

# WOMEN'S RETIREMENT INCOME AND THE THREE-LEGGED STOOL

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A woman's experience in old age is different from that of a man. Women live longer; this remains true even when their worklives resemble those of men in duration and stress.<sup>1</sup> Because women usually outlive their husbands, they are more frequently alone in old age. Furthermore, during those years women are much poorer than men. In 1980, for example, the median income of females sixty-five years old and over was \$4,226, compared with \$7,342 for men the same age.<sup>2</sup>

Although many factors contribute to women's poverty in old age, one major cause is that most women spend many years as homemakers. In fact, many women in today's retired population have been lifelong homemakers. Even those who worked for pay during substantial parts of their lives worked at home for long periods. Both lifelong and occasional homemakers lost retirement income accumulated in their own right when they were out of the paid labor force, retirement income that frequently was not replaced by support provided by their husbands.

An indication of the seriousness of the problem can be found in the following figures: In 1977, when the poverty level for an elderly individual living alone was \$2,906,<sup>3</sup> 28.4% of women sixty-five and over living alone had incomes less than that amount.<sup>4</sup>

Retirement income has traditionally been viewed as a three-legged stool: one leg is Social Security, the second, private pensions, and the third, savings. This article will attempt to update that perception from the point of view of women,<sup>5</sup> focusing on the reasons for women's pov-

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1. GEORGE WASHINGTON UNIVERSITY, OLDER WOMEN: THE ECONOMICS OF AGING 1, 2 (Oct. 1980) (published by the Women's Studies Program and Policy Center of George Washington University in conjunction with the Women's Research and Education Institute of the Congresswomen's Caucus). For a somewhat different analysis, see Key, *Sex-Based Pension Plans in Perspective: City of Los Angeles, Department of Water and Power v. Manhart*, 2 HARV. WOMEN'S L.J. 3 (1979).
2. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SER. P-60, No. 127, MONEY, INCOME, AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE U.S.: 1981, table 8 (1981) [hereinafter cited as MONEY, INCOME, AND POVERTY STATUS].
3. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1979, table 756, at 461 (100th ed. 1979) [hereinafter cited as STATISTICAL ABSTRACT].
4. *Id.* table 763, at 464.
5. It is conventional to omit from the "stool" two other possible legs, earned income and wel-

erty in old age. It will also suggest some helpful changes in retirement systems.

### SOCIAL SECURITY AND OTHER GOVERNMENT PENSIONS

The three-legged stool is extremely lopsided today with benefits provided by the federal government, primarily Social Security, bearing most of the burden of supporting women in their old age. In 1976 88% of unmarried women over age sixty-five were entitled to Social Security,<sup>6</sup> and 60% had no other income.<sup>7</sup>

Social Security is preeminent as a source of income not only because so many women depend upon it but also because it is regularly adjusted upward to keep pace with the cost of living.<sup>8</sup> Few other forms of retirement income are commensurably increased.<sup>9</sup> It is difficult to exaggerate the importance of cost-of-living increases in retirement benefits. During the 1970's living costs increased at an average annual rate of 7.4%. As a result, by 1980 those who retired in 1970 experienced more than a 50% decrease in the value of any retirement income that was not indexed.<sup>10</sup> The importance of Social Security has become even greater as the rate of inflation has accelerated in recent years, to a figure in excess of 11% in 1980.<sup>11</sup>

Federal employees are generally not covered by Social Security but instead receive indexed federal pensions; these also take the place of staff pensions, and, therefore, for long-term employees are larger than

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fare, although both are important sources of income for the elderly. They are not discussed here but should not be forgotten.

6. U.S. DEPT OF HEALTH, EDUCATION, & WELFARE, SOCIAL SECURITY: THE CHANGING ROLES OF MEN AND WOMEN 177 (1979) [hereinafter cited as THE CHANGING ROLES OF MEN AND WOMEN].
7. *Id.* at 183.
8. Social Security's indexing is accomplished by application of two separate formulas. During the employee's working years, his or her entitlement (and that of any spouse who will ultimately be entitled in the capacity of spouse) increases in accord with the average *earnings* of covered workers. 42 U.S.C. § 430 (Supp. III 1979). After retirement, benefit increases are provided which keep pace with the *cost of living*. 42 U.S.C. § 415(i) (1976 & Supp. III 1979). Because of the unusual inflation and low productivity of recent years, wages have been increasing at a slower rate than the cost of living, with the result that retired persons have been getting higher increases than have workers, a discrepancy many people think unfair to the working population. This difference is part of the reason for Social Security's current deficit position. (Another factor is high unemployment; the Social Security tax is paid only by the employed.) For these reasons Congress may change the indexing pattern of Social Security benefits. Even if this should happen, however, Social Security benefits will continue to rise with inflation.
9. Private pensions are not fully indexed, and it is unreasonable to expect private employers to shoulder the risk of protecting their retirees against inflation because of the impossibility of predicting the rate of inflation in the years ahead. The potential expense of the unknowable is too great for employers to assume. Some employers do, however, provide ad hoc increases to retirees. For a discussion of the relative importance of Social Security and private pensions, see J. BRITAIN, PRIVATE PENSIONS AND THE ECONOMIC STATUS OF THE ELDERLY (1979) (prepared by the Brookings Institution under contract with the Pension and Welfare Benefits Program, U.S. Dep't of Labor).
10. Data on inflation is obtained from STATISTICAL ABSTRACT, *supra* note 3, table 780, at 476.
11. The cost-of-living increase in Social Security, which is effective July, 1981 and corresponds to price inflation, is 11.2%.

Social Security alone. Most federal pensions are based upon the employee's average salary for the three highest earning years, keeping entitlements relatively current with inflation for those who continue in federal employment until the date of retirement. Those who leave before retirement, however, are not protected against inflation between the time of resignation and the date of eligibility for pension payments. This in itself works as a significant deterrent to federal employees against changing jobs.<sup>12</sup>

After retirement, federal pensions are raised once a year in accordance with increases in the cost of living.<sup>13</sup>

In comparison, state and local pensions, if indexed at all, are generally only partially indexed, typically with a limit of 3% to 5% per annum.<sup>14</sup>

Unfortunately, many women are ineligible for either Social Security or a federal pension. Those omitted include women who are not covered by Social Security as a result of either their own work or marriage to a covered worker. They fall within one of the following five categories:

First, homemakers widowed by federal employees who did not provide them with survivor annuities. The decision whether to provide a survivor annuity is the employee's at the moment of retirement; however, as a result of legislation in 1980,<sup>15</sup> a federal employee who wishes to elect not to provide a survivor annuity may do so only with the written and witnessed acknowledgement of his or her spouse.

Second, divorced homemakers whose former husbands worked for federal agencies,<sup>16</sup> including those whose deceased former husbands were civil servants, or whose former husbands were foreign service officers, if the divorce occurred prior to February 15, 1981.<sup>17</sup> Even if the retirees tried to provide survivor annuities for their former spouses, the federal government will not pay annuities to those divorced widows.

Third, widows of former federal employees who die after leaving

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12. By contrast, while employees in the private sector face loss of private pensions as a result of mobility, their Social Security continues to be indexed.

13. As we go to press, President Reagan has suggested provisions designed to prevent retirees from collecting duplicating federal pensions and Social Security.

14. PRESIDENT'S COMM'N ON PENSION POLICY, FINAL REPORT, COMING OF AGE: TOWARD A NATIONAL RETIREMENT INCOME POLICY 595 (1981) [hereinafter cited as TOWARD A NATIONAL RETIREMENT INCOME POLICY].

15. 5 U.S.C.A. § 8339 (West Supp. 1981).

16. U.S. GENERAL ACCOUNTING OFFICE, REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES: NEED FOR OVERALL POLICY AND COORDINATED MANAGEMENT OF FEDERAL RETIREMENT SYSTEMS 2-5 (1978).

17. See Foreign Service Act of 1980, ch. 8, § 2206, 42 U.S.C.A. § 5055 (West Supp. 1981).

federal service and before reaching retirement age. The law does not cover the family of a former employee who dies before retiring.

Fourth, widows of certain federal employees or retirees whose pensions are not indexed or are only partially indexed. This is the case for the widows of most officers of the judiciary.<sup>18</sup>

Fifth, those state and local employees who are not covered under Social Security. As noted above,<sup>19</sup> the state and local pensions that they receive will rarely be indexed in full.

Until 1981 homemakers who were once married to railroad employees and later divorced or who remarried after being widowed by a railroad worker were also excluded from any coverage. Fortunately, this gap was filled by Title XI of the Budget Reconciliation Act.<sup>20</sup>

### PRIVATE PENSIONS

In 1976 only 12% of women sixty-five or older who had no husband were receiving private pensions, the second leg of the stool. The comparable figure for men was 21%.<sup>21</sup> The 12% figure included some women who were receiving survivor annuities based upon their husbands' employment. Thus, an even smaller percentage were receiving pensions based upon their own earnings.

#### Coverage

Fewer women than men are covered by private pension plans. A 1979 survey sponsored by the Social Security Administration (SSA) and the Department of Labor (DOL) found that only 31% of women workers were covered by a pension plan on their current jobs, compared with 50% of men.<sup>22</sup>

There are many reasons why only a small proportion of women are protected under private pension plans. First, pension law does not require an employer to offer a pension plan to its employees. In this respect, pension law is unlike other laws governing labor conditions which require covered employers to meet minimum standards, for example, to

18. S. 1403, 97th Cong., 1st Sess. (1981). This bill was introduced in the 97th Congress to improve survivor annuities for the widows or widowers of federal judges. The bill is the result of the work of a special judicial committee led by Judge Irving Kaufman. It would retain the current provision giving survivors an increase of 3% for each 5% increase received by judges. It makes no provision for divorced spouses. N.Y. Times, June 21, 1981, at 43, col. 1.

19. *Supra* note 14.

20. Omnibus Budget Reconciliation Act of 1981 § 1117, 45 U.S.C. § 231 (1981) [hereinafter cited as OBRA].

21. THE CHANGING ROLES OF MEN AND WOMEN, *supra* note 6, at 177.

22. G. THOMPSON ROGERS, PENSION COVERAGE AND VESTING AMONG PRIVATE WAGE AND SALARY WORKERS, 1979: PRELIMINARY ESTIMATES FROM THE 1979 SURVEY OF PENSION PLAN COVERAGE (June 1980) (available from the Social Security Administration, Division of Retirement and Survivors Studies) [hereinafter 1979 SURVEY]; U.S. DEP'T OF LABOR, PATTERNS OF WORKER COVERAGE BY PRIVATE PENSION PLANS (1980). The two publications sometimes show different figures because SSA based its findings upon all workers while DOL used only full-time workers. This article relies primarily upon the SSA figures.

pay a minimum wage,<sup>23</sup> provide safe and healthful working conditions,<sup>24</sup> give extra compensation for overtime work,<sup>25</sup> and meet other specified standards.<sup>26</sup> Pension law regulates plans only if an employer first decides to provide a pension plan. The employer can avoid the whole problem by deciding not to have a plan.

Collective bargaining and the desire for a tax shelter are the two principal reasons that employers decide to establish pension plans, although the stated justification is often the desire to attract and retain employees. Most large employers are subject to collective bargaining and have established plans in response to negotiation with labor unions. Those employers who wish to obtain tax shelters can do so only if they provide pensions for their employees proportionately as generous as those payable to company managers, and otherwise in accordance with the Employee Retirement Income Security Act of 1974 (ERISA).<sup>27</sup> Small employers look to their tax advisers to determine whether the tax advantages are sufficient to warrant establishing new plans or to continue maintaining those already in operation. An indication of the dimension of the tax incentives can be found in the United States Department of Treasury's estimate of revenue loss due to pension plans; the figure for 1981 exceeds \$20 billion.<sup>28</sup>

The SSA-DOL 1979 survey found that 79% of noncovered workers (men and women) were excluded because they worked for companies where pension plans were not available to employees. Women were found to be employed in industries where pension plans were less common, particularly the trade and service industries. In addition, women were found to be concentrated in occupations not covered under pension plans, even when they worked for employers with plans covering employees in other occupations. Service workers, among whom women predominate, had the lowest probability of coverage. Clerical workers were less likely to be covered than factory operatives, managers, or professional and technical workers.

Even when women were in the same occupation as men, the survey found that they were less likely to be covered.<sup>29</sup> One important reason was that they were not as often protected by a union contract. Another reason seems to be the size of the firm; coverage was substantially higher among employees of large firms rather than small firms where many women work.

Nevertheless, even when all these factors—industry, occupation, union membership, and size of firm—were discounted, fewer women

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23. Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. III 1979).

24. Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1976 & Supp. III 1979).

25. Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. III 1979).

26. Davis-Bacon Act, 40 U.S.C. §§ 276(a)-276(a)(5) (1976).

27. 29 U.S.C. §§ 1001-1381 (1976 & Supp. III 1979); I.R.C. §§ 401, 404, 410, 411, 412; and related provisions of the Internal Revenue Code.

28. OBRA *supra* note 20, Special Analysis 8, table G-1.

29. 1979 SURVEY, *supra* note 22, at 14.

were covered than men.<sup>30</sup> In part, this may be because women's labor force participation is often interrupted in ways that cause their exclusion from coverage.

ERISA does not require plans to cover employees who are under age twenty-five, who have less than one year of service, or who work fewer than 1000 hours during the year. If the plan provides for vesting<sup>31</sup> after three years, it may exclude employees from participation for three years.<sup>32</sup> Inasmuch as many women work while they are in their early twenties, and then either work on a part-time schedule or leave the labor force to raise a family, the uncovered years before age twenty-five are important to them, as are periods of temporary or part-time work later in life.<sup>33</sup>

### Vesting

An employee who is covered under a plan and has accrued benefits will receive a pension only if the right to the benefit is "vested," that is, only if the employer's promise to pay the accrued benefits is not conditioned upon the employee's continuous service for the employer until retirement. Vesting is usually earned by years of service under the plan. ERISA does not require vesting credit to be given in any year in which the employee has less than 1000 hours of service, nor to an employee who is less than twenty-two years of age.<sup>34</sup> (Note that this is different from the age of required coverage, which is twenty-five.)

The rights of those who do have creditable service may vest under one of several permissible formulas.<sup>35</sup> The most common schedule for large corporate plans is the "ten-year cliff," which requires vesting only after the employee has worked ten years.<sup>36</sup> This rule, like all the current vesting rules, has the effect of requiring short-term employees to subsidize long-term employees, especially in profit-sharing plans where forfeited funds originally earmarked for short-term employees are ultimately paid to those who stay long enough to acquire vested rights. If the employer adopts another type of plan under which there is no com-

30. *Id.* at 15.

31. Vested benefits are benefits which the employee will receive even if he leaves that employer's employ before retirement age. See text accompanying notes 34-40 *infra*.

32. 29 U.S.C. § 1052 (1976); I.R.C. § 410.

33. The proposed Women's Economic Equity Act of 1981 would lower the minimum age for participation to 21. S. 888, 97th Cong., 1st Sess. (1981); H.R. 3117, 97th Cong., 1st Sess. (1981).

34. 29 U.S.C. § 1053(b)(1)(A) (1976); I.R.C. § 411(a)(4).

35. The employer may, of course, provide an accelerated method of vesting, but most do not.

36. Small corporate plans may be required to provide 40% vesting after four years, followed by annual increments, until full vesting is achieved after eleven years. An alternative vesting schedule, the "graded" vesting formula, requires the plan to provide partial vesting after five years but does not require full vesting for 15 years. A third vesting schedule, known as the "rule of 45," depends upon a combination of age and years of service; vesting begins when the two total 45, and moves up by specified increments until full vesting is achieved when the combination equals 55. There are other vesting schedules which permit delayed coverage but require faster vesting; these are used primarily by plans covering teachers and by certain other specialized types of plans. See 29 U.S.C. § 1053(a) (1976); I.R.C. § 411.

parable use of forfeitures, the short-tenure employees may still subsidize others indirectly because their salaries or wages are lower than they would be if the employer was not contributing to a pension plan that does not benefit them.

The 1979 survey revealed relatively small differences in vesting between men and women with comparable tenure on the job.<sup>37</sup> Of those covered under a pension plan 70% of men and 64% of women age fifty-five and over are vested.<sup>38</sup> This represents, however, only 24% of women workers in that age bracket, as compared with 40% of men of comparable age.<sup>39</sup> The gap in the vesting rates is almost entirely attributable to length of service. Women do not stay on their jobs as long as do men, for reasons that are generally related to their home responsibilities.

Interruptions in service also interfere with vesting. Under ERISA, if an employee leaves the job before vesting occurs, he or she must return to the same plan in order to retain and add to the vesting credits acquired during the years before the interruption. Therefore, unless the employee was covered by a multi-employer plan, which generally exists in only a few industries characterized by short job tenure and collective bargaining, the employee must return to the same employer. Specifically, ERISA provides that if there is a break in service equal to the period of service prior to the break, all prior service which has not yet vested may be disregarded in determining whether the employee's pension is vested.<sup>40</sup> For example, if a woman has worked the four years from ages twenty-two to twenty-six and then stops working to stay home for four years, she may have to begin the vesting process all over when she returns, even if she returns to the same job. Therefore, women who start work in their early twenties and then take time off to raise children may lose their earlier credits toward vesting.

#### Amount of Pension Benefits

Women's pension benefits are generally lower than benefits payable to men, primarily because the amount of a pension is generally related to earnings. Women earn approximately 60% of men's average earnings.<sup>41</sup> One reason may be transitory: the number of middle-aged women in entry-level jobs is likely to decrease, though not disappear, as their younger cohorts, who have made greater commitments to the labor force at earlier ages, reach middle age. The second factor seems less transitory: women in traditional female occupations are poorly paid.

The way in which lower earnings can result in a smaller pension is

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37. 1979 SURVEY, *supra* note 22, at 18.

38. *Id.* at 19.

39. *Id.* at 9.

40. 29 U.S.C. § 1053(b)(3) (1976); I.R.C. § 411(a)(6).

41. STATISTICAL ABSTRACT, *supra* note 3, table 690, at 419.

illustrated by the following formula, typical for a defined benefit plan, under which the pension consists of 1 1/2% of the average earnings of the employee in his or her five best years, multiplied by the number of years of employment. If a woman had a "high-5 average" of \$8,618 (which was the median salary for women employed full-time and throughout the year in 1977) and she had worked thirty years, she would be entitled to an annual pension of \$3,878 ( $.015 \times \$8,618 \times 30$ ). By comparison, a man whose high-5 year earnings averaged \$14,626<sup>42</sup> (the median earnings for men employed full-time throughout the year in the same year) and who had worked thirty years, would be entitled to an annual pension of \$6,581.70 ( $.015 \times \$14,626 \times 30$ ). In most cases the discrepancy in pensions would be greater than in the illustration because fewer women than men have worked thirty years creditable for pension purposes.

### Social Security Integration

Tax law withholds deductions from plans that discriminate in favor of the highly paid; however, under the Social Security integration rules, a plan is not deemed discriminatory merely because it fails to provide both Social Security and a private pension on the same earnings. Instead, the Social Security "integration rules" permit employers to treat Social Security taxes or benefits as though they were part of the employer's pension plan. The adverse impact of these provisions primarily affects low-paid employees.

The Internal Revenue Service (IRS) approves several methods of integrating plans with Social Security.<sup>43</sup> Two more popular methods of integration decrease the amount of private pension as the Social Security wage and contribution (FICA) base rises. One, the "excess" method, pays benefits only on earnings above "covered compensation," that is, compensation above the weighted average of the FICA base during the employee's working years counted for Social Security purposes. A variant of this method, the "step-rate" method, pays benefits on earnings below the covered compensation base at a rate as much as 37 1/2% less than the rate applicable to earnings above the covered compensation base.

Under the second integration rule, used primarily by defined contribution plans (where the employer contributes a fixed proportion of the employee's earnings), the employer contributes to the plan only on earnings above the current FICA base.<sup>44</sup>

Because the FICA base is rising rapidly, the adverse impact of these two methods of Social Security integration is growing. Since 1937 the

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42. *Id.*

43. I.R.C. § 401(a)(5); Treas. Reg. § 1.401-3(e) (1981). For an excellent explanation of the integration rules, see D. GRUBBS, INTEGRATION OF PLANS WITH SOCIAL SECURITY (1979) (published by the American Law Institute and American Bar Association).

44. Treas. Reg. § 1.403(e)(2)(iv) (1981).



FICA base has risen incrementally from \$3,000 to \$29,700 in 1981, with the major growth in the last few years. For an employee born in 1915, the maximum covered compensation, important for either the excess or step-rate method, is still only about \$10,000 because during most of the employee's working years, the FICA base was under \$10,000, exceeding that figure for the first time in 1973. Since 1977 the FICA base has been zooming upwards. Thus, a pension plan integrated in this way would concentrate benefits to a person who retired in 1980 on average compensation at retirement age in excess of \$10,000. As younger employees reach retirement age, however, the level of covered compensation will be much greater, reflecting the higher FICA base. In today's dollars, assuming no further legislated changes in the FICA base, by the year 2000 payment of benefits integrated under an excess plan will not be mandatory for earnings under \$17,000, and by 2010, when members of the baby boom generation begin to reach retirement age, under \$22,000.

Under this integration rule too, the higher the FICA base, the more wages that can be ignored for pension purposes. This means that more benefits can be reduced, and larger numbers of persons "covered" by the plan can lose their pensions.

The third method, the most popular, permits plans to reduce benefits by a portion, up to 83 1/2%, of the Social Security benefit payable to the same employee. Because Social Security benefits were proportionately reduced by the 1977 Social Security amendments,<sup>45</sup> the adverse impact of this method of integration has also been reduced, at the cost, however, of reducing the total retirement income payable to a retiree. Most plans offset reductions by 50% rather than 83 1/2%, but any reduction creates a problem. Moreover, this method is highly objectionable because it permits a plan to withhold pension benefits on the basis of Social Security benefits earned in employment not covered by the pension plan.

Many employers take advantage of the integration rules and provide no benefits or greatly decreased benefits to low-paid employees. Women are hit harder by integration than are men because they earn substantially less.

### **Women's Entitlement As Wives**

Traditionally, a pension has been viewed as owned entirely by the employee. While in the past some plans offered retiring employees the opportunity to provide survivor benefits to their spouses, many plans made no such offer. When the option was available, participants may not have known about it, and there was little encouragement from the plan for them to choose it. The result was that few women received

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45. Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509 (amending scattered sections of 2, 26, 42, 45 U.S.C.).

survivor benefits. A pre-ERISA estimate was that less than 2% did so.<sup>46</sup>

ERISA made significant changes. The law now requires plans that offer a life annuity to give employees the option of providing a survivor benefit.<sup>47</sup> In some situations, the survivors are entitled to a survivor annuity unless the employee has elected otherwise; in other situations, the employee must have made an affirmative election. The circumstances in which either form of election is available are, however, limited. As indicated above, the plan is not affected unless it offers the life annuity form of benefit. The employee may be ineligible, unless he is retired or has reached retirement age. In addition, the spouse is not mandatorily eligible unless married to the employee for the year before retirement and the year prior to death (thus excluding divorced spouses and those to whom the employee is married after retirement). Finally, the plan may require the employee to accept substantial reductions in his benefit in order to pay for the spouse's benefit.<sup>48</sup>

Precise data on the extent to which these ERISA rules have resulted in provision of survivor annuities to women are not available. The author has the impression from conversations with actuaries and pension lawyers that hourly paid employees rarely make the election, but that significant numbers of salaried workers and professionals do provide for their spouses. Instead of survivor annuities, the latter group may have defined contribution plans with vested account balances which go to the spouses in the event of the employee's death. When this is the case, the spouse is protected even if the spouse is not named for a survivor annuity.

Another factor in evaluating the availability of spouse benefits is the possibility that many employers make life insurance available instead in the pre-retirement years. Because it is relatively inexpensive, life insurance may be better for the survivor if she and the employee are young. Moreover, it is payable in the full amount regardless of age, while pension benefits may be actuarially reduced if the survivor is young. Of course, life insurance, once spent, is not available for retirement income, and, therefore, it may not be as adequate for the older widow.

Finally, ERISA requires that the employee be given sufficient financial information in order to make a fully informed election pertaining to joint and survivor benefits.<sup>49</sup> The complexity and administrative nuisance of this requirement is so onerous that many plan designers avoid the joint and survivor option altogether. For example, the IRS model plans for money-purchase and profit-sharing plans<sup>50</sup> do not contain a joint and survivor option; instead they offer either a lump sum or 120 monthly payments to the retiree or his heir. The alterna-

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46. Pension Rights Center, *Pension Facts No. 2* (1979).

47. I.R.C. § 401(a)(11); 29 U.S.C. § 1055 (1976).

48. *Id.*

49. 29 U.S.C. § 1055(c) (1976); I.R.C. § 1021(a)(1)(E).

50. [1976] PENS. COORDINATOR (TAX RESEARCH INST. OF AM.) ¶ 630, 670.

tives may or may not provide protection for the surviving spouse, depending upon whether she inherits the account balance, but the choice of 120 monthly payments (a type of ten-year-certain form of payment) raises other problems. In the case of either an employee who retires at age sixty-five and lives to the age of 80 or older or his widow who lives as long or longer, this type of ten-year certain may mean destitution when the ten-year period ends.

### SAVINGS

The third leg of the stool is private savings. Although approximately half of women sixty-five and over who were living without husbands in 1976 had investment income, their average income from this source was very small: only \$340 in interest from savings and only \$1,660 from other investments.<sup>51</sup>

A tax incentive to save specifically for retirement is provided through an Individual Retirement Account or annuity (IRA), established under section 408 of the Internal Revenue Code. This provision permits an employee to make a tax-deductible contribution to a special account and to defer taxes on the interest earned by the account until retirement.<sup>52</sup> Because the earnings are compounded regularly on a tax-free basis, money in an IRA can multiply astonishingly over a period of years.

Data on participation in IRA's are imprecise,<sup>53</sup> but it is apparent that relatively few persons eligible to make contributions—probably less than 4%—have actually done so in the past. These persons, the Department of Treasury reported in 1979, are disproportionately drawn from the wealthy. Over 50% of those eligible with incomes of \$50,000 or more make contributions to IRA's, compared to less than 5% of those with incomes below \$20,000.<sup>54</sup> The figures are not surprising. Persons with incomes below \$20,000, or even \$30,000, are likely to need their earnings to live on, especially in inflationary times, and are far less interested in avoiding taxation than are persons of higher income for whom taxes are proportionately more significant.

The Reagan Administration supported major changes in the IRA rules to encourage savings which were included in the Economic Recovery Tax Act of 1981.<sup>55</sup> Those of greatest interest to women include

51. THE CHANGING ROLES OF MEN AND WOMEN, *supra* note 6, at 176-77.

52. These contributions may not be made earlier than age 59 1/2 and may not begin later than age 70 1/2.

53. The SSA-DOL survey found that some persons who are covered by private pension plans report that they are also contributing to IRA's, a clearly unauthorized practice.

54. *Employee Contributions to IRA's and Other Pension Plans: Hearings on S. 75, S. 94, S. 209, and S. 557 Before the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Senate Comm. on Finance*, 96th Cong., 1st Sess. 113, 124-25 (1979) (statement of Dan Halperin, Deputy Assistant Secretary of the Treasury) [hereinafter cited as *Hearings on S. 75, S. 94, S. 209, and S. 557*].

55. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 311, 95 Stat. — (to be codified in scattered sections at 26 U.S.C.).

the following:

First, IRA's may now be established by and receive contributions from persons who are active participants in another plan. This means that women employed in short-duration jobs, which group includes most employed women, may contribute to an IRA and thus be assured of retirement income even if they do not stay on the job long enough to vest in the employer's plan. While this change is an improvement, it is not likely to be a major help to most women whose earnings from full-time employment in 1980 averaged 60% of men's,<sup>56</sup> because few have the excess income to make contributions. Thus it is far from clear that the eligibility of women who are active participants in a plan to establish IRAs will result in many employed women actually doing so.

Second, a major change raised the maximum contribution by an individual worker from \$1,500 to \$2,000 a year. At the same time the previous limitation of 15% on the proportion of earnings that may be contributed was dropped. Thus, the new law permits a woman earning only \$2,000 a year to contribute her entire earnings to an IRA. Whether she will do so is another matter.

Third, the rules on spousal IRA's were changed. Under previous law an individual could allocate half of his IRA contribution to his non-working spouse's account. Anyone accepting this option was allowed a tax deduction for additional contributions up to \$250 above the \$1500 maximum.<sup>57</sup> This provision provided an incentive to any husband who wanted the full tax deduction to contribute \$875 toward his wife's IRA account. There is no known data on the number of spousal IRA's established since they were first authorized in 1977.

Under 1981 law the maximum contribution to a spousal IRA was increased from \$1,750 to \$2,250, but the requirement that half of the contribution be credited to the non-working spouse was deleted. This means that a worker taking full advantage of the right to contribute to a spousal IRA no longer needs to contribute \$875 to his spouse's account, but can receive the maximum tax advantage if he contributes only \$250 to her account, while contributing \$2,000 to his own.

Fourth, certain divorced wives were made eligible to contribute unearned income to an IRA.<sup>58</sup> Specifically, the law now allows divorced women who had IRA's of their own, whether spousal or regular, at least five years prior to the divorce, to make tax deductible contributions of alimony, or of alimony and earnings combined, up to a maximum of \$1,125 a year, provided their former spouses had contributed to the IRA for at least three of the most recent five years. It seems unlikely that many divorced women will be able to take advantage of this new opportunity, both because they will not have received the req-

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56. MONEY, INCOME, AND POVERTY STATUS, *supra* note 2, table 13.

57. Int. Rev. Code of 1954, ch. 1, § 220, 90 Stat. 1734.

58. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 311, 95 Stat. — (to be codified in scattered sections at 26 U.S.C.).

uisite contributions from husbands in the years just before divorce, and because they will not be paid sufficient alimony in the years after.

These changes in IRA law will probably help some women, but whether they will do so in proportion to the cost to the United States Treasury is doubtful. An indication of the relationships can be gleaned from a 1979 Department of Treasury estimate that the amendment permitting active participants in other plans to make deductible contributions to IRA's of the then maximum of \$1500 would have led to a revenue loss of \$1.1 billion; of this amount \$850 million would have constituted added deductions for savings already being made on a non-deductible basis.<sup>59</sup> The revenue loss from the 1981 amendments is likely to exceed this estimate. For reasons just outlined, the amendments are unlikely to provide commensurate increases in retirement security for women. Thus, from the perspective of women, other uses of the federal money involved could have provided better protection.

### RECOMMENDATIONS

Substantial improvements are needed in the systems comprising all three legs of the retirement-income stool: Social Security and other federal pensions, private plans, and savings.

#### A. Social Security and Other Federal Pensions

First, coverage of indexed, retirement-income programs provided by the federal government must be expanded to include those employees and their spouses who are now unprotected. Without this basic improvement, many women will continue to be without indexed pensions in old age, if they have any pension at all.

Second, Social Security must be reformed to provide equity and adequacy for married women workers, widows, and divorcees. Since defects in Social Security for women are addressed in another article in this issue,<sup>60</sup> they will not be discussed here.

#### B. Private Pensions

Efforts to obtain greater coverage for women under private pension plans are essential. The President's Commission on Pension Policy has recommended universal private pension coverage;<sup>61</sup> this is but one possible approach. Efforts to obtain equality for women in the marketplace should also have a salutary effect.

Most importantly, ERISA must be amended to provide faster vesting. A gradual phasing-in of shorter vesting periods might help plans

59. *Hearings on S. 75, S. 94, S. 209, and S. 557, supra* note 54, at 113, 124-25 (statement of Dan Halperin).

60. Kaltenborn, *Social Security: A Proposal to Improve Equity and Adequacy for Women*, 8 J. LEGIS. 250 (1981).

61. TOWARD A NATIONAL RETIREMENT INCOME POLICY, *supra* note 14, at 42.

adjust. If such a change were accompanied by a requirement that resigning employees with vested benefits "roll" their entitlements over into an IRA or a central fund maintained by the government, the money would be kept for retirement income. At present, if the plan allows withdrawal of the vested benefits, may vested employees spend their assets immediately. A rollover requirement would also avoid undue administrative burdens on employers and employees who might otherwise have to find each other years later as individual short-term employees reach retirement age.<sup>62</sup> Finally, although immediate or one-year vesting would obviously benefit women (and men) employees, if pension plan administrators can show that pension funds would suffer if required to maintain liquidity to permit withdrawal by short—tenure employees,<sup>63</sup> a slightly longer period might be considered.

Integration of private pensions with Social Security must be more stringently regulated than at present, particularly since the increase in the FICA base may otherwise lead to corresponding decreases in many private pensions.<sup>64</sup> The President's Commission on Pension Policy recommended change; unfortunately, its proposals were not explicit. One clearly needed reform is the limitation of permitted offsets to Social Security earned on the same job as the pension being decreased.

More data are needed on life insurance as a substitute for survivor annuities. Proposals for ERISA amendments could then be tailored to assure that widows get one or the other. Even without these data, however, it is clear that (1) ERISA election procedures should be simplified to eliminate the current disincentive which results from complexity, for plans to offer the joint and survivor form of benefit; (2) post-retirement survivor benefits should be made mandatory, unless waived by the employee's spouse; (3) joint and survivor requirements should be strengthened to assure protection to those women whose husbands die before reaching retirement age; and (4) plans should be required to offer protection for those divorcées whose husbands elect it or are ordered to do so by a court.

### C. Savings

Although saving for retirement should be encouraged, many women cannot afford it. Furthermore, it would be counterproductive if IRA's were to replace tax-qualified employer pension plans which are subject to the rules against discrimination. For these reasons liberaliza-

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62. EMPLOYEE BENEFIT RESEARCH INSTITUTE, ANALYSIS OF ALTERNATIVE VESTING REQUIREMENTS FOR PRIVATE PENSIONS 15 (1980).

63. TOWARD A NATIONAL RETIREMENT INCOME POLICY, *supra* note 14, at 45.

64. The proposed Women's Economic Equity Act also includes this provision. Women's Economic Equity Act of 1981, S. 888, 97th Cong., 1st Sess. (1981); H.R. 3117, 97th Cong., 1st Sess. (1981).

tion of the IRA rules should proceed slowly. Moreover, once vesting is improved, liberalization would not be as necessary as it seems today.

Despite these doubts, it would seem appropriate to permit homemakers to purchase IRA's with unearned income. The proposed Women's Economic Equity Act would allow women to purchase IRA's based upon their husbands' earnings.<sup>65</sup> If this change were adopted, married women could save out of those assets available to them, and divorced women could contribute from alimony monies without complying with the narrow conditions of the 1981 law.

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65. *Id.* § 101.