

# SOCIAL SECURITY: A PROPOSAL TO IMPROVE EQUITY AND ADEQUACY FOR WOMEN

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## INTRODUCTION

The Social Security System has grown since its inception in 1935 to become "the largest public income maintenance program in the United States"<sup>1</sup> and "the government's most successful social program."<sup>2</sup> Over ninety percent of paid employment is covered by Social Security,<sup>3</sup> and its benefits are the most common form of income for people age sixty-five and older.<sup>4</sup> As discussed in another article in this issue,<sup>5</sup> a basic benefit indexed to the cost of living is vitally important to the income security of retired people.

The Social Security System has been severely criticized for its treatment of women.<sup>6</sup> Although women receive better treatment under Social Security than under private pension plans,<sup>7</sup> the system's discriminatory impact on women results in serious problems. This article proposes an alternative system for addressing these problems.

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The views expressed in this article are those of the author and do not necessarily reflect the position of the United States Department of Justice.

1. CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, A REPORT PREPARED FOR THE SUBCOMM. ON RETIREMENT INCOME OF THE HOUSE SELECT COMM. ON AGING, 96TH CONG., 1ST SESS., WOMEN AND RETIREMENT INCOME PROGRAMS: CURRENT ISSUES OF EQUITY AND ADEQUACY, 26 (Comm. Print 1979).
2. 1979 ADVISORY COUNCIL ON SOCIAL SECURITY, SOCIAL SECURITY FINANCING AND BENEFITS: REPORT OF THE 1979 ADVISORY COUNCIL ON SOCIAL SECURITY 1 (1979) [hereinafter cited as REPORT OF THE 1979 ADVISORY COUNCIL].
3. PRESIDENT'S COMM'N ON PENSION POLICY, AN INTERIM REPORT 4 (May 1980) [hereinafter cited as INTERIM REPORT].
4. U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, SOCIAL SECURITY AND THE CHANGING ROLES OF MEN AND WOMEN 176 (1979) [hereinafter cited as CHANGING ROLES OF MEN AND WOMEN].
5. Fierst, *Women's Retirement Income and the Three-Legged Stool*, 8 J. Legis. 263 (1981).
6. See, e.g., TASK FORCE ON WOMEN AND SOCIAL SECURITY, A WORKING PAPER PREPARED FOR THE SENATE SPECIAL COMM. ON AGING, 94TH CONG., 1ST SESS., WOMEN AND SOCIAL SECURITY: ADOPTING TO A NEW ERA (Comm. Print 1975). In 1977 the Congresswomen's Caucus asked the Secretary of Health, Education, and Welfare, Joseph A. Califano, Jr., to prepare a report on issues involving women and Social Security and proposals for solving the problems. The report, entitled the REPORT OF THE TASK FORCE ON THE TREATMENT OF WOMEN UNDER SOCIAL SECURITY, was issued in February 1978 and included a discussion of suggested approaches.
7. See U.S. DEP'T OF JUSTICE, TASK FORCE ON SEX DISCRIMINATION, THE PENSION GAME: AMERICAN PENSION SYSTEM FROM THE VIEWPOINT OF THE AVERAGE WOMAN (1979).

## HISTORICAL BACKGROUND: LEGISLATIVE HISTORY AND SPECIFIC SOCIAL SECURITY PROVISIONS

The Social Security System was designed at a time when most American families included a breadwinning husband, a homemaking wife, and dependent children. The system, therefore, provides only benefits for workers and derivative benefits for dependent wives<sup>8</sup> and children. A major problem is that the protection provided for wives as homemakers does not equal that provided for workers; homemakers are without disability insurance or benefits for their survivors in the event of their death.<sup>9</sup>

A second major problem involves the treatment of the increasing number of women who work in covered employment.<sup>10</sup> At retirement age, these women are generally eligible for benefits both as dependent

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8. *Treatment of Women under Social Security: Hearings Before the Task Force on Social Security and Women of the Subcomm. on Retirement Income and Employment and Select Comm. on Aging, House of Representatives, 96th Cong., 1st Sess. (1980) (Appendix III, containing U.S. DEPT OF HEALTH, EDUCATION AND WELFARE, SOCIAL SECURITY AND THE CHANGING ROLES OF MEN AND WOMEN 9-11 (1979) [hereinafter cited as 1980 Hearings].* The Social Security Act has been amended over the years to add generally equivalent benefits for husbands. Some gender-based distinctions have been held to be unconstitutional. *E.g.*, *Califano v. Goldfarb*, 430 U.S. 199 (1977) (where the Court held that a survivor's benefit provision requiring widowers, but not widows of insured workers, to prove actual dependency in order to qualify for benefits offered female wage earners less protection for their surviving spouses than that provided male employees); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (where the Court struck down a provision which granted survivor's benefits to mothers but not to fathers of minor children of deceased workers); *but see Califano v. Webster*, 430 U.S. 313 (1977) (*per curiam*) (where the failure by Congress to make a 1972 extension to men of a favorable computation change, previously applied only to women, retroactive was held not to constitute unconstitutional discrimination on the basis of sex). *See generally* Martin, *Social Security Benefits for Spouses*, 63 CORNELL L. REV. 789 (1978).
9. Survivor's benefits are provided only if the decedent was fully or currently insured. 42 U.S.C. § 402(d) (1976) (child's benefits); 42 U.S.C. § 402(e) (1976 & Supp. II 1978) (widow's benefits); 42 U.S.C. § 402(f) (1976 & Supp. II 1978) (widower's benefits); 42 U.S.C. § 402(g) (1976 & Supp. II 1978) (mother's benefits). An individual is "fully insured" if he or she has coverage for 10 years (40 quarters) or coverage for one-fourth of the years between the year in which he or she attained age 21 and the year of death, but not less than six quarters of coverage. 42 U.S.C. § 414(a) (1976). An individual is currently insured for survivor's benefits if he or she had at least six quarters of coverage in the 13 quarters immediately preceding his or her death. 42 U.S.C. § 414(b)(1) (1976). Fulltime homemakers are therefore unlikely to be insured for survivor's benefits.

In order to be ensured of disability benefits an individual must be fully insured and must meet an additional recency of work requirement. An individual over age 31 must have 20 quarters (five years) of coverage in the 40 quarters (10 years) immediately preceding the onset of the disability. An individual under 31 must have coverage for one-half of the quarters between the quarter he or she attained the age of 21 and the quarter in which he or she became disabled, but not less than six quarters of coverage 42 U.S.C. § 423(c)(1) (1976). Women who drop out of the labor force to become homemakers lose any disability coverage as homemakers after five years or less, and if they re-enter the labor force, they must work for five years to regain coverage.

10. The number of women in the labor force is increasing dramatically. PRESIDENT'S ADVISORY COMMITTEE FOR WOMEN, VOICES FOR WOMEN: 1980 REPORT OF THE PRESIDENT'S ADVISORY COMMITTEE FOR WOMEN 131 (1980) [hereinafter cited as PRESIDENT'S ADVISORY COMMITTEE]. In addition, the original Social Security Act covered employees in commerce and industry. Today, as a result of legislative reforms, most people in the United States who work for a living are covered. Exceptions include "permanent civilian employees of the Federal government, employees of state and local governments which have not elected coverage for their employees, and employees of nonprofit organizations which have not waived their exempt status in order to provide Social Security coverage for their employees." NA-

wives and as workers in their own right. Entitlement to more than one benefit is called "dual entitlement." The amount that dually entitled persons actually receive, however, is limited to the higher of the two benefits for which they are eligible.<sup>11</sup> Because the benefits cannot be added together, their benefits as workers duplicate, rather than supplement, their benefits as spouses.

To illustrate this problem, it is useful to compare the treatment afforded the following hypothetical couples. Suppose that a husband retired in 1980 with average indexed monthly earnings (AIME)<sup>12</sup> of \$1,200. Because his wife has never worked in covered employment, her AIME is zero. His benefit as a retired worker amounts to \$492, while she, as a dependent wife, is entitled to a benefit equal to fifty percent of her husband's benefit or \$246.<sup>13</sup> The couple, therefore, is entitled to a combined benefit totalling \$738. Compare that couple to a second couple that also has a combined AIME of \$1,200. Suppose, however, that this husband's AIME is \$900 and his wife's AIME is \$300. The husband's benefit at age sixty-five is \$401, while his wife is eligible for either a wife's benefit of \$200 or a worker's benefit of \$209 based on her own AIME. Since the wife's benefit as a worker is greater than her benefit as a wife, the couple's total benefit would be the sum of the two workers' benefits or \$610. This total is \$128 less than that of the first couple.

The discrepancy in benefits between couples with one earner and couples with the same total earnings divided between two earners is even greater with regard to survivor's benefits. If the husband in the first hypothetical dies, his wife will be entitled to a widow's benefit equal to his worker's benefit, \$492.<sup>14</sup> Although the wife in the second couple would also be entitled to a widow's benefit upon the death of her husband, her benefit would be only \$401, \$91 less than that of the first widow.

A third problem with the current Social Security System lies in its treatment of divorced persons. A woman whose marriage to a covered worker ends in divorce after ten years or more is treated as if she were still married for purposes of qualifying for wife's and widow's bene-

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TIONAL COMM'N ON SOCIAL SECURITY, *SOCIAL SECURITY IN AMERICA'S FUTURE: FINAL REPORT OF THE NATIONAL COMMISSION ON SOCIAL SECURITY* 168 (1981).

11. The Social Security Act provides that an individual entitled to two or more benefits can receive no more than the highest single benefit. 42 U.S.C. § 402(k) (1976). An individual entitled as a worker and as a spouse receives the worker's benefit. If the spouse's benefit is higher than the worker's benefit, the worker's benefit is subtracted from the spouse's benefit, and the difference is paid as a supplement to the worker's benefit.
12. Average indexed monthly earnings or AIME for a retired worker are the average covered earnings of the worker, indexed to wages, over his or her computation period, which includes the years between 1950 (or the year that the worker reached age 21, whichever is later) and the year that the worker reached 62, less five "drop-out" years. The computation period will be 35 for workers born after 1939. 42 U.S.C. § 415 (1976 & Supp. II 1978).
13. 42 U.S.C. § 402(b)(2) (Supp. II 1978).
14. 42 U.S.C. § 402(e)(2)(A) (Supp. II 1978).

fits.<sup>15</sup> As long as her former husband is retired, she will be eligible for a wife's benefit equal to fifty percent of his benefit, based on his lifetime earnings record at age sixty-five.<sup>16</sup> She is not entitled to any benefit before he retires, and her benefit will be actuarially reduced if she claims it before age sixty-five.<sup>17</sup> The fifty percent wife's benefit is designed to be supplemental in nature. It supplements the benefit of a retired worker in recognition of the fact that the benefit must support two people.<sup>18</sup> A fifty percent wife's benefit is insufficient to support a single individual living alone. Moreover, the requirement that the former husband be retired before the wife collects<sup>19</sup> creates hardships for divorced women whose husbands are younger than they and/or choose to continue working for an extended period of time. One positive provision in the current Social Security System is that the divorced wife's position improves when her former husband dies. At that time, her benefit as a surviving divorced wife is the same as a widow's benefit.<sup>20</sup>

### PROPOSED SOLUTION: EARNINGS SHARING

One proposal to solve the problems in the current system advocates earnings sharing, a method of splitting earnings credits between husband and wife for the years of the marriage. An earnings sharing plan was one of the comprehensive options developed by the Department of Health, Education, and Welfare in its report, "Social Security and the Changing Roles of Men and Women."<sup>21</sup> The earnings sharing approach has also been endorsed, in part, by the 1979 Advisory Council on Social Security<sup>22</sup> and by the President's Commission on Pension

15. 42 U.S.C. § 402(b) (wife's benefits) & (e) (widow's benefits) (Supp. II 1978); see 1980 *Hearings*, *supra* note 8, at 25 (Appendix III, containing U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, SOCIAL SECURITY AND THE CHANGING ROLES OF MEN AND WOMEN (1979)).

16. 42 U.S.C. § 402(b)(2) (Supp. II 1978).

17. 42 U.S.C. § 402(q) (1976 & Supp. II 1978).

18. INTERIM REPORT, *supra* note 3, at 27-30.

19. 42 U.S.C. § 402(b) (1976 & Supp. II 1978).

20. 42 U.S.C. § 402(e)(1) (1976).

21. CHANGING ROLES OF MEN AND WOMEN *supra* note 4.

In 1976 a Task Force on Sex Discrimination was established in the Civil Rights Division of the Department of Justice to eliminate sex discrimination from the laws and practices of the federal government. The Task Force focused on the Social Security System and in 1977 developed an earnings sharing plan designed to eliminate the disparate impact of the Social Security System on women. The earnings sharing plan, set out in a draft report, was never finalized but was referred to in congressional testimony concerning sex discrimination inherent in the Social Security System. *President Carter's Social Security Proposals: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. 567 (1977) (statement of Donald Fraser) [hereinafter cited as *President Carter's Social Security Proposals*]. The draft was later published as Appendix III to 1980 *Hearings*, *supra* note 8.

As a result, Congress, in the 1977 Social Security Act Amendments, Pub. L. No. 95-216, 91 Stat. 1548 (codified at 42 U.S.C. § 902 (Supp. I 1977)), directed the Secretary of Health, Education, and Welfare (HEW) to consult with the Task Force in a study of ways to improve the treatment of women under social security laws. The report, SOCIAL SECURITY AND THE CHANGING ROLES OF MEN AND WOMEN, was issued in February 1979. It was also published as Appendix III to 1980 *Hearings*, *supra* note 8. It included an alternative earnings sharing plan.

22. REPORT OF THE 1979 ADVISORY COUNCIL, *supra* note 2.

Policy,<sup>23</sup> although both groups recognize that some problems with earnings sharing have yet to be resolved. Finally, the President's Advisory Committee on Women endorsed the approach in 1980.<sup>24</sup>

The philosophy behind earnings sharing is that marriage is an economic partnership and that assets accumulated during marriage, including a social security earnings record, should be shared equally between spouses, regardless of how they chose to allocate homemaking and breadwinning responsibilities.<sup>25</sup> It is presumed that retirement income should be based on an individual's constructive activities during his or her lifetime. For this purpose, homemaking and paid participation in the labor force should each constitute constructive activity.

In its simplest form, earnings sharing would credit each spouse with fifty percent of a couple's total covered earnings for each year of the marriage. Each spouse's social security benefit would then be based on his or her own earnings record which would include all covered earnings from years that the individual was not married and shared earnings from years that the individual was married.<sup>26</sup>

Pure earnings sharing presents two fundamental problems. First, it may produce inappropriate results when only one spouse is entitled to benefits as a result of disability, retirement, or the death of the other spouse.<sup>27</sup> Second, it is intended to correct inequities in the current system; that is, it is based on a perception that under the current system some people unfairly receive more money than others. Thus, if it is to be implemented without substantially increasing costs (by "equalizing up" in all cases), it will necessarily decrease benefits for some classes of beneficiaries. Although it is generally accepted that a transitional plan is needed to protect those who will retire in the near future, a fully developed transitional plan has not yet been proposed.

### Modified Earnings Sharing

The following is a description and critique of a modified earnings sharing plan. It includes a transitional plan that addresses both the problems in the treatment of women under the current system and the problems raised by pure earnings sharing.

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23. INTERIM REPORT, *supra* note 3.

24. PRESIDENT'S ADVISORY COMMITTEE, *supra* note 10, at 131. Specifically, the Committee recommended changing the Social Security Act "to account for homemaker contributions through a system of 'earnings sharing.'" *Id.*

25. *Social Security Inequities Against Women: Hearings Before the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging*, 95th Cong., 1st Sess. 28-29 (1975) (statement of Arvonne Fraser); *Future Directions in Social Security: Hearings Before the Senate Special Comm. on Aging*, 94th Cong., 1st Sess. 1756 (1975) (statement of Arvonne Fraser); *President Carter's Social Security Proposals*, *supra* note 21, at 567.

26. *1980 Hearings*, *supra* note 8, at 14 (Appendix II, containing REPORT OF THE 1979 ADVISORY COUNCIL, *supra* note 2). As a practical matter, earnings credits may be split or shared retroactively when a specified event, such as divorce, disability, or retirement, occurs.

27. *Id.* at 15.

*Share Earnings Only at Divorce.* All benefits under this proposal are based on the individual's record, as altered by any earnings sharing or inheritance that has occurred. This proposal would increase benefits for homemakers and lower-earning spouses and decrease benefits for higher-earning divorced persons. As a result, it would distribute the economic burdens of divorce more equally between spouses and would serve as a disincentive to divorce for higher earners.

All benefits after a divorce would be based on shared earnings. This would produce a trade-off between increased protection in some situations and reduced protection in others. For example, if a one-earner couple with children divorces and the higher-earner is subsequently disabled, disability benefits for the worker and the children would be reduced by earnings sharing. On the other hand, if the homemaker is disabled within five years of a divorce, current law provides no disability benefits for either the homemaker or the children.<sup>28</sup> Because the homemaker is more likely than the worker to receive custody of the children,<sup>29</sup> the disability of a divorced homemaker is likely to impose a heavier economic burden on the family than the disability of the worker. To ameliorate this situation, earnings sharing would provide increased disability protection for divorced homemakers.

A "divorce incentive" may be said to exist whenever similarly situated individuals or couples would receive more favorable treatment if they were divorced than if they were married. However, a married homemaker supported by a working spouse does not encounter, as a result of a disability, the financial hardship faced by a divorced homemaker. This is especially true since a divorced homemaker probably is not receiving and cannot expect to receive support from his or her former spouse.<sup>30</sup> The significant difference in the needs of married and divorced homemakers justifies differential treatment.

If divorce occurs before the onset of the disability, there is, of course, no divorce incentive. Determining the time of onset, however, may be difficult. In addition, there exists the danger that divorce may be prompted by the expectation that a progressive disease will result in a disability. It is, therefore, impractical to limit coverage to disabilities occurring after a divorce. A disabled homemaker who loses his or her source of support through divorce logically should receive the same protection as a homemaker who is disabled after a divorce.

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28. See note 9 *supra*.

29. In 1978, 91% of children under 18 living with a divorced parent with no spouse present lived with their mothers. Calculated from U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: DIVORCE, CHILD CUSTODY, AND CHILD SUPPORT, Special Studies Ser. P-23, No. 84., Table 6, at 11 (1979).

30. In 1979, approximately "fourteen percent of the 14.3 million ever-divorced or separated women were awarded or had an agreement to receive alimony or maintenance payments." U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: CHILD SUPPORT AND ALIMONY: 1978, Advance Rep., Special Studies Ser. P-23, No. 106, at 1 (1980). Of the almost 760,000 women supposed to receive alimony payments in 1978, about two-thirds actually received them. *Id.*

There is a fear that providing disability insurance only for divorced homemakers would either lead to sham divorces or encourage real divorces when the married homemaker is disabled. Absent more definite evidence that the fear is justified, this fear should not be used to justify denial of disability insurance to divorced homemakers who need it. Sham divorces could be discouraged by providing appropriate, but limited, disability protection for married homemakers. If necessary, appropriate rules could be established to disregard sham divorces (for example, where the couple continues to live together).

*Inheritance of Earnings.* Surviving spouses and surviving divorced spouses inherit credits earned during the marriage. All benefits are based on the individual's record as altered by any inheritance or sharing that has occurred. Under current law, the surviving spouse or the surviving divorced wife of a worker is eligible for widow(er)'s benefits equal to the benefit that the worker received or would have received as a retired worker.<sup>31</sup> If the spouse is also entitled to a benefit as a retired worker, his or her benefit is the greater of the two amounts.

Under this modified earnings sharing program, inheritance of earnings credits would replace benefits for surviving spouses and surviving divorced wives. Survivors of lifelong marriages would be entitled to benefits, as workers, based upon inherited earnings at least equal to those provided under current law.<sup>32</sup> These benefits would be increased by any of the survivor's own earnings. The proposal would increase, therefore, benefits for survivors of two-earner couples.<sup>33</sup> Benefits could be decreased slightly for surviving homemakers, if the duration of the marriage was shorter than the benefit computation period and the homemaker earned less than the deceased spouse in the years before and after the marriage. This result is consistent with the principle that benefits should be based on an individual's own lifetime record, including earnings of either spouse during a marriage. Inheritance of earnings credits would also improve protection for homemakers because widowed homemakers would be entitled to disability coverage based on inherited earnings.

*Benefits for Retired Couples.* Currently, a worker aged sixty-two or older is eligible for retirement benefits.<sup>34</sup> The individual's Primary Insurance Amount (PIA),<sup>35</sup> which is the amount payable if the worker

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31. 42 U.S.C. § 402(e) (widow's benefits and surviving divorced wife's benefits) & (f) (widower's benefits) (1976 & Supp. II 1978). The benefit is subject to actuarial reduction if taken before age 65. 42 U.S.C. § 402(q) (1976 & Supp. II 1978).

32. *Id.*

33. See 1980 Hearings, *supra* note 8, at 22 (Appendix II, containing REPORT OF THE 1979 ADVISORY COUNCIL, *supra* note 2).

34. 42 U.S.C. § 402(a)(2) (1976). Workers must be "fully insured individuals," as defined by 42 U.S.C. § 414(a) (1976).

35. 42 U.S.C. § 415 (1976 & Supp. II 1978).

retires at age sixty-five, is related to the worker's AIME.<sup>36</sup> The PIA is determined by the following formula:

90% of the first \$194,  
 plus 32% of AIME between \$194 and \$1,171,  
 plus 15% of AIME in excess of \$1,171.<sup>37</sup>

The dollar amounts in the formula (\$194 and \$1,171) may be called "bend points" because they are the amounts at which the ratio of PIA to AIME changes. The bend points shown were used in the 1980 benefit formula and are indexed to wages.<sup>38</sup> The ratios of PIA to AIME may be called multipliers, and they do not change over time.

If a retired worker is married and both spouses claim benefits at age sixty-five, the "spouse's benefit" is equal to 50% of the "worker's benefit."<sup>39</sup> Therefore, the couple's benefit is 150% of the worker's benefit, as determined under the formula above. Multiplying the worker's PIA by 150% has the same effect as multiplying the multipliers in the benefit formula by 150%. The benefit of a couple receiving one "worker's benefit" and one "spouse's benefit," therefore, is the same as if the benefit were computed according to the following formula, using the AIME of the higher earning spouse:

135% of the first \$194,  
 plus 48% of AIME between \$194 and \$1,171,  
 plus 22.5% of AIME in excess of \$1,171.

When both spouses are entitled to benefits as workers, the benefit formula is applied to each spouse's AIME individually in order to determine their individual PIA's. As a result, benefits for couples with two earners vary depending on the distribution of earnings between the spouses and on the relationship of each spouse's AIME to the formula's bend points. For an extreme example, consider couple A, where the husband's AIME is \$277 and the wife's AIME is \$111. The husband's PIA is

	90% of the first \$194	=	\$175,
plus	32% of \$277-\$194	=	27
			\$202.

The wife's PIA is 90% of \$111 or \$100. The couple's benefit is the sum of their individual benefits or \$302.

Compare couple B, where combined AIME's are the same as that of couple A (\$388), but both spouses have equal AIME's of \$194. Each spouse's benefit is 90% of \$194 or \$175. Thus, the couple's benefit is  $2 \times 90\%$  of \$194 or \$350.

36. See note 12 *supra* and accompanying text.

37. 42 U.S.C. § 415(a) (Supp. II 1978). These dollar amounts are indexed to wages. The amounts shown were used in 1980. 44 Fed. Reg. 62,956-58 (1979). The Secretary shall publish in the Federal Register on or before November of each year the formula for computing benefits and for adjusting wages and self-employment income. *Id.*

38. *Id.*

39. 42 U.S.C. § 402(b)(2) (Supp. II 1978).



The difference in benefits between couple A and couple B is caused by the fact that husband A's AIME exceeds the first bend point in the formula by \$83; therefore, in determining his PIA, the excess is multiplied by 32% rather than by 90%. In general, then, when the AIME's of a husband and wife are unequal, there is a possibility that transferring some of the earnings from the higher earner to the lower earner could result in increased benefits for the couple. This occurs when the transferred earnings fall into a bracket with a higher multiplier.

The inequality of benefits for two-earner couples with different distributions of earnings could be remedied by treating all two-earner couples as though the earnings were equally distributed between the spouses. This has the effect of doubling the bend points based on the combined AIME as follows:

90% of the first \$388,  
 plus 32% of combined AIME between \$388 and \$2,342,  
 plus 15% of combined AIME in excess of \$2,342.<sup>40</sup>

Retired couples would be permitted to base their benefits on the formula producing the greatest total benefit. As a result, all two-earner couples would receive benefits at least equal to those of other couples with the same total earnings divided equally between the spouses. Under this formula, one-earner couples, as well as some two-earner couples with one AIME much higher than the other, would receive higher benefits under the formula equivalent to the current law worker's benefit plus the spouse's benefit. This formula would be phased out gradually.<sup>41</sup>

*Disability and Survivors' Benefits for Married Individuals.* The disability of a married homemaker does not produce a loss of cash income to a family. It does, however, result in a loss of homemaking and child-care services and in a significant increase in necessary household expenditures. It is also likely to result in significant medical costs. For this reason, married homemakers should be permitted to use their spouses' earnings records to establish eligibility for medicare benefits on the same basis as disabled workers. In addition, flat-rate benefits for young children of disabled or deceased homemakers should be provided to enable families to meet the child-care costs incurred as a result of the homemaker's disability or death. Finally, homemakers who reach retirement age before their working spouses should be allowed to use their spouses' records to establish eligibility for medicare and a flat-rate benefit for any young children.

#### TRANSITION: SURVIVING SPOUSES AND DIVORCED SPOUSES

Earnings sharing ensures that retirement benefits are based upon

40. See note 37 *supra*.

41. See text accompanying note 44 *infra*.

credits earned during all years when the individual either worked in covered employment or was married to, and presumably kept house for, someone who worked in covered employment. Reductions in benefits for years when the individual neither worked nor was married to a worker are intended as a consequence of the system, as are reductions in benefits for divorced higher-earners.

Earnings sharing and inheritance of earnings credits would ultimately replace the current law's benefits for divorced wives, surviving divorced wives, and widow(er)s.<sup>42</sup> To ensure that benefits are not lost for years of marriage when earnings were not subject to sharing or inheritance, current benefits should be retained for all marriages beginning before institution of these provisions. This retention of benefits provided under current law produces acceptable results in all but two cases. First, widows of late marriages of short duration could not combine inherited credits with "dependent" spouse benefits based upon an earlier marriage. They would in effect be dually entitled.

Widow(er)'s benefits under current law are based on the worker's lifetime earnings record.<sup>43</sup> Logically, then, there is no reason for a widow to receive benefits based upon a deceased husband's earnings in years when they were not married. Widow's benefits should be replaced, therefore, by inherited earnings which, in turn, should be combined with earnings acquired through covered employment or through other marriages. This proposal should be implemented in a manner that does not disrupt current expectations. Current benefits would be retained as an alternative for marriages that begin up to five years after implementation of the proposed system.

Second, divorced wives' and surviving divorced wives' benefits provided under current law would be reduced as a result of any reduction in the former spouses' earnings records resulting from divorce. This reduction would be greatest for those wives who were married longest.

The worst case would be a homemaker who was married throughout the computation period and for whom implementation occurred in the middle of the computation period. Earnings would be shared at the time of divorce for years after implementation; therefore, the homemaker would be entitled to benefits as a worker based upon those shared earnings. Because the marriage began before implementation, she would also be entitled to benefits as a divorced wife when the former husband retired. Those benefits, however, would be reduced by sharing based upon the former husband's record. Her benefit as a divorced wife would be computed as fifty percent of her former husband's benefit, based upon his reduced record. Unless the former wife was entitled to enough years of shared earnings to produce a worker's

42. Current benefits are codified at 42 U.S.C. § 402(b) (divorced wife's benefits) & (e) (widow's benefits and surviving, divorced wife's benefits), and (f) (widower's benefits) (1976 & Supp. II 1978). See note 11 *supra* and accompanying text.

43. 42 U.S.C. § 402(e)(2)(A) (Supp. II 1978).

benefit equal to that she would have received as a divorced wife under current law, she may be better off with no earnings sharing.

To avoid this problem created by marriages that begin before implementation and end in divorce after implementation, a partially retroactive sharing could be provided. The lower-earning spouse could receive credits equal to one-half of the couple's combined earnings for all years of the marriage. Unfairness to the higher earner might result if his or her earnings record were decreased for years before implementation of the proposed system. The higher earner's record, therefore, could be reduced by sharing only for those years after implementation.

Sharing earnings at divorce reduces the higher-earning spouse's earnings record and, therefore, reduces benefits for divorced wives and surviving divorced wives based on that record. Ultimately, divorced wives will receive fairer and more adequate protection through earnings credits acquired through divorce and inheritance. In the transitional period, however, benefits for divorced wives and surviving divorced wives of marriages that began before implementation should be retained.

#### TRANSITION: RETIRED COUPLES

As previously discussed, the benefit formula produces lower benefits for two-earner couples with different distributions of earnings between the spouses. An alternative benefit formula that treats all two-earner couples as though each spouse had equal earnings would correct this inequality. A problem remains, however, because provision of "dependent" spouse's benefits allows couples in which one spouse contributed all or most of the earnings to receive higher benefits than two-earner couples receive under current law. The proposal would eliminate this problem over a twenty-five year period by changing the one-earner benefit formula to equal the two-earner benefit formula.<sup>44</sup> Use of the one-earner formula will decline gradually, as more couples are able to obtain higher benefits by using the two-earner formula based on their combined AIME's. Calculated at five-year intervals, the formula would be adjusted as follows:

<u>Years after Implementation</u>	<u>Adjusted Formula</u>
0-5	135% of the first \$194, plus 48% of AIME between \$194 and \$1,171, plus 22.5% of AIME in excess of \$1,171.
10	121.5% of the first \$233, plus 43.2% of AIME between \$233 and \$1,405, plus 20.25% of AIME in excess of \$1,405.

44. See text accompanying notes 39-40 *supra*.

15	109.35% of the first \$280, plus 38.88% of AIME between \$280 and \$1,686, plus 18.23% of AIME in excess of \$1,686.
20	98.42% of the first \$336, plus 35% of AIME between \$336 and \$2,023, plus 16.4% of AIME in excess of \$2,023.
25	90% of the first \$388, plus 32% of AIME between \$388 and \$2,342, plus 15% of AIME in excess of \$2,342.

### COSTS

Although an estimate of the cost of this proposal is beyond the scope of this paper, acknowledgement of its cost implications is necessary. Ultimately, elimination of higher benefits for one-earner families will reduce costs, while addition of protection for homemakers will increase costs. The balance of cost increases and decreases will, of course, have to be calculated before any proposal is adopted.

The transitional period during which protection is improved and higher benefits under current law remain available, will be more expensive than the ultimate system. The "financial crisis" of the Social Security System is currently a matter of great public interest, but the short-range difficulties of the System are far less serious than its long-range funding problems. The Trustees of the Social Security trust funds project that under current law the income of the funds over the next twenty-five years will slightly exceed expenditures.<sup>45</sup> An actual crisis is expected about thirty years from now in 2010, when the post-war baby-boom generation begins to reach retirement age.<sup>46</sup> Because Social Security is a pay-as-you-go system (that is, taxes paid by today's workers are used to pay benefits to today's retirees), its cost depends upon the ratio of retirees to workers, the "dependency ratio." In 1930 that ratio was 9.1%. By 1980 it had risen to 18.4%. It is expected to increase rapidly beginning in 2010 and reach 31.8% in 2030.<sup>47</sup> Thus, despite valid concern about the immediate financial position of the Social Security System, attention should be focused on the potentially more serious, long-range problems. If the system's provisions regarding women are reformed in the near future, the costly transitional phase can be completed before 2010.

45. SOCIAL SECURITY ADMINISTRATION & HEALTH CARE FINANCING ADMINISTRATION, SUMMARY OF THE 1980 REPORTS ON THE SOCIAL SECURITY TRUST FUNDS 11-14 (June 19, 1980).

46. INTERIM REPORT, *supra* note 3, at 41-44.

47. PRESIDENT'S COMM'N ON PENSION, DEMOGRAPHIC SHIFTS AND PROJECTIONS: THE IMPLICATIONS FOR PENSION SYSTEM (WORKING PAPERS) 28 (1980). "Dependency ratios" should be used with caution. The figures shown, for example, include only persons over age 65 as "dependents." When persons under age 18 are included, changes in the dependency ratio are less significant. *Id.*

### CONCLUSION

There are two hard facts concerning the equality of men and women under the Social Security System.<sup>48</sup> First, one-earner couples and their survivors generally receive higher benefits than two-earner couples and their survivors. It is not possible to raise benefits for two-earner couples to levels equivalent to those for one-earner couples without substantially increasing costs. Reduction of benefits for one-earner couples to the level of those received by two-earner couples, however, may be politically infeasible. Second, the disability or death of a homemaker does not result in a loss of income to the family. As a result, provision of full disability and survivor benefits for homemakers would produce a substantial net increase in the incomes of their families for which a sufficient justification may not exist. The services of a homemaker are a valuable contribution to a family, but they are difficult to value. Furthermore, they cannot be fully replaced by purchased services. Full cash disability and survivors' benefits for homemakers, therefore, may be inappropriate.

This earnings sharing proposal attempts to address these problems by trading gradual reductions in benefits for one-earner families for appropriate improvements in protection for homemakers. The result, it is hoped, will be a benefit structure in which no class of beneficiaries suffers a net loss in protection, and the actual needs of individuals and families are met more appropriately than under the current benefit structure.

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48. The Social Security System is highly complex, and any proposed modification as broad in concept as earnings sharing inevitably raises difficult technical problems. The Social Security Administration's working paper on the interim recommendations of the 1979 Advisory Council on Social Security discusses a number of such problems and possible solutions to them. It is clear that much additional work must be done on the details of the proposed system before it can be implemented, but the technical problems can be resolved adequately when agreement is reached on the broad outline of the reforms required. SOCIAL SECURITY ADMINISTRATION, DEVELOPMENT OF THE ADVISORY COUNCIL'S INTERIM RECOMMENDATIONS ON THE TREATMENT OF WOMEN (Sept. 12, 1980).