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HOMEMAKERS AND SOCIAL SECURITY: GIVING CREDITS WHERE CREDITS ARE DUE

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INTRODUCTION

Household labor and childrearing have long been considered fundamental to the proper functioning of American society. In the second half of the 18th century, mothers were tasked with the special role of inculcating republican values in their children, the future citizens of the United States.¹ In the 19th century, "republican motherhood" gave way to the "cult of domesticity." Urban bourgeois women, regarded as paragons of virtue, struck out into the tenements to promote genteel, family-oriented behavior among working-class women.²

The concept of the devoted mother as the heart of the family and the family as the building block of society is still prevalent today, although that concept has expanded to include other types of caregivers. In July 1988, President Ronald Reagan told the Student Congress on Evangelism, "When the family is strong, the Nation is strong. When the family is weak, the Nation itself is at risk."³ In 2000, President Bill Clinton proclaimed November as "National Family Caregivers Month," in honor of those individuals who care for elderly, ill, or disabled family members.⁴ In May 2003, Senator Robert Byrd spoke before the Senate, praising mothers as "essential to our families and our society."⁵ In 2006, Senator Barbara Mikulski asserted that "family caregiving is the bastion of our community."⁶ And in July 2008, President (then Senator) Barack Obama declared, "No matter what you do for living [sic], I think we can all agree that raising our children and caring for our loved ones is the most important job we have."⁷

It appears, however, that these leaders are paying mere lip service to mothers and other caregivers. For all of their rhetoric, our political leaders have

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1. See generally LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* (1980).

2. See CHRISTINE STANSELL, *CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789-1860* xii-xiii (1987).

3. President Ronald Reagan, Remarks to the Student Congress on Evangelism (July 28, 1988) (transcript available at <http://www.reagan.utexas.edu/archives/speeches/1988/072888b.htm>).

4. See Proclamation 7370 of Nov. 5, 2000, 3 C.F.R., 2000 Comp., p. 190-91 (2001).

5. Senator Robert C. Byrd, Remarks before the Senate: In Honor of Mother's Day (May 8, 2003) (transcript available at <http://byrd.senate.gov/speeches/speeches.html> (follow "May" hyperlink under "2003"; then follow "In Honor of Mother's Day" hyperlink)).

6. Interview by William Daroff with Senator Barbara Mikulski (Oct. 9, 2006) (transcript available at <http://www.ujc.org/page.aspx?id=129375>).

7. Senator Barack Obama, Address at the Democratic National Committee Women's Leadership Forum: Obama's Remarks at Clinton-Obama Breakfast Forum (July 10, 2008) (transcript available at http://www.realclearpolitics.com/articles/2008/07/obamas_remarks_at_clintonobama.html).

not seen fit to amend the largest federal entitlement program⁸—Social Security—to reflect the importance of caregiving and housekeeping activities. Only those who earn wages on the market are considered “workers” within the meaning of the Social Security Act.⁹ Because an overwhelming majority of stay-at-home parents,¹⁰ adult caregivers,¹¹ and homemakers in general¹² are women, the Social Security system, by precluding these individuals from receiving primary benefits, has discriminatory effects for women.

In this Article, I argue that Congress should amend the Social Security Act to allow people whom I will refer to as “homemakers” (those who have forgone or significantly reduced their participation in the labor force in order to take on caregiving responsibilities¹³) to opt into the Social Security system. In Part I of the Article, I summarize and then critique the Act’s current treatment of homemakers, with a particular focus on the inadequacy of the derivative benefits provisions as they apply to former or current spouses. I begin Part II by explaining why, according to the theory of judicial underenforcement, Congress is obligated to cure these defects in the Act. I then recommend that

8. See Karen C. Burke & Grayson M.P. McCouch, *Women, Fairness, and Social Security*, 82 IOWA L. REV. 1209, 1209 (1997).

9. 42 U.S.C. §§ 409, 411(a-b) (2006).

10. In 2006, there were 159,000 married stay-at-home fathers and 5,646,000 married stay-at-home mothers with children under the age of fifteen. U.S. CENSUS BUREAU, THE STATISTICAL ABSTRACT OF THE UNITED STATES 54 tbl.64 (2008), <http://www.census.gov/compendia/statab/2009edition.html>. In proportional terms, 97.26 percent of married stay-at-home parents with children under the age of fifteen were women.

11. In 2003, 61 percent of adult caregivers were female. NAT’L ALLIANCE FOR CAREGIVING & AARP, CAREGIVING IN THE U.S. 23 fig.6 (2004) [hereinafter NAT’L ALLIANCE]. The more burdensome the level of care, the more likely the caregiver was to be female. *Id.* at 22-23.

12. In 2006, 22.3 percent of all married couples were composed of a husband who participated in the labor force and a wife who did not, whereas only 6.5 percent were composed of a wife who participated in the labor force and a husband who did not. U.S. CENSUS BUREAU, *supra* note 10, at 381 tbl.582. 98.2 percent of the spouses receiving derivative benefits in December 2006 were women. See Soc. Sec. Admin., *Annual Statistical Supplement to the Social Security Bulletin*, 2007 SOC. SEC. BULL. 5.9 tbl.5.A1.3 (2007).

13. State legislatures have defined the “homemaker” as, variously, “a person who has primary responsibility for the care of a home and family and who receives no direct monetary compensation for their duties,” R.I. GEN. LAWS § 10-7-14 (1997), and “an individual who...has worked in the home for a substantial number of years providing unpaid household services for family members,” ALA. CODE § 16-60-240 (2001) (excerpted from the definition of “displaced homemaker”). Most scholars who have written about the legal treatment of homemakers neglected to articulate a definition of “homemaker,” although one implicitly defined “homemaker” as an individual who has stayed out of the labor force to “keep house” or because of “home responsibility.” See Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 69 n.3 (1993). I intend my definition to be more inclusive than Starnes’ definition (which excludes anyone who works outside the home on a part-time basis) but less inclusive than the legislative definitions (which encompass full-time paid workers who perform unpaid household services in the evenings and on weekends).

Congress eliminate derivative benefits for spouses and adult caregivers¹⁴ and instead offer an elective “homemaker credits” program. In lieu of limited and indirect derivative benefits, homemakers could choose to pay into Social Security and receive independent old-age benefits¹⁵ in return for their work inside the home. I contrast my plan with the two most frequently discussed proposals for incorporating unpaid domestic work into the Social Security system: (A) imposing a payroll tax on the work in order to fund the homemaker’s social security benefits, and (B) leaving the work untaxed and awarding “free” benefits. Part III explores homemaker credits programs in other countries. Japan, Ireland, and Germany have all created opt-in public pension schemes for homemakers, united in purpose but varied in their specifics. By comparing these programs to each other and compiling their best features, Congress can construct a maximally inclusive and fair homemaker credits program. Part IV anticipates and responds to accusations of administrative impracticability that might be raised against a proposal for a homemaker credits program in the United States. In this section, I tackle such practical matters as defining “homemaker,” calculating imputed income, and determining tax liability.

I. THE CURRENT SYSTEM¹⁶

The Social Security Act, first signed into law in 1935, provides old-age benefits to individuals who have attained retirement age¹⁷ and have worked for at least forty quarters (ten years) at or above a certain wage.¹⁸ The monthly benefits an insured worker receives are calculated based on the worker’s total earnings over his or her career (up to a certain amount per year¹⁹) and may be reduced if the worker is under the age of seventy and is still earning money

14. In practice, these benefits should be phased out gradually. Homemakers and adult caregivers who are currently collecting derivative benefits or will imminently collect them should not be cut off from this vital source of income; at the same time, they cannot enroll in the homemaker credits program, because they never paid into it.

15. Although this Article focuses on old-age benefits as the main component of Social Security, homemakers enrolled in a homemaker credits program would also be entitled to disability and Medicare benefits.

16. The following general description of the Social Security system owes much to John Bigler, Diane Archer & John Regan, *An Overview of Social Security, Medicare and Medicaid*, 65 N.Y. St. B. J. 14 (1993).

17. Retirement age for anyone born between 1943 and 1954 is 66 years. 42 U.S.C. § 416(l)(1)(C) (2003). Early retirement age—at which permanently reduced benefits are awarded—is 62 years. *Id.* § 416(l)(2).

18. *Id.* §§ 413-414. The amount of earnings needed to earn a quarter of coverage changes every year. This year, it has been set at \$1,090. See Social Security Office of the Chief Actuary, *Automatic Increases: Quarter of coverage*, <http://www.ssa.gov/OACT/COLA/QC.html> (last visited Oct. 30, 2009).

19. The maximum amount of earnings creditable in 2007, for example, was \$97,500. See SOC. SEC. ADMIN., SOCIAL SECURITY HANDBOOK § 1301.1 (2009), http://www.ssa.gov/OP_Home/handbook/handbook.13/handbook-1301.html [hereinafter SOCIAL SECURITY HANDBOOK].

through employment or self-employment.²⁰ The Social Security program is self-sustaining, meaning that benefits are financed by a dedicated payroll tax and only minimal funding from the general revenue.²¹ Both the worker and his or her employer pay a flat tax on the worker's earnings up to the aforementioned cap.²²

The Act was amended in 1939 to provide "derivative" or "secondary" benefits to the children, parents, and spouses (both current and former) of insured workers.²³ In order to be eligible for spousal benefits, a current spouse must (A) be over the age of sixty-two or have a child in his or her care, and (B) not be entitled to benefits based on his or her own work record in an amount equal to or greater than that which the insured worker is entitled to receive.²⁴

A divorced spouse of an insured worker is also entitled to benefits if he or she is unmarried and is not entitled to his or her own primary benefits in an amount equal to or greater than one-half of the benefits the worker is entitled to receive.²⁵ Moreover, the divorced spouse must have been married to the worker for at least ten years,²⁶ and both the divorced spouse and the worker must have attained retirement age.²⁷ Like current spouses, divorced spouses receive benefits in the amount of one-half of what the insured worker receives.²⁸

The surviving spouse of a deceased insured worker is eligible to receive survivor's benefits if he or she is unmarried, is at least sixty years old and healthy or at least fifty years old and disabled, and is not entitled to primary benefits in an amount equal to or greater than the deceased worker's primary benefits.²⁹ The amount of survivor's benefits can be as great as the primary insurance amount of the deceased worker.³⁰

20. 42 U.S.C. § 403(b)(1); see SOCIAL SECURITY HANDBOOK, *supra* note 19, at §§ 1802-1805.

21. Soc. Sec. Admin., *Social Security Online: History, Frequently Asked Questions*, <http://www.ssa.gov/history/genrev.html> (last visited Oct. 30, 2009).

22. For 2009, the combined tax rate for Social Security and Medicare is 7.65 percent each for employees and their employers and 15.3 percent for the self-employed. Soc. Sec. Admin., *Cost-of-Living Adjustment* (2008), <http://www.ssa.gov/pressoffice/factsheets/colafacts2009.htm>. [hereinafter COLA]. However, self-employed individuals effectively pay the same rate as employees, because they can deduct the "employer's" share of the tax on their income tax return. Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 997-98 (1993).

23. 42 U.S.C. § 402; see Burke & McCouch, *supra* note 8, at 1214. This Article's primary focus is on current and former spouses, although I will also discuss the inadequacy of derivative benefits as applied to adult caregivers. See *infra* p. 8.

24. 42 U.S.C. § 402(b)(1), (c)(1).

25. *Id.*

26. *Id.* § 416(d).

27. *Id.* § 402(b)(1), (c)(1).

28. *Id.* § 402(b)(2), (c)(2).

29. *Id.* § 402(e), (f).

30. *Id.* § 402(e)(2)(A), (f)(2)(A).

Although spousal benefits might, at first glance, appear to function as “shadow” wages for homemakers,³¹ they actually work to the detriment of women as a class, for a number of reasons. First, by making spousal benefits unavailable to women who have never been legally married, the Social Security Act unfairly disadvantages certain subsets of women who are either unable³² or disinclined to marry.³³ Second, even married or formerly married women are unable to avail themselves of the full range of benefits to which their insured husbands are entitled. Although they may collect old-age benefits, they are ineligible for disability protection and cannot confer survivor’s benefits on their children.³⁴

The inadequacy of spousal benefits is further demonstrated by the stringent qualifying conditions outlined above. If, for example, a divorced woman was married for only nine years, or if she remarries, or if her ex-husband has not yet retired, or if she herself has not reached retirement age, her claim to derivative benefits will be barred—even if she facilitated her ex-husband’s wage-earning by performing all of the caregiving and housekeeping work during their marriage.³⁵

On a similar note, spousal benefits may inhibit homemakers in unhappy marriages from divorcing. Although an insured worker’s marital status does not affect his eligibility for benefits, the only surefire way for a homemaker to maintain full eligibility is to remain married to the worker until the worker dies.³⁶ Even widows, however, cannot collect their survivor’s benefits until they reach age sixty (or fifty, if they are disabled).³⁷ Therefore, a young widowed homemaker may have no source of income in the period between the death of her husband and the time she reaches retirement age.³⁸

31. Burke & McCouch, *supra* note 8, at 1229-30.

32. Same-sex marriages, even if allowed under state law, are not recognized by the federal government. See Defense of Marriage Act of 1996, 28 U.S.C. § 1738C (2006). Therefore, a full-time homemaker in a lesbian couple would be deprived of any Social Security benefits. See Burke & McCouch, *supra* note 8, at 1231.

33. Women belonging to particular racial minorities, while legally permitted to marry, may be uninterested as a group in doing so. See Burke & McCouch, *supra* note 8, at 1231. In 2007, the percentage of black women aged eighteen or over who had never been married was more than twice as high as the percentage of white women in the same category. See U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2007 at tbl.A1 (2008), <http://www.census.gov/population/www/socdemo/hh-fam/cps2007.html>.

34. See Robert L. Brown, Robin Damm & Ishmael Sharara, *Including Homemakers in Social Security*, 4 N. AM. ACTUARIAL J. 28, 35 (2000).

35. See Mary E. Becker, Commentary, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet’s Constitutional Law*, 89 COLUM. L. REV. 264, 282-83 (1989).

36. See *id.* at 283.

37. 42 U.S.C. § 402(e), (f) (2003).

38. See Brown et al., *supra* note 34, at 36; Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1, 18 (1999) (referring to this phenomenon as the “widow’s gap”).

A final argument against spousal benefits is that the federal government encourages women to be financially dependent on their husbands by deterring them from working part time outside the home.³⁹ In terms of social security, and all other things being equal, Married Person A, who never enters the labor force, is better off than Married Person B, who works intermittently or for low wages. Unless Married Person B earns enough to generate social security benefits in the amount of more than one-half of her spouse's benefits, the Social Security Administration will discount her primary benefits in favor of the derivative benefits to which she is automatically entitled.⁴⁰ Married Person B thus has little incentive to work outside the home, especially considering the unpleasant working conditions that women often face, including a pay gap, overt and covert discrimination, and sexual harassment. Stated another way, the government is subsidizing one-earner families and the husband is likely to be the one earner, due to gender-based employment discrimination and social norms.⁴¹ Therefore, spousal benefits serve to perpetuate stereotypical gender roles within the family⁴² and sex segregation in the workplace.

The current derivative benefits provisions also disadvantage adult caregivers (*i.e.*, individuals who care for ill, elderly, or disabled adult family members or friends). The plurality of adult caregivers are caring for one of their parents,⁴³ yet derivative benefits based on a parent's past earnings are largely unavailable to anyone over the age of eighteen.⁴⁴ Furthermore, although many Americans provide care for a grandparent, in-law, sibling, or non-relative,⁴⁵ these relationships are not contemplated for the purpose of derivative benefits entitlement. The restricted coverage of the derivative benefits provisions again has a disproportionate impact on women: Not only are women more likely than men to serve as adult caregivers,⁴⁶ but female caregivers are less likely than male caregivers to earn primary benefits through paid employment.⁴⁷

In short, the current Social Security system contributes to women's economic vulnerability, both directly (by affecting women's finances) and indirectly (by influencing their behavior). Women's unequal access to Social

39. See Becker, *supra* note 35, at 283.

40. See *id.* at 280; see also McCaffery, *supra* note 22, at 999 (observing that "there is no marginal return to the taxes paid on the first dollars earned by a spouse.").

41. See Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1583 (1996) ("[M]any women have no choice but to assume the caretaking role in the household, knowing that it is difficult if not impossible to achieve individual success in the market.").

42. See Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1538 (1998).

43. NAT'L ALLIANCE, *supra* note 11, at 35 tbl.7.

44. SOC. SEC. ADMIN., BENEFITS FOR CHILDREN (2004), <http://www.socialsecurity.gov/pubs/10085.pdf>. The narrow exceptions to this rule are (1) children who are 18 or 19 and full-time high school students and (2) disabled children aged 18 or over whose disability began before age 22. *Id.*

45. NAT'L ALLIANCE, *supra* note 11, at 35.

46. *Id.* at 23.

47. *Id.* at 31.

Security benefits is no trivial matter. Many elderly individuals depend on these benefits for their survival,⁴⁸ and this is presumably true of women even more so than men.⁴⁹ Clearly, gender equality will not be fully realized in the United States until the federal government develops some method of recognizing unpaid domestic work for purposes of Social Security.

II. PROPOSALS FOR REFORM

Although the Supreme Court has rejected disparate impact claims brought under the Equal Protection Clauses of the Fifth and Fourteenth Amendments in the absence of discriminatory legislative intent,⁵⁰ this does not necessarily mean that neutral laws which have a disparate impact on certain categories of people are constitutional. According to the theory of judicial underenforcement,⁵¹ the reluctance of the federal courts to enforce a constitutional norm can be attributed to any number of factors⁵² and should not be construed as an "authoritative determination"⁵³ that the constitutional norm does not exist. Therefore, "government officials have a legal obligation to obey an underenforced constitutional norm which extends beyond its interpretation by the federal judiciary to the full dimensions of the concept which the norm embodies."⁵⁴ Even though the Equal Protection Clause's prohibition against discriminatory effects is underenforced by the courts,⁵⁵ Congress should consider itself bound by that prohibition and amend the Social Security Act to neutralize the statute's disparate impact on women.

The question, then, is what amendments Congress should make, bearing in mind the twin principles underlying Social Security: individual equity and

48. 52 percent of elderly married beneficiaries and 72 percent of elderly unmarried beneficiaries receive more than half of their income from Social Security. 20 percent of elderly married beneficiaries and 41 percent of elderly unmarried beneficiaries rely on social security for 90 percent or more of their income. SOC. SEC. ADMIN., SOCIAL SECURITY BASIC FACTS (2009), <http://www.ssa.gov/pressoffice/basicfact.htm>.

49. Women live, on average, approximately five years longer than men, so they need more money to support themselves during retirement. See U.S. CENSUS BUREAU, *supra* note 10, at 74 tbl.98.

50. See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that a facially neutral law does not violate the Equal Protection Clause unless the government acted with discriminatory intent); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (applying *Washington v. Davis* to a sex discrimination claim).

51. See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1977-78).

52. Sager cites concerns of institutional propriety (i.e., deference to the political branches of government) as one motive for self-imposed judicial restraint. See *id.* at 1226.

53. *Id.* at 1220-21.

54. *Id.* at 1227.

55. Cf. *Mathews v. de Castro*, 429 U.S. 181, 185 (1976) ("Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.'" (quoting *Helvering v. Davis*, 301 U.S. 619, 640 (1937))).

social adequacy.⁵⁶ Individual equity is the notion that “participants should receive an ‘actuarially fair’ return on their contributions,”⁵⁷ while social adequacy requires that “benefits . . . be set at a level sufficient to ensure a minimally adequate standard of living for all participants.”⁵⁸

Two types of proposed reforms have attracted attention in scholarly and legislative circles. The first proposal is that the government should treat nonmarket (household) labor exactly like market labor.⁵⁹ Homemakers would be required to pay taxes on their imputed wages, and they would be eligible to receive independent Social Security benefits upon retirement.⁶⁰ Although this scheme promotes both individual equity and social adequacy, its fatal flaw is political infeasibility. A second, contrasting proposal is that the government should treat household labor like market labor for purposes of Social Security but not the tax code.⁶¹ Primary benefits for homemakers would be funded by the general revenue instead of by payroll taxes.⁶² This approach not only swings too far in the direction of social adequacy but also shares with the first proposal the defect of political infeasibility.⁶³

The elective homemaker credits program I propose would strike a sensible, politically attractive balance between the two extremes of mandatory taxing and no taxing at all, while also furthering the goals of individual equity and social adequacy. In the sections to follow, I provide an overview of the elective homemaker credits scheme and then explain why this compromise solution is preferable to taxing unpaid domestic work or providing untaxed benefits to homemakers.

A. *The Homemaker Credits Compromise*

The exclusion of unpaid domestic workers from the Social Security system reflects the federal government’s normative stance on familial configuration and the value of domestic work. According to the federal government, families should consist of one wage-earner and one homemaker, and the homemaker’s role should be a secondary, supportive one. Instead of implicitly passing judgment on (and penalizing) any households that do not conform to this model, the government should adopt a neutral position. Homemakers—whether married, divorced, widowed, or single—should be considered real workers if they want to be considered as such. They should be empowered to perform the cost-benefit analysis themselves: either pay into Social Security and receive the same old-age protection as a wage-earner does,

56. See Burke & McCouch, *supra* note 8, at 1211; Liu, *supra* note 38, at 6-8.

57. Burke & McCouch, *supra* note 8, at 1211.

58. *Id.*

59. Staudt, *supra* note 41, at 1574.

60. *Id.* at 1642-43.

61. See H.R. 252, 93d Cong. (1973).

62. Grace Ganz Blumberg, *Adult Derivative Benefits in Social Security*, 32 STAN. L. REV. 233, 274 (1980).

63. Staudt, *supra* note 41, at 1630; Zelenak, *supra* note 42, at 1531-32.

or forgo social security benefits down the road in favor of greater disposable income now.

An enrollee in the homemaker credits program would pay taxes on her imputed income—the work she performs for herself and her family, thus “eliminat[ing] the need to procure goods or services in the market.”⁶⁴ Upon reaching retirement age, she would collect monthly benefits in proportion to the quarters of coverage credited to her. In effect, the Social Security system, after resolving some preliminary administrative issues,⁶⁵ would treat the unpaid domestic worker much the same as a paid worker.

Although individual equity and social adequacy, the twin interests underlying Social Security, are sometimes in tension with one another, an elective homemaker credits program would advance both of them. Currently, homemakers receive no direct financial return on their contributions to their families and their household at large. Not coincidentally, the importance of their work too often goes unappreciated. Imputing wages for unpaid domestic work “would have the transforming effect of forcing recognition of its value.”⁶⁶ Thus, individual equity would come in the form of both symbolic credit and monetary credits.

With respect to social adequacy, elderly homemakers, as a group, are in sore need of economic assistance. As noted above, women tend to live longer than men⁶⁷ and earn lower wages.⁶⁸ These factors contribute to high rates of poverty among elderly women, especially those who live alone.⁶⁹ If the government allowed homemakers to independently access Social Security benefits in their old age, the standard of living for never-married and divorced homemakers, in particular, would be greatly enhanced.

B. *Taxing Unpaid Domestic Work*

The idea of taxing unpaid domestic labor is most closely associated with law professor Nancy Staudt.⁷⁰ Staudt supports extending payroll taxation⁷¹ to

64. Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 45 (1997).

65. See *infra* pp. 20-24.

66. Silbaugh, *supra* note 64, at 47.

67. See *supra* note 49.

68. Although the income gap is narrowing, the median income for women in 2006 was still \$12,251 less than the median income for men. U.S. CENSUS BUREAU, *supra* note 10, at 447 tbl.679.

69. In 2007, 12 percent of women aged 65 or over lived below the poverty line, as compared to 6.6 percent of men in the same age group. When the focus is narrowed to elderly women who live alone, the number jumps to nearly 20 percent. U.S. CENSUS BUREAU, ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT TO THE CURRENT POPULATION SURVEY tbl.POV01 (2008), http://pubdb3.census.gov/macro/032008/pov/new01_100_01.htm.

70. See generally Staudt, *supra* note 41.

71. Although Staudt also includes an income tax in her proposal, it is unclear why. See Zelenak, *supra* note 42, at 1531 (“Only payroll taxation is relevant on the linkage question

housework for several reasons. First, attaching economic value to housework would augment its social value⁷² - this is the symbolic component of individual equity discussed in the previous section. Second, taxing homemakers is a means to grant them access to independent Social Security benefits.⁷³ This ties into the monetary component of individual equity as well as the principle of social adequacy.

Additionally, eliminating tax distinctions between market and nonmarket labor might enhance women's ability to break free from stereotypical gender roles. The government's current failure to tax housework provides a financial incentive for wives to work at home, thus perpetuating the conventional breadwinner/homemaker family structure.⁷⁴ Instead of paying taxes on her earned income and using the after-tax dollars to purchase day care or a cleaning service, a wife can save money for her family by dropping out of the work force, dismissing the paid helpers, and working full-time for her family, tax free.⁷⁵ Imposing a tax on her imputed income would remove the incentive for her to take on a homemaking role, thereby allowing her to base her decision between market and nonmarket labor on her "true" desires rather than mere economic concerns.

A mandatory tax on housework, however, would be politically infeasible and might harm more homemakers than it helps. Staudt wants the government to tax imputed income rather than provide "free" benefits, so that the welfare stigma will not attach to social security benefits for homemakers.⁷⁶ For low-income homemakers, the tax would be entirely offset by a household income tax credit.⁷⁷ Middle-class homemakers, however, would receive only a limited amount of tax relief and thus might object to paying a tax on imputed income.⁷⁸ Congress would have difficulty convincing them to support such a plan while still keeping the ratio of taxes to benefits high enough that the homemakers

[between taxes and Social Security benefits], and payroll taxation alone should be sufficient for symbolic purposes."). I will overlook Staudt's apparent blunder for purposes of this Article, because her plan would be unsound even if she had recommended compulsory payroll taxation alone.

72. Nancy C. Staudt, *Tax Theory and "Mere Critique": A Reply to Professor Zelenak*, 76 N.C. L. REV. 1581, 1587 (1998).

73. Staudt, *supra* note 41, at 1597.

74. McCaffery, *supra* note 22, at 1003 ("By performing [housekeeping and caregiving] services herself, the wife obtains a tax benefit for the family..."). It is important to note that the benefit accrues to the *family*, not the individual woman. See Staudt, *supra* note 41, at 1596 ("[I]n general, women do not have equal access to the resources made available because of nontaxation of household labor.").

75. See McCaffery, *supra* note 22, at 1003. This behavioral incentive is probably more powerful for middle and upper-class women than for lower-class women. Staudt, *supra* note 41, at 1591 ("Low-income and single women . . . usually do not have the option to substitute home labor for market labor and instead must work in both spheres to survive economically.").

76. See Staudt, *supra* note 41, at 1630-31.

77. *Id.* at 1637-38.

78. See Zelenak, *supra* note 42, at 1531-32.

truly “earn” their benefits.⁷⁹ Indeed, a mandatory tax on uncompensated domestic work might be so unpopular that large numbers of homemakers would resort to tax evasion. Ferreting out underground homemakers would be exceedingly difficult and would consume government resources that could be better spent elsewhere. By making the homemaker credits program non-compulsory, the government could preserve the best features of Staudt’s scheme (furthering individual equity and social adequacy and removing incentives for women to remain in traditional roles) while eliminating its undesirable upshot.

C. Providing “Free” Benefits to Homemakers

In 1973, United States Representative Bella Abzug of New York sponsored a bill that would “amend . . . the Social Security Act to provide that an individual who resides with and maintains a household for another person or persons (while such person or any of such persons is employed or self-employed) shall be considered as performing covered services in maintaining such household and shall be credited accordingly for benefit purposes.”⁸⁰ Imputed credits would be calculated based on the market cost for domestic services.⁸¹ Funding for homemakers’ benefits would come from the general revenue—marking a departure from Social Security’s tradition of self-sustenance.⁸² The bill was referred to the House Committee on Ways and Means⁸³ and never again surfaced in the Congressional Record.

The bill died in committee most likely because offering homemakers all the benefits of Social Security without any of the burdens tips the scale too far in the direction of social adequacy. Staudt has suggested that this type of program would impart a flavor of welfare to homemaker credits, making them politically unpalatable.⁸⁴ More importantly, providing “free” benefits to six million homemakers would place a tremendous strain on the Social Security system, which is already in fiscal crisis.⁸⁵ Even repealing spousal benefits would not free up enough revenue to fund independent benefits for

79. *See id.* at 1532.

80. H.R. 252, 93d Cong. (1973).

81. Blumberg, *supra* note 62, at 274. *See infra* p. 22 for a discussion of why this method of valuation would be inadequate.

82. Blumberg, *supra* note 62, at 274-75.

83. H.R. 252.

84. Staudt, *supra* note 41, at 1630. Although Staudt’s article was written in 1996, her criticism has not lost its potency: The American public today seems to disapprove of welfare just as much as it did back in the 1990s. *See* Posting of R.M. Schneiderman, *Do Americans Still Hate Welfare?*, N.Y. TIMES ECONOMIX BLOG <http://economix.blogs.nytimes.com/2008/10/30/do-americans-still-hate-welfare> (Oct. 30, 2008, 10:24 EST).

85. *See* Robert Pear, *Finances of Social Security and Medicare Deteriorate*, N.Y. TIMES, May 2, 2006, at A23 (projecting that the Social Security fund will go bankrupt in 2040).

homemakers.⁸⁶ Without taxes, therefore, “improving benefits for one group [homemakers] necessarily entails either lower benefits for another or higher program costs.”⁸⁷ Whether homemakers’ benefits were subsidized by paid workers (in the form of lower benefits) or taxpayers in general, the American public would regard homemakers not as hardworking contributors to the economy but as charity cases and hangers-on.⁸⁸

III. HOMEMAKER CREDITS PROGRAMS ABROAD

The experience of other countries demonstrates that elective homemaker credits programs are a viable alternative to spousal benefits.⁸⁹ When it comes to homemaker credits programs, one size does not fit all: Japan, Ireland, and Germany, for example, have tailored their programs to suit the needs of their respective societies and the overall structure of their social security systems. These carefully designed programs can serve as patterns for social security reform in the United States.

A. Japan

Japan’s social security program consists of a public pension scheme and universal health insurance.⁹⁰ The public pension scheme is two-tiered, with a basic pension and an earnings-related pension.⁹¹ All Japanese residents (including self-employed persons and unpaid family workers) are enrolled in the basic pension plan.⁹² They pay a flat tax and collect a fixed amount of benefits⁹³ starting at age sixty-five, regardless of whether they are “retired.”⁹⁴

86. As noted above, spousal benefits are available to only a subset of homemakers and equal only a fraction of primary benefits.

87. Henry Aaron, *Women and a Two-Tier Social Security System: Discussion*, in *A CHALLENGE TO SOCIAL SECURITY: THE CHANGING ROLES OF WOMEN AND MEN IN AMERICAN SOCIETY* 124, 127 (Richard V. Burkhauser & Karen C. Holden eds., 1982).

88. Staudt, *supra* note 41, at 1630.

89. Japan, Ireland, and Germany, the case studies in this Article, award survivor’s benefits but not regular spousal benefits. See Naohiro Yashiro & Takashi Oshio, *Social Security and Retirement in Japan*, in *SOCIAL SECURITY AND RETIREMENT AROUND THE WORLD* 239, 250 (Jonathan Gruber & David A. Wise eds., 1999); SOC. SEC. ADMIN., *SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD: EUROPE, 2008* at 115, 153 (2008), <http://www.ssa.gov/policy/docs/progdsc/ssptw/2008-2009/europe/ssptw08euro.pdf> [hereinafter EUROPE].

90. Yashiro & Oshio, *supra* note 89, at 249.

91. *Id.* at 250.

92. Takashi Oshio & Akiko Sato Oishi, *Social Security and Retirement in Japan: An Evaluation Using Micro-Data*, in *SOCIAL SECURITY PROGRAMS AND RETIREMENT AROUND THE WORLD: MICRO-ESTIMATION* 399, 401 (Jonathan Gruber & David A. Wise eds., 2004).

93. Yashiro & Oshio, *supra* note 89, at 250.

94. *Id.* at 242. “[B]ut one can collect the benefits as early as age sixty with a certain reduction in rates.” *Id.* at 250.

Although the basic pension benefits are modest (totaling approximately one-quarter of an employee's benefits⁹⁵), they exceed the contributions paid.⁹⁶

Employees who have reached the age of sixty⁹⁷ receive both basic pension benefits and an earnings-related pension.⁹⁸ Benefits under the earnings-related pension are proportional to the employee's past contributions (up to a certain amount).⁹⁹

The Japanese basic pension plan promotes individual equity by distributing old-age benefits to homemakers in exchange for their work. It also promotes social adequacy by setting benefits at a higher rate than taxes, thus providing a financial cushion to those individuals who are likely to need it the most in their old age. However, the cushion is a thin one, conveying the message that housework is only one-quarter as valuable to society as paid work. Furthermore, even if paying a small flat tax will yield disproportionately generous benefits later in life, low-income Japanese homemakers may experience the tax as an intolerable burden. The United States could avoid these problems by valuing housework at the average or median wage; making its homemaker credits program optional; and implementing a graduated tax based on total household income.¹⁰⁰

B. Ireland

The state pension in Ireland is available to those who have reached age sixty-six, regardless of retirement status.¹⁰¹ To qualify for a full pension (€223.30 per week¹⁰²), an individual must have paid contributions for at least 260 weeks, with an annual average of at least forty-eight weeks of contributions.¹⁰³ Those with a lower annual average of contributions (down to a ten-week minimum) receive a correspondingly reduced pension.¹⁰⁴

Only employed persons who earn €38 or more per week and self-employed persons who earn €3,174 or more per year are eligible for the state pension.¹⁰⁵ In 1994, however, Ireland implemented a "Homemaker's Scheme" whereby a maximum of twenty homemaking years can be disregarded for

95. *Id.* at 242.

96. JAMES H. SCHULZ, *THE ECONOMICS OF AGING* 161 (7th ed. 2001).

97. *See* Yashiro & Oshio, *supra* note 89, at 258.

98. *Id.* at 250.

99. *Id.*

100. *See infra* pp. 21, 23-24.

101. *See* EUROPE, *supra* note 89, at 153.

102. For purposes of comparison, a person in Ireland working forty hours a week at minimum wage would earn €346 per week. *See* Citizens Info. Bd., *Minimum Rates of Pay in Ireland*, http://www.citizensinformation.ie/categories/employment/employment-rights-and-conditions/pay-and-employment/pay_inc_min_wage (last visited Oct. 30, 2009).

103. *See* EUROPE, *supra* note 89, at 154.

104. *See id.* at 155 ("€218.90 a week is paid for an annual average of between 20 and 47 weeks; €167.50 is paid for an annual average of between 15 and 19 weeks; and €111.70 is paid for an annual average of between 10 and 14 weeks.").

105. *Id.* at 153.

purposes of calculating annual average contributions to the state pension fund.¹⁰⁶ To qualify as a "homemaker," a person must (1) be a permanent resident of Ireland; (2) be under the age of sixty-six; (3) earn less than €38 per week; (4) have been employed or self-employed sometime between the ages of sixteen and fifty-six; and (5) care for a child under the age of twelve or an incapacitated person on a full-time basis.¹⁰⁷ Each family can register only one homemaker at a time.¹⁰⁸ Registration is optional, although individuals who apply for other parenting- or caregiving-related government assistance are automatically considered for the Homemaker's Scheme as well.¹⁰⁹

One of these other assistance programs is the Carer's Benefit, "a payment made to insured persons in Ireland who leave the workforce to care for a person(s) in need of full-time care and attention."¹¹⁰ The Carer's Benefit is available for up to 104 weeks for each person being cared for.¹¹¹ Like homemakers, carers are credited for their work for purposes of calculating annual average contributions to the state pension fund.¹¹² "Credits are awarded at the same rate as [a carer's] last paid contribution."¹¹³

The most serious shortcoming of the Irish social security system is that homemakers who have never worked in the paid labor force are ineligible to receive credits.¹¹⁴ Also excluded are homemakers who have children over the age of twelve or who work part-time outside the home.¹¹⁵ Those individuals who do qualify for the Homemaker's Scheme or Carer's Benefit do not receive old-age benefits as direct compensation for their caregiving work. Instead, the

106. See Citizens Info. Bd., *Homemaker's Scheme*, http://www.citizensinformation.ie/categories/social-welfare/irish-social-welfare-system/social-insurance-prsi/homemakers_scheme (last visited Oct. 30, 2009) [hereinafter *Homemaker's Scheme*]. A similar provision in the United States Social Security Act, whereby a female wage earner could exclude from the computation of her average monthly wage three more lower earning years than a similarly situated male wage earner, was upheld as constitutional in *Califano v. Webster*, 430 U.S. 313 (1977), five years after it had been removed from the statute by Congress.

107. See *Homemaker's Scheme*, *supra* note 106.

108. *Id.*

109. *Id.* ("[Y]our claim for Child Benefit, Carer's Allowance, Carer's Benefit or the Respite Care Grant will be treated as an application to be registered as a Homemaker.").

110. Citizens Info. Bd., *Carer's Benefit*, http://www.citizensinformation.ie/categories/social-welfare/social-welfare-payments/carers/carers_benefit (last visited Oct. 30, 2009) [hereinafter *Carer's Benefit*]. Full-time caregivers may receive a Carer's Allowance in addition to the Carer's Benefit. However, the Allowance is means-tested—*i.e.*, available to low-income people only. It is therefore more akin to a welfare program than a social security program. See Citizens Info. Bd., *Carer's Allowance*, http://www.citizensinformation.ie/categories/social-welfare/social-welfare-payments/carers/carers_allowance (last visited Oct. 30, 2009).

111. See *Carer's Benefit*, *supra* note 110.

112. See *id.*

113. *Id.*

114. See *Homemaker's Scheme*, *supra* note 106.

115. See *id.*

time they spend on this work is officially disregarded.¹¹⁶ In short, Ireland's system enhances social adequacy for a small subset of homemakers but does little to advance individual equity. The United States could improve on the Irish system by eschewing strict eligibility requirements and calculating benefits on the basis of a homemaker's approximate working time.¹¹⁷

C. Germany

Germany mandates social security coverage for employed persons, some self-employed persons, and anyone caring for a child under the age of three.¹¹⁸ It also provides voluntary coverage for anyone aged sixteen or older who is exempt from compulsory coverage.¹¹⁹ Individuals whose income exceeds €800 per month can contribute 9.95 percent of their monthly earnings, up to a certain amount.¹²⁰ Those earning between €401 and €800 per month can pay a reduced amount, while those earning less than €400 per month contribute nothing at all.¹²¹

Additionally, the qualifying conditions for old-age pension benefits are relaxed for women. Whereas men are eligible for a full pension at age sixty-five after forty-five years of contributions,¹²² women of the same age need only ten years of contributions after the age of forty.¹²³ This provision is presumably designed to aid women who enter (or reenter) the work force after their children reach school-age.

Germany's social security system comes closer than Japan and Ireland's systems to realizing individual equity and social adequacy with respect to homemakers. A homemaker who opts into coverage receives the same pension benefits—the same recognition of her work—as a paid employee. These benefits represent an “actuarially fair” return on her contributions to her household and, by extension, to society.¹²⁴ If a homemaker has earned little to no money in the labor market over the course of her working lifetime, her entry into the social security system is facilitated by a graduated tax scheme. Therefore, those homemakers who will be most susceptible to poverty in their old age are guaranteed a minimally adequate standard of living.¹²⁵

116. *See id.*

117. *See infra* pp. 21-23.

118. EUROPE, *supra* note 89, at 115.

119. *Id.*

120. *See id.*

121. *Id.* To put these figures in context, a single person in Germany earning less than €764 per month is officially considered poor. U.S. CONSULATE GEN., GERMANY: FACTS & FIGURES (2009), http://frankfurt.usconsulate.gov/root/pdfs/germany_facts_figures/factsandfigures0509.pdf.

122. This requirement takes effect in 2012. *See* EUROPE, *supra* note 89, at 115.

123. This requirement applies to women born before 1952. *See id.*

124. *See* definition of individual equity, *supra* text accompanying note 57.

125. *See* definition of social adequacy, *supra* text accompanying note 58.

The German system falters, however, by adjusting its eligibility criteria based on the sex of the insured person. Sex is only an inexact proxy for short-term homemaking; although most of the people who leave the work force to parent full-time are female, Germany's policy would penalize the minority of men who are homemakers. Similarly, the sex-specific provisions would reinforce gender stereotypes by encouraging mothers rather than fathers to take time away from work, because the mothers need fewer years in the paid labor force to qualify for a full pension. Not only is Germany's sex-based distinction unwise as a policy matter, it would also be rejected as unconstitutional in the United States.¹²⁶

IV. PRACTICAL CONSIDERATIONS

Two of the most common objections to the taxation of housework involve valuation and liquidity.¹²⁷ To impute income to homemakers, the government must somehow "value" the domestic work (*i.e.*, determine how much it is worth). To collect taxes from homemakers, the government must consider the liquidity of uncompensated domestic workers and set the taxes at a rate that these workers are actually able to pay. These administrative problems may be tricky, but they are far from insurmountable. This section of the Article addresses valuation and liquidity concerns after establishing some basic eligibility criteria for the homemaker credits program.

A. Defining "Homemaker"

Enrollment in the homemaker credits program should not be restricted to full-time homemakers, as it is in Ireland. Some caregivers may wish to work part-time in the labor market and part-time in the home, thus leading balanced lives and supplementing their household income. The government should not discourage caregivers from adopting this lifestyle.

On the other hand, the full-time wage-earner who comes home in the evening and spends a few hours performing housekeeping and caregiving activities should not be eligible to receive homemaker credits. He or she is already entitled to primary benefits based on his or her paid work. Therefore, homemaker credits should not be available to anyone who works more than a certain number of hours per week—perhaps thirty—in the labor market.

As mentioned in the introduction to this Article, a "homemaker" should be defined as someone who has forgone or significantly reduced his or her participation in the paid workforce in order to take on caregiving responsibilities.¹²⁸ In other words, someone who performs unpaid housework

126. In *Craig v. Boren*, the Supreme Court cautioned against the use of sex "as an inaccurate proxy for other, more germane bases of classification." 429 U.S. 190, 198 (1976).

127. See Staudt, *supra* note 41, at 1575; see also W. ANDREW ACHENBAUM, SOCIAL SECURITY: VISIONS AND REVISIONS 138 (1986) (posing a litany of questions in an attempt to reveal the administrative hurdles that any homemaker credits program would confront).

128. See *supra* note 13.

but is not in charge of a child, elderly parent, or other dependent person will not qualify for homemaker credits. This proposed legal definition of "homemaker" is probably narrower than the layperson's definition, which might include caregivers and noncaregivers. However, the caregiving criterion lessens the risk that nonparticipants in the labor force will receive social security credits for ambiguous activities such as baking and gardening, which might be considered hobbies by some and work by others.¹²⁹ Although caring for a dependent can of course be pleasurable, it is generally arduous, demanding work and probably more essential to the family's well-being than tending a garden. Furthermore, although the work performed by a homemaker without dependents no doubt benefits the homemaker's spouse, the benefit to society is less obvious. In contrast, child care and elder care, if not provided by the family or some other private entity, become the taxpayers' burden. The government should therefore award special recognition to those who engage in caregiving in lieu of wage labor.

B. *Valuation: Calculating Imputed Wages*

Scholars and legislators have suggested a wide assortment of methods for calculating imputed wages for unpaid domestic work. Representative Abzug's 1973 bill referred to the market cost for domestic services.¹³⁰ However, domestic work, even when performed by non-family members, has long been undercompensated.¹³¹ Merely applying the non-family member rate to family members would perpetuate the undervaluation and stigmatization of domestic labor—as would applying the statutory minimum wage.

Economist Gary Becker and others have advocated an opportunity-cost approach.¹³² The government would assess how much each homemaker could be earning on the market, based on her actual prior market wage (if she used to perform paid work) or the average earnings for someone of the same educational level, age, and geographical location.¹³³ Theoretically, this approach would generate a highly accurate estimate of the value of housework, because individuals will perform housework only until the point that market labor becomes more valuable to them.¹³⁴ However, making such individualized determinations would be both complicated and expensive.

129. See Staudt, *supra* note 41, at 1577-78 (offering the gardening example).

130. Blumberg, *supra* note 62, at 274.

131. Actually, "the wage of a paid domestic worker is driven down by competition with a tax-subsidized unpaid houseworker..." Silbaugh, *supra* note 64, at 83. Perhaps after a few years of taxing homemakers who enroll in the homemaker credits program, the market cost for domestic services would increase, and the government could start using that cost as a fair estimate of the value of unpaid housework.

132. See Gary S. Becker, *A Theory of the Allocation of Time*, 75 *ECON. J.* 493, 516-17 (1965); Blumberg, *supra* note 62, at 272 n.181; Silbaugh, *supra* note 64, at 80.

133. Blumberg, *supra* note 62, at 272 n.181.

134. Becker, *supra* note 132, at 516-17.

Perhaps the most promising proposal involves using the average or median wage for all paid workers.¹³⁵ Although this method of calculation might err on the side of overvaluation, it is simple and straightforward, and would reject the conventional understanding of homemaking as inconsequential work (or not work at all).

Regardless of the chosen method of imputing wages, there would be no need to ascertain the exact number of work hours each homemaker contributes to her household. The Social Security Administration could adopt guidelines for the estimation of working time, based on such factors as the homemaker's sex, the number of dependents in his or her household, the presence of a spouse, and the level of the homemaker's participation in the labor market.¹³⁶ Similar guidelines or schedules are used in other areas of the law, such as determination of eligibility for disability benefits¹³⁷ and compensation for work-related injuries.¹³⁸

C. *Liquidity: Determining Tax Liability*

Somewhat more intractable than the problem of placing a value on housework is the problem of unpaid domestic workers' ability to pay taxes. A Japanese-style flat tax rate imposed on all participants in the homemaker credits program would deter women in low-income families from enrolling in the program. As Staudt observes, "[L]ow-income women might prefer to forgo potential future security to avoid paying an increased tax burden in the short run"¹³⁹

Therefore, the government would do better to implement a graduated tax, similar to the German system but based on total household income rather than individual income. Homemakers in low-income households would receive the highest ratio of benefits to taxes, paying somewhere on the order of 3.5 percent of their imputed income.¹⁴⁰ Middle-class homemakers would pay 7.65 percent,

135. See SCHULZ, *supra* note 96, at 162. Although Schulz also mentions imputing to homemakers the median wage for paid *female* workers, this would (1) endorse the stereotype that all homemakers are women, and (2) perpetuate the undervaluation of domestic work.

136. Staudt, *supra* note 41, at 1623-24. Studies have shown that household children under the age of 18 and lack of paid employment are directly proportional to the number of hours Americans spend each week performing housework. BUREAU OF LABOR STATISTICS, AMERICAN TIME USE SURVEY tbl.8, <http://www.bls.gov/news.release/pdf/atus.pdf> (last visited Oct. 31, 2009). Married women perform more hours of housework than single women, while married men perform fewer hours of housework than single men. Bobbie Mixon, *Chore Wars: Men, Women and Housework*, Apr. 28, 2008, <http://www.nsf.gov/discoveries> (follow "People and Society" hyperlink under "Discoveries by Research Area"; then follow "Chore Wars" hyperlink).

137. 20 C.F.R. § 404, subpart P, app. 2 (2003).

138. 82 AM. JUR. 2D *Workers' Compensation* § 405 (2003).

139. See Staudt, *supra* note 41, at 1629.

140. This percentage is roughly equivalent to the average effective tax rate imposed, under current law, on the poorest twenty percent of households. Robertson Williams, *Taxes and the Poor: How Does the Federal Tax System Affect Low-Income Households?*, in THE TAX POLICY BRIEFING BOOK: A CITIZEN'S GUIDE FOR THE 2008 ELECTION AND BEYOND

the same rate as employees.¹⁴¹ Homemakers whose households fall in the highest income tax brackets would also pay 7.65 percent, and their spouses or dependent parents, considered "employers" for these purposes, would match that amount.¹⁴²

This stratified structure would allow low-income women to take advantage of homemaker credits without bankrupting the Social Security program. Although this structure requires homemakers in high-income households to invest more than they will receive in benefits, the detriment to individual equity is outweighed by the overall boon to social adequacy. Homemakers whose families can afford to pay extra tax dollars would subsidize benefits for homemakers whose families are struggling to make ends meet. Married homemakers at all income levels would have an incentive to enroll in the program as a way of insuring their retirement "nest egg" against divorce.

V. CONCLUSION

With a Social Security crisis looming, now may not seem like the time to incorporate an additional segment of the population into the program. If the Social Security fund is projected to run dry in thirty years,¹⁴³ what purpose is there in overhauling the system? The answer is that it is never the wrong time to correct unconstitutional disparities in government programs. As long as Social Security is in operation, it should treat men and women equally. On a more practical level, an elective homemaker credits program will pay for itself and, by supplanting "free" derivative benefits for spouses and adult caregivers, may even boost the Social Security coffers.

The most frequent criticism of homemaker credits proposals is not that they are futile or inopportune but that they would be impractical to execute and unappealing to low-income women. Lawmakers, however, have managed to overcome these obstacles in other areas of the law. If the courts can calculate the value of household services when awarding damages for loss of consortium¹⁴⁴ or the wrongful death of a homemaker spouse,¹⁴⁵ or when dividing property upon divorce,¹⁴⁶ the Social Security Administration can

(2008), <http://www.taxpolicycenter.org/briefing-book/key-elements/poor/households.cfm>. It also happens to approximate one-half of the combined Social Security and Medicare tax rate for employees. See SOCIAL SECURITY HANDBOOK, *supra* note 19, § 405.

141. See COLA, *supra* note 22. A bill sponsored by Representative Barbara Jordan in 1975 would have funded social security benefits for homemakers by taxing the household at the self-employment rate. H.R. 3009, 94th Cong. (1975).

142. See COLA, *supra* note 22.

143. See Pear, *supra* note 85, at A23.

144. RESTATEMENT (SECOND) OF TORTS § 693 cmt. f (1977).

145. See Patricia Jean Lamkin, Annotation, *Admissibility and Sufficiency of Proof of Value of Housewife's Services, in Wrongful Death Action*, 77 A.L.R.3d 1175, 1179 (1977).

146. UNIF. MARRIAGE AND DIVORCE ACT § 307, (amended 1973), 9A U.L.A. 288-89 (1998).

calculate the value of household services when awarding social security benefits.

In January 2009, President Obama and the members of the 111th Congress swore to support and defend the United States Constitution.¹⁴⁷ To truly follow through on their oaths, they must amend the Social Security Act to reduce its bias toward paid workers, who are disproportionately male. The United States should follow the lead of other industrialized nations by creating an optional social security credits program for homemakers and discontinuing derivative benefits for the spouses of living insured persons. Until this happens, or the sexual division of labor comes to an end, American women will continue to live and work as second-class citizens.

147. See U.S. CONST. art. II, § 1, cl. 8; U.S. Senate, *Oath of Office*, http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm (last visited Oct. 31, 2009).

