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Maureen B. Cavanaugh

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Social Security is arguably the most successful social program ever adopted in the United States. Providing income protection for workers and their families in retirement, disability, and death, Social Security has significantly reduced financial insecurity, especially the elderly's poverty rate.[1] Nonetheless, the Social Security program itself now faces financial insecurity, largely because of various demographic factors. The Frances Lewis Law Center and Washington and Lee University, in a long tradition of promoting an opportunity for positive dialogue about a subject of national importance, devoted its Spring 2001 symposium to the question of Social Security reform, its necessity, and how it might best be effected. *Social Security: Can the Promise Be Kept?* considers the demographic factors prompting our concern with Social Security's long-term viability and, equally importantly, the implications of any reform for twenty-first-century America's economic and legal structure. The symposium offered ten leading individuals, including economists, government policymakers, practitioners, and members of the legal academy, the opportunity to inform the debate concerning Social Security reform with a wider perspective. By examining in context the program that is available to all working Americans, cognizant of other existing programs, especially employer-provided, tax-qualified plans, the manifold implications of Social Security reform can be better addressed. The complexity of any Social Security reform should not serve as an impediment to necessary reform. Rather, any reform adopted should be better able to meet Social Security's needs because it would recognize related systems and other national priorities.

The baby boom generation's relationship to the economy, as C. Eugene Steuerle reminded us, has been likened to a pig that was swallowed by a python and has been moving inexorably through the system.[2] The baby boom generation has moved through the economy and is now close to retirement, thus explaining some level of our attention to the baby boom generation's retirement

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* Assistant Professor and Alumni Faculty Fellow, Washington and Lee University School of Law. B.A., Swarthmore College; M.A., Ph.D., Cornell University; J.D., University of Minnesota.

1. *See* Craig Copeland, *Social Security Reform Issues*, 58 WASH. & LEE L. REV. 1203, 1203 (2001) (noting decrease in poverty rate for elderly "from 35.2% in 1959 to 10.2% in 2000").

2. C. Eugene Steuerle, *Social Security: The Broader Issues*, 58 WASH. & LEE L. REV. 1235, 1239 (2001).

security. The desirability of increasing our national savings rate, always an issue of great concern for economists and policymakers, also explains some of our concerns as well as some of the proposed solutions.[3] In addressing the immediate problem faced by the Social Security program nationally, we also have engaged in a re-examination, often without realizing it, of the principal tenets and competing goals of social insurance – social adequacy and individual equity. Somewhat surprisingly, individual accounts, which are comprised of the diversion of some portion of current workers' Social Security taxes to private accounts, have become the *sine qua non* of its proponents or the *cum qua non* of its opponents in the reform debate.[4] This resulting narrow focus, while appearing to address both savings rates and individual equity concerns, turns out not to be entirely helpful. Whatever reform we adopt must answer not only the demographic challenges and capital formation needs of our society; it must do it in a world where the current system of employer-provided, tax-qualified pensions is shaped by and predicated on the current Social Security system.[5] The impact of reform for the existing employer-based system, in which only half of all employers currently participate,[6] needs consideration. If participating employers are now responding to economic trends by shifting to employees the increased risk and responsibility for providing their own adequate retirement and health care, we must examine our fundamental commitment to the element of social insurance inherent in the current Social Security program lest we institute changes that could constitute a rejection of one of the program's basic goals – social adequacy.[7]

The demographic forces that compel our attention to some manner of Social Security reform include the declining number of current workers paying employment taxes that fund payments to an increasing number of retired beneficiaries who also are living longer. If the ratio of workers to retirees declines from 3:1 to 2:1, the necessary consequence of a "paygo"[8] system must be

3. *See* Edward M. Gramlich, *The Goals of Social Security Reform*, 58 WASH. & LEE L. REV. 1229, 1230 (2001) (discussing goal of raising national saving).

4. *See* Steuerle, *supra* note 2, at1235 (disagreeing with emphasis on individual accounts in Social Security reform debate).

5. *See* Kathryn L. Moore, *The Effects of Partial Privatization of Social Security upon Private Pensions*, 58 WASH. & LEE L. REV. 1225, 1268-75 (2001) (noting possible effects of partial privatization on benefits promised by current Social Security system).

6. Moreover, a disproportionate number of employers who participate in the existing employer-based system are larger employers. EBRI, EBRI DATABOOK ON EMPLOYEE BENEFITS 83 (1997).

7. *See* Regina T. Jefferson, *Privatization: Not the Answer for Social Security Reform*, 58 WASH. & LEE L. REV. 1287, 1314 (2001) (noting that "social adequacy" was one of original two primary objectives of Social Security).

8. Because current employment taxes are the source of funding for current benefits, the system is not pre-funded, but is described as a "pay-as-you-go" system. For discussions of funding as a problem distinct from individual accounts, see the articles included in this symposium *infra*.

either an increase in tax rates, or a decrease in benefits received, or both. Craig Copeland provides a comprehensive overview, based on the latest Employee Benefits Research Institute (EBRI) research, of all the demographic trends and actuarial issues prompting the need for reform.[9] Ultimately, he cautions us that any effort to reform Social Security based on deterministic actuarial models may well not solve the issues presented by a stochastic economy.[10]

Increasing the revenue available to pay for retirement benefits raises several issues, including the productivity of future generations and the number of workers participating in that future productive economy. The need for new savings, so that capital will be available for future generations to be as productive as possible, is a necessary part of any solution. Governor Edward Gramlich, former Chair of the Quadrennial Advisory Council on Social Security, suggests that "add-on" individual accounts might better address this need than accounts that merely "carve-out" a portion from the existing Social Security contributions.[11] The demographic factor of retirees generally living longer should be regarded as a very positive development, although it accounts for at least some of our concern for Social Security solvency. The problem of Americans spending a relatively greater number of years in retirement than as part of the workforce could be addressed simply by indexing the retirement age, thereby allowing each cohort of workers to expect a constant, rather than an increasing, share of work relative to retirement. Governor Gramlich ultimately and forcefully reminds us that in evaluating any proposal for reform, we must consider the social protections we enjoy and expect – so that we retain the features of Social Security's social insurance program that we do not want to abandon.[12]

Recognizing the importance we rightfully accord to a successful retirement program, C. Eugene Steuerle further explains that Social Security's current structure, with its built-in growth, necessarily implicates every other program to which we currently devote, or need to devote, federal budgetary resources.[13] The significance of Social Security for our other national priorities is a current, not future, concern. In short, the real Social Security question is how we as a nation can meet the needs of all our citizens. The provision of retirement and health benefits understandably affects individual and thus collective labor force participation rates. Labor force participation rates in turn determine not only the number of contributors to and beneficiaries of the retirement system itself, but also the number of contributors to and beneficiaries of government revenues. If we fail to address the system's rigidities,

9. Copeland, *supra* note 1, at 1213-14.

10. *See* Copeland, *supra* note 1, at 1218-19 (discussing problems associated with basing Social Security reform program on deterministic actuarial models).

11. Gramlich, *supra* note 3, at 1231-32.

12. *See* Gramlich, *supra* note 3, at 1231-32 (noting concerns associated with Social Security reform).

13. Steuerle, *supra* note 2, at 1236.

designed in response to problems of an earlier era, we will fail to address the inadequacy of Social Security in meeting the basic needs of today's elderly. Thus, Steuerle cautions that our response to the issue of Social Security reform implicates all our other priorities and how effectively we address the very goal of Social Security itself – providing benefits to the neediest of the elderly.[14]

Once the factors prompting our concern with Social Security's solvency are disentangled to reveal the variety of issues we confront, we can then begin to assess the more specific question posed by current reform proposals, namely the consequences of introducing some form of individual accounts within the current retirement system. Because Social Security is only one leg of the three-legged stool that comprises our national retirement income system, complementing personal savings and the employer-provided system that is predicated on the tax benefits accorded it, we must address the consequences of reform for both the employer system and individual savings. Kathryn Moore focuses on the significance of implementing a system of private, individual accounts within our current retirement income system.[15] Private employer-provided, tax-qualified pension plans are expressly coordinated with Social Security through the integration rules – rules that allow employers to link their private pension plans expressly with Social Security by including their Social Security contributions for lower-wage earning employees in their calculation of employer-provided benefits.[16] Once we realize how integrated private employer plans are with Social Security, we must then address the related issues of how the introduction of private accounts may alter the relative employee demand for and employer provision of defined benefit[17] plans in contrast to defined contribution[18] plans, as well as to employee investment decisions.

Recognizing that Social Security reform necessarily implicates employer-provided plans should also cause us to consider current trends in employer-

14. *See* Steuerle, *supra* note 2, at 1244 (expressing belief that "the Social Security debate is defined far too narrowly").

15. Moore, *supra* note 5, at 1268-86.

16. *See* Moore, *supra* note 5, at 1261-67 (discussing integration rules generally).

17. Defined benefit plans are plans that provide in retirement a percentage of an individual's pre-retirement salary by calculating an individual's benefits using a formula, such as a percentage of salary and length of service with that employer. ERISA §3(35); *see* JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 45-47 (3d ed. 2000) (discussing defined benefit plans generally). The risk of investing and accumulating assets sufficient to pay that benefit is borne by the employer. Generally, defined benefit plans are paid out as an annuity for the lives of the individual and surviving spouse.

18. Defined contribution plans are defined as plans providing an individual account for each participant, wherein benefits are a function of amounts contributed whether by the employee, employer or both. The amount ultimately available to the individual upon retirement is a function of the amount contributed annually throughout the individual's career and the investment history of the account. Thus, the risk for adequate resources rests with the individual. ERISA §3(34); *see* LANGBEIN & WOLK, *supra* note 17, at 47-55 (discussing varieties of defined contribution plans).

provided plans. Increasingly, employers are shifting greater risk to individuals through the use of defined contribution plans – essentially individual accounts.[19] Similarly, individuals are being asked to assume greater responsibility for the costs of medical insurance, whether as employees or retirees, by paying for a greater portion of health insurance premiums and other costs.[20] The three-legged retirement income stool, with its diverse support system, is collapsing in a way that will increasingly require individuals to ensure their own adequate retirement and health care savings. Regina Jefferson cautions that a transformation of the Social Security program, paralleling the employer-provided plan movement away from a life-time annuity provided by defined benefits plans to the individual saving's account model provided by defined contribution plans, could leave individuals unprotected by the social safety net the Social Security program was intended to provide.[21]

Individual accounts should, therefore, be analyzed not simply as a solution addressing the concerns of individual equity and national savings, but also as a solution that presents significant risk for individuals. The degree of risk acceptable, individually and collectively, is one for the political sphere. Whether or not it is addressed at the outset, the administrative decisions that decide the form of individual accounts will prove decisive. Karen Burke and Grayson McCouch identify the key administrative issues that raise concerns regarding acceptable levels of cost, risk, and control.[22] Standardized low cost accounts will constrain individual choice but limit risk; higher cost accounts that increase both individual control and risk may necessitate significantly higher government regulation. The Thrift Savings Plan available to federal employees is an example of a standardized low cost model. Other useful models can be found internationally, whether in Latin America or among the OECD countries.[23] Ultimately, the choice between constrained risk with limited choice and greater freedom of choice with greater risk is an important decision that we should evaluate at the outset, not leave for resolution at some future date.

Ian Lanoff identifies the central concern for reform based on individual accounts as the need to limit the risk to individuals from their own investment

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19. *See* Jefferson, *supra* note 7, at 1302, 1306 (noting that individual accounts proposals – "privatization" – shifts risks to employees).

20. *See, e.g.*, Regina T. Jefferson, *Medical Savings Accounts: Windfalls for the Healthy, Wealthy & Wise*, 48 CATH. U. L. REV. 685, 690-91 (1999) (describing increased deductibles as component of MSAs).

21. Jefferson, *supra* note 7, at 1314-16.

22. *See* Karen C. Burke & Grayson M.P. McCouch, *Privatizing Social Security: Administration and Implementation*, 58 WASH. & LEE L. REV. 1325, 1328 (2001) (discussing relationship between proposed system of personal accounts and "decisions concerning acceptable levels of cost, risk, and control").

23. *See* Estelle James, *Reforming Social Security in the U.S.: An International Perspective*, BUS. ECON., Jan. 2001, at 31, 35-41 (outlining components of multi-pillar model and comparing different versions of model, including Latin American and OECD versions).

decisions while increasing investment opportunity, a very real problem created by increased individual investment control.[24] He finds in ERISA's fiduciary requirements a "best practices" model that could be transferred to an individual account system under Social Security.[25] Reducing risk to individuals is motivated by more than mere paternalism or concern with the plight of unfortunate individuals. Ultimately we all share in increased risk, Lanoff reminds us, to the extent that the federal government must make whole individuals whose investment decisions have resulted in poor returns and who thus have inadequate retirement resources.

Norman Stein also looks to the private pension system to consider its problems and what those problems might suggest for how we approach Social Security reform.[26] According to Stein, the employer-based pension system is plagued by problems of leverage, linkage, and leakage.[27] By leverage, Stein identifies the understanding that a qualified plan's tax benefits for business owners and managers are to be leveraged into increased benefits for lower and moderate income employees; by linkage, he addresses the desirability of linking employee plan participation with employee expectations; and by leakage, he raises the goal of preserving retirement funds for retirement.[28] Given the very nature of the voluntary employer-provided system, it is not surprising that leverage and linkage are imperfect: Only half of the workforce is covered, and among those covered, high wage earners represent a significant number. Participant expectations often diverge from actual benefits. Leakage contributes to inadequate retirement benefits by allowing employees to use retirement benefits for current consumption. Ensuring adequate retirement income for most Americans, and certainly for lower income individuals, requires that any reform of Social Security address flaws in the current employer-provided system and individual decision-making.

Ultimately, the symposium contributors offer no easy solutions to either the concerns regarding Social Security's solvency or the issues raised when we consider generally the competing goals of social adequacy and individual equity inherent in any social insurance program. These symposium papers may encourage us, however, to confront the issues more thoughtfully and thus to produce a solution that better addresses the very many concerns raised by Social Security reform.

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24. *See* Ian D. Lanoff & Roberta J. Ufford, *ERISA Protections Provide Guidance for Social Security Privatization*, 58 WASH. & LEE L. REV. 1353, 1353-54 (2001) (arguing that individual accounts system would create increased risk for participants).

25. *Id.* at 1361-68.

26. *See generally* Norman P. Stein & Patricia E. Dilley, *Leverage, Linkage, and Leakage: Problems with the Private Pension System and How They Should Inform the Social Security Reform Debate*, 58 WASH. & LEE L. REV. 1369 (2001) (discussing current employment-based pension system in context of social security privatization debate).

27. *Id.* at 1370-1427.

28. *Id.* at 1371-72.