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The Three Legged Stool: Women and Retirement (In)Security

By Frances Leonard*

In the Fall of 1980, more than four hundred older women¹ attended the White House Mini-Conference on Older Women² to draft an agenda of their most critical concerns to be presented to the delegates of the White House Conference on Aging in December, 1981. Almost ninety percent of those responding identified income as one of the three most critical concerns facing older women; for over half, income was the most critical concern.³ This concern is justified by an examination of the statistics regarding the income levels of older women. According to the Census Bureau, more than one-third of the unmarried women⁴ age sixty-five or

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¹ "Older woman" is a term of art. Feminist and older women’s advocate Tish Sommers believes the term is subjective in that a woman is an "older woman" when she accepts the description as applying to her or when she perceives that others are applying it to her. Interview with Tish Sommers, President of the Older Women’s League, in Oakland, California (Nov. 10, 1980). The Age Discrimination in Employment Act (ADEA) uses age 40 as the threshold. See 29 U.S.C. § 631(a) (Supp. III 1979). Old-age benefits under Social Security begin at age 62, 42 U.S.C. § 402(a)(2) (1976), and aged Supplemental Security Income (SSI) benefits begin at age 65, id. § 1381, yet mandatory retirement is prohibited until age 70, 29 U.S.C. § 631(a) (Supp. III 1979). This Article uses the term to describe women of retirement age, the threshold of which is approximately age 50.

² The conference was held October 9-10, 1980, at the Hotel Savory in Des Moines, Iowa.

³ Respondents were asked to list by priority the three most critical issues faced by older women. Out of 182 responses, 160 included income as one of their top three concerns (88.9%), while 100 placed it as their first concern (54.9%). Health was the first priority for 26 (14.3%); housing was named first by six (3.3%). The raw data is available through the Older Women’s League, 3800 Harrison St., Oakland, CA 94611.

⁴ Statistical references throughout this Article pertain to unmarried older women. Most of these unmarried older women are widows; one study estimates 7 out of 10 women age 65 or over are or will become widows. President's Comm'n on Pension Policy, Working Papers: Working Women, Marriage and Retirement at xi (1980) [hereinafter cited as Working Papers] (relying on estimate of Dr. James Weed, Statistician, National Center for Health Statistics). By contrast, men who enter retirement years married tend to remain
older are living below the poverty level; older women actually are becoming the single poorest group in the United States. 

Retirement income policy planners speak of the “three legged stool,” a metaphor that refers to the three components of an adequately funded retirement: social security, pensions, and savings. The American retirement system operates on the assumption that all three legs will be in place. To the extent one or more legs is short or missing, most individuals will not have an adequate retirement income. Unfortunately for women, the three legs usually are short or missing. Sixty percent of the unmarried older women (including widows age sixty-five or older) rely on social security benefits un supplemented by a pension or savings. Only eighteen percent receive additional income from pensions.

Public policy, as reflected in statutes and regulations, is to some degree responsible for the income crisis that many older women face. The American retirement income system is controlled married until death. Grad & Foster, Income of the Population Aged 55 and Older, 1976, Social Security Bull., July 1979, at 17. Between the ages of 55 and 61, 12% of men are unmarried, compared with 24% of women. Between the ages of 65 and 72, 13% of men are unmarried, compared with 40% of women. Over age 73, 14% of men are single, compared with 54% of women. Id.

5. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL SECURITY AND THE CHANGING ROLES OF MEN AND WOMEN app. C, at 178 (Table 13) (1979) [hereinafter cited as HEW REPORT]. For people age 65 and over, the 1976 poverty level was $3445 for couples and $2730 for single people. Id. at 167 (Table 1).

6. The White House Conference on Aging, Office of Public Affairs, Facts on Older Women 2 (1980) [hereinafter cited as Facts on Older Women]. The poverty rate for older women is 65% higher than it is for older men. Id.

7. “When social security was established, it was intended to provide a minimum floor of retirement income. It was expected to be supplemented by other sources of retirement income such as private pensions and personal savings. Together those sources were to provide an adequate retirement income. These three sources of retirement income generally are referred to as the three-legged stool in the U.S. and as the three pillars of retirement income in such countries as Switzerland and West Germany.” President’s Comm’n on Pension Policy, An Interim Report 4 (May 1980) [hereinafter cited as INTERIM REPORT].

8. HEW REPORT, supra note 5, at 183 (Table 16).

9. Id.

substantially by statute. Pension plans in the private sector are regulated by the comprehensive Employee Retirement Income Security Act \(^{11}\) (ERISA), while public sector pension funds are regulated under both state and federal statutes. \(^{12}\) In addition, tax-sheltered retirement savings programs are federally regulated. \(^{13}\) Finally, the Social Security Act \(^{14}\) pervades the entire retirement income field.

Although no more than forty-one percent of the elderly poor would be expected to be unmarried women \(^{15}\) if no bias were present in the statutory system, the President's Commission on Pension Policy has reported that seventy-two percent of the elderly poor are unmarried women. \(^{16}\) The disproportionate number of retirement age women below the poverty level must result from an implicit discrimination in the statutory retirement income system, which reflects a lack of concern for the factors of age and sex, or a disregard for the value to society of unpaid work in the home. \(^{17}\) The consequence of the present system's failure to accommodate the prevailing work patterns of the female population has been that many women of retirement age are forced to seek aid from

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\(^{13}\) See I.R.C. § 408.


\(^{15}\) In 1977, of the total population aged 65 or older, there were 146 women to every 100 men. Department of Health, Education, and Welfare, National Clearinghouse on Aging, Facts About Older Americans 1978 (1979). It is projected that the disparity in this age group will widen by the turn of the century to 150 women to every 100 men, Id. Women thus currently constitute approximately 59% of the population age 65 or over; at most, 70% of these women are unmarried. See note 4 supra.

\(^{16}\) INTERIM REPORT, supra note 7, at 28 (Chart IV).

\(^{17}\) As asked by one Congresswoman: "[D]oes society place enough value on the childbearing/homemaking role of women to shift some of the cost of this function off the woman herself and on to the pension system?" ERISA Improvements Act of 1979: Hearings on S. 209 Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 1043 (1979) (statement of Representative Schroeder).
need based public assistance programs. Furthermore, because women age sixty-five or older constitute the fastest growing segment of the American population, the problem is becoming increasingly significant; one out of four women working today can expect to be poor in her old age.

The major federal statutes that control the three legs of the retirement income stool include a number of provisions that discriminate against the female majority of the older population. Although since *Califano v. Goldfarb* these laws have been substantially free of gender distinctions, many "sex-neutral" provisions continue to have a disparate impact on women that usually is not felt until their retirement years. Retirement income for women thus is a problem related to both age and sex.

The devastating effects of discrimination based on both age and sex further combine to deprive women of the benefits of the pension and savings components of retirement income. Pensions are designed to award the long-term, full-time, well-paid employee, historically characteristics of the male work pattern. In addition,

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18. In 1976, 15% of single older people reported receiving public assistance. *American Council of Life Insurance, Pension Facts 1978-1979*, at 45 (Table 20) [hereinafter cited as *Pension Facts*]. Most of these are undoubtedly women, because women predominate among unmarried elders. See note 4 *supra*.

19. See note 15 *supra*.


21. 430 U.S. 199, 217 (1977) (holding unconstitutional a Social Security Act provision requiring widowers to prove dependency). One gender distinction retained in the Social Security Act is that all the community property income earned in a husband-wife business partnership is credited entirely to the husband's account unless substantially all of the management and control of the business is in the hands of the wife. 42 U.S.C. § 411(a)(5)(A) (1976).

22. The principle of dual-burden discrimination was recognized by the Fifth Circuit in *Jeffries v. Harris County Community Action Ass’n*, 615 F.2d 1025 (5th Cir. 1980). The plaintiff in *Jeffries*, a black woman, alleged that she was the victim of employment discrimination in being denied a promotion. The district court had considered the sex and race discrimination claims separately. Because of the number of women employees, the district court held there was no sex discrimination; based on the number of black employees and the fact that a black male received the promotion, the district court also found that there had been no race discrimination. The Fifth Circuit held that the district court erred in not considering the plaintiff's claim (and statistical evidence) of discrimination on the basis of both race and sex, and declared that discrimination against black women can exist in the absence of discrimination against white women or black males. *Id.* at 1032-35. This principle should be extended to cases alleging both age and sex discrimination because separate statistical showings of female employees and employees over the age of 40 are not likely to reveal discrimination against women over 40.

while Social Security covers ninety percent of the paid work force, it does not cover homemakers, the largest occupational class of all.\(^\text{24}\) Finally, tax-sheltered private savings for retirement are, as a practical matter, unavailable to most homemakers.\(^\text{25}\) The convergence of these factors makes the retirement income stool a shaky one for older women.

This Article attempts to illustrate how the aggregate effect of the separate statutory schemes regulating the distribution of retirement income results in a significant income disadvantage for women of retirement age. The Article examines the features of the major federal retirement income statutes, focusing on those factors that result in single women having forty percent less retirement income than single men.\(^\text{26}\) The Article also reviews the various proposals for reform of each of the statutory systems.

**The First Leg: Social Security**

Despite its original purpose of merely supplementing private pension income,\(^\text{27}\) the social security system now provides the foundation of the American retirement income system. Social security presently pays $120,000,000,000 a year to 35,000,000 people,\(^\text{28}\) or one in every seven in the nation,\(^\text{29}\) and covers ninety percent of the paid labor force.\(^\text{30}\)

Because of their greater longevity, women constitute approxi-
mately sixty percent of the social security beneficiaries. Rather than serving its majority constituency equitably, however, the amount of social security benefits received by the average woman is much less than that received by the average man. While underlying sex discrimination in the paid labor force contributes to this income gap, it is only part of the problem; also at fault are various provisions in the Social Security Act (Act) and in the regulations promulgated under the Act. In general, the problems result from Congress’ lack of recognition of homemaking as an occupation, with the effect being felt by the homemaker when she retires.

Social Security and the Retired Homemaker

The social security system, as presently structured, operates to exclude many retired homemakers from participating in the system by imposing the requirement that a worker remain in the paid labor force for forty quarters (ten years) to qualify for fully insured status. The effect of this restriction is disproportionately felt by persons who combine a paid work career with time at home for child rearing. Many of these persons do not meet the forty quarter threshold, and as a consequence can receive social security benefits only as dependents, being ineligible for the more lucrative

31. Of the 24,500,000 social security beneficiaries over the age of 62 in 1976, 14,400,000 were women. HEW REPORT, supra note 5, at 4.
32. CRS REPORT, supra note 23, at 95 (Table 20) (source: DEPT OF COMMERCE, BUREAU OF CENSUS, CURRENT POPULATION REPORT No. 118). While the average yearly benefit paid to men is $5,400, the average benefit paid to women is only $3,100 per year. Id.
33. Because Social Security is wage-based, lower paid workers receive lower retirement income benefits. Because women’s wages are, on the average, less than sixty percent of men’s, see CRS REPORT, supra note 23, at 11, this disparity is reflected in retirement years by the reduced social security benefit. The fact that almost two million women who were entitled to their own primary account chose to receive dependent’s benefits because they were higher, see HEW REPORT, supra note 5, at 4, illustrates the impact of low paid work history on social security benefits.
35. Social Security Administration regulations are found at 20 C.F.R. §§ 401-450.105 (1980).
36. Gender descriptions that assume homemaking is primarily a female occupation are used throughout this Article for convenience.
38. Of the 14,400,000 women receiving social security benefits in 1976, roughly 58% received their benefits as dependents, approximately 3,400,000 as wives and approximately 5,000,000 as widows. Only 6,000,000 women received their benefits as retired workers. HEW REPORT, supra note 5, at 4.
worker benefits. In addition, the payroll contributions made by workers who do not attain forty quarters of coverage are never recovered either as retirement benefits or as a lump-sum return of the contributions.

Furthermore, under the dual entitlement rule, which allows a married homemaker with her own fully-insured status to receive the greater of either her old-age benefits or one-half of her spouse's benefits, many women who do achieve forty quarters of coverage still find that, because of the original disparity in employment income, fifty percent of their husband's benefits is greater than one hundred percent of their own. By opting for spousal benefits, these women must forfeit the payroll contributions they have made.

Even if a retired homemaker has met the forty-quarter threshold for eligibility, in calculating the amount of benefits for which she is eligible, a homemaker's work is not only ignored by the social security system, it may lower the amount of benefits to which

39. The lifetime homemaker, with no paid work history, whose marriage remains intact until her husband's retirement, is not affected by this official disregard of the homemaking occupation. While both are living, the couple will receive 150% of his Primary Insurance Amount (PIA). Id. § 402(a)-(b)(2) (1976 & Supp. III 1979). Upon the death of either, the benefit is reduced to 100% of his PIA. Id. § 402(e)(2)(A), (f)(3)(A).

40. The statute makes no provision for the return of payroll contributions to one who comes under the dual entitlement. See 42 U.S.C. § 402(b)(1)(D)-(c)(1)(C). The Act prohibits a couple from making voluntary contributions on the homemaker's behalf as employment compensation for her services in the home. Id. § 410(a)(3)(A).

41. Id. § 402(b)(1)(D), (c)(1)(C) (1976). See note 33 supra. The tendency of the system to place heavy reliance on dependency benefits for the unpaid homemaker is rooted in history. At the time the Social Security Act was enacted, it was assumed that men worked, women stayed home, and marriage lasted a lifetime. See HEW Report, supra note 5, at 1-3. These assumptions, however, are no longer true; one in three marriages ends in divorce, id. at 2, and 90% of American women are in the paid labor force at some time in their lives. Id. at 2. The social security system has failed to respond adequately to these changes.

42. See note 33 supra. The notion that some contributors will receive more value for their payments than others is reflected in many sections of the Act. See, e.g., 42 U.S.C. § 415(a)(1)(A)(i)-(iii) (Supp. III 1979) (relative amount of benefit varies with salary); id. § 429 (World War II service personnel deemed to have paid into the system); id. § 431 (same for Japanese-Americans interned at relocation centers during World War II). Nonetheless, it seems manifestly unjust that workers whose predominant work patterns, imposed in part by societal pressure, fall outside the Act should be additionally penalized by forfeiture of those amounts they have contributed.
she is entitled. Because social security benefits are wage-based, the amount of benefits a person is entitled to receive is calculated with reference to his or her Average Indexed Monthly Earnings (AIME) over a thirty-five year period. In making this calculation, a retiree is permitted to exclude only the five lowest earnings years from the thirty-five year calculation. The practical effect of limiting this exclusion to only five years of the wage earner's lowest earning years is to lower the retirement income of older women who have combined homemaking with paid employment. For example, a woman who worked in the paid labor force for five years, devoted fifteen years to raising a family, and then returned to the paid labor force for twenty years, will have to include ten “zero earnings years” in her AIME calculation.

Other countries have acted to mitigate this result in their own social security programs. The United Kingdom, for example, credits women and men for up to twenty homemaking years if the homemaking spouse is also caring for a child, or an aged, sick, or disabled relative. Switzerland credits all married women, widows, and divorced women for their years of marriage, whether or not the marriage produced children.

The system in the Federal Republic of Germany awards credits towards the minimum needed to qualify to men and women who are temporarily out of the labor force because of illness, unemployment, training, or the use of a sixteen week maternity leave. The credit is given a sex-based, indexed average wage

44. See generally id. § 415(b)(2)(B) (Supp. III 1979).
45. See id. § 415(b).
46. In response to the women's movement of the 1970's, many countries revised their social security systems to reflect the current situation. For example, revisions occurred in Germany in 1972, and in the United Kingdom in 1975. See CRS REPORT, supra note 23, app. D, at 112-13.
47. U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY IN A CHANGING WORLD 114 (1979). Under the British two-tier system, workers must be credited for approximately forty years of work in order to qualify for the first tier, the basic flat-rate pension. The homemaking credits are not assigned a monetary value, but instead go to establishing eligibility for the flat-rate benefit which is tied to years in the work force, rather than wages. The second tier is calculated on the twenty highest earnings years. Id. at 131-34. See also CRS REPORT, supra note 23, at 113.
48. U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY IN A CHANGING WORLD 128-29 (1979). Ironically, by crediting married persons for their homemaking years, both the United Kingdom and Switzerland have created an inequality with respect to single people. Married people with partial work histories end up with more credits than single people with the same work histories. Id. at 118.
49. Id. at 125-26.
value. As in the United States, the German system does not give homemakers credit. Unlike our system, there is no supplementary spousal benefit to compensate for the uncredited work. The German homemaker, however, is able to buy into the system by making her own payroll contributions, an opportunity not available to her American counterpart.

Sweden uses a two-tier system. The flat-rate, or first tier amount, is uniformly paid to all persons at age sixty-five, regardless of their relationship to the paid labor force. The fifteen highest earnings years are used to calculate the second tier. The unpaid homemaker therefore will receive only the flat rate at age sixty-five. Unless there are children under age sixteen, she receives no dependents' benefits.

All of these systems create retirement income credits for the homemaker in her own right. She either receives the flat-rate sum, has the option to contribute voluntarily, or obtains retirement credits for her work in the home. The American system provides none of these options.

Social Security and the Divorced Older Woman

Because a share in the husband’s pension is most unlikely for divorced older women, this group of retirement age women is especially dependent on social security benefits. However, for a divorced older woman to receive social security retirement and survivor's benefits based upon her former husband’s earnings, the marriage must have lasted at least ten years. With the median duration of marriage now less than seven years, the ten-year re-

50. Because the average wage is separated by sex, and because German women earn less than German men, credits for women are given a much lower value than those for men. Id.
51. Id. at 118.
52. Id. at 114, 126. The woman is given certain latitude in selecting the wage level under which she will make her contributions. The woman’s wage level is not tied to her husband’s wage level. Id. at 126. Inasmuch as contributions are calculated at a high 18% of the assumed wage rate, most German homemakers do not make voluntary contributions, and those that do usually pay at the minimum rate. Id. at 114, 126. Furthermore, benefits based on voluntary contributions are not indexed to the inflation rate, so the homemaker’s actual benefit is quite low. Id. at 126.
53. CRS Report, supra note 23, at 114.
54. Id.
55. See notes 207-11, 224-31 & accompanying text infra.
57. In 1977 and 1978, the median duration of marriage in states participating in di-
requirement prohibits many older women from sharing in retirement benefits although they shared the reduced marital income resulting from the deduction of the social security payroll tax from their former husband’s salary.58

While the divorced older woman who does qualify under the marriage duration requirement seemingly receives the same retirement benefit as the wife of the retiree—50% of the husband’s Primary Insurance Amount59 (PIA)—the figure is misleading. A retiree’s wife will also share the 100% of the PIA received by the husband for a combined income of 150% of the PIA for the couple. Thus, as a practical matter, the wife is receiving 75% of the PIA. The divorced older woman, who as a single person has higher per capita expenses than members of a couple, does not share a spouse’s benefits and therefore must exist on one-third less income than a retiree’s wife.

Furthermore, and again with seeming equality, the spousal benefits for both the wife and the divorced older woman cannot begin until the husband begins to draw his own social security.60 During this period, however, the wife is sharing in the husband’s earnings, while the divorced older woman is dependent on her own resources.61 The provision thus results in disproportionate hardship to divorced older women. Severing the divorced older woman’s retirement benefits from her former husband’s retirement date would alleviate some of the problems these women face.

In addition to the provisions just discussed, the Act imposes yet another disadvantage on the divorced older woman as compared to the wife of the retiree. After the retiree dies, both the widow and the surviving divorcee may qualify to receive survivor’s benefits equal to 100% of the decedent’s PIA.62 However, the

58. Attempts to lower the length of the marriage requirement to five years were made in H.R. 765, 96th Cong., 1st Sess. (1979), H.R. 874, 96th Cong., 1st Sess. (1979), and H.R. 7374, 96th Cong., 2d Sess. (1980). All measures failed to pass.
60. The wife’s or divorced older woman’s entitlement ‘depends on a tie to “an individual entitled to old-age or disability insurance benefits.”’ Id. § 402(b)(1). Such an individual is defined, among other things, as one who has “filed application for old-age insurance benefits.” Id. § 402(a)(3) (1976).
widow may retain her benefits upon remarriage after the age of sixty, 63 whereas remarriage at any age will cause the forfeiture of the surviving divorcee's benefits. 64

Social Security and the Disabled Older Woman

The social security system provides not only retirement and survivorship benefits, but also disability benefits. While the disability benefits are available under a number of circumstances, many of the prerequisites imposed on eligibility for these benefits operate to exclude women from being entitled to them.

The Disabled Woman Worker

Disability benefits, through either social security or the worker's pension, may serve as a form of early retirement benefits. 65 A disabled worker in late middle age will "retire" on disability until attaining the minimum retirement age. 66 The Act recognizes the early retirement characteristic of disability insurance by establishing the minimum age for some beneficiaries at fifty. 67

Women workers often accrue forty quarters of social security coverage many years before retirement. 68 Even a thirty year period of uncovered work in the home between the earned credits and application for benefits will not affect a woman's eligibility for old-age benefits. The requirements are quite different, however, for eligibility to receive social security disability benefits. As is the case with retirement benefits, forty quarters of coverage are needed to be considered eligible to receive disability benefits. 69 To be eligible

63. Id. § 402(e)(4).
64. Id. § 402(e)(1)(A) (1976). Forfeiture will occur even if the surviving divorced wife participated in the marriage (and the reduced income resulting from the payroll contribution) for thirty years, and the widow for only three.
65. "[F]or some older workers, reemployment may not be possible under any program due to serious ill health or injury. For these workers, disability programs essentially have functioned as early retirement programs." INTERIM REPORT, supra note 7, at 39.
67. Widows, widowers, and surviving divorced wives must be at least 50 to receive disability benefits. Id. § 402(e)(1)(B)(i), (f)(1)(B)(ii).
68. Most women tend to accumulate their work experience at an early age. The age bracket with the highest proportion (76%) of women in the paid labor market is 20-24 years old. Young, Work Experience of the Population in 1977, MONTHLY LAB. REV., Mar., 1979, at 54.
for disability benefits, however, twenty quarters of coverage must have been earned within the ten years prior to the application for disability benefits. The formerly employed, fully insured woman with even six homemaking years intervening before her application for social security disability benefits, a pattern common to many women, will not be able to satisfy this requirement. The forfeiture will not be felt until a woman’s later years, after she has engaged in work in the home not covered by social security for six years following a career in which she had accumulated forty quarters of coverage. Disability in the later years of a homemaker’s career thus will often not bring her the early “retirement” benefits in the form of disability payments that a male co-worker is eligible to receive.

Today, women frequently reenter the paid work force after a period of working in the home. If a woman has raised two children to school age, ten years can easily have passed since her last period of covered employment. For her to regain her eligibility for disability benefits, she would have to work twenty additional quarters (five years). Assuming she has accumulated forty quarters of coverage before leaving her employment to raise a family, she effectively has to work a total of sixty quarters to regain her eligibility for disability benefits. This requirement severely penalizes women who choose to combine a career of homemaking with reentry into the paid labor force.

The Disabled Homemaker

In addition to the possibility of being precluded from receiving social security disability benefits because of the restrictions described above, the older wife or divorcée who becomes disabled before she reaches age sixty-two cannot receive disability benefits on the basis of her husband’s earnings. She is precluded from receiving these benefits even though she is otherwise eligible for old-age benefits on her husband’s earnings at age sixty-two. The homemaker, along with other classes of potential disability beneficiaries, thus is dependent on the insured worker’s earnings for

70. Id. § 423(c)(1)(B).
71. At 62 she can receive wife’s benefits on her husband’s account. Id. § 402(b)(1)(B) (1976).
72. Beneficiaries dependent on the insured worker’s record include the insured worker, id. § 423(c)(1), and widows, widowers, surviving divorced wives, and children. Id. § 402(d)(1)(B)(ii), (e)(1)(B)(ii).
support. The argument that the disabled wife may be supported by her spouse's income exemplifies the social security system's failure to recognize the economic value of the homemaking role, both to the family and to society generally. The value is realized only when the family, deprived of the homemaker's services by her disability, must hire others to replace her.

The Disabled Widow

Although the disabled widow or surviving divorced older woman may be able to receive disability benefits between the ages of fifty and sixty, she is hindered by certain obstacles in addition to the high minimum age requirements. For example, the insured worker or worker's child is deemed disabled by his or her "inability to engage in any substantial gainful activity by reason of [disability]," the disabled widow, widower, and surviving divorced spouse, however, are subject to a stricter test: "[impairment at a level of severity] deemed to be sufficient to preclude . . . any gainful activity."

The distinction between "substantial" gainful employment and "any" gainful employment is made in the regulations. Gainful work activity is broadly defined as "activity for remuneration or profit." Substantial gainful activity is defined more narrowly as the "performance of significant physical or mental duties . . . productive in nature." Because many persons arguably can engage in some sort of activity for remuneration or profit, albeit menial and inadequate to meet cost of living expenses, application of the "any gainful employment" standard to the widowed homemaker is critical. The problem is brought even more sharply into focus in light of the fact that the woman may be fully insured as a worker for purposes of old-age benefits, but, because of her six year absence from coverage, is ineligible to qualify for disability as a worker under the more lenient standard that she is unable to engage in any substantial gainful activity.

74. Id. § 423(d)(1)(A) (emphasis added).
75. Id. § 423(d)(2)(B) (emphasis added). This provision has a greater impact on women than men because although the section applies to widows and widowers alike, most men qualify on their own PIA and not as widowers, under the dual entitlement rule.
76. 20 C.F.R. § 404.1532(b) (1980).
77. Id.
Social Security and the Widow

Recent amendments to the Social Security Act have benefited widows. They now receive 100% of their deceased spouse's PIA, can remarry after age sixty and retain their benefits, and can start receiving benefits at age sixty. A major problem that remains for these women, however, is the "widow's gap," illustrated by the following hypothetical.

W and H were married and had three children, the last of whom, A, was born when W was twenty-nine. H died when W was forty-one and A was twelve. Because she had children in the home under the age of eighteen, W received a "mother's benefit;" the children under the age of eighteen also received "children's benefits." Upon A's eighteenth birthday, W, who was then forty-seven, lost her mother's benefit. Under the current statutory scheme, W would be ineligible for widow's benefits until she was sixty. If she became disabled, she could, after age fifty, attempt to qualify for widow's disability, but she would be subject to the stricter test, which requires the widow to prove that her disability precludes her from engaging in any activity for remuneration or profit, a difficult standard to meet. This gap in the widow's benefits often coincides with an "early death" clause in her late husband's pension plan, so that she may have no income at all. Because of her lack of recent paid employment and the double burden of sex and age discrimination on older women, she may be

78. A large percentage of the women age 65 or older are or will become widows. See note 4 supra. The average age of widowhood in the United States is 56, and widows outnumber widowers six to one. Facts on Older Women, supra note 6, at 2.
80. Id. § 402(e)(4).
81. The benefits received are actuarially reduced. 42 U.S.C. § 402(g)(1) (1976). The means by which the benefits are indexed, however, may result in another "early widowhood" problem. Social security benefits are indexed by the inflation rate, while a worker's earnings (upon which the benefit is based) are indexed by the wage rate. A deceased worker's wages, however, are indexed by the inflation rate. Because wages have until recently outpaced inflation, the effect is to tie the early widow to a standard of living that does not represent her reasonable expectation of the standard of living she would have attained. See generally INTERIM REPORT, supra note 7, at 7.
83. Id. § 402(g)(1)(E), and (d)(1)(B)(i).
84. Id. § 402(d).
85. The benefits accruing to the children would continue until they were no longer full time students or until they were twenty-two years of age, whichever came first. Id. § 402(d)(1)(B)(i).
86. See notes 194-97 & accompanying text infra.
unable to find employment. Being neither disabled, blind, nor age sixty-five, she would not qualify for public assistance under the Supplemental Security Income program (SSI). No longer caring for dependent children, she also would be ineligible for Aid to Families with Dependent Children (AFDC).

The convergence of gaps of coverage for women between the ages of forty-five and sixty in the Social Security Act, gaps which previously have been invisible to retirement income policy planners, may leave the middle-aged widow destitute—far worse off, in fact, than aged, blind, or disabled individuals who can qualify for SSI. The impact of these provisions thus demonstrates the need for a comprehensive review and possible revision of the various retirement statutes.

Proposals for Change in the Social Security System

The 97th Congress is expected to give high priority to the financial problems of the social security system. As a greater number of people become eligible for a greater amount of benefits, the system increasingly is becoming financially unstable. To ensure the continued viability of the system, the government is faced with a choice of reducing benefits to certain classes of beneficiaries or designing a refinancing plan for the system. The outcome of this determination may affect millions of women currently on social security, especially those who soon will be eligible.

Reducing benefits to ensure the fiscal viability of the system most likely will require the selection of certain classes of beneficiaries whose benefits must be eliminated or curtailed. Because the growing majority of American elders are women, any reduction in benefits to this class will have severe economic consequences to the aged population as a whole. A true refinancing plan, on the other hand, would not single out certain classes of beneficiaries whose benefits would be reduced or eliminated. Rather, it would seek to stabilize the system by addressing the allocation of the tax burden between general revenue funds and payroll taxes, or by establishing a new tax base.

The most frequently proposed method of refinancing the social security system is an infusion of general revenues, either specifically to bolster certain programs or generally to bolster the economic base of the system. Social Security Advisory Councils have recommended for over four decades that general revenues be used
to finance part of the social security program.\textsuperscript{87} In 1938, the Advisory Council recommended that, over a period of time, the program should be one-third financed from general revenue.\textsuperscript{88} Most recently, the Council "unanimously [found] that the time has come to finance some part of social security with nonpayroll tax revenue."\textsuperscript{89}

Although an increased payroll tax also has been suggested as a means of refinancing the system, a major disadvantage of that method is its regressive nature. In addition, increases in the payroll tax contribute to inflation by increasing labor costs per unit of production.\textsuperscript{90}

In general, consideration of financing methods is as much an older woman's concern as distribution of benefits. Each proposal discussed below will be examined from the viewpoint of older women. Although none of these proposals has yet been adopted, all continue to be actively debated and promoted. Many of these proposals are predicated upon what one older women's advocate has called the "new myths," one of which theorizes that "women are going into the workforce in such numbers that dependency is only a transitional problem."\textsuperscript{91}

\begin{itemize}
  \item \textsuperscript{87} Social Security Financing and Benefits: Reports of the 1979 Advisory Council on Social Security 36 (1979).
  \item \textsuperscript{88} Id.
  \item \textsuperscript{89} Id. at 35.
  \item \textsuperscript{90} Id. at 37.
  \item \textsuperscript{91} T. Sommers, Gray Paper No. 2, Social Security: Adequacy and Equity for Older Women 15 (1979) [hereinafter cited as Sommers]. One poll reported that 44\% of nonworking mothers under the age of 30 stated they would look for jobs if adequate day-care facilities were available. Roper Organization, Inc., The 1980 Virginia Slims American Women's Opinion Poll 13 (1980). Seventy-three percent of the nonworking women under 30 plan to work in the future; 62\% under 40 plan to work full-time, as do 37\% under 50. Id. at 10. Finally, 52\% think that by the end of the century, almost all women who can work will be working. Id. at 33.
  
  At least one commentator disagrees with this assumption. "Given the continuing shrinkage of entry-level jobs and inadequacy of available child care, the assumption that the present rate of increase of [women's] labor force participation will continue is a very dubious one. Dependency is a condition which women will have to deal with for the foreseeable future. Considering how slowly basic changes take place, it is dangerous to assume that sex roles are disappearing." Sommers, supra note 91, at 15. The Virginia Slim's poll found that 57\% of American women approve of continued change in women's status, but 23\% think change has gone far enough. Fifteen percent think it has gone too far. Roper Organization, Inc., The 1980 Virginia Slims American Women's Opinion Poll 33 (1980).
\end{itemize}
Proposals Detrimental to Older Women

Tying Social Security Benefits Strictly to Wages

Social security benefits currently are weighted so that persons on the lower end of the wage scale receive somewhat more for their contributions than do the well-paid. In addition, there is a minimum benefit. Because of the regressive nature of the payroll tax and because those with high salaries pay the tax only on a portion of their earnings, the apparent advantage conferred by weighting is not as much an advantage as an offset against the disadvantages. Nevertheless, some have recommended eliminating this weighting feature of social security, along with the minimum benefit. This proposal would tie social security benefits strictly to wages. Proponents of this proposal argue that weighting and the minimum benefit are welfare benefits, more appropriately a matter for SSI. Thus, if a person's lifetime earnings failed to yield a social security benefit sufficient to sustain a poverty line existence, public assistance should provide the difference. This rationale forms the basis for one proposed refinancing plan, which suggests that resorting to partial general revenue funding will alleviate the financial problems with social security that have resulted from the system's dependence on its trust funds and on payroll tax. Directly supplementing the social security system with general revenue funds is perceived to be politically unpopular; the SSI, however, is funded by general revenues and if sufficient social security benefits can be shifted onto the SSI, then in effect social security's obligations will have been met by general revenues.

One variation of this proposal would provide a minimum poverty level benefit for the low-paid worker who worked thirty years in employment covered by social security. A worker with only "sporadic" ties to the paid labor force, however, would not be covered by social security, but rather would be a candidate for SSI.

93. See id. § 415(a)(1)(C)(i)(I).
95. Id. at 451-52, 508-12.
96. Id. at 515-16. The 1979 Advisory Council also recommended that social security not attempt to provide a poverty level benefit to workers who do not spend most of their working lives under social security. ADVISORY COUNCIL ON SOCIAL SECURITY, SOCIAL SECURITY FINANCING AND BENEFITS 66 (1979).
Women, with their movement in and out of the paid labor force in order to undertake family responsibilities, would be such workers. The disregard of the American retirement system for unpaid work in the home thus would create "blank spots" in the employment record of most women in the country, even though they might have spent a lifetime in productive work.

Furthermore, the disenfranchised social security beneficiary who applies for SSI will find more is involved than a simple transfer of funds. Because the eligibility requirements of SSI are different from those of social security, she will have to spend-down her assets in excess of $1500 and prove her need. These features, absent from social security, unalterably distinguish the two programs.

Forcing income-poor people to become asset-poor increases poverty, and increased poverty inevitably leads to increased public expense. The proposal for providing financial relief to social security by transferring its obligations to SSI thus is a most dubious one. In addition, the proposal would place a disproportionate burden upon older women.

Decreasing Benefits for Mothers and Children

The child of a deceased or retired worker currently is eligible for benefits until age eighteen or, if a full-time student, until age twenty-two. In addition, the widow will receive mother's benefits until her youngest child is eighteen. The Carter administration proposed to eliminate the benefit for students eighteen to twenty-two years old and to terminate the mother's benefit when the youngest child reaches age sixteen.

Although the proposal appears aimed at reducing social security benefits for young adults, in reality it would increase greatly the financial burden on middle-aged widows raising older children through college. Further, this burden would not fall equally on wo-

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98. Nonetheless, the Advisory Council has rejected "recurrent proposals" to make social security benefits strictly proportional to earnings. ADVISORY COUNCIL ON SOCIAL SECURITY, SOCIAL SECURITY FINANCING AND BENEFITS 64 (1979).
100. Id. § 402(g)(1)(E).
men and men, as eighty-five percent of surviving spouses are widows.\textsuperscript{102}

Eliminating the Lump Sum Death Benefit

Upon the death of the spouse, a $255 lump-sum payment is made to the widow or widower or to the person paying the burial expenses.\textsuperscript{103} The Carter administration included the elimination of the lump-sum death benefit in its social security recommendations.\textsuperscript{104} Because of the larger number of widows than widowers, this sum is primarily a widow's benefit and its elimination would adversely affect many older women.

Eliminating Survivor's Benefits for Currently Insured Workers

Even if a worker has not accumulated forty quarters of coverage, his or her survivor will receive benefits if death occurs when the worker is "currently insured" for six of the previous thirteen quarters.\textsuperscript{105} The Carter administration recommended eliminating survivor's benefits for the currently insured.\textsuperscript{106} The elimination of these benefits would have a serious effect on younger widows because their husbands are more likely not yet to have attained fully insured status.

Eliminating Spousal and Survivor's Benefits

Critics have proposed that both spousal and survivor's benefits be phased out entirely in the next thirty to fifty years.\textsuperscript{107} This proposal would return social security to the provisions of its 1935 enactment, repealing amendments that were in force before the first social security benefit was paid in 1940.

The proposal is based on the expectation that all women will be fully and adequately employed in lifetime careers by the turn of the century. Minimal credits for child-care years (three) are men-

\textsuperscript{102} Facts on Older Women, supra note 6, at 1.
\textsuperscript{103} 42 U.S.C. § 402(i) (1976).
\textsuperscript{104} Bulletin No. 15, supra note 101, at 5. The Advisory Council opposed this measure. Id.
\textsuperscript{105} 42 U.S.C. § 414(b) (1976).
\textsuperscript{106} Bulletin No. 15, supra note 101, at 5. The Advisory Council recommended against this proposal. Id.
\textsuperscript{107} CRS Report, supra note 23, at 35. This was proposed by a member of the 1975 Advisory Council on Social Security. Id.
tioned, but women would lose all the protections now included in the system that compensate in part for unpaid childbearing and rearing and discrimination in the paid labor force. If women were to fail to achieve full economic parity with men by the target date, a substantial displacement of funds from other sources would be necessary to alleviate serious economic consequences.

Current figures illustrate how spousal and survivor's benefits partially alleviate the earnings disparity between men and women. Over twenty-two percent of the women receiving wife's or widow's benefits also were entitled to receive benefits based upon their own earnings. Under the dual entitlement rule, these women workers received dependent's benefits because fifty percent of their husband's entitlement exceeded one hundred percent of their own. In addition, of the over fourteen million female beneficiaries, more than half received benefits as wives or widows.

The argument for eliminating dependent's benefits is seriously flawed. If the premise is correct and all women will be fully employed within a few decades, then the system as presently constructed will automatically phase out these benefits as dependency recedes. Neither wife's nor widow's benefits are available to a person whose own work record yields benefits in excess of one-half of the benefits of the higher earning spouse. If, indeed, economic equality is achieved, dependent's benefits will automatically disappear.

Eliminating the Minimum Benefit

Eliminating the minimum PIA also has been proposed. This would result in the reduction of the PIA for the beneficiaries receiving the lowest benefits. Because women are disproportionately represented in the lowest wage brackets by reason of employment discrimination, women will be more seriously affected by such a reduction than will men.

108. Id.
110. Id.
112. Eliminating the minimum PIA was a Carter administration proposal which was not adopted. Bulletin No. 15, supra note 101, at 5. The Advisory Council opposed eliminating the minimum PIA. Id. But see Martin, Public Assurance of an Adequate Income in Old Age: The Erratic Partnership Between Social Insurance and Public Assistance, 64 CORNELL L. REV. 437, 509 (1979).
Changing the Inflation Index

Social security benefits are tied to the Consumer Price Index as prepared by the Department of Labor. Some critics have suggested that, because older people have a different consumption pattern than the general population, other indices with a lower inflationary rate would be more accurate. Currently, the average woman lives eighteen years after her sixty-fifth birthday; the average man lives less than fourteen years after his sixty-fifth birthday. The life expectancy for older women has a dramatic effect on fixed incomes. Real income is halved every seven years at an inflation rate of ten percent. The average man faces two such halving periods after age sixty-five; the average woman, three. If a man and a woman both retire at age sixty-five with a fixed income of $300 per month, the man at his death will have a real income of $75 per month, while the woman's real income at her death will be only $37.50 per month.

For this reason, cost-of-living indexing is of critical concern to women. Cost-cutting here would be illusory because the effect would be borne by the social security beneficiaries least able to withstand the reduction. Millions of people existing just over the poverty level will be forced to supplement social security with SSI. Because recipients would require two transfer payments instead of one, costs of administration would increase. Because need-based public assistance programs are far more expensive to administer than strict entitlement programs, overall costs would increase because failure of the entitlement system would serve to swell the need-based programs.

Raising the Retirement Age

One proposal to reduce social security costs is to increase the age at which old-age benefits are awarded. If the early and normal retirement ages were increased from sixty-two and sixty-five to

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114. See INTERIM REPORT, supra note 7, at 17. The Commission has recommended that the Bureau of Labor Statistics ascertain whether enough difference in the consumption patterns of retired people exists to maintain a separate index. Id. at 18.
115. CRS REPORT, supra note 23, at 49.
116. INTERIM REPORT, supra note 7, at 16 (Table IV).
sixty-five and sixty-eight respectively, costs would be greatly reduced.\textsuperscript{118}

This proposal would affect the retirement income of women in those areas in which the dependent's benefit is tied to the worker's retirement age, most notably in the case of the divorced woman. To mitigate this effect, such legislation should include a provision basing eligibility on the woman's retirement age, and not on her former husband's retirement age.

\textit{Proposals Beneficial to Older Women}

Increasing the number of excludable years from the zero-earning years represented by the homemaker's years outside of the paid labor force\textsuperscript{119} would have a negative impact on employed women's social security benefits because they are included in the AIME calculation upon which retirement benefits are based. One way to mitigate this effect would be to increase the number of years, currently five,\textsuperscript{120} that can be excluded from the formulation for those persons engaged in homemaking, childrearing, or caring for an ailing relative. Although increasing the number of excludable years would not have the same effect as crediting those years, it would be one way of reducing the homemaking penalty.\textsuperscript{121}

\textbf{Homemaker's Credits}

A further step to reduce the homemaking penalty would be to give credits for homemaking years. A precedent for this exists in other countries.\textsuperscript{122} A precedent also exists in the United States with respect to gratuitous credits for military service\textsuperscript{123} and for Japanese-Americans interned in relocation centers during World War II.\textsuperscript{124} Although social security payroll contributions were not paid by these two groups, Congress reasoned that the nation's obligation to these persons could be paid by deeming the contributions

\begin{footnotes}
\item[118] Not only will people receive benefits over a shorter time period, but by remaining in the labor market, they will continue to make payroll contributions into the system.
\item[119] See notes 46-54 & accompanying text \textit{supra}.
\item[121] Studies indicate that drop-out credits would benefit 35\% of all women beneficiaries for an increase of 5\% over the current system. \textit{Working Papers}, \textit{supra} note 4, at 25. For a more detailed discussion of the complexities of this area, see \textit{id.} at 23-25.
\item[122] See notes 46-54 & accompanying text \textit{supra}.
\item[124] \textit{id.} § 431.
\end{footnotes}
to have been paid. Similarly, persons who elect to remain out of
the paid labor force in order to care for their children could be
credited for this socially useful task. These credits could be al-
lowed in the form of either bare credits or assigned value credits.
Bare credits would supply only the necessary quarters for a home-
maker to meet threshold eligibility requirements. Forty bare cred-
its would create eligibility for the minimum PIA, as well as the
other benefits attendant to fully insured status. In contrast, as-
signed value credits carry a hypothetical earnings value. For ex-
ample, Japanese-Americans interned in relocation centers during
World War II are deemed for that period to have paid into the
system at the higher of either the minimum wage or their earnings
before internment. Congress considered this credit provision to
represent a partial repayment for the interruption of the internees’
earning years. The same formulation could be applied to women or
men who interrupt their earning years to care for young children or
older parents.

Although various proposals to credit homemaking have been
made, a number of issues that affect the scope and the extent of
the credits must be resolved. These issues include whether or not
the homemaker would be required to contribute financially,
whether marriage would be required to claim homemaking status,
whether part-time homemakers would be eligible, and what
formula would be used in calculating the amount of the credits.

Transition Benefit for Widows

The widow’s gap is most traumatic when the husband dies
soon after the children have reached age eighteen. Ineligible for
mother’s benefits (and probably pension survivor’s benefits if her
husband dies before age fifty-five), the widow will have no social
security or pension income until her social security widow’s benefit
begins at age sixty. A widow’s transitional benefit of one year has
been proposed to help alleviate this result.

A one year transition period would be helpful to all widows,

125. Id.
126. For a discussion of the complexities presented by crediting work at home, see
WORKING PAPERS, supra note 4, at 26-27.
127. See notes 83-91 & accompanying text supra.
would provide widows over the age of 50 a four-month transitional benefit, but failed to pass
Congress.
but would be most realistic when applied to younger, childless widows with better employment prospects. The truly displaced homemaker, ineligible for mother’s benefits because her children are grown, is generally in her fifties, without recent paid work experience, and is virtually unemployable. A woman in this situation should be eligible to receive full widow’s benefits at age fifty, thus restricting the need for a transitional benefit to younger widows.

Restructuring Social Security

In response to a congressional mandate, the Department of Health, Education, and Welfare issued a comprehensive report in early 1979 presenting two models for a restructured social security system—one based on earnings sharing and the other a two-tier approach.

Under the earnings-sharing model, wives’ and widows’ benefits would be eliminated because they would have their own PIA. While single, a person would build her or his own social security record based on wages. The credits earned by either the husband or the wife during marriage would be divided equally between the spouses upon divorce or for the purpose of computing retirement benefits. Divorcing spouses would take their shared credits from the marriage without having to satisfy the ten-year marriage rule. In addition, the divorced older woman would not have to await her former husband’s retirement before her own benefits would begin.

Earnings sharing would eliminate the problem of including homemaking years as zero-earnings years in the AIME calculation upon which retirement benefits are based for homemakers by dividing the marital credits whether or not both spouses were in the

129. See Social Security Amendments of 1977, Pub. L. No. 95-216, § 341, 91 Stat. 1509. The mandate was to make a detailed study of proposals to eliminate dependency as a factor in the determination of entitlement to spouse’s benefits “... and of proposals to bring about equal treatment for men and women in any and all respects under such program, taking into account the practical effects (particularly the effect upon women’s entitlement to such benefits) of factors such as, (1) changes in the nature and extent of women’s participation in the labor force, (2) the increasing divorce rate, and (3) the economic value of women’s work in the home.” Id. § 341(a).
130. HEW REPORT, supra note 5.
131. Id. at 39.
132. Id.
133. Id. at 42.
paid labor force. In effect, the zero years would be borne by both spouses. Although homemakers would share equally in the benefits based on the couple’s wages, homemaking as an occupation would still not be given credit recognition.

Under a two-tier or “double decker” system, everyone in the country would be entitled to first-tier social security benefits upon reaching age sixty-five or upon incurring a disability. Former ties to the paid labor force would be irrelevant. Homemakers, therefore, would receive benefits in their own right.

The second tier of social security benefits would be earnings-related. It would not be weighted in favor of the lower earner because the first tier of benefits theoretically would provide that minimal protection. The second tier of benefits would be allocated under a modified earnings sharing model, with the earnings credits accrued during a marriage being split upon divorce or inherited upon widowhood.

Under the two-tier system, divorced spouses would no longer be subject to the ten-year marriage requirement, nor would they have to await the retirement of their former spouses. Rather, they would be entitled in their own right to benefits under the first tier as well as the earnings-sharing characteristic of the second tier.

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134. Id.
135. The HEW earnings sharings model has been criticized by some who observe that the concept would benefit couples with two earning partners at the expense of the career homemaker. One activist cautioned against attempting to solve inequities by pitting one group of women against another: “There appears to be confusion about equal treatment for men and women and equal treatment between working women and dependent homemakers. This may reflect the bias of career women who have been in the forefront of social security reform efforts as well as pressures by male policy makers, who often attempt to pit women against each other. Both options [earnings sharings and two-tier] improve the benefits of working women, not at the expense of males, but of homemakers, except in the case of divorce.” Sommers, supra note 91, at 10-11. A package of bills that would have instituted earnings sharings was introduced to Congress by Representative Mary Rose Oakar of Ohio. The package includes H.R. 1513, 97th Cong., 1st Sess. (1981); H.R. 1514, 97th Cong., 1st Sess. (1981); and H.R. 1515, 97th Cong., 1st Sess. (1981). These bills avoid the difficulties in the HEW model by permitting couples to elect the higher of the two computations.
136. HEW REPORT, supra note 5, at 71.
137. Id.
138. Id.
139. Id. at 72.
140. Id.
The Second Leg: Pensions

The second leg of the retirement income stool is the pension.⁴¹ For women, however, this leg is likely to be nonexistent. Only eighteen percent of retirement age women receive a pension, either on their own records of earnings or on their husbands', compared to thirty-eight percent of retirement age men.⁴²

As with social security, the pension problem is twofold. Most women are not covered by pension plans. Although forty-nine percent of the male employees in the private sector are in occupations covered by a pension plan, only twenty-one percent of the female employees work in such jobs.⁴³ When homemaking is included as an occupation, the percentage of women in occupations covered by a pension plan is even less. Secondly, even if a woman does have an interest in a pension based upon her own record of earnings, the average benefit is only fifty-nine percent of a man's average benefit.⁴⁴

The difficulty older women have in obtaining pensions is partially explained by the wage related nature of pension benefits: lower earners receive lower pensions. The forty percent differential between men's and women's wages is carried into retirement. Unlike social security regulations, however, provisions that are stan-

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⁴¹ Pension plans today control a large percentage of American capital. The aggregate assets of public and private plans at the end of 1979 was $609,000,000,000. SEC Directorate of Economic and Policy Analysis, Assets of Private and Public Pension Funds (Aug. 12, 1980), reprinted in Los Angeles Daily Journal, Sept. 26, 1980, at 13. This figure exceeds the total fiscal budget for all federal expenditures by the United States government in 1978 and is expected to exceed $1,300,000,000,000 before the end of the decade. Rifkin & Barber, American Workers own $550 Billion, in Retirement Income 11 (1979) (Retirement Income is a report of the Pension Rights Center, a nonprofit organization located in Washington D.C.). For both sexes, however, this leg of the stool is short. In 1976, 91% of single elders reported receiving social security benefits while only 14% reported receiving private pensions and 8% reported receiving government pensions. Pension Facts, supra note 18, at 45 (Table 20). Their married counterparts received more of each type of income: 94% receive social security, 28% have some type of private pension, and 12% have government pensions. Id. The lower figures for single elders undoubtedly reflect the fact that older women predominate in the group; three-fifths of all women age 65 and over are unmarried, while three-fourths of men in that group are married. Facts on Older Women, supra note 6, at 1. Furthermore, even before social security automatic cost of living adjustments were enacted, the proportion of retirement income attributable to pension income was dropping. Pension Facts, supra note 18, at 47 (Table 22). Because very few pensions are tied to the cost of living, this proportion can be expected to drop still further.

⁴² Working Papers, supra note 4, at 31 (Table 6).

⁴³ CRS Report, supra note 23, at 3.

⁴⁴ Id. at 41.
standard in most pension plans have such a discriminatory impact on women that their ultimate receipt of an adequate pension is unlikely. For example, while survivor's benefits under social security are automatic, even for the divorced wife, survivor's benefits under most public and private pension plans are optional for the wife and nonexistent for the divorced spouse. The result has been that, prior to the enactment of ERISA in 1974, only two percent of widows received survivor's benefits from their husbands' pensions. Since the enactment of ERISA, the figure has risen to between five and ten percent.

Private Pensions

In 1974, Congress enacted ERISA, the first comprehensive federal pension reform law. ERISA provides increased security for private pensioners, and sets forth minimum standards applicable to private pension plans. Nevertheless, ERISA contains many weaknesses, especially for women.

ERISA and the Retired Working Woman

ERISA does not make pensions mandatory; the decision to establish a pension plan is made solely by private employers. If the employer elects to establish a plan, ERISA provisions establish minimum standards that must be met in order to "qualify" the

146. Statement of Edith Fierst on Private Pension Problems of Women, before the President's Commission on Pension Policy (Nov. 30, 1979) (Ms. Fierst was staff Advisor on Retirement Income to the Inter-departmental Task Force on Women, an agency of the executive branch).
148. "ERISA does not provide security for all employees, nor does it rectify all inequities. But the law is a vast improvement over the past, and it prevents many past injustices from recurring." ERISA—General Information About the Employee Retirement Income Security Act (1979) (pamphlet of the Department of Labor, Labor-Management Services Administration).
149. This decision has far-reaching implications for retirement income generally. Without mandatory pension coverage, the proportion of the private pension's contribution to retirement income as a whole will continue to decrease due to cost of living indexing of social security and the lack thereof for pensions. See note 141 supra. Unless policy makers concede that social security will no longer be supplementary to pensions, but will become in effect the sole retirement income source for the nation's elders, the three-legged stool will collapse. The President's Commission on Pension Policy is giving universal, mandatory pension coverage serious study. Interim Report, supra note 7, at 10. The Commission's final report was due to be published in February, 1981.
plan for certain tax benefits. Unfortunately for the woman worker, the minimum standards reflect the work pattern traditionally rewarded by pensions, and historically that of men: long-term, full-time, and well-paid employment. Movement into and out of the paid labor force, or movement from low-paid job to low-paid job, will not earn a pension. The following discussion examines the types of pension provisions that contribute to the retirement income crisis faced by older women.

Provisions that Cause Forfeitures

An employee must remain in a particular employer's work force for a minimum duration for pension rights to vest. ERISA permits employers to select one of three vesting schedules set forth in the Act. Most select the "cliff-vesting" option, which requires ten years of covered employment before the worker's right to the pension vests. The other two options compel a partial vesting at five years. Thus, the one out of five women who work in covered employment must, as a threshold requirement, remain with that particular employer at least five years for a partial pension and ten years for a full pension.

The nature of women's employment patterns is such that most will not work long enough for one employer for their rights to a pension to vest. Women have greater job mobility than men; in 1978, the average American male changed jobs every 4.6 years, while the average woman changed jobs every 2.8 years. If private pensions are going to form a significant portion of retirement income of older women, vesting periods will have to be reduced.

150. CRS REPORT, supra note 23, at 4.
152. Id. § 1053(a)(2)(A). See CRS REPORT, supra note 23, at 42.
154. In 1978, after the age of 25, the average woman's job tenure was 38-48% less than the average man's. Bureau of Labor Statistics, Department of Labor, News Release USDL 79-285 (Apr. 23, 1979). Among women, those over age 55 had the longest tenure—8.4 years—which is still over a year short of vesting under most plans. In contrast, men achieved 11 years tenure at age 45 and remained above that figure until retirement age. Id.
155. Id.
156. One interesting possibility is that of utilizing tax regulations to encourage earlier vesting in pension plans of professional corporations. Section 411(d)(1)(B) of the Internal Revenue Code provides that plans that discriminate in favor of upper-echelon employees as a consequence of their provisions for accrual or forfeiture of benefits will be disqualified. One proposed regulation would have effectively disqualified as discriminatory plans that facially comply with ERISA's vesting requirements, but in fact discriminate against the
In addition, if an employee who has not yet acquired vested pension rights leaves his or her employer for a period of time and then returns, a “break in service” has occurred. If the break equals or exceeds the earlier period of employment, the vesting period starts anew. Mobile workers are disadvantaged by this requirement. For many older women who have combined paid employment with working in the home, this provision has resulted in reduced retirement income.

Employers also are not required to include part-time or seasonal workers in the pension plan. Therefore, employees who work nineteen hours or less per week, or who work full-time for a few months per year, will not earn a pension. This includes the long-term, part-time worker, such as the office nurse who comes in twice a week for twenty years or the bookkeeper who works forty hours per week for three months during tax season over a period of fifteen years. Because a much greater percentage of female than male employees works part-time, this requirement has a disparate impact on women.

If mobile women workers could take their pension credits with them when they changed or took breaks from jobs, thus accumulating the credits over several years in and out of the paid labor force with several different employers, many of the problems of forfeiture to which older women are subject would be alleviated.

Pension portability is defined in two ways. The more restrictive meaning refers to the portability of vested pension credits. This type of portability would not be as useful to many women because of their failure to acquire vested pensions. The second type of portability is modeled after social security, in which credits accumulate in the system from the first quarter of employment regardless of when or where earned. Portability of unvested pension credits would be a major pension law reform for women.

lower paid employees who routinely fail to work the number of years required for the plan to vest. 45 Fed. Reg. 24,201 (1980). The regulation was not approved.

158. The statute defines this class as those employees who work less than 1000 hours per year. Id. § 1054 (b)(3)(C).
159. In 1977, 33% of all women employees worked part-time as compared to 12% of male employees. CRS Report, supra note 23, at 42.
160. See id. at 44-45.
161. See id.
162. Some pension experts advocate the establishment of a federal portability fund for this purpose. See id. at 45. Congresswoman Patricia Schroeder advocates a federal cleari-
The obstacles of cliff-vesting, break in service forfeiture, and the exclusion of part-time workers from ERISA thereby could be overcome.

If, in addition to the portability of unvested pension credits and earlier vesting, employers were required to furnish a qualified pension plan to all employees, a significant component of retirement income would be in place for many more retired women.\footnote{163} All working women would be covered, instead of one in five, and the mobility and part-time characteristics of the female work force would no longer cause forfeitures.

In its most far-reaching recommendation, the President's Commission on Pension Policy proposed to the President that "serious consideration should be given to the establishment of a universal minimum advance-funded pension system. Such a program could be thought of as an advance-funded tier of social security that would permit contracting out to pension plans that wanted to meet its standard, or as a universal, employee pension system with a central portability clearinghouse."\footnote{164} The Commission's interim recommendation has been criticized, however, as an industry-backed method of increasing capital formation, rather than a participant-oriented solution,\footnote{165} because the report recommended mandatory coverage without recommending mandatory benefits. Time of vesting and other problems would remain under this proposal.\footnote{166}

Provisions that Reduce the Amount of Pension Benefits Received By Women

The eighteen percent of retired working women who do receive a pension receive on the average less than do men.\footnote{167} This fact can

\footnote{163} It has been predicted that under the present system, only 50% to 60% of the labor force, male and female, will be working in jobs covered by a pension plan. Rich, \textit{Pensions: Too Few, Too Small for Most}, in \textit{Retirement Income} 1, 16 (1979) (a report of the Pension Rights Center).

\footnote{164} \textit{Interim Report, supra} note 7, at 10.

\footnote{165} \textit{Citizen's Commission on Pension Policy, Citizen's Guide to the President's Commission on Pension Policy\textit{ Interim Report 1980}, at 21-26 (1980). The Citizen's Commission is a private organization that monitors the activities of the President's Commission.}

\footnote{166} \textit{Id.} at 25.

\footnote{167} According to the Census Bureau, in 1976 the median private pension benefit was $1833 per year for unmarried men, and $1351 for unmarried women. \textit{CRS Report, supra}
be partially attributed to women's lower wages. Several ERISA provisions, however, which function to reduce the amount of benefits that a worker is eligible to receive, have a disparate impact on women workers.

ERISA also permits plans to increase the rate at which benefits accrue in the later years of employment.\textsuperscript{168} A worker employed under such a plan for thirty years thus would accrue benefits at a higher rate in his or her final decade of employment than in the first. This kind of plan favors traditionally male employment patterns and results in lower pension checks for retired women.

Furthermore, under ERISA, plans are permitted to offer a pension benefit that is "integrated" with social security. Under such a plan, the worker's pension benefit is calculated so that, taken in conjunction with the worker's social security benefit, the total amount equals a certain percentage of his or her final salary before retirement.\textsuperscript{169} Because social security benefits are weighted in favor of the lower-paid worker, the percentage of a lower-paid worker's wages represented by the worker's social security benefits is higher than for the well-paid worker. Thus, the plan will have to pay a smaller percentage of the lower-paid worker's final wages in order to meet, with social security, the combined benefit. Under an integrated plan, the weighting of social security in favor of lower-paid earners is rendered negligible by the weighting of the pension in favor of the higher-paid worker.\textsuperscript{170}

An integrated plan will mean fewer pension benefits for workers whose wages do not exceed the social security wage-base.\textsuperscript{171} Because women are overrepresented among the low earners, they will be overrepresented among those whose pension rights fail to vest. Most pensions are paid as annuities calculated on the basis of actuarial tables separated by sex, rather than being paid in a lump sum at retirement. The rationale for calculating separate actuarial tables on the basis of sex is the greater average longevity of wo-

\textsuperscript{168} 29 U.S.C. § 1054(b)(1)(B) (1976). The credits in the later years may be up to one third higher than those in the earlier years.

\textsuperscript{169} See CRS Report, supra note 23, at 50.

\textsuperscript{170} Id.

men. The result for women is that they receive either a larger premium or a smaller monthly benefit.

In City of Los Angeles Department of Water & Power v. Manhart, a case brought under Title VII of the Civil Rights Act of 1964, the United States Supreme Court held that an employer violated the Act when he or she required women to pay higher contributions to a pension plan than men for the same monthly benefit. The Court reasoned that despite the greater longevity of women as a class, requiring individual women, who may or may not exceed the average male lifespan, to pay a higher premium violated Title VII. The Court, however, expressly stated that its holding does not imply that there would be a Title VII violation when equal contributions were required of each employee and then used to purchase in the open market what may be an unequal benefit for an individual retiree.

Although conceptually significant, Manhart directly affected only that minority of private pension plans that require employee contributions. Furthermore, a system that permits a lower pension benefit for an equal contribution has a much more adverse impact on retirement income for women than one as in Manhart,

172. Various factors have been found to contribute to longevity, such as race, marital status, occupation, smoking habits, and place of residence. Only sex, however, has been used as a factor in determining the actuarial tables used by pension funds. Gender based actuarial tables apparently are not offensive enough to be considered unconstitutional. “Race is not now determined as a composition factor of the group [life insurance] because of its social unacceptability . . . .” Randall, Consultation on Discrimination Against Minorities and Women in Pensions and Health, Life, and Disability Insurance, Risk Classification and Actuarial Tables as They Affect Insurance Pricing for Women and Minorities app., at 22 (1979) (prepared for the United States Commission on Civil Rights). Ironically, the move to unisex tables by some states has its precedence in automobile liability insurance coverage tables designed to lessen the cost of insurance to male drivers. The Participant (Mar. 1980) (publication of the Teachers’ Insurance and Annuity Association—College Retirement Equity Fund).

173. For an interesting compilation of actuarial data that affect women see generally id.

176. Women paid monthly contributions that were almost 15% higher than men’s. 435 U.S. at 705. The Court stated that “[t]o insure the flabby and the fit as though they were equivalent risks may be more common than treating men and women alike; but nothing more than mere habit makes one subsidy seem less fair than the other.” Id. at 710.
177. Id. at 708.
178. Id. at 717-18.
179. See CRS Report, supra note 23, at 48. Public pensions, as in Manhart, usually do require employee contributions.
which disburses an equal pension for which a larger monthly con-
tribution was paid.

Another form of discrimination that lowers retirement income
for older women is found in tax regulations. When an annuity is
received, the Internal Revenue Service excludes a portion of it
from income as a return of capital. The exclusion formula is cal-
culated on sex-based tables. If a man and woman receive equal an-
nuities based on equal contributions, he may pay income tax on
one-sixth of his annuity, while she may be taxed on one-third. This
inequity results because under the IRS's tables, a woman is pre-
sumed to have a longer time in which to collect annuity payments;
therefore credit for her original investment is spread over a longer
period, resulting in a higher monthly taxable income. Whether or
not the individual woman will outlive the average male is not
taken into consideration. Thus, not only will women annuitants
generally receive a smaller amount in return for equal contribu-
tions, they will pay taxes on a larger percentage of their annuity
benefits. This is another example of the compounding effect of
seemingly legitimate procedures that differentiate on the basis of
sex.

Lack of indexing further impairs the retirement income of wo-
men because the one-third increased life expectancy of women over
age sixty-five compared with that of men results in women's fixed
income being subject to longer exposure to the devastating effects
of inflation. Private pensions, as contrasted to social security, are
seldom tied to any index at all. Until appropriate cost-of-living
indexing is part of all retirement income, women's longevity inevi-
tably will contribute to the lower overall income older women
receive.

ERISA and the Retired Wife

As under social security, homemaking is not considered to be a
pensionable activity under ERISA. Neither private nor govern-

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181. See notes 113-16 & accompanying text supra.
182. Over 93% of all private plans are not indexed. PENSION FACTS, supra note 18, at
47.
183. The proposed ERISA Improvements Act of 1979 would, inter alia, have required
the Secretary of Labor to conduct a study of the feasibility and ramifications of requiring
pension plans to provide cost of living adjustments. S. 209 § 152, 96th Cong., 1st Sess.
(1979). This comprehensive bill did not pass the 96th Congress.
ment plans provide for splitting of pension credits between spouses. Unless a homemaker has been in the paid labor force long enough to gain a vested pension in her own right, she will have no pension income upon her husband’s retirement.

Social security provides a dependency benefit to the spouse. Although this spousal benefit is tied to the worker’s account, it nevertheless recognizes the economic nature of the marital unit. Pensions, however, adhere to insurance principles. The single worker and the married worker will receive the same pension. No spousal benefit is paid.

ERISA does require that pension plans offer a “joint and survivor” annuity. But if the election is made to provide a survivor’s benefit to the wife, the joint annuity, paid during the couple’s joint life, will be actuarially reduced. This reduction produces an effect opposite to that produced by social security. Instead of an increased benefit, the couple receives a reduced benefit. The homemaker spouse becomes a financial liability, rather than an asset. Not only is her contribution to the productivity of her spouse unrecognized, its effect on pension benefits is negative.

**ERISA and the Widow**

The Opt-out

Before the enactment of ERISA, pension plans were not required to offer a survivor’s benefit. Those plans that did usually required that the retiree “opt-in” upon retirement. ERISA now requires that pension plans that pay benefits in the form of an annuity offer a joint and survivor annuity. The married retiree, unless he or she opts out, will receive the reduced joint benefit.

The opt-out feature is a major cause of the poverty of older women. While the option not to provide for survivor’s benefits to the spouse must be exercised by the retiree in writing, neither

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184. See notes 37-43 & accompanying text supra.
185. HEW Report, supra note 5, at 10.
187. Id. § 1055(h).
190. Id. § 1055(e).
191. The insurance industry opposes spousal notification or consent on the basis of the cost of the paperwork involved. Beshgetoor, Insurance Association Opposes Increased Survivor Protection, in Retirement Income 9 (1979) (report of the Pension Rights Center).
spousal consent nor notification of the election is required by the Act.\footnote{192} Furthermore, ERISA does not merely permit an opt-out provision, it mandates it.\footnote{193} Thus, a plan with an automatic survivor's benefit would not satisfy the Act.

Complete Forfeiture

The second major problem for widows under ERISA is the forfeiture of the entire benefit, including the survivor's annuity, if the husband dies before reaching his plan's early retirement age.\footnote{194} If the couple has planned their retirement around the pension, thus de-emphasizing investment or employment for the wife, the effect on the widow is devastating.\footnote{195}

The unprotected gap in pension rights for middle-aged married women coincides with the social security widow's gap.\footnote{196} If the husband of a fifty year old woman with grown children dies before his plan's early retirement age, his widow will receive no pension, no social security until age sixty, and no SSI, and is ineligible for unemployment benefits. When this lack of benefits is coupled with her minimal opportunity for paid employment and the stricter test for social security disability benefits that is applied to widows, a decade or more of unprotected years may result.\footnote{197}

Survivor's Annuity Reduction

ERISA permits the joint annuity paid during the lives of the

\footnote{192. Legislation that would have amended ERISA to require the written consent of both spouses before an election to opt-out is made failed to pass the 96th Congress. \textit{See S. 209, 96th Cong., 1st Sess. (1979). H.R. 5167, 96th Cong., 1st Sess. (1979). This legislation is expected to be reintroduced.}}


\footnote{194. 29 U.S.C. § 1055(b) (1976). This age varies with each plan, but generally ranges from 50 to 60.}

\footnote{195. S. 209 would have required that the employees make the election whether or not to provide survivor's benefits at the time of vesting, rather than at retirement. This would have provided widows whose husbands had vested and had elected not to opt-out, with preretirement death protection. \textit{See S. 209 § 127, 96th Cong., 1st Sess. (1979). The bill failed to pass.}}

\footnote{196. \textit{See notes 83-91 & accompanying text, supra.}}

\footnote{197. The President's Commission on Pension Policy recommended that survivor's benefits or life insurance be available to survivors of vested workers who die before retirement. \textit{Interim Report, supra note 7, at 33. This recommendation has been criticized as being inadequate because life insurance does not offer the retirement protection a survivor's annuity does. \textit{Citizens Commission on Pension Policy, Citizen's Guide to the President's Commission on Pension Policy Interim Report 1980, at 29 (1980).}}}
couple to be actuarially reduced.198 When the worker dies, the surviving spouse's annuity can be reduced to as little as one-half of the actuarially-reduced joint annuity.199 The worker's benefits are not subject to this reduction. For example, if the full single annuity were $100, and the joint annuity $80, the survivor's pension could be as low as $40 per month. This provision reduces the pension income of older widows in relation to older widowers.

Remarriage Forfeiture

Under social security200 and some public retirement plans,201 remarriage of a widow after age sixty will not terminate her survivor's benefits. ERISA is silent on the issue, with the result that private plans permitting remarriage without loss of benefits are rare. The pensioned worker can remarry at any time without penalty. His annuity is unaffected, just as it is upon his wife's death. ERISA also permits the denial of survivor's benefits to a wife who marries the retiree after he retires.202

Need for Conceptual Reform of Survivor's Annuities

ERISA codified the joint and survivor's provisions without recognizing the economic nature of the marital unit. The collateral issue of the marital property rights of both spouses arises; because both shared equally in the lower wages paid in return for the package of fringe benefits, both should share equally in the resulting benefits. Benefit sharing could be accomplished within the framework of sound insurance principles. Pension plans, as group insurance plans, adjust premiums to the characteristics of the group. Instead of treating the homemaking spouse as a liability, she should be included in the group on the same basis as her spouse,

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199. Id. § 1055 (g)(3).
202. ERISA only requires a reasonable period (set by the Secretary of the Treasury by regulation) before the annuity starting date within which election to opt-out of the plan must be made. 29 U.S.C. § 1055(e) (1976). Most plans deem the decision irrevocable after the first day of retirement. If a woman marries a retired man on a single annuity, it will not be subject to reduction to a joint annuity in order to provide her with survivor's benefits. Note, however, that, if a worker marries shortly before retirement, elects the joint and survivor benefit, but dies before their first anniversary, the plan need not pay the survivor's benefits. Id. § 1055(d).
and premiums adjusted accordingly. The result would be no reduction of the joint annuity, no reduction of the survivor’s annuity, a vested right to the pension credits accrued before early death, and the elimination of the remarriage forfeiture. The increased cost of this protection could be borne by the group as a whole, as with social security, or through an increased premium paid by the married worker while employed.

**ERISA and the Divorced Wife**

Whether a pension is divisible upon divorce depends upon the property laws of the particular state. In California, for example, even unvested pension credits earned during the marriage are held to be community property. Once the pension is determined to be community property, the crucial question becomes how the pension is to be awarded.

An older divorcing couple’s principal assets most often are the home and the pension fund. Frequently the negotiated settlement involves an exchange of the fund for the house—the woman keep-

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203. Including homemakers in the coverage group is the current practice of many employment-related group health plans. But even under these plans, the dependent’s coverage is not secure if she leaves the group by reason of divorce or widowhood. Some states have enacted statutes that require that group health policies provide for rights of conversion to individual policies for new widows and divorced spouses leaving the group. See Cal. Ins. Code §§ 10126, 11512.6; Ill. Rev. Stat. Ann. 73-979c; N.Y. Consol. Laws § 162(5).

204. As the President’s Commission on Pension Policy found: “The treatment of pensions in divorce settlements varies greatly by state. The eight community property states view marriage as an equal partnership, and upon divorce, divide property acquired during the marriage equally between the spouses. Seven additional states have adopted the Uniform Dissolution of Marriage Act that also equally divides property acquired during the marriage. Some states, however, do not consider future entitlement to a pension as the employee’s property, especially if the pension is not vested. Therefore, pension assets are not valued in some divorce settlements, even in states where marriage is viewed as an equal partnership. The 12 common law states equally divide only jointly-held assets, but some allow the court to ‘equitably’ distribute property at divorce which may or may not include pension assets. The other 23 states generally give the courts discretion to divide a couple’s assets in a fair manner.” Working Papers, supra note 4, at 34. The President’s Commission has recommended that pensions be defined as property. Interim Report, supra note 7, at 32. But the Citizen’s Commission on Pension Policy has pointed out that defining a pension as property does not go far enough, because property can be defined as separate property. The Citizen’s Commission recommended that pensions be defined as “marital” or “joint” property. Citizen’s Commission on Pension Policy, Citizen’s Guide to the President’s Commission on Pension Policy, Interim Report 1980, at 29 (1980).

ing the home, and the man the pension. However psychologically and economically advantageous this arrangement may be for the woman at the time of the divorce, its effect often is to lower the retirement income of divorced older women as compared to divorced older men. Another frequent property settlement device involves the exchange of the woman’s pension rights for personal property or other consideration. This settlement, although increasing her share of marital property at the time of dissolution, will adversely affect the divorced wife’s income upon reaching retirement age.

If a share of the pension payments are awarded to the wife, her retirement income will be more secure if the fund issues monthly annuity payments directly to her. In *Carpenters Pension Trust Fund v. Kronschnabel*, the Ninth Circuit recently upheld a California decision ordering a pension plan to make separate payments to divorced spouses. The United States Supreme Court also has let stand a series of California decisions ordering pension payments to be made directly to divorced wives. Finally, even though some states recognize that retirement benefits are marital property, no state extends that recognition to survivor’s benefits. The divorced wife’s benefits end upon the death of her former husband.

Private pensions add to the per unit labor cost of all goods and services. In addition, many employers believe long vesting schedules encourage employee stability to the benefit of the particular enterprise and the economy as a whole. Balanced against these considerations is the disproportionate representation of older women among the poor. The failure of the pension system to accommodate women’s work patterns inevitably has resulted in the growing social and economic cost to every citizen in caring for this class of individuals.

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207. 632 F.2d 745 (9th Cir. 1980).
209. “However, even those courts which consider the pension part of the marital kitty award the spouse a portion of the retirement benefits during the lifetime of the retiree only. Therefore, payments cease after the death of the retired federal employee, and the spouse is deprived of any survivor’s benefits.” 125 Cong. Rec. E1069 (daily ed. Mar. 13, 1979) (remarks of Rep. Schroeder).

The President’s Commission on Pension Policy recommended that a pro-rata share of survivor’s benefits be assigned to the former spouse. *Interim Report*, supra note 7, at 33.
Government Pensions

Most federal employees are covered under the vast Civil Service Retirement system (CSR) or the Uniformed Services Retirement system\(^\text{210}\) (USR). In addition, railroad workers are covered by the federal Railroad Retirement system\(^\text{211}\) (RR). However, neither CSR nor RR workers are covered by social security. Thus, they rely heavily on their pension plans for retirement income. Furthermore, in contrast to workers covered under private plans, most government workers make payroll contributions to their plans.\(^\text{212}\)

Universal Coverage

Most of the ten percent of paid workers still uncovered by social security are federal, state, and local employees. The extension of social security coverage to all paid workers in the nation has been recently proposed.\(^\text{213}\)

Civil service and military pensions, like most private pensions,\(^\text{214}\) permit the retiree to "opt-out" of a survivor's benefit.\(^\text{215}\) The retiree alone makes the decision, and in some cases, no notice need be provided to the spouse.\(^\text{216}\) Such a decision can have serious effects for the civil service widow because she is not covered under the widow's benefit provided by social security. Similarly, the divorced spouse of a civil servant is almost certainly not provided for under the plan, either with retirement or survivor's benefits.\(^\text{217}\) Surviving divorced women without social security benefits very likely have no retirement income at all. Such situations exemplify

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\(^{212}\) For example, civil service plan participants pay seven percent of their basic pay. 5 U.S.C. § 8334(a)(1) (1976).


\(^{214}\) See notes 188-193 & accompanying text supra.


\(^{217}\) See notes 220-31 & accompanying text infra.
the need for universal coverage by social security.

*Government Pensions and the Retired Woman*

Government plans suffer from drawbacks similar to those of ERISA-regulated plans with respect to retired women, including the reflection of lower wages in lower benefits, backloading, and vesting problems. CSR does provide vesting after five years, but this period still is too long for many women. One advantage most government retirees enjoy is cost-of-living indexing.

*Government Pensions and the Divorced Wife*

Women who were married to government employees are especially vulnerable to weaknesses in the dependent’s benefits, because of little or no social security coverage. Until recently, no major government plan provided for a divorced wife, regardless of the length of the marriage. Foreign Service wives are the only federal employee wives now provided for under a major plan in the event of divorce.

The United States Supreme Court in *Hisquierdo v. Hisquierdo*, overruled the California Supreme Court and held that, in the case of RR beneficiaries, congressional intent was clear that such benefits were not marital property. Following *Hisquierdo*, Congress acted to make CSR pensions expressly subject to

219. Half of state retirees and almost all of federal retirees have automatic cost of living adjustments. PENSION FACTS, supra note 18, at 47.
220. However, a unanimous California Supreme Court recently ruled that military pensions may be divided according to community property principles. In re Marriage of Milhan, 27 Cal. 3d 765, 613 P.2d 812, 166 Cal. Rptr. 533 (1980).
221. The Foreign Service Act of 1980, Pub. L. No. 96-465, provides that Foreign Service wives with ten or more years of marriage are entitled to a pro-rata share of the retirement annuity, subject to the review of the divorce court. Id. Both spouses must sign a waiver of the survivor’s annuity. Id. For legislation to correct this situation for civil service wives, see H.R. 2818, 96th Cong., 1st Sess. (1979), for military wives, see H.R. 2817, 96th Cong., 1st Sess., (1979), and for railroad wives, see H.R. 3057, 96th Cong., 1st Sess. (1979)—all of which failed to pass the 96th Congress. H.R. 2818 and H.R. 2817, would have required a ten year marriage, after which the divorced wife would have been awarded a pro-rata share of the credits earned during marriage. H.R. 3057 would have put railroad divorced wives in the same position as under social security.
224. 439 U.S. at 581-80.
court-ordered marital property divisions, but legislation to overturn *Hisquierdo* with respect to railroad pensions failed to pass.

Divorced railroad wives are in an especially difficult position. Under *Hisquierdo*, a surviving divorced wife is precluded from any share of the railroad benefits and, as a surviving divorced wife of a railroad retiree who was also fully insured under social security, she may not be eligible for social security divorced wife's benefits. Because railroad retirement does not grant survivor's benefits to a divorced wife, however, she also is ineligible for benefits from the RR fund. Had she been married to a worker covered by social security only, she would receive a survivor's benefit, but because he was covered by social security as well as the pension, she will receive nothing. The plight of the divorced railroad wife exemplifies how decisional law and two major retirement statutes combine to create retirement income problems for one group of older women.

**The Third Leg: Retirement Savings**

If nearly nine out of ten women over age sixty-five receive social security, but only one in six living alone receives a pension, the savings leg of the retirement income stool would have to be very secure for the majority of older women to have an adequate retirement income. Unfortunately, this leg, too, is weak for most older women. One-half of the women over age sixty-five who live alone have savings of under $1,000.

The vehicle Congress enacted to strengthen this component also may contribute to the income deficiencies older women face upon retirement. This provision is the Individual Retirement Account (IRA), which permits individuals who are not working in employment covered by a pension plan to make contributions to

227. Survivors of workers covered under both systems can receive only railroad survivor's benefits if the worker was with the railroad at the time of retirement. 42 U.S.C. § 402(1) (1976).
229. HEW REPORT, supra note 5, at 183 (Table 16).
230. Id.
232. I.R.C. § 408.
such an account with significant tax advantages.233

IRA’s and the Retired Homemaker

Homemakers are the largest occupational class excluded from pension coverage. Only compensated individuals, however, are eligible to establish an IRA.234 Although the Internal Revenue Code was amended to enable a married couple with one nonearning spouse to slightly increase their contributions,235 the homemaker married to a worker covered by a pension plan is not eligible to establish her own account, even if her husband’s pension will never become vested. Her eligibility is derived entirely from her working spouse’s own eligibility, through employment not covered by a pension plan.236

Legislation to enable homemakers to establish IRA’s failed to pass the 96th Congress.237 The proposed laws would have permitted each spouse to contribute to an IRA, based on the income of the earning spouse. The ineligibility of the earning spouse because of pension coverage would not have affected the eligibility of the noncompensated spouse for an IRA.

IRA’s and the Retired Working Woman

The four of five women in the paid labor force who are not in employment covered by a pension, including part-time and seasonal workers, are eligible to establish an IRA. IRA’s can partially compensate for the harm done to women’s retirement income because of part-time work. The IRA is unavailable, however, for the woman who works under covered employment, but fails to vest because of mobility.238 If IRA’s were available to such workers, wo-

233. Contributions to the account are tax deductible when paid, id. § 408(e)(1), and the income generated by the account is not taxed until distributed after retirement when, presumably, the retiree is in a lower tax bracket. A maximum annual contribution of 15% of gross income, or $1500, whichever is less, is permitted. Id. § 408 (a)(1), (b)(2).

234. Under 29 U.S.C. § 1245 “compensation” includes earned income as defined in IRC § 401(c)(2). Alimony is not mentioned in § 401(c)(2).

235. See I.R.C. § 220(b). The increase was to $1750 per year.

236. Even if her husband is eligible to open an IRA, but chooses not to, the homemaker will not be eligible to set up her own.


238. Attempts to permit mobile workers who do not satisfy vesting requirements to
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men would have a better chance to build the savings leg of the retirement income stool.\textsuperscript{239}

IRA's and the Divorced Older Woman

After a divorce, a woman whose income includes alimony or spousal support will be handicapped in trying to establish adequate savings for retirement. The amount of the spousal support cannot be included in gross income for the purpose of calculating the maximum annual contribution to an IRA,\textsuperscript{240} despite the fact that for income tax purposes, spousal support is included in gross income and thereby taxable.\textsuperscript{241}

Conclusion

A sixty-five year old woman who has worked fifteen years in the home and twenty-five years in the paid labor force has contributed forty years of productive work. The fact that part was uncompensated, and the rest poorly paid and mobile, does not reduce her equal need for an adequate retirement income. Whether upon retirement she is married, widowed, or never married, she will be disadvantaged under all three prongs of the American retirement income system. The high representation of older women in the ranks of the elderly poor bears witness to this. Because women constitute the majority of the older population, solving that generation's poverty problems will not be possible without addressing the retirement income system's coverage of women.

Retirement income policy planners are becoming increasingly aware of the problem. The 97th Congress has a unique opportunity to eliminate the retirement income penalty imposed on women by

\begin{itemize}
\item[	extsuperscript{239}] Contributions to an IRA yield far more income at retirement than equal contributions to an ordinary savings program. A $100 annual contribution to a regular savings account would yield a monthly retirement income of $74 for a worker with an average income of $10,000. The same contribution to an IRA would yield the worker $112 per month in retirement income. \textit{Interim Report, supra note 7}, at 20 (Table V).
\item[	extsuperscript{240}] Under 29 U.S.C. § 1245, "compensation" includes earned income as defined in I.R.C. § 401(c)(2). Alimony is not mentioned in I.R.C. § 401(c)(2).
\item[	extsuperscript{241}] I.R.C. § 61(a)(8).
\end{itemize}
the nature of their working lives. By restructuring the pension and retirement savings systems, the three components of retirement income would become more balanced and the excessive reliance on social security, with its attendant fiscal implications, would be alleviated.