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The Pension Game: Age- and Gender-Based Inequities in the Retirement System

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ARTICLES

THE PENSION GAME: AGE- AND GENDER-BASED INEQUITIES IN THE RETIREMENT SYSTEM

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I. INTRODUCTION

In the past decade, criticism of the retirement system in this country has been pervasive, with comments leveled primarily against the system's overall complexity, unfairness and inadequacy.[1] Problems with the retirement system in general reflect underlying social and economic changes and Congress's failure to respond. Indeed, the private retirement system[2] developed in response to various social and economic changes which occurred primarily around the turn of the century,[3] after the Depression and

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[1] *See, e.g., A Prospectus of Working Women's Concerns: Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 100th Cong., 1st Sess. 47-49 (1987) (statement of Sarah McClendon, McClendon News Service), 55-58 (statement of Mary Rose Oakar), 183-93 (statement of Irene Lee, National Institute for Women of Color), 248-54 (statement of Anne Moss, Women's Pension Project, Pension Rights Center); *see also* Graetz, *The Troubled Marriage of Retirement Security and Tax Policies*, 135 U. PA. L. REV. 851 (1987); Moss, *Women's Pension Reform: Congress Inches Toward Equity*, 19 U. MICH. J.L. REF. 165 (1986); Munnell, *ERISA - The First Decade: Was The Legislation Consistent With Other National Goals?*, 19 U. MICH. J.L. REF. 51 (1986).

[2] For purposes of this discussion, the term "private retirement system" is used to denote the voluntary system of employer-provided benefits. This is in contrast to the "public retirement system," a term which generally refers to any government retirement system (including state and local systems), but which is used throughout this Article as a term to refer to the Social Security system.

[3] These social changes were generally brought about by the industrial revolution. They included rapid growth in union membership, longer life spans and the desire of some large corporations to rid themselves of older, less productive workers in the least contentious

after the Second World War.[4] Further economic changes in the 1960s and early 1970s resulted in the exposure of deficiencies in the private pension laws.[5] Strong public reaction to these deficiencies provided the catalyst precipitating the enactment of the Employee Retirement Income Security Act of 1974 (ERISA).[6]

ERISA, designed to reinforce the rights of workers to a promised retirement benefit, represents the stongest and most comprehensive private pension legislation in the history of the United States. After its enactment, however, further social changes—in particular, more women in the workforce—underscored the fact that both the public and private retirement systems had been designed around an antiquated model of women as homemakers and men as breadwinners. It further assumed, and to a large extent continues to assume, that the utopian system of the husband providing adequately for his wife after his death comports with reality. This is, in fact, not the case, notwithstanding that husbands often believe that when they die their wives will be secure financially.[7] The present retirement system not only fails to meet the needs of many women but also blatantly discriminates against them in many respects.[8]

Some of the problems associated with gender-based discrimination under the private retirement system were addressed by the

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manner. *See* L. OZANNE, TAX POLICY FOR PENSIONS AND OTHER RETIREMENT SAVING 17 (1987); Tibbits, *Introduction* to J. SCHULZ, THE ECONOMICS OF AGING at xvii (1988).

[4] Public feelings of financial insecurity in the aftermath of the Depression brought about the Social Security system. These feelings, combined with union pressure in a stronger postwar job market, contributed to the rapid growth of employer plans. *See* J. SCHULZ, *supra* note 3, at 218; *see also* Watson, *Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses Under ERISA*, 76 IOWA L. REV. (forthcoming 1991).

[5] The problem of several large employers declaring bankruptcy and depriving workers of their promised retirement benefits during the 1960s and 1970s was compounded by the increase in oil prices and corresponding decrease in purchasing power in the early 1970s. *See generally* E. ANDREWS, THE CHANGING PROFILE OF PENSIONS IN AMERICA 6-8 (1985); L. OZANNE, *supra* note 3, at 135-37.

[6] Pub. L. No. 93-406, 88 Stat. 829 (codified as amended primarily in scattered sections of I.R.C. (1988) & 29 U.S.C. §§ 1001-1461 (1988).

[7] *See infra* text accompanying notes 157-204 (discussing problems women face as secondary recipients under the private retirement system). While men as a group continue to earn more than women as a group, *see infra* note 68, with the increasing number of two-earner families this may not always be the case. In a situation in which the female is the higher earner, her death may leave the husband financially insecure.

[8] *See infra* notes 51-203 and accompanying text (discussing gender-based discrimination in the retirement system).

Retirement Equity Act of 1984 (REA),[9] as well as various other acts from 1982 through 1986.[10] The anamoly, however, is that these acts, while curing many of the high-visibility ills that had once so engendered public passion, left behind more subtle issues of discrimination. These more subtle issues are always more difficult to combat, primarily because of the lack of an effective lobby.

The growing population of elderly persons signals another important social change[11] and, combined with the abrogation of the mandatory retirement age,[12] indicates that in the future there are likely to be more elderly people in the workforce.[13] There is, as this

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[9] Pub. L. No. 98-397, 98 Stat. 1426 (1984). REA improved the plight of women under the retirement system in several respects: (1) it lowered the minimum participation age from 25 to 21; (2) it lowered the minimum age for vesting credit from 21 to 18; (3) it provided that a one-year break in service for purposes of child rearing is not to count against a nonvested worker for vesting purposes; (4) it provided that survivor annuities were to apply automatically and any opt-out could be obtained only with spousal consent; (5) it provided for a pre-retirement survivor annuity; and (6) it provided that retirement benefits are subject to division between the spouses upon divorce. *Id.*

[10] *See, e.g.*, Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-509, § 9203(a)(2), 100 Stat. 1874, 1979 (1986) [hereinafter OBRA] (requiring plans to include workers hired after age 60 and requiring accrual of benefits for workers continuing to work after age 65); Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended in scattered sections of 26 U.S.C.) [hereinafter TRA 86] (lowering minimum vesting period from 10 years to 5 years, revising coverage to require inclusion of more workers and prohibiting plans from integrating out workers' pension benefits with social security); Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (codified as amended in scattered sections of 26 U.S.C.) [hereinafter TEFRA] (enacting top-heavy provisions under ERISA which require faster vesting and accrual of a minimum benefit under plans that pay more than 60% of benefits to company owners and other key employees, ensuring that women, particularly those working in support-staff jobs in small professional service offices, will actually receive some benefit under the plan).

[11] OFFICE OF THE ACTUARY, SOC. SEC. ADMIN., SOCIAL SECURITY AREA POPULATIONS PROJECTIONS, ACTUARIAL STUDY No. 88, 43, 56-7 (Tables 16e, 18e, 18f) (1983). This study projects that by the year 2040 118 million Americans will be in the age 60 to 70 group with another 54 million in the over-70 age group. *Id.* at 57 (Table 18f).

[12] Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. No. 90-202, §§ 4, 15, 81 Stat. 602, 603, 604 (codified as amended at 29 U.S.C. §§ 623, 621 (1985)); *see infra* text accompanying notes 215-18 (discussing implications of prolonging tenure of the workforce).

[13] Around the year 2010, when the baby boomers begin to retire, society will experience the "baby bust" phenomenon when there are an inadequate number of workers in the workforce to support the retired "boomers." Therefore, in order for the system to continue to function, more elderly persons must be encouraged to continue in the active workforce. For a general discussion of this phenomenon, see *Employment in the Year 2000: A Candid Look at Our Future: Hearings Before the Subcomm. on Investment, Jobs and Prices of the Joint Economic Comm.*, 100th Cong., 2d Sess. (1988) [hereinafter *Year 2000 Hearing*].

It is predicted that by the year 2040, 26% of the population will be over the age of 60. *See* D. KOITZ, VARIOUS EFFECTS OF RAISING THE NORMAL RETIREMENT AGE FOR SOCIAL SECURITY

article will demonstrate, a correlation between gender- and age-based discrimination.[14] As with gender-based discrimination, strides have also been made toward abolishing age discrimination,[15] but issues nevertheless remain.

A troubling aspect inherent in these issues of discrimination is that problems of equity under the retirement system are also problems of adequacy. In the past, Congressional lethargy in enacting fairer retirement laws has been excused under the guise that the private retirement system is a voluntary system and national retirement policy interests are best served by maintaining this "voluntariness."[16] At least as far as Congress is concerned, the "public interest" in maintaining a voluntary retirement system overrides any perceived lesser interest of ensuring fairness and adequacy for all workers. This perspective, however, does not explain the same lethargy toward enacting fairer Social Security laws,[17] nor

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BENEFITS 53 (1984).

[14] *See infra* notes 19 & 35-38 and accompanying text.

[15] *See infra* notes 204-06 and accompanying text (discussing recent advances in laws relating to the elderly in the private retirement system).

[16] *See, e.g.*, Remarks of Elizabeth Dole, Secretary of Labor, addressing the Association of Private Pension and Welfare Plans, 6 Pens. Plan Guide (CCH) ¶ 26,135 (June 15, 1990) [hereinafter Remarks of Dole]. This position is contrary to the recommendation of the President's Commission on Pension Policy, appointed by President Carter, which advocated a compulsary minimum universal pension system. FINAL REPORT OF THE PRESIDENT'S COMMISSION ON PENSION POLICY, COMING OF AGE TOWARD A RETIREMENT INCOME POLICY, *reprinted in The Future of Retirement Programs in America: Hearing Before the House Select Comm. on Aging*, 97th Cong., 1st Sess. 160-64 (1981) [hereinafter FINAL REPORT ON PENSION POLICY].

There have been several rationales put forward in defense of the current position on continued voluntariness: first, the varying needs of employers, as well as employees, should be respected; second, a mandatory private retirement system would undermine the Social Security system; third, a public desire to avoid excessive governmental intrusiveness. For a more in-depth discussion of these theories and their effect on retirement policy, see Altman, *Rethinking Retirement Income Policies: Nondiscrimination, Integration, and the Quest for Worker Security*, 42 TAX L. REV. 438-56 (1987); Borzi, *A National Retirement Income Policy: Problems and Policy Options*, 19 U. MICH. J.L. REF. 5 (1986); Graetz, *supra* note 1, at 855-64.

While skepticism has been expressed as to whether Congress will ever decide in favor of a mandatory system (*see* Borzi, *supra*, at 26), steps in that direction were taken in 1986 under OBRA in providing coverage for older employees hired within 5 years of normal retirement age (*see infra* notes 205, 209, 211 and accompanying text) as well as under the TRA 86 in increasing coverage under the safe harbor antidiscrimination-in-coverage rules. *See* TRA 86, *supra* note 10, at § 1112(a) (amending I.R.C. § 410(b)(1) (1986)).

[17] *See, e.g., infra* notes 117-27, 222-32 and accompanying text (discussing inequities in Social Security system).

does it justify continued inaction in light of the overwhelming social changes predicted to occur shortly after the turn of the century.[18]

This Article begins by stressing the importance of retirement benefits in general and employer-provided benefits in particular. It then addresses specific current issues of age and gender discrimination under both the private retirement and Social Security systems. Gender-based discrimination is emphasized because of the overlap between gender-based discrimination and age discrimination.[19] Finally, this Article suggests specific reforms for a fairer and more adequate system in the twenty-first century.

II. The Importance of Employer-Provided Retirement Benefits

In order to fully comprehend the magnitude of the problems raised by discrimination in the retirement system, one must first recognize the importance of pension benefits. The economics of retirement security is often referred to as a "three-legged stool," with the legs consisting of Social Security benefits,[20] employer-provided

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[18] *See supra* notes 11 & 13 (discussing the aging of the population and the coming "baby bust").

[19] For instance, women constitute the majority of the elderly population. Women are also disproportionately represented among the elderly living in poverty. *See infra* notes 35-38 and accompanying text. Issues of gender-based discrimination overlap in other ways as well. Consider, for example, the shortening of the minimum vesting age from 10 years to 5 years under TRA 86. *See* TRA 86, *supra* note 10, § 113, at 2446. One of the reasons for this provision was the disproportionate impact of the minimum vesting period upon women, who as a group have much shorter job tenure than men. *See infra* notes 97 & 101 and accompanying text. It is predicted that the five-year vesting provision will have a striking effect on women, increasing their pension recipiency from 43% to 56% for retired women aged 67 and over. E. Andrews, *supra* note 5, at 8. *But see Private Pensions: Impact of New Vesting Rules Similar for Women and Men*, U.S. Gen. Accounting Office, Report to Congressional Committees, 6 (1990) [hereinafter GAO Report] (concluding that five-year vesting will have similar effects on women and men).

Another boon for women was the abrogation of the provision allowing the elimination of individuals hired within five years of normal retirement age. OBRA, *supra* note 10, § 9203, at 1979. This provision benefitted many women who were forced to enter the workforce at an advanced age because of the death of a spouse or because of other unanticipated financial exigencies. Both of these provisions also benefitted the elderly as a group.

[20] Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301-1397(f)). Social Security consists of various types of benefits: (1) old age and disability benefits; (2) lump sum death benefits; (3) dependents' benefits; and (4) survivors' benefits. Some aspects of Medicare (consisting of Hospital Insurance and Supplemental Medical Insurance) are also included. For a discussion of these types of benefits, see E.

pension benefits and individual savings.[21] For many, though, the stool has only one leg—Social Security benefits. Social Security benefits constitute the most important source of retirement income for many retired American workers.[22]

ANDREWS, *supra* note 5, at 3-6; J. SCHULZ, *supra* note 3, at 121-53, 188-215.

[21] FINAL REPORT ON PENSION POLICY, *supra* note 16, at 105. Pension benefits, Social Security benefits and other post-retirement income should equal approximately 60% to 70% of pre-retirement income for the average wage earner. For lower-income individuals, the replacement rate should be greater. *Id.* at 160. This report also discusses a potential fourth leg, earned income, but concludes that it is of declining importance as a source of retirement income. *Id.* at 105. However, with the elimination of the mandatory retirement age, *see supra* note 12 and accompanying text, the advances in medicine resulting in prolonged life spans and the "baby bust" phenomenon on the verge of realization, *see supra* note 13, perhaps this report is too quick to dismiss the importance of post-retirement earnings or, at least, earnings of individuals over age 65. *See Social Security Trust Fund Reserves: Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 100th Cong., 2d Sess. 12 (1988) (statement of P. Royal Shipp, Senior Specialist in Social Legislation, Congressional Research Service); *see also infra* notes 204-20 and accompanying text.

For a general discussion of the various types of benefits involved in retirement security, see Bradley, *Economic Security in Retirement: Whose Responsibility?*, in SEARCH FOR A NATIONAL RETIREMENT INCOME POLICY 1-11 (J. Vanderhei ed. 1987) [hereinafter SEARCH FOR A NATIONAL RETIREMENT INCOME POLICY].

[22] Social Security and Supplemental Security Income are important income sources for many Americans, particularly elderly individuals living alone who have income levels below, at or near the poverty threshold. *See infra* note 25 (discussing poverty threshold). The elderly poor derive 79% of their income from Social Security while the "near poor" (those with income levels below 150% of the poverty line) derive 81% of their income from Social Security benefits. THE COMMONWEALTH FUND COMM'N ON ELDERLY PEOPLE LIVING ALONE: OLD, ALONE AND POOR 15 (Table 2) (1987) [hereinafter COMMONWEALTH FUND STUDY]. Social Security benefits constitute a major source of income (half or more) for 62% of the elderly; for 26% of the elderly, Social Security benefits constitute 90% or more of their income; for 15%, Social Security benefits provide the sole source of income. SOC. SEC. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., FAST FACTS & FIGURES ABOUT SOCIAL SECURITY 6 (1988).

Occasionally statistics refer to the "near poor," those with incomes only slightly above the poverty threshold. I maintain that the "near poor" should also be considered "poor." For example, most of these individuals are probably not insured or adequately insured against a medical catastrophe. Since they are hovering only slightly above the poverty threshold, they remain vulnerable to any economic contingency.

The oldest elderly group (age 85 and over) rely even more heavily upon Social Security benefits. Almost 40% of this group depends upon Social Security benefits for 90% or more of their monthly income. For 20% of this group, Social Security provides the sole source of income. Yet average Social Security benefits for this group are 8% lower than the benefits received by the 65-84 age group. *The Oldest and Poorest Social Security Beneficiaries: Hearing Before the House Subcomm. on Social Security of the Comm. on Ways and Means*, 101 Cong., 1st Sess. 5 (1989) (memorandum of Sandra Casber Wise, Staff Director, Committee on Ways and Means).

Supplemental Security Income (SSI), a federal cash-assistance program implemented in 1974, provides 14% of income for those at or below the poverty level and 2% for those whose income level is slightly above the poverty threshold. *Id.* Eligibility for SSI is limited

The poorest of the elderly fall into two groups (although there is much overlap between these groups): (1) the elderly who live alone and (2) the elderly who are among the "oldest old"—aged eighty-five and over.[23] In recent years the hypothesis that elderly persons are more financially secure than the rest of the American population has become a popular theory.[24] While many older persons do

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to those who are able to meet a strict income and asset test. For a discussion of SSI, see J. SCHULZ, *supra* note 3, at 208-15.

[23] *See* CHAIRMAN OF THE HOUSE SELECT COMM. ON AGING, 100TH CONG., 2D SESS., AGING NOTES 1-8 (Comm. Print 1988) [hereinafter AGING NOTES]. There are various reasons for the economic vulnerability of these two groups. For one, elderly persons living alone must rely on fewer sources of income. Widows represent 67% of this group, *id.* at 5-8, and the fact that they frequently experience dramatic reductions in income following a divorce or the death of a spouse has been well documented. *See infra* notes 158-203 and accompanying text.

The reasons for the economic vulnerability of the "oldest old" are more complex. One possible reason for the economic disparity between the "younger" elderly (those just entering the age 65 and over group) and the "oldest old" is that the younger group has greater pension benefits since they reached their peak working years during the 1950s and 1960s, a period of greater economic expansion. AGING NOTES, *supra*, at 4. During this period society witnessed the greatest proliferation of private retirement plans. *See* Watson, *supra* note 4. Other possible reasons for the economic plight of the "oldest old" are: (1) the inverse proportion of advancing age to a decline in earning potential; (2) depletion of assets over time (including the effect of inflation on fixed incomes); (3) depletion of assets due to illness and related health care expenses (including maintenance expenses such as nursing home costs); (4) death of the primary wage-earning spouse; and (5) reluctance or inability to convert major assets (such as a house) into cash. AGING NOTES, *supra* at 4. The ranks of the "oldest old" will increase substantially over the next half century, *id.* at 3, which makes their relative economic vulnerability a further cause for concern.

[24] *See, e.g.*, J. SCHULZ, *supra* note 3, at 3-4; Gustafson, *Comment to Poverty Among the Elderly: Where Are the Holes in the Safety Net?* in NATIONAL BUREAU OF ECONOMIC RESEARCH, PENSIONS IN THE U.S. ECONOMY 134 (Z. Bodie, J. Shoven & D. Wise eds. 1988) [hereinafter PENSIONS IN THE U.S. ECONOMY]. *See generally The Aging of the U.S. Population: Planning for the Retirement and Employment Needs of Older Americans: Hearing Before the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging*, 100th Cong., 2d Sess. 5-38 (1988). The poverty rate among the elderly in general has decreased for the following reasons: (1) the increase in Social Security benefits that Congress enacted in the 1960s; (2) the proliferation of retirement plans after the Second World War; and (3) the rapid economic growth of the country during the 1950s and 1960s with the resulting increase in living standards. AGING NOTES, *supra* note 23, at 1. However, poverty among the elderly continues to be a serious problem. In 1986, 29% of persons aged 65 and over and 38% of persons aged 75 and over lived in families with incomes below $10,000. In contrast, only 13% of the general population lived in families in that income range. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, TRANSITIONS IN INCOME AND POVERTY STATUS 1985-86, at 3 (1990) [hereinafter TRANSITIONS]. Furthermore, while the poverty rate for the elderly is decreasing in general, the proportion of elderly who are "near poor" (between 100% and 125% of the poverty threshold) has dramatically increased. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, MONEY, INCOME, AND POVERTY STATUS IN THE U.S.: 1988, at 5 (1989)

enjoy financial security, in part because of improvements in Social Security benefits, a disturbingly high percentage of them are poor, living on incomes far below the poverty threshold.[25] Almost two million elderly face added complications; they are alone and poor.[26] There are approximately twenty-seven million noninstitutionalized elderly persons in the United States; nearly nine million of them live alone.[27] Elderly persons who live alone suffer poverty rates almost five times higher than elderly couples,[28] nineteen percent versus four percent.[29] Poverty among blacks and other minorities is even higher.[30] Nearly two-thirds of black women aged 85 and older who live alone have incomes at or below the poverty threshold.[31] Of the elderly who live alone, two-thirds are widows, many of whom are in desperate financial straits because of sharp declines in

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[hereinafter 1988 POVERTY STATUS].

[25] COMMONWEALTH FUND STUDY, *supra* note 22, at 1. *See also Abolishing Poverty Among Older Americans: Hearing Before the Select Comm. on Aging*, 100th Cong., 1st Sess. 28 (1987) [hereinafter *Abolishing Poverty Hearing*] (statement of Dr. Karen Davis, Chairman, Department of Health Policy and Management, The Johns Hopkins School of Hygiene and Public Health). Of the approximately 27.4 million elderly Americans aged 65 or over, more than 16.9 million had total annual monetary income of less than $10,000. It has also been determined that most older persons do not have substantial investment holdings. *See* S. REP. No. 291, 100th Cong., 2d Sess. 94 (1988). While there is some disagreement over an exact figure that represents the poverty threshold, for 1986 the government fixed it at $5,255 for a single individual aged 65 or older and $6,630 for a couple in that age group. TRANSITIONS, *supra* note 24, at 60. A consensus can be reached, however, that this level of income "represents real deprivation, where hard choices among the necessities of food, shelter and medical expenses are a daily reality." COMMONWEALTH FUND STUDY, *supra* note 22, at 8.

[26] *See generally* COMMONWEALTH FUND STUDY, *supra* note 22 (addressing problems of elderly people living alone); *Abolishing Poverty Hearing*, *supra* note 25 (discussing ways to abolish poverty for the elderly).

[27] COMMONWEALTH FUND STUDY, *supra* note 22, at 5; AGING NOTES, *supra* note 23, at 7. *See generally Abolishing Poverty Hearing*, *supra* note 25, at 28 (statement of Dr. Karen Davis discussing the poverty rates among the elderly who live alone).

[28] COMMONWEALTH FUND STUDY, *supra* note 22, at 5.

[29] *Id.* at 9. This study also showed that 43% of the nonwhite elderly living alone are poor or "near poor." The corresponding figures for Hispanics and whites were 35% and 16% respectively. *Id.*; *see also infra* note 30.

[30] Recent statistics show that 32.2% of elderly blacks and 22.4% of elderly Hispanics live in poverty, compared to 10% of white elderly persons living alone. *See* 1988 POVERTY STATUS, *supra* note 24, at 60-61; *see also infra* note 36 (discussing statistical data).

[31] COMMONWEALTH FUND STUDY, *supra* note 22, at 1. *See also The Pension Gamble: Who Wins? Who Loses?: Hearing Before the Senate Special Comm. on Aging*, 99th Cong., 1st Sess. 37 (1985) [hereinafter *Pension Gamble Hearing*] (statement of Judy Schub, Legislative Representative, American Association of Retired Persons); *Abolishing Poverty Hearing*, *supra* note 25, at 25 (statement of Dr. Karen Davis).

income following retirement[32] or the death of a spouse.[33] Half of the elderly living alone are over the age of 75, and close to half are in failing health.[34]

The problem of widows' poverty exemplifies the problem of the elderly poor because widows are disproportionately represented among the poorest of the elderly.[35] Elderly women are almost twice as likely to live in poverty as elderly men.[36] Nearly three-fourths of

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[32] *See infra* notes 158-63 and accompanying text.

[33] *See* AGING NOTES, *supra* note 23, at 5-6; *see also infra* notes 35, 158-203 and accompanying text.

[34] *Abolishing Poverty Hearing*, *supra* note 25, at 28 (statement of Dr. Karen Davis). "The elderly who live alone often lack the essential economic, physical, and emotional support that can mean the difference between a dignified old age and a spiralling deterioration." COMMONWEALTH FUND STUDY, *supra* note 22, at 5; *see also Quality of Life for Older Women: Older Women Living Alone: Hearing Before the House Select Comm. on Aging*, 100th Cong., 2d Sess. 36-38 (1988) [hereinafter *Quality of Life Hearing*] (testimony of Dr. Karen Davis, Director, The Commonwealth Fund, Commission on Elderly People Living Alone, and Chairman, Department of Health Policy and Management, The Johns Hopkins School of Hygiene and Public Health).

[35] Another Commonwealth Fund study shows that 88% of women over the age of 75 are widowed and living alone. *Quality of Life Hearing*, *supra* note 34, at 8 (citing COMMONWEALTH FUND COMM'N, AGING ALONE: PROFILES AND PROJECTIONS (1988) [hereinafter AGING ALONE]).

[36] *See* BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, No. 14, CURRENT POPULATION REPORT 3 (1989) [hereinafter CURRENT POPULATION REPORT]. Probably the major reason why many women over the age of 85 live in poverty is because these women lived during a time in which women did not enter the paid workforce. Thus, they never had the opportunity to amass any retirement benefits, either public or private. It has been postulated that today's women are more financially savvy than their predecessors and that this fact will eradicate the "feminization of poverty." Francese, *Demographic Trends Reshaping Retirement Security*, in SEARCH FOR A NATIONAL RETIREMENT INCOME POLICY, *supra* note 21, at 26-27. This theory, while plausible on its face, is nevertheless fatally flawed because it does not take into account other discrepancies in the treatment of women (versus men) in the workforce. *See, e.g.*, *infra* notes 51-54 & 66-155 and accompanying text (discussing women as workers); *see also infra* notes 349-51 and accompanying text (discussing women's disparate treatment in the workforce). Another reason for the relative poverty of older women may be crippling expenses of last illnesses of their spouses.

Statistics show that a change in marital status from married to single does not significantly affect the poverty level of men but it does affect the poverty level of women. Married women in general had an income to poverty ratio of 4.09 in 1986, while women who divorced during that year had an income to poverty ratio of 2.34. TRANSITIONS, *supra* note 24, at 8.

This paper refers extensively to statistical data. I have encountered several problems with such data. For instance, different agencies may reach strikingly different results on supposedly the same issues. *See, e.g.*, *infra* notes 64 & 65. Often the variables are not well-defined, thus making it difficult to evaluate the disparaties in results and impossible to rely with any degree of certainty upon that data. Recognizing the shortcomings of such data, I, nevertheless, occasionally use it in this article because in all cases, even those in which the results are widely disparate, the end result on the discrimination aspect itself is the same. That is, all

the elderly poor over age 65 are female.[37] One reason for this is the discrepancy in Social Security benefits received by women versus those received by men.[38] Many of the elderly subsist solely on Social Security and Supplemental Security benefits.[39] A number of workers presently predict that Social Security will provide at least one-half of their post-retirement income.[40] Yet Social Security was never intended to provide a replacement of earned income upon retirement. It was instead intended to provide an income floor, or minimum subsistence level benefit, that could be supplemented with private savings and investments to replace a portion of pre-retirement income.[41]

When another leg in the form of pension benefits is added to the "retirement stool," the numbers change considerably. The mean monthly income for those aged 65 and over receiving both Social Security and private pension benefits in 1984 was $761 for women and $1,023 for men.[42] Thus, private pension benefits are likely to be a major dividing line between poverty and nonpoverty. This is

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of the data show that women, particularly elderly women, are severely discriminated against under the retirement system. The question is merely the degree of severity.

[37] *Quality of Life Hearing*, *supra* note 34, at 49 (prepared statement of the Older Women's League).

[38] *See* COMMONWEALTH FUND STUDY, *supra* note 22, at 23-24. In 1988, for example, average monthly Social Security benefits were $574 for men and $367 for women. For recipients aged 65, the average monthly benefit was $639 for men and $449 for women. For those aged 66-69, the monthly benefit was $555 for men and $444 for women. The average monthly benefit for those aged 70 or more was $598 for men and $645 for women. SOC. SEC. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVICES SOCIAL SECURITY BULLETIN, ANNUAL STATISTICAL SUPPLEMENT, 1989, at 253 (Table 6.B2). While this data appears to show that the benefit discrepancy is inversely proportional to the increasing age group of the individuals, it does not take into account those women who receive no Social Security benefits. That is, the average monthly benefit is determined on the basis of those who actually *receive* benefits. Thus, the apparent "trend" which this data suggests cannot be relied upon because there are many women who do not receive Social Security benefits. *See infra* notes 54-56 and accompanying text.

The projections are that in the future problems of poverty among the elderly will be confined largely to women. *See generally*, COMMONWEALTH FUND STUDY, *supra* note 22; *Quality of Life Hearing*, *supra* note 34.

[39] *See supra* note 22 (discussing Social Security benefit as a percentage of total income).

[40] Williams, *Social Security, Past, Present and Future*, in SEARCH FOR A NATIONAL RETIREMENT INCOME POLICY, *supra* note 21, at 70 (citing *Social Security at 50 Faces New Crossroads*, U.S. NEWS & WORLD REPORT, Aug. 12, 1985, at 40-43).

[41] *See*, CONGRESSIONAL QUARTERLY, INC., SOCIAL SECURITY AND RETIREMENT 3 (1983) [hereinafter CONGRESSIONAL QUARTERLY, INC.]; R. MYERS, SOCIAL SECURITY 25-26 (3d ed. 1985).

[42] BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, PENSIONS: WORKER COVERAGE AND RETIREMENT INCOME 1984, at 9 (Table I) (1987) [hereinafter WORKER COVERAGE].

further supported by the fact that only nine percent of the elderly poor who live alone receive employer-provided pension benefits as a supplement to their Social Security benefits, compared to thirty-five percent for all elderly who live alone.[43]

Only slightly over half of the population is presently covered under an employer-provided retirement plan.[44] Those who are not covered are apt to be young, working for small companies of fewer than one hundred employees, in many cases self-employed or working part-time, nonunionized, low paid and working in the service or agricultural industries.[45] This group predominantly consists of women and minorities.[46] By the year 2000, the workforce is predicted to become more elderly, more female, more service-oriented and more disadvantaged.[47] It has been speculated, with some acumen, that the Social Security system may not be able to meet its obligations in the future when the bulk of the "baby boomers" retire, many of them dependent solely upon Social Security benefits.[48] The reason for such speculation is that the Social Security

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[43] COMMONWEALTH FUND STUDY, *supra* note 22, at 11 (Table 1).

[44] Currently only about 49.5% of the nonagricultural workforce is covered under a private employer-provided plan. This figure represents a decline from the 1979 rate of 55.7%. EMPLOYEE RESEARCH INST., PENSION POLICY AND SMALL EMPLOYERS: AT WHAT PRICE COVERAGE? 14 (1989) [hereinafter PENSION POLICY AND SMALL EMPLOYERS]. For a discussion of this downward trend, see EMPLOYEE BENEFIT RESEARCH INST., BUSINESS, WORK AND BENEFITS 93-94 (1988).

[45] E. ANDREWS, *supra* note 5, at 49, 72 (Tables III.1, IV.1); *see also, Pension Gamble Hearing, supra* note 31. Several reasons have been suggested to explain why employers do not establish plans: (1) plans are expensive—the smaller the company, the more disproportionate the expense becomes since in addition to contributions for the employees, the employer must also pay administrative costs; (2) plans are burdensome—in order to maintain tax qualified status, strict reporting and disclosure requirements must be met; and (3) pension plans are not marketed and many employers believe that they cannot afford a plan, are ignorant of the advantages of qualified plans, or wish to plow extra profits into some other aspect of the business. Borzi, *supra* note 16, at 25-26. Other reasons have also been suggested: some companies may have low profit margins and uncertain futures, and the tax benefits for smaller companies may not be as great as for larger companies. S. REP. No. 291, 100th Cong., 2d Sess., vol. 1, at 47 (1988). *See generally*, PENSION POLICY AND SMALL EMPLOYERS, *supra* note 44 (assessing the factors that influence small businesses when considering establishing pension plans).

[46] *See* E. ANDREWS, *supra* note 5, at 63 (Table III.8); *see also Pension Gamble Hearing, supra* note 31, at 37 (statement of Judy Schub). However, the coverage of women is gradually improving. For further discussion, see *infra* notes 73-76 and accompanying text.

[47] *See generally Year 2000 Hearing, supra* note 13; *American Families in Tomorrow's Economy: Hearing Before the House Select Comm. on Children, Youth and Families*, 100th Cong., 1st Sess. (1987).

[48] *See, e.g.*, PENSION POLICY AND SMALL EMPLOYERS, *supra* note 44, at 13; *Social Security's*

system is a pay-as-you-go system in which current payments fund current benefits.[49] When society experiences the "baby bust" phenomenon[50] shortly after the turn of the twenty-first century there will be fewer workers to support the benefits payable to the vast number of retired "boomers." At best, the Social Security system may at that point breed an intergenerational conflict when a massive proportion of the current workforce is no longer active and the younger workers are forced to support them. At worst, the system will be unworkable because the economy will not be able to support it.

III. GENDER-BASED DISCRIMINATION IN THE RETIREMENT SYSTEM

The ERISA legislation is facially neutral, as far as age- and gender-based discrimination are concerned, but in practice it fails to consider that 56.6% of the workforce is female with very different work patterns from their male counterparts.[51] This point is illustrated by the fact that two-thirds of retirees receiving pension benefits are males[52] with mean monthly pension income of $670; the mean monthly pension income for similarly situated women is $370.[53] The paucity of retirement benefits for women is a major contributing factor to the "feminization of poverty," a phenomenon that appears to be worsening.[54] To comprehend the underlying causes of this phenomenon, it is necessary to examine women's role, both in and out of the workforce, and the relationship of that role to the difference in retirement security between men and women.

Insecure Future, Wall St. J., Aug. 21, 1989, at A8, col. 3.

[49] For a discussion of this, see CONGRESSIONAL QUARTERLY, INC., *supra* note 41, at 7-42.

[50] *See supra* note 13.

[51] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 9 (1989) (percentage of labor force in 1988).

[52] WORKER COVERAGE, *supra* note 42, at 2.

[53] *Id.*

[54] It is predicted that by the year 2020, the vast majority of those having income at or below the poverty threshold will be female. COMMONWEALTH FUND STUDY, *supra* note 22, at 22-23.

For an eye-opening discussion of the disparaties in health care and benefits between men and women, see *Quality of Life Hearing, supra* note 34, at 3-6 (prepared statement of Edward R. Roybal, Chair, House Select Committee on Aging).

A. Women as Nonparticipants in the Workforce and Nonrecipients of Pension Benefits

There are many women who are not in the paid workforce. Most of these women stay home to raise a family, care for a disabled family member or maintain a household. Some of them cannot find work. For retirement security, they are dependent upon their husbands and upon the Social Security system. If these women have never been employed outside the home, they will have accumulated no earnings credits and, thus, will have no entitlement to Social Security benefits in their own right.[55] The future financial security of such women will therefore be entirely derivative, signaling that women's work has no value and that women are no better than dependents. Indeed, a woman's entitlement to Social Security survivor benefits will depend entirely upon the earnings record of her husband. Moreover, if she takes a paying job, she may find that the time during which she was not in the conventional labor force reduces her average lifetime earnings and, hence, the amount of her Social Security benefits. Furthermore, upon her death, her family—already deprived of her services—will receive no Social Security survivor benefits attributable to those services. If, on the other hand, her husband dies first, her future financial security will depend upon her husband's financial perspicacity, as well as his foresight in providing adequately for his family after his death. Finally, she may find herself with few or no Social Security benefits if her husband dies or becomes disabled, or if they divorce, especially if any of these contingencies occur during the early years of marriage.[56]

Homemaker coverage is not a novel concept. Several countries currently provide equitable national pension coverage for home-

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[55] The term "earnings credits" refers to the Social Security credit to which an individual is entitled by virtue of employment. *See* 42 U.S.C.A. § 410 (West 1983 & Supp. 1990). The credit is measured in terms of calendar quarters of coverage. *See* 42 U.S.C.A. § 413 (West 1983 & Supp. 1990). Section 413 explains how to determine the number of quarters needed for fully insured status. *Id.*

[56] This is partly because of the "widow's gap." If a covered worker dies before age 62, his widow will not be able to receive benefits until she reaches age 60 unless there is a dependent or disabled child in her care or unless she herself is disabled, in which case she may receive benefits at age 50. *See* J. SCHULZ, *supra* note 3, at 138-39. Another factor comes into play with divorce. In order to receive derivative Social Security benefits, an individual must have been married to the covered spouse for a period of 10 years before the date of the final divorce decree. 42 U.S.C. § 419(d) (1983).

makers.[57] The anamoly of the lack of homemaker coverage in the United States is that it continues to exist. In the past few years, there have been bills introduced in Congress to provide Social Security credits for homemakers.[58] They have, however, received little political support because of disagreement over an array of issues including financing of benefits, valuation of services, determination of how much credit to allow, eligibility and the general perception that primarily higher income families would benefit.[59] Recently, though, an alternative reform approach has been introduced, and it has generated more interest than the individual credit approach. This alternative approach involves earnings sharing in which credits are split equally between spouses, similar to a community property concept.[60]

Another problem faced by the homemaker is the issue of retirement savings incentive. The current rules governing individual retirement accounts (IRAs) were substantially amended under the 1986 Tax Reform Act (TRA 86), resulting in an overall diminution in value of these accounts as a retirement incentive device.[61] Homemakers with no earned income of their own have never been permitted to establish an IRA.[62] Thus, they are precluded from obtaining tax-free retirement accumulation to the extent available to others under the IRA rules. Instead, the working spouse may establish an IRA and is permitted to contribute an extra $250 per year for the benefit of the nonworking spouse.[63] The current rules ignore cultural trends and presume the integrity of the marital relationship.[64] It is anachronistic to presume that the nonworking

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[57] These countries are Germany, Japan, Great Britain, Sweden, Canada and France. Most of the programs are funded through voluntary homemaker contributions. *See* J. SCHULZ, *supra* note 3, at 149; Leonard, *Older Women and Pensions: Catch 22*, 10 GOLDEN GATE U.L. REV. 1191, 1193 (1980).

[58] *See* J. SCHULZ, *supra* note 3, at 149-51 (discussing homemaker bill proposals).

[59] *Id.*

[60] *See* H.R. 203, 101st Cong., 1st Sess. (1989); S. 1480, 101st Cong., 1st Sess. (1989); *see also* SCHULZ, *supra* note 3, at 148-51. For a discussion of various approaches to solving the problem of homemaker coverage, see Leonard, *supra* note 57, at 1193.

[61] *See* L. OZANNE, *supra* note 3, at 99-100, 104. For a discussion of IRAs as vehicles for the wealthy, see Borzi, *supra* note 16, at 41-43.

[62] I.R.C. § 219(b)(1) (1988).

[63] *Id.* at § 219(c). If, however, the working spouse is covered under a qualified retirement plan, the amount of deductible contributions is phased out. *Id.* at § 219(g).

[64] Not only has divorce become more common but the number of single parent families has increased to 21% (or 13.8 million families). BUREAU OF LABOR STATISTICS, U.S. DEP'T OF

spouse will always be supported by the working spouse. It is more likely that the couple will divorce or the working spouse will die prematurely. The nonworking spouse, who may have minor children to support, will then need every available source of income at her disposal, particularly since Social Security benefits are not likely to be adequate for her purposes.[65]

B. *Women As Workers: Benefit Entitlement*

1. Private Sector Benefits. Nearly 70% of women between the ages of 25 and 54 are currently in the workforce.[66] Relatively few of these women receive any form of pension benefit upon retirement,[67] primarily because women face a number of obstacles in receiving such benefits. In fact, the first obstacle is encountered before the issue of retirement coverage ever arises: the question of employment opportunities and fair wages. Most women earn far less than men at comparable jobs.[68] They are also largely confined to lower-paying positions and jobs.[69] These are the primary reasons

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LABOR, EMPLOYMENT IN PERSPECTIVE: WOMEN IN THE LABOR FORCE 1 (1st quarter, 1989). Approximately 80% of these single parents are female. *Id.* at Table A.

Since IRAs are not considered to be "qualified plans" in the tax sense, the joint and survivor annuity rules do not usually apply. Thus, the spouse is generally not entitled to an automatic portion of the IRA unless the IRA is a "rollover IRA" which contains a rollover distribution from a qualified plan subject to the joint and survivor annuity rules. *See* D. MCGILL & D. GRUBBS, FUNDAMENTALS OF PRIVATE PENSIONS 722-23 (1989).

[65] In 1986, there were 39.1 million single parent families. The poverty rate for these families was 34.6% compared to 7.1% for persons in married couple families. Of these single parent families, 23.2 million were headed by females. The poverty rate for these households was 39.1%. CURRENT POPULATION REPORT, *supra* note 36, at 3; *see also supra* note 54 and accompanying text.

When dealing with statistics, different agencies may produce widely disparate results. Although the Census Bureau produced different results from those of the Department of Labor, *see supra* note 64, for the number of single parent families, the percentage of female-headed families was close to the percentage determined by the Department of Labor.

[66] Shank, *Women and the Labor Market: The Link Grows Stronger*, MONTHLY LAB. REV., March 1988, at 3.

[67] A study published in 1985 revealed that only 10% of female spouses had primary pension benefits. Maxfield & Reno, *Distribution of Income Sources of Recent Retirees: Findings From the New Beneficiary Survey*, SOC. SEC. BULL., Jan. 1985, at 9.

[68] *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 162 (Table 4.1) (1988). Women currently earn $.70 for every dollar earned by men. *Id.*

[69] R. LYNN, THE PENSION CRISIS 27-28 (1983). It has been speculated that some seemingly beneficial provisions may not produce the desired effect. For instance, the amendment to the ADEA, which abrogated the mandatory retirement age, permitted a temporary exception for college and university professors. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 6(a), 100 Stat. 3344 (codified at 29 U.S.C.A. § 631(d) (West

why women are disproportionately represented among the poverty-sticken. There are, however, other reasons as well.

a. Coverage and Participation

The next obstacle to retirement security is coverage under an employer-provided plan. Since the provision of pension plans is not mandatory,[70] employees must rely on the benevolence of their employers to provide such a plan. Some employers are benevolent and some are not.[71] Some also are more benevolent than others.[72] Those employers who do not provide a retirement plan tend to be smaller, nonunionized companies, usually engaged in the retail trade or personal service industries.[73] Herein lies a problem for women, because most women do not work for large companies, nor do they belong to unions.[74] In fact, 45% of all women working outside the home work for employers with a workforce of fewer than 100 employees.[75] Only 26% of employed women (versus 35% of employed men) are members of a union.[76]

Supp. 1990)). Proponents believed that colleges and universities would have an interest in ridding themselves of older tenured teachers in order to bring in younger people with fresher ideas. This would permit greater access for women and minorities, who have typically been underrepresented on college and university faculties. Also, there was a fear that older teachers with typically higher salaries would place additional burdens on the already strained budgets of most colleges and universities if they were permitted to continue indefinitely.

Opponents of the university exclusion counter that there is little statistical proof that women and minorities would be permitted greater access or that many teachers would continue teaching beyond age 65. They also argue that the exclusion constitutes double discrimination: once on the basis of age, and again on the basis of occupation. They further argue that many colleges and universities abuse mandatory retirement "to rid themselves of undesirable and unproductive professors, instead of dealing directly with a problem that can afflict faculty members of any age." SPECIAL COMM. ON AGING, DEVELOPMENTS IN AGING: 1989, S. REP. No. 249, 101st Cong., 2d Sess. 112 (1990) [hereinafter DEVELOPMENTS IN AGING: 1989].

[70] *See supra* note 16 and accompanying text. Mandatory coverage was recommended, however, under the President's Commission report. *Id.*

[71] *See supra* note 45 (discussing reasons why employers do not establish plans).

[72] In the past, however, many of the "richer" plans inured to the benefit of the more highly paid employees. In an effort to curb some of this abuse, Congress enacted the "top-heavy" rules in 1982. *See supra* note 10 & *infra* note 98.

[73] E. ANDREWS, *supra* note 5, at 76 (Table IV.2).

[74] *Id.* at 65 (Table III. 9).

[75] Gottlich, *The Tax Reform Act of 1986: Does It Go Far Enough to Achieve Equity Pension for Women?*, 4 WIS. WOMEN'S L.J. 1, 13 (1988).

[76] E. ANDREWS, *supra* note 5, at 65 (Table III.9).

For those fortunate enough to work for an employer who offers a retirement plan, the next obstacle to coverage is twofold: eligibility and participation. The ERISA legislation was originally designed to strengthen the rights of workers in order to ensure that promised benefits would be available upon retirement.[77] But this quagmire of rules and regulations contains some loopholes regarding eligibility, and unfortunately these loopholes disproportionately affect women. As a result, the women affected tend to be poor and are apt to stay that way. For instance, the loopholes allow some workers to be legally excluded from the plan because of part-time employment,[78] employment for less than one year[79] or job classification.[80] Exclusion on the basis of part-time employment has a particularly pernicious effect on women because approximately two-thirds of all part-time workers are female.[81] This is because

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[77] ERISA § 2, 29 U.S.C. § 1001 (1988). Most of the public outcry culminating in the ERISA legislation was over the loss of benefits, due primarily to inadequate funding, mismanagement and corruption. *See* Watson, *supra* note 4. Thus, the ERISA legislation does a good job of assuring adequate funding and providing fiduciary rules. *See* 29 U.S.C.A. §§ 1001-1014 (West 1985 & Supp. 1990) (fiduciary rules); 29 U.S.C.A. §§ 1081-1086 (West 1985 & Supp. 1990) (funding rules).

ERISA has been criticized, however, as raising the costs of establishing and maintaining retirement plans, thus reducing the incentive for such plans. This allegation was supported by the fact that the number of terminations of defined benefit plans increased after ERISA was enacted. SPECIAL COMM. ON AGING, 98th CONG., 2d SESS., THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 129 (Comm. Print 1984). *But see* Munnell, *supra* note 1, at 80. It has also been criticized for providing inadequate enforcement means. Strasser, *ERISA: A Law With No Teeth?*, NAT'L L.J., July 16, 1990, at 1, col. 4.

[78] ERISA § 203(b)(2), 29 U.S.C.A. § 1053(b)(2) (West Supp. 1990); I.R.C. § 410(a)(3) (West Supp. 1990) (requiring only workers with 1000 hours of service during a 12 consecutive month period to be included in the plan). *See also* ERISA § 202(a)(3)(A), 29 U.S.C. § 1052(a)(3)(A) (1988); I.R.C. § 410(a)(3)(A) (West Supp. 1990) (defining "year of service" as "a 12-month period during which the employee has not less than 1,000 hours of service.").

[79] 29 U.S.C.A. § 1052(a)(1)(A)(ii) (West Supp. 1990); I.R.C. §§ 410(a)(1)(A)(ii), (b)(4) (West Supp. 1990).

[80] *See* I.R.C. § 410(b)(2) (West Supp. 1990). The rationale behind this provision is unclear. One consequence of the change in the IRA rules (*see supra* note 61 and accompanying text) is that on some level equity is afforded to those employees who are excluded from an employer-provided plan, since they may contribute tax-free to an IRA. *But see supra* note 64 and accompanying text (discussing a disadvantage of IRAs).

[81] *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS 23 (Jan. 1986). One in four women are working part-time. In contrast, only one in ten men are working part-time. One in seven employed women are working part-time involuntarily because they could not find full-time work. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT IN PERSPECTIVE: WOMEN IN THE LABOR FORCE 1 (2d Qtr. 1989).

It has been suggested that many employers may deliberately limit the number of hours employees work so that they may avoid having to cover these workers under the pension

family responsibilities of child-rearing and caring for disabled family members are usually regarded as "women's work."

Exclusion on the basis of job tenure of less than one year is also likely to affect women more because women tend to have shorter job tenure than their male counterparts.[82] Another pitfall of shorter job tenure is the disproportionate effect on women of the "lapsed time" method[83] of computing credit hours. Normally, benefit credits are allocated on the basis of a year of service, but an employer is permitted to count equivalencies instead.[84] Under this method, an employee who is employed full time as of the first day of an annual period and the last day of that same period is considered to have completed a year of service. Thus, the lapsed time, rather than the actual hours worked, is counted. The advantage to this method is its administrative convenience for the plan sponsor and the subsequent reduction in the cost of plan maintenance. The problem, though, is that an employee may work the requisite number of hours during the year[85] but fail to complete a year of service for benefit purposes because she was not employed on either of the requisite dates.[86] Since women have shorter job tenure than men and are inclined to longer breaks in service for child-rearing or other family responsibilities, the lapsed time method has the potential to disproportionately disadvantage women.[87]

Exclusion on the basis of job classification is also permitted under the antidiscrimination in coverage rules.[88] These rules came into effect under ERISA to ensure adequate coverage of the rank-

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plan. *See* Gottlich, *supra* note 75, at 15.

Legislation has been introduced to provide coverage of part-time workers with 500 or more hours of service during a consecutive 12-month period. See H.R. 2577, 100th Cong., 1st Sess. (1987). This raises the problem that employers may limit more severely the number of hours part-time employees work in order to avoid covering them under the plan.

[82] *See infra* text accompanying notes 97 & 100-01 (discussing women's job tenure).

[83] Treas. Reg. § 1.410(a)(7) (1980).

[84] *Id.*

[85] *See supra* note 78.

[86] *See* Borzi, *supra* note 16, at 12 n.30. While the lapsed time method affords the employer greater administrative convenience, it does not accord flexibility to the employee. *Id.*

[87] *Id.* There have apparently been no empirical studies of the lapsed time method, so there is no direct proof that this actually disadvantages women more than men. However, this must be the case in light of other discrepancies under the retirement system which have been proven to impact disproportionately upon women. *See, e.g., supra* note 81 (discussing part-time workers).

[88] I.R.C. § 410(b) (West Supp. 1990).

and-file employees under ERISA-covered plans, although the rationale behind the exclusion of employees on the basis of job classification is unclear. "Adequate coverage", however, does not mean that *all* workers must be covered. Under TRA 86, 30% of rank-and-file employees may be excluded for no reason and this percentage may, under some circumstances, be even higher.[89] Employees who have not met the minimum age and service requirements[90] may be excluded from consideration.[91] Those excluded from the plan are usually the lower-paid employees.[92]

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[89] I.R.C. § 410(b)(1)(A) (West Supp. 1990). For plan years beginning after December 31, 1988, one of three coverage tests must be met: (1) the "percentage" test, in which the plan must benefit 70% of all non-highly compensated employees (*see infra* note 120 for the definition of "highly compensated employee"); (2) the "ratio" test, in which the plan must benefit a percentage of non-highly compensated employees that is at least 70% of the percentage of highly compensated employees benefited; or (3) the "average benefits" test, in which the employer-provided benefits, calculated as a percentage of compensation for the non-highly compensated employees and the highly compensated employees, must produce an average benefit percentage for the non-highly compensated employees greater than or equal to 70% of the average benefit percentage for the highly compensated employees. Under the latter test, the plan must also benefit a classification of employees that does not discriminate in favor of the highly compensated employees. *Id.*

I.R.C. § 401(a)(26) (West Supp. 1990) was intended to increase the coverage ratio, particularly in smaller plans. Under this provision, a plan must benefit the lesser of either 50 employees or 40% or more of all employees on each day of the plan year. This provision is a minimum threshold which applies in addition to the other coverage rules. A problem with I.R.C. § 401(a)(26), though, is that many plans require employee contributions in order to receive employer contributions. *See infra* text between notes 137 & 139. Those employees eligible to make contributions to certain plans are treated as benefiting for pupeses of I.R.C. § 401(a)(26), even though they do not actually participate. This affects many lower-paid women who cannot afford to contribute. *See* Gottlich, *supra* note 75, at 8-9.

Prior to TRA 86, a plan could meet the safe harbor coverage requirements by benefiting only 56% of the employees. *See* I.R.C. § 410(b)(1) (1982). This percentage could be even lower since the plan was and still is allowed to exclude some employees from coverage consideration. *See* I.R.C. §§ 410(a)(1), (b)(2) (West Supp. 1990).

[90] 29 U.S.C.A. § 1052(a)(1)(A) (West Supp. 1990); I.R.C. § 410(a)(1) (West Supp. 1990) (attaining age 21 or completing one year of service, whichever date is later).

[91] Also excluded are those employees covered under a collective bargaining agreement in which retirement benefits were the subject of a good faith agreement. I.R.C. § 410(b)(3) (West Supp. 1990). For a brief but insightful discussion of potential effects of the collective bargaining exclusion, see Wolk, *Discrimination Rules for Qualified Retirement Plans: Good Intentions Confront Economic Reality*, 70 VA. L. REV. 419, 435-36 (1984).

[92] *See* E. ANDREWS, *supra* note 5, at 52 (Table III.2); *see also* Gottlich, *supra* note 75, at 12-16 (discussing coverage of women). For a discussion of the general pitfalls of low-paid employees and the tax cost of private retirement plans, see Wolk, *supra* note 91. Some have advocated complete elimination of any exclusionary provision. *E.g., Pension Gamble Hearing, supra* note 31, at 45 (testimony of Judy Schub), 105 (testimony of the National Federation of Business and Professional Women's Clubs, Inc.).

The ERISA legislation permits an exclusion of nonsalaried workers, such as maintenance workers, cleaning crews, some support staff and others, usually low-paid workers, who punch a time clock.[93] Since women are often clustered in lower-paying positions,[94] they are heavily represented in this group.

b. Vesting and Benefit Determination

Once the coverage hurdles are cleared, many workers are dismayed to learn that their problems do not end. In order to be entitled to receive any benefits under a plan, one must first be vested.[95] Prior to TRA 86, the minimum full vesting period was ten years.[96] The average job tenure of women has fluctuated from year to year, but it was not until the mid-1980s that women averaged more than five years on a single job.[97] Even though they were technically covered, thus allowing that plan to qualify for special tax benefits,[98] women frequently did not receive anything under the

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[93] I.R.C. § 401(a)(5)(A) (West Supp. 1990).

[94] *See supra* notes 68-69 and accompanying text.

[95] Vesting refers to the point at which the employee's right to receive benefits under the plan becomes nonforfeitable. For a discussion of vesting and applicable statutory requirements, see MCGILL & GRUBBS, *supra* note 64, at 149-57.

One study, released several years ago, found that about 57% of all covered nonagricultural workers were entitled to benefits under a plan. Borzi, *supra* note 16, at 30 (citing Employee Benefit Research Institute Issue Brief, *New Survey Findings On Pension Coverage and Benefit Entitlement*, Aug. 1984, at 5 (Table 1)).

[96] 29 U.S.C. § 1053(a) (1982) (*amended by* Pub. L. No. 99-514, § 1113(a), 100 Stat. 2085 (1986); I.R.C. § 411(a) (1982) (*amended by* Pub. L. No. 99-514, § 1113(a), 100 Stat. 2446 (1986)).

[97] According to Gottlich, *supra* note 75, at 4 (citing BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT IN PERSPECTIVE: WORKING WOMEN (1984)), the average job tenure of women was 3.3 years. According to 1983 statistics, one-half of all women employed full-time had been on their current jobs 3.7 years. *See* Moss, *supra* note 1, at 173 (citing Sehgal, *Occupational Mobility and Job Tenure in 1983*, MONTHLY LAB. REV. 18, 19 (Oct. 1984) [hereinafter *Occupational Tenure*]).

[98] The tax benefits are threefold. First, the employer is permitted to deduct the amount of the contribution to a qualified plan. *See* I.R.C. § 404(a) (West Supp. 1990). Second, the employee is not currently taxed on the amount of the contribution or the amount of accumulation in the trust. *See* I.R.C. § 402(a)(1) (West Supp. 1990). Finally, the trust itself is exempt from tax. *See* I.R.C. § 501(a) (West Supp. 1990).

One point worthy of mention is the "top-heavy" vesting provision. This provision came into being under TEFRA in 1982, effective for plan years beginning after December 31, 1983, and applies to plans in which 60% or more of accrued benefits or aggregate of the account balances under the plan belong to key employees. See I.R.C. § 416(i)(1) (West Supp. 1990) for the definition of "key employee." If a plan is top-heavy, it must implement special faster vesting and a minimum nonintegrated benefit. See I.R.C. § 416(g)(1)(A) (West

plan because of their relatively short job tenure. Effectively, women subsidized pensions for those more highly paid male workers who did qualify.

TRA 86 shortened the minimum vesting period from ten years to five years[99] primarily because of the unfairness to women under the ten-year schedule. The new five-year minimum vesting schedule appears to be an equitable amendment on the surface since the current median job tenure for women is 5.4 years.[100] A closer examination, however, shows that the lowest-paid women have significantly shorter job tenures than five years.[101] So while the 86 Act will to some extent narrow the gap in benefit receipts between men and women, it nevertheless does little to improve the overall statistics of women and poverty.[102] The result is inadequate legislation

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Supp. 1990) for the definition of "top-heavy." The top-heavy rules were originally designed to curb abuses inherent in professional corporations (such as those commonly found in the legal and medical professions), in which special tax benefits were accorded plans while the majority of benefits inured to the advantage of the higher-paid employees (e.g., doctors and lawyers), with very little benefits being funnelled to the lower-paid support staff, many of whom were women.

The top-heavy rules have been hailed by women's groups as allowing more women to vest and to actually receive a benefit under the plan, since these rules benefit the lower-paid, shorter-term worker. *See* Gottlich, *supra* note 75, at 14. For a discussion of the pros and cons of terminating the top-heavy rules, see *id.*

[99] Tax Reform Act of 1986, Pub. L. No. 99-514, Title XI, § 1113, 100 Stat. 2085, 2446, amending 29 U.S.C. § 1053(a)(2)(1982); I.R.C. § 411(a)(2) (West Supp. 1990). An alternative vesting period may be used under which a participant must be fully vested after seven years, and would begin to initially vest after three years of service. Employees who are covered under a multi-employer plan, however, remain subject to the 10-year vesting rule. The new minimum vesting provision applies to plan years beginning after December 31, 1988. Tax Reform Act of 1986, Pub. L. No. 99-154, Title XI, § 1113, 100 Stat. 2085, 2447.

[100] Carey, *Occupational Tenure in 1987: Many Workers Have Remained in Their Fields*, MONTHLY LAB. REV. 4 (Oct. 1988). The median job tenure, in general, has increased in the last few years. This is due in part to the aging of the labor force. *See id.* at 4-5. The median job tenure of men on a single job is currently 7.9 years. *Id.* at 4 (Table 1). The current law remains inequitable, however, in its treatment of women in multi-employer plans, since the minimum vesting period under those plans is still 10 years. *See supra* note 99.

I maintain that median job tenure is an inappropriate indicator of inequality of pension coverage. The *median* tenure is, by definition, skewed to the high end of the scale. That is, it does not reflect the fact the lower-paid women have job tenures significantly less than 5.4 years. A more appropriate criterion is a ratio of job tenure to salary scale. *See infra* note 101 and accompanying text.

[101] For instance, cashiers have an average job tenure of 2.4 years; file clerks, 2.5 years; child care workers, 2.7 years; sales counter clerks, 3.1 years; receptionists, 3.3 years. Carey, *supra* note 100, at 9 (Table 1).

[102] *See supra* notes 35-54 and accompanying text. *But see* GAO REPORT, *supra* note 19, at 6 (Figure 1) (arguing there will be no vesting discrepancy between men and women under

enacted to appease the more vocal critics who have complained about the obvious pro-male bias of the system.

If a worker is covered under a plan and fully vested, the next hurdle to clear is the *amount* of benefits in which the worker is vested. If covered under the plan but fully vested in little or nothing, the plan will not go very far toward providing retirement security. Instead, it represents an empty promise.[103] Most benefits are determined under formulas based on salary earned and employment longevity.[104] Both of these factors present problems for female workers, causing them to receive lower overall benefits than their male counterparts.[105]

Another problem with benefit determination is the practice of "backloading" benefits in which greater weight is given to later work years when determining the amount of benefits a retiree will receive.[106] Again, this has an invidious effect on women because of their shorter job tenure.

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the new rules).

[103] This comes close to the original 1974 rationale behind the ERISA legislation—to provide protection to the workers so that their promised benefit would be there when they retired. *See* Pub. L. No. 93-406, Title I, 88 Stat. 831 (1974), codified at 29 U.S.C. § 1001 (1988); *see also supra* note 77 and accompanying text.

[104] This type of formula is known as a "unit benefit formula." Under this formula, the benefit is determined as either a percentage (usually 1% to 2%) of compensation ("compensation" being specifically defined) or a percentage of average compensation for a specified number of years prior to retirement multiplied by the number of years of employment with the employer maintaining the plan. D. McGILL & D. GRUBBS, *supra* note 64, at 105-09. Another type of benefit formula is the "flat benefit formula," in which the benefit is a percentage of compensation to which the employee is eligible after a minimum period of time. In the event that an employee retires without the minimum period of service, the benefit will be reduced proportionately. *Id.* at 109-10.

[105] *See supra* notes 53, 68 & 69 and accompanying text. One study has concluded that median increase in benefits attributable to the faster minimum vesting schedule of TRA 86 will amount to approximately five percent of compensation. GAO REPORT, *supra* note 19, at 7. The dollar increase for men, however, is twice that of women, although the Report concluded that the faster minimum vesting schedules would otherwise affect men and women equally. *Id.* at 2, 6.

[106] An example of backloading is a formula which will provide a smaller percentage benefit for the earlier years of service (i.e., a benefit of 1% of compensation for the first 10 years of service) and a larger percentage benefit for later years of service (i.e., 1.5% of compensation for any years of service over 10). This practice is tolerated to an extent under both ERISA and the Internal Revenue Code. *See* 5 U.S.C. § 8339(a) (1988); I.R.C. § 411(b) (West Supp. 1990). The discrimination inherent in backloading benefits is evident from the fact that the disparity in job tenure of men versus women increases dramatically with age. For instance, in the age 60-64 range, men averaged 23.9 years on a single job, while women averaged 14.5 years on a single job. Carey, *supra* note 100, at 5.

This discussion of vesting and determination of benefits raises the important issue of portability, which Congress has never acted upon—although it has had the opportunity on a number of occasions—and which is currently pending in the Pension Portability Act.[107] In what has been termed its most "radical" form, portability involves transferring unvested credits from one plan to another.[108] Under a more conservative approach, portability would permit the transfer of vested pension credits or accrued benefits from one job to another.[109] Under the radical form, a worker's benefits would vest earlier. Under either approach, the worker would be able to transfer credits upon changing jobs. The advantages for workers in general and women in particular are obvious.[110] Because most benefit formulas calculate benefits on the basis of a percentage of highest salary and number of years of service,[111] a worker who spends a few years at several jobs may vest in several plans but ultimately receive fewer benefits than if she had spent all her working years with a single employer.[112] Not only will the ultimate amount of the benefit itself be less but also, since most private

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[107] S. 685, 101st Cong., 2d Sess., 135 CONG. REC. 3236 (1990). There have been four pension portability bills introduced since 1987. For a discussion of these, see PENSION POLICY AND SMALL EMPLOYERS, *supra* note 44, at 135-38. The portability issue is likely to surface again when the 102nd Congress considers pension-simplification legislation.

[108] Gottlich, *supra* note 75, at 18. The radical form is very problematic for a number of reasons, including how to translate credits received under one type of plan in terms of credits and benefits under another type of plan. For instance, what amount of benefit should be given to an employee previously covered under a plan less generous than his current plan? Who pays this benefit, particularly if the former employer is no longer in existence? How does one translate benefits under a defined contribution plan in term of benefits under a defined benefit plan? There is also a difference among portability of credits, portability of benefits and portability of assets; there is disagreement as to whether all of these should be portable. *See generally* STAFF OF JOINT COMM. ON TAXATION, 100TH CONG., 2D SESS., PROPOSALS AND ISSUES RELATING TO THE PORTABILITY OF PENSION PLAN BENEFITS (Joint Comm. Print 1988) (discussing issues and legislative proposals relating to portability of pension plan benefits).

[109] A voluntary portability provision which allowed the transfer of vested benefits was included in one of the earlier drafts of ERISA, but omitted in the final version. Gottlich, *supra* note 75, at 19 n.127. ERISA did provide some limited portability by allowing tax-free rollovers to another qualified plan or to an individual retirement account within 60 days. I.R.C. § 402(a)(5) (West Supp. 1990).

[110] *See supra* notes 100-01 and accompanying text; *see also* Moss, *supra* note 1, at 176.

[111] *See supra* note 104 (outlining benefit formulas).

[112] Outside of the benefit formula, the larger the amount of benefits/assets accumulated, the better the investment potential. Thus, a worker who is vested in several plans but in a small amount of benefits in each plan may be disadvantaged from an investment standpoint. She is definitely disadvantaged under the usual unit benefit formula.

plans are not indexed for inflation,[113] the purchasing power of the final benefit will be reduced.[114] Another consideration in favor of portability is that many workers, particularly the lower-paid ones, currently receive a pre-retirement distribution upon leaving the plan.[115] Most low-paid workers spend this distribution without rolling it over into another plan,[116] thus substituting current consumption for future retirement security.

c. *Integration*

Another problem facing the female worker is integration of pension benefits with Social Security.[117] Integration is a legalized form of coverage discrimination.[118] It involves a reduction of pension

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[113] Indexing affects the employee in two ways: (1) it affects the more mobile employee from the time of termination of employment to retirement, since benefits will be calculated on the nonindexed wage at termination; and (2) it affects the retiree or survivor from the time of retirement to the date of death, with the longer-lived individual more severely affected (*see infra* note 158 and accompanying text). A plan that is not indexed for inflation will never be able to provide adequate retirement security for the longer-lived retiree, because that retiree will always be subject to the ravaging effects of inflation. Thus, the retiree will never be able to predict the spending power of his retirement benefits with any degree of certainty. *See* Munnell, *supra* note 1, at 65-68. For a suggested indexing plan, see *id.* at 73.

[114] *See infra* note 163 and accompanying text.

[115] *See* E. ANDREWS, *supra* note 5, at 58, 162.

[116] *See id.* TRA 86 purported to deal with this problem by imposing a new 10% penalty tax on pre-retirement distributions. *See* I.R.C. § 72(t) (West 1988 & Supp. 1990). Secretary of Labor Elizabeth Dole, in discussing the Pension Portability Bill of 1990, S. 685, 101st Cong., 1st Sess., said that one purpose of the Bill is to prevent the squandering of assets "when distributed prior to retirement." Remarks of Dole, *supra* note 16, at ¶ 26,135.

[117] Integration is not only a problem for women, but also for many other low-paid workers. It is estimated that 56% of covered workers in medium and large companies will receive no benefits or reduced benefits because of Social Security integration. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS, 1984 11 (1985). It is addressed as a woman's problem here because it primarily affects lower-paid workers. *See* Moss, *supra* note 1, at 174. Since women constitute the majority of lower-paid workers, it follows that integration is predominantly a woman's problem. *See supra* notes 68, 69 & 74 and accompanying text.

[118] *See* I.R.C. § 401(a)(5) (West Supp. 1990); *see also* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) (upholding integration of pension benefits with worker's compensation awards and approving Social Security integration in dictum). The term "discrimination" in a technical sense under ERISA refers to discrimination in coverage in which higher-paid workers are favored over lower-paid workers. *See* I.R.C. § 410(b)(1)(A) (West Supp. 1990). This concept offends the normal antidiscrimination in coverage rules. *See* I.R.C. § 410(b) (West Supp. 1990).

For a discussion of the history of integration and related issues, see J. SCHULZ & T. LEAVITT, PENSION INTEGRATION: CONCEPTS, ISSUES AND PROPOSALS (1983).

benefits by a portion of the worker's Social Security benefits,[119] and is a throwback to the days when pension benefits were considered to be a gratuity from the employer. The theory behind integration is that the employer is required to contribute to the employees' retirement security through Social Security contributions. In retirement, Social Security replaces a greater percentage of the lower-compensated employees' income than that of the more highly paid employees.[120] By integrating its plan with Social Security, the employer may provide the same rate of replacement of pre-retirement income to all of its workers. From a broader policy rationale, integration will prevent lower-paid employees[121] from receiving more than 100% of their pre-retirement income.[122] This theory does not take into account, however, the fact that higher-paid employees are better able to save toward retirement, thus completing the third leg of the "three-legged stool" of retirement security. Therefore, replacement of pre-retirement income should decrease as income increases.[123] This theory also fails to take into account the fact that, in most cases, Social Security does not adequately replace the pre-retirement income of lower-paid workers.[124]

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[119] The mechanics of integration are technically complex and are derived from revenue rulings. *See, e.g.*, Rev. Rul. 71-446, 1971-2 C.B. 187.

[120] *But see* Graetz, *supra* note 1, at 873 (stating Social Security system is inadequate, even for low-income workers, to maintain pre-retirement living standards). For ERISA purposes, "highly compensated employee" is a defined term covering any employee who received compensation from the employer in excess of $75,000, who received compensation from the employer in excess of $50,000 and was in the "top paid group" of employees for that year, who was a 5% owner at any time during the preceding five-year period or who was at any time an officer receiving compensation above a stated amount. I.R.C. § 414(q)(1) (West Supp. 1990). *But see* S. 2901, 101st Cong., 2d Sess., 136 CONG. REC. 10638 (1990) (amending the definition of highly compensated employees).

[121] Some higher-paid short-term employees may also be affected.

[122] A retiree should need much less than his pre-retirement level of income. Most retirees have paid off their mortgages by this time, and have equity in their homes which they may use to purchase a smaller house or a condominium. They are also afforded tax advantages in selling their former residence. *See* I.R.C. § 121 (West Supp. 1990). Furthermore, the retiree will not have to pay the tax cost of working, such as Social Security payroll tax, some state and municipal taxes and some federal taxes. In addition, some retirement benefits are not subject, or not subject in full, to federal income tax. *See* I.R.C. § 86 (West Supp. 1990). Finally, the retiree will not have the real costs of working, such as commuting expenses (and possibly, the cost of domestic help or child or dependent care). The retiree may, however, have increased medical and convalescence costs associated with advancing age.

[123] For a discussion of the pros and cons of integration, see Borzi, *supra* note 16, at 45-46.

[124] For further discussion, see Graetz, *supra* note 1, at 872-74; Munnell, *supra* note 1, at 60.

Prior to TRA 86, a fully vested long-time worker might find upon retirement that her benefits had been "integrated out" and her entitlement to benefits under the plan was illusory. Thus, she would only be entitled to receive Social Security benefits. Congress recognized the unfairness of this situation, and under TRA 86 provided that workers covered under an integrated plan must now receive a minimum benefit. As a result, workers will lose only half of their employer-provided benefits to Social Security integration.[125] In assessing the equity of this provision, the optimist/pessimist game of determining whether the cup is half-full or half-empty comes to mind; that is, it all depends on one's perspective. From Congress' perspective, half of the workers' plan benefits are protected. From the workers' perspective, however, half of those benefits may be dissipated. And while receiving half of the benefits is certainly better than receiving none, from the workers' perspective it would be better if the dissipation factor were zero.[126]

Another problem with Social Security integration is that TRA 86 may not necessarily accomplish its desired objective. Employers who wish to avoid the minimum benefit provision will merely establish a less generous nonintegrated plan.[127]

d. Benefit Insurance Coverage

The federal government insures certain pension benefits of vested participants through the Pension Benefit Guaranty Corpo-

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[125] Pub. L. No. 99-514, Title XI, § 1111(c)(1) (1986) (codified at I.R.C. § 401(a)(5),(l) (West Supp. 1990). A problem under TRA 86, however, is that it only applies to benefits attributable to plan years beginning after December 31, 1988, so until January 1, 1989, all benefits may be integrated out. Legislation has been introduced to abrogate this effect by requiring all benefits for workers retiring after December 31, 1988 to be calculated under the new rules. H.R. REP. No. 2613, 100th Cong., 1st Sess. (1987). This legislation also mandates the elimination of Social Security integration after January 1, 2000. *Id.*

[126] It is estimated that more than half and perhaps as many as two-thirds of all plans are integrated. J. SCHULZ & T. LEAVITT, *supra* note 118, at 25.

Integration was a pre-ERISA concept. *See* Revenue Act of 1942, Pub. L. No. 77-753, § 162, 56 Stat. 798, 862-67; *see also supra* note 118. The sagacity of this concept was debated during the ERISA proceedings, with the result that both the House Ways and Means Committee and the Conference Committee agreed to a moratorium on further integration until the issue could be more carefully considered. Ultimately, however, Congress rejected the moratorium under pressure from management. *See* Munnell, *supra* note 1, at 59.

[127] Borzi, *supra* note 16, at 47. Still another problem is that the minimum benefit level is more costly for defined benefit plans than for defined contribution plans. This may accelerate the trend toward defined contribution plans. *See infra* note 139 and accompanying text.

ration (PBGC), a government agency created under ERISA.[128] The insurance protection, however, does not apply to plans of small professional service employers.[129] This is a curious exclusion, considering that Congress in 1982 enacted the top-heavy rules specifically to obviate problems arising with coverage of lower-paid workers in professional service corporations.[130] The major problem was that professionals either excluded the support staff—many of whom were women—or gave them a separate plan with vastly disproportionate benefits. The top-heavy rules have been hailed by women's groups as providing more benefits to a greater number of women.[131] However, the PBGC coverage exclusion indicates that Congress still does not take seriously the issue of women's coverage inequity under the private retirement system.

e. Defined Benefit Versus Defined Contribution Plans

A final obstacle to adequate retirement security under the private system is the dwindling number of defined benefit plans. Under a defined benefit retirement plan, the worker is promised a fixed benefit at retirement.[132] Thus, the employer assumes the risk of any investment downturns. Under a defined contribution retirement plan, an account is established for each employee, and the employer promises only that the employee will receive his or her account balance upon retirement.[133] Thus, under a defined contribution plan, the employee assumes the investment risk. Defined contribution plans raise several problems for workers in general, and one for women in particular. On the general level, since the employee assumes the risk it is impossible to predict with certainty the spending power of the ultimate benefit, unless the employee is

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[128] For a discussion of the role of the PBGC, see D. McGILL & D. GRUBBS, *supra* note 64, at 55, 582-639.

[129] 29 U.S.C. § 1321(b)(13) (1988). The exclusion applies to plans of professional service employers with no more than 25 active plan participants. *Id.*

[130] *See supra* note 98.

[131] *See id.*

[132] *See* ERISA, § 3(35), 29 U.S.C. § 1002(35) (1988). This benefit is usually determined as a percentage of final salary (or an average of several final salary years) multiplied by the number of years of service. *See supra* note 104 (outlining benefit formulas).

[133] ERISA § 3(34), 29 U.S.C. § 1002(34) (1988). This account may consist of employer contributions, employee contributions (if permitted), investment earnings on the contributions and any forfeitures allocated to the employee's account. *See* D. McGILL & D. GRUBBS, *supra* note 64, at 112.

very close to retirement age and there are no downturns in the economy. Workers may in some cases discover that either they cannot afford to retire and must continue working or they must lower their standards of living after retirement.

Another general problem is that defined contribution plans frequently make lump sum distributions. Unless the employee is extremely knowledgeable about investment decisions or extremely lucky (or both), the lump sum benefit will be vulnerable to downswings in the economy, unlike a fixed annuity. Congress has expressed a clear preference for the annuity form of benefit for adequate retirement security.[134] A lump sum distribution not only conflicts with this preference but emphasizes the lack of a coherent national retirement policy.[135] One final problem for all workers covered under defined contribution plans is that such plans are generally not insured by the federal government.[136] Thus, in addition to assuming the investment risks, the employee must also assume the risk that the employer might become bankrupt or otherwise terminate the plan.[137]

Women, in particular, are vulnerable under defined contribution plans because many of these plans require employee contributions in order to participate or to receive greater benefits under the plan. In the latter case, the employer either matches the employee's contribution or otherwise contributes an amount which is determined by the amount of the employee's contribution. Since women generally receive lower wages than men,[138] the effect on women is self-perpetuating since as a group they have less disposable income than men.

Despite the retirement security problems that defined contribution plans present, these plans are increasing as a percentage of all primary plans, while the proportion of defined benefit plans is

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[134] *See* Retirement Equity Act of 1984, Pub. L. No. 98-397, § 103, 98 Stat. 1426, 1429-33 (amending ERISA § 205, 29 U.S.C. § 1055 (1982)).

[135] Query, whether the federal government should continue to subsidize capital accumulation plans, such as defined contribution plans, through tax incentives. For a discussion of this issue, see Borzi, *supra* note 16, at 40-41.

[136] *See supra* notes 128-31 and accompanying text.

[137] Plan terminations are more closely regulated in the case of defined benefit plans, because they are scrutinized by both the Internal Revenue Service (IRS) and the PBGC. Terminations of defined contribution plans are scrutinized only by the IRS.

[138] *See supra* notes 68-69 and accompanying text.

decreasing.[139]

2. Social Security Benefits. In addition to the problems previously mentioned for nonworking women under the Social Security system, there is also a problem for working women. This problem arises with survivor benefits and two-earner families. For two-earner families, the survivor benefit is the greater of the survivor's primary benefit[140] or the primary benefit plus the difference between the primary benefit and the decedent's benefit.[141] Thus, the survivor benefit is the greater of the survivor's primary benefit or the secondary (pure survivor's) benefit. This means that the survivor may pay the maximum Social Security tax,[142] but would be entitled to only a survivor benefit. Thus, her own earnings record would be disregarded; despite possibly years of maximum contributions to the Social Security system, she would receive nothing for her contributions.[143]

This provision, as with most of the other points addressed in this Article, may affect men also. However, it potentially affects more women than men because women tend to live longer than men,[144] and also because the wages of men, on the whole, are higher than

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[139] Clark, *Defined Contribution Plans: Are They the Pension of the Future?*, in WHAT IS THE FUTURE FOR DEFINED BENEFIT PENSION PLANS? 5, 6 (1989) [hereinafter FUTURE FOR DEFINED BENEFIT PLANS?]. For further discussion of the contrast between defined benefit and defined contribution plans, see COMM. ON WAYS AND MEANS, 100TH CONG., 1ST SESS., RETIREMENT INCOME FOR AN AGING POPULATION 344-48 (Comm. Print 1987).

Although defined benefit plans provide greater retirement security, they present problems with job mobility. Because benefits under such plans are determined by salary and length of service, workers who shift jobs will often find themselves disadvantaged under the defined benefit plan. *See supra* notes 111-12 and accompanying text. Since younger workers are generally more likely to change jobs than older workers, there is a conflict between younger workers and older workers as to the desirability of defined benefit versus defined contribution plans.

For a general discussion of the problems of women under defined contribution plans, see Gottlich, *supra* note 75, at 15-16.

[140] The term "primary benefit" is used throughout this article to refer to benefits to which the worker is entitled in her own right based on her own work history, as opposed to "secondary benefits," which is used to refer to benefits received as a result of a family member's (usually a spouse's) participation in the workforce and coverage under a retirement plan.

[141] 42 U.S.C.A. § 402(b)-(e) (West 1983 & Supp. 1990).

[142] The rate is currently 15.3%, which includes both Old-Age, Survivors and Disability Insurance as well as Hospital Insurance. *See* I.R.C. § 3111 (West 1988).

[143] Some argue that joint tax returns should mean joint social security contributions. *See* Leonard, *supra* note 57, at 1194.

[144] *See infra* note 158 and accompanying text.

those of women.[145]

3. Working Women and Retirement Savings Incentive. In addition to being inadequately protected under both the Social Security and the private retirement systems, women are not encouraged to save on their own for their post-retirement years. For instance, the rules pertaining to IRAs[146] provide that an individual may not make a deductible contribution to an IRA if that individual or the individual's spouse is covered under an employer-provided retirement plan.[147] The shortsightedness of these rules is particularly unfortunate for women. The rules fail, for example, to consider whether the individual is vested under the employer's plan[148] and, if vested, what amount of benefits the individual will derive from the plan. Those benefits may be less than the amount of benefits the individual could derive from contributing to her own IRA.[149] The rules also fail to take into account the effect of the lack of portability,[150] as well as the effect of integration, on pension benefits.[151]

In addition to the foregoing considerations, the rule denying deductible contributions because of spousal coverage also fails to consider the possibility of divorce. While REA amended the ERISA provisions to provide greater equity in the treatment of retirement benefits upon divorce,[152] other factors may prevent either spouse from receiving adequate benefits.

Statistics indicated that the benefits of IRAs were disproportionately balanced in favor of higher income individuals.[153] In this sense, it was appropriate for the 99th Congress to consider chang-

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[145] *See supra* note 68 and accompanying text.

[146] *See supra* notes 61-65 and accompanying text.

[147] *See supra* notes 62-63 and accompanying text.

[148] *See* I.R.C. § 219(g) (1988).

[149] The benefits an individual derives are twofold: (1) a tax deductible contribution to the IRA (which means that the contribution is made with before-tax dollars); and (2) tax-free accumulation on the contribution. *See* I.R.C. § 219(a) (1988). Thus, the benefits of an IRA are much greater than an ordinary savings account, as far as the tax treatment is concerned. Also, many women may be entitled to contribute more to an IRA than will be contributed on their behalf under their employer-provided plan. *See supra* notes 52-54 and accompanying text.

[150] *See supra* notes 107-16 and accompanying text.

[151] *See supra* notes 117-26 and accompanying text.

[152] *See supra* note 9.

[153] *See* EMPLOYEE BENEFITS RESEARCH INSTITUTE, INDIVIDUAL RETIREMENT ACCOUNTS: CHARACTERISTICS AND POLICY IMPLICATIONS 18 (1984) (Table 18).

ing the general IRA rules. But the statistics also showed that women were more likely to contribute the maximum amount to an IRA.[154] Surely the goals of curbing the abuse by higher income individuals and achieving greater fairness for lower income individuals could have been reconciled in a manner more equitable to women.[155]

C. Women As Secondary Recipients: Survivors, Dependents, Former Spouses

REA greatly expanded the rights of secondary recipients under the private retirement system.[156] It provided automatic joint and survivor coverage upon the death of the spouse and clarified that pension assets are considered part of the equitable estate to be distributed upon divorce.[157] There are, however, lingering problems for survivors, including in particular the problem of adequacy of spousal benefits. Women live longer than men.[158] Also, men tend to marry younger women. This tends to create two problems for women. First, studies have shown that elderly persons living alone are much more economically vulnerable and much more likely to live in poverty.[159] Five times more women than men are wid-

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[154] *See* PENSIONS IN THE U.S. ECONOMY, *supra* note 24, at 11 (1988).

[155] For instance, there is no indication in the legislative history of TRA 86 that the problem of inequities in benefits for women in general or homemaker benefits in particular was ever considered. Instead, the IRA changes were based purely on fiscal policy considerations.

[156] *See supra* note 9. Similar provisions had been enacted a few years earlier which affected smaller groups of women. *See, e.g.*, Foreign Service Act of 1980, Pub. L. No. 96-465, 94 Stat. 2074 (codified as amended at 22 U.S.C. §§ 3901-4226 (1982)); Social Security Amendments of 1983, Pub. L. No. 98-21, § 132, 97 Stat. 65, 93-94 (codified at 42 U.S.C. § 402 (1985)) (amending Pub. L. No. 97-35, §§ 1116-29, 95 Stat. 357, 628-43); Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, Title X, 96 Stat. 718, 730-38 (1982)(codified in scattered sections of 10 U.S.C.).

[157] Retirement Equity Act of 1984, Pub. L. No. 98-397, §§ 103, 203, 98 Stat. 1426, 1429-33, 1440-41 (1984) (amending ERISA § 205, I.R.C. § 401(a)(11) (West 1988) and adding I.R.C. § 417 (West 1988)); *see also id.* at §§ 104(a), 204(a), 98 Stat. at 1433-36, 1445 (adding ERISA § 206(d) (3)(A), I.R.C. § 401 (a)(13)(B) (West 1988).

[158] *See* DEP'T OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE U.S. 72-73 (1989) (calculating average lifetime in years by sex and stating life expectancy by race, sex and age).

[159] *See* COMMONWEALTH FUND STUDY, *supra* note 22, at 5-9 (statistics showing that American society is aging and that elderly women are generally poorer); AGING ALONE, *supra* note 35 (testimony recognizing the special needs of the elderly and suggesting federal policies to aid older women).

owed.[160] Widows constitute two-thirds of all elderly persons living alone and more than eighty percent of all women living alone.[161] Second, the vast majority of private pension plans are not indexed for inflation.[162] Therefore, the survivor will find her purchasing power greatly diminished over the duration of her life.[163]

1. Retirement Benefits As Deferred Compensation. Another more pervasive problem for both primary and secondary recipients is that Congress still does not recognize the fact that pension benefits are deferred compensation earned by the worker.[164] Pensions are important employment benefits and should no longer be regarded as a gratuity bestowed upon the employee out of employer benevolence. Under an ideal economic model, if an employer does not offer a retirement plan to its employees, those employees should receive higher current compensation. Indeed, the tax benefits of qualified retirement plans are structured under the concept that contributions to such plans are derived from salary.[165]

Furthermore, the tax expenditure for qualified pension plans is significant, projected for 1991 to be $61.8 billion attributable to employer plans and $9.3 billion attributable to IRAs.[166] These constitute the largest revenue expense (and loss to the fisc) of any fed-

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[160] *See* AGING ALONE, *supra* note 35, at 8-9.

[161] COMMONWEALTH FUND STUDY, *supra* note 22, at 8.

[162] *See supra* note 113 and accompanying text.

[163] *See id.* This problem may affect many of the elderly as longevity increases. Social Security benefits are, however, indexed for inflation. The benefit increase occurs whenever the Consumer Price Index rises more than 3% during any specified period. *See* Social Security Amendments Act of 1983, Pub. L. No. 98-21, § 112, 97 Stat. 65, 73-76 (1983).

[164] *See* Moss, *supra* note 1, at 171; Watson, *supra* note 4.

[165] *See* I.R.C. § 404(a) (West 1988 & Supp. 1990). Unlike salary, the employee is not currently taxed on the amount of the contribution on his behalf that is held in trust. Nor is the employee taxed on any accumulation attributable to the contribution. The employee, however, does not receive a current benefit from the contribution (other than being covered under a retirement plan) and since the employee's benefit may not vest for several years, she may never receive any benefit under the plan. The doctrine of constructive receipt does not apply to tax contributions made on behalf of employees to qualified retirement plans. *See* Rev. Rul. 60-31, 1960-1 C.B. 174 (applying doctrine of construction receipt); I.R.C. § 402(a)(1) (West 1988 & Supp. 1990). If it did, it would frustrate the policy behind tax qualified retirement plans.

[166] *See* L. OZANNE, *supra* note 3, at 14 (Table 3). Ozanne further predicts that for 1992 the budget cost will be $67.5 billion for employer plans and $10.3 billion for IRAs. *Id. But see id.* at 13 n.16. For a view that departs from the theory that qualified plans represent tax expenditures, see Zelinsky, *The Tax Treatment of Qualified Plans: A Classic Defense of the Status Quo*, 66 N.C.L. REV. 315 (1988).

eral budget item.[167] Thus, the federal government should have an interest in covering as many workers as possible under the private retirement system in order to prevent overburdening such public benefit programs as supplemental security income.[168]

Pension benefits should be regarded as belonging to the employee who earned them. Indeed, this is the underlying concept behind portability,[169] but plan sponsors do not always view benefits this way. For instance, the spouse of a deceased worker may receive only half of the worker's benefits, even though the deceased worker never received any benefits under the plan because of his early death.[170] Furthermore, if a couple has been married less than a year, the plan can, under some circumstances, refuse to provide any benefits to the surviving spouse,[171] notwithstanding the fact that such a denial may be contrary to the wishes of the decedent. Moreover, no consideration is given to factors relevant at the time of the decedent's death, such as whether the survivor may have been pregnant or disabled. Nor is any consideration given to factors relevant at the time of marriage, such as whether the wife wed with the expectation and promise of financial security in return for which she gave up valuable opportunities.[172]

One rationale for the denial of benefits for short-term marriages is that, for such marriages, life insurance is usually a better alternative.[173] Life insurance, however, is frequently payable in a lump sum and may be severely depleted by funeral and last illness expenses of the decedent.

2. Recent Cases. a. Fox Valley. Secondary recipients have not fared well during the last few years, particularly in the Seventh Circuit. For instance, in the case of *Fox Valley & Vicinity Con-*

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[167] *See* L. OZANNE, *supra* note 3, at 13-14.

[168] *See* 42 U.S.C. §§ 1381-83(c) (1988); *see also supra* note 22 (discussing Supplemental Security Income).

[169] *See supra* notes 107-16 and accompanying text. For an excellent discussion of the problems of trust aspects of ERISA, see Fischel & Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105 (1988).

[170] *See* I.R.C. § 417(b)-(c) (West 1988 & Supp. 1990).

[171] *See* I.R.C. §§ 401(a)(11)(D), 417(d) (1988) (pertaining to ESOPs and defined contribution plans which are not subject to the minimum funding standards). For a general discussion of the history and effect of this provision, see Watson, *supra* note 4.

[172] *See* Watson, *supra* note 4.

[173] *See* Gustavson & Trieschmann, *Universal Life Insurance As An Alternative to the Joint and Survivor Annuity*, 40 J. RISK AND INSURANCE 529 (1988) (advocating single annuity plus life insurance as an alternative to pensions for some retirees).

struction Workers Pension Fund v. Brown,[174] the Seventh Circuit transformed a waiver of retirement benefits into the ultimate secondary recipient situation involving a perceived conflict between divorce and survivorship benefits.

James and Laurine Brown were married in 1982 and divorced in 1986. In a divorce agreement drawn up by Laurine Brown's attorney, Laurine waived any rights to benefits under her husband's pension plan. The waiver did not constitute a qualified domestic relations order (QDRO).[175] The plan provided that the beneficiary of death benefits under the plan should be the person designated in the last written notice received prior to the participant's death.[176]

After the divorce, the Browns continued to live together intermittently. James died about a year after the divorce. Laurine was the designated beneficiary of James' pension benefits. When Laurine made a claim for those benefits, the plan sponsor interpleaded. The lower court denied Laurine's motion for summary judgment and decreed that the benefits should go to James' mother pending evidence of intent.[177] The case was then appealed to the Seventh Circuit, which affirmed the lower court decision.[178] The Seventh Circuit later reheard the case *en banc* and affirmed its original decision.[179]

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[174] 879 F.2d 249 (7th Cir. 1989), *aff'd on rehearing*, 897 F.2d 275 (7th Cir. 1990) (en banc).

[175] The ERISA legislation contains an anti-alienation clause that prevents pension benefits from being used for purposes other than retirement. ERISA § 206(d), 29 U.S.C. 1056(d) (1988); I.R.C. § 401(a)(13) (West 1988 & Supp. 1990). An exception to the anti-alienation provision is the qualified domestic relations order (QDRO) that enables a former spouse to bring retirement assets into the property settlement arena. ERISA § 206(d)(1), (3); 29 U.S.C. § 1056(d)(3) (1988); I.R.C. §§ 401(a)(13)(B) (1988), 414(p) (West 1988 & Supp. 1990). For a discussion of the historical background and effect of QDROs, see Watson, *supra* note 4.

[176] *Fox Valley*, 879 F.2d at 251.

[177] Fox Valley & Vicinity Construction Workers Pension Fund v. Brown, 684 F. Supp. 185, 190 (N.D. Ill. 1988), *aff'd*, 879 F.2d 249 (7th Cir. 1989).

[178] *Fox Valley*, 879 F.2d at 254. There is now a split in the circuits on the issue of whether the beneficiary designation controls. The Sixth Circuit, in a case with facts similar to those of *Fox Valley*, has recently held that the beneficiary designation controls on the ground that ERISA pre-empts state law on this issue. *See* McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990), *reh'g granted*, 1990 U.S. App. Lexis 19935 (not recommended for full text publication).

[179] Fox Valley & Vicinity Construction Workers Pension Fund v. Brown, 897 F.2d 275, 282 (7th Cir. 1990).

The Seventh Circuit gave multiple reasons for its holding. First, if the Browns had intended to secure an interest in the death benefits, they could have done so with a QDRO, or they could have omitted altogether any mention of pension benefits from the divorce agreement, or James could have redesignated Laurine as his beneficiary.[180] Judges Easterbrook, Manion, Bauer and Ripple dissented in the *en banc* decision, pointing out that the majority decision requires the plan to ignore its own written designation rule.[181] They also point out that contrary to the conclusion of the majority, ERISA's spendthrift clause appears to apply to beneficiaries, as well as participants.[182] In a separate dissent, Judge Ripple, joined by Judges Bauer, Easterbrook and Manion, argued that it is quite plausible to read the divorce agreement as establishing nothing more than Laurine's waiver of her right to insist on a QDRO as part of the division of marital property.[183]

As to the majority's point on James' redesignation, Judge Ripple's dissent made the very cogent point that James knew about the designation already on file. James was thus entitled to conclude that, even if Laurine had waived any interest in the retirement benefits at the time of the divorce, his decision not to change the beneficiary designation amounted to a redesignation. After all, he had been informed at the time he made the original designation that a change could be effected only by coming to the office and changing the beneficiary designation in writing.[184] According to the dissent, the question of redesignation should have been at least a triable issue of fact.[185]

The dissenters also questioned the validity of the waiver. They argued that not only does the waiver contradict the plan's written designation rule but also it constitutes a unilateral anticipatory gift which is not enforceable under state law.[186]

Still another problem inherent in this decision, and a point

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[180] *Fox Valley*, 879 F.2d at 253; *Fox Valley*, 897 F.2d at 279-80.

[181] 897 F.2d at 283 (Easterbrook, J., dissenting). Judge Ripple, who dissented in the original decision, had a separate dissent in the en banc decision. He was joined in this dissent by Judges Easterbrook, Bauer and Manion. *Id.* at 284-85 (Ripple, J., dissenting).

[182] *Fox Valley*, 897 F.2d at 283 (Easterbrook, J., dissenting).

[183] *Fox Valley*, 897 F.2d at 285 (Ripple, J., dissenting).

[184] *Id.*

[185] *Id.*

[186] *Fox Valley*, 897 F.2d at 283 (Easterbrook, J., dissenting).

which the dissent does not make, is that the majority presumes a very high degree of employee cognizance and understanding of plan terms. With the present complexity and constant change in the retirement laws,[187] it is extremely doubtful that the average worker understands very much at all about her retirement plan.[188]

Not only does this decision have implications for beneficiaries but also it has implications for plan administrators. One administrator of a large plan complained about the decision, saying: "What the court is doing here is imposing on me an obligation to go outside the four walls of my office to do a factual investigation which I currently do not do."[189]

b. Sperry & Hutchinson Co. Consider also the case of Delvina Lorenzen, whose husband, Warren, had been a long time employee of the Sperry & Hutchinson Company in Chicago, Illinois.[190] Warren Lorenzen was eligible to retire on February 1, 1987, having reached age 65, the designated retirement age under the company's plan. The company requested that he postpone his retirement for five months until he completed a project on which he was engaged at the time. Warren agreed. At the same time, Warren decided to

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[187] *See, e.g.*, Borzi, *supra* note 16, at 46 (explaining that the present system needs simplification because the current rules are difficult to explain or police).

[188] Indeed, this ignorance was pervasive enough for Congress to hold hearings on the subject. *See Pension Plans: Many Workers Don't Know When They Can Retire: Hearing Before the House Select Comm. on Aging*, 100th Cong., 1st Sess. (1987).

[189] Samborn, *Ex-Wife Waived Right to Benefits*, NAT. L.J. 3, 32 (Mar. 26, 1990) (quoting Larry Bushmaker of the Midwest Operating Engineers Pension Trust Fund). The majority concludes that administrative duties are not compromised by its decision because "a plan administrator must investigate the marital history of a participant and determine whether any domestic relations orders exist that could affect the distribution of benefits." *Fox Valley*, 879 F.2d at 254; 897 F.2d at 282.

There were, prior to *Fox Valley*, three methods by which a designation could be affected: (1) by the qualified joint and survivor annuity rules under I.R.C. §§ 411 and 417; (2) by the last written designation (or waiver) on file; or (3) by a QDRO. While it is true that a plan administrator must currently determine whether a QDRO exists, the majority's holding, nevertheless, greatly increases the burden on plan adminstrators. A QDRO is a statutorily specific document. *See* I.R.C. § 414(p) (West 1988 & Supp. 1990). If a divorce agreement does not constitute a QDRO, administrators in the past have not had to look further. Instead, they could rely upon the last designation by the participant. Now, however, adminstrators will have to look beyond the four corners of the instrument to determine intent of the participant, as well as the validity of the document itself. More importantly, after the *Fox Valley* decision, administrators will no longer be able to rely on the integrity of a designation under the plan, even if made in accordance with the plan terms.

[190] Lorenzen v. Employees Retirement Plan of the Sperry and Hutchinson Co., Inc., 896 F.2d 228 (7th Cir. 1990).

take his retirement benefits in a lump sum on July 1, the agreed upon extended retirement date. This decision would enable him to receive larger lifetime benefits in lieu of a 50% survivor annuity for Delvina in the event of his death. For this, Delvina had to execute a written consent, which she did.[191]

The plan also provided for a pre-retirement survivor annuity in the event of death before retirement or in the event of death after retirement but before receiving any benefits under the plan.[192] The amount of this benefit was considerably smaller than the lump sum amount.[193]

On June 15, two weeks before the extended retirement date, Warren Lorenzen suffered a cardiac arrest and was hospitalized in serious condition. On June 27, he suffered another cardiac arrest which necessitated his being placed on life support equipment. His physicians advised Delvina that her husband's condition was hopeless and recommended that she authorize removal of life support equipment. On June 28, this was done and Warren Lorenzen died—three days short of the extended retirement date.[194]

The plan took the position that, because Warren had not officially retired, the benefit due Delvina was a pre-retirement benefit.[195] Delvina brought suit in federal district court contesting this decision and won.[196] On appeal, the Seventh Circuit, with Judge Posner writing for the majority, reversed and held *for* the plan, stating that Delvina had no contractual claim since the terms of the plan were clear on its face.[197] Evidently, the importance of the clarity of plan terms, at least in the Seventh Circuit, is a volatile

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[191] The written consent is a requirement under both ERISA and the Internal Revenue laws. *See* ERISA § 205 (1985), *amended by* Retirement Equity Act, Pub. L. No. 98-397, § 203(b), 98 Stat. 1426, 1441 (1984); I.R.C. § 417(a)(2) (1988).

[192] See I.R.C. § 417(c) (1988) for the definition of pre-retirement survivor annuity.

[193] Under the terms of the plan, Mrs. Lorenzen, prior to the waiver, would have been entitled to a survivor annuity for the remainder of her life after the death of her husband. This annuity would have been equal to one-half of the monthly payments her husband would have received. By waiving her right to a joint and survivor annuity, her husband would have been able to receive what would probably have been a larger overall amount as a lump sum. *Sperry & Hutchinson*, 896 F.2d at 234.

[194] *Id.*

[195] The pre-retirement survivor annuity was about half of the amount she would have received if Warren Lorenzen had survived for three more days. *Id.*

[196] Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co., Inc., 699 F. Supp. 1367 (E.D. Wis. 1988), *rev'd*, 896 F.2d 228 (7th Cir. 1990).

[197] *Sperry & Hutchinson*, 896 F.2d at 237.

concept.

This case presents several interesting issues. First, the decision cuts to the heart of the concept that retirement benefits are earned by the worker, represent deferred compensation, and should belong, by right, to the worker.[198] If such benefits are not considered to belong to the worker, the worker's family may be deprived of adequate benefits, as illustrated by the *Lorenzen* decision.

Second, this case illustrates that REA did not go far enough to protect spousal benefits and to establish the concept that retirement benefits are jointly earned and should, by right, belong to both spouses.[199] Further changes need to be made in the pre-retirement distribution laws, or at least in the definition of pre-retirement. The technical requirement of signing on the dotted line after the substantive requirements have been met should not have such devasting consequences for the surviving family members.

Third, this decision has tremendous implications in today's aging society where more people will continue working past retirement age. Although Judge Posner seemed to feel that Warren Lorenzen merely gambled and lost[200] and, thus, this result was clearly

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[198] *See supra* notes 164-68 and accompanying text.

[199] This was supposedly the underlying concept behind REA. Consider the prologue to the 1984 legislation:

> An Act . . . to improve the delivery of retirement benefits and provide for greater equity under private pension plans for workers and their spouses and dependents by taking into account changes in work patterns, the status of marriage as an economic partnership, the substantial contribution to that partnership of spouses who work both in and outside the home, and for other purposes.

Prologue, Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984).

[200] 896 F.2d at 234, 235. Judge Posner states that "if Lorenzen had received the lump sum, frittered it away at the gaming tables, and then died, Mrs. Lorenzen would be even worse off than she is . . . , but the plan has not argued this possibility as a ground for reducing her damages." 896 F.2d at 234.

This is a very curious statement from one with the theoretical leanings of Judge Posner. Why *reduce* damages on that basis? To make such a statement is to ignore the economic fundamentals of the situation. First, Warren Lorenzen was in no shape to fritter away anything at that point since he was on life support machinery. Second, if this argument should be considered valid, then the converse should also hold true; that is, Warren Lorenzen was more likely to have *made* money on the lump sum amount. After all, he would have received a significant sum of money under the plan and Delvina Lorenzen had enough faith in his financial judgment to waive her right to a joint and survivor benefit. Also, as an employee, he was valued enough to be asked to remain on the job past retirement age. Therefore, he must have had some intellectual ability. Granted, the frailty of human nature being what it is, intellectual ability does not automatically mean that one will always be economically

indicated, the point he does not raise is whether the employer, who may have acted legally within the strict confines of the statute, acted morally as well.[201] Under a moral rationale, the employer should have clearly explained the possibility of forfeiture to the Lorenzens. Such an explanation would have allowed Delvina Lorenzen to give adequate consideration to all the possibilities and how they might affect her and to make an informed decision to waive her right to a joint and survivor annuity. It would also have enabled Warren Lorenzen to negotiate around a possible forfeiture contingency, or at least to seek the advice of counsel, since he stayed on at the behest, and for the convenience, of the employer. Query, whether a law that permits such an immoral consequence should be allowed to stand as the law of the land.

Another issue raised by the *Lorenzen* case is whether the present manner of regarding retirement plans in a vacuum is rationally indicated. Unlike *Fox Valley*, the *Lorenzen* decision appears to be correct under the present perspective of retirement law, which examines only the four corners of the plan document. But the *Lorenzen* decision enforces this perspective to a fine point. The negative aspect is that the *Lorenzen* decision injects critical medical and emotional decisions, such as the discontinuation of life support machinery, into the retirement realm.[202] A more positive aspect is

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prudent or wise. But the odds were certainly in Warren Lorenzen's favor since he was in the position of staring retirement in the face.

[201] Judge Cudahy, who does not directly raise the morality issue, appears, nevertheless, to address it obliquely when he states in his dissent: "There is nothing to suggest that anyone brought to his or his wife's attention the possibility that she would suffer drastic financial penalties if he happened to die in the interim." *Sperry & Hutchinson*, 896 F.2d 239 (Cudahy, J., dissenting). He goes on to say, "the 'rational bookmaker's' approach to problems is singularly out of place here." *Id.*

[202] Judge Posner has a ready answer for this: "Life-support equipment is expensive and, to a considerable degree, futile and degrading. It should not be used to secure retirement benefits. If the parties to retirement plans envisaged such a use, they probably would define death as inability to 'live' without life-support machinery—at least if permitted by state law . . . ." *Id.* at 234.

Those plans which fall under the auspices of ERISA are under the control of federal law. The federal government has an interest, particularly concerning retirement, in the law being as uniform as possible. Some courts have hesitated to condone "death with dignity." Indeed, the crux of the *Cruzan* decision is that life, no matter how tenuous, is worth preserving. *See* Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988) (en banc), *aff'd*, 760 F.2d 598 (8th Cir. 1989), *aff'd*, 110 S.Ct. 2841 (1990). Now, Posner wants to attack "life with dignity" in the case of the survivors.

Not only will survivors bear the brunt of the *Sperry* decision, but plan administrators will

that the decision provides some certainty for workers because it indicates the length to which the court is willing to go to enforce a strict construction of the plan instrument. Thus, workers should be made aware that they must not take retirement decisions lightly and must bargain against such forfeiture contingencies. The problem, however, is that savvy workers or those who can afford good legal counsel will benefit, while the majority, most of whom are rank-and-file employees, will not. In the latter case, it will be the survivors, usually women,[203] who will lose.

IV. Discrimination On the Basis of Age

This is a particularly difficult time to discuss issues of age discrimination under the private retirement system. While advances have been made to combat age discrimination—the elimination of the mandatory retirement age,[204] the abrogation of the exclusion from pension coverage of employees hired within five years of retirement age[205] and the institution of forced accrual of benefits for those employees who continue to work past retirement age[206]—these advances may ultimately act as a deterrent to the

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also be burdened. For instance, at what point does one reach an 'inability to live without life-support machinery?' This would open the legal arena to such issues and possibly tie up retirement benefits for an inordinate time. This decision will also give plans the upper hand in dealing with survivors who cannot afford to litigate or to wait for benefits. This was actually a ploy being used in *Lorenzen* since one of the issues before the court was whether the plan fiduciary had acted in good faith in withholding benefits from Mrs. Lorenzen. *See Sperry & Hutchinson*, 896 F.2d at 236.

[203] *See supra* notes 160-61 and accompanying text.

[204] *See supra* note 12.

[205] *See* Budget Reconciliation Act, Pub. L. No. 99-509, §§ 9203(a)(1), (2), 9204(b), 100 Stat. 1874, 1979-80 (1986) (amending 26 U.S.C. § 410(a)(2) (1982), 29 U.S.C. § 1052(a) (1988)).

The exclusion provision had been criticized on the ground that it was inconsistent to allow such a rule when the ADEA purported to protect older workers up to age 70 from employment discrimination. *See, e.g.*, Moss, *supra* note 1, at 179-80; Munnell, *supra* note 1, at 70-71.

Advocates of the provision argued that it was very expensive, particularly under defined benefit plans, to fund a retirement benefit for an older worker who would be in the workforce a shorter time. One problem with this argument is that while the normal retirement age under ERISA is 65, some plans designate an earlier age, such as 60 or 62, as normal retirement age with the result that an employee who commenced work at age 55 or 57 would be excluded from the plan. *See* Moss, *supra* note 1, at 179-80.

[206] Omnibus Reconciliation Act of 1986, Pub. L. No. 99-509, § 9201, 100 Stat. 1874, 1973-75 (1986) (amending ERISA § 204, 29 U.S.C.A. § 1054 (West Supp. 1990), I.R.C. § 411(b)(1)(H) (West 1988 & Supp. 1990)).

hiring and retention of elderly employees, at least on a full-time basis. This will be particularly true for employers maintaining defined benefit plans.[207] The cost of accruals for older workers under these plans is extremely high since there are fewer years of service for the benefits to accrue interest. Thus, the employer's subsidy must be greater.[208]

In particular, there is a fear that the requirement of pension coverage for employees hired within five years of normal retirement age will act as a deterrent, not only to hiring but also to the establishment and maintenance of defined benefit plans.[209] Since defined benefit plans provide greater retirement security,[210] their decreased viability is inconsistent with a rational retirement security policy.

TRA 86 lowered the minimum vesting age from ten years to five years[211] and abrogated the "rule of 45"[212] which, at the time of its enactment, was viewed as an advantage for older workers but ultimately functioned as a deterrent to their hiring.[213] While the faster vesting schedule appears to be advantageous to the elderly because

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[207] *See supra* note 132 and accompanying text (describing defined benefit plan).

[208] A problem with the OBRA legislation mandating accrual of benefits for workers over age 65 is that it is vague on the issue of whether it applies retroactively. The EEOC initially took the position that the law did not apply retroactively so that accruals were not required for years of service completed after age 65 but prior to the law's effective date (1988). This position was estimated to cost older workers $3 billion in lost pension benefits. *See* DEVELOPMENTS IN AGING: 1989, *supra* note 69, at 122. The EEOC has subsequently backed away from this position, relying instead on the position of the IRS. The IRS takes the position that, for defined benefit plans, the accrual is retroactive; for defined contribution plans, however, it is not. Therefore, an employee who is covered under a defined benefit plan and who turned age 65 before 1988 will be entitled to accruals from the time she turned 65. If that same employee, however, is covered under a defined contribution plan, the plan is only obligated to accrue post-age-65 benefits from 1988. *See* Prop. Reg. § 1.411(b)-2(f)(1)(ii), & (iii) (1988) (CCH ¶ 20, 149C, 1989) (explaining how to comply with minimum participation and vesting standards).

[209] *See* Borzi, *supra* note 16, at 38.

[210] *See supra* notes 132-39 and accompanying text.

[211] *See supra* notes 10, 96, 99.

[212] *See* Tax Reform Act of 1986, Pub. L. No. 99-514, Title XI, § 1113(a), 100 Stat. 2085, 2446-47 (1986) (amending ERISA § 203(a)(2)(C), 29 U.S.C. § 1053(a)(2)(C) (1988); I.R.C. § 411(a)(2) (1988). Under the "rule of 45," vesting was determined based on a combination of age and service. This method favored older employees because 50% vesting would occur when the sum of the employee's age and service after a minimum of five years of service equalled or exceeded 45 with 10% vesting occurring each year for the next 5 years. Thus, an employee aged 40 when hired would have to be 50% vested after 5 years of service. Younger workers would have to wait a much longer period to vest.

[213] *See* Munnell, *supra* note 1, at 71.

those forced to enter the workforce or change jobs at an advanced age will find it easier to vest in their accrued benefits, a shorter vesting schedule may not be consistent with rational retirement policy because it may promote current spending among a mobile populace.[214]

The elimination of the mandatory retirement age might have very interesting and unanticipated results. On the one hand, it will have a positive effect in that older workers who are physically and mentally capable cannot be forced to retire from the workforce solely on the basis of age.[215] The prolongation of workforce participation will also ease some of the overall problems of the retirement system. On the other hand, those workers who will wish to prolong their careers are likely to be relatively highly paid, white-collar professionals, such as doctors, lawyers, accountants and teachers. Those who will wish to retire from the workforce, if they can afford to do so, will include lower-paid blue-collar workers whose professions are more physically demanding.[216] This latter group is most affected by the lack of a national retirement policy. The differences in prolonging workforce participation have several implications for society in general. First, the difference in financial security between these two groups may be much greater than originally anticipated because the heretofore unsung potential fourth leg of the retirement stool, investment income, will assume greater importance for the first group. This disparity in financial security may further polarize these two groups, eventually establishing a permanent underclass of impoverished retirees. Second, the increase in the Social Security retirement age from 65 to 67 will have a greater impact on the latter group, many of whom will not be entitled to an employer-provided pension under the present sys-

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[214] The report of the Carter Commission, which endorsed voluntary shorter vesting schedules, declined to endorse a mandatory five-year vesting period because they believed that such a short period would result in workers being vested in small amounts and that this would not be conducive to retirement security. *See* FINAL REPORT ON PENSION POLICY, *supra* note 16, at 45. Note that the same logic would also apply to the more rapid vesting schedules under the top-heavy rules. *See supra* note 98.

[215] For comments on ability versus mandatory retirement, see *Ability Is Ageless: Hearing Before the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 99th Cong., 2d Sess. (1986); *Work After 65: Options for the 80's: Hearing Before the Senate Special Comm. on Aging*, 96th Cong., 2d Sess. (1980) [hereinafter *Work After 65 Hearing*].

[216] *See Work After 65 Hearing*, *supra* note 215, at 61-78 (Table 2).

tem.[217] Third, the "baby bust" phenomenon may actually be worse than anticipated.[218] Normal morbidity and mortality rates may not be reliable because of the unduly high incidence of certain terminal diseases such as AIDS, combined with the high incidence of morbidity and mortality due to drug related problems. The drug problem, in particular, is worsening. While illegal drugs were prevalent and a problem in the 1960s and 1970s when most of the "boomers" came of age, the problem is much more severe today for three reasons: (1) the drugs of today are largely "harder," more debilitating drugs; (2) drugs are a much bigger business today and "pushers" are more professional; and (3) drugs increase the threat of serious disease contact. Serious drug problems prevalent among lower- and lower-middle-classes compound this issue because little incentive exists among those classes to give up drugs or to "just say no."

Another potentially underrated problem for the retirement system is the extent of prior cutbacks in federal support for education.[219] With a reduced and under-educated workforce, the Social Security system and the country as a whole stand to suffer greatly.[220]

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[217] *See supra* notes 45-47 & 70-145 and accompanying text.

[218] *See supra* note 13 and accompanying text.

[219] *See A Shifting Budget Scenario*, The Boston Globe, Jan. 10, 1989, at 14; *Reagan OKs Deficit-Cut Plan New Taxes Included for Next 2 Years*, Chicago Tribune, Nov. 21, 1987, at 1, Zone C. *See also The YLPR Interview: Ralph G. Neas*, 8 YALE L. & POL'Y REV. 366, 378 (1990) (interview conducted by P. Daniels, G. Dorfman & D. Pink):

> YLPR: One last question. What do you think will be the greatest civil rights challenge of the next decade and the next century?
>
> Neas: I have to go with my gut and say that it is educational opportunity. How do we get out of this rut with millions of school children who are not given an opportunity to get an adequate education? And . . . I am not talking so much about high school or college or law school. I'm talking about pre-school, elementary school, and junior high. Many of the other opportunities in housing and employment are meaningless unless you have an opportunity to educate someone so that they can later take advantage of these other opportunities. I honestly, very deeply, believe educational opportunity in the broadest possible sense is the principal challenge of the civil rights community in the coming decade and coming century.

Id.

[220] The effect of federal cutbacks in education are likely to become catastrophic as modern technology becomes more sophisticated, replacing many jobs formerly held by the less well-educated.

A. *Discrimination Under the Social Security System*

Although many of the elderly are dependent on Social Security,[221] the system has a severe limitation—the Social Security earnings limit—which adversely affects those who are the most dependent. If earnings are in excess of a specified amount, beneficiaries under the age of 70 who continue to work will experience a reduction in their Social Security benefits.[222] This provision is puzzling in several respects. First, it encourages retirees to withdraw from the workforce, a policy which may not prove wise in the future from a national economic standpoint.[223] Second, it implies that Social Security benefits and current earnings are mutually exclusive.[224] This makes little sense considering that Social Security benefits are typically inadequate as a sole income source[225] and that they were originally intended to provide a floor of retirement security upon which a retiree would add private pension benefits and investments.[226] Since only about half of the nonagricultural workforce is covered under an employer-provided retirement plan[227] (and probably much less than that ever receive any benefits under those plans[228]), public policy should dictate that the elderly should be encouraged to remain in the workforce as long as they are able.[229]

Another issue is the lack of consistency in commencement of

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[221] *See supra* note 22.

[222] *See* Social Security Amendments of 1983, Pub. L. No. 98-21, § 114(c)(1), 97 Stat. 65, 79 (1983) [hereinafter Social Security Amendments of 1983].

[223] *See supra* notes 48-50 and accompanying text (discussing effects of a smaller workforce).

[224] *See* Borzi, *supra* note 16, at 13.

[225] *See supra* text between notes 40 & 41 (describing Social Security benefits as a supplement, not a sole source of income).

[226] *Id.*

[227] *See supra* notes 44-45 and accompanying text.

[228] *See supra* notes 66-139 and accompanying text. *See also* GAO REPORT, *supra* note 19, at 5 (estimating that only 53% of covered workers were vested in their accrued benefits prior to TRA 86; 76% are estimated to vest under the new minimum vesting schedules).

[229] Legislation has been proposed to eliminate the Social Security earnings test. *See* S. REP. No. 2159, 101st Cong., 1st Sess. (1990) (proposing the elimination of earnings test for individuals of retirement age); H.R. REP. No. 4241, 101st Cong., 2d Sess. (1990) (proposing the elimination of earnings test for individuals over 65 and the increase of the maximum amount of outside income for Social Security beneficiaries); S. REP. No. 1995, 101st Cong., 1st Sess. (1989) (advocating an increase in the amount of income exempt from reduction under the retirement test); H.R. REP. No. 3526, 101st Cong., 1st Sess. (1989) (suggesting phasing out the retirement earnings test as applied to persons over 65).

benefits between the Social Security system and the private retirement system. The retirement age for commencement of Social Security benefits will be raised from age 65 to age 67 by the year 2027.[230] The normal retirement age for ERISA purposes is presently age 65.[231] As a result, there is a gap in the receipt of retirement income in which the retirement stool will, for many, have only one or two legs. To date, this situation has not been addressed by Congress.[232]

B. Discrimination Under the Private Retirement System

Although Congress has been slow to act upon issues of gender-based discrimination under the private retirement system, its record in combatting age discrimination has been better. One reason is that new legislation has been necessary to thwart an apparently obvious departure by the United States Supreme Court from the true purpose and intent of the Age Discrimination in Employment Act of 1967 (ADEA).[233]

The ADEA was enacted to alleviate age discrimination in employment. Section 4(a)(1) provides that it shall be unlawful for an employer to "fail or refuse to hire" or to "discharge" an employee or in any other way discriminate against the employee "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[234] A partial exception exists under section 4(f)(2), which allows an employer to "observe

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[230] *See* Social Security Amendments of 1983, *supra* note 222, at § 210(a), 97 Stat. at 107-08 (codified at 42 U.S.C.A § 416(l) (West 1983 & Supp. 1990)). The age for full benefits is to be phased in gradually in order to avoid disadvantaging those who are already close to age 65. For workers who reach age 62 in the year 2000, the age for receiving full benefits will be increased by two months per year for six years. Thus, workers reaching age 62 in the year 2002 will not be able to receive full benefits until the year 2007 when they are 67. *Id.* For those workers attaining age 62 during the five-year period from 2017 to 2022, the retirement age will be 67. Thus, covered workers reaching age 67 after 2027 will be able to retire and receive Social Security benefits. *Id.*

[231] *See* ERISA § 206, 29 U.S.C. § 1056 (1988). The normal retirement age assumes importance under ERISA in establishing the age at which benefits commence if the employee is retired, as well as the age at which benefits must vest. *See infra* notes 255-58 and accompanying text.

[232] One reason for the lag is apparently the consideration given to the voluntary nature of the private retirement system. *See* Borzi, *supra* note 16, at 14. *See also supra* note 16 and accompanying text.

[233] Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C.A. § 621-34 (West 1988 & Supp. 1990)).

[234] *Id.* at § 4(a)(1) (codified as amended at 29 U.S.C. § 623(a)(1) (1988)).

the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan" without violating section 4(a)(1) as long as the plan is not "a subterfuge to evade the purposes" of the ADEA.[235] Several cases have arisen which have tested the limits of the ADEA and prompted congressional response.

1. The McMann Decision. In 1973, Harris McMann, an employee of United Airlines, was forced to retire on account of age (60) under the terms of United's retirement plan. He then brought suit in federal district court against United alleging that his forced retirement constituted a subterfuge to evade the provisions of the ADEA and therefore was not protected by the section 4(f)(2) exception. The district court granted summary judgment in favor of United.[236] McMann appealed.

On appeal, the Fourth Circuit reversed, holding that while the ADEA did not prohibit all forms of discrimination, it did prohibit distinctions based solely on age.[237] United then appealed to the United States Supreme Court, which granted certiorari and ultimately held in favor of United.[238]

The Supreme Court concluded that neither the statute nor the legislative history indicated a congressional intent to prohibit mandatory retirement on the basis of age and that, contrary to McMann's claim, the plan did not constitute a subterfuge to evade the provisions of the ADEA.[239] The Court based its decision on a strict construction of the term "subterfuge" as a "scheme, plan, strategem, or artifice of evasion."[240] The Court then reasoned that,

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[235] *Id.* at § 4(f)(2) (codified as amended at 29 U.S.C. § 623(f)(2) (1988)).

[236] McMann v. United Air Lines, No. 72-75-A (E.D.Va. Sept. 2, 1975), *rev'd*, 542 F.2d 217 (4th Cir. 1976), *rev'd*, 434 U.S. 192 (1977).

[237] McMann v. United Air Lines, 542 F.2d 217, 220 (4th Cir. 1976), *rev'd*, 434 U.S. 192 (1977). The court stated that:

> Any other reading of the "subterfuge" clause would produce the absurd result that an employer could discharge an employee pursuant to a retirement plan for no reason other than age, but then could not refuse to rehire the presumptively otherwise-qualified individual, for [the statute] explicitly provides that "no such employee benefit plan shall excuse the failure to hire any individual. . . . [C]onceptually there is no difference between a mandatory retirement age of sixty-two and a refusal to hire anyone who is sixty-two years old."

Id. at 220-21 (quoting Hodgson v. American Hardware Mutual Ins. Co., 329 F. Supp. 225, 229 (D. Minn. 1971)).

[238] United Air Lines v. McMann, 434 U.S. 192 (1977), *rev'g* 542 F.2d 217 (4th Cir. 1976).

[239] *Id.* at 202-04.

[240] *Id.* at 203.

under this definition, pre-ADEA plans could not possess the element of subjective intent necessary to evade the purposes of the ADEA.[241]

There were several important points which the Court rejected, however. First, a pre-ADEA plan that contains a provision contrary to the purpose of the ADEA could be considered a subterfuge if the employer does not amend the offending provision to conform to the ADEA. Under the Court's interpretation of the ADEA, pre-Act plans could force older employees to retire solely on the basis of age despite the ADEA's current elimination of the mandatory retirement age for most employees.[242] The *McMann* decision is thus illogical from a legal, as well as a moral, perspective. The purpose of the ADEA was to prevent arbitrary discrimination on the basis of age.[243] By use of the term "arbitrary," Congress implies that not all age-based discrimination is prohibited. In fact, there are two types of age-based discrimination which were specifically exempted from the ADEA: bona fide occupational qualifications (BFOQs)[244] and certain disparate benefits under employee benefit plans.[245] Because of the voluntary nature of employer-provided plans and the strong social and fiscal policy encouraging such plans, Congress has often confronted the problem of enacting equitable retirement laws while simultaneously encouraging the establishment and maintenance of private retirement plans. One such problem has been reconciling fair treatment of older workers with the valid objections of employers to the tremendous increases in cost that would result in some cases if older workers were required to be given equal benefits with younger workers.[246]

Another problem is the potential deterrent to hiring older workers which might result if inclusion in the retirement plan with equal benefits to the younger workers were mandated. At the time it enacted the ADEA, the 90th Congress was engaged in hearings

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[241] *Id.*

[242] *See supra* note 12 and accompanying text. For further illumination on the absurdity of this result, see *supra* note 237.

[243] *See* 29 U.S.C. § 621(b) (1988).

[244] 29 U.S.C. § 623(f)(1) (1988).

[245] 29 U.S.C. § 623(f)(2) (1988).

[246] *See, e.g., supra* note 132 and accompanying text. *See also* United Air Lines v. McMann, 434 U.S. 192, 199-200 (1977) (quoting Jacob Javits and his concerns during the ADEA hearings).

on inequities under the private retirement system which eventually culminated in the enactment of ERISA. Reform of the private retirement system, although at the conception stage, had been given a great deal of attention by some members of that Congress—including Senator Jacob Javits, who was probably the "father" of the ERISA legislation, to the extent it can be said to have had a single father. Javits, in particular, had a general idea of what basic reforms of the private retirement system were needed and what compromises were required to accomplish that objective.[247] The ERISA legislation contained some provisions which at first glance appeared to contradict Congress' continuing concern with age discrimination, but closer scrutiny revealed that these provisions were added as a protection for older employees in the marketplace. One of these provisions allowed employers to exclude from retirement plans those employees hired within five years of normal retirement age.[248] Another provision allowed employers to cease accruing benefits for employees who worked past normal retirement age.[249] Both provisions were designed to encourage the hiring of older employees by relieving the employer's burden of increased costs attributable to such hiring.

It is more likely that Javits drafted ADEA section 4(f)(2) to allow flexibility to employers, thereby encouraging the hiring of older workers. This approach is entirely consistent with both the demeanor of Javits[250] and the purpose and intent of the ADEA.[251] Indeed, it is irrational to presume that Javits and the Congress that enacted such strong protective legislation against age discrimination could possibly have intended to create such a gaping loophole as the one opened by the Supreme Court's interpretation of section 4(f)(2) under *McMann*.[252]

Further support for this theory is inherent in the nature of employee benefit plans. An employee benefit plan exists to provide

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[247] *See* J. JAVITS, THE AUTOBIOGRAPHY OF A PUBLIC MAN 378-86 (1981).

[248] *See supra* note 205 (discussing the repeal of the exclusion provision under the Budget Reconciliation Act).

[249] *See supra* note 206 (discussing ERISA amendment abrogating this provision).

[250] *See generally* J. JAVITS, *supra* note 247.

[251] ADEA, *supra* note 233, at § 2(b) states: "It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

[252] *See* United Air Lines v. McMann, 434 U.S. 192, 216 (1977) (Marshall, J., dissenting).

benefits to employees and in some cases, to their beneficiaries.[253] A plan can, in its many forms, provide a variety of benefits.[254] The type of plans specifically delineated by section 4(f)(2) involve the concept of a "normal retirement age"[255] at which benefits become payable under the plan, although the normal retirement age may have other significance as well.[256] The employee benefit plan does not by itself mandate termination of employment for an employee who reaches the normal retirement age. This decision is instead within the domain of the employer and its particular policies.[257] Permitting mandatory termination of employees based solely on age considerations belies the nature of retirement and other employee benefit plans. For instance, employees often continue to work past normal retirement age as established by the plan.[258] While involuntary retirement may affect the amount of benefits they receive,[259] it is not necessarily mandated under the terms of the retirement plan since the plan deals only with the provision of benefits at the *anticipated* retirement age under that particular plan. In fact, a single employer may have several plans covering the same employees.

To draw such a distinction between pre-Act and post-Act plans is in itself arbitrary and the Court's methodology in this regard is most illogical. For instance, if one accepts the Court's reasoning that a pre-ADEA plan or provision cannot be considered a "subterfuge" to evade the purpose or intent of the ADEA, it does not nec-

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[253] *See* Treas. Reg. § 1.401-1(a)(2)(i), (ii) (1956).

[254] *See generally* D. McGILL & D. GRUBBS, *supra* note 64, at 101-78.

[255] *See supra* note 231 (discussing normal retirement age).

[256] Normal retirement age is also important in establishing the upper limit for vesting of benefits. For instance, benefits must be vested upon normal retirement age even if the worker has not otherwise fulfilled the service requirement. *See* Caterpillar Tractor Co. v. Commissioner, 72 T.C. 1088 (1979).

[257] The distinction between normal retirement age under a plan and mandatory termination of employment outside of cause is often blurred. This is probably because the policy of most employers on mandatory termination outside of cause becomes entwined with the normal retirement age under the plan. *But cf.* text accompanying *supra* notes 187-88. Under a purist view of normal retirement age under a plan, this is the age at which it is *contemplated* that workers will retire and begin to receive benefits under that plan. If workers continue to work without retiring, their benefits continue to accrue, but in most cases they are not entitled to receive a distribution under the plan until they actually retire.

[258] *See, e.g., supra* text between notes 190 & 191.

[259] While benefits must continue to accrue if an employee continues to work past normal retirement age (*see supra* note 206 and accompanying text), that employee may not be entitled to receive any benefits under the plan until she has actually retired.

essarily follow that the plan can continue to discriminate on the basis of age in contravention to the purpose and intent of the ADEA. In other words, why should a pre-Act plan be forever pardoned for its transgressions? If a pre-ADEA plan or provision cannot be a subterfuge to evade the ADEA, it logically follows that pre-ADEA transgressions should thereby be forgiven under the law, but the plan must conform to the provisions of the ADEA from its effective date.

Less than a year after the *McMann* decision, Congress amended section 4(f)(2) to override the Supreme Court's interpretation of the ADEA permitting mandatory retirement solely on the basis of age.[260] Remaining at issue, however, was the interpretation of the term "subterfuge" under the ADEA. Because Congress sought specifically to override the decision in *McMann*, yet left the subterfuge issue intact, the presumption was that the Court's interpretation of the term was within the intent of Congress and, thus, within the intent of the ADEA.[261]

2. The Betts Decision. Twelve years after the Supreme Court's decision in *McMann*, it was once again faced with interpretation of the term "subterfuge" under the ADEA. The issue in *Public Employees Retirement System of Ohio v. Betts*[262] was whether Public Employees' Retirement System (PERS) could provide fewer benefits to older employees solely on the basis of age.

The PERS plan provided disability benefits to employees under the age of 60 but no corresponding benefits to employees over that

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[260] *See* Age Discrimination in Employment Act of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978). The legislative history to this amendment refers to the conflict among the circuits on the interpretation of section 4(f)(2). *See* Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978) (holding that mandatory early retirement under reasonable and bona fide retirement plan did not violate ADEA); Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974) (holding that employer was not obliged under ADEA to rehire employee who had been forced to retire on basis of age). The legislation specifically mentions the *McMann* decision, which at that time had not been heard by the Supreme Court, and condones the opinion of the Fourth Circuit. *See* S. REP No. 95-493, 95th Cong., 1st Sess., at 10 (1977).

[261] *See, e.g.*, EEOC v. County of Orange, 837 F.2d 420 (9th Cir. 1988) (holding that age discrimination would normally be found but that since *McMann* controlled and the employer's plan was pre-ADEA, it could not be considered a subterfuge to evade the purposes of the ADEA); EEOC v. Cargill, Inc., 855 F.2d 682 (10th Cir. 1988) (same reasoning with life insurance and disability plans).

[262] 109 S. Ct. 2854 (1989), *rev'd*, 848 F.2d 692 (6th Cir. 1988), *aff'g* 631 F. Supp. 1198 (S.D. Ohio 1986).

age.[263] In addition to the disparity in amount of benefits, the younger employees were entitled to be treated as though they were on a leave of absence for the first five years of their disability with the option to return to work if their condition improved. Older employees were denied this option.[264]

After developing Alzheimer's disease, June Betts retired at age 61 and was forced to take age-and-service retirement benefits rather than disability benefits. As a result she received less than half the monthly benefits to which she would have been entitled if she had been permitted to retire with disability benefits.[265] She filed suit against the plan alleging a violation of the ADEA. Both the district court[266] and the appellate court[267] held that the plan was facially discriminatory in violation of the provisions of the ADEA and not entitled to the protection of section 4(f)(2).[268] According to both courts, section 4(f)(2) protection is only available to plans that can show a cost-based justification for disparate benefits.[269] Since the PERS plan could not show such justification, it violated section 4(a)(1).[270]

The Supreme Court subsequently determined that the PERS plan was entitled to section 4(f)(2) protection unless it was a subterfuge to evade the purpose of the ADEA.[271] Since the Court had

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[263] Disabled employees over age 60 had two alternatives under the PERS plan. They could choose to take either an unpaid medical leave, in which case they would receive no benefits but would presumably remain an employee, or a length of service retirement under which they would be entitled to reduced benefits if they had not reached age 65, the retirement age delineated under the plan. Younger employees were offered a third option, disability benefits which would entitle them to receive more benefits, in many cases, than the early retirees. *Betts*, 109 S. Ct. at 2858-59.

[264] *Id.* at 2858.

[265] Betts' disability benefit would have been $355 per month, whereas the age-and-service retirement benefit amounted to only $158.50 per month. *Id.* at 2859.

[266] Betts v. Hamilton County Board of Mental Retardation, 631 F. Supp. 1198 (S.D. Ohio 1986), *aff'd*, 848 F.2d 692 (6th Cir. 1988), *rev'd*, 109 S. Ct. 2854 (1989).

[267] Betts v. Hamilton County Board of Mental Retardation and Developmental Disabilities, 848 F.2d 692 (6th Cir. 1988) *rev'd*, 109 S. Ct 2854 (1989).

[268] *Betts v. Hamilton County Board of Mental Retardation*, 631 F. Supp. at 1205-07; *Betts v. Hamilton County Board*, 848 F.2d at 694-95.

[269] *Betts v. Hamilton County Board of Mental Retardation*, 631 F. Supp. at 1204; *Betts v. Hamilton County Board*, 848 F.2d at 695. This conclusion was based on a regulation promulgated by the Department of Labor in January 1969. *See infra* notes 277-79 (discussing 29 C.F.R. § 1625.10(d)).

[270] *Betts*, 109 S. Ct. at 2860 (discussing appellate decision).

[271] *Id.*

already interpreted the term "subterfuge" in *McMann*, the first issue was whether the prior interpretation was valid under the statute, the legislative history and subsequent congressional actions.

According to the Court, the statute and legislative history were both silent on the specific meaning of the term. Therefore, the earlier interpretation was not in error on these grounds. In evaluating congressional action, the Court found that legislative history of the 1978 amendment to the ADEA overriding *McMann* explicitly rejected the Court's interpretation of the term "subterfuge" under *McMann*.[272] But the Court pointed out that despite this rejection, Congress had not amended the subterfuge language of the statute.[273] Therefore, the 1978 amendment had not affected the *McMann* definition of subterfuge. According to the Court, the PERS provisions that arose prior to the ADEA were insulated from challenge.[274]

Some of the PERS provisions, however, arose after the effective date of the ADEA.[275] *McMann* supplied no answer for these provisions. The Court determined, therefore, that it must delve further into the precise meaning of the section 4(f)(2) exemption.[276]

The Equal Employment Opportunity Commission (EEOC), under the auspices of the Department of Labor, had promulgated regulations interpreting section 4(f)(2).[277] Under these regulations, the purpose of the exemption was to provide latitude to employers to offer benefits to their employees without incurring a burden-

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[272] *Id.* at 2861 (citing H.R. REP. No. 950, 95th Cong., 2d Sess. (1978)).

[273] *Id.* The Court, in dismissing the Congressional rejection stated: "We have observed on more than one occasion that the interpretation by one Congress (or a committee or a member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." *Id.*

The fallacy of this argument, though, is that Senator Javits, the author of section 4(f)(2), was a member of both Congresses. Therefore, to the extent there was a significant overlap in the membership of both Congresses in question, or an overlap in the membership of key members involved in any particular issue, greater weight should be given to that interpretation; at least, it should not be summarily dismissed.

[274] *Id.* The PERS plan was established in 1933 and amended in 1959 to add the provision disqualifying employees over age 60 from receiving disability benefits under the plan. *Id.* at 2862.

[275] For instance, in 1976 the plan was amended to add the provision which established a floor of 30% of final average salary for younger employees who retired under a disability. No such floor was provided to older disabled employees. *Id.*

[276] *Id.*

[277] *See* Age Discrimination in Employment Guidelines, 29 C.F.R. § 1625.10 (1988).

some cost for older employees. Thus, section 4(f)(2) allowed unequal treatment of older employees when justified by "significant [age-related] cost considerations."[278]

While the substance of the long-standing regulation did not appear to be inconsistent with the purpose and intent of the ADEA, the Court, nevertheless, dismissed it as contrary to the "plain language of the statute."[279] In a particularly vehement dissent, Justice Marshall attacked this reasoning as "so manipulative as to invite the charge of result-orientation."[280]

The Court also launched another attack on the cost justification rationale, contradicting the EEOC on the meaning of the statutorily delineated plans under section 4(f)(2). The section 4(f)(2) exemption is limited to "any bona fide employee benefit plan such as a retirement, pension, or insurance plan."[281] The EEOC argued that this delineation supported the rationale behind its regulation since these types of plans "share the common characteristic that the cost of the benefits they provide generally rises with the age of their beneficiaries."[282] The Court, however, dismissed this argument and interpreted the phrase "any employee benefit plan" as being broadly inclusive in scope. The Court found the "such as" clause to be illustrative and not limiting: "Many plans that fall

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[278] *See id.* at §§ 1625.10(a)(1) and 1625.10(f)(1)(ii). *See also Betts*, 109 S. Ct. at 2862 (discussing § 1625.10).

[279] *Betts*, 109 S. Ct. at 2863. The portion of the regulation to which the Court objected involved the definition of "subterfuge." Under the regulation, "a plan or plan provision which prescribes lower benefits for older employees on account of age is not a 'subterfuge' within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations." 29 C.F.R. § 1625.10(d).

In a somewhat inconsistent statement, the Court said: "In view of our *interpretation* of the plain statutory language of the subterfuge requirement, however, this reliance on legislative history is misplaced." *Betts*, 109 S. Ct. at 2863-64 (emphasis added).

If this statutory language is so plain, why does the Court need to interpret it? Indeed, if this language is so plain, why has the EEOC regulation been allowed to stand for so long? It is surely not for want of judicial attention. *See, e.g.*, EEOC v. City of Mt. Lebanon, Pa., 842 F.2d 1480, 1489 (3d Cir. 1988); Cipriano v. Board of Education, 785 F.2d 51, 57-58 (2d Cir. 1986) (cited in *Betts*, 109 S. Ct. at 2863).

Further on in the decision, the Court again contradicts itself in stating: "To be sure, this construction of the words of the statute is not the only plausible one." *Betts*, 109 S. Ct. at 2866.

[280] *Betts*, 109 S. Ct. at 2870 (Marshall, J., dissenting).

[281] Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4(f)(2), 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. § 623(f)(2) (1985)).

[282] *See Betts*, 109 S. Ct. at 2865 n.6.

within these categories do not share that particular [cost] attribute at all, defined contribution pension plans perhaps being the most obvious example."[283]

This statement represents a curious misconception.[284] While defined contribution plans are frequently included under the generic classification of "retirement plans," they are technically neither retirement plans nor pension plans.[285] There are, however, two types of defined contribution plans which are exceptions to this rule: target benefit plans and money purchase pension plans. Although considered to be a defined contribution plan, the target benefit plan is actually a hybrid between a defined benefit plan and a defined contribution plan. For instance, it pays a target benefit, similar to a defined benefit plan.[286] The employer's contributions to this plan are based upon age and service.[287] Thus, the amount of contribution is much greater for an older employee who commences employment later and has fewer years of service with the employer.[288] The money purchase pension plan is technically a de-

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[283] *Id.* at 2864.

[284] It is also not the only misconstruction of the term "retirement plan." The Court further states:

> As Justice White wrote in his separate concurrence in *McMann*, "[b]ecause all retirement plans necessarily make distinctions based on age, I fail to see how the subterfuge language, which was included in the original version of the bill and was carried all the way through, could have been intended to impose a requirement which almost no retirement plan could meet."

Id. at 2866 (quoting United Air Lines v. McMann, 434 U.S. 192, 207 (1977)).

While retirement plans necessarily make distinctions based on age, what Justice White in *McMann* and the majority in *Betts* fail to see is the distinction between retirement plans and capital accumulation plans. *See* Borzi, *supra* note 16, at 40-41. A capital accumulation plan, such as a profit sharing plan or true defined contribution plan, does not make distinctions based on age. Instead, the employer makes contributions for the benefit of the covered employees and each employee has an account in his name under the plan which holds those contributions. When the employee is vested and entitled to a distribution under that plan, she is then entitled to the balance of the account. The employer does not promise a set benefit, only the account balance. Thus, age does not enter into the formula. As mentioned earlier, most plans are of this type, with defined benefit plans dwindling in number. *See supra* note 139 and accompanying text. Thus, the cost-based rationale would by no means "eviscerate § 4(f)(2)" as Justice White and the majority claim. *See Betts*, 109 S. Ct. at 2866. Instead, there would be significant cost protections afforded to employers under the EEOC cost justification rationale.

[285] Defined contribution plans are technically "capital accumulation plans." *See* Borzi, *supra* note 16, at 38-41.

[286] *See supra* note 132.

[287] *See* D. McGILL & D. GRUBBS, *supra* note 64, at 115.

[288] *Id.* at 124 (listing the higher cost for older employees as a disadvantage to this type of

fined contribution plan. Under this type of plan, contributions are made under a predetermined formula, often based on age and service,[289] with an anticipated benefit as a goal.[290] Again, the employer's contributions will vary depending on the age of the employee upon entering the plan.[291] When the employer's contribution is not predicated on age or service, a money purchase pension plan is not a pension plan at all, but a profit sharing plan.[292] Under the plain language of the statute, a retirement plan, a pension plan and an insurance plan will all experience increased costs if a participant enters the plan at an advanced age. Under this "plain language" the cost-based justification was clearly within the intent of the statute.

The Court's interpretation begs the question of why Congress was not more explicit if it truly intended to limit section 4(f)(2) protection to plans which could show a cost-based justification for disparate benefits. There are several possible reasons why Congress was not more explicit. First, the drafters might have believed that the intent of the provision was clear on its face. Certainly true retirement, pension and insurance plans all involve a cost differential for older employees.[293] Instead of these avenues, however, the

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plan).

[289] *See* Rev. Rul. 68-592, 1968-2 C.B. 166.

[290] *See* D. McGILL & D. GRUBBS, *supra* note 64, at 114. This differs from a profit sharing plan in that contributions under a profit sharing plan are usually determined by profits with no anticipated benefit. *But see infra* note 292 (discussing profit sharing plans).

[291] It is conceivable that some of the money purchase pension plans use a contribution formula which is not based on age, but this is not the normal type of money purchase plan. *See* D. McGILL & D. GRUBBS, *supra* note 64, at 114. The Court, however, is not justified in raising such a narrow exception to affect the rights of so many of the elderly in such a devasting manner.

[292] The 1986 Tax Reform Act changed the definition of profit sharing plans to allow contributions without regard to current or accumulated profits. *See* TRA 86, *supra* note 10, at § 1136(a), adding I.R.C. § 401(a)(27). The definition was changed: (1) to preserve the integrity of collective bargaining agreements; (2) to allow profit sharing plans for nonprofit organizations; (3) to allow profit sharing plans to new companies during a period for which they may show a paper loss; and (4) to encourage the coverage of workers under profit sharing plans in any companies in years in which there is a paper loss but the companies have assets with which to make the contributions. *See* H.R. CONF. REP. No. 841, 99th Cong., 2d Sess. (1986).

The 1986 amendment obscured the distinction between profit sharing plans and money purchase plans. Therefore, after the effective date of this provision, for plan years beginning after December 31, 1985, a defined contribution plan must at the outset designate its intent to be either a profit sharing or a money purchase plan. *See* I.R.C. § 401(a)(27)(B) (West Supp. 1990).

[293] If one is not to read the statute in its "plain language," another logical interpretation

Betts Court embarked on what the dissent termed an "impossibly tortured" construction of the statute.[294] If, indeed, Congress' intent under section 4(f)(2) was to exempt any employee benefit plan from the ADEA, it did not need to delineate the types of plans. Obviously pension plans, retirement plans and insurance plans are all employee benefit plans. The term, in its broad sense, needs no further clarification.

Second, at the time the ADEA was enacted, Congress was on the verge of considering the most sweeping reform of the private retirement system ever undertaken in the United States.[295] An issue then concerning many members of Congress was the effect of that reform on the working elderly.[296] This effect could not be determined until some years after the reform became effective, and, at the time the ADEA was enacted, it was unclear whether reform would be forthcoming at all. Therefore, it is likely that Congress believed the safest course was to err on the side of the least restrictive legislation in order to allow flexibility if the need should later arise.

Having disposed of the cost justification rationale, the Court went on to try to determine which types of age discrimination Congress intended to prohibit.[297] Here the majority struggled with consistency between sections 4(a)(1) and 4(f)(2). The problem was that the Court had rejected the logic that section 4(a)(1) encompasses employee benefit plans of the type covered by section 4(f)(2). The Court then aptly stated: "It is difficult to see how a plan provision that expressly mandates disparate treatment of older workers in a manner inconsistent with the purposes of the Act could be said not to be a subterfuge to evade those purposes."[298]

This problem would not arise, however, if one assumes a cost justification for the disparate treatment. Such a justification fur-

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is to read the term "such as" to mean "having the effect of." *See supra* text accompanying note 235. This interpretation would produce the same result as a true "plain reading" of the statute.

[294] *Betts*, 109 S. Ct. at 2869 (Marshall, J., dissenting).

[295] *See* Watson, *supra* note 4 (discussing events that urged Congress to consider reform).

[296] This is abundantly clear from the legislative history of the ADEA. *See, e.g.*, H.R. REP. No. 805, 90th Cong., 1st Sess. 4 (1967) (cited in United Air Lines v. McMann, 434 U.S. 192, 213 (Marshall, J., dissenting)); S. REP. No. 723, 90th Cong., 1st Sess. 4 (1967).

[297] *Betts*, 109 S. Ct. at 2865-66.

[298] *Id.* at 2866.

thers the purpose of the ADEA by removing pecuniary obstacles which might discourage employers from hiring older workers.

After what Justice Marshall would view as a selective examination of the legislative history,[299] the majority decided that section 4(f)(2) was intended to provide broad protection to all bona fide employee benefit plans as long as the plan does not discriminate in "other, nonfringe benefit aspects of the employment relationship."[300] The Court then proposed two "examples" to show that although "this result permits employers wide latitude in structuring employee benefit plans, it does not render the 'not a subterfuge' proviso a dead letter."[301] According to the Court, the examples "suffice to illustrate the not-insignificant protections provided to older employees by the subterfuge proviso in the section 4(f)(2) exemption."[302] A major problem with these "not-insignificant protections," however, is that under the *Betts* decision, the ADEA plaintiff must prove not only discriminatory treatment under the employee benefit plan, but also that the employer intended to discriminate against older employees in "some nonfringe benefit aspect of the employment relationship."[303] As Justice Marshall stated, "a more appropriate approach would place the burden on the employer to show that the discrimination was not born of improper intent."[304]

The Court's reasoning in *Betts* is difficult to comprehend.[305] What is clear, however, is that ADEA plaintiffs will not find a sympathetic forum in the Supreme Court, nor are they likely to find an equitable remedy after *Betts* against discrimination in the private retirement system.[306]

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[299] *Id.* at 2870-73 (Marshall, J., dissenting).

[300] *Betts*, 109 S. Ct. at 2868.

[301] *Id.* at 2867.

[302] *Id.* at 2868.

[303] *Id.*

[304] *Id.* at 2871 n.5 (Marshall, J., dissenting).

[305] One explanation for this reasoning is that *Betts* is a pure statutory interpretation case. If the language is plain on its face, one need not look to the legislative history or try to further glean the intent of Congress. The position of Justice Scalia is that legislative history is unimportant in statutory interpretation. *See* Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702, 2724 (1989) (Scalia, J., concurring). However, as *Betts* well illustrates, the Court often finds "plain meaning" where others do not.

[306] *See, e.g.*, Abbott v. Federal Forge, Inc., 912 F.2d 867 (6th Cir. 1990) (upholding employer's moratorium on rehiring of older employees who would be entitled to past seniority credits under employer's retirement plan and refusing to extend *Betts* to create an affirma-

Jacob Javits was the author of section 4(f)(2) and a long-time champion of the elderly.[307] Throughout his distinguished career he fought age discrimination and strove to promote a fairer and more workable retirement system.[308] It is difficult to fathom Javits' conceiving such a twisted piece of legislation as the Supreme Court's ultimate interpretation of section 4(f)(2), which in reality struck a blow to civil rights for the elderly.[309] Congress, in overwhelmingly passing the Older Workers Benefit Protection Act,[310] has indicated that it does not believe the *Betts* decision reflects the intent of the 90th Congress. This legislation specifically refers to the *Betts* case and states that it is intended to override that decision.[311]

3. Early Retirement Trends. The development of retirement as a social pattern has helped promote age-based employment discrimination.[312] If credence is given to the concept that ability is ageless,[313] why should older workers be denied employment opportunities available to younger workers? Retirement as a way of life has become so "embedded in the American consciousness"[314] that most courts see no inconsistency between the elimination of the mandatory retirement age[315] and the elimination of older workers

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tive prohibition against refusals to hire on basis of an employee benefit plan).

[307] *See generally* J. JAVITS, *supra* note 247.

[308] *See id.*

[309] *See Betts*, 109 S. Ct. at 2874-75 (Marshall, J., dissenting).

[310] Pub. L. No. 101-521, 104 Stat. 978 (1990).

[311] *See supra* note 310. The Bush Administration, while in favor of overriding *Betts*, initially opposed the Older Workers Benefit Protection Bill because it feared that such "wholesale changes to the ADEA" would create a disincentive for employers to establish and maintain pension plans. *See Administration Policy Statement Opposes Older Workers Benefit Protection Bill*, Pens. Plan Guide (CCH) ¶ 23,806R (Sept. 21, 1990).

The legislative history of the Older Workers Benefit Protection Act contains an admonition to the Court against "strict constructionist" readings of civil rights statutes. It urges, instead, a broad interpretation of such statutes. (In October 1990, President Bush vetoed the Civil Rights Act of 1990, S. REP. No. 2104, 101st Cong., 2d Sess. (1989), which contained a similar admonition.) However, it has been noted that such admonitions have been issued before and the Court has ignored them, presumably on the road to furthering some grander political agenda which does not include minorities, women or the elderly. *See* Ralston, *Court vs. Congress: Judicial Interpretation of The Civil Rights Acts and Congressional Response*, 8 YALE L. & POL'Y REV. 205, 221-22 (1990).

[312] *See* DEVELOPMENTS IN AGING: 1989, *supra* note 69, at 93.

[313] *See, e.g., supra* notes 204-06, 215 and accompanying text.

[314] SPECIAL COMM. ON AGING, DEVELOPMENTS IN AGING: 1988, S. REP. No. 4, 101st Cong., 1st Sess. 93 (1989) [hereinafter DEVELOPMENTS IN AGING: 1988].

[315] *See supra* note 12 and accompanying text.

from the workforce, whether by voluntary or involuntary means.[316] Two national polls conducted in 1975 and 1981 revealed that 8% of Americans believe older workers are discriminated against both in the marketplace and in the workforce.[317] This perception was shared by 61% of employers.[318]

A particularly difficult discrimination problem is the so-called "voluntary" elimination of older workers from the workforce. Voluntary elimination involves the provision of incentives designed to ease older workers out of the workforce. Often it is not recognized as discrimination because it is frequently couched in terms of a reward for employment longevity, and in fact has been characterized as such by the courts.[319] When it becomes a strong-arm tactic, however, it rises to the level of an involuntary elimination. Consider, for example, the case of *Bodnar v. Synpol, Inc.*,[320] in which an employer facing financial problems offered retirement incentives to "nonessential" employees over the age of 55. The employer told these employees that, if an insufficient number of them elected the incentive, it would have to resort to job elimination without severance pay. A number of older employees elected the incentive, then sued alleging constructive discharge in violation of the ADEA.[321]

The district court granted partial summary judgment to the employer, holding that the employer's release agreement was valid and enforceable because it was clearly and unambiguously worded and had been voluntarily executed by employees who had not been unduly influenced or defrauded.[322] The Fifth Circuit affirmed the

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[316] *See supra* notes 237-302 and accompanying text.

[317] *See* DEVELOPMENTS IN AGING: 1988, *supra* note 314, at 94.

[318] *Id.* Of the 552 employers surveyed, 22% cited present legal constraints as a factor preventing them from hiring older workers for positions other than senior management. Twenty percent thought older workers were disadvantaged in promotions and training and 12% thought older workers received smaller pay raises than younger workers. *Id.*

[319] *See, e.g.*, Henn v. National Geographic Soc., 819 F.2d 824, 826-27 (7th Cir.), *cert. denied*, 484 U.S. 964 (1987) ("Because an offer of early retirement is valuable, the sort of thing many people would pay to receive, it might be thought to 'discriminate against' those who do not get the offer.").

[320] 843 F.2d 190 (5th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988).

[321] Bodnar v. Synpol, Inc., 633 F. Supp. 13 (E.D. Tex. 1986), *aff'd*, 843 F.2d 190 (5th Cir. 1988).

[322] *Id.* at 15. The court did not apparently think that the employer's representation to consider job termination if an insufficient number elected the incentive constituted undue influence.

judgment of the district court, finding no genuine issue of material fact raised in the employer's limiting job elimination to "nonessential" employees over age 55.[323] The court appeared to be swayed by the fact that the employer was experiencing financial difficulties and consequently had the right to choose essential employees.[324]

The obvious question, though, is why younger employees with less experience were not considered to be "nonessential." The fact that the employer's criteria were in large part based on age did not seem to worry the court. Presumably, the court would have been more concerned had the criteria involved race or gender.

The Second Circuit, unlike the Fifth Circuit, has been more sympathetic to the plight of older workers, but also more confused on the issues. In *Paolillo v. Dresser Industries*,[325] a case with a very complicated history, an employer faced with financial difficulties called a meeting of older workers on five minutes notice. At this meeting, the employer offered the workers certain early retirement incentives, insisting that they were voluntary and requesting the incentive election form to be returned within six days of the meeting. The employees who accepted the incentives later sued alleging constructive discharge in violation of the ADEA.[326] The district court granted summary judgment for the employer but the Second Circuit reversed.[327] The Second Circuit initially determined that the employer's incentive retirement plan constituted a prima facie violation of the ADEA.[328] This decision, however, was severely criticized by the Seventh Circuit in *Henn v. National Geographic Society*.[329] The Second Circuit then withdrew its original opinion and substituted another upon rehearing.[330] In the substituted opinion, the court determined that "since early retirement is a major decision with far-reaching impact on the lives of older workers," the employer's plan raised the factual question of

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[323] *Bodnar*, 843 F.2d at 194.

[324] *Id.* at 193-94.

[325] 813 F.2d 583 (2d Cir. 1987), *withdrawn and decided on reh'g*, 821 F.2d 81 (2d Cir. 1987).

[326] The employees sued in the District Court for the District of Connecticut, Judge Peter C. Dorsey presiding (district court opinion unpublished). Paolillo v. Dresser Indus., Inc., 821 F.2d 81, 81 (2d Cir. 1987).

[327] *Id.* at 84-85.

[328] *Id.* at 82.

[329] 819 F.2d 824, 827 (7th Cir. 1987).

[330] *Paolillo*, 821 F.2d at 81.

whether the employees had retired voluntarily.[331] This issue, the court concluded, must be resolved by "credibility determinations" made at trial.[332]

On remand, the district court instructed the jury on constructive discharge, which involved a determination of intolerable work conditions. The court also instructed the jury that in order to return a verdict for the employees there must be a finding that age constituted the real reason for the early retirement incentive plan.[333] The jury ultimately returned a verdict for the employer. The employees again appealed.[334]

The Second Circuit determined that this was not constructive discharge because there were no intolerable work conditions. The court determined that there may, however, have been unlawful activity if the employees had been allowed insufficient time to reach a decision on such an important matter as retirement.[335] Once the employees established involuntariness, the next test was to prove that "age [m]ade a difference in the [employer's] decision to implement the elective termination plan."[336]

The court then reversed the decision of the district court and remanded.[337] Although the amended jury instruction lowered the plaintiffs' burden of proof on the age issue, the court clearly expected the employer to ultimately prevail.[338] Some courts have hinted that early retirement, even involuntary early retirement, improves the employee's position because the employee may obtain another job and thus receive retirement benefits and wages.[339]

Involuntary early retirement, however, can hardly be termed a reward. There is often a cost to early retirement, whether volun-

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[331] *Id.* at 84-85.

[332] *Id.* at 85.

[333] Paolillo v. Dresser Indus., Inc., 10 E.B.C. 1741, 1742 (2d Cir. 1989) (district court opinion unpublished).

[334] *Id.*

[335] *Id.* at 1743.

[336] *Id.* The court concluded that the charge to the jury was misleading because it implied that age should be the principal reason for implementing the plan. Instead, the court reasoned, the jury only needs to find that age is a "significant contributing factor." *Id.* at 1744.

[337] *Id.*

[338] For instance, the court states: "[W]e conclude that we cannot simply affirm, although we are tempted to do so because we do not want to put the parties to the expense and effort of another trial in a case whose outcome seems reasonably predictable." *Id.* at 1743.

[339] *See supra* note 319 (discussing Seventh Circuit's opinion that retirees should value early retirement).

tary or involuntary. In monetary terms it may affect employer-provided retirement benefits, Social Security benefits and, perhaps, unemployment compensation. In nonmonetary terms it may adversely affect an individual's physical and mental health.[340]

ERISA itself has affected retirement trends. For instance, it ensures a greater likelihood of employees ultimately receiving their promised retirement benefits.[341] Studies have shown that voluntary retirement decisions are primarily based on economic factors, rather than health and other noneconomic factors.[342] All else being equal, higher pension benefits will likely hasten a worker's departure from the labor force.[343] This trend toward earlier retirement contravenes sound public policy—encouraging workers to remain in the workforce for longer periods of time.[344] Increasing incentives in the private sector for early retirement will create serious problems when the "baby boomers" reach retirement age after the turn of the century and there is a dearth of well-educated younger workers.[345]

Because of these potential problems and because of medical advances prolonging life and improving health, many people may seek employment after retirement. Thus, age discrimination issues are likely to assume more viability and visibility as time goes on. These problems, therefore, need to be addressed now before they become much more serious issues later.

V. CONCLUSION: SUGGESTIONS FOR REFORM

Current and anticipated social changes[346] are producing a rapidly outdated retirement system, resulting in a consensus that the

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[340] *See* DEVELOPMENTS IN AGING: 1989, *supra* note 69, at 101. "Medical evidence suggests that forced retirement can adversely affect a person's physical, emotional and psychological health even to a point where life span may be shortened. According to the American Association of Retired Persons (AARP), 30% of the Nation's retirees are believed to suffer from serious adjustment problems." *Id.*

[341] *But see supra* note 77 and accompanying text (discussing participation and eligibility problems with ERISA).

[342] *See* DEVELOPMENTS IN AGING: 1989, *supra* note 69, at 101.

[343] *See id.*

[344] *See supra* notes 48-50 and accompanying text (discussing potential hazard of early retirement on Social Security system).

[345] *See supra* note 13 and accompanying text (discussing "baby-bust" phenomenon).

[346] *See supra* notes 11-13 (addressing issue of more elderly people in the workforce) & 47-54 (discussing problems faced by workers in general and women in particular) and accompanying text.

present system needs reform.[347] There does not, however, appear to be much agreement as to how to accomplish that reform. As part of any such agenda, greater consideration must be given to matters of equity and fairness to women and the elderly.

It has been suggested that many of the inequities suffered by women in the workforce and under the retirement system will cure themselves as more women enter the workforce and retire.[348] Granted, the present status of women in the workforce, having changed significantly since the 1940s and 1950s when most of the presently retired women first entered the workforce, supports this hypothesis. It is also true that REA may cure some of the existing problems once its full effect is determined. Suggesting, however, that the problem of women's poverty will self-eradicate denies the past and ignores the present. Women continue to receive disparate treatment in the type of jobs they obtain and the wages they receive.[349] The present public and private retirement systems fail to consider the working patterns and special needs of women.[350] Many of these patterns and needs will remain constant. Unless the retirement system is reformed to accommodate these patterns and needs, poverty in the future will be largely confined to women.[351]

It has also been postulated that, as the population and, thus, the workforce ages, many of the problems of age-based employment discrimination will resolve themselves, resulting in less need for federal intervention.[352] While the future cannot be foretold, present circumstances belie this theory. Older workers are often victimized by age discrimination so subtle that even the courts are reluctant to recognize it. Furthermore, with lengthening life expectancies and no mandatory retirement age, the workforce has already aged. There has been, however, a tendency toward *more*,

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[347] *See, e.g., supra* note 1 and accompanying text (citing some commentators who have criticized the public and private retirement systems). It appears that the 102nd Congress has "Pension Simplification" on its agenda.

[348] *See supra* note 36 (analyzing argument that savvy women will eradicate the "feminization of poverty").

[349] *See, e.g., supra* notes 68-69 and accompanying text (discussing comparable opportunity and pay problems).

[350] *See supra* notes 51-203 and accompanying text (outlining women's special problems in the workforce).

[351] *See supra* note 54 and accompanying text (setting forth the Commonwealth Fund prediction that by 2020 the majority of poverty-stricken individuals will be women).

[352] *See* DEVELOPMENTS IN AGING: 1989, *supra* note 69, at 115.

rather than less, federal intervention since Congress has had to counteract overly strict constructions of its laws.

The private retirement system is, in large part, a creature of federal tax policy and exists only through federal tax incentives.[353] Although heavily subsidized,[354] the system fails abysmally for many workers whom it should otherwise protect. A disproportionate number of these workers are female.[355] The retirement system of the future should consider the fact that women are ill-treated under the present system and that the elderly should be encouraged to remain in the workforce as long as they are able.

Many of the problems with the retirement system result from Congress' piecemeal approach to retirement policy. Congress does not appear to be interested in reform. Instead, it attempts to cure as few problems as possible, and then only when forced to appease critics and constituents. This piecemeal approach results in a system unable to meet the needs of the majority of workers, although these same workers are forced to bear a large part of the bill for the few, mostly higher paid workers, for whom the system is adequate.[356]

The 1983 amendments to the Social Security Act[357] have alleviated the short term economic problems which the Social Security system once faced, but the long term economic problems remain.[358] Since the Social Security system is a pay-as-you-go system,[359] there are serious doubts as to whether the system can continue to sustain itself when "baby boomers" retire.[360] Congress should, therefore, attempt to cover as many workers as possible under the private retirement system. To this end, the private retirement system

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[353] *See supra* note 98 and accompanying text (outlining tax benefits of certain pension plans). For a criticism of this policy, see Graetz, *supra* note 1; Wolk, *supra* note 91.

[354] *See supra* note 166 and accompanying text (setting forth multibillion-dollar federal budget cost of tax-qualified plans).

[355] *See supra* notes 44-47 and 51-203 and accompanying text (addressing gender-based inequities).

[356] *See supra* note 166 and accompanying text (discussing enormous tax burden).

[357] *See* Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1983) (codified as amended at I.R.C. § 86 (West 1988 & Supp. 1990) and scattered sections of 42 U.S.C.A. (West 1983 & Supp. 1990)).

[358] *See supra* notes 44-50 and accompanying text (discussing the "baby-bust" phenomenon).

[359] *See supra* note 49 and accompanying text.

[360] *See supra* notes 48-50 and accompanying text (arguing that there will be fewer workers to support the benefits payable to the vast number of retired "baby boomers").

should either become a mandatory system,[361] or no coverage exclusions should be permitted under a more comprehensive voluntary system.[362] One of the problems faced by many women will be solved by including part-time workers or, at least, workers with a significant number of hours worked per year.[363] This inclusion will also help the elderly since many of them may in the future continue to work on a part-time basis.

It is doubtful that fundamental reform can be achieved without recognizing that pension benefits constitute wages.[364] Indeed, much recent reform supports this contention.[365] But Congress has stopped short of advocating this position. The reason has to be attributed to strong lobbying efforts by big employers. If pension benefits were considered to be wages, employers' expenses in maintaining plans will be much greater because they could no longer rely on forfeitures as a funding device.[366] Given the tremendous tax cost to the populace,[367] it is incredible that such forfeitures continue to be condoned. Perhaps a more subtle reason for the strong lobbying efforts is that employers would be held accountable for the practice of advertising their retirement plans as a recruiting and retention device when in fact relatively few employees ever receive any significant benefits from those plans.[368] Such a practice continues at the expense of the workers and the taxpayers.

Another reason Congress refuses to recognize that pension benefits constitute wages is because the logical next step would be a

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[361] *See supra* note 16 and accompanying text (discussing President's Commission recommendation for a mandatory system and listing rationales in favor of a voluntary system).

[362] *See supra* notes 77-94 and accompanying text (discussing coverage exclusion loopholes). Increasing coverage alone will not alleviate the overall problem of retirement security because not all employers offer retirement plans. *See supra* notes 44-46 and accompanying text.

[363] *See supra* notes 78-81 and accompanying text (illustrating that two-thirds of all part-time workers are female).

[364] *See supra* notes 164-73 and accompanying text (arguing that retirement benefits should be considered earned compensation).

[365] *See supra* note 10 (discussing reform with respect to the Tax Equity and Fiscal Responsibility Act of 1982, the Tax Reform Act of 1986, and the Omnibus-Budget Reconciliation Act of 1987).

[366] *See* D. McGILL & D. GRUBBS, *supra* note 64, at 124-25.

[367] *See supra* note 166 and accompanying text (listing 1992 projections that budget cost for employment plans will be $67.5 billion and costs for IRAs will be $10.3 billion).

[368] *See supra* notes 66-163 and accompanying text (describing how women, particularly, fail to receive significant retirement benefits).

mandatory retirement system. If pension benefits are recognized as wages under the voluntary system, the employees' right to benefits is strengthened. Employer's costs would then be higher because of the increased chance that they would actually have to pay the benefit. As a result, the overall system will be severely hampered as a voluntary system because employers will be less inclined to establish generous plans, if, indeed, they would be inclined to establish plans at all. While this may have some advantages, such as forcing the true economics of the situation to conform to reality (i.e., forcing employers to pay higher current wages),[369] if the conclusion is that a national retirement system is desirable or necessary, then the system must be mandatory if the theory of benefits as wages is adopted. Otherwise, employers simply will not establish retirement plans for their workers.

As part of the general reform, integration of retirement plans with Social Security should be abolished. Social Security benefits are not adequate as a sole income source and the long-term viability of the program, as it exists today, is questionable.[370] Since there is not much disagreement on the inadequacy of the system, it is senseless for Congress to allow any private benefits to be integrated out because of Social Security coverage. A particularly egregious aspect of integration is that many integrated plans lead workers to believe that they are covered under the plan and will actually receive certain benefits when this may not be the case at all.[371] While Congress appears to be heading in the direction of abrogating Social Security integration, it has, nevertheless, stopped short of complete abrogation.

Integration makes no sense from either a social policy aspect or an equitable and moral aspect. It persists as a viable alternative because it most adversely affects lower-paid workers. These workers are not often knowledgeable about their retirement plans,[372] nor do they form a very effective lobby.

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[369] *See supra* notes 164-65 and accompanying text (arguing that, if the employer did not offer a retirement plan to its employees, those employees would receive higher current compensation).

[370] *See supra* notes 39-41, 47-50 & 124 and accompanying text (explaining why Social Security system fails, in intent and result, as a sole source of income).

[371] *See supra* notes 125-26 and accompanying text (analyzing worker's lost benefits due to integration).

[372] *See supra* note 188 (citing workers' ignorance about their retirement plans).

If the private retirement system continues, the pure retirement aspect of the system should be encouraged to a greater extent than it is at present. While special tax incentives are afforded tax qualified plans,[373] the value of those incentives has decreased with the income tax rate structure under TRA 86,[374] and the number of plans, particularly defined benefit plans and plans of small employers, has decreased in the last fifteen years.[375] This is due largely to the oppressive number of changes in the law made during that period of time.[376] Each major change means more expense for the plan sponsor, particularly those sponsors of defined benefit plans.[377]

If the system remains voluntary, coverage under private retirement plans should be increased. The lapsed time method of counting hours worked[378] should be revised. Commentators have suggested either abolishing the method altogether or revising it to allow an employee to prove that the requisite number of hours of service were met.[379] The lapsed time method is a simple and cost effective administrative method for many employers. The inequities, however, need to be eliminated.

Some system of portability should be devised. There has been much discussion of this issue in the past,[380] but, again, no agreement on implementation.[381] Many portability problems can be solved if pension benefits are considered to be earned wages belonging by right to the employee. Portability will be a difficult issue to address without this realization. Otherwise, the interests of the employer will predominate, as they have in the past. The anomaly is that Congress depends upon employers to establish and maintain adequate plans for the workers. In reality, though, the

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[373] *See supra* note 98 (discussing tax benefits to private plans).

[374] *See* TRA 86, *supra* note 10, at § 101(a) (lowering maximum tax rates and implementing a "flat" two-tiered rate structure).

[375] *See supra* note 139 and accompanying text (addressing decrease in defined benefit plans and increase in defined contribution plans).

[376] *See* Clark, *supra* note 139, at 15-16.

[377] *Id. See also* Borzi, *supra* note 16, at 29.

[378] *See supra* notes 83-87 and accompanying text (discussing method of computing hours based on whether an employee was employed on first and last full days of the year rather than counting actual hours worked).

[379] *See, e.g.*, Borzi, *supra* note 16, at 32.

[380] *See supra* note 107 (discussing pension portability bills introduced since 1987).

[381] *See supra* notes 108-09 (discussing unsuccessful attempts to adopt portability).

employers bear very little of the actual cost of these plans. Most employer contributions constitute foregone current wages and much of the remainder constitutes tax incentives. Therefore, the loser is the worker who is forced to bear the major expense without adequate congressional protection.

Portability is more important now than ever before because of the shorter minimum vesting period[382] which will result in more workers being vested in smaller benefits.[383] Employers will often wish to distribute those benefits for administrative convenience.[384] The smaller the amount, the less incentive for the worker to roll over the distribution into another retirement plan.[385] If the benefit is not rolled over, it will more than likely be spent currently instead of saved for retirement. This has implications not only for the worker, who will have fewer benefits upon retirement, but also for the taxpayers, who have sustained the private retirement system under the social-policy guise of providing retirement security for the workers. This policy is not realized if retirement benefits are spent prior to retirement.

The lack of indexing in private plans will become more apparent with the shorter vesting schedules.[386] Portability, combined with the shorter vesting schedules, will not completely solve the problem, but it would certainly alleviate some of the effects of the lack of indexing.

Some reform will be forthcoming around the turn of the century when catastrophic social change necessitates it.[387] But the time for consideration is now. Those who advocate speedy action, however, should not be too optimistic. The facts indicate that such reform will not be forthcoming until Congress is forced to act. There are several reasons for this pessimism. One is that the issue of reform has been discussed for a number of years but nothing has been done about many of the issues raised. Another is that the tax rates

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[382] *See supra* note 99 and accompanying text (discussing the Tax Reform Act of 1986 which shortened the minimum vesting period from 10 years to 5 years).

[383] *See supra* note 104 and accompanying text (discussing the method by which benefit formulas calculate benefits).

[384] *See supra* note 115 and accompanying text (citing E. ANDREWS, *supra* note 5).

[385] *See supra* note 116 and accompanying text (discussing current consumption of lump sum distributions by low-paid workers and purpose of Pension Portability Bill of 1990).

[386] *See supra* note 113 (discussing the ways that indexing affects employees).

[387] *See supra* notes 11 & 13 and accompanying text (discussing growing elderly population and "baby bust" phenomenon).

after TRA 86 are too low to provide the real incentives of prior law. Since the federal fisc is losing less money from the tax incentives accorded qualified retirement plans, congressional incentive to reform the retirement system has waned. Another is the mindless approach under TRA 86 to the revision of the IRA rules, which does not encourage retirement savings for many who may eventually need it.[388]

As far as issues of equity are concerned, the same logic applies. It is a sad commentary on our system of government that issues of equity and fairness to women, the aged and minorities persist today, much less that such issues have been raised for a number of years and change has been very slow in coming. The fact that the Social Security system, a public system to which most Americans are entitled to participate as a matter of right, continues to discriminate against these groups bodes ill for the chances of equity and fairness being achieved under the private retirement system. Logically, a greater collective voice should be heard under the Social Security system than under the private retirement system. Furthermore, the Social Security system does not have the cloak of voluntariness to shield it as does the private retirement system. Thus, the Social Security system is a good indication of Congress' tolerance of biased inequities in the retirement system.

Of course, for such reform to eradicate the inequities against women and the elderly, there must also be more deep-seated reform in the marketplace. Again, the outlook is not good based on past experience and the present ideology of the Supreme Court. One wonders what happened to the knights of old who enacted such sweeping reform in 1974. Perhaps they all died with Jacob Javits.

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[388] *See supra* notes 146-55 and accompanying text (arguing that TRA 86 discourages women from saving for post-retirement years. TRA 86 forbids individuals from making a deductible contribution to an IRA if the individual or spouse is covered under an employer-provided retirement plan.).