FAMILY ECONOMIC INTEGRITY UNDER THE SOCIAL SECURITY SYSTEM

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> Social Security will always be a goal, never a finished thing, because human aspirations are infinitely expansible—just as human nature is infinitely perfectible.[1]
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> We do almost no single, sensible, and deliberate thing to make family life a success. And still the family survives.
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> It has survived all manner of stupidity. It will survive the application of intelligence.[2]

I
INTRODUCTION

The Social Security program has been the subject of examination and criticism since its creation in 1935.[3] Most recently, sex-based classifications in the benefit structure have been the focal point of analysis. The benefit structure which is the subject of this article is the major public pension plan known as Old Age, Survivors and Disability Insurance, or OASDI.[4] OASDI now covers 90% of the work force and provides the major portion of retirement income for most of the aged.[5] These benefits fall into two major categories: primary benefits, which are retirement income paid to the covered worker in the form of

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1. Altmeyer, First United States Commissioner for Social Security, September 1945, *quoted in* C. SCHOTTLAND, THE SOCIAL SECURITY PROGRAM IN THE UNITED STATES 181 (2d ed. 1970).

2. W. LIPPMAN, DRIFT AND MASTERY 235 (1914), *quoted in* THE AMERICAN WOMAN—WHO WAS SHE? 160 (A. Scott, ed. 1971).

3. Social Security Act, ch. 531, § 201, 49 Stat. 623 (1935) (current version at 42 U.S.C. § 401 (1970 & Supp. V 1975)) [hereinafter cited as Social Security Act of 1935]. This article will not discuss any of the health insurance benefits of Social Security.

4. 42 U.S.C. §§ 401-431 (1970 & Supp. V 1975) (originally enacted as Social Security Act of 1935, ch. 531, tit. II, 49 Stat. 620 (1935).

5. A. MUNNELL, THE FUTURE OF SOCIAL SECURITY 13 (1977). This series of studies in social economics undertaken by the Brookings Institution notes that during 1975, 100 million people worked in OASDI-covered employment and that the system paid out over $55 billion in retirement benefits. In 1968, 77% of all aged beneficiary units (a unit is either one person or a couple) received only Social Security benefits, 19% received other public or private pensions in addition to Social Security, and only 4% received other public pension benefits alone. These other public pension benefits include civil service retirement, a system entirely independent of Social Security, and military retirement pay or railroad retirement, systems designed to build on Social Security income.

old-age insurance benefits,[6] and secondary benefits, which are payments made to the worker's dependents.[7]

The disparity in treatment of the recipients of secondary benefits, wives and husbands, widows and widowers, and mothers and fathers, has been the subject of recent judicial scrutiny. For example, there was previously no "father's benefit" available to the husband of a deceased worker who was survived by a minor child.[8] In order to receive the husband's benefit,[9] husbands of covered workers had to meet dependency tests not imposed upon wives similarly situated.[10] Although a number of these disparities have been corrected, the benefit structure continues to reflect a pattern of marital life and family obligations which is no longer typical.

Because benefits to dependents are computed and distributed according to the relationship of the recipient to the covered worker, the system embodies a number of assumptions regarding the roles of men and women within the family.[11] Coverage is extended to the worker based on that worker's contributions during employment.[12] Additional benefits are allowed according to the number of dependents in the worker's family. Where there are two workers in the family, benefits are based on the record of the one regarded as the primary income producer. Thus, families with shared income producing arrangements contribute more and receive fewer benefits in proportion to their contributions than

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6. 42 U.S.C. § 402(a) provides as follows:

(a) Every individual who—
(1) is a fully insured individual (as defined in section 414(a) of this title),
(2) has attained age 62, and
(3) has filed application for old-age insurance benefits or was entitled to disability insurance benefits for the month preceding the month in which he attained the age of 65, shall be entitled to an old-age insurance benefit for each month, beginning with the first month after August 1950 in which such individual becomes so entitled to such insurance benefits and ending with the month preceding the month in which he dies. Except as provided in subsection (q) and subsection (w) of this section, such individual's old-age insurance benefit for any month shall be equal to his primary insurance amount (as defined in section 415(a) of this title) for such month.

7. 42 U.S.C. § 402(b) (1970 & Supp. V 1974) (wife's insurance benefit); *id.* § 402(c) (1970) (husband's insurance benefit); *id.* § 402(d) (child's insurance benefit); *id.* § 402(e) (1970 & Supp. V 1974) (widow's benefit); *id.* § 402(f) (widower's benefits); *id.* § 402(g) (mother's insurance benefits); and *id.* § 402(h) (parent's insurance benefits).

8. *See* text accompanying notes 43-47 *infra*.

9. 42 U.S.C. § 402(c) (1970).

10. *See* text accompanying notes 130-34 *infra*.

11. The family referred to throughout this article is the traditional nuclear family consisting of a husband and/or wife and perhaps children. The author has struggled unsuccessfully to devise a workable definition of the family that would include non-traditional arrangements ranging from extended families (those including more than two generations) to groups of two or more unmarried adults who share living space, household duties, expenses, and perhaps children. The American family today includes all of these, but the family unit recognized under OASDI remains the traditional, nuclear family.

12. The initial goal of the program was worker income security, replacement of lost wages, and protection of the worker against the economic hardships attendant to old age, death, and disability. C. SCHOTTLAND, *supra* note 1.

families with the identical income produced by one worker. Today, family economic stability is not always dependent upon the efforts of one breadwinner. Part I outlines the benefit system and analyzes its efficacy in light of a family economic structure that has changed considerably since 1935.

Several recent Supreme Court decisions[13] confronting the sex-linked benefit structure signal a growing recognition that presumed role behavior within the family is not an appropriate or constitutionally permissible basis for allocating benefits under the program.[14] In addition, these decisions herald an awareness that gender-based discrimination has imperiled family cohesion by devaluing the work of the female partner, both in the home and in the marketplace. Part II discusses these decisions and enunciates the principles which courts utilize for evaluating compulsory, federally-sponsored retirement income programs.

Recently, the family, traditionally viewed as a basic and vital unit in society, has been proclaimed an endangered institution.[15] Although it might be appropriate for a federally-sponsored and financed income security program to include among its goals strengthening the family, Social Security has not done so. The purpose of the Social Security program has traditionally been viewed as simply income replacement.[16] It has become apparent that complete retirement income security cannot be provided under Social Security.[17] That goal has been shelved, if not abandoned, during the recent legislative effort to protect the solvency of the program.[18] A more attainable goal would be the promotion of family economic stability by the provision of a retirement and disability income support system based on a recognition of the economic interdependence of the family members. The changes in the economy and in the pattern of participation in the labor market by the adult members of the family since 1935 have not been reflected in the benefit system. Part III articulates and examines the values and assumptions underlying the establishment of such

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13. Wiesenfeld v. Sec. of HEW, 367 F. Supp. 981 (D.N.J. 1973), *aff'd sub nom.*, Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Goldfarb v. Sec. of HEW, 396 F. Supp. 308 (E.D.N.Y. 1975), *aff'd sub nom.*, Califano v. Goldfarb, 430 U.S. 199 (1977); Webster v. Sec. of HEW, 413 F. Supp. 127 (E.D.N.Y. 1976), *rev'd per curiam sub nom.*, Califano v. Webster, 430 U.S. 313 (1977).

14. For example, in Califano v. Goldfarb, 430 U.S. 199 (1977), the Court stated that its earlier decision in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), "compels the conclusion . . . that the gender-based differentiation . . . is forbidden by the Constitution, at least when supported by no more substantial justification than 'archaic and overbroad' generalizations . . . or 'old notions' . . . that are more consistent with 'the role-typing society has long imposed,' . . . than with contemporary reality." *Id.* at 206-07 (citations omitted).

15. N.Y. Times, Nov. 27, 1977, at 1, col. 1.

16. R. MYERS, SOCIAL SECURITY 21-22 (1975).

> There are a number of what might be termed "basic principles" of the OASDI program. These were the basic principles initially, and they have not been changed greatly in more than 35 years of operation. Among these are the following: (1) the benefits are based on presumptive need, (2) the benefits should provide a floor of protection, (3) there should be a balance between social adequacy and individual equity, (4) the benefits should be related to earnings, and (5) financing should be on a self-supporting contributory basis.

Id.

17. N.Y. Times, Dec. 15, 1977, at 1, col. 3.

18. *Id.*

a sweeping, intrusive, and expensive governmental income support system. Whether such a federally-sponsored program is desirable will not be discussed.

Social Security will continue to exist and exert a pervasive influence on the retirement planning of most families. If that influence is to be equally beneficial for all workers and their families, benefits must be allocated to the individual family members without discriminating on the basis of the internal financial structure of the family. The work of strengthening and preserving the family is done within the unit. No amount of support from without will be effective if internal arrangements are not respected and the right to privacy in the establishment and modification of those arrangements is not preserved.[19] Acknowledgment of the economic interdependence of the family's adult members is central to this goal.

Thus, in summary, this article will first briefly examine the original purposes and assumptions underlying the Social Security system. Recent Supreme Court decisions scrutinizing some of the provisions that embody these assumptions will then be discussed. The values emerging from these decisions constitute a new standard for evaluating legislative schemes affecting family economic security. Finally, a legislative proposal for restructuring the Social Security system will be tested for its efficacy in incorporating the new standard.

II
THE SOCIAL SECURITY SYSTEM: DO YESTERDAY'S VISIONS FIT TODAY'S REALITIES?

A. The Original Structure and Purpose of the Social Security Act

The Great Depression brought the general problem of economic security, and the specific need of the aged dependent, to the attention of the nation.[20]

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19. In his dissenting opinion in Poe v. Ullman, 367 U.S. 497 (1961), Mr. Justice Harlan declared:

> Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that is has been found to draw to its protections the principles of more than one explicitly granted Constitutional right. . . . This same principle is expressed in the *Pierce* and *Meyer* cases, *supra*. [Meyer v. Nebraska, 262 U.S. 390 (1930) and Pierce v. Society of Sisters, 268 U.S. 510 (1924)]. These decisions, as was said in *Prince v. Massachusetts*, 321 U.S. 158, at 166, 'have respected the private realm of family life which the state cannot enter.'

Id. at 551-52.

In Pierce v. Society of Sisters, 268 U.S. 510 (1924), the Court sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools. In Meyer v. Nebraska, 262 U.S. 390 (1930), children's rights to receive teaching in languages other than English were protected against curtailment by the state.

The quality of family life is determined as much by the economic choices parents make as by educational decisions. The federal government should not prescribe favored economic arrangements by directly or indirectly rewarding some alternatives and penalizing others.

20. J. PECHMAN, H. AARON & M. TAUSSIG, SOCIAL SECURITY, PERSPECTIVES FOR REFORM 1 (1968).

The original Social Security Act[21] was designed to prevent the economic hardships that befall the aged and to assure the protection of qualified individuals as a matter of right.[22] The Act did not require the retired worker to submit to a means test,[23] nor did it provide for a discretionary determination of need by administrators. The provisions of the Act reflect a compromise between the desire to acknowledge the social welfare needs of a growing aged population that was no longer part of the labor force and the desire to reward, and thus encourage, participation by those able to work in the productive processes of the country.[24]

Under the original Act[25] the retired worker was the only beneficiary. Throughout the discussion of this legislation it was taken for granted that because most workers were male and the heads of households, providing protection for them would automatically result in financial security for their dependents.[26] Although women were covered as workers, their numbers were not deemed to be significant enough to merit calculation in the planning process. Thus, the only statistical determination made by the Advisory Council[27] was the number of men age sixty-five and over who were married in 1930.[28] No inquiry was made as to the number of women over 65 who were self-supporting. The underlying premise was that the worker was male and the sole supporter of his family.[29] America was viewed as a "land where all men were breadwinners and all women were wives or widows; where men provided necessary income for their families but women did not. . . ."[30]

By 1939 Congress had determined that the income protection afforded to the worker might not provide sufficient protection for his family.[31] Accordingly, the Act was amended to provide direct payment of benefits to certain members of the worker's family following his retirement or death.[32] Benefits were available to wives, widows, and children based on their presumed dependence on the worker (husband/father). Proof of actual dependency was not required.[33] No comparable protection existed for the husbands, widowers, or

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21. Social Security Act of 1935, *supra* note 3.

22. *Proposed Amendments to the Social Security Act: Hearings on H.R. 6635 Before the House Comm. on Ways and Means*, 76th Cong., 1st Sess. 24 (1939) (Final Report of the Advisory Council on Social Security) [hereinafter cited as *1939 Hearings*].

23. Nevertheless, an earnings test is applied to determine whether the worker is actually retired. *See* R. MEYERS, *supra* note 16, at 72-75.

24. *1939 Hearings*, *supra* note 22, at 26.

25. Social Security Act of 1935, *supra* note 3.

26. *Hearings before the Senate Committee on Finance on S. 1130*, 74th Cong., 1st Sess. 2 (1935).

27. *1939 Hearings*, *supra* note 22, at 30.

28. *Id.*

29. *Id.*

30. Griffiths, *Sex Discrimination in Income Security Programs*, 49 NOTRE DAME LAW 534 (1974).

31. R. MYERS, *supra* note 16, at 86.

32. Social Security Act Amendments of August 10, 1939, ch. 666, §§ 202(b), (d), (e), 53 Stat. 1364-65, *as amended* 42 U.S.C. §§ 402(b), (e), (g) (1970).

33. REPORT OF THE SOCIAL SECURITY BD., H. R. MISC. DOC. No. 110, 76th Cong., 1st Sess. 6 (1939). It was noted that in 1939 two-thirds of all men over age sixty-five were married. The benefit

children of working women, who were not considered to be dependent upon the earnings of the adult female.[34] Eleven years later, in 1950, the Act was amended to provide benefits, based on a woman worker's earnings record, for her children, and her husband or widower, but only if actual dependency was proven.[35] Thus, those who were dependent upon a female worker had to prove actual need in order to qualify for a benefit[36] which would have been allowed without such proof had the worker been male.

Benefits are paid to the worker and to the worker's dependents based on the worker's Primary Insurance Amount (PIA).[37] The PIA is calculated on the basis of the worker's average monthly wage.[38] To receive benefits, a person must have been employed in a covered[39] occupation for a substantial period of time.[40] Since benefits are based on the average monthly wage,[41] only gainfully employed individuals or their dependents qualify for coverage.[42] The present scheme gives no credit for uncompensated work done in the home. It is assumed that the retirement needs of the unemployed spouse will be met by the provisions for dependents' benefits.

The amended Act reveals several unstated assumptions about the nature of the family unit it protects. The first assumption is that the primary wage-earner is the husband. The second is that if the wife is employed, her earnings are not as essential to family maintenance as those of her spouse. The third is that any contribution to the family made by a nonwage-earning spouse is not sufficiently vital to the economic stability of the family to be recognized under this program.

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for wives was perceived as a way of increasing benefits to workers during the early years of the program. There was thought to be a greater need on the part of married couples since a couple was presumed to have only one wage-earner. Note that proponents of the amendment urged that the cost of this supplemental benefit would decrease as wives developed their own benefit rights based on their own earnings records. *1939 Hearings*, *supra* note 22, at 59 (statement of Arthur J. Altmeyer, Social Security Board Chairman).

34. *See* Note, *Sex Classifications in the Social Security Benefit Structure*, 49 IND. L.J. 181 (1973).

35. Social Security Act Amendments of August 10, 1950, ch. 809, § 101(a), 64 Stat. 483, 485, *as amended*, 42 U.S.C. §§ 402(c), (f) (1970).

36. *See* 42 U.S.C. §§ 402(c)(1)(C), 402(f)(1)(D) (1970).

37. 42 U.S.C. § 402(a) (1970 & Supp. V 1975). The computation of old age and survivors insurance benefit payments under the statute is based on this Primary Insurance Amount (PIA).

38. 42 U.S.C. § 415(a) (1970).

39. Covered employment is defined in 42 U.S.C. §§ 409, 410 (1970 & Supp. V 1975).

40. In order to be fully insured under OASDI, a worker must have at least one quarter of coverage per year from age twenty-one (or from 1950, whichever is later) until the year in which the worker dies or reaches age sixty-two, with at least six quarters of coverage or a total of forty quarters of coverage. 42 U.S.C. § 414(a) (Supp. V 1975). A "quarter of coverage" is defined as a three-month period in which the worker has received at least $50 in wages in covered employment or has been credited with at least $100 of self-employment income. *Id.* §§ 411(b), 412, 413(a) (1970 & Supp. V 1975). A "currently insured individual" is one who has at least six quarters of coverage during the thirteen quarters prior to the application for a benefit. *Id.* § 414(b) (Supp. V 1975). Section 413(a) (1970 & Supp. V 1975) provides that a woman who reaches age sixty-two qualifies under certain circumstances; whereas a male worker must reach age sixty-five to obtain the same benefit.

41. 42 U.S.C. § 415(b) (1970 & Supp. V 1975).

42. *See id.* § 414.

A fourth assumption concerning the care of children was embodied in the 1950 amendment which created the "mother's benefit."[43] The mother's benefit is payable to a woman under age sixty-two who is a wife, widow, or surviving divorced wife of a covered worker, so long as she has in her care a child who would be eligible as a dependent under the Act.[44] The benefit was created to allow a woman with children to stay at home and care for them after her husband's death, retirement, or disability. Since it was assumed that the mother was solely involved in child-rearing, this provision was designed to facilitate her *remaining* at home.[45] No corresponding father's benefit was created.[46] In 1971 the Advisory Council, still supporting the traditional view of appropriate family roles, recommended that this parental benefit not be extended to fathers:

> A man generally continues to work to support himself and his children after the death or disability of his wife. . . . Even though many more married women work today than in the past, so that they are both workers and homemakers, very few men adopt such a dual role; the customary and predominant role of the father is not that of a homemaker but rather that of the family breadwinner. The Council therefore does not recommend that benefits be provided for a young father who has children in his care.[47]

The system reflects a view of family life and family finances that fits only one of several possible marriage models. Even partners in the traditional marriage model, which the system was designed to protect, are not well served. Only the income-earner is accorded retirement security in his own right. The wife who is a homemaker can never obtain the same right to benefits. She is assured of full protection only so long as she remains married and her husband

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43. Social Security Act Amendments of August 28, 1950, tit. 1 § 202(g), 64 Stat. 482, 485-86 (amending 42 U.S.C. § 402 (1946), codified in 42 U.S.C. §§ 402(b)(1)(B) (1970), 402(g) (1970 & Supp. V 1975)). The first provision for a worker's widow with a dependent child was made in the 1939 amendments and designated "Widow's Current Insurance Benefits." Social Security Act Amendments of 1939, ch. 666 § 202(3), 53 Stat. 1365 (amending 42 U.S.C. § 402 (Supp. IV 1934)). The 1950 amendments not only changed the title to "Mother's Benefits," but also extended this protection to divorced mothers and, as a wife's benefit, to mothers whose husbands are retired or disabled. If the worker is retired or disabled, the mother's benefit is equal to 50% of his Primary Insurance Amount (PIA). 42 U.S.C. § 402(b)(1)(B), 402(b)(2) (1970). If the worker dies, the mother's benefit is 75% of his PIA. *Id.* § 402(g)(1) (Supp. V 1975); § 402(g)(2) (1970)).

44. Wives or ex-wives with children, whose husbands retire or become disabled, are provided a "wife's benefit" under 42 U.S.C. § 402(b)(1)(B) (1970). Wives with children, whose husbands die, are given the mother's benefit under 42 U.S.C. § 402(g)(1) (Supp. V 1975).

45. [1971] ADVISORY COUNCIL ON SOC. SEC., Rep. 35.

46. The Statute provided no benefits for fathers which are comparable to the mother's benefit provided under 42 U.S.C. § 402(g). Until the Supreme Court in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), declared this omission to be unconstitutional, fathers could not claim a "mother's benefit."

47. [1971] ADVISORY COUNCIL ON SOC. SEC., Rep. 35. The marriage model termed traditional (consisting of one male breadwinner and one female homemaker) may still be the preferred arrangement. Nevertheless, the fact that more women have entered the labor force in recent years than ever before indicates a strong need, as well as a strong desire, for families to have two incomes. For a review of the findings of economists on this subject, see Sawhill, *Economic Perspectives on the Family*, 106 DAEDALUS 115 (1977).

remains employed in a covered occupation.[48] Marriage is presumed to be a partnership of one worker and one dependent. There is no room in this model for recognition of the economic value of the housewife's contribution. The work of the homemaker in the form of household and child-rearing services is accorded no value upon which retirement security can accrue.

The traditional marriage model is rapidly being replaced by the two-income-earner family.[49] Partners in this type of marriage may contribute equally to the support of the family, they may alternate as primary wage earner, or one may always be the major contributor. Whatever the family's economic arrangement is, the wife's payroll deductions will not be reflected in the benefits she receives, unless she consistently earns more than her husband.[50] The wife must qualify as the permanent, primary breadwinner; otherwise she will be awarded benefits which only reflect her presumed status as dependent. Divorced spouses are accorded even less protection.[51]

The equal treatment of both spouses, whether their contributions are made in the form of services, salaries, or a combination of both, would further the goal of family economic stability. An approach which yields independent benefit records for both spouses would be consistent with the favored treatment accorded by the law to marriage and the family. The changes that have occurred in the work patterns of women and in the economic structure of the family have created the need to restructure the Social Security system to accommodate more than one marriage model.

B. Changes in the American Family Since 1935.

The society that the legislators in 1935 projected for the future is not the society of the 1970's.[52] The picture of a family in which the husband is the only breadwinner and the wife is in the home caring for the children does not represent the typical American family today.[53] In 1975, only seven out of one-hundred husband-wife families fit this description.[54] Part of the reason for this

48. *See* R. MYERS, *supra* note 16, at 43.

49. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, EMPLOYMENT IN PERSPECTIVE: WORKING WOMEN 3 (1978). In June, 1978, 46.6% of the married women whose husbands were present were employed. *See* Wall St. J., Aug. 28, 1978, at 1, col. 1; Aug. 31, 1978, at 1, col. 1; Sept. 5, 1978, at 1, col. 1; Sept. 8, 1978, at 1, col. 1; Sept. 13, 1978, at 1, col. 1; Sept. 15, 1978, at 1, col. 1; Sept. 19, 1978, at 1, col. 1; Sept. 22, 1978, at 1, col. 1. This series of articles on women at work explores many of the ramifications of the increased participation of women in the labor force. ". . . (M)ost analysts believe that the long rise in women's labor force participation will continue well into the future. 'I would expect over 44 million women to be in the labor market by 1980,' says Ralph Smith of the Urban Institute. If he's right, that would amount to nearly 52% of the expected 1980 population of working age females." Wall St. J., Aug. 28, 1978, at 14, col. 3.

50. Griffiths, *supra* note 30, at 536-37.

51. *See* Mathews v. DeCastro, 429 U.S. 181 (1976), which holds that different treatment of married and divorced women is constitutionally permissible where there is reason to presume that their needs are different.

52. *See generally* Sawhill, *supra* note 47.

53. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, NEWS 2-3 (March 8, 1977) [hereinafter cited as LABOR STATISTICS, NEWS].

54. *Id.* at 3.

dramatic change is that women have entered the labor force in greater numbers than ever before. Between 1950 and 1974 the number of women workers nearly doubled, while the number of men workers increased by about one-fourth.[55] Thus, the ratio of women per one-hundred men in the labor force has risen from forty-one in 1950 to sixty-three in 1974.[56]

The marital composition of the labor force has also undergone substantial change since 1970.[57] While married persons still predominate in the labor force, the percentage of unmarried persons has been steadily increasing. In March, 1970, 69.2% of the labor force was married. By March, 1976, the percentage of married persons had dropped to 64.7.[58] This drop may reflect either the declining popularity of marriage, which has caused fewer young people in the labor market to marry,[59] or the increasing incidence of divorce, which has forced more previously-married women into the labor force.[60] In any case, the changing patterns of marriage and divorce contribute substantially to this multiplicity of domestic arrangements.[61] As families are formed, dissolved, and regrouped, the members cannot be presumed to play the same roles throughout their adult lives.

The family's increasing need for two incomes most readily accounts for the growth in the numbers of wives and mothers in the work force. Economic pressure has caused significant changes in the pattern of family financial responsibility. Of the total number of husband-wife families in 1975, only 29.5% were supported by the husbands' earnings alone.[62] The earnings of wives represented 26.3% of the family income.[63] The role of the breadwinner in the family is no longer assigned to one person. It is determined not so much on the basis of a person's sex as it is determined by economic necessity. As marriage evolves into an economic partnership, the financial planning of the participants takes into consideration their personal preferences and employment opportunities.[64]

Historically, motherhood has been seen as an impediment to a woman's gainful employment.[65] The presence of children in the family, however, may in fact be an incentive for mothers to enter the work force. The economic burden that children impose on the family is substantial and has increased[66] since the

55. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, A STATISTICAL PORTRAIT OF WOMEN IN THE U.S. 23, 26 (April 1976) [hereinafter cited as A STATISTICAL PORTRAIT].

56. *Id.*

57. LABOR STATISTICS, NEWS, *supra* note 53, at 1.

58. Id. From 1970-1976 "the proportion of the persons in the labor force who had never been married grew from 20.1 to 23.2 percent and that of divorced and separated persons rose from 6.8 to 9.2 percent." *Id.*

59. It is also possible to interpret this statistic as indicating that workers are now entering the labor force at an earlier age.

60. *See* A STATISTICAL PORTRAIT, *supra* note 55, at 31.

61. Clark, *The New Marriage*, 12 WILLIAMETTE L. J. 441, 449 (1976).

62. LABOR STATISTICS, NEWS, *supra* note 53, at 49, Table 4.

63. *Id.* at 3. Where the wife worked year-round, fulltime, the percentage was 38.8. *Id.*

64. Sawhill, *supra* note 47, at 116-17.

65. L.P. BROCHET, WOMAN: HER RIGHTS, WRONGS, PRIVILEGES 124-33 (1869, 1970 ed.); M.M. BROWNLEE & W.E. BROWNLEE, WOMEN IN THE AMERICAN ECONOMY 9 (1976).

66. Sawhill, *supra* note 47, at 118.

Social Security Act was passed. Whatever the reasons may be, the number of working mothers has increased markedly in the last thirty years. Between 1940 and 1976, the labor force participation rate of mothers leapt from 8.6% to 48.8%.[67] The participation rate for mothers was two percentage points higher than for all other women. Furthermore, mothers of minor children are employed in greater numbers than ever before. Of the nearly 38 million women in the labor force in March, 1976, 14.6 million had children under eighteen years of age.[68] Over three-fifths of all working mothers had children between six and seventeen years of age. The remaining two-fifths had children under the age of six.[69] These figures reflect what is probably the most significant change in the labor force that this country has ever experienced.[70]

The present Social Security system not only adheres to the outdated assumption that husbands are the only breadwinners, but also presupposes that all marriages last forever. Today, however, marriages are being dissolved with increasing frequency. The national divorce rate has been increasing so steadily that in 1975 the number of divorces in a single year exceeded one million for the first time.[71] One in every three marriages now ends in divorce.[72]

The only time a marriage is treated as an economic partnership is upon the retirement of the chief income-earner. It is supposed that only at that point in the lives of the individuals and in the duration of the marriage can the benefits be allocated fairly between the partners. Because of the increasing incidence of divorce, many marriages do not survive until one or both of the partners reach retirement age. The result of these striking changes in family composition and finance is that the Social Security system is less responsive to the needs of both adult partners. Therefore, an economic partnership must be recognized as existing throughout the marriage, regardless of its duration.

Outmoded assumptions about sex roles in a marriage are not the only cause of the disparity between the stated purpose of the program, i.e., compensation for lost income, and its actual effectiveness. Social Security is no longer purely an income replacement system.[73] The contribution from payroll tax is no longer the sole financial base for the system. Also, the benefits paid are only loosely based on the income-earner's contribution. The primary determinant of the benefit is the number of dependent family members. This is sometimes characterized as a shift from an individual equity system to a social adequacy program.[74] This change has affected the character of the benefit. The Social

67. EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, WOMEN'S BUREAU 4 (October 1977).

68. *Id.* at 1.

69. *Id.*

70. N.Y. Times, Nov. 29, 1977, at 1, col. 1.

71. U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 68-69 (1976).

72. U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION SURVEY (June 1976).

73. C. CAMPBELL, THE 1977 AMENDMENTS TO THE SOCIAL SECURITY ACT 19 (American Enterprise Institute Special Analysis No. 78-2, 1978).

74. R. MYERS, *supra* note 16, at 23-24.

Security system's form of government largess should be a property right which accrues in both the husband and wife as independent workers, with benefits based primarily on their contributions to the economic stability of the family and secondarily on their payroll contributions. Furthermore, the expectation of the retired individual that this benefit will be available as a matter of right must be protected.

C. *The Failure of the Social Security System to Treat Benefits as Property Rights in the Family Members*

The final criticism of OASDI is not one based on the lack of sex-neutral standard for allocating benefits, but one which goes to the very heart of the entitlement created by the federal government. Social Security benefits are a form of government largess, which is supported by and available to almost all workers. Participation in the program is, in effect, compulsory.[75] The benefits are not vested property rights in the person who has been compelled to contribute part of his or her wages every year.[76] The social insurance scheme bears some resemblance to private insurance plans, such as private pension plans and deferred compensation schemes, in that both employer and employee make contributions to the fund.[77] Social Security does not create contractual rights in its beneficiaries.[78]

The family's interest in securing these benefits, whether for the retirement years of its workers or for the support of its dependent children during their minority or disability, is as vital as any interest in property of a more traditional nature. In many instances retirement or survivor's benefits may be the sole source of retirement income for a family. This entitlement may be the only protection against resorting to public welfare, which, unlike OASDI benefits, many recipients view as a degrading and unacceptable reward for a lifetime of full employment. Social Security benefits, however, are not property interests protected under the law to the same extent as one's home or savings account are. This form of wealth, flowing from the government, is "held by its recipients conditionally, subject to confiscation in the interest of the paramount state."[79]

In *Flemming v. Nestor*,[80] it was determined that the interest of the worker in his or her Social Security benefits is not an accrued property right.[81] Ephram

75. *Id.* at 15.

76. Justice Black has pointed out:

> The people covered by this Act are now able to rely with complete assurance on the fact that they will be compelled to contribute regularly to this fund whenever each contribution falls due. I believe they are entitled to rely with the same assurance on getting the benefits they have paid for and have been promised, when their disability or age makes their insurance payable under the terms of the law.

Flemming v. Nestor, 363 U.S. 603, 624 (1960) (Black, J., dissenting).

77. R. MYERS, *supra* note 16, at 12-16.

78. *Id.* at 13.

79. Reich, *The New Property*, 73 YALE L.J. 733, 768 (1964).

80. 363 U.S. 603 (1960).

81. *Id.* at 608.

Nestor was an alien who became eligible for old age benefits under Social Security in 1955. He had come to this country in 1913 and had contributed, along with his employer, to the old age and survivors insurance trust fund from 1935 until his retirement in 1955. For three years prior to his employment he had been a member of the Communist Party. In 1954 Congress passed two laws, both of which operated retrospectively to make such membership cause for deportation,[82] and one of which made deportation grounds for loss of retirement benefits.[83] Nestor was deported in 1956, and his wife, who remained behind, was shortly thereafter deprived of the benefits payable to her. The Supreme Court, in a five-to-four decision, held that discontinuing Nestor's retirement insurance because of activities which were lawful at the time he was conducting them, was not a taking of property without due process of law.[84] This decision was based solely on the finding that retirement benefits were not vested property rights. Nestor's interest could not be "analogized to that of the holder of an annuity. . . ."[85]

The Court reasoned that Congress had built into the Social Security system the flexibility to allow for "boldness in adjustment to ever-changing conditions. . . ."[86] It determined that judicial interference would be allowed only where an action of Congress modifying these rights was "utterly lacking in rational justification."[87] The Court concluded that Congress could rationally decide not to support deported persons with public funds on the grounds specified in the statute. Nevertheless, it found that the "interest of a covered employee . . . is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause."[88]

The holding that entitlement to retirement benefits is less than a fully protected property interest seriously misapprehends the importance of these benefits to the family. Most participants reasonably expect that the government will guarantee a right to benefits based on their own and their employer's contributions. Most participants do not believe that the government is merely distributing a gratuity and can cease payment whenever it is not totally irrational to do so. The Court's holding implies that OASDI is a gratuity. This implication is

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82. 8 U.S.C. § 1251(a)(6)(C) (1976).
83. 42 U.S.C. § 402(n) (1970).
84. The Court stated:

> To engraft upon the Social Security system a concept of "accrued property rights" would deprive it of the flexibility and boldness in adjustment to ever changing conditions which it demands. . . . It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and has since retained, a clause expressly reserving to it "the right to alter any provision" . . . . That provision makes express what is implicit in the institutional needs of the program . . . . We must conclude that a person covered by the Act has not such a right in benefit payments as would make every defeasance of "accrued" interests violative of the Due Process Clause of the Fifth Amendment.

363 U.S. at 610-11.
85. *Id.* at 610.
86. *Id.*
87. *Id.* at 611.
88. *Id.*

inconsistent with the original purpose of the law. During the formation of the legislation Congress considered it undesirable that retirees think they were being given something for nothing. The system was created to reflect the "concept that free men want to earn their security and not ask for doles—that what is due as a matter of earned right is far better than a gratuity."[89]

The original approach to federal old age insurance was to directly relate the benefits to the contributions paid by the worker.[90] Provision was made for a lump sum rebate to assure the return of contributions for which the worker would have otherwise received no benefit. Thus, if a contributor died before attaining the age of retirement, a lump sum payment was made to his or her estate.[91] One who reached retirement age without having made the requisite contribution to qualify for old age insurance benefits was entitled to a lump sum rebate.[92] The 1939 amendments[93] eliminated the rebate provision and reduced the lump sum death payments.[94] However, payments to dependents and survivors of fully insured individuals were substituted.[95] These changes were made primarily to increase the benefits paid to persons retiring in the first several years of the program without increasing the cost of the program.[96] A secondary reason for the change was to expand the protection offered to the family of the worker.[97] This shifted the focus from the contributions of the individual to the needs of the family. The second provision reflected a desire to reduce the possibility that a surviving wife or child would be forced to resort to public assistance or general relief.[98] The purpose and effect of these amendments was to create a pattern of family protection, at the cost of somewhat diluting individual compensation for contributions.

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89. 102 CONG. REC. 15110 (1956) (remarks of Senator George, Chairman of the Senate Finance Committee). "Social Security is not a hand out; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self-respect." *Id.*

90. *See* R. MYERS, *supra* note 16, at 23-24.

91. Social Security Act of 1935, ch. 531, § 204(a), 49 Stat. 620.

92. Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360 (amending 42 U.S.C. § 402 (1935)).

93. The 1939 amendments reduced the lump-sum death payment to six times the Primary Insurance Amount (PIA). *Id.* § 202(9). The maximum PIA was then $60. In 1950 the payment was reduced to three times the PIA (maximum PIA was $80). Social Security Act Amendments of 1950, ch. 809, § 202(i), 64 Stat. 477 (amending 42 U.S.C. § 402 (1939)). The 1954 amendments reduced the lump-sum death payment to the lesser of three times the PIA (maximum was $522.80) or $255. Social Security Act Amendments of 1954, ch. 1206 § 102(i)(2), 68 Stat. 1062 (amending 42 U.S.C. § 402 (1950)). The present maximum payment remains $255. 42 U.S.C. § 402(i) (1970).

94. Social Security Act Amendments of 1939, ch. 666 § 202, 53 Stat. 1360 (amending 42 U.S.C. § 402 (1945)).

95. SOCIAL SECURITY BOARD, PROPOSED CHANGES IN SOCIAL SECURITY ACT (Dec. 30, 1938), *reprinted in* 2 SOC. SEC. BULL. 4, 7 (1939). *See* ADVISORY COUNCIL ON SOCIAL SECURITY, FINAL REPORT, S. DOC. NO. 4, 76th Cong., 1st Sess. (1938) [hereinafter cited as ADVISORY COUNCIL REPORT]. *See generally* A. ALTMEYER, THE FORMATIVE YEARS OF SOCIAL SECURITY 89-92 (1966).

96. A. ALTMEYER, *supra* note 95, at 100-02. *See* H.R. REP. NO. 728, 76th Cong., 1st Sess. 7 (1939); S. REP. NO. 734, 76th Cong., 1st Sess. 11 (1939).

97. 4 SOC. SEC. BD. ANN. REP. 168 (1939).

98. "[T]he new pattern of benefits had the basic social advantage of relating the benefits to the probable need as indicated by the existence of dependents." A. ALTMEYER, *supra* note 95, at 102.

Flemming v. Nestor[99] stands as a focal point of the tension between competing views of retirement insurance. On the one hand, it is argued that this program was designed to insure adequate maintenance for the greatest number, regardless of the amount of their contributions. On the other hand, the program attempts to afford protection to the worker commensurate with his or her contributions. The Court again referred to this controversy in *Weinberger v. Wiesenfeld*[100] when it discussed the government's argument, based on the holding in *Flemming*, that the covered worker has a noncontractual interest in future benefits.[101] It stated that the lack of direct correlation between one's benefits and one's contributions is not sufficient reason to justify unequal treatment as between workers.[102] The Court remarked in a footnote that Congress had attempted to meet both goals by providing at least as much protection as the workers' contributions would purchase on the private market.[103]

The task that continues to confront both Congress and the Court is that of transforming compulsory contributions to a government trust fund into an entitlement which accrues not only to the individual worker, but also to his or her family and dependents. This difficulty has not been squarely faced by either body. Its resolution requires careful articulation of the nature of the worker's contribution to the program and to the national economy, of the nature of the entity being protected and benefited, and of the philosophical basis for the choices made to justify the result.

Social Security is here to stay, in one form or another. This system of retirement insurance, born in the Depression, has matured into a pervasive fixture in the employment and retirement arrangements of almost every American worker. The right to retirement benefits cannot be characterized as a governmental gratuity. The Court in *Flemming v. Nestor*, a case decided on unusual facts, seriously misjudged the importance of this benefit as a vested property right. In order to fully promote the economic stability of the family during retirement, Congress should declare these benefits to be vested rights, accrued on a basis that presumes the economic value of contributions of both marriage partners to be equal. The standard for measuring the effectiveness of the program to meet that goal has begun to emerge from recent Supreme Court decisions concerning this program. These decisions lend further strength to the argument that the economic interdependence of members of the family compels reassessment of the philosophical basis underlying Social Security.

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99. 363 U.S. 603 (1960); See text accompanying notes 80-88 *infra* for a discussion of this case.
100. 420 U.S. 636 (1975).
101. *Id.* at 646.
102. *Id.* at 646-47.
103. *Id.* at 647 n.14.

III
THE SUPREME COURT APPLIES EQUAL PROTECTION ANALYSIS TO SOCIAL SECURITY BENEFIT STRUCTURE

A. The First Challenge: Weinberger v. Wiesenfeld[104]

In 1975, the Supreme Court faced for the first time a constitutional challenge to the disparate treatment accorded women under the Social Security system. In *Weinberger v. Wiesenfeld*,[105] Stephen Wiesenfeld, a young widower whose wife had died in childbirth in 1972, claimed the benefit provided under 42 U.S.C. § 204(g), the mother's insurance benefit.[106] His wife, Paula, had been employed as a school teacher for seven years prior to her death, during which time the maximum Social Security deductions had been taken from her salary. For several of those years she was the primary wage-earner in the family. Upon her death, her husband was left with the sole responsibility for the care of their infant son. He applied for Social Security benefits for himself, as the surviving spouse of a covered worker, and for their son, as a dependent. Benefits were granted to the child pursuant to the Act's child's insurance benefit provisions,[107] but Mr. Wiesenfeld was denied benefits for himself because the statute restricted eligibility for such payments to "widows" and "surviving divorced mothers."[108] He challenged the constitutionality of this federal statute on the ground that it awarded benefits solely on the basis of sex.

Stephen Wiesenfeld contended that the purpose of the benefit was to replace the income which the deceased worker could no longer provide for the family. He urged that the law's embodiment of sexually discriminatory classifications was based on a stereotypic presumption that gender determines a person's role in the family. He argued that awarding benefits only to widows and surviving divorced wives is over-inclusive because some wives are not in fact dependent on their husband's or ex-husband's earnings. He likewise contended that the scheme is under-inclusive because some husbands are in fact supported by their wives. Thus, he reasoned that the purpose of awarding a benefit to a surviving dependent spouse, which is to give that spouse the option of staying home with the children, could be met by a dependency test.[109] However, no such test was available to Mr. Wiesenfeld. The benefit was not available to fathers or widowers, no matter what the source of their financial support.

The lower court[110] examined several modes of analysis which might be

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104. 420 U.S. 636 (1975), *aff'g* Weisenfeld v. Sec. of HEW, 367 F. Supp. 981 (D.N.J. 1973) (three judge court).

105. 420 U.S. at 636.

106. 42 U.S.C. § 402(g) (1970 & Supp. V 1975).

107. *Id.* § 402(d).

108. *Id.* § 402(g).

109. A dependency test was applied to husbands who sought widower's benefits under § 402(f)(1). *See* text accompanying notes 129-33 *infra*.

110. 367 F. Supp. 981 (D.N.J. 1973).

required by previous Supreme Court decisions.[111] It found the most appropriate parallel in *Frontiero v. Richardson*,[112] where a government benefit awarded solely on the basis of the federal employee's sex was struck down as unconstitutionally discriminatory.[113] The standard set by four Justices[114] in *Frontiero* was that sex is a suspect classification. They held, therefore, that statutes establishing sex-based categories are subject to strict scrutiny.[115] The strict scrutiny test has not been applied consistently in sex discrimination cases decided since *Frontiero*.[116] The analytical difficulties facing the lower court prompted one commentator to characterize the court's efforts as an heroic struggle "to divine the Court's direction from this bewildering doctrinal maze."[117] The court's ultimate reliance upon the strict scrutiny test applied by Mr. Justice Brennan in *Frontiero* resulted in an order that Mr. Wiesenfeld be paid the benefits to which he would have been entitled, but for the challenged provision.[118]

On appeal, the Supreme Court voted unanimously to affirm the decision of the district court.[119] The opinion, written by Mr. Justice Brennan, first noted that the discrimination invalidated in *Frontiero* and the sex-based classification challenged by *Wiesenfeld* were indistinguishable.[120] The Court declared the purpose of the statute to be the alleviation of financial strain on surviving de-

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111. *Id.* at 987.

112. 411 U.S. 677 (1973).

113. The court struck down military housing and medical benefits statutes that permitted a serviceman to claim his wife as a dependent, whether or not she actually depended upon him for her support, but permitted a service-woman to claim her spouse as a dependent only if he actually depended upon her for one half of his support. *Id.* at 688-91.

114. Justices Brennan, Douglas, Marshall, and White signed the majority opinion in *Frontiero*.

115. 411 U.S. at 688. For a complete analysis of the array of doctrines and decisions confronted by the lower court, see Johnston, *Sex Discrimination and the Supreme Court—1975*, 23 U.C.L.A. L. REV. 235, 249-52 (1975).

116. *See, e.g.*, Stanton v. Stanton, 421 U.S. 7 (1975); Craig v. Boren, 429 U.S. 190 (1976). The "two-tier" analysis in equal protection cases, introduced by the Warren Court, has not always found favor in the Burger Court. *See* Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring). The fate of the rational basis and strict scrutiny tests is carefully considered in Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). It may be that a middle level of inquiry is being formulated. In Trimble v. Gordon, 430 U.S. 762 (1977), the Court applied a test that was said to be "less than strict scrutiny" but "not toothless," to classifications based on illegitimacy. The standard was the same as that applied by the majority in Craig v. Boren, 429 U.S. 190 (1976): a law which treats males less favorably than females "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. Under the "not toothless" standard the purpose of the legislation must bear more than an attenuated relationship to state interests. Before the *Trimble* decision, one commentator expressed the belief that with respect to sex discrimination, the Court had already adopted the suspect classification test in all cases except "ameliorative discrimination" situations, in which a more flexible rule was applied. Note, *The Emerging Bifurcated Standard for Classifications Based on Sex*, DUKE L.J. 163, 177-84 (1975).

117. Johnston, *supra* note 115, at 251.

118. 367 F. Supp. at 991.

119. 420 U.S. 636 (1975). Justice Douglas took no part in the consideration or decision of the case. Justice Rehnquist concurred in the result only.

120. 420 U.S. at 642-43.

pendents of workers.[121] The Court then declared that a gender-based classification failed to achieve this goal because the families of female workers were not afforded the same protection as the families of male workers. The Court asserted that even if most husbands are workers and most wives are homemakers and child-bearers, that presumption "cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support."[122] In effect, the Court declared that the Wiesenfeld family should not be penalized because its allocation of primary responsibilities did not correspond with Congressional presumptions about appropriate sex roles. The Court also refused to support sex-based stereotypes which presume that one sex is better suited to child-rearing activities than the other. The care provided by each parent was deemed to be equally important: "It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female."[123]

The concurring opinion of Mr. Justice Powell, who was joined by the Chief Justice, emphasizes that the legislative purpose for creating a mother's benefit was family protection.[124] The opinion simply concludes that the challenged gender-based classification furthers no "legitimate" governmental interest.[125] It was not clear from the concurring opinion whether an instance in which a sex-based classification provides family protection might still serve a "legitimate" governmental objective. Indeed, this concurring opinion[126] and the separate concurrence of Mr. Justice Rehnquist[127] are predicated almost entirely upon the strong showing of legislative history.[128] Since this was the first challenge to any of the sex-based benefits in the Social Security scheme it remained to be seen whether other gender-based classifications might be upheld as furthering some legitimate governmental interest.

B. The Presumption of Dependency Extended to Widowers: Califano v. Goldfarb[129]

For almost twenty-five years, Hannah Goldfarb worked as a secretary in the New York Public School System and during those years paid in full all Social Security taxes on her earnings. After her death in 1968, her husband, Leon Goldfarb, a retired federal employee, applied for the widower's benefits provided under Federal Old Age, Survivors and Disability Insurance.[130] His application was denied because he did not meet the statutory requirement that he be receiving at least half of his support from his wife at the time of her

121. *Id.* at 648-49.
122. *Id.* at 645.
123. *Id.* at 652.
124. *Id.* at 654. *See* Walker, *Sex Discrimination in Government Benefit Programs*, 23 HASTINGS L.J. 277 (1971).
125. 420 U.S. at 655.
126. *Id.* at 654-55.
127. *Id.* at 655.
128. *Id.* at 648-52. *See* ADVISORY COUNCIL REPORT, *supra* note 95, at 31.
129. 430 U.S. 199, 202-03 (1977).
130. 42 U.S.C. §§ 401-431 (1970 & Supp. V 1975).

death.[131] For Mr. Goldfarb to have satisfied the requirements of the Act,[132] his wife would have to have been earning three times what he earned.[133]

The district court in *Goldfarb* held that the disparate treatment of surviving male and female spouses mandated by this section constituted unjustifiable discrimination against female wage-earners because it afforded them less protection for their surviving spouses than is provided to male employees.[134] Mr. Justice Brennan was joined by three other justices in affirming the district

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131. Goldfarb v. Sec. of HEW, 396 F. Supp. 308, *aff'd sub nom.*, Califano v. Goldfarb, 430 U.S. 199 (1977). 42 U.S.C. § 402(f)(1) provides:

> (f)(1) The widower (as defined in section 416(g) of this title) of an individual who died a fully insured individual, if such widower—
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> (A) has not remarried,
>
> (B)(i) has attained age 60, or (ii) has attained age 50 but has not attained age 60 and is under a disability (as defined in section 423(d) of this title) which began before the end of the period specified in paragraph (6),
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> (C) has filed application for widower's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which she died and (I) has attained age 65 or (II) is not entitled to benefits under subsection (a) of this section or section 423 of this title,
>
> (D)(i) was receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, from such individual at the time of her death or, if such individual had a period of disability which did not end prior to the month in which she died, at the time such period began or at the time of her death, and filed proof of such support within two years after the date of such death, or, if she had such a period of disability, within two years after the month in which she filed application with respect to such period of disability or two years after the date of such death, as the case may be, or (ii) was receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, from such individual at the time she became entitled to old-age or disability insurance benefits or, if such individual had a period of disability which did not end prior to the month in which she became so entitled to such benefits, and filed proof of such support within two years after the month in which she became entitled to such benefits or, if she had such a period of disability, within two years after the month in which she filed application with respect to such period of disability or two years after the month in which she became entitled to such benefits, as the case may be, and
>
> (E) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of his deceased wife,
>
> shall be entitled to a widower's insurance benefit for each month . . . .

132. 42 U.S.C. § 402(f)(1)(D) (1970).

133. Thus, only husbands whose wives contribute 75% of family income meet this dependency test. The wife must have provided for all of her own half of the family budget, plus half of her husband's share. *See generally* 20 C.F.R. § 404.350 (1977).

134. 396 F. Supp. 308, 309 (1975). This decision also applied to 42 U.S.C. § 402(c)(1)(C) (1970), which imposes a similar dependency requirement on husbands of covered female wage-earners applying for old age benefits. *Id.* Under § 402(b) (1970 & Supp. V 1975), wives applying for such benefits are not required to prove dependency. Several lower court decisions holding these classifications unconstitutional were affirmed by the Supreme Court three weeks after its decision in *Goldfarb*. *See, e.g.*, Abbott v. Califano, 430 U.S. 924 /1977), *aff'g* ___ F. Supp. ___ (N.D. Ohio 1976); Jablon v. Sec. of H.E.W., 430 U.S. 924 (1977), *aff'g* 399 F. Supp. 118 (D. Md. 1975); Silbowitz v. Califano, 430 U.S. 924 (1977), *aff'g sub nom.*, Silbowitz v. Sec. of H.E.W., 397 F. Supp. 862 (S.D. Fla. 1975).

court's decision.[135] The majority held that the gender-based distinction challenged by Mr. Goldfarb presented an equal protection question indistinguishable from that decided in *Wiesenfeld*,[136] and that that decision, along with *Frontiero v. Richardson*,[137] required affirmance of the district court judgment.[138] According to the majority, Hannah Goldfarb, like Paula Wiesenfeld, "not only failed to receive for her family the same protection which a similarly situated male worker would have received but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others."[139] *Wiesenfeld* compelled the conclusion that gender-based discrimination is forbidden by the Constitution when supported by no more substantial justification than overbroad generalizations about dependency. The decision was based on equal protection for the working wife.[140] After *Goldfarb*, a widower under OASDI is treated just as a widow. He is presumed to be eligible for a dependent's benefit unless his benefit as a worker is higher. Although it was estimated that 220,000 additional widowers would be eligible to collect $211 million in benefits in the first year after the decision,[141] the Court did not discuss the potential economic impact of its decision.

The plurality decision in *Goldfarb* was made possible by the concurrence of Mr. Justice Stevens. Justice Stevens wrote that the four justices who voted to affirm did not correctly characterize the relevant discrimination.[142] He argued that the proper focus is equal protection for the male survivor rather than equal protection for the deceased female worker.[143] In his judgment, the case did not involve a question of compensation for the female worker.[144] The concurring opinion is ground-breaking in its identification of the relevant discrimination as the plight of the surviving male spouse. It is an important first step in the effort to gain legal recognition that sex discrimination harms both men and women.

In *Wiesenfeld* the Court displayed an understanding of the true nature of most gender-based discrimination disputes: that stereotypes which embody overbroad assumptions about sex roles are harmful when the government imposes them upon individuals whose personal choices do not conform.[145] Although it is more frequently women who are disadvantaged by such discrimination, in *Goldfarb* Mr. Justice Stevens acknowledged the adverse effect governmental intrusion can have on the lives of *all* citizens, both men and wom-

135. In the majority opinion Mr. Justice Brennan was writing for Justices White, Marshall, and Powell.

136. 420 U.S. 636 (1975).

137. 411 U.S. 677 (1973).

138. 430 U.S. at 204.

139. 430 U.S. at 206 (quoting 420 U.S. at 645).

140. *Id.*

141. Wall St. J., March 3, 1977, at 2, col. 1.

142. 430 U.S. at 217.

143. "In short, I am persuaded that the relevant discrimination in this case is against surviving male spouses, rather than against deceased female wage earners." *Id.* at 218.

144. For this reason, Justice Stevens held that *Frontiero* was not applicable. *Id.* at 217 n.1.

145. *See* Johnston, *supra* note 115, at 261.

en. It is the first time any member of the Court has clearly articulated the view that sex discrimination harms men as well as women. Taken together, the majority and the concurring opinions in *Goldfarb* hold that the statute, whether viewed as devaluing the contribution of the wage-earner female to her family's economic well-being or as penalizing surviving male spouses on the basis of their gender alone, imposes disparate treatment which is constitutionally impermissible.

In addition, Justice Stevens' concurrence refuted the dissenting view that the statutory scheme was designed for a compensatory purpose.[146] The dissenting view urged that because of past economic discrimination against women, the law was designed to make it easier for widows to obtain benefits. Therefore, the law was said to rest upon some ground of difference having a fair and substantial relation to the object of the legislation.[147] Such a compensatory purpose was the justification for upholding a Florida statute granting widows but not widowers a $500 tax exemption in *Kahn v. Shevin*.[148] Justice Stevens characterized that decision as one upholding a "statute on the basis of a hypothetical justification for the discrimination which had nothing to do with the legislature's actual motivation."[149] Justice Stevens openly acknowledged the disparity between *Kahn* and *Wiesenfeld*. He stated a preference for the reasoning expressed in the later, unanimous decision. In *Wiesenfeld* the Court refused to permit mere recitation of a benign, compensatory purpose automatically to shield a statute which is actually based on archaic and overbroad generalizations.[150] Assuming that the special characteristics of social insurance plans are not and should not be an acceptable basis for tolerating gender-based discrimination that affects both men and women unfairly, the question remains what test should be applied to determine when different treatment based on gender may be tolerated. The Court has failed to discuss whether the historic, economic disadvantage women suffer is sufficient reason for subjecting gender-based classifications to a different test than other types of classifications. Narrowly interpreted, *Wiesenfeld* confines the *Kahn* principle to those statutory schemes embodying classifications demonstrably based on contemporary realities and with actual, benign, compensatory purposes.[151]

Whatever degree of economic disadvantage women may suffer, economic harm falls equally and inexorably upon the family, composed of both men and women. Where such grave harm to one of society's fundamental institutions is recognized, surely it is necessary and reasonable, if not mandated by the equal protection clause, to test particular statutory classifications under heightened levels of scrutiny.

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146. 430 U.S. at 217. *See* J. Rehnquist, dissenting, at 241.
147. *Id.* at 225-26.
148. 416 U.S. 351 (1974).
149. 430 U.S. at 224.
150. *Id.*
151. Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 471 (1978). *See* Califano v. Webster, 430 U.S. 313 (1977).

C. *Benefits For Divorced Spouses: Oliver v. Califano*[152]

Bertha and Stuart Oliver were married in 1921 and divorced in 1946, after nearly twenty-five years of marriage. Mrs. Oliver worked during most of her adult life, including the years of her marriage, in employment covered by Social Security. She retired in 1967, a fully insured individual under Title II of the Social Security Act.[153]

Mr. Oliver was also employed until his retirement in 1945, but was employed by the federal government and, therefore, was not covered by Social Security. Mr. Oliver was also ineligible for benefits under Title II of the Act on the basis of his own work record.[154] Mr. Oliver sought divorced spouse benefits under 42 U.S.C. § 402(b) and was denied those benefits because he was a divorced husband, not a divorced wife.[155] If Mrs. Oliver had been the man and Mr. Oliver the wife, benefits would have been granted automatically. Mr. and Mrs. Oliver challenged the constitutionality of section 402(b) as violative of the equal protection guarantees of the due process clause of the fifth amendment. They contended that section 402(b) distinguished between Social Security beneficiaries and contributors solely on the basis of their sex.[156]

Mr. Oliver argued that he fulfilled all of the conditions of section 402(b), except for being a divorced wife. His marriage to the insured individual lasted at least twenty years, he had never remarried, and he had no independent eligibility for retirement benefits. Mrs. Oliver contended that had she been a male instead of a female wage-earner, her labors and contributions to Social Security would have provided old age protection for her former spouse.

The district court found the challenged statutory section to be structurally similar to the restriction struck down in *Wiesenfeld*. As in *Wiesenfeld*, the section eliminated any possibility that a male could qualify for a benefit that would have been extended automatically to an identically situated female.[157] The Court held that this section would not withstand a constitutional challenge, because it neither served an important governmental objective, nor substantially related to the achievement of such an objective.[158] The Court struck down the section because it created a gross disparity between treatment of males and females, which bore no relationship either to contribution or to need.

D. *Summary*

The line of Supreme Court cases just examined leads inexorably to the conclusion that a number of assumptions about sex roles within the family are no longer permissible bases for gender-based classifications under the Act. Al-

152. No. C-76-2397 SC (N.D. Cal., June 24, 1977).
153. *Id.* at 2.
154. *Id.*
155. 42 U.S.C. § 402(b) (1970 & Supp. V 1975) applies to the wife, and every divorced wife, of an individual entitled to benefits. § 402(c) (1970) applies to the husband of a covered worker.
156. Oliver v. Califano, No. C-76-2397 SC (N.D. Cal., June 24, 1977) at 9-10.
157. *Id.* at 12-13.
158. *Id.*

though stereotypic assumptions about dependency and support obligations may still be maintained by a significant number of persons in our society, they are no longer sufficient reason to create barriers to equal participation in government benefit programs. In *Wiesenfeld*, the Court plainly denounced the presumption that all women who work are secondary contributors to the economic well-being of the family.[159] Also discredited was the notion that only a mother is a valuable and fit parent.[160] Since a surviving father is as important to a child as a surviving mother is, or must be presumed to be under the law, then it is logical for the law to value equally the care of both living parents. The *Goldfarb* decision establishes that the law may no longer presume a spouse to be dependent upon a wage earner spouse unless that same presumption is extended to all spouses, regardless of sex.[161] Furthermore, the *Goldfarb* holding heralds the legal recognition of a family economic interdependence that has always existed but has not often been acknowledged in the law. The *Oliver* decision indicates that even when spouses are divorced, the presumption of dependency cannot be made to favor one sex over the other.[162] This is so, notwithstanding the Court's recognition that divorced people usually lead separate lives after dissolution of the marriage.[163] If a benefit is to be given to divorced spouses, it must be allocated equally for both divorced husbands and wives. While benign compensatory legislative purposes will apparently justify modification of the general rule that equal treatment must be accorded to both

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159. 420 U.S. at 645. The Court emphatically stated:

> Obviously the notion that men are more likely than women to be the primary supporters of their spouses and the children is not entirely with empirical support. [citation omitted]. But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.

Id.

160. The Court remarked as follows:

> The fact that a man is working while there is a wife at home does not mean that he would or should be required to continue to work if his wife does. It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody and management' of 'the children he has sired and raised, [which] undeniably warrants deference, and, absent a powerful countervailing interest, protection.' Stanley v. Illinois, 405 U.S. 645, 651 (1972).

Id. at 651-52.

161. 430 U.S. 199 (1977). It is noteworthy that the presumption was not ratified in the other direction, so that no spouse is presumed to be dependent upon the other until so proven. The reasons why there exists a preference for extending the benefit, rather than eliminating it, have been stated. See Califano v. Webster, 430 U.S. 313 (1977), where the Court explained:

> The legislative history is clear that the differing treatment of men and women in former § 215(b)(3) was not 'the accidental by-product of a traditional way of thinking about females' . . . but rather was deliberately enacted to compensate for particular economic disabilities suffered by women.

Id.; see Ginsburg, *supra* note 151, at 470-71.

162. No. C-76-2397 SC (N.D. Cal., June 24, 1977).

163. Mathews v. De Castro, 429 U.S. 181, 189 (1976).

sexes under the law, the purpose must be specifically and narrowly drawn to pass constitutional muster.[164] The Court has given no indication that a more broadly couched legislative design, based on sex role stereotypes and not on demonstrable economic discrimination, would be permissible.

Taken together these three decisions mandate that the Social Security system eliminate from its benefit structure presumptions as to role behavior within the family. The contributions of men and women workers must now yield equal benefits. However, the Social Security system perpetrates a form of discrimination even more subtle than disparate treatment of men and women based on sexual stereotypes. Discrimination is inherent in the presumption that in all families there is but one primary breadwinner and that the work of the dependent spouse has no value.[165] If work done by men and women in the marketplace is to be valued equally then work in the home must be so valued. If maintaining the economic stability of the family is the goal of this system, then no one person's work should be devalued because there is another worker in the family who is earning more. If the full potential of judicially established standards for equality within this sytem is to be realized, a new philosophical base must be established which embodies both the standard of equal treatment for all covered workers and recognition of the contribution of the homemaker.

IV

THE EMERGING STANDARD: FAMILY ECONOMIC INTEGRITY AS THE GOAL OF SOCIAL SECURITY

The remaining inequities in the Social Security system stem from the legislative perception of the family as a unit composed of one primary income-earner and one dependent spouse. The homemaker is regarded not as a worker, but as a dependent. The contribution of the dependent spouse to family economic stability is considered to be valueless for purposes of accruing retirement credit for that individual. The dependent's benefit is always calculated on the basis of the income-earner's work record. If a wife is employed, her benefits will be based on her own employment record only when she earns more than her husband.[166]

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164. Califano v. Webster, 430 U.S. 313 (1977).

165. This could be described as sex discrimination because the homemaker is generally the female partner. But for the purposes of this discussion, it will be assumed that either the male or the female spouse may be the primary supervisor of home maintenance and child care. It has been estimated that married women do ten times as much housework as married men. J. KREPS, SEX IN THE MARKETPLACE: AMERICAN WOMEN AT WORK 6 (1971).

166. The Social Security Amendments of 1977 directed the Secretary of Health, Education & Welfare to conduct a study of the treatment of women under Social Security. Pub. L. No. 95-216, 91 Stat. 1509. The Task Force issued its report on March 6, 1978, listing the following areas for concern:

> Issues of fairness are raised about the treatment of two-earner couples and single workers compared with one-earner couples. Also, for growing numbers of families, the family support pattern shifts over a lifetime—wives move between homemaker and paid-work roles and marriages end in divorce or death of a spouse before retirement. Thus, issues are raised about

These inequities adversely affect the family by restricting the options available to both husband and wife to work in the home and in the labor market. One result of this restriction is a marriage penalty paid by couples in which both spouses are employed. Such a couple may be paid less in total retirement benefits than another couple in which only the husband works, even though both families had the same total earnings and made the same contributions to Social Security.[167]

If the goal of the system is family economic stability, then that goal is not being met when families are treated differently based on the number of salaried workers in the unit. Families with equal earnings ought to receive equal benefits, whether one or both partners produced those earnings. The problem could be solved by making two changes in the system. The first is to give recognition to the contributions and retirement needs of the non-income-earning spouse. The second is to allow individuals to accrue credits on a yearly basis instead of determining retirement benefits at the time of retirement.

A. Developing a Standard for Family Economic Stability

In order to articulate a standard for measuring the effectiveness of the Social Security system in contributing to family economic security, two problems must be resolved. The first task is to define the family unit. The second is to evaluate the contributions of the family members. These two problems are historically interrelated. The law has defined the family, for most purposes, to be a husband and wife and their children and has described the rights, responsibilities and obligations of the members. The prevailing legal view of marriage and the family must either be incorporated into the philosophical basis for the Social Security program, or a new description of the family must be formu-

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gaps and inconsistencies in protection of individuals who experience changes in family support patterns during their lifetimes. . . .

Finally, characterizing spouses as "workers" or "dependents" based on whether they work in paid employment or perform unpaid homemaker services is criticized by some who view marriage as an interdependent economic relationship to which each spouse makes a substantial contribution. Viewing marriage as an interdependent relationship leads some to the conclusion that each spouse should have protection under social security that recognizes this interdependency and does not characterize one spouse as a worker and the other as a dependent.

Id. at 15.

167. The Task Force on Women and Social Security reported in 1975 that the penalty imposed on working couples could be ameliorated by a number of legislative proposals. The problem was illustrated by the following example:

> A husband with a nonworking wife has average annual earnings of $6,000. The monthly benefits payable to the couple at age 65 would now be $323.40 to the husband and $161.70 to the wife, for a total of $485.10. In the case of a working couple with equivalent combined earnings—but where the husband had average annual earnings of $4,000 and the wife $2,000—the husband's monthly benefit would be $246.80 and the wife's monthly benefit would be $168, for a total of $416.60. The working couple would receive $68.40 per month less than the couple with the nonworking wife, although the total earnings and contributions of each couple were identical.

TASK FORCE ON WOMEN AND SOCIAL SECURITY, WOMEN AND SOCIETY: ADAPTING TO A NEW ERA 24-25 (1975).

lated. The most important consideration should be the economic structure of the family.

The common law quite simply resolves the problem of allocating responsibilities and evaluating the members' contributions to the family. The traditional common law held that a married women was obligated to perform household services in return for the benefit of her husband's duty to support her.[168] The husband was obligated to support his wife and had the sole right to manage and collect income from the property.[169] Sometimes referred to as the housewife or maintenance marriage,[170] the basis of the bargain was a division of labor based solely on sex. Vestiges of these laws remain in the area of interspousal support even though economic and social conditions have changed substantially.[171] The underlying assumption is that the entire economic worth of the wife is devoted to the marital unit while the husband's obligation ends with the provision of support. Thus, all earnings above the amount necessary for support belong solely to the husband.[172]

Courts have consistently refused to inquire into the equity of this bargain during an ongoing marriage.[173] Unless the parties separate, the wife's right extends only to that support which her husband deems sufficient, not to what he can afford or what is reasonable under the circumstances.[174] Notwithstanding Married Women's Property Acts[175] and the passage of the nineteenth amend-

168. *See generally* Crozier, *Marital Support*, 15 BOSTON U. L. REV. 28 (1935); Johnston, *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1044-61 (1972).

169. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 422 (1941).

170. Rheinstein, *Division of Marital Property*, 12 WILLIAMETTE L.J. 413 (1976).

171. An early source of laws concerning family financial responsibility were the Elizabethan Poor Laws. The need to protect the state from the burden of dependent persons generated laws reflecting both the economy of that century and the common law view of marriage. *See* 2 F. POLLACK & F. MAITLAND, HISTORY OF ENGLISH LAW 339-405 (2d ed. 1899). The Elizabethan Poor Laws reflected this duty by prescribing a penalty for persons neglecting to support their families:

> [I]f any poor person shall not use proper means to obtain employment, or if, being able, he neglects his work, or spends his money in the alehouse or otherwise improperly or if he does not apply a proper proportion of his earnings toward the maintenance of his wife and family, by which default or neglect they or any of them become chargeable, he is . . . to be deemed an idle and disorderly person . . . . 2 G. NICHOLLS, HISTORY OF THE ENGLIGH POOR LAW 103-04 (rev. ed. 1898).

172. *See* Johnston, *supra* note 168, at 1036.

173. *See* McGuire v. McGuire, 157 Neb. 226, 59 N.W. 336 (1953); Brown, *The Duty of the Husband to Support the Wife*, 18 VA. L. REV. 832 (1932); Paulsen, *Support Rights and Duties Between Husband and Wife*, 9 VANDERBILT L. REV. 709 (1956); Sayre, *A Reconsideration of Husband's Duty to Support and Wife's Duty to Render Services*, 29 VA. L. REV. 857 (1943).

174. One commentator has concluded that,

> [d]epending on his personality and hers, the chances—which have nothing to do with legal rights—may be either that she will with difficulty get an inadequate subsistence or that she will live in idleness and luxury. This is precisely the situation in which property finds itself; it may be overworked and underfed, or it may be petted and fed with cream, and that is a matter for the owner to decide.

Crozier, *supra* note 168, at 33.

175. *See* Johnston, *supra* note 168, at 1061-70.

ment,[176] the basic legal structure of marital rights and obligations remains unchanged.[177] The support-for-services bargain persists even though fewer families conform to that model. It is neither necessary nor desirable that this common law tradition be reflected in government benefit programs.

As the traditional picture of the family becomes less accurate,[178] the underlying assumptions about intra-family arrangements must be clearly defined and then examined for accuracy. Given the increasing labor market participation of wives and the decreasing permanence of marriages,[179] it may be considered outmoded to continue to define the family as a married couple and their children.[180] Nevertheless, the institution of marriage still holds a revered place in our legal system.[181] A legislative judgment that a marriage of two heterosexual

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176. U.S. CONST. amend. XIX. *See* C. CATT & N. SHULER, WOMAN SUFFRAGE AND POLITICS (1926).

177. *See* Crozier, *supra* note 168; Johnston, *supra* note 168; Kanowitz, *The Male Stake in Women's Liberation*, 8 CAL. W. L. REV. 424 (1972); Karowe, *Marital Property: A New Look at Old Inequities*, 39 ALBANY L. REV. 52 (1974); Warren, *A Husband's Right to a Wife's Services*, 38 HARV. L. REV. 421 (1925).

178. *See* text accompanying notes 52-70 *supra*.

179. *See* Prager, *Sharing Principles and the Future of Marital Property Law*, 25 U.C.L.A. L. REV. 1, 16 (1977).

180. *See* N.Y. Times, Nov. 27, 1977, at 8, col. 1. This first of a series of four articles notes that, despite the changes and rising indices of instability which have occurred in this decade, traditional forms of marriage remain acceptable to a majority of Americans.

181. The Supreme Court has characterized marriage as "the foundation of family and society, without which there would be neither civilization nor progress." Maynard v. Hill, 125 U.S. 190, 211 (1888). Later, in Meyer v. Nebraska, 262 U.S. 390 (1923), the liberty guaranteed by the fourteenth amendment was said to include "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . . ." *Id.* at 399. In Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court declared a statute providing for sterilization of "habitual criminals" to be violative of the equal protection clause because it restricted one of the "basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541. In Griswold v. Connecticut, 381 U.S. 479 (1965), the marriage relationship was held to lie within the "zone of privacy created by several fundamental constitutional guarantees." *Id.* at 485.

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

From these precedents came the pronouncement in Loving v. Virginia, 388 U.S. 1 (1967), that "[m]arriage is one of the basic civil rights of man, fundamental to our very existence and survival." *Id.* at 12. *See also* Carey v. Population Services International, 431 U.S. 678 (1977); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Smith v. Organization of Foster Families, 97 S. Ct. 2094 (1977); Paul v. Davis, 424 U.S. 693 (1976); Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974). In Zablocki v. Redhail, 434 U.S. ___ (1978), the Court reviewed this line of cases in the process of striking down a Wisconsin statute which required parents with support obligations to show, as a prerequisite for obtaining permission to marry, that their child is not a public charge and is not likely to become one. The Court remarked:

adults is an institution worth preserving and benefiting would not be irrational or discriminatory. When other arrangements such as homosexual marriage or contractual cohabitation are recognized by state law, judicial decision, or Congressional action, it would be a simple matter for such participants to be given the option to register as a family for purposes of accruing Social Security credits.

While the traditional legal definition of the family includes sex role assumptions, federal jurisprudence supports the proposition that sex role distinctions should not be prescribed by the law. In *Stanton v. Stanton*,[182] the Supreme Court struck down the Utah age of majority statute because it set a different age for girls and boys. Boys in Utah were deemed minors until age twenty-one while girls were emancipated at eighteen. Suit was brought by a divorced mother seeking child support for her daughter until her twenty-first birthday. The father's defense was based on the Utah statute; he claimed he had no legal obligation to support the daughter beyond her eighteenth birthday. The Court held that the statutory classification violated the equal protection clause of the fourteenth amendment *under any test*. The Court avoided having to decide whether sex was a suspect classification by declaring that there was no compelling state interest, no rational basis, and no test in between that would validate the classification.[183] The Court recognized that a statute that codifies sex roles has a pernicious impact upon the educational opportunities and expectations for personal growth in young women:

> A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. . . . The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always necessary, antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl.[184]

This statement reflects the Court's position that the division of duties between partners in a marriage is not an appropriate subject for legislation. One year earlier the Court declared that it had "long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[185] Thus, the roles of the partners in a marriage should not be the basis for legislative bonuses or penalties. If men and women are to be accorded equal treatment

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> It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child-rearing and family relationships. As the facts in this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.

Id. at 4097.

182. 421 U.S. 7 (1975).

183. *Id.* at 17.

184. *Id.* at 14-15.

under the law, such equal treatment should be granted whether or not the individual is married. If personal choices within marriage are protected liberties, then those choices should not be influenced by government benefit schemes that reward one type of arrangement and penalize any others.

Notwithstanding the reluctance of the Supreme Court to make a forthright declaration that sex and marital status are prohibited criteria for allocating legislative benefits and burdens, it is possible to glean from some decisions an acceptance of a revised picture of the American family. The traditional support-for-services concept of marriage is being replaced by a view of women and men working together in the full range of human endeavor, from creating a home to running a business and maintaining a profession. Thus, both husbands and wives should be deemed to share equally in the responsibility for family financial welfare. The idea that the woman's contribution to social security should provide as much protection for her family as a man's contribution is premised on the underlying presumption that her contribution and responsibility to the family should be accorded the same worth as that of her husband.

The Supreme Court first rejected outdated perceptions concerning the proper role of women as in the home, rather than in business, in *Reed v. Reed*.[186] The standard enunciated in *Reed* was that sex-based classifications had to be substantially related to the achievement of a legitimate statutory objective. A corollary of this rule is that men may claim that they are harmed by statutes which embody assumptions concerning the interests, abilities, and behavior of women. In *Craig v. Boren*[187] the Court struck down an Oklahoma statute that prohibited the sale of beer to women under the age of eighteen and to men under the age of twenty-one. The statute, which purportedly was passed to promote traffic safety, was based upon the assumption that boys between the ages of eighteen and twenty-one were more likely to commit drunken driving offenses than girls in that age bracket. The Court found that there was too tenuous a relationship between gender and traffic safety to satisfy the standard enunciated in *Reed*.

Men have also suffered from the gender discrimination inherent in the idea that only the woman is the proper and able child-nurturer. In 1972, the Court in *Stanley v. Illinois*[188] struck down a statute which declared that upon the mother's death, children of unwed fathers were to be wards of the state without a hearing or presentation of proof of actual dependency. The scheme was one that permitted state officials to circumvent neglect proceedings on the theory that an unwed father was not a parent whose existing relationship with his children must be considered. The underlying assumption was that unwed fathers were neither interested nor competent with regard to protecting the child's welfare and thus had no right to any determination of their child-rearing interests or capacities. The Court held that due process requires that the putative father be given a hearing.[189] The procedure was held to be unconstitu-

185. 414 U.S. 632, 639-40 (1974).
186. 404 U.S. 71 (1971).
187. 420 U.S. 190 (1976).
188. 405 U.S. 645 (1972).
189. *Id.* at 658.

tional, apparently because it foreclosed the determinative issues of competence and care on the basis of the sex and marital status of the parent. Thus, the biological role of the mother clearly does not entitle the government to presume that the father's biological role is not to be equally respected under the law.[190]

The assumption that sex differences inevitably produce marked differences in the abilities and proclivities of individuals is no longer a permissible basis for legislation. A law based on this assumption benefits those persons who fit the stereotype but penalizes those whose personal choices and abilities do not. The penalty is placed on the family when the law in question is one which benefits a family unit only if that unit conforms to the legislatively perceived sociological norm. This type of governmental intrusion into the lives of its citizens harms not only the individuals but also the family units. Such presumptions no longer—if, in fact, they ever did—bear any substantial or fair relation to the permissible goals of legislation.

B. Recapitulation

The decisions which recognize the evolution of family structures constitute a trend in the law which should be reflected in the Social Security system. Three simple maxims provide the guidelines for recasting the system. First, the contribution of a non-income earning spouse is valuable and should be reflected by yearly Social Security credits to that spouse's work record. Second, families with two wage-earners should receive no greater or lesser benefit than families with one wage-earner producing the same total income. Third, the Social Security system should not infringe upon individual arrangements and freedom of personal choice with respect to income-earning, child care, or family maintenance within the family. The standard of family economic integrity can be met only when the government benefits afforded by this system have an equal impact on all families. The necessary result of this philosophical base is a sex-neutral benefit structure that allows for maximum flexibility within the family unit.

V

PROPOSED LEGISLATION WHICH MEETS THE EMERGING STANDARD OF FAMILY ECONOMIC STABILITY

The primary goal of the Social Security program *should be* the economic stability of the family. Because the family no longer conforms to one economic model, Social Security must also facilitate the economic independence of the marital partners. This goal can be met only if the underlying philosophy of the system is recast. This article has emphasized the importance of a clear statement of the objectives of the Social Security program. Once the goals of the program have been set forth and the assumptions underlying these goals articulated and evaluated, the method by which the program attempts to achieve its stated objectives can be established. Thus, the first step in recasting the system

190. The holding in *Wiesenfeld* is in accord, as it rebuts the presumption that only mothers should be given the opportunity to stay home with their children.

is to eliminate the outdated assumptions which distort the program goals and hamper the effectiveness of the system.

The first assumption that must be set aside is that the system is strictly an income replacement system. This has not been the case since the 1939 amendments.[191] The present benefit structure reflects a blend of individual equity considerations with social adequacy goals.[192] If the goal of the program is clearly understood to be an income support system, then it must be based primarily upon the individual's contribution to the family unit, and secondarily upon the actual contribution of the wage-earners.

The second assumption underlying the present program that must be eliminated in order to facilitate economic stability and the financial independence of both spouses is that family protection can be achieved by basing the allocation of benefits upon either the presumed or demonstrated dependency of the recipient upon the income-earner. Both husband and wife should have his or her own Social Security record with credits based on contributions to the family and benefits paid on the basis of that record. Married persons would then develop Social Security records which reflect credits accrued during the years of their marriage and credits accrued before or after marriage. The record so developed could then follow the individual through times of full and part-time employment, whether married, single, or divorced. There would be no penalty in the form of reduced benefits for persons who have been in and out of the labor market because family responsibilities took precedence at a particular time. There would be no penalty for changes in marital status.

The third weakness of the present system is that it applies the concept of marriage as an economic partnership only at the time benefits are to be computed, that is, upon retirement, death, or disability. In addition, benefits are computed on the basis of the marital status of the claimants at the time when application is made. In order to provide flexibility in the system and to bring it into line with the present multiplicity of family economic arrangements, all three assumptions must be addressed and eliminated.

The basic tenet which should form the philosophical foundation of Social Security is that marriage is a contract between two equally capable and contributing persons. The nature and extent of that contribution to the family unit must be presumed to be equal, whether it is rendered as services to the family, monetary support, or a combination of the two. The changing lifestyles and work patterns of both men and women can then be accommodated in a way that gives recognition to individual endeavor and support to family fiscal integrity.

One suggested alternative to the present structure of the Social Security system is a program of sharing family earnings credits between spouses. A plan of this nature was first introduced in Congress in 1976 by Representative Donald Fraser.[193] After revisions and some expansion it was introduced in the

191. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, REPORTS OF THE ADVISORY COUNCIL ON SOCIAL SECURITY 42 (1975).

192. R. MYERS, *supra* note 16, at 24-25. *See* A. ALTMEYER, *supra* note 95, at 101-02.

193. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, REPORT OF HEW TASK FORCE ON THE

1977-78 session of Congress by Representatives Fraser and Keys and had sixty cosponsors by the end of 1977.

The Fraser/Keys plan is based on the assumption that marriage is an equal partnership. Social Security credits are provided for homemakers and for secondary earners. Each spouse accures his or her own permanent Social Security record based on a percentage of total family earnings each year. This proposal incorporates the primary change in philosophy suggested in Part III, that the contribution of each spouse to the family is assumed to be of equal value, whether that contribution is in the form of work in paid employment or work in the home. The plan provides that each year, each member of a couple is credited with earnings equal to the larger of (1) 50% of the couple's total covered earnings, or (2) 75% of the total covered earnings of the higher-paid worker. This second alternative is termed the 75/75 option and is designed to allow recognition of the contribution of the homemaker spouse.

The Fraser/Keys plan addresses several of the inequities in the present system. It provides coverage for the homemaker spouse on an independent basis. Likewise, protection is afforded disabled homemakers and the survivors of disabled homemakers. The present requirement that a dependent spouse be married to the income-earner spouse for a minimum number of years is eliminated. Eligibility is not based on an individual's status as dependent spouse, divorced spouse, or surviving spouse. Nor is it necessary for a divorced spouse to establish dependency.

In summary, the three most attractive aspects of the Fraser/Keys plan result from changing the focus of the inquiry as to eligibility for benefits from one of dependence at the time of retirement to one of accrued credits over the course of the individual's adult life. Spouses who perform homemaking functions in some years, and work for pay in others, maintain continuity in their individual earnings records. These persons, as well as fulltime homemakers, acquire full disability and survivor protection based on their own earnings records. Finally, the benefits allocated to divorced persons are based on a share of family earnings during marriage, and individual earnings before and after marriage. The Fraser/Keys plan meets the standard of family economic stability because it is based on the premise that marriage is a partnership in which the contributions of each spouse are of equal importance. It allows independent establishment of benefit entitlement based on this presumed equality of the partners during the marriage. This in turn provides meaningful and personal protection to homemakers or part-time workers, whether they are male or female.

In conclusion, the subtle and yet systematic discrimination inherent in the present system must be affirmatively rejected by a clear statement of legislative intent. Because it would be financially detrimental to impose one particular family model upon all individuals, the Social Security program must be designed to accommodate a number of family economic models. Such accommodation requires the elimination of outmoded assumptions concerning both sex

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TREATMENT OF WOMEN UNDER SOCIAL SECURITY 25 (1978). The current version of this plan is H.R. 3247, 95th Cong., 1st Sess. (1977), entitled "Equity in Social Security for Individuals and Families Act."

roles within the family and the retirement needs of its members. The arrangements made within the family must be protected from such presumptions by a scheme based on sex-neutral determinations and by recognition of the contributions of both spouses in the home and in the market place. Only when the primary goal of the system is to preserve the family unit and recognize that unit as a partnership of independent adult workers will the sex-neutral benefit system realize its full potential. If Social Security is truly an infinitely perfectible system, the incorporation of these values will be a definitive step toward that goal.