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# COMMENTARY

## OBSCURING THE STRUGGLE: SEX DISCRIMINATION, SOCIAL SECURITY, AND STONE, SEIDMAN, SUNSTEIN & TUSHNET'S *CONSTITUTIONAL LAW*

Mary E. Becker\*

At any given time, the more powerful [of the sexes] will create an ideology suitable to help maintain its position and to make this position acceptable to the weaker one. . . . It is the function of such an ideology to deny or conceal the existence of a struggle. Here is one of the answers to the question . . . as to why we have so little awareness of the fact that there is a struggle between the sexes. It is in the interest of men to obscure this fact; and the emphasis they place on their ideologies has caused women, also, to adopt these theories.

Karen Horney.<sup>1</sup>

Both sexes have powerful reasons for obscuring the struggle between them. As Horney points out in the above passage, it is in men's self interest to protect the status quo by obscuring the divergent interests of the two sexes. In the same essay, Horney also observes that both sexes have reason to ignore the struggle: "we see love between the sexes more distinctly than we see hate — because the union of the sexes offers us the greatest possibilities for happiness."<sup>2</sup> Given this expectation, we "are naturally inclined to overlook . . . the destructive forces that continually work to destroy our chances for happiness."<sup>3</sup>

Women have a number of other reasons for obscuring the struggle besides the hope that they will find happiness in relationships with individual men. Many women are (or want to be) economically dependent on individual men because men tend to have greater economic resources and potential than women. For these women, the best strategy

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References to G. Stone, L. Seidman, C. Sunstein & M. Tushnet, *Constitutional Law* (1986), appear as Casebook.

1. Horney, *The Distrust Between the Sexes*, in *Feminine Psychology* 105, 116 (1967). I learned of Karen Horney's discussion from A. Rich, *Of Woman Born* 111 (10th Anniversary ed. 1986).

2. Horney, *supra* note 1, at 117.

3. *Id.* at 117-18.

is often to act as though women's and men's interests were the same.<sup>4</sup> Even women who reject economic or emotional dependence on individual men have reasons to obscure the struggle: minimizing the conflict helps them maintain their sanity and their ability to operate effectively within the current system.<sup>5</sup>

One important way in which we obscure struggle between the sexes is by obscuring one reason for struggle: inequality between the sexes.<sup>6</sup> If the sexes are already equal, then there is no need to struggle over the (currently skewed) distribution of financial and physical security, power, status, leisure time, and sexual satisfaction.

In law, inequality is obscured by accepting as discrimination only that which the law prohibits rather than critically examining the law to judge how well it deals with actual discrimination in the real world. If discrimination is that which the law proscribes, then unremedied discrimination must be past.<sup>7</sup> It follows that women and men are now equal. There is no reason to struggle or need for change.

In this Commentary, I illustrate these points by analyzing the presentation of sex discrimination challenges to the old-age portion of the social security system in a recent and popular constitutional law casebook: Stone, Seidman, Sunstein and Tushnet's, *Constitutional Law* ("casebook"). The authors use old-age social security cases—cases in which there is a sex discrimination challenge to the social security sys-

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4. See, e.g., A. Dworkin, *Right-Wing Women* 56–57, 65–67 (1978).

5. Women have, however, more to gain by changing the status quo than men have. Women are, therefore, somewhat more likely to try to change the status quo by calling attention to the struggle than are men.

6. For a discussion of other ways in which we obscure the struggle, see Becker, *Politics, Differences and Economic Rights*, 1989 U. Chi. Legal F. (forthcoming); cf. Bourque & Grossholtz, *Politics an Unnatural Practice: Political Science Looks at Female Participation*, 4 Pol. & Soc'y 225 (1974) (discussing sexist biases in political science that tend to obscure political struggle between the sexes); Fraser, *What's Critical About Critical Theory? The Case of Habermas and Gender*, 35 *New German Critique* 97 (1985) (analyzing ways in which Habermas obscured, rather than clarified, the struggle between the sexes); Sapiro, *Research Frontier Essay: When Are Interests Interesting? The Problem of Political Representation of Women*, 75 *Am. Pol. Sci. Rev.* 701 (1981) (discussing difficulties women face in asserting their political interests).

7. For an example of such thinking, see *Califano v. Webster*, 430 U.S. 313, 317 (1977) (upholding social security provision allowing women reaching age 62 prior to 1972 to exclude more low-income years than men in benefit calculation). The Court justified preferential treatment of women on the ground that women have been discriminated against *in the past* in the wage-labor market, implying that discrimination in the wage-labor market is a thing of the past. But see Becker, *Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel & Lazear*, 53 *U. Chi. L. Rev.* 934, 935–40 (1986) (noting that substantial barriers continue to face women and that antidiscrimination legislation has been ineffective in eliminating all barriers in the workplace). Moreover, the social security system itself is structured so as to give men (who tend to be breadwinners) better old-age financial security than women. See *infra* sections II and III. Yet in *Califano v. Webster*, this continuing discrimination is ignored by the Court in deciding "preferential" treatment of women by the social security system is permissible.

tem's benefits for the elderly—for a substantial portion of their presentation of the constitutional law of sex discrimination. One of the three major edited cases is an old-age social security case.<sup>8</sup> Of the four major note cases, one involves old-age social security.<sup>9</sup> Thus, of the three Supreme Court cases dealing with sex-discrimination challenges to the old-age portion of the social security system,<sup>10</sup> two are prominently featured in the authors' treatment of unconstitutional sex discrimination.

In these cases, the norm of sexual equality is used only to challenge explicit classifications on the basis of sex. Such classifications are impermissible under these cases unless the distinction compensates women for past discrimination (benefitting, rather than harming, women), in which case the classification may be permissible.<sup>11</sup> The authors of the casebook offer extensive comments about whether this benefit-burden line makes any sense,<sup>12</sup> but they never question whether the narrow focus on overtly differential treatment of women and men is an effective method of identifying discrimination within the social se-

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8. *Califano v. Goldfarb*, 430 U.S. 199 (1976) (holding differential standards for widows and widowers applying for old-age survivors' benefits unconstitutional), in Casebook at 640 and discussed *infra* notes 40–59 and accompanying text. The other two major cases are *Craig v. Boren*, 429 U.S. 190 (1976) (striking as unconstitutional a state statute allowing only women to drink 3.2% beer between the ages of eighteen and twenty-one), in Casebook at 616; and *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (upholding from attack a statutory rape statute defining crime as intercourse “with a female . . . under the age of 18 years”), in Casebook at 627.

9. *Webster*, 430 U.S. 313, in Casebook at 645. The other major note cases are *Reed v. Reed*, 404 U.S. 71 (1971) (striking as unconstitutional statutory preference for male relative as executor of estate of deceased), in Casebook at 612; *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding differential standard of eligibility for dependents' benefits for male and female spouse of soldier unconstitutional), in Casebook at 613; and *Rostker v. Goldberg*, 453 U.S. 57 (1981) (holding constitutional statute requiring only men to register for draft), in Casebook at 631.

10. The third old-age social security case, *Heckler v. Mathews*, 465 U.S. 728 (1984) (upholding transitional sex-specific rule) is noted briefly in Casebook at 88, outside the section on sex discrimination, in connection with a standing issue.

A fourth social security case—involving a challenge to “mother's” benefits rather than the old-age portion of the system—is discussed briefly in a note. See *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (holding unconstitutional differential standards for widowed mothers and widowed fathers applying for social security “mother's” benefits as survivor of deceased qualified worker), in Casebook at 615. “Mother's” benefits are benefits paid after the death of a covered worker to his spouse if she is caring for the deceased's children and if she makes less than \$6,480 (1988 limit) a year. 1 Unempl. Ins. Rep. (CCH) ¶ 12,349, at 1119–1119-2, ¶ 12,459, at 1265 (1988).

11. Compare *Goldfarb*, 430 U.S. at 216–17 (invalidating gender classifications that would harm women's dependents in applying for social security) and *Weinberger*, 420 U.S. at 645 (same) with *Webster*, 430 U.S. at 318 (upholding gender classifications which benefit women and compensate for past discrimination), as described *infra* notes 35–39 and accompanying text.

12. See, e.g., Casebook at 646–48 (asking whether all laws that create distinctions between the sexes inevitably discriminate against both because of their close association and suggesting that the very concept of discrimination against one sex may be incoherent in our society).

curity system. Nor do they suggest that discrimination might remain in the social security system after the elimination of explicitly different treatment of women and men.<sup>13</sup>

To be sure, the authors do suggest that the current constitutional standard is inadequate in other contexts. For example, they include the major sex-discrimination disparate-impact case, *Personnel Administrator v. Feeney*,<sup>14</sup> which upheld the constitutionality of a state veteran's preference statute under which "desirable state civil service employment [was] an almost exclusively male prerogative."<sup>15</sup> Both in the note material following *Feeney*<sup>16</sup> and at several other points, the authors question the effectiveness of formal equality in eradicating sexual inequality.<sup>17</sup> But, with the exception of the *Feeney* veteran's preference (which is actually presented in an earlier section on race rather than in the section on sex discrimination),<sup>18</sup> the inadequacies of the current standard for sex discrimination are presented as *abstractions*.<sup>19</sup>

More particularly, the authors never mention the ways in which sex

13. In contrast, the authors note some very tangential and indirect ways in which sex-based classifications in the social security system might hurt women. See *infra* note 105.

14. 442 U.S. 256 (1979).

15. *Id.* at 283 (Marshall, J., dissenting); see Casebook at 554-56.

16. See Casebook at 556-57 (questioning whether "the Court's formulation of the intent requirement in *Feeney* adequately heed[s] the risk that legislatures will be selectively indifferent to the welfare of politically powerless groups"). But see *id.* at 624-25, 648 (questioning whether women *are* a politically powerless group).

17. See, e.g., *id.* at 623-24. The authors ask whether "it follow[s] from the pervasiveness of sex-role differentiation that laws reinforcing that differentiation are constitutionally suspect," since facially neutral laws seem to benefit only those few women who adopt "male" roles and in fact harm many others. This is an important point, but the authors fail to note its cause: facially neutral laws tend to embody male norms. More importantly, the authors do not give concrete examples that would illustrate the pervasiveness (or even the presence) of laws embodying rules designed for men. See *infra* note 19 and accompanying text.

18. *Feeney* is in a section on race titled "Equal Protection Methodology: Heightened Scrutiny and the Problem of Race," see Casebook at 554, which occurs prior to the sex discrimination section titled "Equal Protection Methodology: Heightened Scrutiny and the Problem of Gender," see *id.* at 610.

19. See, e.g., *id.* at 623 (questioning effectiveness of gender neutrality in a culture with deeply embedded sex-role distinctions); *id.* at 638-39 (asking whether and when distinctions based on "real" differences should be sustained). The most concrete reference to possible inadequacies for ordinary adult women in the current system is a reference to "[p]regnancy, abortion, reproduction, and [the] creation of another human being" as women's unique experiences. *Id.* at 639-40. In this context, the authors note that the current standard entitles women to "'equality only insofar as they are like men.'" *Id.* at 640 (quoting Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1007 (1984)). But the authors do not flesh out precisely how these unique experiences contribute to women's subordinate status. Women and men could, after all, enjoy equal status, financial security, power, and leisure time even though only women bear children. For example, employers could be required to give pregnant workers job-protected leaves of absence for childbirth, and the government could provide unemployment insurance during the leave.

discrimination pervades the structure of the social security system irrespective of sex-specific classifications. Most law students' only exposure to the social security system occurs in their classes on constitutional law. If, as I suspect is the case, the authors' presentation is representative of most classroom discussions of the issue,<sup>20</sup> then most law students graduate with the impression that the Supreme Court decisions have eliminated sex discrimination in the social security system except, perhaps, to the extent that women receive a benefit denied their spouses under the odd cases allowing some distinctions beneficial to women. The ongoing struggle between the sexes within the social security system has been effectively obscured in the classroom.

On one level, this Commentary is a critique of a particular and peculiar notion of sex discrimination: the current constitutional standard, which defines sex discrimination as overtly differential treatment of women and men (unless justified by "real" differences). The current constitutional standard thus requires that similarly situated women and men be treated the same. When the law incorporates male norms (as it often does), the current standard requires only that women who are like men be treated like men.<sup>21</sup> Many feminist scholars have written about

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20. In both the selection of cases and the presentation of the social security issue, the Casebook is quite similar to the other three major constitutional law casebooks: P. Brest & S. Levinson, *Processes of Constitutional Decisionmaking* (2d ed. 1983); G. Gunther, *Constitutional Law* (11th ed. 1985); W. Lockhart, Y. Kamisar, J. Choper, & S. Shiffrin, *Constitutional Law* (1986). Brest and Levinson have three major cases in their section on sex discrimination, and none of these cases is a social security case. See P. Brest & S. Levinson, *supra*, at 576-622. But they discuss each of the three Supreme Court old-age Social Security cases decided when their book was published in notes at 596-99. Gunther has only two major cases in his section on sex discrimination, and neither of these cases is a social security case. See *id.* at 642-69, 737-42. But *Califano v. Webster* is one of his twelve major note cases. See *id.* at 738. Lockhart, Kamisar, Choper, and Shiffrin use *Califano v. Webster*, as one of their two major edited cases. And they include *Weinberger v. Wiesenfeld*, described *infra* note 35 and accompanying text, and *Califano v. Goldfarb*, described *infra* notes 40-59 and accompanying text, as two of their six major note cases. Although, like Stone, Seidman, Sunstein, and Tushnet, all of these authors present the social security cases in some detail, none suggests that there might be structural discrimination in the system or any problem for women other than the provisions overtly treating women and men differently.

21. The current constitutional standard is, at least in part, the result of the successful efforts of the American Civil Liberties Union's Women's Rights Project, which litigated for it during the seventies. See Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 *Law & Inequality* 33, 54-58 (1984); Cowan, *Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976*, 8 *Colum. Hum. Rts. L. Rev.* 373 (1976); see also Ginsburg, *Sex and Unequal Protection: Men and Women as Victims*, 11 *J. Fam. L.* 347 (1971) (participant in American Civil Liberties Union's Women's Rights Project applies formal equality as the equal protection standard for sex discrimination). The Court may also have been influenced by advocates of the Equal Rights Amendment, who also urged that a formal equality standard be applied to questions of sex discrimination.

the inadequacy of this notion.<sup>22</sup> This Commentary contributes to this ongoing critique by noting its weaknesses in the context of the social security system. Modern equal protection doctrine gives lip service to equality in marginal cases (e.g. social security cases banning express distinctions between women and men),<sup>23</sup> but leaves intact laws favoring breadwinners relative to homemakers (the basic structure of the social security system).<sup>24</sup>

This Commentary is not, however, primarily a critique of equality doctrine. I doubt that any abstract standard of equality would entirely eliminate the bias favoring breadwinners over homemakers in the social security system.<sup>25</sup> But the inevitable shortcomings of a constitutional standard should not blind us to existing inequalities and the need for legislative change.

My ultimate purpose is therefore to begin a discussion of how sex discrimination should be presented in constitutional law casebooks. Currently, casebooks focus on the leading constitutional cases and the doctrines therein propounded, with some fairly abstract criticism of the Court's focus on sexually explicit classifications. Indeed, the authors' casebook is the best of the current texts in terms of offering students some exposure to the problems with this focus.<sup>26</sup> We do expect constitutional law casebooks to present the doctrine developed by the Court, with particular attention to the cases important to doctrinal development. But it is the essence of formalism to confine analysis to legal doctrine. Good pedagogy goes beyond the presentation of doctrine to explore the relationship between doctrine and sound policy.

In a subject as complex as constitutional law, dealing with countless historical, social, intellectual, and ideological forces, one cannot describe everything relevant to every case. One must select. I merely point out that the authors' casebook, like the other major constitutional law casebooks, contains a selection of material that tends to obscure, rather than highlight, women's inequality. Given the common human

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See, e.g., Bown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Standard for Equal Rights for Women*, 80 *Yale L.J.* 871 (1971).

22. See, e.g., C. MacKinnon, *Sexual Harassment of Working Women* (1979) [hereinafter C. MacKinnon, *Sexual Harassment*]; C. MacKinnon, *Feminism Unmodified* (1987) [hereinafter C. MacKinnon, *Feminism Unmodified*]; Becker, *Prince Charming: Abstract Equality*, 1987 *Sup. Ct. Rev.* 201; Littleton, *Reconstructing Sexual Equality*, 75 *Calif. L. Rev.* 1279 (1987).

23. Some cases have actually harmed women. These cases tend not to be marginal, but strongly and directly reinforce the existing power structure. See, e.g., *infra* note 59.

24. For a somewhat similar analysis of the Supreme Court's standard for racial equality, see Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *Minn. L. Rev.* 1049 (1978).

25. See Becker, *supra* note 22.

26. Compare the authors' section on sex discrimination in Casebook at 610-52 with P. Brest & S. Levinson, *supra* note 20, at 576-622, G. Gunther, *supra* note 20, at 642-69, 737-42 and W. Lockhart, Y. Kamisar, J. Choper & S. Shiffrin, *supra* note 20, 1286-1308.

tendency to obscure the struggle between the sexes, it is understandable that authors of constitutional casebooks—who must make difficult selections from a wealth of material—tend not to highlight the reality of women's continuing inequality in concrete terms.

Often, law students are able to understand the real issues behind doctrinal development without explanatory material.<sup>27</sup> There is, however, reason to think that in the context of sex discrimination, students are likely to need particularly pointed guidance, rather than abstract hints. Certainly, students are unlikely to appreciate the real issues in cases dealing with the byzantine social security system without some information about its structure. Nor is such information of only historical importance since structural inequality remains in the system to the present day.

I believe that the authors' casebook would be more effective in presenting the constitutional law of sex discrimination had they attempted to describe the effect of the current standard on the status of women. Such a presentation would include material about the heavy costs associated with the current standard,<sup>28</sup> its ineffectiveness in concrete contexts like social security, and its benefits. Until such material is added, it seems quite likely that the struggle will continue to be obscured in the classroom.

This Commentary is divided into three Parts. Part I briefly describes the Supreme Court's social security cases and discusses in detail the old-age social security case, *Califano v. Goldfarb*, included by the authors as one of three full (edited) constitutional sex discrimination cases in text.<sup>29</sup> This section demonstrates that, in and of itself, the distinction challenged in *Goldfarb* is trivial<sup>30</sup> in several senses and has always been trivial on a practical level.

Part II compares the old-age social security system for women and men. Although explicitly differential treatment of women and men has been virtually eliminated from the system,<sup>31</sup> it affords a much better old-age security system for ordinary men than for ordinary women.<sup>32</sup> Part III describes two ways in which these inequities could at least be partially corrected without increasing the social security taxes paid by

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27. Consider, for example, *Cohen v. California*, 403 U.S. 15 (1971) (upholding first amendment right to wear jacket with "fuck the draft" patch).

28. In addition to ignoring the ineffectiveness of the current standard in concrete contexts such as social security, the Casebook entirely ignores the ways in which the current standard has seriously harmed many women. See *infra* note 59 (describing a case in which the current standard has actually harmed women). See also *infra* sections II and III (discussing inadequacies of social security system under current standard).

29. 430 U.S. 199 (1977), in Casebook at 640. The other two major cases are described *supra* note 8.

30. For a clarification of this use of "trivial," see *infra* pp. 274-75.

31. For a discussion of the two remaining transitional differences, see *infra* note 56.

32. There is no alternative equivalent safety net designed especially to meet the needs of ordinary women.

families. I do not offer any novel insights. These problems and solutions (and others) have long been discussed in the social security literature and even in law journals<sup>33</sup> and were therefore available when the authors published their casebook in 1986.

Throughout this Commentary, I use "discrimination" broadly to refer to that which enforces and reinforces women's subordinate status relative to men, regardless of whether there is "discrimination" under current legal standards. Subordination refers to the fact that, on a systemic basis, a variety of factors and forces operate in such a way that women, on average, enjoy less leisure time, financial and physical security, status, power, and sexual satisfaction than men.<sup>34</sup> These differential distributions tend to ensure that, on an individual basis, women remain subordinated to men, whether on the job or in the home. As a result, women tend to live lives qualitatively different from the lives of men. Social security contributes to the differential distribution of financial security between women and men by affording much better financial security in old age to those who have successfully fulfilled traditional male breadwinner roles than to those who have fulfilled female roles. It thereby contributes to the subordination of individual women to individual men.

#### I. THE TRIVIALITY OF *CALIFANO V. GOLDFARB*

The Supreme Court has decided four cases involving challenges to the social security system on the basis of sex discrimination. The first two cases held certain sex-specific provisions unconstitutional,<sup>35</sup>

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33. In addition to the authorities cited at *infra* note 113, see Note, Women and Social Security: Seizing the Moment for Change, 70 Geo. L. J. 1563 (1982). For more recent discussions, see Simon, Rights and Redistribution in the Welfare System, 38 Stan. L. Rev. 1431 (1986); Note, Should Married Couples Share Social Security Earnings Credit?, 26 J. Fam. L. 601 (1988) [hereinafter Note, Married Couples].

34. On the differential distribution of leisure time, see P. Blumenstein and P. Schwartz, American Couples 144-48, 151-53 (1983); L. Gilbert, Men in Dual Career Families: Current Realities and Future Prospects 60-90 (1985); J. H. Pleck, Men's Family Work: Three Perspectives and Some New Data, in Work and Family 232 (P. Voyandoff ed. 1984). On financial security, see Corcoran, Duncan & Hill, The Economic Fortunes of Woman and Children: Lessons from the Panel Study of Income Dynamics, 10 Signs 232 (1984). On physical security, see M. Gordon and S. Riger, The Female Fear (1989). On status and power, see Woman's Research and Educ. Inst. of the Congressional Caucus for Women's Issues, The American Woman 1987-1988, at 313-14 (1987) (Tables 16-18) (showing the number of women in elective office, in the judiciary and on the board of directors of Fortune 1000 corporations); Hymowitz and Schellhardt, The Glass Ceiling, Wall St. J., March 24, 1986, § 4 at 1 (discussing the difficulty women face breaking into upper management positions). On sexual satisfaction, see A. Dworkin, Intercourse (1987); S. Estrich, Real Rape 10-15 (1987); C. MacKinnon, A Feminist/Political Approach: Pleasure Under Patriarchy from Theories of Human Sexuality (J. Gear & W. O'Donohue eds. 1987); L. Rubin, Worlds of Pain 134-54 (1976).

35. See *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977) (striking down rule that only surviving widower must show dependency to be eligible for old-age survivor's benefits);

whereas the later cases upheld other sex-specific provisions.<sup>36</sup> The line drawn by the Court in these cases depends upon the reason (in the Court's view) that the legislature adopted the sex-specific classification. If the classification is based on stereotypical impressions of traditional differences between the sexes, then the classification is unconstitutional.<sup>37</sup> If the classification is based on the desire to compensate women for past discrimination<sup>38</sup> or to protect (transitional) reliance on earlier sex-based social security provisions,<sup>39</sup> then sex-specific classifications are constitutional.

From these four cases, the authors have selected *Califano v. Goldfarb* as one of only three major (edited) cases in the section on the constitutional standard for equal protection in the context of sex discrimination.<sup>40</sup> In *Goldfarb*, plaintiffs challenged provisions under which widowers were entitled to survivors' retirement benefits only if they showed dependency on their deceased wives, whereas widows were automatically entitled to survivors' benefits. The Court held that the distinction was unconstitutional because either similarly situated women and men were treated differently as wage earners or because similarly situated widowers and widows were treated differently after the death of their spouse.<sup>41</sup> Despite its prominent position in the authors' casebook, the case is trivial from several perspectives.

First, it is trivial in the sense that the challenged provision affected very few people.<sup>42</sup> It authorized the payment of retirement benefits to a widower as a dependent spouse of a deceased, covered worker only if the widower first proved that he was dependent on his deceased wife.<sup>43</sup>

Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975) (striking down rule that only mothers are eligible for "mother's benefits" as caretaker of deceased workers' children).

36. See *Heckler v. Mathews*, 465 U.S. 728 (1984) (upholding a transitional rule under which only husband need show dependency to be eligible for spouse's old-age benefit without offset for his own government pension); *Califano v. Webster*, 430 U.S. 313 (1977) (upholding a rule allowing women to exclude more low-income years than men in calculating benefit levels).

37. *Goldfarb*, 430 U.S. at 207, 211, 217 (denial to spouses of deceased female workers benefits available to spouses of deceased male workers based on "archaic and overbroad" generalizations); *Weinberger*, 420 U.S. at 643 (considering "archaic and overbroad" the assumption that only mothers need survivors' benefits after death of covered wage earner).

38. See *Webster*, 430 U.S. at 317-21 (concluding that Congress allowed women to exclude more low-income years than men in calculating benefit levels to compensate for past discrimination in wages and economic opportunities).

39. See *Mathews*, 465 U.S. at 742-44 (concluding that transitional provision incorporating earlier sex-specific provision, i.e., that only male spouses need show dependency, was based on reliance on sex-specific provision, rather than on desire to perpetuate "archaic and overbroad" generalizations).

40. For a description of the other major cases in the Casebook, see *supra* note 8.

41. Four of the Justices in the majority said the former, see 430 U.S. at 206-07; Justice Stevens, the fifth majority Justice, said the latter, see *id.* at 217-24.

42. For a discussion of this use of "trivial," see *infra* p. 274.

43. For a similar analysis of *Goldfarb*, see Simon, *supra* note 33, at 1478-82.

But most widowers are not eligible for spouses' benefits, regardless of whether they can show dependency, because one can claim as a spouse of a deceased covered worker only if one's own benefits as a covered worker are less than the deceased spouse's benefits. The vast majority of widowers draw greater social security benefits as retired workers than as the surviving spouses of deceased, covered worker wives because most men earn more than their wives. For example, although almost all female and male applicants were subject to the same rules in 1985,<sup>44</sup> 99.36% of those receiving benefits as widowed spouses were widows and only 0.635% widowers. Indeed, in the entire country only 30,182 men received benefits as widowers at the end of 1985, whereas 4,725,618 women received benefits as widows.<sup>45</sup>

At the time of the decision most of the widowers affected by *Goldfarb* were men not covered by social security at all because they worked in exempt fields such as state or federal government. In *Goldfarb* itself the reason Leon Goldfarb's draw as a dependent on his deceased wife's account was larger than his draw on his own account as a retired worker was that Leon had worked for the federal government and was therefore exempt from the social security system. Leon Goldfarb was not an unusual man injured by Congress's reliance on "archaic and overbroad"<sup>46</sup> stereotypes. Instead, he was apparently a (stereo)typical man in a position consistent with Congress's sex-linked expectations. Goldfarb argued, in effect, that because some women were allowed a double dip into both the social security retirement system and the federal employees' retirement system, he too should be allowed a double dip even though he was not, and had never been, economically dependent on his wife.<sup>47</sup>

As noted, at the time *Goldfarb* was decided most male workers earned more than their wives and were covered by the social security system. *Goldfarb* did not, therefore, affect most men one way or the other. Since then, the social security system has steadily expanded to cover almost all workers.<sup>48</sup> For instance, federal employees hired after

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44. At that time, as now, only two sex-specific distinctions remained in the system. See *infra* note 56. It is quite unlikely that the elimination of these distinctions would have made a dramatic change in the number of widowers applying for benefits as widowed retirees.

45. Social Security Bulletin, Annual Statistical Supplement I54 (1987) (Table 70).

46. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1973); *Goldfarb*, 430 U.S. at 207, 211, 217. For contextual explanation, see *supra* note 37.

47. The rationale for allowing women to double dip was that women were more likely than men to be economically dependent on their social security-covered spouses. If forced to choose between social security dependents' benefits and their own federal employee pension benefits, more women would tend to choose social security dependents' benefits, thus forfeiting their contributions to the federal employees' pension system. Today, *all* double dipping is prohibited except for some transitional sex-specific tolerance of double dipping by some older retirees. See *infra* note 56.

48. An estimated 90% of workers are now covered by the social security system. Social Security Administration, Department of Health and Human Services, Social Se-

December 31, 1983, are covered by the social security system.<sup>49</sup> The issue is, therefore, even less important today than it was at the time of decision.<sup>50</sup>

Scholars of equal protection may find this use of "trivial" odd. The point of equal protection doctrine is to protect certain minorities from the majority,<sup>51</sup> regardless of the numbers involved. In constitutional law, principle is paramount.

In achieving equality for women, however, what matters (to a very large extent) is numbers—results—not abstract principles. Women constitute fifty-two percent of the population.<sup>52</sup> Yet systemic discrimination against women pervades our society.<sup>53</sup> *Goldfarb* does nothing significant about the problems women face. Relative to the changes necessary to achieve equality between the sexes, it is trivial.<sup>54</sup>

From the perspective of women's equality, the case is trivial in another sense: it involves a challenge to the award of benefits to a man.<sup>55</sup> Furthermore, the woman who had made the relevant contributions to the system was dead. One would expect the case to have had only the most limited effect on the status of women in the real world during

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curity Handbook 6 (1986). This percentage will increase in the future because all federal employees are now covered. *Id.*

49. See 42 U.S.C. §§ 402(b)(4)(A), (c)(2)(A) (1982); *Heckler v. Matthews*, 465 U.S. 728, 731-33 (1984).

50. The other three Supreme Court social security cases alleging sex discrimination are also trivial in the sense that they made little practical difference at the time of decision. *Weinberger*, 420 U.S. 636 (striking down as unconstitutional rule that only mothers are eligible for "mothers' benefits" as caretakers of deceased worker's children), was of little practical importance because an earnings limit excludes most men (and disproportionately more men than women). For example, in 1989 a father (or mother) cannot earn more than \$6,480 and qualify. 1 Unempl. Ins. Rep. (CCH) ¶ 12,459, at 1265 (Nov. 8, 1988). *Califano v. Webster*, 430 U.S. 313 (1977) (upholding as constitutional a provision allowing women to exclude more low-income years in calculating benefits), was of little practical importance because the provision applied, even at the time the case was decided, to women who reached 62 prior to 1975. It was, therefore, only a transitional distinction and of decreasing importance over time. *Heckler v. Matthews*, 465 U.S. 728 (1984) (upholding as constitutional a rule requiring male spouses in certain circumstances to show dependency), was marginal in the sense that it too involved a transitional rule.

51. See Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 716-17 (1985); Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 Yale L. J. 1287, 1294-97 (1982).

52. Bureau of the Census, Dept. of Commerce, *Statistical Abstract of the United States 1988*, at 15 (Table 16) (1987) (projection).

53. See *infra* note 34 and accompanying text.

54. In 1985, for example, it affected only 30,182 *men* (whose relatively powerful wives were dead) out of a total national population of 238,740,000—most of whom were women. Bureau of the Census, U.S. Dept. of Commerce, *Statistical Abstract of the United States 1988*, at 16 (Table 17) (1987) (1985 data).

55. The Women's Rights Project of the ACLU consciously adopted a policy of using male plaintiff's in sex-discrimination cases during the seventies. See Cole, *supra* note 21, at 54-55; Cowan, *supra* note 21, at 394-95.

their lives and marriages. True, after *Goldfarb*, a very few working women and retired women workers (those who earned more than their husbands or whose husbands were not covered by social security) could sleep more soundly knowing that in the event of their deaths, their widowers would receive more money. But these women tend to be relatively powerful. The case will not make any significant change in the status of those women most in need of change. The change may have been worth making, depending on the costs associated with it, but one would not imagine that it did much good.

Scholars of equal protection may again find my use of "trivial" odd. Equal protection doctrine tends to regard discrimination against women and men as parallel (and equally troubling) events. But sex discrimination does not leave men and women similarly situated; its meaning for men is not symmetrical to its meaning for women. Like women, men may be constrained by stereotypes and social pressures. Nevertheless, men tend to come out on top, which is not at all the same as being constrained and coming out on the bottom. Sex discrimination subordinates women to men on a systemic basis in our society, but not vice versa. Thus, awarding benefits to men whose wives are dead is trivial because the award is unlikely to affect at all women's subordinate status, which should be at the center of the equal protection doctrine of sex discrimination.

Today, as was true at the time the authors' casebook was published in 1986, *Goldfarb* is trivial in a third sense. The issue is largely moot as a result of legislative change. In response to cases like *Goldfarb*, all sex-specific classifications have been eliminated from the social security system except for a couple of minor transitional provisions.<sup>56</sup>

Perhaps the social security cases are of historical importance to the development of the constitutional law of sex discrimination.<sup>57</sup> If

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56. Two transitional sex-specific rules remain in the social security system. With respect to counting years for the benefit calculation, special rules apply to men who reached 62 prior to 1975. 1 Unempl. Ins. Rep. (CCH) ¶ 12,205, at 1052 (Nov. 17, 1987). And there is still a distinction with respect to a husband attempting to prove dependency in order to avoid an offset for his own federal employee's pension from his social security claim as his wife's dependent. But even with respect to this rule, only individuals eligible for spousal benefits in January 1977 are affected by the sex-specific treatment. See 42 U.S.C.A. § 402 note on Offset Against Spouses' Benefits on Account of Public Pensions (West Supp. III 1985) (earlier and virtually identical version of this transitional provision upheld in *Heckler v. Mathews*, 465 U.S. 728 (1984)).

57. The Supreme Court has heard only four social security cases involving claims of sex discrimination. See supra notes 35-36 and accompanying text. Since 1971, when the Court first struck down a rule on the ground that it discriminated on the basis of sex in *Reed v. Reed*, 404 U.S. 71 (1971), there have been dozens of constitutional sex discrimination challenges in other contexts. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (single-sex nursing school); *Orr v. Orr*, 440 U.S. 268 (1978) (alimony statute); *Vorchheimer v. School Dist.*, 430 U.S. 703 (1977), summarily affirming 532 F.2d 880 (3d Cir. 1976) (single-sex high schools); *Stanton v. Stanton*, 421 U.S. 7 (1975) (child support obligation dependent on sex of child); *Turner v. Dept. of*

*Goldfarb* is retained in the Casebook for this reason, it surely would be relevant to note that the Court developed its constitutional standard for sex equality in trivial cases. It seems likely that development in such a context might affect the effectiveness of a substantive standard. If *Goldfarb* and the other three Supreme Court constitutional social security cases are not of great historical importance, however, they should be replaced by cases that are of greater historical importance or that raise more important and timely issues.<sup>58</sup> Such cases do exist.<sup>59</sup>

The social security sex-discrimination cases are trivial in another, more important sense. They ignore the real inequities of the social security system from the perspective of women.

## II. STRUCTURAL DISCRIMINATION IN THE SOCIAL SECURITY SYSTEM

The social security cases and the authors' presentation of them suggest that the major sex-discrimination problem with social security is historical: in the past, the system discriminated against women who were like men by treating them differently from men. In fact, the major problem with social security was *and is* its treatment of ordinary women, women who are primarily responsible for domestic production and reproduction and who often participate, on a limited basis, in wage employment. The social security system is structured to afford greater financial security in old age to breadwinners than to full or part-time homemakers. Thus, the major problem from the perspective of women's inequality is not, as the cases suggest, that the social security system has treated the atypical woman differently from a similar man, but rather that it gives less effective old-age financial security to typical women than to typical men.<sup>60</sup>

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Employment Sec., 423 U.S. 44 (1975) (pregnancy); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (pregnancy).

58. *Califano v. Webster*, 430 U.S. 313 (1977) (upholding constitutionality of allowing women to exclude more low-earning years in calculating benefits than men) *could* be used to present a number of interesting sex discrimination issues, including the costs of formal equality (at the time of decision, the differential was already being phased out) and the strongest justification for the distinction (not the generic *past* discrimination referred to by the Court, but the present discrimination women face, including the structure of the social security system).

59. To my mind, a far more important case in terms of the constitutional history of women's inequality is *Orr v. Orr*, 440 U.S. 268 (1979) (holding state statute providing for alimony to be paid only to [some] women unconstitutional). See Becker, *supra* note 22, at 219-22 (arguing that *Orr* and the approach to equality it reflected and reinforced contributed to the increasingly serious postdivorce impoverishment of women and children). But the Casebook does not include any consideration of how the current standard has weakened women's (and children's) economic position. See, e.g., Casebook at 623-24 (suggesting only the nebulous harm of legitimating the status quo).

60. In response to an early version of this Commentary, the authors of the Casebook include the following explanation in their 1988 Supplement:

In the social security system, the real problem is that three classes are established: those who qualify under ordinary standards; dependents; and those who

Elderly women are more likely to be poor than elderly men. For example, although the overall poverty rate for those sixty-five and older in 1986 was 12.4%,<sup>61</sup> the rate for elderly women was 15.2%.<sup>62</sup> Women without men were especially likely to be poor. The poverty level for elderly widows was 20.9%, and the rate for elderly divorced women was 25.4%.<sup>63</sup> A longitudinal study of older couples over a ten-year period found that widows were much more vulnerable to poverty than married couples because, in part, many assets evaporated or shrank with the death of the husband.<sup>64</sup> At the end of the study period (1979), 37% of the widows were poor, whereas fewer than 10% of the couples were.<sup>65</sup>

It is not only that women live longer than men and therefore exhaust their savings and other resources. Both public and private income-support systems for the elderly afford much better protection for men than for women. For example, men are more likely to have private pensions (because male-dominated industries and jobs are more likely to offer them) and to have larger private pensions (because, like social security, most private pension benefits are keyed to preretirement income).<sup>66</sup> Thus, social security is especially important for women. Yet social security works better for men than for women.

Women receive about 52% of social security benefits paid to the elderly.<sup>67</sup> But because women live longer than men, 60% of elderly social security beneficiaries are women.<sup>68</sup> These figures show that eld-

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do not qualify at all. The social security system protects the first group quite well, the second group less well, and the third group not at all. For purposes of sex equality, the problem is that as the group becomes increasingly female, it is decreasingly protected.

Casebook at 97 (Supp. 1988). This is a welcome addition. The authors need to explain, however, that the system was *designed* to reward men's, and ignore women's, contributions to society (by affording a better safety net to those fulfilling traditional men's roles than to those fulfilling traditional women's roles), and to explicitly encourage women's, but not men's, dependency (by linking only women's financial security to continued relationships with covered workers). See *infra* notes 77-105 and accompanying text. Without reference to concrete facts such as these, the reader might be left with the impression that women are less well protected due to an accident of design or because they are somehow less deserving.

61. Bureau of the Census, U.S. Dept. of Commerce, Current Population Reports, Special Studies, Series P-60 No. 160, Poverty in the U.S.: 1986, at 55 (Table 11) (1988).

62. *Id.* at 58.

63. *Id.*

64. Hurd & Wise, *The Wealth and Poverty of Widows: Assets Before and After the Husband's Death*, at 18-23 (National Bureau of Economic Research Working Paper No. 2325) (July 1987).

65. *Id.* at 8.

66. See, e.g., Hess, *Aging Policies and Old Women: The Hidden Agenda*, in *Gender and the Life Course* 319, 321 (A. Rossi ed. 1985).

67. Social Security Administration, U.S. Dept. of Health & Human Services, *Social Security Bulletin, Annual Statistical Supplement, 1987*, at 216 (Table 130) [hereinafter 1987 Statistical Supplement].

68. *Id.*

erly women tend to receive less, on average, than elderly men. Part of the problem is that a retired worker's benefits are tied to the worker's own wage<sup>69</sup> and women tend to earn less than men in the wage-labor market.<sup>70</sup> As a result, women drawing benefits as covered workers tend to receive smaller benefits than men drawing benefits as covered workers. For example, for social security benefits paid at the end of 1985 to individuals collecting on their own accounts as retired workers, women received an average monthly benefit of \$412.10, whereas men received an average monthly benefit of \$538.40.<sup>71</sup> Moreover, wives and divorced wives received an average dependents' benefit of only \$247.20.<sup>72</sup> Widows and surviving divorced wives received more: an average of \$445.10.<sup>73</sup> In every category, whether collecting as independent covered workers or as dependents of male workers, women received, on average, less than male workers.

One might object that, regardless of the data just presented, the system does not discriminate on the basis of sex because women receive a far greater portion of benefits than their contributions warrant.<sup>74</sup> Women make only about 28% of contributions to the social security system, yet they collect about 54% of benefits.<sup>75</sup> This perspective ignores, however, the traditional division of labor within marriage.

Traditionally, at least according to the norm, men were *entirely* responsible for the economic welfare of their wives and families; wives were *entirely* responsible for domestic production and reproduction.<sup>76</sup> Under a traditional marital division of labor, one would expect women (at least once married) to make 0% of the contributions, but to receive 59.4% of old-age benefits, since 59.4% of the elderly are women.<sup>77</sup>

69. 42 U.S.C. 415 (d) (1982 & Supp. IV 1986).

70. Bureau of the Census, U.S. Dept. of Commerce, Money and Income Poverty Status in the United States: 1987, Current Population Reports, Consumer Income, Series P-60, No. 161, at 5 (Aug. 1988) (1987 data) [hereinafter Consumer Income].

71. See 1987 Statistical Supplement at 145-46 (Table 70).

72. This statistic was extracted from *id.* at 150 (Table 70). As noted below, this differential is less troubling for wives than divorced wives. See *infra* notes 90-98 and accompanying text. The wife lives with the retired worker who is drawing, on average, \$538.40.

73. See Consumer Income, *supra* note 70, at 169 (Table 83) (1987).

74. See, e.g., Munnell & Stiglin, Women and a Two-Tier Social Security System, in *A Challenge to Social Security: The Changing Roles of Women and Men in American Society* 101, 106 (R. Burkhauser & K. Holden eds. 1982).

75. See *id.* These percentages apply to the system as a whole, including such items as disability and mother's and father's benefits.

76. For a more detailed discussion of the economic partnership underlying most marriages, see *infra* notes 118-19 and accompanying text.

77. U.S. Bureau of Census, Current Population Reports, Series P-25, No. 1022, United States Population Estimates by Age, Sex, and Race: 1980-1987, at 121 (Table 1) (1987) (1987 estimate). Needs do not, of course, decrease with advancing age. If anything, they increase. One would therefore expect the traditional division of economic responsibilities to result in a little more old-age security for women than men if the sexes are to maintain the same economic level during old-age.

Given the traditional division of labor—which still holds to some extent in almost all families<sup>78</sup>—there is no reason to conclude that because 54% of old age and disability benefits are paid to women, the social security system does not discriminate on the basis of sex. Even with a modified form of the traditional division of labor in marriage, one would not expect women's benefits to correlate to women's contributions.

Indeed, the general data described above indicate that social security is a better old-age security system for men because, on an individual basis, men receive more than women, despite the greater need women have due to their greater longevity. There are—and have always been—three major problems with social security from a sex-discrimination perspective, all related to the system's preference for those successfully fulfilling traditional male roles over those fulfilling traditional female roles. First, for an individual filing an independent claim, old-age benefit levels are linked to wages,<sup>79</sup> and earning high wages is a traditional male (breadwinner) role.<sup>80</sup> Second, women cannot combine domestic and wage-labor production in accruing social security benefits, though most women work both in the home and in the market for wages depressed by their domestic responsibilities.<sup>81</sup> Third, dependents' benefits (which belong mostly to women) tend to be smaller and more contingent than workers' benefits; divorced dependents receive particularly small and contingent benefits.<sup>82</sup>

The first of these problems needs little explanation. Full-time, year-round women workers tend to earn less than similarly situated men in the wage-labor market. In 1987 full-time women workers

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78. P. Roos, *Gender and Work: A Comparative Analysis of Industrial Societies* 16–19 (1985); G. Staines & J. Pleck, *The Impact of Work Schedules on the Family* 59–63 (1983); Vanek, *Household Work, Wage Work, and Sexual Equality*, in *Women and Household Labor* 275, 276 (S. Berk ed. 1980).

79. 42 U.S.C. § 415(d) (1982 & Supp. IV 1986).

80. See *infra* notes 83–85 and accompanying text.

81. See *infra* notes 86–88 and accompanying text.

82. See *infra* notes 89–101 and accompanying text. The treatment of divorced women will become increasingly problematic as increasing numbers of divorced people reach retirement age. In 1986, “only” 702,000 women 65 and older were divorced and not remarried (or 4.4% of women in that cohort). Extracted from U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1988*, at 40 (Table 48) (1987). But in that same year, 15% of women between the ages of 35–44 were divorced, or 2,473,000 women. Extracted from *id.*

The financial insecurity of divorced women does not, of course, affect only currently divorced women. Many women remain married because of financial pressure. And divorced women often remarry for the same reason. In all likelihood, the vast majority of women experience these financial pressures—to marry and to remain married to men—at some time in their lives. A recent study estimates that two-thirds of all first marriages are now likely to end in divorce. T. Castro & L. Bumpass, *Recent Trends and Differentials in Marital Disruption*, Center for Demography & Ecology, University of Wisconsin—Madison (Mar. 1988) (on file at Columbia Law Review).

earned only 65¢ for every \$1.00 earned by full-time male workers.<sup>83</sup> By linking life-time wages and old-age security,<sup>84</sup> social security inevitably creates a better security system for men than for women.<sup>85</sup>

The second problem is that women cannot combine domestic and wage-labor production in accruing social security benefits. Social security recognizes the value of women's domestic contributions to the household economy only indirectly through the award of dependents' benefits. Younger women often combine limited wage work with domestic responsibilities, typically working only part time or not at all for several years while their children are young. These women must choose between their claims as dependents and their claims as workers; they cannot combine both domestic and wage labor in building their retirement rights. Many women in this situation draw dependents' benefits because they are greater than their benefits as independent (but intermittent and typically low-paid) wage workers.<sup>86</sup> For these women, direct contributions to social security through wage work do not count at all.<sup>87</sup>

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83. Extracted from Bureau of the Census, U.S. Dept. of Commerce, Median Incomes of MIF, Current Population Reports, Special Studies, Series P-60 No. 161, at 5 (1988).

84. 42 U.S.C. § 415(d) (1982 & Supp. IV 1986).

85. The link between wages and benefits is part of what makes social security, to some extent, social insurance rather than a need-based social safety net. For discussions of whether social security is an insurance or welfare system, see Altman, *The Reconciliation of Retirement Security and Tax Policies: A Response to Professor Graetz*, 136 U. Pa. L. Rev. 1419, 1424-32 (1988); Simon, *supra* note 33, at 1458-59. For a discussion of how safety nets for men are structured as social insurance whereas those for women are structured as welfare, see Fraser, *Women, Welfare and The Politics of Need Interpretation*, 2 *Hypatia* 103, 108-13 (1987); Nelson, *Women's Poverty and Women's Citizenship: Some Political Consequences of Economic Marginality*, 10 *Signs* 209, 221-23 (1984); Pearce, *Toil and Trouble: Women Workers and Unemployment Compensation*, in *Women and Poverty* (1986).

Neither of the changes to social security suggested at *infra* notes 117-126 and accompanying text eliminate the link between a couple's wages and a couple's benefits.

86. Of women awarded old-age benefits in 1986, 49.9% received benefits as dependents rather than as independent workers. Extracted from 1987 Statistical Supplement, *supra* note 67, at 121-22 (Table 46). Only 50% of women received benefits as independent workers. *Id.* (These calculations exclude that very small group of elderly women receiving benefits as the widowed *mothers* of covered workers.)

Many of the 49.9% of women receiving dependents' benefits in 1986 worked for wages at some point in their lives, but drew dependents' benefits because they were larger than their benefits as independent workers. (As a dependent, a widow draws a full worker's benefit of 100% PIA, see *infra* note 91 and accompanying text; unless a widow earned as much as her husband, she will claim as a dependent rather than as a worker.) The Office of the Actuary of Social Security has estimated that in 1980, 12% of women beneficiaries were entitled to benefits as dependents and as workers (though, of course, drawing only one type of benefit). By 2000, 17% of women beneficiaries are expected to be in this position; 19% by 2020, and 22% by 2040. See Fierst, *Discussion, in A Challenge to Social Security*, *supra* note 74, at 66, 68 (Table 3.10).

87. Or, to put it another way:

[F]amilies which contribute equal amounts into the system and have equal

Social security, as currently structured, is incapable of giving women credit for both wage employment and domestic production and reproduction. It cannot, therefore, track society's expectations of ordinary women.<sup>88</sup>

The third problem is that women's claims as dependents are smaller and more contingent in a number of ways than workers' claims. This becomes clear by looking at wives' and widows' benefits during old age and at ex-wives' benefits. In general, the treatment of wives and widows is not too troubling. A worker who retires at full retirement age, sixty-five today, is entitled to one full draw (100% Primary Insurance Amount ("PIA")) from the time he retires to his death.<sup>89</sup> During the life of the worker, the wife receives 50% of his PIA provided that both she and her husband have reached sixty-five.<sup>90</sup> Since they are presumably living together and sharing his 100% PIA, this means that she lives in a household collecting 150% PIA. If he has died, she receives 100% PIA from age sixty-five to her death<sup>91</sup> unless—and this is troubling—she remarried prior to reaching the age of sixty, in which case her claim evaporates.<sup>92</sup>

Termination of her claim on remarriage might seem appropriate. After all, almost all men over sixty-five are covered by social security, and she will again be in a household eligible for 150% of her new husband's PIA. The new husband may, however, be entitled to smaller benefits than her first husband or may only be eligible for retirement at a later date. In either event, her marriage will not result in an increased draw on his account equal to 50% of her first husband's PIA and will destroy her claim based on her marital partnership with the deceased worker.

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earnings over their lifetimes can receive substantially different OASI benefits depending on how the earnings were divided between the husband and wife. Because benefits received by a single-earner couple are often higher than those received by a two-earner couple with identical combined lifetime earnings, the provision of spouse benefits is often considered an unjustified income transfer to wives of higher earners, or to result in redundant OASI taxes paid by working wives.

Burkhauser & Holden, Introduction, *in* A Challenge to Social Security, *supra* note 74, at 1, 4.

88. At the time the dependents' provisions were added to social security in 1939, 25% of women participated in the wage-labor market. For 15% of households, both spouses worked in the wage-labor market. *Id.* at 10. Today, 56% of women 20 years of age and older work. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings, Apr. 1988, at 58 (Table A-58) (1988). About the same proportion of married women, 56.5%, work, according to first quarter 1988 data. Bureau of Labor Statistics, U.S. Dept. of Labor, Press Release (Table 5) (Apr. 27, 1988).

89. 1 Unempl. Ins. Rep. (CCH) ¶ 12,301, at 1073-2 (1988).

90. *Id.* ¶ 12,309, at 1087.

91. *Id.* ¶ 12,341, at 1111-13.

92. *Id.* at 1110-11. Her claim may, however, rise again if she divorces the second husband and can collect more as the dependent of the first covered worker to whom she was married than as the dependent of the second. See 42 U.S.C. § 402(b)(1)(C) (1982).

Remarriage never has a similar effect on men's claims. Regardless of marital status, the independent worker is entitled to 100% PIA from age sixty-five to death; marriage can only increase his household's draw from 100% to 150%.<sup>93</sup>

The treatment of divorced wives is rather different from the treatment of wives and widows. A divorced wife is not entitled to any benefits unless the marriage lasted for at least ten years.<sup>94</sup> At that point she is fully vested as a dependent, provided she does not remarry.<sup>95</sup> The ordinary worker never faces the possibility that if he leaves his employer—or, for that matter, his spouse—he will lose his social security claim. A full-time homemaker who is divorced after nine years of marriage walks away with no social security credit for that period.

A second problem for an ex-wife is that she can begin drawing social security retirement benefits during the life of the worker only if both she and the worker have reached the requisite retirement age.<sup>96</sup> This makes little sense as a retirement security system for an ex-wife.<sup>97</sup> A man's right to retirement benefits depends, of course, only on his own age.

A third problem for the divorced wife is the level of benefits during the life of the worker. If the divorced wife—who was married for at least ten years—begins to draw benefits at age sixty-five, she gets 50% of the worker's PIA.<sup>98</sup> Thus, after divorce, the single retired man gets twice what his ex-wife gets—no matter how long the marriage. And if he is remarried, he (and the new wife) receive three times what the ex-wife receives.

Fourth, although the retired worker's remarriage can only increase

93. See *supra* note 90.

94. 42 U.S.C. §§ 402 (b), (e), 416(d)(1)–(2) (1982 & Supp. IV 1986). As indicated earlier, wives are eligible for benefits when the marriage has lasted one year. Widows are eligible after nine months of marriage prior to the covered worker's death. *Id.* § 416(b)–(c).

95. *Id.* §§ 402 (b), (e), 416(d)(1)–(2). Her ultimate draw will depend on the ultimate earnings record of the covered worker to whom she was married.

96. *Id.* § 402(b)(1).

97. During marriage, linking the dependent wife's benefit to the husband's retirement makes some sense, since prior to his retirement the couple does not need income support to replace his wages. If divorced women received adequate alimony prior to the ex-husband's retirement, they would be in a similar position. But the vast majority of divorced women are not awarded any alimony. See Bureau of the Census, U.S. Dept. of Commerce, *Child Support and Alimony: 1985*, at 6 (Table G) (1987) (of ever-divorced or currently-separated women in 1985, only 14.6% had ever been awarded alimony). And many who are awarded some alimony are unable to collect it. *Id.* In addition, alimony awards are increasingly tending to be short term (e.g., for a four-year period). See, e.g., Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 *UCLA L. Rev.* 1181, 1225–26 (1981) (study of two California counties). Given the tenuous nature of the link between most divorced women and their ex-husbands, her old-age income support should not depend on his retirement.

98. I Unempl. Ins. Rep. (CCH) ¶ 12,309, at 1087 (1988).

his household's draw, the divorced wife's remarriage—before or after the worker's death—may terminate her claim. Prior to the ex-husband's death, remarriage by the divorced wife will terminate her social security claim (after a marriage of ten years or more) unless she marries someone who claims benefits as one of several specified categories of dependents.<sup>99</sup> Since most men claim benefits as covered workers rather than as dependents, for most divorced wives this means that her remarriage during the life of the ex-husband terminates her social security claim no matter how long the marriage.<sup>100</sup>

After the workers' death, the rules about remarriage of the divorced wife change to match the rules applicable to widows described above: if she marries before she reaches age sixty, her claim terminates; if she marries after reaching sixty, remarriage does not affect her claim.<sup>101</sup>

Thus, in a number of important respects, the social security system fails to afford women as reliable an old-age security system as that afforded men. The problems with the system are obvious, not subtle. Women who lead ordinary lives are less likely to be well protected by the social security system than men who live ordinary lives because the system prefers those who have successfully fulfilled men's traditional breadwinner role over those who fulfilled women's traditional roles. Social security discriminates against women because it is designed so that women are at a much greater risk of poverty than are men. It exerts pressure on homemakers to depend economically on men in old age, despite the riskiness of such dependence. Indeed, the system blatantly contributes to the subordination of women to men on an individual basis by linking old-age security for women (but not for men) to continuation of the marriage bond until death.<sup>102</sup>

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99. 42 U.S.C. §§ 402(b)(1)(C), 402(b)(3) (1982 & Supp. IV 1986). Under the statute, a divorced woman's claim terminates unless she marries someone entitled to retirement benefits in one of the following ways: as a divorced husband of a covered worker; as the widower of a covered worker; or as a father taking care of the children of a deceased covered worker and earning less than \$6480 (in 1988), see 1 Unempl. Ins. Rep. (CCH) ¶ 12,459, at 1265 (1988); as the retired dependent parent of a deceased covered worker; or as someone originally entitled to benefits as the disabled child of a retired, deceased, or disabled covered worker.

100. The marriage must have lasted at least 10 years or she has no claim. A claim based on a first marriage of at least 10 years revives if the woman divorces her second husband. See 1 Unempl. Ins. Rep. (CCH) ¶ 12,309, at 1086 (1985). She can then draw the greater of the two benefits. See *id.* ¶ 12,367, at 1157-4 (1986).

101. 42 U.S.C. §§ 402(e)(1)(A), (e)(3) (1982 & Supp. IV 1986).

102. See *supra* note 92 and accompanying text (discussing termination of widows' benefits for women who remarry before reaching age 60); *supra* notes 94–101 and accompanying text (discussing divorced wives' claims).

There have been two Supreme Court cases in which plaintiffs argued that social security distinctions between wives or widows and divorcees were unconstitutional: *Bowen v. Owens*, 476 U.S. 342 (1986) (upholding provisions in effect between 1979 and 1983, which authorized payment of survivor's old-age benefits to covered worker's widow who remarried after 60 but not to a similarly situated divorced wife who remar-

The sexual inequity within the social security system illustrates a general problem with the current constitutional standard. That standard, by banning distinctions on the basis of sex,<sup>103</sup> requires only that men and women be treated the same. The standard incorporates a male norm,<sup>104</sup> so that women are only entitled to be treated as men are treated. In the context of social security, this does not mean that women are entitled to as much old-age security as men in a way appropriate given society's quite different expectations of them. Instead, women are constitutionally entitled only to be treated as wage earners (men) are treated under the standards developed for those expected to be their families' breadwinners.

Thus, despite the prominent position of *Califano v. Goldfarb* in the authors' casebook, the differential treatment of widowers who earned less than their deceased wives (relative to widows in a similar position) has never been a significant aspect of the subordination of women through the social security system. In contrast, the structure of the social security system (ignored by the case and by the casebook) ties women's old-age economic security to their continuing relationships with individual men and to their performance in a market that pays them less than it pays men, thereby encouraging economic dependence on individual men. Such factors have always been a key part of women's subordination to men. In the context of social security, the casebook ignores what is critically important from the perspective of women's equality and focuses exclusively on the trivial, obscuring, in the process, the actual ongoing sexual inequity of the system.<sup>105</sup>

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ried) and *Mathews v. De Castro*, 429 U.S. 181 (1976) (upholding act providing for benefits for a wife, but not an ex-wife, under 62 with a retired or disabled husband receiving social security provided she has a minor child of his in her care). In both cases, the distinctions were upheld as possibly based on rational (though perhaps inaccurate) perceptions of differences. The Court never mentioned the obvious benefit to men of having their wives' financial security turn on continued marriage. This is irrelevant under the rational-basis standard. And because the distinction was not overtly sex-specific, the Court did not use the heightened scrutiny appropriate in cases of sex-discrimination.

103. See *supra* note 11 and accompanying text; see also *Orr v. Orr*, 440 U.S. 268 (1979) (striking down law requiring payment of alimony by husbands only); *Reed v. Reed*, 404 U.S. 70 (1971) (invalidating law that favored males as administrators of intestate decedents).

104. For general discussions of such problems, see, e.g., C. MacKinnon, *Sexual Harrassment*, *supra* note 22, at 101-27; C. MacKinnon, *Feminism Unmodified*, *supra* note 22, at 32-45; Becker, *supra* note 22, at 206-12, 214-24; Law, *supra* note 19, 1007-08. The authors of the Casebook include a note, quoting Professor Law, on the unspoken male norm within the current constitutional standard. See Casebook at 639-40. Yet the current constitutional standard incorporates a male norm only to the extent that the laws to which it applies do so. A requirement of facial neutrality need not itself be discriminatory. These points are ignored by the authors. See *supra* notes 17 & 19.

105. In the context of social security, the authors point out some very tangential ways in which sex-based classifications might harm women. See Casebook at 648-49 (suggesting that a problem in requiring widower but not widow to show dependency

Even if appropriate adjustments to the system were difficult to imagine, the casebook should give a more accurate understanding of the problems women face in relying on either the social security system or the Constitution. It is not, however, difficult to imagine some partial solutions to the problems with the social security system. Suggestions about possible changes could be included in note material along with information about the structural problems in the social security system from the viewpoint of women's equality.

### III. PARTIAL SOLUTIONS TO SEXUAL INEQUITIES IN THE SOCIAL SECURITY SYSTEM

A number of solutions to the problems discussed above have received considerable attention over the last twenty-five years.<sup>106</sup> As early as 1963, there was concern about the treatment of women under the social security system. In that year, the Committee on Social Insurance and Taxes of the President's Commission on the Status of Women looked at the treatment of working wives and suggested some changes to the system.<sup>107</sup> In 1967, legislation was introduced in Congress to equalize the treatment of one- and two-earner couples through a "combined earning plan."<sup>108</sup> During the following years, this and other adjustments to improve the system's treatment of women were proposed. For example, in 1972 and 1974, legislation was introduced giving social security credit for work in the home.<sup>109</sup> Since 1976, earnings sharing has been repeatedly considered by various entities.<sup>110</sup> In 1977, Congress ordered the Department of Health, Education, and Welfare to study social security's treatment of women, and in 1979 it published its

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might be that such a rule reinforces "stereotypes of dependence and passivity that make women the losers in the long run"); *id.* at 650 (suggesting that sex-based social security classifications, even when "favorable" to women in the Court's view, might harm women by reinforcing old stereotypes). The 1988 Supplement does, in response to my criticisms, refer to the fact that the social security system is a much better safety net for men than for women. But see *supra* note 60.

106. See Note, *Married Couples*, *supra* note 33, at 608-13.

107. The Committee recommended that a working wife be given a part of her husband's earnings (her dependent's share) together with credit for her own wage work. Staff of House Comm. on Ways and Means, 99th Cong., 1st Sess., Report on Earnings Sharing Implementation Study 241 (Comm. Print 1985) [hereinafter *Earnings Sharing Study*].

108. *Id.* ("Combined earnings plans generally would allow married couples at retirement to combine their past earnings credits up to the amount of the contribution and benefit base each year and for the couple to receive 150 percent of benefit based on combined earnings."); see *infra* notes 116-123 and accompanying text (discussing earnings sharing).

109. *Id.* at 241-44. This suggestion becomes somewhat less radical when one considers that for many years, members of the armed forces received social security credit without making social security contributions. See 1 Unempl. Ins. Rep. (CCH) ¶¶ 12,501-12,505 (1988).

110. *Earnings Sharing Study*, *supra* note 107, at 242-44.

report suggesting comprehensive changes to the system, including, as one of two options, earnings sharing.<sup>111</sup> Since then, a number of solutions, including earnings sharing, have been considered by such entities as the Advisory Council on Social Security, the President's Commission on Pension Policy, the National Commission on Social Security, and the National Commission on Social Security Reform.<sup>112</sup> Yet no constitutional law casebook mentions any aspect of this wide-spread debate about how to reform the system to correct its structural bias against women.

Rather than discuss each of the many proposed solutions, I will briefly describe two possible improvements.<sup>113</sup> Neither is ideal.<sup>114</sup> Neither addresses the major difficulty created by linking old-age security to life-time wages in a culture in which women receive less in wages than men.<sup>115</sup> But both are relatively simple and would improve the situation of many women, especially divorced women. A few lines would be sufficient, in a casebook note, to refer at least to one of the solutions.

The more radical of the two changes is earnings sharing.<sup>116</sup> Earnings sharing would eliminate entirely all provisions affording old-age benefits to dependents and replace them with a new allocation of contributions during marriage. During marriage, half the social security contribution of each wage-earning spouse would accrue to the account of the wife and half to the account of the husband. Thus, each partner would accrue identical social security credits based on half of their joint earnings. Women's social security accounts, like men's, would then be fully portable. However long a woman was married, and whatever combinations of wage work and domestic work occurred during her life, everything would count towards her social security account.<sup>117</sup> This

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111. *Id.* at 243. The other option was a double-decker plan, creating a bottom level of benefits higher than current benefit minimums.

112. *Id.* at 243-45.

113. Readers interested in additional policy readings on these issues should see *id.*; Earnings Sharing Implementation Plan: Hearing Before the Task Force on Social Security and Women of the Subcomm. on Retirement Income and Employment and the House Select Comm. on Aging, 98th Cong., 2d Sess. (1984); U.S. Dep't of Health, Education, and Welfare, Social Security and the Changing Roles of Men and Women (1979); Office of Legislative and Regulatory Policy, Social Security Administration, Report on the Earnings Sharing Implementation Study, 48 Soc. Security Bull. 31 (1985); Note, Married Couples, *supra* note 33; A Challenge to Social Security, *supra* note 74.

114. Both of the "solutions" discussed in the text reinforce (at least marginally) the two-tier benefit system in the United States, under which "legitimate" beneficiaries receive rights to "insurance" (such as old-age social security), whereas "illegitimate" beneficiaries receive smaller amounts of means-tested "charity." See, e.g., Nelson, *supra* note 85, at 221-23. Many women would be best served by the elimination of the two-tier system.

115. See *supra* note 85.

116. See *supra* notes 111-112 and accompanying text.

117. For suggestions on how to improve earnings sharing, see, e.g., A Challenge to Social Security, *supra* note 74, at 101; Aaron, Discussion, *in* A Challenge to Social Secur-

change would give women credit for both wage labor and their domestic contributions.

This approach is consistent with the economic partnership underlying most marriages. Homemakers should receive social security benefits not because they are needy dependents of deserving wage workers, but because of the division of labor within the household economy in most marriages.<sup>118</sup> In most marriages one spouse, typically the husband, is primarily responsible for the family's economic welfare. The other spouse in the standard marriage, typically the wife, is primarily responsible for the domestic front. Although she may also work for wages outside the home, she likely works fewer hours or at a more flexible job so as to accommodate her domestic obligations. In return for the wife's reliance in not pursuing wage labor full-time or full speed and for her contributions to the household economy, the husband assumes primary responsibility for the family's financial security, including their old-age security. Thus, her social security claim is based on her direct contributions to the household unit and indirect contributions to the general economy—especially through bearing and rearing the next generation of workers who will, in fact, be financing the social security system when their parents retire.<sup>119</sup>

Furthermore—with the important exception of the link between old-age financial security and wages —earnings sharing eliminates the problems discussed above. In particular, it equalizes the treatment of breadwinners and homemakers, and of divorced breadwinners and divorced homemakers, and gives women social security credit for both wage and domestic work.

Earnings sharing has not, however, been enacted, and the political barriers to its enactment are not likely to disappear in the near future. The problem is that the net increase in benefits for women, especially divorced women, would be offset by reductions in benefits for many individuals, especially divorced men, but also many wives and widows.<sup>120</sup> For example, under one earnings sharing proposal, in the year 2030, 73% of divorced women entitled to benefits only as covered workers would receive increased benefits (relative to what they would receive under current law). And 69% of divorced women entitled to benefits only as dependents today would also receive increased bene-

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ity, at 124. See generally authorities cited *supra* note 113 (discussing the impact of earnings sharing proposals).

118. See, e.g., G. Becker, *A Treatise on the Family* 14–32 (1981) (analyzing the division of labor within households and families).

119. See Becker & Murphy, *The Family and the State*, 31 *J.L. & Econ.* 1, 8–12 (1988) (suggesting that social security is “part of a ‘social compact’ between generations,” in which younger generations finance their parents in old age in exchange for the costly investments made earlier in the children by the parents).

120. There is a no-loser version of income sharing, but it is quite expensive. See Office of Legislative and Regulatory Policy, *supra* note 113, at 35.

fits.<sup>121</sup> But 69% of divorced men would receive lower benefits.<sup>122</sup> And many widows—perhaps as many as 44%—would receive lower benefits than under present law, particularly those who would receive the highest level of benefits.<sup>123</sup> With social security, as with any other entitlement program, it is politically difficult, if not impossible, to make adjustments that decrease existing benefits. And it is in the interests of most men and many women—women who will (or think they will) stay in relationships with individual men—to resist major revision of the social security system such as earnings sharing, despite the long-recognized problems with the current system from the perspective of women, especially divorced women.

A less politically controversial solution, which would at least eliminate some of the problems facing divorced women, would be to implement one simple legislative change: a statute providing that in the event of divorce, state courts can divide social security benefits between the divorcing couple along with other forms of financial security.<sup>124</sup> Currently, a Supreme Court case bans such divisions, holding that federal law governing retirement pensions preempts state law divorce divisions.<sup>125</sup> It should, however, be relatively easy to enact legislation overruling this decision. Such legislation has already been enacted with respect to military retirement pay and civil service retirement annuities.<sup>126</sup>

### CONCLUSION

The social security cases approach the social security system as though there were only one possible problem with the system from the perspective of sexual equality: that unusual women who are breadwinners for their families might not be treated like male breadwinners. But the problem with social security—from the perspective of *most* women—has never been the inaccuracy of its stereotyped assumptions, but rather that the system has always afforded a shaky security system to women in (stereo)typical roles relative to the stronger security system it affords men in (stereo)typical roles.

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121. *Id.* at 34.

122. *Id.* at 36.

123. *Id.* at 34, 36.

124. See Note, *Married Couples*, *supra* note 33, at 619.

125. See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 587–90 (1979). *Hisquierdo* involved the railroad retirement system, rather than the social security system. But its “logic” would apply to social security benefits; it is uniformly regarded as indicating federal preemption of state-divorce law divisions of social security benefits. See, e.g., *Wisner v. Wisner*, 129 Ariz. 333, 338–339, 631 P.2d 115, 120–21 (1981); *In re Marriage of Nizenkoff*, 65 Cal. App. 3d 138, 139–41, 135 Cal. Rptr. 189, 190–91 (1977); *In re Marriage of Kelley*, 64 Cal. App. 3d 82, 90–93, 134 Cal. Rptr. 259, 263–64 (1976); *Umber v. Umber*, 591 P.2d 299, 302 (Okla. 1979); *In re Marriage of Swan*, 301 Or. 167, 173–74, 720 P.2d 747, 750 (1986).

126. See Note, *Married Couples*, *supra* note 33, at 607–08, 619.

In light of this systemic problem, casebooks on constitutional law should be changed. Authors of such books should either replace the social security cases with more important sex-discrimination cases or should present the cases together with information about the structural inequities present in the social security system and the possibility of eliminating these structural inequities. Teachers who assign these cases should use them to illustrate the pervasiveness of sexual inequality under formal equality.

Current constitutional law casebooks—such as Stone, Seidman, Sunstein and Tushnet's—actually obscure the fact that the sexes have competing interests and must struggle if a more equitable distribution of resources, including financial security in old age, is to be achieved. The accepted approach to presenting the law of sex discrimination in a constitutional law casebook—focusing almost exclusively on the Court's definition of discrimination—conflates actual discrimination with legally proscribed discrimination. This obscures the inadequacy of current remedies and leads to the unquestioning acceptance of a conservative legal standard. In addition, students leave law school unaware of the need for change where the constitutional standard is inadequate. For example, it may be that the Court will, for decades to come, be unwilling to hold that the social security system unconstitutionally discriminates on the basis of sex. Students should, nevertheless, leave a class that addresses sex discrimination in the social security system with some appreciation of the real problems and the need for legislative change, rather than with the misgilded impression that all significant discrimination against women has been eliminated from the system. Constitutional law cannot remedy all discrimination. But constitutional law casebooks should not obscure inequality between the sexes.