” and noted that “[f]ederal welfare costs will be reduced by an estimated \$0.1 billion”).

128. See 26 U.S.C. § 3101(a)–(b) (2018). Payroll taxes are a flat percentage of covered income. Currently, employees pay payroll taxes through wage withholding of 7.65% of covered wages. A worker making \$10,000 in wages each year pays 7.65% of those wages as payroll taxes, and a worker making \$70,000 of wages each year also pays 7.65% of those wages as payroll taxes. There is no effort to adjust the rates to reflect relative ability to pay. This flat tax system stands in sharp contrast with the progressive rates of the federal income tax, where lower levels of income are taxed at one percentage but higher levels of income are taxed at a higher percentage.

129. Tax Reduction Act of 1975, Pub. L. No. 94-12, tit. II, § 204(a), 89 Stat. 30, 30–31.

130. Revenue Act of 1978, Pub. L. No. 95-600, tit. I, §§ 104(a)–(e), 105(a), 92 Stat. 2763, 2772–73 (1978).

131. Tax Reform Act of 1986, Pub. L. No. 99-514, tit. I, §§ 104(b)(1)(B), 111(a)–(d)(1), tit. XII, §§ 1272(d)(4), tit. XIII, § 1301(j)(8), 100 Stat. 2085, 2104, 2107–08, 2594, 2658.

The credit was expanded again in 1990 under President George H. W. Bush, introducing a slightly higher credit for families with more than one child.<sup>132</sup> In 1993, the credit was expanded under President Clinton, establishing a small credit for childless workers and increasing the credit for workers with children.<sup>133</sup> In 1993, the EITC's two primary policy reasons became clearer.<sup>134</sup> The rate of the credit for childless workers was (and remains) 7.65%, equal to the employee portion of federal payroll taxes,<sup>135</sup> thus underscoring the EITC's stated purpose of functioning as a payroll tax offset.<sup>136</sup> Simultaneously, having substantially larger credit amounts for workers with children fits well with the anti-poverty intent of the EITC.<sup>137</sup> In 2001, President George W. Bush signed legislation designed to alleviate marriage penalties inherent in the EITC design.<sup>138</sup> Under President Obama, in 2008 the EITC was temporarily expanded for tax years 2009 and 2010 to provide for the first

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132. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, tit. XI, §§ 11101(d)(1)(B), 11111(a)-(b), 11111(e), 104 Stat. 1388-405, 1388-408, 1388-412, 1388-413 (1990) (codified as amended in 26 U.S.C. § 32).

133. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, tit. XIII, ch. 1, pt. 3, § 13131, 107 Stat. 312, 433-35 (1993) (codified as amended at 26 U.S.C. § 32).

134. Arguably, there now are more than two policy objectives for the EITC. See George K. Yin et al., *Improving the Delivery of Benefits to the Working Poor: Proposals to Reform the Earned Income Tax Credit Program*, 11 AM. J. TAX POL'Y 225, 260 (1994) (identifying as objectives of the EITC "a Social Security tax rebate, a work incentive, an income supplement, a benefit for children of low-income families, and an offset generally to regressive federal taxes").

135. 26 U.S.C. §§ 32(b)(1)(C), 3101(a)-(b) (2018).

136. According to the House Budget Committee's report on the Omnibus Budget Reconciliation Act of 1993, "[T]he committee believes that extending the EITC to low-income working taxpayers without qualifying children will provide these taxpayers with an additional benefit for entering the labor force and reduce the burden of the individual income and payroll taxes on those with a lower ability to pay taxes." H.R. Rep. No. 103-111, at 609 (1993).

137. The House Budget Committee report explained that "[p]roviding a larger basic EITC to larger families recognizes the role the EITC can play in alleviating poverty. Moreover, this larger credit may provide work incentives and increase equity by reducing the tax burden for those workers with a lower ability to pay taxes." H.R. Rep. No. 103-111, at 609 (1993).

138. Economic Growth and Tax Reconciliation Act of 2001, Pub. L. No. 107-16, tit. III, §§ 303(a)-(f), (h), 115 Stat. 38, 55-57 (2001) (codified as amended at 26 U.S.C. § 32).

time a higher credit for families with three or more children.<sup>139</sup> In 2010, this temporary expansion was extended through 2012.<sup>140</sup> In 2013, it was extended again through 2017.<sup>141</sup>

The EITC is often described as a payroll offset measure, and indeed that has been a purpose since the beginning.<sup>142</sup> However, it was also part of the welfare reform and welfare-to-work movements.<sup>143</sup> The EITC cannot legitimately be called a general anti-poverty measure. Despite the small EITC for childless workers, the primary focus has been on alleviating poverty for families with children.<sup>144</sup> Its main concern is not lifting people out of poverty, but lifting children out of poverty.<sup>145</sup>

#### IV. Proposal

Social welfare programs historically have been categorized as social insurance or public assistance (welfare) programs, at least since the New Deal era.<sup>146</sup> Generally, social insurance is now more broadly available, and eligibility and benefits are based on contribution (i.e., payment of premiums or targeted

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139. American Recovery and Reinvestment Act of 2009, Pub L. No. 111–5, div. B., tit. I, § 1002, 123 Stat. 115, 312 (2009) (codified as amended at 26 U.S.C. § 32).

140. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, tit. I, § 103(c), 124 Stat. 3296, 3299 (2010) (codified as amended in 26 U.S.C. § 32).

141. American Taxpayer Relief Act of 2012, Pub. L. No. 112240 § 103(c), 126 Stat. 2323, 2319–20 (2013) (codified as amended in 26 U.S.C. § 32).

142. *See supra* note 124 and accompanying text.

143. *See supra* note 125 and accompanying text.

144. *See supra* notes 136 and 137 and accompanying text.

145. However, in his 2014 State of the Union Address, President Obama indicated a desire to bolster the credit for childless workers, saying, “I agree with Republicans like Senator Rubio that it doesn’t do enough for single workers who don’t have kids. So let’s work together to strengthen the credit, reward work, and help more Americans get ahead.” Barack Obama, U.S. President, President Barack Obama’s State of the Union Address (Jan. 28, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address>. The President’s proposal did not obviate the need for this Article’s proposal, however. Indeed, they would work well in tandem.

146. KATZ, *supra* note 20, at 186 (1986) (noting that “Progressive Era legislation introduced the distinction between public assistance and social insurance that has dominated the history of social welfare in twentieth-century America”).

taxes).<sup>147</sup> Social insurance programs in the United States include Social Security and Medicare. Public assistance (or welfare), on the other hand, is targeted at narrower groups of individuals and eligibility and benefits are based on need.<sup>148</sup> Programs in the United States thought of as welfare include cash assistance, food stamps, and Medicaid.<sup>149</sup> As explained above, the EITC blends elements of social insurance with elements of public assistance. The most politically appealing programs are based on a social insurance model, such as Social Security and Medicare. It is said that these programs are equally available to all who have paid into the system, similar to insurance. They are earned benefits and have low or no stigma attached.

In reality, however, the line between a social insurance and a public assistance program is often blurred. Social insurance models have elements of public assistance built into them. The benefit formula for Social Security benefits is progressive, even though contributions are flat, and unlike true insurance, benefits are not tied to actual life expectancy or other individualized actuarial factors.<sup>150</sup> Medicare Part B premiums are raised for higher-income beneficiaries, even though benefits remain the same and even though the increase is not based on any actuarial risk factor.<sup>151</sup> Further, many Medicare and Social Security reform proposals incorporate features that makes these programs less like social insurance and more like public assistance, such as means testing Medicare or raising or

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147. A. Dale Tussing, *The Dual Welfare System*, SOCIETY, Jan./Feb. 1974, at 50.

148. *Id.*

149. *Id.*

150. ANDREW G. BIGGS ET AL., A PROGRESSIVITY INDEX FOR SOCIAL SECURITY, SOC. SECURITY OFF. OF RET. & DISABILITY POL'Y, ISSUE PAPER NO. 2009-01 (Jan. 2009), <https://www.ssa.gov/policy/docs/issuepapers/ip2009-01.html>.

151. *Part B Costs*, MEDICARE.GOV, <https://www.medicare.gov/your-medicare-costs/part-b-costs> (last visited Feb. 23, 2019); see also Juliette Cubanski & Tricia Neuman, *Medicare's Income-Related Premiums: A Data Note*, HENRY J. KAISER FAMILY FOUND. (June 3, 2015), <https://www.kff.org/medicare/issue-brief/medicares-income-related-premiums-a-data-note/>.

eliminating the wage cap for Social Security taxes but not for calculating Social Security benefits.<sup>152</sup>

While our most politically popular social insurance programs are increasingly taking on more elements of public assistance, at the same time elements of social insurance programs are being incorporated into public assistance programs. For example, TANF payments are now time-limited instead of being tied solely to need.<sup>153</sup> The Affordable Care Act expanded Medicaid to cover all lower-income individuals rather than focusing on particular populations with particular need.<sup>154</sup> The addition of work requirements in Medicaid can be viewed as evidence of this trend. Work requirements meaningfully turn Medicaid into an earned benefit, a hallmark of social insurance.

This blending of models can be utilized to reduce the stigma of public assistance benefits by adding well-designed community engagement elements. To the extent that community engagement requirements can be added to social safety net programs to address legitimate policy concerns and to reduce the stigma attached to such benefits, such measures could boost support for the programs and provide longer-term protection.

However, Medicaid is a public assistance program (as opposed to a social insurance program) for good reason. It is designed to meet the medical needs of vulnerable populations. Unless and until the United States adopts universal healthcare on a social insurance model, guaranteeing access to care for everyone, there are limits as to how work requirements should be implemented Medicaid, the program to meet the health needs of our neediest residents. First, the social contribution required should be defined broadly. As this paper outlines, and as others have noted, there is intrinsic value in a broad range of activity

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152. Merrill Matthews, *Medicare's Becoming a Means-Tested Welfare Program, and That Could Be a Good Thing*, FORBES (Mar. 26, 2015, 11:21 AM), <https://www.forbes.com/sites/merrillmatthews/2015/03/26/medicares-becoming-a-means-tested-welfare-program-and-that-could-be-a-good-thing/#436388559380>; see also Kathleen Romig, *Increasing Payroll Taxes Would Strengthen Social Security*, CTR. ON BUDGET & POL'Y PRIORITIES (Sept. 27, 2016), <https://www.cbpp.org/sites/default/files/atoms/files/9-27-16socsec.pdf>.

153. See *supra* note 22 and accompanying text.

154. See *supra* note 71 and accompanying text.

beyond paid work. Second, there must be exceptions for people who cannot contribute. There is intrinsic value in simply being a human being, and a just society provides for those who cannot provide for themselves. Third, the requirements cannot sacrifice the core goals of the program. Medicaid must continue to be focused on health. Fourth, any requirement must be implemented in a way that does not arbitrarily deny people benefits. This likely means an investment of resources to adequately implement the rules, including a serious investment in outreach and education and implementation of effective avenues for reporting qualifying activity, with a focus on ease of use for the Medicaid beneficiary.<sup>155</sup> If these parameters can be met, then implementing social contribution requirements would adhere more closely to the social contract that is the basis for social welfare programs. Pragmatically, well-designed social contribution requirements could boost support for the programs, perhaps significantly.

I confess to having a deep skepticism that our current political climate would produce any plan that is practical, administrable, and humane. In addition, I reiterate my earlier deep concerns that health care, in particular, is a very poor choice for implementing this type of policy. Nevertheless, the theory may represent a “second best” solution that is acceptable to both the left and right. The EITC has broad bipartisan appeal because it is both welfare (which appeals to the left) and it is work-based (which appeals to the right). It is public assistance because it is means tested, while at the same time being social insurance because the benefit is based on contribution (work) rather than need. Social Security is perceived as insurance—an earned benefit—yet has multiple public assistance features, such as a progressive benefit formula. Medicaid may become politically stronger, and less prone to political attack and funding cuts, if elements can be added that address the desire for personal responsibility in exchange for benefits. Because Medicaid is intended to provide health care—a universal human need—to the most vulnerable among us, it is important to

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155. The cost to meaningfully and equitably implement the requirements likely will raise serious efficiency questions. The benefits from the requirements may simply not be worth the cost of implementing them.

protect the accessibility of the program for those who need it. Making work requirements a precondition of eligibility is punitive. It results in the removal of health care from someone who otherwise could not access needed care and, perversely, may make it even harder for the individual to find and keep a job. As noted above, opinion polls demonstrate that while people are in favor of work requirements generally, they are opposed to punitive requirements.<sup>156</sup> In addition, professional organizations representing over a half-million physicians and medical students have voiced strong opposition to punitive work requirements because they may “limit access to preventive and primary care services and inhibit Medicaid beneficiaries from seeking care that helps them avoid more costly health conditions and maintain wellness.”<sup>157</sup> These physician groups have also noted that “[w]hile [they] support voluntary programs to assist Medicaid enrollees in obtaining a job or gaining job skills, as well as voluntary access to treatment for substance use disorders, [they] are concerned that making participation in such programs a mandatory condition of eligibility would create unacceptable barriers to care, especially for the most vulnerable persons.”<sup>158</sup> These concerns are valid; a faulty approach to work requirements is problematic because it undermines the core mission of the program, and punitive work requirements could well lead to reduced overall health of the targeted population.<sup>159</sup> However, for work (or community engagement) programs to function well, enrollees must have the incentive to participate. Engagement of the enrollee is critical.

In light of all of these considerations, I propose that any activity engaged in to obtain eligibility for Medicaid (or any other program where community engagement requirements are

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156. See *Taking Away Medicaid*, *supra* note 101.

157. Am. Acad. of Family Physicians, Am. Acad. of Pediatrics, Am. Coll. of Obstetricians and Gynecologists, Am. Coll. of Physicians, Am. Osteopathic Ass’n, & Am. Psychiatric Ass’n, *America’s Frontline Physicians: Statement on Medicaid Work Requirements*, AM. C. OBSTETRICIANS & GYNECOLOGISTS (Jan. 12, 2018), <https://www.acog.org/About-ACOG/News-Room/Statements/2018/Americas-Frontline-Physicians-Statement-on-Medicaid-Work-Requirements?>

158. *Id.*

159. Douglas Jacobs, *The Social Determinants Speak: Medicaid Work Requirements Will Worsen Health*, HEALTH AFF. (Aug. 6, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180730.371424/full/>



added), even if unpaid, is work that is worthy of all the benefits of paid work, not just Medicaid eligibility. Thus, such unpaid work should be counted as earned income for purposes of the EITC, should help build an earnings record and be credited as a quarter of covered employment for the Social Security and Medicare programs. For symmetry, and to reduce stigma for all programs, this community involvement should accrue all the other benefits of paid work.

For example, a student attending a degree program could be eligible for an EITC and would accrue an earnings record for Social Security and Medicare. The same would be true of a young mother or father who chooses to be home with their children, or who are engaged in elder care. The same would be true of a person who volunteers in the community. All of these activities are valuable to society. Indeed, they are valuable enough that the proponents of personal responsibility are willing to provide important social welfare benefits. Thus, these activities should be fully valued.<sup>160</sup>

My proposal to extend broad credit for all paid and unpaid work is perhaps critical for winning the support of liberals and progressives. The effect of such a rule would be to make these work-based programs much more universal. While falling short of a guaranteed income, it is a step in that direction.

## V. Conclusion

The desire to demand work of benefit recipients stems from long-standing ideas about equity and poor relief, and I believe that we ignore these ideas at our peril. To the extent equal sacrifice principles can be incorporated into safety net programs

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160. As is true of any new proposal, additional work is needed with respect to implementation issues. This Article is not intended to provide a detailed blueprint of all the nuances of how the proposal would be implemented. For example, an important initial question is how to value the unpaid work. It seems reasonable to credit unpaid work at the minimum wage, but there may be other models that are better. Another question is whether there will be a limit or cap on the number of hours that can be credited. Another question is whether actual paid work should count against cap on unpaid work that is adopted. Another question is whether credit for unpaid work would count against an individual when calculating the phase out of the EITC. This Article is intended to start a conversation.

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for the poor without sacrificing the core missions of the programs, I believe that should be done. Incorporating elements of social insurance into public assistance programs may improve overall political and public support for the programs. Additionally, there is human dignity in earning something rather than being handed something. However, the Medicaid work requirements, as they are currently structured and implemented, do not protect the core mission of the program and do not boost the dignity of the enrollees.

This Article proposes that Medicaid (and SNAP and TANF) benefits incorporate community engagement requirements that are designed to boost human dignity. The allowable work should be broadened to include not just paid work but other forms of activity that are intrinsically valuable to the enrollee and to the society, including attending school and caring for children or elders. These activities should be put on the same footing as paid work—not as an exemption from the work requirements but as activity that satisfies the work requirement. This Article proposed that the work requirements be changed from a punitive requirement that could result in the loss of health care (a basic human need) into an incentivized enhancement. Activity that counts toward the broadened community engagement rules of Medicaid would also receive credit toward the EITC, Social Security, and Medicare. Together, these changes address personal responsibility, reduce stigma, and more truly acknowledges the importance of all socially valuable work.