Social Security Benefits to Widows: The Ongoing Favoritism of Single-Earner Families and the Impact on Elderly Women

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I. Introduction

President Clinton said it best in his 1999 State of the Union Address when he said, "[w]e should reduce poverty among elderly women, who are nearly twice as likely to be poor as our other seniors."[1] Based on recent reports, the Social Security fund is projected to be insolvent by 2029.[2] As a result of this prognosis, a wealth of proposals have been championed to address the insolvency problem. Caught in the middle of all these proposed Social Security reforms is a population of widows currently receiving Social Security benefits.[3] For many of these women, their surviving spouse benefits provided by Social Security are not sufficient to prevent them from falling into poverty.[4] Even more troubling, most within this population of widows have worked at some point in their lives and contributed to the Social Security Fund.[5] Yet, when the time comes for them to collect from the Social Security

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1. Address Before a Joint Session of the Congress on the State of the Union, 35 WEEKLY COMP. PRES. DOC. 78, 79 (Jan. 19, 1999) [hereinafter State of the Union].

2. *See* Jonathan Barry Forman, *Whose Pension Is It Anyway? Protecting Spousal Rights in a Privatized Social Security System*, 76 N.C. L. REV. 1653, 1658 (1998) [hereinafter Forman, *Protecting*].

3. *See* Laura E. Stiglin, *A Classic Case of Overreaction: Women and Social Security*, NEW ENG. ECON. REV., Jan./Feb. 1981, at 29, 30 (discussing supplementary benefits available to widows of retired workers under the 1939 Social Security Amendment).

4. *See* NATIONAL ECONOMIC COUNCIL INTERAGENCY WORKING GROUP ON SOCIAL SECURITY, WOMEN AND RETIREMENT SECURITY 12 (1998) [hereinafter WOMEN AND RETIREMENT SECURITY] (noting that the poverty rate for elderly widowed women is 18% compared to a rate of only 4.6% for elderly married couples in 1997).

5 *See id.* at 11.

Fund, they are finding that their work efforts do not provide for any additional benefits.[6] This result is due primarily to the antiquated benefit rules currently in place in the Social Security Regulations.[7]

Despite the increasing number of dual-earner families, the current Social Security distribution regulations do not reflect this change; rather they still favor single-earner families.[8] As a result, dual-earner married couples face the "marriage tax penalty"[9] while they are working, and receive lower Social Security benefits than single-earner families when they retire.[10] While this disparity in distribution of benefits is inequitable, the impact on the surviving spouse receiving Social Security benefits after the death of a spouse is even more significant. During the period when both spouses are alive, the likelihood of the couple falling into poverty is low.[11] However, the risk of one spouse falling into poverty increases significantly when the other spouse dies.[12] This increase is

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6. *See* Stiglin, *supra* note 3, at 32 (commenting that working women often "do not get their 'money's worth' from Social Security" because even though these women have paid into Social Security from their wages "they often get no or only slightly higher benefits as workers than . . . as spouses"); *see also* Jonathan Barry Forman, *Promoting Fairness in the Social Security Retirement Program: Partial Integration and a Credit for Dual-Earner Couples*, 45 TAX LAW. 915, 946 (1992) [hereinafter Forman, *Fairness*]. Under the dual-entitlement rule, discussed *infra* notes 58-59 and accompanying text, often the benefits to the secondary earner are based on the primary earner's earnings. *See id.*

7. *See* RICHARD V. BURKHAUSER & TIMOTHY M. SMEEDING, SOCIAL SECURITY REFORM: A BUDGET NEUTRAL APPROACH TO REDUCING OLDER WOMEN'S DISPROPORTIONATE RISK OF POVERTY 15 (Maxwell Sch. of Citizenship & Pub. Aff. Center for Pol'y Res. Policy Brief No. 2, 1994) (noting that the current Social Security benefit pay-out rules are "obsolete . . . [and] no longer reflect the changed working patterns of men and women within marriage"); *see also* Karen C. Burke & Grayson M. P. McCouch, *Women, Fairness, and Social Security*, 83 IOWA L. REV. 1209, 1219 (1997) (arguing that "the system of spousal benefits 'undermines the incentive of the potential second-earner spouse to enter the work force' and reinforces the bias in favor of the 'traditional' family with a 'working husband' and a 'stay-at-home' wife").

8. *See* BURKHAUSER & SMEEDING, *supra* note 7, at 10.

9. In situations where both spouses earn equivalent amounts, their combined tax is greater than if they had filed as single individuals. *See* CONGRESSIONAL BUDGET OFFICE, CONGRESS OF THE UNITED STATES, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX at xiii (1997). On the other hand, single-earner families (or cases where one spouse's earnings is greatly larger than the other spouse's earnings) do not face such a situation. *See id.*

10. *See* Alicia H. Munnell & Laura E. Stiglin, *Women and a Two-Tier Social Security System*, *in* A CHALLENGE TO SOCIAL SECURITY: THE CHANGING ROLES OF WOMEN AND MEN IN AMERICAN SOCIETY 104 (Richard V. Burkhauser & Karen C. Holden eds., 1980).

11. *See* WOMEN AND RETIREMENT SECURITY, *supra* note 4, at 12 (citing the poverty rate for elderly married couples as 4.6% in 1997).

12. *See id.* The poverty rate for widowed women and men increases to 18%

due primarily to the decrease in benefits provided to surviving spouses.[13]

Furthermore, this phenomenon has a disparate impact on elderly women,[14] since women live longer.[15] For example, in March 1997 nearly five million surviving spouses received Social Security benefits.[16] Of these five million, nearly all individuals receiving spousal or survivor benefits were women.[17] Additionally, on average, women remain widows for seventeen years.[18] Social Security is, and will most likely continue to be, a significant source of income for these retired women.[19] Without Social Security, it is estimated that 60.6% of widows would live in poverty.[20] Current estimates indicate that 20.2% of widows over the age of sixty-five live in poverty.[21] At the same time widows are facing these hard-

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and 11.4% respectively, from 4.6% when both spouses are alive. *See id.*

13. *See* EKATERINA SHIRLEY & PETER SPIEGLER, THE BENEFITS OF SOCIAL SECURITY PRIVATIZATION FOR WOMEN 2, 5 (The Cato Project On Soc. Security Privatization No. 12, 1998); *see also* Senator Carol Moseley-Braun, *Women's Retirement Security*, 4 ELDER L.J. 493, 495 (1996) (stating that 80% of the elderly widows who are living below the poverty standard were not poor when their spouses were alive). Additional factors contributing to the financial difficulties faced by widows are a decline in pension income and other assets. *See* WOMEN AND RETIREMENT SECURITY, *supra* note 4, at 14. At the death of the spouse, assets available to the widow may be reduced because they are bequeathed to other family members or were used to cover medical expenses for the deceased. *See id.*

14. *See* SHIRLEY & SPIEGLER, *supra* note 13, at 4 (noting that Social Security "treatment of dual-earner couples is generally perceived as a women's issue").

15. *See* WOMEN AND RETIREMENT SECURITY, *supra* note 4, at 8 (stating that at 65, a woman can expect to live to 85 while a man only to 81). This gap in life expectancy between men and women is expected to continue in the future. *See id.*

16. *See* Jonathan Barry Forman, *Reforming Social Security to Encourage the Elderly to Work*, 9 STAN. L. & POL'Y REV. 289, 291 (1998) [hereinafter Forman, *Reforming*].

17. *See* SHIRLEY & SPIEGLER, *supra* note 13, at 4 (citing that women compose 99% of individuals receiving Social Security benefits under the spousal and survival benefits). One study reported that women are nearly three times as likely as older men to be widowed (49% to 14%). *See* BURKHAUSER & SMEEDING, *supra* note 7, at 2.

18. *See* BURKHAUSER & SMEEDING, *supra* note 7, at 10.

19. *See* SHIRLEY & SPIEGLER, *supra* note 13, at 5 (stating that "[n]on-married women over 65 rely on Social Security for 72 percent of their retirement income, on average, . . . Forty percent of non-married women over 65 rely on Social Security for 90 percent or more of their retirement income"); *see also* WOMEN AND RETIREMENT SECURITY, *supra* note 4, at 7 (noting that without Social Security, nearly 52.2 % of women would be living in poverty).

20. *See* WOMEN AND RETIREMENT SECURITY, *supra* note 4, at 7. Additionally, nearly 25% of unmarried women rely on Social Security as their sole source of income. *See id.*

21. *See* SHIRLEY & SPIEGLER, *supra* note 13, at 2. Other sources estimate the poverty rate for elderly widows at 18%. *See* WOMEN AND RETIREMENT SECURITY, *supra* note 4, at 7. It is estimated that widows comprise 64% of the elderly women currently in poverty. *See* SHIRLEY & SPIEGLER, *supra* note 13, at 4. Although women represent approximately 60% of individuals over 65, women also represent

ships, future retired people will be coming from dual-earner families.[22] Therefore, the disparity of benefits received by widows from single-earner families and dual-earner families only further exacerbates these problems.

This Article examines the current disparity in Social Security benefits paid to widows based on Social Security's treatment of dual-earner and single-earner families. Part II provides an overview of the Social Security system, including a description of the funding and benefit distribution system currently in place.[23] Part III describes some of the problems facing Social Security.[24] Part IV examines the major proposals presently under consideration and the impact of each proposal on benefits to widows and the disparity in place.[25] Finally, Part V of this Article describes the author's proposed reform regarding benefits for widows.[26]

II. Social Security Overview

Social Security was enacted in 1935 when the country was trying to come out of the Great Depression.[27] The purpose of the Social Security Act was to provide benefits to individuals during their retirement.[28] This type of social insurance was considered especially important in a time when workers faced uncertainty as to their current and future prospects.[29]

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nearly 75% of the elderly poor. *See* Moseley-Braun, *supra* note 13, at 494. In addition, statistics show that an elderly woman is "twice as likely as a man to live below the poverty line." *Id.*

22. *See* BURKHAUSER & SMEEDING, *supra* note 7, at 12.

23. *See infra* notes 27-62 and accompanying text.

24. *See infra* notes 63-95 and accompanying text.

25. *See infra* notes 96-167 and accompanying text.

26. *See infra* notes 168-75 and accompanying text.

27. *See* John C. Goodman & Dorman E. Cordell, *The Nightmare in Our Future: Elderly Entitlements*, NAT'L CENTER FOR POL'Y ANALYSIS Report No. 212 (January 1998) <http://www.ncpa.org/studies/s212.html>. Although the Social Security Act was passed with other welfare legislation, Social Security was not intended to be a welfare program. *See* Social Security Administration, *Social Security History Page* (visited Nov. 13, 1998) <http://www.ssa.gov/history/history6.html> [hereinafter *Social Security History Page*]. Rather, through its contribution requirement, Social Security was promoted as a way for workers to contribute to their own future retirement benefit. *See id.; see also* Burke & McCouch, *supra* note 7, at 1213 (stating that "[t]he formal linkage between wages, contributions, and benefits distinguishes Social Security from pure social welfare programs and reinforces the widely-held perception of Social Security benefits as an 'earned right'").

28. *See Social Security History Page*, *supra* note 27 (explaining that the Social Security Act was viewed as a means "to address the long-range problem of economic security for the aged").

29. *See* SOCIAL SECURITY ADMINISTRATION, A BRIEF HISTORY OF SOCIAL SECURITY 4 (1995) (quoting President Roosevelt at the August 14, 1935 signing of the Social Security Act as stating "we have tried to frame a law which will give

The current Social Security system is composed of three programs: (i) Old age and survivors insurance (OASI); (ii) Disability insurance; and (iii) Hospital insurance (better known as Medicare).[30] This Article focuses primarily on OASI, the program that provides income to retirees. Presently, under OASI, individuals are eligible for Social Security benefits at age sixty-five.[31] Individuals may elect to retire at sixty-two[32] but will receive a lower level of Social Security benefits.[33] The amount of an individual's Social Security benefits is based on the individual's earning record over his or her employment history.[34]

A. *Funding Social Security*

Funding for the Social Security program is done through a payroll tax, better known as FICA (Federal Insurance Contribu-

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some measure of protection to the average citizen and to his family against the loss of a job and against poverty-ridden old age").

30. *See* Forman, *Fairness, supra* note 6, at 915.

31. *See id.* at 922 (noting that the standard retirement age is 65 under Social Security); *see also* Goodman & Cordell, *supra* note 27. The standard retirement age is projected to increase to 67 in the year 2000. *See id.*

32. *See* Forman, *Fairness, supra* note 6, at 921 (noting that Social Security benefits are available to individuals over the age of 62 "if they have worked in covered employment for at least ten years"). As a result of expansions and favorable economic conditions in private pensions, workers are retiring earlier. *See* BURKHAUSER & SMEEDING, *supra* note 7, at 3.

33. *See* Forman, *Fairness, supra* note 6, at 923.

34. *See id.* at 921. This amount is also referred to as the individual's Average Indexed Monthly Earnings (AIME). *See id.* at 921-22. The AIME measures the taxpayer's "career-average monthly earnings" while the individual is employed in covered employment. *See id.* at 922. Only covered earnings up to the Social Security earnings cap are considered for determining the individual's Social Security benefits. *See id.* See *infra* notes 45-46 and accompanying text for a discussion of the earnings cap.

To compute the AIME, an individual's earnings covered by Social Security are identified and adjusted for inflation. *See* Forman, *Reforming, supra* note 16, at 290. Earnings are adjusted for inflation so that wages earned by the individual in the earlier part of his or her career are comparable with wages earned in the latter part of his or her career. *See id.* The highest indexed earnings for a maximum 35 years for the individual are accumulated and divided by the number of years of wages used for accumulation. *See id.* This amount is divided by 12 months and represents the individual's AIME in current dollars. *See id.*

The computation of AIME is important because it is connected to the monthly Social Security benefits payable to an individual at the normal retirement age. *See id.* The monthly Social Security benefit is commonly referred to as the Primary Insurance Amount (PIA). *See id.* Since this amount is based on benefits payable at the normal retirement age of 65, if an individual retires at an earlier age, that individual will receive a lower PIA. *See id.* at 291. For example, workers who retire at 62 receive only 90% of the PIA at retirement. *See id.*

tions Act).[35] Currently, almost ninety-two percent of Americans contribute to Social Security through the FICA payroll tax.[36] In addition to the employees' contributions, employers must match the amount their employees contribute to the Social Security Fund.[37] Only wages from covered employment[38] or self-employment are subject to the FICA payroll tax.[39] Income from capital investments, commonly referred to as passive income, including rental income, interest and dividends are not subject to the FICA payroll tax.[40] For 1999, the FICA tax imposed on covered wages is 7.65%, of which 5.35% is allocated for OASI.[41] The income on which the tax is imposed is capped.[42] For 1998 and 1999, the income caps are $68,400 and $72,600, respectively.[43] The income cap is adjusted annually for inflation.[44]

Under the current system, it is possible for two families with equal total earnings to contribute different amounts to the Social

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35. *See* Forman, *Fairness, supra* note 6, at 917.

36. *See* Forman, *Reforming, supra* note 16, at 290 (noting that "ninety-six percent of the workforce are in covered employment").

37. *See* Forman, *Fairness, supra* note 6, at 918. The employees' contribution along with the employers' matching share is remitted to the Unites States Treasury. *See id.* Employers are also required to file quarterly tax returns reporting Social Security tax amounts remitted during the quarter and for the year. *See id.*

38. Under current law, covered employment is defined as:

> any service, of whatever nature, performed . . . (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, . . . or (B) outside the United States by a citizen or resident of the United States as an employee (i) of an American employer . . . , or (ii) of a foreign affiliate . . . of an American employer during any period for which there is in effect an agreement, . . . or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section [433 of this title].

42 U.S.C. § 410(a) (1998). Services performed by a student or a minor while employed by a parent are not considered covered employment. *See id.*

39. *See id.* at 918. Beginning in 1984, voluntary contributions to qualified private retirement plans as well as amounts deferred to "nonqualified deferred compensation plans" are considered to fall under covered earnings also and are therefore subject to the FICA payroll tax. *See id.* at 919.

40. *See* Forman, *Fairness, supra* note 6, at 919; *see also* Goodman & Cordell, *supra* note 27, at 8 (discussing proposal to include capital investment income in the tax base for Social Security purposes).

41. *See* J. ROBERT TREANOR, ET AL., 1999 GUIDE TO SOCIAL SECURITY AND MEDICARE 6 (1998). Additional payroll taxes for disability and Medicare are also paid by employees and matched by employers. *See id.* (noting that a .85% and 1.45% payroll tax is imposed on wages for the Disability Fund and Medicare, respectively). As this Article only relates to OASI benefits, discussions regarding the Medicare/Medicaid portion of the overall Social Security tax will not be discussed.

42. *See* Forman, *Reforming, supra* note 16, at 290.

43. *See* TREANOR, ET. AL, *supra* note 41, at 7.

44. *See* Forman, *Reforming, supra* note 16, at 290.

Security Fund.[45] For example, dual-earner families may contribute more to the Social Security system than single-earner families[46] as demonstrated in Table 1:

Table 1. Comparison of Social Security Contributions of a Single-Earner Couple to those of a Dual-Earner Couple

	JONES	SMITH
WAGES		
Husband	$100,000	$50,000
Wife	0	50,000
Total Combined	$100,000	$100,000
OASI TAXES (Employee's share and Employers' share combined)		
Husband	$7,318	$5,350
Wife	0	5,350
Total Combined	$7,318	$10,700

For 1998, the OASI tax of 5.35% is imposed on a maximum of $68,400 of earned wages. Thus, of Mr. Jones' $100,000 earnings, only $68,400 was subjected to the OASI tax. Based on this, Mr. Jones' contribution is calculated by multiplying $68,400 by 5.35% which results in a total contribution of $3,659. The employers' mandatory match is reflected in the total contribution for each respective person in the table above.

This disparity is attributed mainly to the earnings cap.[47] Of the Jones' total earnings, only $68,400 is taxed according to Social Security Regulations.[48] Because both Mr. and Mrs. Smith's wages are below the earnings cap, their entire salary is taxed individually. Therefore, although both couples have total wages of

45. *See* Forman, *Fairness*, *supra* note 6, at 933.

46. *See id.*

47. *See id.*

48. *See* Forman, *Reforming*, *supra* note 16, at 290. Per Social Security Regulations, each individual's earnings is taxed subject to the earnings cap. *See id.* Therefore, since Mr. Jones is the sole wage earner in this scenario, the Social Security cap applies to his earnings.

$100,000, the Smiths contribute more to the Social Security Fund because their entire wages are taxed, as opposed to the Joneses whose contribution is based on $68,400 of their wages. Despite this difference in contribution levels, the Joneses, as the discussion following will demonstrate, will receive higher Social Security benefits than the Smiths when the time comes for them to retire.[49]

B. *Distribution of Social Security Benefits*

The Social Security system is viewed as a dual-purpose system. Benefits to the retired employee are calculated based on the individual's covered wages before retirement.[50] Additionally, a minimum standard of benefits is provided to ensure the retired individual does not fall into poverty through the Federal Supplemental Security Income program.[51] In addition to benefits for the taxpayer, in 1939 Social Security benefits were extended to the spouse and dependents of the retired taxpayer[52] on the basis of social adequacy.[53] These auxiliary benefits are based on a percentage of the retired employee's Social Security benefit.[54] In the late 1930s, the norm was for only one spouse, usually the man, to work.[55] Bene-

49. *See infra* notes 50-62 and accompanying text.

50. *See* Forman, *Fairness*, *supra* note 6, at 921-24; *supra* note 34 (discussing the calculation of retirement benefits).

51. An underlying objective of Social Security is to provide adequate benefits to keep retired individuals out of poverty. *See* BURKHAUSER & SMEEDING, *supra* note 7, at 3. Under the Federal Supplemental Security Income program, enacted in 1974, a minimum income floor is provided for individuals over the age of 65. *See id.* This income level is periodically adjusted for cost of living increases. *See id.*

52. *See* BURKHAUSER & SMEEDING, *supra* note 7, at 10. In 1956, the Social Security Act was further amended to include disabled workers as well. *See* Goodman & Cordell, *supra* note 27.

53. *See* Burke & McCouch, *supra* note 7, at 1214.

54. *See* Forman, *Fairness*, *supra* note 6, at 924-25. The following represents the current level of benefits each class of dependent/spouse is entitled to, using the taxpayer's benefits as the base:

CLASS OF DEPENDENT/SPOUSE	*% OF BENEFIT*
Married spouses at age 65	50.0
Mothers, fathers, children	50.0
Widows, widowers at age 65	100.0
Dependent parent at age 62	82.5
Surviving mothers, fathers, children	75.0

See id. at 925 (citing STAFF OF HOUSE COMM. ON WAYS AND MEANS, 102ND CONG., OVERVIEW OF ENTITLEMENT PROGRAMS: 1991 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE COMM. ON WAYS AND MEANS 14 (Comm. Print 1991)).

55. *See* BURKHAUSER & SMEEDING, *supra* note 7, at 10. At the time the amendment to Social Security was enacted, it reflected the societal presumption

fits for a worker's spouse and dependent were deemed necessary due to the low level of Social Security benefits paid out in the early days of Social Security and the presumption of dependency of women on their husbands.[56] Moreover, spousal benefits were anticipated to diminish over the long run as more and more women entered into the workforce and qualified for Social Security benefits on their own.[57]

If the taxpayer's dependents or spouse also work, they may be eligible for Social Security benefits based on their own earnings.[58] However, the dual entitlement rule prevents an individual from receiving benefits under both his or her employment as well as his or her spouse's.[59] Under the dual entitlement rule, although a spouse may be entitled to benefits based on his or her own income and benefits based on his or her spouse's income, he or she receives the larger of the two and not both.[60]

Auxiliary benefits not only create spousal benefits while a spouse is alive, but also provide for benefits to the surviving spouses.[61] Based on the present Social Security benefit structure, Table 2 represents the benefits available to spouses of a single-earner family and a dual earning family:

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that married women were dependent on their husband for support. *See* Burke & McCouch, *supra* note 7, at 1214-15.

56. *See* Burke & McCouch, *supra* note 7, at 1214-15. In the 1930s only 25% of women worked. *See id.* at 1215. Today, nearly 60% of women participate in the labor force. *See* WOMEN AND RETIREMENT SECURITY, *supra* note 4, at 11.

57. *See* Burke & McCouch, *supra* note 7, at 1215. This expected decline in spousal benefits has not occurred, however. Currently, 37% of women receive Social Security benefits based on their own earnings. *See* WOMEN AND RETIREMENT SECURITY, *supra* note 4, at 8. It is estimated that "74% of elderly widows receive benefits on the earnings of their deceased spouse." *Id.* at 10. This continued dependency is due to several factors, including: 1) Women continue to make less than men on average (in 1997, women in full-time jobs earned an average of 74 cents for each dollar earned by men in full-time jobs); 2) Women tend to work more part-time jobs than full-time jobs (in 1998, 25.8% of women working were employed in part-time jobs and represented 67.5% of all part-time workers); and 3) Women leave the workforce for more years than men for child caring reasons and other responsibilities (of individuals retiring in 1996, women averaged 27 years of employment while men averaged 39 years). *See id.* at 8-9. As a result of these factors, working women's average lifetime earnings tend to be lower than men's, which causes women to receive Social Security benefits based on their spouse's earnings rather than their own. *See id.* at 3, 8.

58. *See* Burke & McCouch, *supra* note 7, at 1225.

59. *See* Jonathan Barry Forman, *Social Security: What Can Be Done About Marriage Penalties?*, 6 S. CAL. REV. L. & WOMEN'S STUD. 553, 555 (1997) [hereinafter Forman, *Marriage Penalties*].

60. *See id.* Because of this restriction, many commentators have termed the dual entitlement rule a marriage penalty. *See id.*

61. *See Social Security History Page*, *supra* note 27, at 6 (discussing the 1939 Amendment to Social Security which provided for benefits to widows of retired workers).

Table 2. Comparison of Survivor Benefits Between Single-Earner and Dual-Earner Couples

Couples	Average Lifetime Earnings	*Social Security Benefits* Couple	Survivor	Survivor's Benefit / Couple's Benefits
Single-Earner Couple				
Husband	$100,000	$50,000		
Wife	0	25,000	50,000	67%
Total	$100,000	$75,000	$50,000	
Dual-Earner Couple				
Husband	$50,000	$25,000		
Wife	50,000	25,000	25,000	50%
Total	$100,000	$50,000	$25,000	

The above table assumes fifty percent Social Security benefit distribution of average lifetime earnings. This assumption is used for simplification purposes, as calculation of actual Social Security benefits for each couple, based on average lifetime earnings would unnecessarily complicate the analysis. Although actual benefit amounts are not used, the percentage of survivor's benefits to couple's benefits accurately reflects the effect of current regulations.

As demonstrated by combining data from Table 1 (Comparison of Contribution by Couples) with data reflected in Table 2 (Comparison of Survivor Benefits by Couples), even though a dual-earner family may contribute more to Social Security than the single-earner family, the dual-earner family receives less in benefits in comparison to the single-earner family. This disparity, of course, continues, and even increases, after the death of a spouse.[62]

62. *See* BURKHAUSER & SMEEDING, *supra* note 7, at 11; *see also* Burke & McCouch, *supra* note 7, at 1226 (explaining that this disparity between benefits received and paid, as it relates to widows of single and dual-earner couples, is increased further if each couple makes over the Social Security cap).

III. Problems Facing Social Security

Each year, the Social Security Administration, in its trustee's annual report, includes its projection regarding the future of Social Security, as prepared by its actuaries.[63] Based on a recent report, the Social Security fund is expected to be operating in a deficit by the year 2029.[64] A brief discussion of some of the factors contributing to the current deficit projection follows.

A. *Funding for Retiree Benefits*

The Social Security retirement system is structured under a pay-as-you-go system.[65] Under this structure, FICA payroll taxes collected from current employees are used to pay benefits for current retirees.[66] In essence, then, each generation of retirees must depend on the next generation to fund their Social Security benefits.[67]

Because of this dependency, the ratio of workers to retirees is very important.[68] When Social Security was enacted, there were approximately forty-two workers for one retiree.[69] Today, because of lower birth rates and longer life expectancy, gained through advances in the medical field in treating diseases, the ratio of workers to retirees has decreased significantly.[70] The current ratio is 3.3 workers to 1 retiree.[71] The projected ratio for the year 2050 is 1.5 to 2 workers to 1 retiree.[72] As this ratio continues to drop, there will not be enough workers necessary to fund the benefit obligations for retirees, a population which is projected to increase over the years due to longer life expectancy.[73] Thus, the outflow of cash needed for Social Security benefits will be greater than the

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63. *See* Goodman & Cordell, *supra* note 27, at 2 (stating that these projections include three ranges of estimates: the high-cost view (also called the pessimistic viewpoint), the intermediate projection and the low-cost prospects (also called the optimistic view)). Some commentators believe that the pessimistic projections are the more realistic estimates, although the Social Security Administration advocates the intermediate projection. *See id.*

64. *See* Forman, *Protecting*, *supra* note 2, at 1658.

65. *See* Forman, *Fairness*, *supra* note 6, at 920.

66. *See id.*

67. *See* Goodman & Cordell, *supra* note 27.

68. *See id.*

69. *See id.* at 5.

70. *See id.*

71. *See id.*

72. *See id.* (citing intermediate projections for the worker/retiree ratio). The pessimistic outlook projects the ratio to be 1.5 to 1. *See id.*

73. *See id.*

inflow from the FICA payroll tax.

In contrast to these projections, the Social Security Fund currently operates under a surplus (cash inflow from payroll taxes exceeds cash out-flow for current retirees).[74] This surplus is held in a trust fund.[75] In actuality, the Social Security surplus is borrowed by the Federal Government to pay for other governmental expenditures.[76] In exchange, Treasury Bonds, really representing IOUs from the Federal Government to itself, are issued to the Social Security trust fund.[77] At the end of 1990, the trust fund's surplus was estimated at $214 billion.[78] Unfortunately, the surplus is not sufficient to cover a single year's benefit obligations.[79]

B. Longer Life Expectancy

When Social Security was enacted, the average life expectancy was 61.4 years for men and 65.7 for women.[80] As such, a man was not expected to receive Social Security benefits because his anticipated life expectancy was below the retirement age.[81] The retired woman was expected to collect less than one year's worth of Social Security benefits.[82] Therefore, Social Security cash outlays were not contemplated to be significant due to the low life expectancy of both spouses.

Due to scientific advances in the medical field, however, the average life expectancy today has increased to 72.6 years for men and 79.3 for women.[83] At present, the average male retiree is expected to receive Social Security benefits over nearly eight years, while for the female retiree the expectancy is over fourteen years. When it is considered that most individuals now retire earlier, the projections are further extended to eleven and seventeen years for the average male and female retiree, respectively.[84]

74. *See* State of the Union, *supra* note 1. For example, total receipts for 1990 were $286 billion while only $227 billion were distributed as benefits, resulting in a surplus of $59 billion in 1990. *See* Forman, *Fairness, supra* note 6, at 920.

75. *See* Forman, *Fairness, supra* note 6, at 920.

76. *See id.*

77. *See* Goodman & Cordell, *supra* note 27.

78. *See* Forman, *Fairness, supra* note 6, at 920.

79. *See id.* (noting that benefit obligations paid for in 1990 amounted to $227 billion). With the population of retirees growing, it is unlikely that benefit obligations will decrease. *See* Goodman & Cordell, *supra* note 27.

80. *See* Goodman and Cordell, *supra* note 27.

81. *See id.*

82. *See id.*

83. *See id.*

84. *See* Forman, *Reforming, supra* note 16, at 292. Because of expansions in coverage in private pensions and the large economic gains in these plans, there is

As noted previously, this increase in life expectancy is primarily attributed to advancements in the field of medicine.[85] Scientists have been successful in identifying the causes of many diseases,[86] and in some cases what was once a life-threatening ailment no longer poses such a threat.[87] Advances in preventive medicine have also enabled individuals to take better care of themselves, rendering them less susceptible to diseases at an early age.[88] As a result, more individuals are living longer and collecting Social Security benefits over an extended period of time.[89]

C. *Lower Birth Rates*

Simultaneously with the increase in life expectancy, people are having fewer babies, as indicated by the decrease of the fertility rates for the U.S.[90] The fertility rate represents the number of children that women of childbearing age will have over their lifetime.[91] To maintain the current population size, the fertility rate must be 2.1.[92] Presently, the U.S. fertility rate is 1.9.[93] Although moderate projections for the future maintain the fertility rate at 1.9, other models predict a future fertility rate as low as 1.6.[94] As the number of younger people decreases and the number of older people increases, the funding necessary for retirees faces serious problems.[95]

IV. Proposals

Estimates predict that in order for a widow to maintain the same standard of living as when both spouses were alive, she will need to receive eighty percent of the couple's income while both spouses were alive.[96] Yet, under current Social Security guide-

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a trend towards early retirement in America. *See* BURKHAUSER & SMEEDING, *supra* note 7, at 3.

85. *See* Goodman & Cordell, *supra* note 27.

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.* Other recent models, however, have estimated the fertility rate to be as low as 1.8. *See id.*

94. *See id.* Applying the pessimistic fertility rate of 1.6, 100 years from now the population of the United States will only be slightly larger than it is today. *See id.* However, the composition of the population will be significantly different, with older individuals comprising the larger segment of the entire population. *See id.*

95. *See id.*

96. *See* BURKHAUSER & SMEEDING, *supra* note 7, at 12.

lines, widows receive a maximum of sixty-seven percent of pre-death benefits.[97] In light of these facts, an important element of any proposed reform needs to ensure that benefits to widows are at an adequate level to provide protection against falling into poverty.

A. *Privatization*

The privatization proposals call for dramatic alteration of the current Social Security system. Some go as far as replacing the entire system with personalized private pension accounts.[98] Even Congress has caught this privatization wave with the recent proposed legislation by Senator Rod Grams (R-MN) on October 6, 1998.[99]

According to the proposed privatization models, each individual would have a Personal Savings Account (PSA).[100] In lieu of the current Social Security payroll tax, each individual would contribute a predetermined percentage of his or her earnings to their PSA.[101] These PSAs would be held in trust by qualified investment firms or financial institutions approved by a separate Board created to oversee the operation of PSAs.[102] Individuals would have the ability to direct and determine the investment of their PSA.[103] Since the driving factor behind such proposals is to match an indi-

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97. *See id.*

98. *See generally* SHIRLEY & SPIEGLER, *supra* note 13; Goodman & Cordell, *supra* note 27.

99. *See* Personal Security and Wealth in Retirement Act of 1998, S. 2552, 105th Cong. (1998).

100. *See* SHIRLEY & SPIEGLER, *supra* note 13, at 7.

101. *See id.* The proposed Senate bill calls for a minimum contribution of 5% of covered wages earned by the employee. *See* S. 2552 § 251(a). Individuals can contribute above the five percentage threshold but cannot surpass 25% of their wages. *See id.* § 252(b)(2). Employers are required to contribute an additional 5% of employee's wages to the employee's PSA. *See id.* § 252(b)(3). Furthermore, if the employee's PSA balance equals the minimum retirement annuity amount, the employee may elect to stop contributions to his PSA. *See id.* § 252(b)(4). The minimum retirement annuity amount is defined as a balance sufficient for an individual to receive annuity payments equal to 150% of the poverty line over his/her life expectancy. *See id.* § 256(c)(2). In addition to the minimum 5% withholding, an additional 1.2% tax (reduced to 0.6% beginning in 2001) would be imposed to cover transitional costs. *See id.* § 4(a)(2).

102. *See* S. 2552 § 408B(b)(3). This legislation would create the Federal Personal Retirement Investment Board [hereinafter Board]. *See id.* § 9(a)(1). The duties of this Board include review and approval of investment firms and financial institutions to serve as trustees of PSAs. *See id.* § 9(a)(6)(A).

103. *See* SHIRLEY & SPIEGLER, *supra* note 13, at 7. Under the proposed Senate legislation, no restrictions are imposed as to the type of investment an individual may choose. *See* S. 2552 § 408(b). However, a minimum rate of return of 2.5% is mandated by the proposed Act. *See id.* § 9(a)(6)(B).

vidual's contributions with benefits, the only thing that would effect an individual's level of benefits is the individual's contribution.[104]

Individuals participating in PSAs would not be eligible for any OASI retirement benefits.[105] Those individuals without adequate contributions would have to seek assistance from welfare programs which may need to be financially supplemented to address the additional assistance requested by retirees.[106] Therefore, under this proposed scenario, we may simply be trading a large social security program for a larger welfare program.[107] Marital status has no impact on the benefits an individual receives.[108] In fact, the current proposed legislation does not address surviving spousal benefits.[109]

Other proposed privatization models have allowed the individual account holder to designate the beneficiary of their remaining account balance at the time of their death or allowed for joint accounts and survivor annuities.[110] However, there may be no residual balance remaining or the balance may be designated to another individual other than the spouse. In such a scenario, the surviving spouse is left with insufficient resources for living above the poverty level[111] and may need assistance from other sources such as welfare. In short, little protection is provided to surviving spouses under the privatization models. Rather, under the current proposed legislation, such auxiliary benefits are eliminated.

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104. *See* SHIRLEY & SPIEGLER, *supra* note 13, at 7.

105. *See* S. 2552 § 7(y).

106. *See* Forman, *Marriage Penalties, supra* note 59, at 556 (noting that even ardent supporters of privatization admit that the welfare system must be supplemented to cover benefits lost by replacing the current system).

107. *See id.*

108. *See id.*

109. *See generally* S. 2552.

110. *See* Forman, *Protecting, supra,* note 2, at 1673-82 (discussing spousal rights under various privatized retirement systems).

111. Assuming the surviving spouse has her own PSA, this will still not be sufficient to ensure her the same living standard as that before the death of the spouse. A surviving spouse needs 80% of total retirement earnings received before the death of the spouse to maintain the same living standard as when the spouse was alive. *See* BURKHAUSER & SMEEDING, *supra* note 7, at 12. Some privatization models have called for the surviving spouse to be automatically designated as the recipient of any balance left in the spouse's PSA. *See* Forman, *Protecting, supra* note 2, at 1672-75.

B. *Two-Tier System*

Social security benefits are currently computed based on the individual's earnings,[112] not on a means test.[113] Therefore, wealthy individuals and poor families are equally entitled to benefits.[114] Because of this, some criticize the current system for providing benefits to individuals who do not need them, thereby reducing needed funds for poor families.[115] In response to this criticism, a two-tier system has been proposed.[116]

Under the two-tier system, benefits are distributed based on both a means test and on an equity basis.[117] Benefits distributed in the first tier would provide the minimum monthly income necessary to live above the poverty level.[118] Benefits distributed in the second tier would be tied to the individual's income level and participation in the workforce.[119] Additionally, benefits under the second tier would be based on an earnings-sharing component.[120]

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112. *See supra* notes 50-62 and accompanying text (discussing Social Security benefit distribution).

113. *See* Munnell & Stiglin, *supra* note 10, at 105. Under a means test, benefits are provided based on the needs of the individual or family to ensure adequate benefits are provided. *See id.*

114. *See* Forman, *Fairness*, *supra* note 6, at 936 (stating that Social Security benefits are "paid largely without regard to the financial need of the beneficiaries"); *see also* Goodman & Cordell, *supra* note 27 (citing that nearly 800,000 millionaires are collecting Social Security benefits). The rationale for providing benefits to wealthy individuals as well as low-income families is fairness. *See id.* Both the wealthy and the low-income worker contributed to the Social Security Fund through payroll taxes and are therefore entitled to receive a return on their contribution. *See id.* In fact, it was this contribution requirement that set the Social Security program apart from other welfare programs established in 1935. *See id.*

115. *See* Munnell & Stiglin, *supra* note 10, at 105.

116. *See id.* at 107-20.

117. *See id.* at 107.

118. *See id.* at 110.

119. *See id.* This distribution of benefits is similar to the current system in place. *See id.* However, the percentage of AIME used to determine benefits under the second tier will be lower. *See id.* at 110. This is primarily because of the increased cost associated with tier one benefits. *See id.* at 109-10 (noting that if the two-tier system was in place in 1979, approximately $12 billion would have been expended, as opposed to the $5.4 billion expended by Social Security to ensure that an individual's benefits were above the poverty level). Therefore, until the full cost for benefits under the first tier can be determined, benefits under the second-tier are unknown. *See id.* at 110.

120. *See id.* at 108; *see also infra* notes 133-42 and accompanying text (discussing earnings sharing). By providing for an earnings sharing provision, the earnings for each spouse are combined and divided equally between the couple. *See* Munnell & Stiglin, *supra* note 10, at 108. Therefore, each spouse is entitled to benefits based on 50% of the couple's total earnings. *See id.* Earnings sharing is deemed equitable because it recognizes the contribution to the family by both

A joint-survivor annuity option is also included.[121]

Advocates of the two-tier system contend that the cost of benefits will not increase under this proposed system; instead, funds will be reallocated between groups of beneficiaries.[122] Opponents claim that a welfare stigma may be associated with benefits received under the first tier.[123] Supporters of the two-tier system, however, counter that this is an exaggerated concern.[124] Critics also assert that because tier one benefits are tied to a means test, benefits may be susceptible to political tinkering.[125] However, due to the large number of retirees receiving benefits under tier one, a reduction in tier-one benefits is politically less likely.[126]

Proponents of the two-tier system applaud the proposal because it would decrease the gap between benefits received by single-earner and dual-earner couples.[127] Because benefits are proportional, each couple will receive benefits directly related to their earnings history, minus the tier-one benefits.[128] The advantage currently afforded to single-earner couples is thereby removed.[129] Moreover, because benefits received under the first tier are above the poverty level, benefits to widows would be higher than benefits under the current system.[130] But benefits for the single-earner couple widow are reduced under this plan, while benefits to the dual-earner widow are, in some cases, increased.[131]

Although this proposal goes farther than most to equalize the treatment between dual and single-earner couples, it falls short in

spouse, even if one is the homemaker. *See id.* This is primarily based on the theory that both spouses participate in the decision that one spouse stays at home. *See id.* Therefore the couple should bear the cost of that decision and not just one of the spouses. *See id.*

121. *See id.* A spouse could elect to receive 12% reduced benefits to purchase the joint-survivor annuity option. *See id.*

122. *See id.* at 110.

123. *See id.* at 114 (noting that benefits under the first tier have similar characteristics as welfare benefits since they are specifically tied to the poverty line and unrelated to one's earnings).

124. *See id.* at 115 (noting that this stigma is overstated since a large population of retired individuals will be receiving benefits under the first tier).

125. *See id.* at 114-15.

126. *See id.* at 115.

127. *See id.* at 107.

128. *See id.* at 118.

129. *See id.*

130. *See id.* at 116.

131. *See id* at 117. Under the current system, a widow from the single-earner family is entitled to 100% of her spouse's PIA. *See id.* However, with the earnings sharing provision included in the two-tier plan, the same widow is entitled to only 50% of her husband's PIA. *See id.* The widow from a dual-earner couple, in contrast, would receive higher benefits if each spouse had earnings close to or above the earnings cap. *See id.*

its effort to assist widows. Instead of increasing benefits to dual-earner widows to the level of single-earner widows, benefits between dual and single-earner are equalized by a *reduction* in benefits to single-earner widows. Thus, under this plan, widows still face a high risk of falling into poverty due to inadequate Social Security benefits.

Furthermore, unless the couple selects the joint-survivor annuity, benefits to surviving spouses are eliminated.[132] Under the two-tier plan, the surviving spouse continues to receive the same level of benefits as before the death of her spouse. Although this will only provide her with fifty percent of the couple's benefits when both were alive, the impact of the reduction of total benefits provided is mitigated because of the minimal benefit guarantee under the first tier. Nonetheless, under this proposal, overall benefits for some groups of widows will be lower than those provided under the current system.

C. Change in the Structure of Benefit Distribution

1. Earnings Sharing

Touted as the best approach for eliminating marriage penalties,[133] earnings sharing is a concept that has been discussed for numerous years. Under this approach, the earnings of both spouses are aggregated.[134] The total income for the family is then divided in half and credited to each spouse.[135] The benefits of each spouse would be based on one-half of the marriage income plus any amounts credited to that spouse prior to the marriage.[136] By including the additional income earned by the secondary worker in a marriage, this plan virtually guarantees greater benefits.[137] Many commentators contend that under the present system, the income earned by secondary workers is simply ignored in determining benefits to the couple if it is not more than one-third of the other spouse's earnings.[138]

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132. *See id.* at 118.

133. *See* Forman, *Marriage Penalties, supra* note 59, at 557.

134. *See id.*

135. *See id.*

136. *See id.*

137. *See id.*

138. *See* Burke & McCouch, *supra* note 7, at 1219-24 (citing Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 987-88, 996-1005 (1993)). According to McCaffery, if a spouse earns less than one-third of her husband's income, her Social Security benefits will be based solely on the husband's income level. *See id.* Only when her

The earnings sharing plan removes the current disparity of benefits between single-earner and dual-earner couples with identical levels of income.[139] But at the same time, this plan also eliminates all surviving spousal benefits.[140] Because the benefits for each spouse are based on one-half of the marriage's aggregate income, the surviving spouse's benefits will not decrease at the death of the spouse.[141] In essence, a person's retirement benefit is constant throughout the person's retirement, adjusted only for cost of living.

This level of constant benefits comes at a cost, however. By combining and splitting the aggregate earnings for couples, many individuals are faced with a reduced basis used for calculating their Social Security benefits. Single-earner couples are impacted most significantly by this reduced basis.[142] This proposed reform, thereby, shifts inequalities from one group to another.

Additionally, because of the reduced base for determining Social Security benefits, the surviving spouse's level of benefits would be lower than that under the current plan. Like the two-tier plan, this proposal would address the disparity in widows' benefits by reducing the surviving spouses' benefits of single-earner couples rather than increasing the benefits to widows from dual-earner couples. As such, this proposal equalizes benefits by reducing the benefits of one widow when even that level of benefit (maximum sixty-seven percent of benefits before the death of her spouse) is not enough to prevent her from falling into poverty. From this perspective, such a proposal would only serve to increase the number of widows in poverty by not providing an adequate level of benefits.

2. Shifting of Benefits

Certain commentators have suggested that the only necessary modification to Social Security relates to its current distribution of benefits to couples.[143] Such modifications, however, do not

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earnings exceed one-third of her husband's income would she be eligible for Social Security benefits under her own income. *See id.*

139. *See id.* at 1232.

140. *See id.*

141. *See id.* at 1233 n.136.

142. Taking the single-earner family reflected in Table 1, the total income for the couple equals $100,000. Under the Earnings Sharing plan, each spouse's benefits would be based on $50,000. Keeping all assumptions the same, the single-earner's spouse is eligible for $25,000 in Social Security benefits. These benefits would not increase upon the death of one spouse, since surviving spouse benefits are eliminated under this plan.

143. *See* BURKHAUSER & SMEEDING, *supra* note 7, at 13-15.

necessarily propose a solution for correcting the current inequality of benefits to dual-earner income families versus single-earner families.

a. Burkhauser and Smeeding Proposal

One proposal represents itself as a revenue-neutral solution.[144] It calls for a shifting of benefits by reducing the benefits to families while both spouses are alive and redistributing this same income to the survivor.[145] This redistribution of income increases benefits to widows and decreases the risk of falling into poverty.[146] Furthermore, it is contended that the reduced income level when both spouses are alive will not negatively impact the couple.[147] Table 3 demonstrates the extent of redistribution of income proposed by Burkhauser and Smeeding:[148]

Table 3. Comparison of Present Survivor Benefits to Burkhauser and Smeeding Proposed Survivor Benefits as a Percentage of Couple's Total Benefits

Couple	Present Survivor's Benefits/ Couple's Benefits	Proposed Survivor's Benefits/ Couple's Benefits
Single-Earner Couple-Survivor	67%	75%
Dual-Earner Couple Survivor	50%	75%

As the above table shows, Burkhauser and Smeeding's proposal would provide dual-earner survivors and single-earner survivors an equal ratio of survivor's benefits to overall couple's benefits. However, although the percentages are the same, the actual dollar amount of benefits may not be because of the initial disparity in distribution of income between dual and single-earner families. Burkhauser and Smeeding's proposal attempts to reduce the disparity by calculating the benefits to survivors based on total

144. *See id.* at 13.
145. *See id.*
146. *See id.*
147. *See id.* As noted earlier, while both spouses are alive, the couple faces a relatively low risk of falling into poverty. *See id.* at 2.
148. BURKHAUSER & SMEEDING, *supra* note 7, at 13.

benefits received by the couple while both spouses were alive.[149]

Burkhauser and Smeeding do not anticipate that this redistribution of income will require substantial additional outlays.[150] Nevertheless, what minimal additional amounts are needed can be achieved by establishing a short delay in retirement by men, as recommended by Burkhauser and Smeeding.[151] Overall, this proposal would not significantly alter the total amount of benefits provided to a couple; it merely shifts benefits so that the surviving spouse receives higher benefits at a time when it is most needed.[152]

b. Social Security Advisory Council's Proposal

The Social Security Advisory Council recently proposed a similar redistribution plan.[153] Under the Social Security Advisory Council's proposal, surviving spouse benefits would gradually increase to a cap representing the higher of the decedent's benefits currently available under the laws or seventy-five percent of the combined benefits received by the couple before the death of the spouse.[154] This increase in surviving spousal benefits would be offset by a reduction in spousal benefits from fifty percent to thirty-three percent while both spouses are alive.[155]

The Social Security Advisory Council plan, similar to the Burkhauser and Smeeding proposal, does not address the current disparity in the distribution of benefits to dual and single-earner couples. However, while both proposals take the necessary step to increase benefits to widows, the actual dollar benefits are still negatively impacted by the current disparity of benefits to dual-earner widows.

149. *See id.*

150. *See id.* at 14 (comparing their proposal to the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984), which mandated employers to pay pensions to workers in a form of joint and last survivor annuity instead of a single-life annuity). The rationale for the Retirement Equity Act of 1984 was to "encourage workers to shift benefits toward survivors in a revenue-neutral way." *Id.* The redistribution of Social Security benefits in a similar manner is also believed to be a revenue-neutral way of increasing Social Security benefits to survivors. *See id.*

151. *See id.* at 13.

152. *See id.* at 14.

153. *See* Forman, *Marriage Penalties, supra* note 59, at 557.

154. *See id.* at 560 n.6.

155. *See id.*

D. Change in Tax Structure

1. Expansion of Tax Base for Social Security

In 1988, Americans reported total personal income of $4056 billion on their tax returns.[156] Only $2561 billion of that amount, however, was subjected to Social Security tax.[157] This amount represents only sixty-three percent of total income reported for 1988 that was subjected to Social Security tax,[158] since only covered wages are subjected to Social Security taxes.[159] These wages only include earnings from employment and exclude other forms of income such as dividends, interest, rental income, gains from sale of property and pension annuities.[160]

In 1988, Americans reported the following unearned income amounts not subject to payroll taxes: $77 billion as dividend income, $187 billion as interest income, $154 million in gains from sale of property and $150 billion in pension annuities.[161] Such income items have historically been excluded from Social Security taxes to encourage private capital investment which in turn spurs economic growth. The justification for providing such favorable tax treatment to these income items is not as strong today as it was when Social Security was enacted in 1935. In light of the dire predictions for Social Security, one argument would be to include capital investment income in the tax base subjected to the Social Security payroll tax. However, the inclusion of investment income would alter the current connection between Social Security benefits and earnings.

An increase in the Social Security tax base only addresses the projected Social Security deficit by increasing contribution levels to the Social Security fund.[162] This proposal does not impact the disparity in benefits to widows of dual and single-earner couples.

156. *See* Forman, *Fairness*, *supra* note 6, at 930.
157. *See id.*
158. *See id.*
159. *See id.* at 928.
160. *See id.* at 930.
161. *See id.* at 930-31.
162. The Social Security income cap is projected to still be in effect so it is possible that not all of an individual's income will be subject to the Social Security payroll tax. *See supra* notes 43-45 and accompanying text (discussing earnings cap imposed on payroll taxes). Nonetheless, by including these various capital income items, contributions are projected to increase. *See* Goodman & Cordell, *supra* note 27. Goodman and Cordell, however, contend that this increase in tax revenue will come at a cost. *See id.* (projecting that this tax will shrink the infusion of capital into the market causing a reduction in wages, which will lead to a reduction in payroll tax contributions).

One possible impact of such a proposal could be that by increasing the Social Security fund and improving the financial viability of Social Security, a more favorable environment is created to address the inequalities in widow benefits.

2. Modification of Earnings Cap for Social Security Tax

As noted earlier, Social Security tax is imposed only on an earned income cap of $68,400 for 1998.[163] The earning cap for 1999 is $72,600.[164] Earnings above the cap are not subjected to the Social Security tax, nor are employers required to pay FICA taxes for employee earnings above this cap.[165] In light of the recent prognosis concerning the viability of the Social Security system, the use of this cap should be re-examined. If the earnings cap is raised or eliminated, more contributions would be made to the Social Security Fund. However, higher level of benefits would also be paid out since benefits would be determined using the higher level of income. It is unclear if the cash inflow from the added contribution would exceed the outflow of increased benefit payments.

Fairness demands that if a greater percentage of an individual's income is subjected to the payroll tax, then his or her respective levels of benefits should also be determined using the expanded income base. These proposals will only be reasonable if the individual's benefits would be determined based on the level of income taxed. This reasoning is in accord with one of Social Security's original objectives—providing some form of return on an individual's contribution in the form of benefits to the individual.[166] As an alternative, if the cap is to remain intact, benefits should continue to be calculated based on the income cap.[167] This would ensure a closer match of benefit and contribution to Social Security.

As with the proposals to expand the taxable base for the Social Security tax, these proposals have no impact on the disparity of benefits between dual-earner income and single-earner families. This is primarily because benefits are determined based on the status of the couple as single-earner and dual-earner, and corresponding spousal income, and not the aggregate income of the cou-

163. *See* Forman, *Protecting*, *supra* note 2, at 1655.

164. *See* TREANOR ET AL., *supra* note 41, at 7.

165. *See* Forman, *Fairness*, *supra* note 6, at 918.

166. *See* Goodman & Cordell, *supra* note 27.

167. To illustrate this, if an individual earned $100,000, her Social Security benefit would only be based on $68,400 of her income since that is the level at which she contributed to Social Security.

ple or their contributions made to the Social Security Fund. However, as noted above, with increased funding to the Social Security Fund, steps may then be taken to address this inequality in benefits to widows.

The problem with most of the proposals discussed above is that they are vague and incomplete as to their treatment of surviving spousal benefits. Furthermore, it is unclear if the present disparity between widows of dual and single-earner families would be reduced or even eliminated by some of the proposals.

V. Author's Proposal

All proposals for Social Security reform must confront the hard reality that benefits to one group of individuals will be lower than their current basis. It would be nearly impossible to provide a solution that would provide equitable benefits to all, provide a high rate of return on contributions *and* maintain a rational relationship between payroll taxes and benefits without significantly increasing the funding through increased payroll taxes. In light of these limitations, the best reform may be one that keeps the current structure substantially intact and only mildly modifies it. In this spirit, the following represents this Article's proposal.

The reader should be aware that the benefit structure proposed in this Article is in lieu of the spousal and survivor benefits currently in place. Furthermore, benefits calculated based on the proposed changes are based on both spouses being of the same age and retiring at age sixty-five. The author acknowledges that this situation may not be representative of all retired or soon to be retired individuals. This Article does not attempt to address all scenarios involving retired couples. Rather, this Article merely proposes a new benefit scheme that addresses the current disparity in benefits to widows from dual-earner couples. The proposed scheme may require further modifications to address situations which deviate from the example used.

A. Executive Summary

First, one purpose of Social Security was to provide social insurance to retired individuals. Seen in this light, Social Security must, at a minimum, provide enough benefits to retired individuals to live above the poverty level. Second, in order to provide some return on contributions made to the Social Security fund, *all* taxed earnings (up to the income cap) should be included in the calculation of benefits for the couple. Therefore, in dual-earner families, the wages of the spouse, regardless of the amount, should be included in the determination of the couple's benefits. Finally, benefits should be distributed based on the life expectancy of the spouse expected to live the longest. In most cases, that is the woman.

B. Increase of Income Base

Under this proposal, benefits to the couple are increased because of the consideration of wages for both spouses. By increasing the income base used for determining benefits, recognition is provided to all individual contributions. Under the current system, a spouse's Social Security contributions may be, at times, ignored in determining the benefits for that spouse.[168] The increased income base will have no impact on single-earner couples while favorably affecting benefits to dual-earner couples. Under this plan, benefits are more rationally related to the couple's overall contribution than the current system. Table 4 demonstrates the impact on benefits under this proposed plan:[169]

Table 4. Comparison of Monthly Benefits Under the Present System to Monthly Benefits Under the Proposed Plan

Earnings		Monthly Benefits	
Person	Income	Current System	Proposed Plan
Husband	$50,000	$379	
Wife	50,000	330	
Couple	$100,000	$709	$758

The increased benefits to dual-earner couples while both

168. *See supra* notes 58-60 and accompanying text (discussing the dual-entitlement rule); *see also* Burke & McCouch, *supra* note 7 (citing Becker's comments that a wife needs to make more than one-third of her husband's salary in order to earn any benefits from her contributions to the Social Security Fund).

169. For ease of comparison, amounts are calculated based on annuity tables using five percent interest rates compounded monthly. *See* JACK C. ESTES & DENNIS R. KELLEY, MCGRAW-HILL'S COMPOUND INTEREST AND ANNUITY TABLES 16 (1993). For simplicity, it is assumed that the husband is 65 with a life expectancy of 16 more years. *See Women and Retirement Security*, *supra* note 2, at 8. The wife is assumed to be 65 as well with a life expectancy of 20 years. *See id.*

spouses are alive may, however, be adversely affected when considered with the second provision of this proposal.

C. *Change in Life Expectancy Calculation*

Currently, an individual's actuarial life expectancy is factored into the level of benefits each individual receives. However, under this proposed plan, benefits for the couple are grouped together and distributed based on the life expectancy of the longest-living spouse. Under this methodology, since women on average live longer than men, the wife's life expectancy is used. The grouping of the couple's benefits together is based on the concept of the family being one unit.[170] The current dividing of benefits between the spouses ignores the fact that couples jointly consume and share benefits. By combining the benefits of the couple, this proposal acknowledges the practice of sharing of benefits between spouses. Table 5 demonstrates the impact of considering benefits only over the life expectancy of the wife:[171]

Table 5. Comparison of Monthly Benefits Under the Present System to Benefits Under the Proposed Plan Based on Wife's Life Expectancy

Earnings		Monthly Benefits		
Person	Income	Current System	Proposed Plan	Proposed Plan w/ Wife's Life Expectancy
Husband	$50,000	$379		
Wife	50,000	330		
Couple		$709	$758	$660
Widows		$520	$758	$660

170. The recognition of married couples as one single economic unit is not something new. Currently, under Internal Revenue Code section 1041, property transfers between spouses are deemed a tax-neutral transaction resulting in no gain/loss recognition. *See* I.R.C. § 1041 (1998). In the house report on section 1041 Congress deemed it "inappropriate to tax transfers between spouses . . . [because of] the fact that a husband and wife are a single economic unit." H.R. REP. NO. 98-432 pt. 2, at 1491 (1984). Other tax code provisions further such views. *See generally* I.R.C. § 1014 (1998) which makes gifts between spouses a non-taxable event.

171. It is assumed that the wife is 65 years old with a life expectancy of 20 years. *See* WOMEN AND RETIREMENT SECURITY, *supra* note 4, at 8. Amounts are calculated using annuity tables with five percent interest rates compounded monthly for 20 years. *See* ESTES & KELLEY, *supra* note 169, at 16.

Distributing benefits over the longer life expectancy results in the same level of benefits to widows as when both spouses were alive. However, benefits will be lower than under the current system when both spouses are alive. But at this stage of their lives, the couple does not face a significant risk of falling into poverty.[172] At the death of a spouse, when the surviving spouse faces a significant risk of falling into poverty,[173] benefits will not decrease.

Critics of this proposal may argue that maintaining a constant level of benefits over a longer life expectancy increases the financial burden on Social Security. Since no additional funding is provided under this proposal, by providing a higher level of surviving spouse benefits, opponents will contend that the total cash outflow is higher than under the current system. As Table 6 demonstrates, on average, the total cash outflow resulting from this plan is actually lower than under the current system:

Table 6. Comparison of Total Cash Out-Flow Under Current System and Proposed Plan

Benefit Pay-Outs		
	Current System	Proposed Plan
Total Monthly Benefits	$709	$660
Total Annual Benefits	$8,508	$7,920
Total Life Expectancy Benefits	$161,088[174]	$158,400[175]

172. *See* WOMEN AND RETIREMENT SECURITY, *supra* note 4, at 12 (noting that the poverty rate for elderly married couples was 4.6% in 1997).

173. *See* WOMEN AND RETIREMENT SECURITY, *supra* note 4, at 12 (noting that the poverty rate for widows was 18% in 1997).

174. Amount is calculated as follows:

Husband's total Social Security benefit over his life expectancy: $379 x 12 months x 16 years = $72,768.

Wife's total Social Security benefit over her life expectancy:
While husband is alive: $330 x 12 months x 16 years = $63,360.
Sixteen years is used as that is the life expectancy of the husband. While the husband is alive, the wife, under the current system, only receives $330.
During widowhood: At the death of the husband, the wife is also entitled to receive half of the husband's Social Security benefit of $190 per month. Therefore for the remaining four years of the wife's life, her total Social Security benefit is $520 monthly, $6,240 annually and $24,960 over the four years.

Total life expectancy benefit of $161,088 is calculated as the total of $72,768 + $63,360 + $24,960.

175. This amount is calculated by multiplying the annual Social Security benefit amount of $7,920 by 20 years, the life expectancy of the wife.

A second criticism of this proposed plan may be that by providing constant benefits to the surviving spouse, those individuals are receiving more than is necessary. In other words, since widows only need eighty percent of the total benefits received while both spouses are alive, exceeding that level is actually providing excess benefits not needed. Under the current conditions, widows face nearly a four times greater risk of falling into poverty than married elderly couples. Additionally, because assets are often used to address the medical concern of the dying spouse or may be bequeathed to others at the death of the spouse, widows do not have access to many assets to address any emergencies that may occur during their lifetime. Widows, in fact, rely more on Social Security benefits as their main source of income than any other members of the elderly population. With all these financial obstacles faced by the widow, the additional amount provided under the proposed plan merely ensures that adequate funds are available to the widow to address ailment or other needs in the future. This proposed plan does not, as some critics may contend, make the widow richer than she is already.

VI. Conclusion

More and more elderly widows are entering poverty, or facing the risk of poverty each day. The Social Security regulations, however, have provided no added protection to alleviate some of these women's concerns. In fact, under the current Social Security system, these women's own work efforts are often not even considered in determining their benefit levels. By continuing to favor single family earners and the "traditional" family earning structure, Social Security has failed in it's efforts to provide adequate benefits as well as to provide a return on a retiree's contribution to the Social Security Fund to these women.

In light of the plight faced by elderly widows, Social Security reforms should be examined with the perspective of how the proposals will impact elderly widows. While some proposals do increase the connection between benefits and contributions, several strip the widow of the surviving benefits currently in place. Such proposals would continue the problem and even increase the risk of poverty to elderly widows. Under these proposals, we may be faced with a larger welfare program in place of a reduced Social Security system. Such a prospect calls into question the benefits touted by such proposals.

Many reform proposals contain significant overhauls to the current Social Security structure, while others call for the complete elimination of it. This Article maintains that the current system only needs to be modified slightly to address the concerns faced by elderly widows. By taking steps to ensure minimum benefit levels above the poverty line, Social Security will be taking a step closer to providing social insurance to all retired individuals. Further, by providing benefits based on full contributions to the Social Security Fund, benefits will be more rationally tied to contributions. Determining benefits using the longer life expectancy of the spouse of the couple further ensures that benefits are reallocated appropriately. Under the proposed reform, benefits remain the same after the death of a spouse, and ensure that the widow will not face lower benefits in a time when she needs those benefits the most.