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Making Social Security Work for Women and Men

Jonathan Barry Forman

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I. INTRODUCTION

The current Social Security system is wildly redistributive.[1] In particular, it provides generous benefits for the spouses and surviving spouses of covered workers.[2] To come up with the money for these generous benefits, the benefits provided to individual workers must be less than actuarially fair. In short, the current Social Security system takes money from workers and gives it to spouses and surviving spouses.

Not surprisingly, women are the principal recipients of these spousal benefits. Women tend to spend less time in the paid work force, women tend to live longer than men, and men tend to marry younger women.[3] The net effect is that the Social Security system has been pretty good for women.[4] Consequently, any reform of the Social

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1 *See, e.g.*, Jonathan Barry Forman, *Promoting Fairness in the Social Security Retirement Program: Partial Integration and a Credit for Dual-earner Couples*, 45 TAX LAW. 915, 948-57 (1992) and sources cited therein.

2 *See generally* Jonathan Barry Forman, *Whose Pension is it Anyway? Protecting Spousal Rights in a Privatized Social Security System*, 76 N.C. L. REV. 1653 (1998); Jonathan Barry Forman, *Social Security: What Can be Done About Marriage Penalties?*, 75 TAX NOTES 270 (1997) *and* 6 S. CAL. REV. L. WOMEN'S STUD. 553 (1997); Jonathan Barry Forman, *What Can be Done About Marriage Penalties?*, 30 FAM. L.Q. 1 (1996); *and* Jonathan Barry Forman, *Social Security: Why Treat Today's Women as if this Were the 1930s?*, L. A. TIMES, May 4, 1997, at M2.

3 *See infra* Part III.A.

4 *See, e.g.*, Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2061 (1996); Karen C. Burke & Grayson M.P. McCouch, *Women, Fairness, and Social Security*, 82 IOWA L. REV. 1209 (1997); U.S. GEN. ACCT. OFF., SOCIAL SECURITY REFORM: IMPLICATIONS FOR WOMEN'S RETIREMENT INCOME (Report No. GAO/HEHS-98-42, Dec. 1997); (NAT'L ECON. COUNCIL INTERAGENCY WORKING GROUP ON SOC. SECURITY, WOMEN AND RETIREMENT SECURITY (October 27, 1998); OLDER WOMEN'S LEAGUE, WOMEN, WORK AND PENSIONS:

Security system that reduces its redistributive impact could hurt women.

In particular, women could be harmed significantly if the current Social Security system is replaced with a fully privatized system of individual retirement savings accounts (IRSAs).[5] The reason for this effect is because with IRSAs, there would be no redistribution at all. Payroll contributions — and the earnings on those contributions — would remain in individual accounts, and no money would ever be taken from a worker's account to provide benefits for other workers or their families. Of course, it might make sense to compel individual workers to share their retirement accounts with their own spouses, divorced spouses, surviving spouses, and other survivors.[6] But there would be no redistribution from one worker's account to unrelated spouses or to unrelated workers with lower lifetime earnings.

Still, the government bears the burden of justifying its redistributive mandates. In that regard, redistribution based on need seems justifiable to me; that is, it makes sense to redistribute economic resources from rich to poor. Also, Social Security's progressive benefit formula currently does redistribute significant amounts from workers with high lifetime earnings to workers with

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IMPROVING THE ODDS FOR A SECURE RETIREMENT (1998); HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON RETIREMENT INCOME AND EMPLOYMENT OF THE SELECT COMM. ON AGING, 102d CONG., 2d SESS., HOW WELL DO WOMEN FARE UNDER THE NATION'S RETIREMENT POLICIES (Comm. Print 1992).

5 *See, e.g.*, PETER J. FERRARA & MICHAEL TANNER, A NEW DEAL FOR SOCIAL SECURITY (1998); Kathryn L. Moore, *Privatization of Social Security: Misguided Reform*, 71 TEMPLE. L. REV. 131 (1998); *and sources cited in* Forman, *Whose Pension Is It Anyway? Protecting Spousal Rights in a Privatized Social Security System*, *supra* note 2, at 1660-64 (explaining that proponents of complete or partial privatization of Social Security typically call for replacing all or a portion of the current system with a system of individual retirement savings accounts (IRSAs)). All or a portion of the Social Security payroll taxes that workers now pay to the federal government would go instead into IRSAs. *Id.* Typically, these IRSAs would operate pretty much like today's Individual Retirement Accounts (IRAs) and employer 401(k) savings plans. I.R.C. §§ 219, 401 (k) (1994).

6 For example, it could make sense to require each husband and wife to pool their individual accounts and purchase a joint and survivor annuity that would assure them both adequate incomes throughout their retirement years.

low lifetime earnings.[7] Although I might quibble with the basis for that redistribution,[8] I do believe that it makes sense to have a social insurance system that redistributes economic resources from rich to poor.

However, redistribution based on marital status is simply not justifiable. Yet that is the principal way that the current Social Security system benefits women. The current system provides generous *spousal* benefits. Without doubt, these spousal benefits have helped women in general. Unfortunately, spousal benefits fail to adequately target the neediest elderly women — octogenarian widows, divorcees, and other unmarried women who have had low lifetime earnings.[9] Moreover, the current system engenders significant marriage penalties on dual-earner couples and on lesbians and other unmarried women.[10]

Instead, we should replace the current system of spousal benefits with an earnings sharing system.[11] Under earnings sharing, each spouse in a married couple would be credited with one-half of the couple's combined earnings during marriage. To the extent that earnings sharing alone is insufficient to provide adequate benefits for elderly beneficiaries, the government should use general revenues to ensure that no elderly beneficiary has to live in poverty.[12]

At the outset, Part II of this Article provides an overview of the current Social Security system. Part III discusses the need for Social Security reform. Finally, Part IV discusses how earnings sharing could help form the basis for a social insurance system in which no elderly Americans would live in poverty.

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7 *See infra* Part II.B. for an explanation of how Social Security benefits are computed.

8 *See infra* Part IV.B.2. *See, e.g.*, Jon Forman, *Bill Gates and I Pay Equally – and This is Supposed to be a Fair System?*, L. A. TIMES, December 25, 1998, at B9.

9 *See infra* Part III.A.

10 *See, e.g.*, Forman, *What Can be Done About Marriage Penalties?*, *supra* note 2, at 13-19.

11 *See infra* Part IV.A.

12 *See infra* Part IV.B.

II. AN OVERVIEW OF THE SOCIAL SECURITY SYSTEM

The Social Security system includes three programs that provide monthly cash benefits to workers and their families. The Old-Age and Survivors Insurance (OASI) program provides monthly cash benefits to retired workers and their dependents and to survivors of covered workers, and the Disability Insurance (DI) program provides monthly cash benefits for disabled workers under age 65 and their dependents.[13] A worker builds protection under these programs by working in employment that is covered by Social Security and paying the applicable payroll taxes. At present, about 96 percent of the work force is in covered employment.[14] At retirement, disability, or death, monthly Social Security benefits are paid to insured workers and to their eligible dependents and survivors. The third program, the Supplemental Security Income (SSI) program, provides monthly cash benefits to low-income elderly Americans.[15]

The Old-Age and Survivors Insurance (OASI) program is, by far, the largest of these programs, and it is usually what people mean when they talk about Social Security. In 1997, for example, the OASI program paid more than $312 billion in benefits to almost 38 million Americans, and the average benefit paid to a retired worker was about $765 per month.[16] Consequently, for the remainder of this article, the term "Social Security taxes" will refer to OASI taxes, and the term "Social Security benefits" will refer to OASI benefits.

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[13] *See* STAFF OF THE HOUSE COMM. ON WAYS AND MEANS, 105TH CONG., 2D SESS., 1998 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 1-99 (Comm. Print 1998) (hereinafter "1998 GREEN BOOK"); SOC. SECURITY ADMIN., SOCIAL SECURITY HANDBOOK 1997 (13th ed. 1997); *and* SOC. SECURITY ADMIN., SOCIAL SECURITY BULL.; ANN. STATISTICAL SUPP. 1997 (1997). *See generally* Soc. Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as, and amended at 42 U.S.C. §§ 301-1397f (1999)).

[14] *See* 1998 GREEN BOOK, *supra* note 13, at 10.

[15] *Id.* at 261-326. In 1997, for example, the maximum federal SSI benefit for an individual was $484 per month, and the maximum federal SSI benefit for couples was $726 per month; however, some states provided small additional supplements. *Id.* at 277.

[16] *Current Operating Statistics: List of Tables*, 61 SOC. SECURITY BULL. no. 3, at 33, 35, 37, 38 (1998).

A. Social Security Taxes

Social Security benefits are overwhelmingly financed through payroll taxes imposed on individuals working in employment or self-employment that is covered by the Social Security system.[17] For 1999, employees and employers will each pay a tax of 5.35 percent on up to $72,600 of wages earned in covered employment, for a combined OASI rate of 10.7 percent (the lion's share of the total rate of 15.3 percent that is collected for OASI, disability insurance, and Medicare).[18] Self-employed workers pay an equivalent OASI tax of 10.7 percent on up to $72,600 of net earnings.[19]

B. Social Security Benefits

1. Worker Benefits

Workers over age 62 generally are entitled to OASI benefits if they have worked in covered employment for at least 10 years. Benefits are based on a measure of the worker's earnings history in covered employment known as the average indexed monthly earnings (AIME). Basically, the AIME measures the worker's career-average monthly earnings in covered employment.

The AIME is linked by a formula to the monthly retirement benefit payable to the worker at normal retirement age, a benefit known as the primary insurance amount (PIA). For a worker turning 62 in 1999, the PIA is equal to 90 percent of the first $505 of the worker's AIME, plus 32 percent of the AIME over $505 and through

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[17] In addition, as much as 85 percent of a taxpayer's Social Security benefits is subject to income taxation. The actual amount to be included is determined by applying a complicated two-tier formula. I.R.C. § 86 (1999). Basically single taxpayers with incomes over $25,000 and married couples with incomes over $32,000 must include as much as half of their Social Security benefits in income, and single taxpayers with incomes over $34,000 and married couples with incomes over $44,000 must include as much as 85 percent of their Social Security benefits in income.

[18] 1999 Cost-of-Living Increase and Other Determinations, 63 Fed. Reg. 58,446 (1998) (hereinafter 1999 Social Security COLA Determinations).

[19] *Id.*

$3,043 (if any), and plus 15 percent of the AIME over $3,043 (if any).[20] It is worth noting that, on its face, the benefit formula is progressive, meaning that it is designed to favor workers with relatively low career-average earnings.

Finally, Social Security benefits are indexed for inflation.[21] In March of 1998, more than 27 million retired workers were collecting Social Security retirement benefits, and the average benefit was $766 per month.[22]

2. Spousal Benefits

Dependents and survivors of the worker may also receive additional monthly benefits.[23] These so-called auxiliary benefit amounts are also based on the worker's PIA.[24] In particular, a 65-year-old wife or husband of a retired worker is entitled to a monthly spousal benefit equal to 50 percent of the worker's PIA.[25] Consequently, a retired worker and spouse generally can claim a monthly benefit equal to 150 percent of what the retired worker alone could claim. Also, a 65-year-old widow or widower of the worker is entitled to a monthly surviving spouse benefit equal to 100 percent of the worker's PIA.[26] In March of 1998, almost 3 million spouses of retired workers were collecting benefits averaging $393 per month.[27] Similarly, almost 5 million surviving spouses were collecting benefits

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[20] *Id.*

[21] 42 U.S.C. § 415(i)(1999).

[22] *Current Operating Statistics: List of Tables*, *supra* note 16, at 39.

[23] *See* 42 U.S.C. §§ 402(b) (wife), (c) (husband), (d) (child), (e) (widow), (f) (widower), (g) (mother and father), *and* (h) (parents)(1999).

[24] *See id.* at (k). Auxiliary benefits are subject to a variety of limitations. In particular, under the so-called dual entitlement rule, when an individual can claim both a worker benefit and a benefit as an auxiliary of another worker, only the larger of the two benefits is paid to the individual. *Id.*

[25] *See id.* at (b).

[26] *See id.* at (e) & (f); *also generally* 1998 GREEN BOOK, *supra* note 13, at 15 (noting widows and widowers can typically begin drawing benefits at age 60).

[27] *See Current Operating Statistics: List of Tables*, supra note 16, at 39.

averaging $733 per month.[28]

3. For Married Couples, Social Security Pays Benefits in the Form of a Joint and Two-Thirds Survivor Annuity

All in all, Social Security looks a lot like a joint and survivor annuity program. At retirement, a worker covered by Social Security is not allowed to withdraw the balance of some bank account — real or hypothetical. Instead, at retirement, Social Security provides monthly benefits over the course of the worker's life, and these benefits are indexed for inflation.[29] In short, Social Security pays benefits in the form of an indexed lifetime annuity.

Moreover, if a worker is married, Social Security pays monthly benefits over the joint lives of both husband and wife, and those benefits look like a joint and two-thirds survivor annuity. For example, consider a one-earner couple with both spouses age 65. While both the worker and the spouse are alive, they can retire and claim a monthly benefit equal to roughly 150 percent of what the worker alone could claim. If the spouse dies, the worker can continue to claim 100 percent of the worker benefit. Similarly, if the worker dies, the surviving spouse can claim a benefit equal to 100 percent of the worker benefit. In effect, Social Security provides most married couples with an indexed, joint and two-thirds survivor annuity.[30]

III. THE NEED FOR REFORM

A. Poverty Among Elderly Women

The success of the Social Security system is that since its

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[28] *Id.*

[29] *See* 42 U.S.C. § 415(i) (1999).

[30] The "two-thirds" survivor component reflects the fact that the survivor benefit (100 percent of the worker's PIA) is two-thirds of the married couple's benefit when both are alive (150 percent of the worker's PIA for a worker plus spouse). Mathematically, 2/3 = 100 percent/150 percent.

creation in 1935, poverty rates for the elderly have fallen from an estimated 50 percent in 1935 to around 11 percent today.[31] At the same time, however, the failure of Social Security is that it has not solved the problem of poverty among the elderly. Social Security alone has not provided adequate income for retirees, yet it is virtually the only source of income for the lowest 40 percent of Americans.[32]

In particular, women continue to face a much higher risk than men of poverty in old age.[33] At the outset, it is worth noting that women tend to live longer than men and that men tend to marry younger women. In that regard, the average life expectancy for a woman age 65 is about 19 years, versus about 15 years for men.[34] Not surprisingly, women make up 72 percent of the increasing number of Americans over 85 years old.[35] Moreover, Americans are retiring earlier and earlier.[36] All in all, the typical couple will spend about 15 years together in retirement, and the wife will live another 6 years as a widow.[37] Indeed, women are five times more likely to become widowed,[38] and many of these women will find themselves living below the poverty level.[39]

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31 U.S. GEN. ACCT. OFF., SOCIAL SECURITY: DIFFERENT APPROACHES FOR ADDRESSING PROGRAM SOLVENCY 2 (Report No. GAO/HEHS-98-33, July 1998).

32 *See* CHRISTOPHER CONTE, AGENDA BACKGROUND MATERIALS FOR THE NATIONAL SUMMIT ON RETIREMENT SAVINGS: JUNE 4-5, 1998, at 4 (American Savings Education Council 1998). *See also* NAT'L ECON. COUNCIL INTERAGENCY WORKING GROUP ON SOC. SECURITY, *supra* note 4, at 7 (stating "For 25% of unmarried women, Social Security is their only source of income").

33 *See, e.g.*, NAT'L ECON. COUNCIL INTERAGENCY WORKING GROUP ON SOC. SECURITY, *supra* note 4, at 5, 7, 12-13.

34 1998 GREEN BOOK, *supra* note 13, at 1031.

35 *See* NAT'L ECON. COUNCIL INTERAGENCY WORKING GROUP ON SOC. SECURITY, *supra* note 4, at 7.

36 *See* Jonathan Barry Forman, *Reforming Social Security to Encourage the Elderly to Work*, 9 STAN. L. & POL'Y REV. 289, 292 (1998).

37 Howard M. Iams & Stephen J. Sandell, *Cost-Neutral Policies to Increase Social Security Benefits for Widows: A Simulation for 1992*, 61 SOC. SECURITY BULL. no. 1, at 34, 37 (1998).

38 *See* Camilla E. Watson, *The Pension Game: Age-and Gender-based Inequities in the Retirement System*, 25 GA. L. REV. 1, 31 (1990).

39 *See* David A. Weaver, *The Economic Well-Being of Social Security*

Elderly divorced women are particularly at risk. They tend to have an exceptionally high incidence of poverty (around 30 percent), an unusually high incidence of serious health problems, and low Social Security benefits.[40]

Moreover, despite their greater need for retirement income, women have not found much support in the labor market or in the private retirement system.[41] In fact, there is a particularly large gender gap in the private retirement system.[42] For example, while 46.5 percent of men over age 65 in 1995 received pension and/or annuity income averaging $11,460 per year, only 26.4 percent of women over age 65 that year received a pension or annuity, and these averaged just $6,684 per year.[43] Moreover, women age 50 or over are more likely to receive a pension benefit through their husbands (as spouses or survivors) than through their own savings or employment.[44]

There are many reasons for the gender gap in private retirement income.[45] In particular, women tend to earn less than men. Also, women tend to work for smaller companies that are less likely to have a retirement plan, and women also tend to spend more time away from the workplace to raise a family or care for an aging relative. For example, one study found a strong association between

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Beneficiaries, with an Emphasis on Divorced Beneficiaries, 60 SOC. SECURITY BULL. no 4, at 3 (1997); David E. Ott, *Survivor Income Benefits Provided by Employers*, 114 MONTHLY LAB. REV. 13 (June 1991); MICHAEL D. HURD & DAVID A. WISE, THE WEALTH AND POVERTY OF WIDOWS (National Bureau of Economic Research Working Paper No. 2325, 1987).

[40] *See* Weaver, *supra* note 39; *also* Donald T. Ferron, *Social Security Benefits for Women Aged 62 or Older*, 60 SOC. SECURITY BULL. no. 4, at 32 (1997).

[41] NAT'L ECON. COUNCIL INTERAGENCY WORKING GROUP ON SOC. SECURITY, *supra* note 4.

[42] *Id.* at 15-16.

[43] EMPLOYEE BENEFIT RESEARCH INSTITUTE, EBRI DATABOOK ON EMPLOYEE BENEFITS 63 (4th ed. 1997).

[44] *Id.*

[45] *See* NAT'L ECON. COUNCIL INTERAGENCY WORKING GROUP ON SOC. SECURITY, *supra* note 4; William E. Even & David A. Macphearson, *Gender Difference in Pensions*, 29 J. HUM. RESOURCES 555 (1994).

marital and fertility decisions and pension coverage.[46] On the other hand, because younger women today spend more time in the work force and at more equal salaries, the financial security of women is likely to improve somewhat over time.[47]

Still, even if women benefit from increasing pension coverage, they are likely to face a greater risk of poverty than men because of their longer life expectancies. In particular, because relatively few private retirement plans are indexed for inflation, elderly women will often find their purchasing power diminished over the course of retirement.[48] All in all, there is a significant risk that millions of elderly women will outlive their resources, and that octogenarian widows and divorcees will be among the hardest hit.

B. The Current Social Security System Unfairly Redistributes Economic Resources Based On Marital Status

A casual observer of the current Social Security system would see that it is a pay-as-you-go social welfare system that takes payroll taxes from current workers and redistributes those funds to current retirees and their families. On closer inspection, however, most experts agree that the best way to understand Social Security's distributional features is to evaluate the program's impact over the course of a worker's lifetime.[49] This lifetime perspective leads to a comparison between the Social Security taxes paid by a worker and the expected benefits.[50]

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[46] *See* Even & Macphearson, *supra* note 45.

[47] *Id.*; *see also* Sophie M. Korcyzk, *Are Women's Jobs Getting Better, or Are Women Getting Better Jobs?*, *in* PENSION COVERAGE ISSUES FOR THE '90S, 61 (U.S. Dep't of Lab., Pension and Welfare Benefits Admin. ed., 1994); Robin L. Lumsdaine et al., *Pension Plan Provisions and Retirement: Men and Women, Medicare, and Models*, *in* STUDIES IN THE ECONOMICS OF AGING 183 (David A. Wise ed., 1994).

[48] Watson, *supra* note 38, at 32.

[49] *See, e.g.*, Forman, *supra* note 1, at 937-48.

[50] *Id.* For example, one might compare the expected value at age 65 of the OASI taxes that a worker paid over a career, together with interest at a market rate on those tax payments, with the expected value at age 65 of the stream of OASI benefits that the worker can expect to receive for life. The worker will receive his or her "money's worth" if the expected value of benefits to be received equals the expected value of all

Numerous studies have made just such comparisons.[51] Their results clearly show that the link between the Social Security taxes paid by a worker and the expected benefits is quite loose and can vary dramatically depending on such factors as family status, income, and age.[52] In short, not everyone gets his or her "money's worth."

In particular, to come up with the money for spousal benefits, the benefits provided to individual workers must be less than actuarially fair. In essence, workers subsidize the Social Security benefits provided to spouses and surviving spouses. For example, a single worker with no dependents can receive a benefit at age 65 of just 100 percent of the worker's PIA, while a worker with a spouse (who has also reached age 65) can receive a benefit equal to 150 percent of the worker's PIA. Similarly, a surviving spouse of a worker can continue to receive a benefit equal to 100 percent of the worker's benefit long after the worker has died. These "extra" benefits for spouses are paid for by reducing the benefits available to workers, including unmarried workers.

Perhaps worse still, the current Social Security system creates significant marriage penalties and bonuses.[53] Indeed, couples with equal total earnings can receive dramatically different amounts of benefits, depending upon how much is earned by each spouse.

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taxes paid. If the expected value of taxes paid exceeds the expected value of benefits, then the worker would, in effect, be paying other program participants. But if the expected value of benefits exceeds the expected value of the taxes paid, then the worker would be receiving extra benefits from other participants. *Id.*

[51] *See, e.g.*, Michael J. Boskin et al., *Social Security: A Financial Appraisal Across and Within Generations*, 40 NAT'L TAX J. 19 (1987).

[52] Forman, *supra* note 1, at 937-48. In general, the current Social Security system favors early generations of retirees over later generations, low earners over high earners, married couples over single individuals, larger families over smaller families, single-earner couples over dual-earner couples, and elderly retirees over elderly workers. *Id.*

[53] *See, e.g.*, Forman, *What Can Be Done About Marriage Penalties?*, *supra* note 2, at 16-19.

IV. TOWARDS AN EARNINGS SHARING SOLUTION

A. The Earnings Sharing Approach

1. The Marital Partnership Principle

As a general proposition, we believe that marriage is a partnership in which spouses share benefits and responsibilities. This is the marital partnership principle. Based on this principle, state divorce laws authorize alimony and property division orders, and state probate laws typically guarantee that a surviving spouse will get a share of a predeceasing spouse's estate.

For example, at divorce, most states try to achieve an equitable distribution of marital property. Absent evidence to the contrary, divorce law presumes that equal division of the marital property is the most equitable. In that regard, the courts typically treat private pensions as marital property that can be divided at divorce.[54]

2. Earnings Sharing

As creatures of federal law, Social Security benefits are not subject to division by state family courts. In theory, however, the marital partnership principle could be applied to Social Security benefit accruals. Federal law could be amended to use the so-called

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[54] *See* David L. Baumer & J. C. Poindexter, *Women and Divorce: The Perils of Pension Division*, 57 OHIO ST. L. J. 203, 213 (1996). Often, where the duration of the pension-producing employment and the marriage are not the same, the courts utilize the so-called "coverture fraction" to determine what portion of the private pension is marital property and what portion is the participant's individual property. *Id.* The fraction is determined by dividing the number of years of simultaneous marriage and employment by the total employment time. *Id.* For example, if an employee worked for 20 years on the job that resulted in the pension benefits but was married for just 12 of those years before divorce, the marital property share would be just 60 percent (60% = 12/20) of the value of the pension at divorce. *Id. See also,* Mary A. Throne, *Pension Awards in Divorce and Bankruptcy*, 88 COLUM. L. REV. 194 (1988); Grace Ganz Blumberg, *Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, or Replacement, Analysis*, 33 UCLA L. REV. 1250 (1986).

"earnings sharing" approach for dividing Social Security benefits between married spouses.[55] In its simplest form, earnings sharing would eliminate the current Social Security system's spouse and surviving spouse benefits. Instead, each spouse in a married couple would be credited with one-half of the couple's combined earnings during marriage. In the end, each spouse's Social Security benefit would be based on one-half of the married couple's earnings credits during marriage plus whatever earnings credits each of them accrued before or after the marriage.

For example, consider a couple in which the primary worker earned \$40,000 in a given year and the secondary worker earned \$10,000. Under the current Social Security system, the primary worker is credited with \$40,000 of earnings, and the secondary worker is credited with just \$10,000 of earnings. Under earnings sharing, each would be credited with \$25,000 of earnings for that year for purposes of computing benefits.

B. Ensuring Retirement Income Adequacy

1. The Principle of Retirement Income Adequacy

We believe that left to their own devices, many individuals will not save enough for their own retirement. Consequently, we have empowered our government to enact paternalistic Social Security and pension policies to ensure that workers will, in fact, save for their own retirement.[56] This is the principle of retirement income adequacy.

Indeed, Social Security's current spousal benefit rules stem from paternalistic governmental efforts to achieve adequate retirement incomes for the spouses of covered workers. But they have not

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[55] *See, e.g*, STAFF OF THE HOUSE COMM. ON WAYS AND MEANS, 99TH CONG., 1ST SESS., U.S. DEP'T OF HEALTH & HUM. SERVS., REPORT OF EARNINGS SHARING IMPLEMENTATION STUDY (Comm. Print 1985); U.S. CONG. BUDGET OFF., EARNINGS SHARING OPTIONS FOR THE SOCIAL SECURITY SYSTEM (1986).

[56] *See* LAWRENCE THOMPSON, OLDER AND WISE: THE ECONOMICS OF PUBLIC PENSIONS (1998); Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 59 U. CHI. L. REV. 1275 (1991).

worked. Far too many elderly widows and divorcees are living in poverty.[57]

2. Guaranteeing Adequate Incomes to the Elderly

Earnings sharing, by itself, would not ensure that all elderly Americans would avoid the ravages of poverty. However, earnings sharing, together with a more progressive social insurance system, could ensure adequate retirement incomes for the elderly.[58] In short, we need to have a social insurance system that redistributes economic resources in a way that ensures that all of our elderly citizens have adequate retirement incomes.

At a minimum, each elderly individual and couple needs to be assured an income at least equal to the poverty level. In 1999, for example, the poverty level for an unmarried individual is $8,240, and the poverty level for a married couple is $11,060.[59] Our social insurance system should assure that all elderly individuals and couples have at least such poverty-level incomes. This result could be achieved largely with a more progressive Social Security benefit computation formula.[60]

Unfortunately, the Social Security payroll tax is not the proper tool to achieve such redistribution. The current Social Security tax system only redistributes money from workers with modest lifetime earnings to workers with low lifetime earnings and their families. This year, for example, the Social Security tax system does not reach earnings in excess of $72,600.[61] Moreover, as a tax on earnings, the Social Security tax simply does not reach investment income or wealth. Consequently, the tax does not reach coupon-clipping trust-

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[57] *See supra* Part III.A.

[58] It might also make sense to require married couples to pool their Social Security accruals at retirement and use the combined balance towards a joint-and-survivor-annuity type of benefit.

[59] Annual Update of the Health and Human Services Poverty Guidelines, 64 Fed. Reg. 13428 (1999).

[60] Alternatively, eliminating poverty among the elderly could be achieved through an expansion of the Supplemental Security Income (SSI) program.

[61] *See* 1999 Social Security COLA Determinations, *supra* note 18.

fund kids and other high-income non-working investors.

If redistribution is called for (and I believe that it is), why should only those with modest earnings be called upon to subsidize the benefits of workers with low lifetime earnings and their spouses and surviving spouses? It seems to me that it would be more appropriate to use the income tax system or a wealth tax system to achieve such redistribution.[62]

The ultimate details of such a reformed system for financing Social Security benefits are beyond the scope of this paper. Suffice it to say, however, that I applaud President Clinton's recent suggestion that we transfer 62 percent of the projected budget surpluses over the next 15 years — more than $2.7 trillion — to the Social Security system.[63] That's $2.7 trillion from general revenues, not from additional payroll taxes.

V. CONCLUSION

It makes sense to have a social insurance system that redistributes economic resources from rich to poor. But it is unfair for our Social Security system to redistribute economic resources based on marital status. Doing so penalizes unmarried individuals and dual-earner couples, and it has failed to ensure that all elderly Americans have adequate retirement incomes. The time has come to fix Social Security by adopting earnings sharing and finding a better way to redistribute economic resources to benefit low-income elderly Americans. Then we would have a Social Security system that worked for women and men.

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[62] *See* Forman, *supra* note 8.

[63] *See, e.g.*, Mark Felenthal, *Social Security: Clinton Offer to Spend Surplus: Social Security Reform Leads Agenda*, 26 Pens. & Ben. Rep. (BNA) 197 (Jan. 25, 1999).