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WOMEN AND PENSION REFORM: ECONOMIC INSECURITY AND OLD AGE

LORRAINE SCHMALL*

One measure of economic security is participation in a pension plan. Despite all the talk about Social Security insolvency and fears of aged poverty, over the last fifteen years, the private supplemental pension coverage rates have remained fairly stable; just short of 50% for all workers.¹ However, alleging that one-half of all American employees participate in pension plans is less than an ingenuous statement; it is the ultimate essentialist conclusion. Most recipients are men. Most women are white. Accordingly, most women who get pensions are probably white. Through pension coverage through their spouses, some women have in effect two pensions. However, most women have no private pensions. The “average” pension-holder connotes and denotes a majority—white and male—while the many subsets of women, divided by race, ethnicity, social and economic class, and age, continue to fare poorly.

The things that women do, and all the ways in which they work, net them very little in the way of pensions.² They will not be

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1. See *Employee Benefits in Employment Industry, 1999*, U.S. DEPT. OF LABOR, tbl. 1, at <http://stats.bls.gov/ncs/ebs/sp/ebnr0006.pdf> (last visited Sept. 7, 2002). These data make a point: 69% of professional and technical employees have a pension; 45% of those in clerical and sales positions; and 42% in the service industry. Data also evaluate the size of the employer in relation to those offering pension plans: 1-49 workers in size (30%); 25,000 workers or more (81%); full-time workers (56%); part-time workers (21%). *Id.*

2. Those who express criticism of the pension tax laws frequently rely upon the fact that voluntary retirement plan system extends to only 50% of the work force. Colleen E. Medill, *Targeted Pension Reform*, 27 J. LEGIS. 1, 4 (2001). This view is misleading because it hides key differences in coverage patterns among employers and different types of workers. *Id.* at 4-5. As a preliminary observation, the smaller employers, such as those having fewer than 100 employees, are much less likely to sponsor a retirement plan. *Id.* at 5. Only a minority of individuals who work for smaller employers with a retirement plan have such plans available to them (31%). *Id.* However, those individuals who work for larger employers (100 or more full-time employees) have a retirement plan available to them (85%). *Id.* It is therefore not surprising that participation rates in retirement plans are substantially lower for smaller employers. *Id.* Less than one-half of full-time employees (46%) participate in a retirement plan sponsored by a smaller employer. *Id.* In

financially secure when they are old,³ unless they are already wealthy. Women of color are the least likely to have any hope of financial security as they age,⁴ as pension participation and coverage vary enormously by race and ethnicity.⁵ Typically, more men in each of those categories have pensions than their female counterparts, but it is difficult to find reports of these differences. While the data is available from The U.S. Census Bureau, race and ethnicity are not the categorical bases for gender differences. It is merely a way to hide the problem.

No society can develop without planning for its elderly, not owing to respect, fondness, or pity, but because old age typically signifies increased dependency. Growing older is a contingency we can all expect and hope for. However, fairly dramatic changes need to occur if women, especially women of color, are to avoid ending their lives in poverty.

In the last political cycle, much was said about ensuring that the benefits of prescription drugs and medical research are available to the elderly. Given the political banter, it seems the

contrast, the majority of full-time employees (79%) participate in a retirement plan sponsored by a larger employer. *Id.* The rates of participation are also markedly lower for part-time employees. *Id.* For example, larger employers offer retirement plans to 34% of their part-time employees, whereas smaller employers offer such plans to only 13% of part-time employees. *Id.* Coverage rates can be evaluated for different occupations of workers. *Id.* For example, larger firms constitute the only employer who would be likely to offer retirement plan benefits to blue-collar and service employees as would be offered to professional, technical, clerical and sales employees. *Id.*

3. In 1996 older women had a poverty rate of 13.6% compared to men at 6.8%. Almost half of older black women who lived alone (47.5%) were at or below the poverty level in 1996. Significantly more women than men live below the poverty level at all age groups between 45 and 65 or above, with the number increasing substantially with age. Jacqueline DeWarr, *Women and Aging-Part 2: Legal, Economic and Social Issues*, at <http://www.keln.org/bibs/geerken2.html> at 3 (last visited July 28, 2002). Men are so much more likely to earn pensions and to have savings income after retirement that "the poverty rate for elderly women living alone is five times that for married older persons." Theresa Heinz, Jeffrey Lewis, Cindy Hounsell & Women's Institute for a Secure Retirement, *Women and Pensions: An Overview*, at http://www.wiser.heinz.org/pensions_overview.html (last visited Feb. 20, 2001).

4. In 1998, 25.6% of all Americans of Hispanic origin (which is defined as Latin American, Hispano-American and Mexican) were living below the poverty level. U.S. CENSUS BUREAU, *Poverty in the United States, 1999*, (Sept. 2000) available at <http://ycos.infoplease.com/ipa/A0004975.html>. About 26% of all African-Americans were in that category, as were 12.5% of all Asians and Pacific Islanders. *Id.* Among people 55 years and over, 29.8% of them were living below the poverty level. *Id.*

5. Less than one-half of all whites (47%), 41% of African-Americans, 38% of Asian and Pacific Islanders, and 27% of all Hispanics participate in pension plans. U.S. DEPT. OF LABOR, *Coverage Status of Workers Under Employer Provided Pension Plans*, 2 (1999), at <http://www.dol.gov/pwba/programs/opr/cws-Survey/hilites.html> (last visited July 28, 2002).

only problems with aging are health-related; yet, few words were devoted to discussing the real problem: elderly poverty. If pensions were discussed at all, it was typically about the increase in their overall economic worth, about privatizing social security, or about how ordinary citizens have (or have not) developed investment savvy. In the wake of the collapse of a large energy company and the resultant loss of all its employees' pensions, Congress had conducted hearings about how to protect self-directed plans.⁶ Although there has been heated debate about funding public pensions, their privatization, and exuberance over economic market advances involving such plans, these discussions must focus on the present status of women and how any reform might affect them. Women lack equal access, opportunity, and remuneration. Further, their continued, unique family responsibilities need to be considered before any changes can be made. Most of the world's citizens are women, but miraculously, they are counted only as part of an *average*. The number telling their unique stories is horrifying, though more often ignored.

Economic hard times have fallen upon many over the past year. The "go-go" nineties are gone, and the early twenty-first century is now a more somber, typical cycle: some highs and some lows.⁷ We console ourselves by noting that elderly poverty rates are dropping, that women are entering professions at record levels, and that there are more private investors in the stock market than ever before. In typical government understatement, the Department of Labor notes: "[w]hile all workers need to save more for retirement, women face additional challenges because they have lower earnings, experience higher job turnover, and are employed in industries with low or no pension coverage."⁸ There is a plethora of research regarding the inequity of pensions for women, both in their availability and in their degree.⁹ But

6. Several commentators have keenly illustrated the problems with self-directed plans for Congress. See, e.g., Alicia H. Munnell, *Pension and Retirement Issues in the Enron Collapse, Testimony Before the Senate Health, Education, Labor and Pensions Committee*, 107th Cong. (Feb. 7, 2002), in 148 CONG. REC. D 68, 69-70 (2002); see also Dr. Teresa Ghilarducci, *Testimony Before the House Education and Workforce Committee*, 107th Cong. (Feb. 7, 2002), available at <http://edworkforce.house.gov/hearings/107th/fc/enrontwo2702/ghilarducci.htm> (last visited July 28, 2002).

7. From 1999, until late 2000, the jobless rate was at about 3.9%. U.S. DEPT. OF LABOR, *Employment Situation Summary*, at <http://stats.bls.gov/news.release/emsit> (last visited May 27, 2002). In April, 2002, it reached 6%. *Id.* Men and women were equally unemployed at a rate of 5.3%; blacks had an 11.2% rate, and what the Department of Labor labels "Hispanic" had a rate of 7.9%. *Id.*

8. U.S. DEPT. OF LABOR, *Women and Retirement Savings* at <http://www.dol.gov/pwba/pubs/women/women.htm> (last visited July 28, 2002).

9. See, also, Madonna H. Meyer, *Family Status and Poverty Among Older Women: The Gendered Distribution of Retirement Income in the United States*,

understanding and knowledge of the reasons for that discrepancy are essential, so that a remedy can be created without blaming women for embracing their poverty as a matter of choice.¹⁰

Unlike that being researched by critical race scholars, the data I describe here are not hard to discover. I did not need to go to foreign countries and learn languages unknown to the majority of the American people to discover the inequities. They are here, on the Internet, in a newspaper, at family parties, in soup lines, or in nursing homes. Women make less than men during their working lives and therefore have much less than men when they are too old to work.¹¹ This is because women experience gender discrimination as well as discrimination based on race, national origin, age, disability, and religion.¹² Economists, and those with a

37 SOC. PROBS. 551 (1990); see also Camilla Watson, *The Pension Game: Age and Gender Based Inequities in the Retirement System*, 25 GA. L. REV. 1 (1990) (discussing how the retirement system, especially Social Security, indicates our nation's refusal to prepare an adequate response to the demographics that produce older, poorer women). Although more than a decade old, Professor Watson's exhaustive research and cogent arguments, seem to have gone largely unheeded in political discourse. See also Jayne E. Zanglein, *Investment without Education: The Disparate Impact on Women and Minorities in Self-Directed Defined Contribution Plans*, 5 EMPLOYEE RTS. AND EMPLOYEE POL'Y J. 223 (2001).

10. Twenty-six percent of women workers are employed on a part-time basis compared to only 12% of male workers. *Coverage Status of Workers Under Employer Provided Pension Plans, Findings from the Contingent Work Supplement to the February 1999 Current Population Survey* at 1, at <http://www.dol.gov/dol/pwba/public/programs/opr/cws-survey/highlights.html> (last visited April 4, 2002). Even though both full-time and part-time women employees were more likely to work for a firm with a plan than their male counterparts, the overall pension coverage rate in 1999 was 44%, broken down that was 47% for men and 40% for women. Eligibility requirements and the increasing use of 401(K) plans requiring voluntary employee contributions as a condition of participation often result in low coverage rates for part-time, temporary and low wage employees, even in firms sponsoring plans. The pension coverage rate was only 14% for part time employees. The higher percentage of women workers employed on a part-time basis was a major factor in the lower overall coverage rate of women when compared to men. *Id.* at 2-3.

11. OLIVIA MITCHELL ET AL., *THE IMPACT OF PAY INEQUALITY, OCCUPATIONAL SEGREGATION, AND LIFETIME WORK EXPERIENCE ON THE RETIREMENT INCOME OF WOMEN AND MINORITIES* 13 (AARP Public Policy Institute Monograph #9910, 1999) (noting that 33% of the pension and wage gap is due to differences in earnings; 34% due to differential occupational segregation; and 14% due to length of employment). Mitchell further notes that approximately 50% of women work in lower paying sales, clerical, and service jobs as compared to only 24% of men. *Id.* at 27, tbl. 9.

12. See also Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA*, 28 HARV. C.R.-C.L. L. REV. 395 (1993); see generally Deborah W. Post, *Appropriation & Transculturation in the Creation of Community*, 20 B.C. THIRD WORLD L.J. 117 (2000). Each immutable part of a woman—her age, her marital status, her color, her ancestry, her faith—may subject her to separate or collective acts of

majority view, offer neutral explanations for these differences. There are observable and quantifiable differences between working men and women. Women have less education, more interruptions in their work careers, less time overall, and specifically less tenure at each particular job. They tend to work in more part-time positions and act as the primary caretaker of their families. They are less likely to be union members and tend to work in smaller firms. Therefore, they have less because they earn less, which means they have less to put away for old age.¹³

These conclusions, however, fail to take into account the fact that women's statuses are more or less immutable. They may not be able to work more than part-time so they are not offered leadership positions in large corporations. They tend to get paid less even when researchers control for all observable factors. They still suffer from discrimination in the work place. They must live within a culture that creates rules and roles. Even if there were no cultural stereotypes or norms, certain changes could not take place, but the norms and the stereotypes exacerbate the existing problems because they create expectations of how women should behave. Pension policies, practices, and laws that do not recognize and compensate for women's immutable differences perpetuate not only discrimination, but the reality of poverty for older women for generations to come.

The presumption is that more people are getting pensions. Who are these people? When we make this presumption, do we look at low-paid women workers, homemakers, or women currently on welfare; women who are already at pension age, or already retired? Do we evaluate the subsets of women to see what they need? The critical race theorists and the multi-culturalists who argue against the claims of universality and sameness acknowledge the individual stories of all women.¹⁴ Women

discrimination. See Kathryn Abrams, *Symposium: Discrimination and Inequality Emerging Issues Afterword: Critical Strategy and the Judicial Evasion Of Difference*, 85 CORNELL L. REV. 1426, 1432 (2000) (decrying rules protecting whiteness by narrowing (or eliminating) race-conscious remedies). Celebrating "averages" is like celebrating whiteness, since the average pension recipient is white, male, and highly-paid—usually at the detriment of that near-majority of those who are not "average."

13. According to the Institute for Women's Policy Research (IWPR), 38% of women are participating in a pension plan compared to 51% of men. Lois Shaw, Ph.D. & Catherine Hill, Ph.D., *The Gender Gap in Pension Coverage: What Does the Future Hold?*, (Institute for Women's Policy Research, 2002), available at <http://www.iwpr.org/pdf/d447.pdf> (last visited July 28, 2002). When asked in an IWPR study why they were not participating, 25% said they had not been with their employers long enough, 35% said they don't work enough hours to be eligible, ~9% said their job type was not included in the employer's plan, and 22% indicated they chose not to enroll. *Id.* at 4, tbl. 3.

14. See generally Guadalupe T. Luna, *On the Complexities of Race: The Treaty of Guadalupe Hidalgo and Dred Scott v. Sanford*, 53 U. MIAMI L. REV.

appropriately fit within these scholars' definition of "outsider," which has been used to avoid the term minority, but that is incongruous with "the numerical significance of the constituencies typically excluded from jurisprudential discourse."¹⁵ Women, as a class, have not been excluded from the discourse, they have simply been stereotyped, subjected to wage and other types of discrimination, forced to assume gendered roles, denied compensation necessary to achieve substantive equality because of those gender roles, and have had their lack of parity in all things economical and professional explained away by their differences, their supposed agency and free choice, and their lower qualifications. Despite glaring discrepancies in pension access and pension wealth, women of color are not always counted separately.

To end this discrimination, several steps must be taken: the enforcement of existing anti-discrimination laws to achieve formal equality; the adoption of affirmative action by creating (and subsidizing through tax benefits) proportional benefits for part-timers and contingent workers; the extension of pension, family medical leave, and other federal labor laws to smaller-sized firms; the application of these labor laws to include the kinds of work many women do, including agricultural and domestic work; and the compilation and reporting about every subset of women.¹⁶ And that is only a start, because it would leave most women with a modest, rather than no, pension. However, the hidden facts and statistics about women's lack of wealth belie the terrible likelihood that most women will be our poorest cohort for years to come.

WHAT WOMEN EARN: SCANT IN COMPARISON

Those with the greatest participation in pension plans tend to be richer or at least not poverty-stricken employees. Among those earning less than \$200 each week, only 6% participated in a plan compared with 54% of workers earning \$500-\$599 per week and 76% of workers earning \$1000 or more per week.¹⁷ How do these data translate into pension coverage for women in general and

691 (1999).

15. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 n.15 (1989).

16. For years, federal agencies like the U.S. Department of Labor, Bureau of the Census, and Equal Employment Opportunity Commission did not count Latinos and other Hispanics separately. Statistics about women are rarely broken down by race or ethnicity. Some data even report that "Hispanics" are counted both as whites and as minorities. See, e.g., U.S. BUREAU OF LABOR STATISTICS, *Labor Force Statistics from the Current Population Survey*, tbl. 1, at <http://stats.bls.gov/news.release/union2.t01.htm> (last visited Feb. 9, 2001).

17. U.S. DEPT. OF LABOR, *Contingent Work Supplement to the February, 1999 Current Population Survey, Coverage Status of Workers Under Employer Provided Pension Plans* 3, available at <http://www.dol.gov/pwba/programs/oprcws-survey/hilites.html> (last visited July 2, 2002).

subsets of women in particular? Although the statistics are available, one must struggle mightily to avoid the essentialist conclusions. Every attribute of womanhood, which might constitute a proxy for discrimination, leads to less pension wealth. Race, ethnicity, age, marital status, and family size impact the likelihood of contingent or present retirement income.

Median incomes in 1994 based upon household type were radically meager for women alone. The median income for married couples was \$45,041.¹⁸ Male householders with children and an absent wife had a median income of \$30,472.¹⁹ Female householders with children and an absent husband had a median income of \$19,872.²⁰ Female householders living alone earned the lowest median income in 1994. Her median income, \$14,948, was significantly less than the median income, \$24,593, of a similarly situated male. Families maintained by women tend to be poorer during the woman's working life, and this situation is exacerbated as the woman ages. This is more common among minority populations, but is fairly predictable across races, counting for gender alone.²¹ Income is not the sole predictor of poverty for older women. Healthcare expenses also force older women into poverty, owing to the reality that most women have no private insurance.²²

Never-married women are poor; incredibly, divorced and widowed women are even poorer.²³ Despite the myth that divorce enriches women at the expense of their ex-husbands, and regardless of the existence of laws that allow for the division of marital property, including spouses' pensions,²⁴ many ex-wives

18. U.S. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *Current Population Reports, Series P60-189 Employee: Income, Poverty & Valuation of Noncash Benefits: 1994, 1996*, tbl. A, EBRI DATA BOOK ON EMPLOYEE BENEFITS, *Household Income* 479 App. D, tbl. 5 (4th ed. 1997). Of all family types, those maintained by women have the lowest median income. DeWar, *supra* note 3. In 1995 the median income for Hispanic families maintained by women was \$13,474; for black families maintained by women it was \$15,004 and for white families maintained by women it was \$22,068. *Id.* In 1995, out of 12.2 million families in America headed by women, 12% were Hispanic, 33% were black and 64% were white. *Id.*

19. DeWar, *supra* note 3.

20. *Id.*

21. See Regina Gallindo Carter, *Pro Bono Legal Services: A Focus on the Elderly and Disabled*, 60 TEX. B.J. 270 (1997) (describing free legal services available to help elderly women in these positions).

22. The Older Women's League reports that: 80% of retirement age women have no access to pensions; 60% of women over 65 living alone have social security as their only income; and four million mid-life women have no health insurance. DeWarr, *supra* note 3.

23. Half of all older women were widows, (approximately 47%). DeWarr, *supra* note 3. There are five times as many widows (8.6 million) as widowers (1.7 million) in 1996. *Id.* Since 1990 the numbers of divorced women increased 4.2 times faster than for the older population as a whole. *Id.*

24. The Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1436

fare badly financially. Even among women who marry men of wealth, many enter pre-marital or pre-nuptial agreements that severely disadvantage them.²⁵ The National Center on Women and Family Law in New York reports that in the first year of divorce, women generally suffer a 73% reduction in their standards of living while their ex-husbands typically enjoy a 42% increase. Older housewives and women who are married the longest experience the greatest downward mobility and the greatest relative deprivation after divorce.²⁶ One year after divorce, the average woman remains single with an average income of \$11,300.²⁷ One study in 1999 found that "the typical married couple looks forward to around half a million dollars in retirement assets . . . and the median non-married woman about \$160,000."²⁸ The authors found that anticipated retirement income did not vary much as a function of prior marital history among non-married men, but it clearly did for women.²⁹

That is, the median never-married woman expects about 60% more retirement income than non-married divorced or widowed women. The main source of this difference is pension income: the median never-married woman expects over \$2,000 in annual pension benefits, while the median widowed and divorced woman expects none.³⁰

In addition, this pension income gap between never-married and other women was most prominent for Whites, since

(1989), created joint and survivor annuities, which mandate payments to a surviving spouse after a covered retiree dies, unless the spouse waives the joint and survivor benefit in favor of a higher monthly annuity only for the life of the covered retiree. Research has shown that married couples often elect the latter option, due to lack of information about survivor benefits. Camilla E. Watson, *The Pension Game: Age- and Gender-Based Inequities in the Retirement System*, 25 GA. L. REV. 1, 38-39 (1990).

25. See generally Gayle Frommer Brod, *Pre-Marital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM, 229 (1994). See also, Francis Leonard, *The Three Legged Stool: Women and Retirement (in) Security*, 32 HAST. L.J. 1195 (1981) (examining the full panoply of pension issues facing women including the retired homemaker, both divorced and in a marriage, widows, ERISA forfeitures and other issues and discussing Social Security inequities).

26. Joan Pennington, *The Economic Implications of Divorce for Older Women*, 23 CLEARINGHOUSE REV. 488, 489 (1989).

27. Pamela Yip, *Women and Money*, SAN DIEGO UNION & TRIB., Dec. 3, 2000, at H3 (citing data from the NAT'L CENTER FOR WOMEN & RETIREMENT RES.).

28. Phillip B. Levine et al., *Worklife Determinants of Retirement Income Differentials Between Men and Women 21* (NAT'L BUREAU OF ECON. RES., WORKING PAPER NO. 7243, 1999), at <http://www.nber.org/papers/w7243> (last visited July 29, 2002).

29. *Id.*

30. *Id.* at 19 n.27.

Blacks and Hispanics have fewer assets and consequently a smaller gap by sex. Non-married Black and Hispanic men and women expect relatively little income from sources other than Social Security. The median non-married minority in the sample will not receive any employer pension income and only modest income from other financial assets.³¹

There is widespread belief that women are given additional benefits or receive compensatory pension rights that are derived through their husbands or former husbands. Clearly the Social Security System attempts to be slightly redistributive. Social Security allows a woman to receive either the benefits she earned during her lifetime, or the benefits she can receive as her spouse's survivor,³² whichever is higher. However, private pension benefits that belong to a husband are not so clearly shared with a spouse.³³

Only 54% of married private pension plan recipients have selected a joint and survivor option that, in the event of their death, will continue to provide benefits to their spouses. That means that 46% of all married people do not elect to leave benefits to their spouses.³⁴ Only 7% of divorced people receive a joint and survivor benefit.³⁵ Although pension benefits are considered part of marital property and can be divided upon divorce, they typically are not.³⁶ Divorce lawyers can seek a court order that gives part of a husband's retirement benefits to his former spouse and children, "but the rules governing such orders are complicated and . . . [d]ivorce experts say so-called qualified domestic relations orders are frequently flawed, and as a result, many women lose some or all of the benefits."³⁷ Moreover, defined contribution plans, such as 401(k) plans, have no statutorily mandated joint and survivor benefit.³⁸

31. *Id.* at 20.

32. See Kilolo Kijakazi, *Lies, Damn Lies and Statistics: Debunking Flawed Research on People of Color and Women in Social Security Reform*, at http://www.nasi.org/publications2763/publications_show.htm?doc_id=116573&name=Social%20Security (last visited July 29, 2002) (discussing a paper presented at Unity Conference '99, held in Seattle, Washington on how progressive independent spouse benefits usually net greater returns for women and people of color than for white men).

33. U.S. DEPT. OF LABOR, PENSION & WELFARE BENEFITS ADMIN. OFF. OF RES. & ECON. ANALYSIS, *Retirement Benefits of American Workers* (1995), at <http://www.dol.gov/pwba/programs/opr/redbook/cover.htm> (last visited July 29, 2002).

34. *Id.*

35. *Id.*

36. *Id.*

37. Sandra Block, *Golden Years Bleak for Divorces*, U.S.A. TODAY, Aug. 8, 2000, at 1B.

38. In the State of Oregon, half of the women age 65 and older are unmarried, widowed, or divorced. See Erin Hoover Barnett, *Some Women Retirees Face Pittance of Funds, Study Says*, THE OREGONIAN, Oct. 17, 2001, at A01 (discussing data from the Oregon Future Retirement Income

The Department of Labor also keeps tabs on the number of widowed persons who receive benefits based on pensions earned by their deceased spouses and the average annual benefit amount. In 1994, 21% of widows received a pension based on the pension of their deceased husbands; their median annual benefit was \$4,800. Federal statistics show that the poorest Americans are divorced female retirees, 22% of whom live in poverty; the number of widows in retirement age will escalate by 84% in the next two decades to 9.6 million.³⁹ It is not clear whether the same women who get their own pensions also get pensions from their deceased spouses.⁴⁰ If they do, certain women who already have some economic wherewithal have even more security whereas other women have nothing.⁴¹ It is worth noting that widows are also adversely affected by their race. Twenty-two percent of white widows get benefits of \$4,800; 15% of African-American widows have an average annual benefit from their late husbands of \$4,200, and only 13% of all other races have any annual benefit at all from their husbands.⁴²

Women's poverty seems to be one of the most intractable elements of the American workplace. Although the Equal Pay Act was passed in 1963, women in 1979 earned approximately 62.5% of what men earned while women in 1999 earned 76.5% of their male counterparts in full-time jobs.⁴³ Note, again, that these are

Assessment Project, Employee Benefit Research Institute in 2001). But fewer single women who were once married get a survivor pension from their deceased spouse because fewer workers have traditional pensions now. *Id.* Section 401(k) does not mandate joint and survivor pensions benefits. 26 U.S.C. § 401(k) (2000). In fact, most 401(k)s are paid out in lump sums. *Id.*

39. Block, *supra* note 37. Divorced women are often denied their ex-husbands pension benefits, and their ability to provide for retirement is stymied by disrupted work histories and lower salaries, owing to the fact that a woman will typically spend 11.5 years out of work force to care for their children. *Id.*

40. For similar concerns over statistics concerning unemployment and households, see Paul Gregg & Jonathan Wadsworth, *Unemployment and Households: Causes and Consequences of Employment Polarization Among European Countries*, at http://www.ecotec.com/eeo/ersep/imi63_uk/00140002.htm (last visited July 29, 2002). Although statistics show that more women have moved from economic inactivity into paid labor the female employment rate seems to have risen without effecting the unemployment count that much. *Id.* It is not clear whether that is because women have gone to work in households where men have lost work or women have gone to work from households where men are already in employment, noting that stable national employment rates could still allow growth in workless households. *Id.*

41. See *Retirement Benefits of American Workers New Findings From the 1994 Current Population Survey*, U.S. DEPT. OF LABOR, tbl. D11, available at http://www.dol.gov/pwba/programs/opr/redbook/d_11.htm (last visited July 29, 2002).

42. See *supra* note 28.

43. Jewel Elizabeth Partridge, *Similar education still doesn't mean equal*

averages. Some college-educated women, with hefty salaries, and some white males who comprise some percent of the poor, contributed to that average.⁴⁴ Most women earned significantly less than 75% of what most men earn; women of unique (and overlapping) subsets present an even starker contrast. Moreover, even female college graduates' median salary is an expected \$25,362 compared with a young male recent graduate's expectation of earning \$35,345.⁴⁵ Half of all women work in traditionally female, low paying jobs without pensions.⁴⁶ In fact, the majority (59%) of low-wage jobs are held by women who are likely to receive lower wages than similarly situated males.⁴⁷ Not all women who are paid low wages work part-time, nor are they all young: 31% of women of prime working ages (between 25 and 45) worked full-time and were paid low wages.⁴⁸ According to one researcher, a clear factor in low wage employment is the worker's educational level.⁴⁹ About half of all women in the workforce have some college education or college degrees; even this relatively educated group represents one-third of the low wage female work force. Nearly 75% of those without a high school education work

pay for women, UNIV. WIRE, Dec. 7, 2000. The average for *all* women is 72 cents for every dollar that men earn; the gap is even greater for African-American women and Hispanic women who earn 64 cents and 54 cents, respectively, for every dollar that an average man earns. *Id.* That does not suggest that women of color earn more; it is because men of color earn less than the white male.

44. More women graduate from college than men. Since 1994 they have earned more than 50% of all associate, bachelor's and master's degrees awarded. Women accounted for 39% of all Ph.D.'s. NAT'L CENTER FOR EDUC. STAT., *Degrees Conferred by Sex and Race*, at <http://nces.ed.gov/fastfacts/display.asp?id=72> (last visited July 29, 2002). In 1997-1998, minorities earned only 20.5% of the bachelor's, 17.4% of the master's, and 16.8% of the doctorate's degrees. *Id.* Hispanics earned 5.5% of the bachelor's, 4.1% of the master's, and 3.2% of the doctor's degrees. *Id.* Relative figures for students denominated Asian or Pacific Islander are 6.0, 8.0, and 7.7%. *Id.* Each set of figures would suggest that if education mattered, the wage gap between white men and all other groups ought to be smaller than it is.

45. Partridge, *supra* note 43.

46. Yip, *supra* note 27 (citing data from the WOMEN'S INST. FOR A SECURE RETIREMENT in Washington, D.C.).

47. Marlene Kim, *Women Paid Low Wages: Who They Are and Where They Work*, MONTHLY LAB. REV., Sept. 2000, at 26. The current population survey defines low-wage workers as those who are unable to provide for a family of four above the official poverty level while working full-time (2,080 hours per year). *Id.* For workers paid on an hourly basis, this means that low-wage workers are defined as those who were paid no more than \$7.91 per hour or \$16,450 for 2,080 hours of work in 1998. *Id.*

48. *Id.* at 27, tbl. 1.

49. *Id.* at 27. Women with a high school education or less are over-represented in low-wage employment, constituting about 21% of low-wage workers. *Id.* Eleven percent of all female workers have a high school education or less. *Id.*

in low wage jobs, compared to 14% of those with a college education in such jobs.⁵⁰

Married women make up about 49% of all female workers, and 43% of all low-wage female workers.⁵¹ Women who have never been married account for only 28% of all female workers; 49% of never-married women work in low-wage jobs.⁵² The representation of low-wage workers in the wage and salary force is proportional to racial composition; however ethnicity is relevant.⁵³ Those of Hispanic descent are slightly over-represented among low wage workers, constituting 10% of the female work force, but 14% of the low-paid female work force; for example, over one-half of female Hispanic workers are in low wage jobs, which constitutes among females about 10% of the work force and 14% of the low paid workers.⁵⁴ The pension wealth of these discrete groups is radically different.⁵⁵ Female low-wage earners find themselves in certain types of jobs. The females in this group tend to work in retail trade and in the outdoors, such as agriculture, forestry, and fisheries.⁵⁶ Less than one percent of all women work in agriculture

50. *Id.* at 27, tbl. 1.

51. *Id.* at 27.

52. *Id.*

53. *Id.*

54. *Id.* at 27, tbl. 1. *But see* Jared Bernstein et al., *The Minimum Wage Increase: A Working Woman's Issue*, EPI Issue Brief No. 133 (Sept. 16, 1999). African-American women comprise 13.1% of all women workers, but a slightly greater percentage of African-American women (16.2%) are minimum-wage female workers; similarly, Hispanic women constitute 9.0% of all females in the work force, yet 14.4% of minimum-wage working women. *Id.* at 3, tbl. 2.

55. The median pension wealth for whites is \$101,016, relative to that for African-Americans and Hispanic-Americans being \$31,802 and \$16,814, respectively. Margorie Honig, *Minorities Face Retirement*, in *Projected Retirement Wealth and Savings Adequacy, in Forecasting Retirement Needs and Retirement Wealth*, 235, 244 & tbl. 4 (James Moore and Olivia Mitchell eds., 2000). The mean retirement wealth is \$171,849 for whites; \$95,133 for African-Americans; and \$58,997 for Hispanic-Americans. *Id.* Ethnicity also determines the difference in the receipt of benefits. *See* Jayne E. Zanglein, *Investment Without Education: The Disparate Impact on Women and Minorities and Self-Directed Defined Contribution Plans*, 5 EMPL. RTS. & EMPLOY. POL'Y. J. 223, 236 (2001) (citing Olivia Mitchell et al., *The Impact of Pay Inequality, Occupational Segregation, and Lifetime Work Experience on the Retirement Income of Women and Minorities* 9 (AARP Public Policy Institute Monograph #9910, 1999)). Nearly one-half of men receive pensions relative to about one-fifth of women, independent of ethnicity. *Id.* When analyzed along ethnic lines, one-third of whites receive pensions, whereas only one-fifth of Hispanic-Americans and one-fourth of African-Americans receive similar benefits. *Id.* Women and minority groups will have worked fewer years in employment and likely work part-time compared to men. Vickie L. Bajtelsmit & Nancy A. Jianakoplos, *Women and Pensions: A Decade of Progress?* 3 Tab. 2 (EBRI Issue Brief No. 227, Nov. 2000). The executive summary of this brief is available at <http://www.ebri.org/ibex/ib227.htm> (last visited July 29, 2002). *See also*, Mitchell et al., *supra* note 11.

56. *See* Kim, *supra* note 47.

and forestry; one might guess that Latinas are over-represented therein.⁵⁷ Retail trade employs 21% of the entire female work force, but 37% of the low paid work force, and 70% of all retail workers are low paid.⁵⁸ Even among the industries in which women work, there are wage variations. One explanation might be that men are paid more than women within an occupation, but data proving that point does not exist.⁵⁹

Although the greatest number of low-wage workers (41%) are concentrated in the service sector, this is because that sector employees the largest share (47%) of all female wage and salary workers, rather than because low wage workers are over represented within the industry . . . 39% of all female workers are low paid and only 34% of all service workers are low paid. Within the service sector, only women working in personal services are over represented among low wage workers: 58% of those working within private household services, as well as 74% of those working in all other personal service jobs, are low paid.⁶⁰

Low-wage jobs include: bank tellers, receptionists, clerks, household workers, nurses' aids, certified nursing assistants, duplicating machine operators, retail sales clerks, food service workers, cleaning ladies and building services. Part-time workers constitute 33% of all low-wage workers; 54% of part-time workers are likely to receive low wages compared with 24% of all full-time workers.⁶¹ Sixty-eight percent of women who received low wages were not covered by employer-provided health insurance during 1997,⁶² and, starkly, "one-third of women who are paid low wages live below 150 percent of the poverty level."⁶³

A study done in 1991 by the Economic Policy Institute and the Institute for Women's Policy Research showed that 58% of the 11.8 million workers who would receive a pay increase as the result of a higher minimum wage would be women.⁶⁴ Something as simple as increasing the minimum wage to \$12,300 per year for full-time workers "would help to reduce the overall pay gap between women and men," because so many women earn wages at that level.⁶⁵ Even more current data show that 15.3% of married females with children, and 9.2% of single working mothers would benefit from

57. *Id.* at 26, 28 tbl. 2.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 29.

62. *Id.*

63. *Id.*

64. Bernstein et al., *supra* note 54, at 1.

65. *Id.* Almost seven million women would benefit from a proposed minimum-wage increase as of 1998. *Id.* at 3 tbl.2. Over 96% of those women would be non-union employees as opposed to almost 4% of union workers who would benefit from a minimum-wage increase. *Id.*

an increase in the minimum wage.⁶⁶ Almost half, 48%, of all minimum wage workers are full-time workers.⁶⁷

The added tragedy of the less-than-equal-wage is that women make up 76% of single-parent families.⁶⁸ Almost 40% of minimum wage workers are the sole generator of income for their households.⁶⁹ "With equal pay for equal work, the average family would witness an increase in income of more than \$4,000 per year: more money than any tax cut proposal can optimistically promise."⁷⁰

Income disparities during a working life are identical to pension coverage disparities after retirement. According to the U.S. Department of Labor, "only 12% of retirees who had earnings of less than \$10,000 per year get a pension, while 68% of those who earned more than \$40,000 in their last year of work have received pension benefits."⁷¹ Women in particular have felt that drop. The average 25-year-old woman who enjoys a 40-year career will earn \$523,000 less than a similarly situated man.⁷² Despite a booming economy, median family income increased only by 1.9% between 1979 and 1996.⁷³ For the poorest 40% of all American families, average family income fell for the same period.⁷⁴

Researchers have repeatedly found that wage differentials

66. Jared Bernstein & John Schmitt, *The Impact of the Minimum Wage*, EPI Briefing Paper 9, tbl.3 (June 2000), available at http://www.epinet.org/briefingpapers/min_%20wage_bp.html (last visited Feb. 20, 2001). Although African-Americans represent 11.7% of the overall work force, 15.7% belong to the minimum wage category; likewise, Hispanic-Americans represent 10.8% of the total workforce is but nearly twice as many (19.2%) belong to the minimum wage category. *Id.* at 7.

67. *Id.* at 2.

68. Levine *et al.*, *supra* note 28.

69. CENTER FOR POLICY ALTERNATIVES, *Women's Voices 2000: Analysis of Findings From a Nationwide Survey and Focus Group* 33, available at www.cfpa.org (2001) (discussing analysis by Lake, Small, Perry and Associates, American Viewpoint, & Linda Faye Williams, Univ. Maryland at College Park, and Insight Research).

70. *Id.*

71. U.S. DEPT. OF LABOR, *The State of the American Worker: Annual Report Fiscal Year 1999*, at 6-7 (1999). Even improved numbers on the wage gap do not tell the whole story. Since 1989, according to the U.S. Department of Labor, wage earners in the lowest 20% have experienced a drop in wages, while the top 20% enjoys an increase in wages. *Id.*

72. American Federation of Labor-Congress of Industrial Organization (AFL-CIO Factsheet), *Facts About Working Women*, at <http://www.aflcio.org/women/wwfacts.htm> (last visited July 29, 2002) (citing the INSTITUTE FOR WOMEN'S POLICY RESEARCH, *The Male-Female Wage Gap: Lifetime Earnings Losses* (1998)).

73. U.S. BUREAU OF THE CENSUS, *Table F-7: Type of Family (All Races) by Median and Mean Income: 1947-1996*, at <http://www.census.gov/hhes/income/histinc/f07.html> (last visited July 29, 2002).

74. *Id.*

exist even after controlling for characteristics that distinguish individuals in worker productivity, such as education, age, and labor market experience.⁷⁵ Although gender discrimination is illegal, and is dramatically less pervasive than it was, it remains the only explanation for at least part of the wage gap, which illustrates "the fallacy that merit alone determines employment success."⁷⁶

It is hard to tell exactly how much gender discrimination exists. But in fiscal year 2000, there were 79,896 charges filed at the U.S. Office of Equal Employment Opportunity Commission: 36.2% were based on allegations of race discrimination; 31.5% on gender; and 9.8% on national origin. In that year alone, 1,270 complaints were filed by women demanding protections under Equal Pay Act based upon allegations that employers retaliated against them for complaining about discrimination.⁷⁷ Discrimination accounts for some of the differences in employment pay, regardless of whether it is directed against white women, women of color, older women, women from different ethnic backgrounds, women with disabilities, or immigrant women. As Heidi Hartmann related the inexplicable basis for the wage differentials: "science provides no definitive answer to the question of how much discrimination affects women's wages, it remains for members of Congress to judge the extent of discrimination and the urgency of the current situation"⁷⁸

Some claim that wage discrimination may be rationalized based upon objective, observable differences between men and women. For example, Hartmann opined that:

[w]omen may have different skills and qualifications from men and thus earn less. For example, women and men often study different subjects in college, and, on average, men have about five more years of accumulated years of labor market experience than women. Most experts (and others) view differences in pay for these reasons as fair. The part of the pay gap due to these factors can be explained, then, as legitimate and as not considered to be due to labor market discrimination.⁷⁹

75. Levine et al., *supra* note 28.

76. Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 587 (2000).

77. The U.S. Equal Employment Opportunity Commission, *Charge Statistics: Fiscal Year 1992 Through Fiscal Year 2001*, at <http://www.eeoc.gov/stats/charges.html> (last visited July 29, 2002).

78. Heidi Hartmann, *Prepared Testimony of Heidi I. Hartmann before the Senate Committee on Health, Education, Labor and Pensions Hearing on Examining Gender-Based Wage Discrimination*, FED. DOC. CLEAR'G HOUSE CONG. TEST., June 8, 2000, at 3. Ms. Hartman is an economist and President of the Institute for Women's Policy Research, an independent scientific research institute focusing on women's economic issues.

79. *Id.*

Apparently, many feminists and critical race theorists do not share Hartmann's opinion. One study showed that at least 57% of the total gap of 27.6 percentage points between male and female wages was explainable by analyzing women's labor market experience and their entry into better or less well paying occupations.⁸⁰ Even this explanation still allows great differences between men's and women's wages.

Wage inequities may not be discrimination against individual women, but rather discrimination against women's occupations. One study has shown that wages usually fall as the percentage of women in an occupation rises.⁸¹

Women are more mobile than men for inexplicable reasons. There are a plethora of intuitive explanations, although none have been statistically proved. They may follow their men.⁸² They may have little incentive to stay with a low-paying job without benefits. Part-time workers and workers in services, retail trade, and agriculture are more likely to look for another job than full-time workers in general, and workers in other industries in particular.⁸³ Some women, like some men, move to increase their salaries.⁸⁴ They may experience periods of unemployment that correspond with family responsibilities. They may be the last hired—and the first fired.

Tenure is repeatedly cited as an objective, neutral reason for women's lower wages and paltry pension wealth.⁸⁵ But work history by gender is not that different. In February 2000, the median tenure was 3.3 years for women, compared to 3.8 years for

80. *Id.* at 4 (citing Francine D. Blau and Lawrence M. Kahn, *Swimming Upstream: Trends in the Gender Gap Differential in the 1980's*, 15 J. LAB. ECON. 1 (1997)).

81. Naomi Barko, *The Other Gender Gap*, 11 AM. PROSPECT 61 (June 19, 2000). More than 55% of employed women work in traditional women's jobs—librarians, clerical workers, nurses, teachers, and childcare workers. *Id.* If these women are compared not to male workers, but to women with similar education and experience in more gender-balanced occupations, they would earn about 18%, or \$3,446, more per year, according to the Institute for Women's Policy Research. *Id.*

82. *See, e.g.*, *Norman v. Unemployment Insurance Appeals Board*, 663 P.2d 904, 908 (Cal. 1983) (stating that the legislature gives "weight" to marital relationships so that a wife who quits her job to follow her husband is eligible for unemployment compensation).

83. DELOITTE & TOUCHE, *Human Capital I.Q.: January 2001*, at 3 (January, 2001).

84. Kristen Keith & Abigail McWilliams, *The Returns to Mobility and Job Search by Gender*, 52 IND. & LAB. REL. REV. 460, 460 (1999).

85. *But see*, Richard K. Caputo, *The Availability of Traditional and Family-Friendly Employee Benefits Among A Cohort of Young Women, 1968-1995*, 81 FAM. SOC. J. CONTEMP. HUM. SERV. 422 (July 1, 2000) (finding African-American women had longer job tenure and more years of working than white women, but fewer benefits).

men.⁸⁶ Thirty-four percent of male workers age 25 and over had worked for their current employer for ten years or more, compared with 30% of working women.⁸⁷ More than 25% of all wage and salary workers had been with their current employer for twelve months or less as of February 2000.⁸⁸ According to the Department of Labor, "[t]his group includes new entrants and re-entrants to the workforce, job-losers who found new jobs during the previous year, and workers who had voluntarily changed employers during the previous year."⁸⁹ Apparently, assuming men make up a proportionate share of that average, they do not suffer the same salary discounts as women.

Women's job-type segregation may explain their frequently shorter tenure. In February 2000, managers and professionals held the highest median tenure among major occupational groups (4.8 years). Workers in the service occupations held the lowest median score of 2.5 years. Protective service workers had the highest median tenure (5.7 years), compared with food service workers who had the lowest median tenure (1.5 years).⁹⁰ Women's median tenure may reflect exit and re-entry into the labor market, late starts, interrupted work history, or frequent job changes.⁹¹

Things don't improve with age either. Older women in general are poorer than older men.⁹² In 1996, older women had twice the poverty rate of compared to men at 13.6%⁹³ Nearly one-half of the older black women who lived alone were poor in 1996.⁹⁴ Significantly more women than men live below the poverty level at all age groups between 45 and 65 or above; with the number increasing substantially with age. According to the Employee Benefits Research Institute, the average income of elderly men (\$28,597) differs significantly from that of elderly women (\$15,197) in 2000.⁹⁵

86. U.S. DEPT. OF LABOR, *Employee Tenure Summary, Employee Tenure in 2000* 1, 2, available at <http://www.bls.gov/news.release/tenure.nr0.htm> (last visited July 29, 2002).

87. *Id.*

88. *Id.* at 3.

89. *Id.*

90. *Id.* at tbl.6. This data supports the gendered tenures and salaries within an occupation, since arguably more women than men work in food service and more men than women work in protective services.

91. *Id.* at tbl.1. It is interesting to note, however, that even for women who are 25-34 years of age, their median tenure with an employer in 1991 was only 2.7 years. *Id.* Only among female employees 45 years and older, do women, on average, have a minimum of five years of employment history with a single employer. *Id.*

92. DeWarr, *supra* note 3, at *Economic Issues*.

93. DeWarr, *supra* note 3, at *Poverty*.

94. *Id.*

95. EMPLOYMENT BENEFITS RESEARCH INSTITUTE, *Facts from EBRI: Women in Retirement*, available at <http://www.ebri.org/facts/0602fact.pdf> (last

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Much has been written about changing the gendered nature of family caretaking.⁹⁶ Future societal changes are unlikely to adequately address the immediate needs of older women. Some women may have fewer hours for compensated wage-labor because of family responsibilities, which lead to less current and future wealth.

Although the pension laws are gender neutral, inequities in the workplace and in family care giving roles mean that women continue to be less likely to be covered by pension plans and to receive benefits. As long as we allow these inequities to persist, the retirement profile for future generations of women will remain bleak.⁹⁷

There is a body of thought that argues that women choose their poverty. Arguably, women are less likely to have pensions because they voluntarily work at the kinds of jobs that pay less and are more likely to accommodate women's needs or desires to care for children or elders. For example, there is something referred to as the human capital theory in economics that posits that in order to conserve energy for family duties, women look for jobs that require less effort. Because of the numbers of women who choose these "easy" jobs, there are more seekers than there are employers, and often women who work at them are less productive. As a consequence, women earn less than men.⁹⁸

This theory is not unopposed, especially given the data suggesting that women are paid less because they suffer sex discrimination. There are constant violations of the Equal Pay Act, and they are segregated into separate but less remunerative occupations, terms, and jobs.⁹⁹ Moreover, studies that show that a woman's likelihood of working in a male-dominated, as opposed to a female-dominated, field of endeavor—even the likelihood of her holding a job in either of those domains at any given time—does not appear to vary based upon such family related characteristics

visited July 2, 2002).

96. See generally Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047 (1994).

97. Heinz et al., *supra* note 3.

98. See generally Gary S. Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J. LAB. ECON. S33, S52 (1985). See also Victor R. Fuchs, *Womens' Quest for Economic Equality* 4 (1988). The weaker economic position of women is mainly attributed to conflicts that arise in decisions involving career and family matters and that more strongly influence women than men. *Id.* at 60. Moreover, women devoted to child-care and housework typically cannot devote a large effort to a career outside of the home. *Id.*

99. See, e.g., Donald Tomaskovic-Devey, *Gender and Racial Inequality at Work* 111 (1993) (explaining that employment segregation by sex typically as the social basis for the gap in earnings between genders). See generally Samuel Cohn, *Race and Gender Discrimination at Work* (2000).

as marital status, parental status or number of children.¹⁰⁰ Women with children and other dependents work at the same jobs as women without them. In 1996, women accounted for 47% of those holding multiple jobs.¹⁰¹ Although some people argue that women choose to work part-time in order to accommodate their family responsibilities, one study has found that “working wives and non-working wives have a high degree of similarity with respect to factors such as other income besides the wife’s wages and salaries, level of education, and number of children.”¹⁰² Moreover, job categories dominated by women on the whole are not more family-friendly than male jobs. Some argue that a woman’s need for part-time work or flexible work schedules nets her lower pay because she has to pay for the premium of an employer tolerating her need for extra time.¹⁰³ Other researchers have found that the impact of family responsibilities on work effort commitment is virtually nonexistent.¹⁰⁴ Whether women choose to work at low paying jobs because it allows them to shop, to care for their children, to watch TV, or because they do not have the sense of personal worth that would lead them to demand a better and higher paying job, is beyond the scope of this paper. In one infamous case, *EEOC v. Sears Roebuck & Co.*,¹⁰⁵ the largest retailer in the country at the time was able to convince a court that women “lacked interest” in the higher-paying, more desirable positions held by many men. It argued that women had been programmed to nurture and prepared by nature to prefer feminine forms of work that are more consistent with motherhood and care

100. See Tomaskovic-Devey, *supra* note 99 (finding that a woman with a child will likely find herself in a gender-neutral job).

101. John F. Stinson, Jr., *New Data on Multiple Jobholding Available from the CPS*, 120 MONTHLY LAB. REV. 3, 5 (Mar. 1997), available at <http://stats.bls.gov/opub/mlr/1997/03/art1full.pdf> (last visited Aug. 4, 2002).

102. Mahshid Jalilvand, *Married Women, Work, and Values*, 123 MONTHLY LAB. REV. 26, 29 (Aug. 2000).

103. See, e.g., Kristin McCue & Manuelita Ureta, *Women in the Workplace: Recent Economic Trends*, 4 TEX. J. WOMEN & L. 125 (1995); c.f., Jennifer Glass, *The Impact of Occupational Segregation on Working Conditions*, 68 SOC. FORCES 779, 780 (1990) (finding that as the percentage of women in a field rises, the jobs appear to have less flexibility in hours and fewer unsupervised breaks). See also, Mary Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201 (1987) (discussing the fact that many female dominated jobs, for example, working in elementary schools or in dry cleaning establishments, have no fetal protection policies or any other kinds of policies that protect a woman as family care-taker and childcare provider).

104. See Manuelita Ureta, *Women, Work and Family*, 19 N. ILL. U. L. REV. 57, 74-75 (1998). See generally Peter V. Marsden, et al., *Gender Differences in Organizational Commitment: Influences of Work Positions in Family Roles*, 20 WORK & OCCUPATIONS 368 (1993).

105. *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff’d* 839 F.2d 302 (7th Cir. 1988).

provision.¹⁰⁶

Whether by exercise of agency or as a by-product of discrimination, women have less outside income. Some have argued that women's work at home should be paid.¹⁰⁷ Others argue that care-giving to family members should be a public rather than a private family responsibility in order to relieve women of the primary care-giving responsibilities.¹⁰⁸ Some legal feminists argue that women's household labor provides their male partners with time and resources to specialize in market work, and thus, the men should compensate the women.¹⁰⁹ Other feminists have promoted state based welfare strategies.¹¹⁰ It is obvious that whether women do it by choice or out of necessity, society as a whole benefits when private women care for their children and their elders. Clearly women's work in the home has a value, but it is difficult, if not impossible, to assign a dollar amount to their work; moreover, it may be impractical to determine that some one other than a family member should pay for this work.¹¹¹

Most women who work outside the home, and can afford it, use daycare providers, cleaning services, and home health aides. Unfortunately, this has all too often created another subclass of women. Many at-home workers are women of color, few of whom are paid adequately or have any benefits whatsoever.¹¹² Women of color and women from differing backgrounds should have a common cause, but a social caste system imposes a barrier to community. Economic, racial, or ethnic bias becomes the same

106. *Id.*

107. See, e.g., JOAN WILLIAMS, *UNBENDING GENDER*, 124-127 (Oxford University Press 2000) (advocating that wives receive a greater portion of husband's income after divorce as a way of recognizing a woman's greater contributions to housework and childcare). See also Katherine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996) (arguing that women who perform household work are disadvantaged whenever the legal system fails to assign economic value to this form of labor and that the government should treat such labor like paid work).

108. See, e.g., Martha Fineman, *THE NEUTERED MOTHER*, *THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Ava Feder Kittay, *LOVES LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* (1999) (arguing that care provision at home for children and elders should be supported by public provision).

109. See generally, Reva B. Siegel, *Home as Work: The First Womens Rights Claims Concerning Wive's Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994).

110. See generally SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* (Basic Books 1989).

111. See Watson, *supra* note 9, at 30 (advocating a change in the tax laws that would allow woman who do any work outside the home to create tax-sheltered IRA's).

112. See Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race and Agendas of Reform*, 48 AM. U. L. REV. 851, 922 (1999).

kind of “unintentional” discrimination that allows observers to herald advances in wages and pensions of the “average” worker.¹¹³

Professor Peggie Smith has addressed the personal, selfish need of middle-class women for an exploited underclass of women of color. She articulates the problem for all women as the “burden of a double day.”¹¹⁴ She writes: “The revival of domestic service is no surprise. Increasing numbers of women entering the paid work force are confronted with the age-old work-family conflict. Even as women participate in the paid labor force, they remain culturally and socially responsible for childcare and household maintenance.”¹¹⁵ The need of the upwardly mobile, highly paid woman for help at home has almost always guaranteed another subset of low-paid women without retirement security.¹¹⁶

113. As Evelyn Glenn explained:

I, a professional or well-paid woman, do not wish them [women, black women] ill. I just don't care whether they demand or want or get benefits. Their eventual (continuing) poverty is invisible to me. Moreover, assuming a zero sum game, their being underpaid—and left with no benefits, leaves more for me. Another benefit—I may actually directly consume their services, say, for example, as a housekeeper, or a babysitter, a gardener or a handyman. That way, I save 15% of their salary—and they don't have to pay taxes on that paltry salary. More for them.

Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, 18 *SIGNS* 1, 36 (1992). “Feminist policymakers have called for expanding services to assist employed mothers in such areas as child care and elderly care. We need to ask, who is going to do the work?” *Id.* See generally Taunya Lovell Banks, *Toward a Global Critical Feminist Vision: Domestic Work and the Nanny Tax Debate*, 3 *J. GENDER, RACE & JUST.* 1 (1999) (discussing how American feminists failed to seize upon “Nannygate”—the discovery that President Clinton nominated two women for cabinet positions who violated labor and immigration laws by hiring undocumented workers to do their childcare—as a basis for legislative lobbying efforts to protect and regulate household employees because of their ambivalence towards maternalistic instincts). Linda Chavez had to withdraw as George W. Bush's labor secretary nominee because she had an undocumented alien living in her house and doing “some work.” Steven Greenhouse, *Labor Looks for Common Ground with Bush*, *N.Y. TIMES*, Feb. 6, 2001, at A14.

114. Smith, *supra* note 112, at 920.

115. *Id.* at 918-19.

116. *Id.* In the twentieth century, white female “employers,” had servants, and were thus allowed to seek paid occupational goals. *Id.* at 863. As a stark reminder to us middle-class female reformers, for seventy years (1870 to 1940) wage-earning women worked principally in domestic services. *Id.* at 854. Domestic workers probably did not choose their professions. There were also training programs, and government policies, that directed other politically powerless female groups into domestic and farm labor, like Native Americans, Irish immigrants, and Latinas. As among the current workforce, nineteenth century domestics earned less, and had fewer benefits than, women who worked at the store, factory, or office. See *id.* at 942 n.84 and authorities cited therein. Few African-American women were able to identify industrial employment opportunities owing to discriminatory practices. *Id.*

Women's poverty is often exacerbated by the fact that they must be stay-at-home care-givers. Even if they do not stay at home, the cost of care-taking is easily measured in dollars and cents.¹¹⁷ It costs money. An average woman spends 15% of her career out of the paid workforce caring for children and parents, according to the Women's Institute for a Secure Retirement.¹¹⁸ According to some reports: "the average woman spends 11.5 years out of the workforce and over 50% of wage-earning women have reported dropping out of the labor force for family and care giving reasons as opposed to 1% of wage-earning men."¹¹⁹ Care-giving individuals lose more than \$659,000 in wages, social security, and pension contributions because they temporarily or permanently take time off from their jobs; consequently, they miss opportunities for career training, promotions and rewarding assignments.¹²⁰ Moreover, a woman's financial position is difficult whenever she leaves the work force to rear a child. A woman must work an extra five years to recover the lost economic opportunities for each year she tends to childcare.¹²¹

HOW WOMEN WORK: AS TEMPORARIES

Most workers who do not hold full-time jobs are women. Females represent 55% of workers paid by temporary help agencies, and they comprise an even greater percentage of the part-time work force (70%).¹²² Women are twice as likely to work part-time than men. In 1993, for example, 10.7 million women worked part-time. For firms maintaining pension plans, 28% of women who are not covered by a plan are not included because they work part-time.¹²³ Temporary workers make less in wages, and they are rarely included in pension plans. The average temporary service firm employee earned \$7.74 per hour in November 1994, according to the Bureau of Labor Statistics, U.S. Department of Labor.¹²⁴ Many

(citing JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW* (Vintage Books 1986) (1985)).

117. See generally OLDER WOMEN'S LEAGUE, *Mother's Day 2001: Faces of Caregiving* (2001) at <http://www.owl-national.org/reports.htm> (last visited Aug. 4, 2002). No estimates exist about the money women spend on the adults for whom they care for transportation, food and other needs.

118. Pamela Yip, *Women and Money, Time to Get Personal*, S. D. UNION & TRIB., Dec. 3, 2000, at H3.

119. Heinz et al., *supra* note 3.

120. Yip, *supra* note 118, at H3 (citing a study by The Metropolitan Life Insurance Company, The National Alliance of Care giving, and the National Center for Women and Aging at Brandeis University).

121. *Id.* (citing The National Center for Women and Retirement Research in South Hampton, New York).

122. AFL-CIO Factsheet, *supra* note 72, at "Nonstandard Work."

123. Heinz et al., *supra* note 3.

124. Kathryn Hoyle, *New Survey Reports on Wages And Benefits For Temporary Help Workers* 3, available at <http://www.bls.gov/news.release/>

temporary service firms tout the fact that they offer a package of benefits to their employees, including paid holidays and vacation. Forty-nine percent of all temporary employees work in an establishment that provided medical insurance; however, 25% of those businesses offering medical insurance require the employee to pay the premiums. The reason why so few temporary workers actually receive benefits is attributed to their failure to satisfy the minimum qualifications requirements or to simply their decision not to participate in programs, such as those offering insurance plans.¹²⁵ Earning \$14,000 a year, it's no wonder employees choose not to participate. Most of these employees are on the payroll of the temporary help agency, rather than on the payroll of the larger, better paying company that uses them.¹²⁶

Greater numbers of workers, especially women, work for temporary firms even though they may work all year. For example, the number of workers employed by the nation's temporary help supply firms rose by almost 350,000 persons or approximately 43% from 1989 until 1994.¹²⁷ In contrast, total non-firm employment grew by approximately 5% over the same period.¹²⁸ There is a dramatic change occurring in the occupational composition of the temporary help work force. For example, 58% of all temporary workers were in white-collar jobs and only 30% were blue-collar jobs in 1989.¹²⁹ Yet by 1994, white-collar employment dropped to 49% of the industry total, while blue-collar employment rose to 40%.¹³⁰ Service workers' employment was about 5% of the total temporary work force.¹³¹ On average blue-collar workers are more highly paid than many other kinds of workers, although the dramatic rise in the use of blue-collar temporary workers suggests that those who only serve temporarily in those jobs earn significantly less. The hourly earnings of temporary workers barely changed from 1989 to 1994: temporary workers were paid \$7.59 per hour in October, 1999, and \$7.74 per hour in November, 1994, an increase of only about 2%.¹³²

Being a temporary worker means that few employees will get benefits, including those articulated under the Family Medical Leave.

[I]n firms employing most of the temporary workers, less than one-half of the workers—often less than 1/10—qualified for holiday and

occomp.toc.htm (last visited Aug. 4, 2002).

125. *Id.* at 1.

126. *Id.*

127. *Id.*

128. *Id.* at 1.

129. *Id.*

130. *Id.*

131. *Id.* at 1.

132. *Id.* at 2.

vacation benefits. Similarly, most firms reported that less than 10% of their temporary workers participated in a company sponsored health insurance program. These insurance plans typically required the employee to pay part or all of the cost of coverage.¹³³

By statute, temporary workers are excluded from pension plans. Women may choose to work as temps because they enjoy the flexibility of being able to be away from the workplace without penalty; alternatively, it may be the only type of work they can get. Employers clearly enjoy the flexibility of being able to get rid of workers without penalty, including the obligation to pay unemployment compensation. With or without a reason, temporary work leads to no pension security.

HOW WOMEN WORK: AS PART-TIMERS

Twenty-six percent of all women workers are employed on a part-time basis, compared to only 12% of all male workers, and 70% of all part-timers are female.¹³⁴ Although 64% of full-time employees enjoyed pension plan participation, only 37% of part-time workers worked for firms that sponsored pension plans. According to the Department of Labor, the overall pension coverage rate in 1999 was 44%. Broken down by gender, 47% of all men and 40% of all women participated and were eligible for participation in a pension plan. But, pension coverage rate was 51% for full-time employees and only 14% for part-time employees. "The higher percentage of women workers employed on a part-time basis was a major factor in the lower overall coverage rate of women when compared to men."¹³⁵ Non-participation by employees who work in firms with plans is primarily attributed to their ineligibility under established minima in the plan and their part-time status.¹³⁶ Pension plans are permitted to exclude workers who work less than 1000 hours per year. Twenty-two percent of all women fall into this category.¹³⁷ At least one researcher has shown that women of color are less likely than white women to work part-time, but their full-time status does not improve their chances of retirement security.¹³⁸ The confluence of part-time work for white women, and race discrimination for women of color, contributes mightily to the lack of pensions for both groups.

133. *Id.* at 4.

134. AFL-CIO Factsheet, *supra* note 72, at 2.

135. U.S. DEPT. OF LABOR, *Coverage Status of Workers Under Employer Provided Pension Plans*, *supra* note 5, at 2.

136. *Id.* at 3.

137. *Id.*

138. Richard K Caputo, *The Availability of Traditional and Family-Friendly Employee Benefits Among a Cohort of Young Women*, FAM. SOC'Y J. CONTEMP. HUM. SERVICE 422, 436 (July 1, 2000).

WHERE WOMEN WORK: SMALL FIRMS

Women, on average, are more likely to work for small firms. How much sex discrimination and hybrid race-plus-sex discrimination account for these placements is not clear. Take a look at how large and small firms differ. According to the Department of Labor, large firms pay almost twice the annuity benefits that small firms pay. Recipients of large firm's pensions have higher pre-retirement wage levels and more years of pension credited service than pension recipients in small firms.¹³⁹ Although forty million workers are employed by small business firms, only eight million have a pension plan.¹⁴⁰

It is interesting to note that small business has created a vital role in job creation in the modern economy, as businesses with fewer than 500 workers employ a rising share of workers from 1976 (73%) to 1998 (81%).¹⁴¹ Most of the new workers were female. Workers in the service industry now compose nearly 33% of the private sector wage and salaried labor force, and an even greater percentage of these workers are employed in firms sponsoring a pension plan (56%).¹⁴² It must be noted, however, that the service sector consists of a combination of high pay and low pay firms.¹⁴³ Moreover, there is a difference between working for a firm that sponsors a pension plan and actually being covered by that plan. Smaller firms are more likely to offer self-pay pension options. Higher pay correlates with any pension plan, and especially with self-funded plans, suggests a lower rate of coverage for women whose service sector work is typically pink-collar rather than white-collar.

Although the gender gap in median benefits received has narrowed considerably, the percentage of females who receive new private annuity benefits declined from 1989 (35%) to 1994 (31%).¹⁴⁴

139. See generally *Retirement Benefits of American Workers New Findings From the 1994 Current Population Survey*, U.S. DEPT. OF LABOR, available at <http://www.dol.gov/pwba/programs/opr/redbook/cover.htm> (last visited Aug. 4, 2002).

140. Erisa Advisory Council on Employee Welfare and Benefit Plans, REPORT OF THE WORKING GROUP ON SMALL BUSINESS: HOW TO ENHANCE AND ENCOURAGE THE ESTABLISHMENT OF PENSION PLANS, III, ¶ I (Nov. 13, 1998) at <http://www.dol.gov/pwba/adccoun/smrpt1.htm#item3> (last visited Sept. 7, 2002). See also U.S. DEPT. OF LABOR, *A Coverage Status of Workers under Employer Provided Pension Plans*, at www.dol.gov/dol/pwba (1999) (showing women are less likely to be employed by firms providing plans).

141. U.S. DEPT. OF LABOR, *The State of the American Worker: Annual Report Fiscal Year 1999*, *supra* note 71, at 6.

142. U.S. DEPT. OF LABOR, *Coverage Status of Workers Under Employer Provided Pension Plans*, *supra* note 5.

143. *Id.*

144. U.S. DEPT. OF LABOR, *Retirement Benefits of American Workers* 1 (1995), at <http://www.dol.gov/pwba/programs/opr/redbook/cover.htm> (last

Much of this decrease resulted from the shift in pension annuities toward large firms, whose workforce is made up of a smaller percentage of women than in small firms.¹⁴⁵ For example, only 11% of retirees from firms with fewer than 25 workers report the receipt of a pension while 68% of retirees from firms with more than 1,000 workers report that they have received a pension benefit.¹⁴⁶ Not only do small firms tend to provide less retirement benefits, but when they do, they provide them at a much lower rate.¹⁴⁷

WHERE WOMEN WORK: NON-UNION FIRMS

Significantly more men than women are covered by union contracts. Workers in highly paid unionized industries and occupations were most likely to be employed by firms that sponsored pensions plans. The sponsorship rate was 70% greater for workers employed in mining, manufacturing, communications, utilities, finance, insurance and real estate industries, all of which have small numbers of women. Men had significantly higher rates of coverage than women among workers in the manufacturing trade and professional services industries and among workers in the professional, clerical, and services occupations. Further, for unionized workers and workers in large firms, rates of coverage were higher for men than women. The data does not offer an explanation. Yet, AFL-CIO claims to have 5.5 million women members. In 1962 women accounted for 19% of union membership, but by 1997, 39% of all union members were women.¹⁴⁸ Union women do much better than their non-union working counterparts in terms of wages and benefits, but apparently not as well as the men. In 1997, women union members earned 40% more than non-union women; women of color earned 44% more than their non-union member counterparts; Latina union members earned 42% more than non-union Latin workers; and union women earned 84% of what union men earned.¹⁴⁹

Other employment statistics reveal an interesting facet of how union representation influences women's retirement

visited Aug. 4, 2002).

145. *Id.* at 3.

146. *Id.* at 1.

147. Retirement and savings costs increase with establishment size: those with fewer than 100 employees averaged 42 cents (2.4%); those with 100-499 employees averaged 61 cents (2.9%); and those with 500 or more employees averaged \$1.12 (4.0%). U.S. BUREAU OF LABOR STATISTICS, *Employer Costs for Employee Compensation Summary 3* (2001), available at <http://www.bls.gov/news.release/ecec.nr0.htm> (last visited, Aug. 4, 2002).

148. AFL-CIO Factsheet, *supra* note 72, at 4 (citing Bureau of Labor Statistics, Employment and Earnings, January 1998).

149. *Id.*

prospects. In the year 2000, unions represented 13.1% of all working women, 17.3% of all black women, and 11.8% of all women of Hispanic origin. Analyzed further, unions represented 16.3% of all full-time workers but only 7.7% of all part-time workers.¹⁵⁰ Fewer women than men are in unions. Even among the unionized women, some do not enjoy premium wages, for example, service sector employees.¹⁵¹

WHAT WOMEN DO

Since women are over-represented in certain kinds of jobs, they may have less pension coverage. In the alternative, women may elect not to participate in pension plans even when they are offered. It is important to determine how many women who are eligible for pensions actually participate, since the data suggests that more women are employed in industries with pension offerings than ever before. Nearly 60% of all women working full-time in 1996, the majority of which (72% in 1996) were concentrated in three industries: services (35.7%); retail trade (19.7%); and state and local governments (16.6%). Retirement plan sponsorship rates for these three industries in 1993 were categorized as follows: services (52.8%); retail trade (43.9%); and state and local governments (90.8%). The sponsorship rate for working women rose from 52% in 1979 to 58% in 1993.¹⁵² Yet, actual numbers of women who had pensions were significantly lower. From 1972 to 1993, the pension coverage rate for full-time women employees increased from 25% to 41% in service industries, and from 26% to 35% in retail trade industries.¹⁵³

Many people argue that the type of work that women do accounts for their pension participation. According to the U.S. Equal Employment Opportunity Commission in 1998, 14,063,740

150. U.S. BUREAU OF LABOR STATISTICS, *Employer Costs for Employee Compensation Summary*, *supra* note 147, at tbl.1.

151. In one survey, the only group of women which had significantly higher rates of coverage than men was low-wage workers. Richard W. Johnson, Usha Somboorthi & Stephen Crystal, *Gender Differences in Pension Wealth: Estimates Using Provider Data*, 39 GERONTOLOGIST, 320, 330-331 (1999). Rates of coverage were virtually identical for workers earning more than fifteen dollars an hour. *Id.* Women did enjoy a clear advantage over men in terms of pension coverage for workers earning less than fifteen dollars per hour. *Id.* "For example, 63% of women in this sample earning between six and ten dollars an hour had pension coverage in their current job, compared to only 56% of the men." *Id.*

152. EMPLOYMENT BENEFITS RESEARCH INSTITUTE, *Women in Retirement*, at <http://www.ebri.org/facts/1197fact.htm> (last visited Aug. 4, 2002).

153. U.S. DEPT. OF LABOR, PENSION & WELFARE BENEFITS ADMIN., *Changes in the Private Employment Based Pension and Health Systems Over the Past 25 Years 1*, at <http://www.dol.gov/pwba/pubs/factsht2.htm> (last visited Aug. 4, 2002).

women were employed, compared to 16,358,048 men.¹⁵⁴ Among that number, approximately 14% or 2,725,762 of white women were professionals, constituting about 28% of all professionals in the United States.¹⁵⁵ More than 24% of white women were office and clerical workers totaling 3,571,809, and approximately 10% of them were service workers totaling 1,540,713.¹⁵⁶ Nearly 33% of all managers are female; 81% of all office and clerical workers are female; 57.2% of all service workers are women.¹⁵⁷ Only about 3% of all managers are African-American women; 4.1% of all professionals; 13.1% of office and clerical workers; and 14.6% of all service workers are African-American.¹⁵⁸ Latino females represent 1.3% of all managers; 1.7% of all professionals; 6% of all office and clerical workers; and 6.9% of all service workers.¹⁵⁹ White females constitute 27.7% of all managers; 41.6% of all professionals; 59.1% of all office and clerical workers; and 33.3% of all service workers.¹⁶⁰ Based on other indicia of pension coverage, it is clear women of color are most disadvantaged.

Moreover, women predominantly occupy the jobs that are least likely to provide pension benefits. Women hold 60% of all service jobs. They are 96% of all child-care workers, 97% of all receptionists, and 99% of all secretaries. Though women represent less than one-half of the work force, women compose nearly 66% of the minimum-wage working class.¹⁶¹

WHAT WOMEN WORKERS WANT: BENEFITS AND EQUAL PAY

Data show that women employees are more likely to work for a firm with a pension plan than their male counterparts.¹⁶² Much data has been gathered to show that women, more than men, typically prefer deferred compensation or contingent benefits, such as daycare, health insurance, and pension to higher wages.¹⁶³ Studies show that 21% of all females were "not too confident" that they will have enough money to live comfortably, and 17% were

154. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Job Patterns For Minorities And Women In Private Industry (EEO-1)*, 1998 tables, at <http://www.eeoc.gov/stats/jobpat/1998/index.html> (last visited Aug. 4, 2002).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Heinz et al., *supra* note 3.

162. U.S. DEPT. OF LABOR, *Coverage Status of Workers Under Employer Provided Pension Plans* *supra* note 5, at 2.

163. Even "among unionized workers and workers in large firms, rates of coverage were higher for men than women." Johnson et al., *supra* note 151, at 330-331.

"not at all confident" in that regard.¹⁶⁴ On the other hand, 78% of all men were either "somewhat" or "very confident" that they would have enough money to retire.¹⁶⁵ There is also a major political and philosophical difference between genders concerning government programs. Women favor government because they rely on these programs as an important source of financial support, whereas men negatively view such programs as the primary source of higher taxes. These data reflect the relative financial wherewithal of the genders.¹⁶⁶

Other major findings show that women are concerned about equal-pay laws, increasing the minimum-wage, and elder care.¹⁶⁷ These opinions were similar among all women, regardless of race. As one white non-college graduate female said: "I keep hearing that the economy is great, it's booming and everything is wonderful, but I don't know where it's going anymore. I mean, I think maybe it's wonderful for corporations."¹⁶⁸

Not surprisingly, an analysis of these findings showed that both genders have a diverse range of concerns. Women are most concerned with education, followed by retirement, Social Security, the economy, and jobs.¹⁶⁹ After expressing grave concerns about moral decline, their worst fears were for their retirement and Social Security, the availability of secure health insurance for their families in the event that they lose their job or get sick, and maintaining the safety of their children.¹⁷⁰ Despite the fact that women see increasing employment opportunities, many continue to worry about the types of jobs being created. These jobs tend to be in the minimum-wage job market that do not offer adequate pay to cover daily expenses, and women continue to focus on both

164. EMPLOYEE BENEFITS RESEARCH INSTITUTE, DATA BOOK ON EMPLOYEE BENEFITS, 1996 *Retirement Confidence Survey* 75, tbl.9.3 (Employment Benefit Research Institute 1997 (4th ed.)). Sixty percent of the women surveyed are worried or very worried about social security being sufficient for retirement. CENTER FOR POLICY ALTERNATIVES, *Women's Voices 2000*, *supra* note 69, at 18. When asked about saving enough for a secure retirement, 63% of the women were very or somewhat worried. *Id.* There were statistically similar concerns about securing health insurance. *Id.*

165. *Id.*

166. CENTER FOR POLICY ALTERNATIVES, *Women's Voices 2000*, *supra* note 69. "Both men and women say available and affordable health care that's independent of an individual's job, followed by retirement benefits that go from job to job, are most important to them personally. Women turn next to increasing the minimum wage, while men advocate lower taxes." *Id.* at 16.

167. *Id.* at 2.

168. *Id.* at 3.

169. *Id.* at 5.

170. *Id.* at 6. Women voiced this viewpoint regardless of race. "African-American women include having secure health insurance in their top tier while Latinas include keeping children safe." *Id.* at 7.

wages and benefits as central issues in this sector.¹⁷¹ The boom economy may not have reached most women.

Women are 13 points more likely to say the economy is experiencing increasing opportunity than [to] say that they share in the nation's current economic prosperity. The largest drop-off occurs largely among downscale women and includes Hispanic women, non-college educated women [of all races], African American non-college educated women, unemployed women, white retired women, part-time employees, women with a household income of less than \$20,000, women who earn only a little of their total household income, widows, and waitress moms.¹⁷²

That leaves female law professors, CEO's, and e-commerce millionaires who feel secure.

Older women are more reluctant than their younger counterparts to suggest they are economically better off than they were in the recent past or will be in the immediate future.¹⁷³ Statistics bear out their concern. Elderly women are among the poorest of the U.S. population. All women, regardless of race, emphasize the importance of being able to receive equal-pay-for-equal-work while maintaining their family affairs.¹⁷⁴ Latina and Asian women, however, focus next on discriminatory practices in hiring and promotion, while other women share concerns about low pay and wages.¹⁷⁵ Men and women concurred in one matter: women are not paid the same as men for equal work.¹⁷⁶ Whether employed outside the home or not, all women decry disparate wages between the genders.¹⁷⁷

By a margin of three to one, benefits are more important to women than wages in a job. . . Women prefer good benefits to better salary across generational lines and educational level. Not surprisingly, women who work part-time are significantly more likely to call for better benefits than full-time workers, and women in lower income households are slightly less likely to call for benefits over salary than their wealthier counterparts.¹⁷⁸

Women often view the lack of opportunity at work as related to their family responsibilities. In one study, 62% of working parents express their desire to find affordable care for their children.¹⁷⁹ While the Family and Medical Leave Act was passed

171. *Id.*

172. *Id.* at 9.

173. *Id.*

174. *Id.* at 11

175. *Id.*

176. *Id.* at 26.

177. *Id.* at 11.

178. *Id.*

179. *Id.* at 37 (citing AFL-CIO, Bargaining for Childcare Factsheet (1999), at http://www.aflcio.org/women/f_chldcr.htm (last visited July 2, 2002).

in 1993¹⁸⁰ to address some of these challenges, nearly 66% of employees who did not take necessary family or medical leave simply could not afford missing the pay to take the leave.¹⁸¹ Academics need to chronicle the obvious: 72% of women surveyed and 68% of men surveyed said that women get paid less than men who do the same work.¹⁸² Seventy-one percent of the women who were asked in 2000 indicated they would choose a job that pays somewhat less but that does provide benefits over a job that does not have benefits but pays somewhat more.¹⁸³ The statistics are staggering in the amount of consensus among women wherein 88% ranked equal pay and benefits as their highest priority in the workplace.¹⁸⁴ These women, apparently, want what they do not have.¹⁸⁵ Eighty-two percent of men, on the other hand, indicated that their highest priority was retirement benefits that go from job to job.¹⁸⁶ Men already *have* pensions, but even 81% of the women agreed that this was very important.¹⁸⁷ Seventy-six percent of the women and 61% of the men supported paid family and medical leave.¹⁸⁸ Sixty-six percent of the women supported government matching retirement savings accounts for low-income people.¹⁸⁹ Among subgroups of women, 93% of African-Americans, 91% of Latinas, 90% of Asians, and 87% of white women placed equal pay and benefits on a list of best ideas for the workplace.¹⁹⁰ Women, more than men, want the benefits that will afford them (and their children) better lives.¹⁹¹ They seem more inclined to income redistribution, and less opposed to government: the results are not surprising, since most of what they have has been legally mandated. The "free market" of employment opportunities works most efficiently for white men. All other groups are penalized by specific and general discrimination.

180. *Id.*

181. *Id.* (citing The Bi-partisan Commission to Study the Family Medical Leave Act). "Women most likely to believe more should be done to provide parents with quality child care services, include African-American women, Democrats, mothers with children under 19, especially Latina, African-American, and unmarried mothers, women under 45, separated and divorced women, waitress moms, and white married working mothers." *Id.* at 12.

182. *Id.* at 26.

183. *Id.* at 27.

184. *Id.* at 30.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 31.

191. *Id.* at 30.

WHAT BENEFITS COST: VERY LITTLE, BUT APPARENTLY TOO MUCH

Benefit costs for full-time workers represented a greater proportion of compensation costs than for part-time workers (28.2% compared with 19.0%).¹⁹² Median weekly earnings of full-time wage and salary workers clearly reflect a hierarchy based on race and sex. For example, the median weekly wage for whites in the first quarter of 2002 was \$629; for African-Americans it was \$511 and for Latinos and other Hispanics it was \$421.¹⁹³ In March 2001, employer costs for employee compensation for civilian workers in private industry or state and local government averaged \$22.15 per hour. Wages and salaries account for 73% of these costs, while benefits accounted for the remaining 27%.¹⁹⁴ There is no data categorized by gender or race that accurately reflects these percentages of what women in general, and women of color, receive. Average compensation costs were \$25.34 per hour for white-collar occupations, \$19.35 for blue-collar occupations, and \$10.32 for service occupations.¹⁹⁵ Benefits accounted for a greater proportion of compensation costs for service occupations (34.7%) than for blue-collar occupations (33.9%) and white-collar occupations (27.3%).¹⁹⁶

The average cost per hour worked for retirement and savings was 75 cents for white-collar occupations, 66 cents for blue-collar occupations and 15 cents for service occupations. The proportion of total compensation represented by retirement and savings benefits was 3.4 percent among blue-collar occupations, 3.0 percent for white-collar occupations, and 1.5 percent for service occupations.¹⁹⁷

Eligibility requirements and increasing use of Section 401(k) plans,¹⁹⁸ which require voluntary employee contributions as a condition of participation, led to low coverage rates for part-time, temporary, and low-wage employees even among firms that sponsored plans.¹⁹⁹

192. U.S. BUREAU OF LABOR STATISTICS, *Employer Costs for Employee Compensation Summary*, *supra* note 147, at tbl.9, available at <http://www.bls.gov/news.release/ecec.t09.htm> (last visited June 12, 2002).

193. U.S. BUREAU OF LABOR STATISTICS, *Labor Force Statistics from the Current Population Survey, Median Usual Weekly Earnings of Full-time Wage and Salary Workers by Age, Race, Origin and Sex, Second Quarter 2000 Averages, Not Seasonally Adjusted* tbl.2 at <http://www.bls.gov/news.release/wkyeng.t02.htm> (last visited June 16, 2002).

194. U.S. BUREAU OF LABOR STATISTICS, *Employer Costs for Employee Compensation Summary*, *supra* note 147, at tbl.1.

195. *Id.* at tbl.4.

196. *Id.* at "State and local government".

197. *Id.* at "Retirement and savings benefit costs in private industry" (citing tbl.6).

198. 26 U.S.C. § 401(k) (2000).

199. *Id.*

WHAT PENSIONS WOMEN RECEIVE: SMALLER IN AMOUNT AND LENGTH

Pensions have become more important, especially in light of the budgetary pressures on the Social Security System and increase in the population of older people.²⁰⁰ In 1988, the median annual income from private pensions for all men over the age of 50 was \$8,456.²⁰¹ For all women it was \$4,277.²⁰² In 1995, men had a median annual income from their private pensions of \$9,600.²⁰³ By 1995, women had an income of one-half that amount, or \$4,800.²⁰⁴ The overall pension participation rate is somewhat skewed by the fact that 90% of all public employers sponsor pension plans, with nearly 90% of all their employees vested; on the other hand, only 42% of all employers in the retail trade industry sponsored a pension plan in which only 80% of their employees were vested.²⁰⁵

The figures on the real median income of the older population, broken down by gender, are astounding. For males age 55-64, the median income in 1994 was \$27,075.²⁰⁶ For females in the same age bracket, the real median income was \$10,867.²⁰⁷ For men 65 and older, the average real median income for 1994 was \$15,250.²⁰⁸ For females 65 and older, the real median income in 1994 attributed to them was \$8,950.²⁰⁹ These median amounts are typically derived from four sources: Social Security, employment based pensions, savings and asset income, and earnings from part time work. Accordingly, the retirement system in the U.S. consists of private, public, and individual efforts.²¹⁰ The sources of income in 1995 were as follows: Social Security, 43%; pensions and

200. Lorraine Schmall, *Transnational Issues of Women and Pension Security and Reform*, 14 N.Y. INT'L L. REV. 87 (2000). For persons nearing retirement in 1992, pension wealth, defined as the present value of the stream of future expected pension benefits, equaled 23% of total household wealth, almost as large as the share of total wealth attributable to future social security benefits. Johnson et al., *supra* note 149, at 320 ("workers with pension coverage tends to be economically advantageous in other ways as well, for example, covered workers are predominately white and well-educated, work for large, unionized firms, and earn high wages").

201. EMPLOYMENT BENEFIT RESEARCH INSTITUTE, *Tabulations of the March 1988, 1990 and 1996 Current Population Surveys* and EBRI DATA BOOK ON EMPLOYEE BENEFITS tbl.8.4 (Employee Benefits Research Institute 1997 (4th ed.)).

202. *Id.*

203. *Id.*

204. *Id.*

205. EBRI DATABOOK ON EMPLOYEE BENEFITS, *Retirement Plan Sponsorship, Participation and Investing Trends by Industry*, 89 tbl.10.6 (4th ed., Employee Benefits Research Institute 1997).

206. *Id.* at tbl.6.1

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 55.

annuities 19%; income and assets, 18%; earnings, 18%; and other, 2%.²¹¹

Most older women rely on Social Security. Even among women who have both private pension and Social Security income, the combined benefit replaced only about 45% of their pre-retirement wages when pre-retirement earnings are adjusted to 1994 price levels.²¹² Perhaps one of the most distressing and unforeseen results of this survey was that almost 66% of all respondents were likely to fund their retirement by working in retirement.²¹³ Data already show that this trend exists. While the percentage of older men in the labor force has decreased, the percentage of older women has increased. In 1997 63% of older women were employed part-time compared with 51% of all men, and 33% of older women were self-employed.²¹⁴ Sixty-five percent of women over 65 have nothing other than Social Security for pension security, and a retired female worker's 1996 Social Security benefit averaged only \$7,452 a year—a value that is well below the minimum wage income and barely above the official poverty level of older adults.²¹⁵ Even fewer women age 65 and over (about 13%) are currently receiving a pension, yet that value only amounts to \$3,000 per year in 1994 dollars.²¹⁶ Pockets of severe poverty exist among the elderly—a notion that belies the widely held perception that the elderly are well prepared for retirement.²¹⁷ This is particularly true for elderly women who experience enhanced poverty rates that are well above those experienced by both the elderly as a group and the population as a whole.²¹⁸

Gender is a particularly strong correlate of retirement annuity and/or employment based pension income reciprocity . . . ; 46.4% of

211. *Id.* at 57.

212. U.S. DEPT. OF LABOR, *Retirement Benefits of American Workers, New Findings from September 1994 Current Population Survey*, available at <http://www.dol.gov/pwba/programs/opr/redbook/cover.htm> (last visited Aug. 4, 2002).

213. INVESTMENT COMPANY INSTITUTE, *401(k) Plan Participants: Characteristics, Contributions, and Account Activity* 11, 52 fig.58 app.B (Spring 2000), available at http://www.ici.org/pdf/rpt_401k_planp.pdf (last visited June 16, 2002). Despite the fact that the Age Discrimination and Employment Act prohibits employers from refusing to allow older workers to participate in their pension plans, it can be anticipated that post-retirement workers will likely be working part-time and will therefore be naturally excluded from continuing retirement asset accumulation. *Id.*

214. DeWarr, *supra* note 3.

215. Heinz et al., *supra* note 3.

216. *Id.*

217. *Id.*

218. *Id.* The authors note that 21% of women aged 65-74 lived below the poverty level in 1992, and 24% of women 75 and older were poor. *Id.* The poverty rate for black women ages 75 and older was 43%, and for Hispanic women, it was 35%. *Id.*

men over age 65 in 1997 received annuity and/or pension income averaging \$11,460 per year . . . [while] only 26.4% of women over age 65 in 1995 received an annuity or pension, with an average pension of \$6,684. Hence, a woman age 65 and over in 1995 was only 57% as likely to receive a retirement annuity or employment based pension payment as her male counterpart. If she did receive one, her mean benefit was likely to be 58% of that of a man and her median benefit was likely to be 54% of that of a man in the same age group.²¹⁹

In 1992, among female workers who did not participate in any employment based retirement plan, only 5.9% contributed to an IRA.²²⁰ Only 38% of women retirees received pension benefits; only 21% received health coverage that could be continued for life if they chose to pre-pay.

CONCLUSION

Women do not fare well under the statutory regime that ostensibly protects and encourages the establishment of pension wealth. Wage disparity between the genders will continue if society maintains its disregard for the intangible assets women provide in the home. The overwhelming trend toward defined contribution plans has an invidious and disparate impact upon women who are less likely to work in firms that sponsor plans or in full-time and permanent jobs. Their lower pay, their tendency to spend current income on family needs rather than defer wages for retirement, and their lack of financial savvy contribute to their likelihood of old-age poverty. The effects of race and national origin discrimination in the workplace compound these gender disadvantages. Businesses in particular and the government in general fail in unique ways in recognizing women's assets for enhancing stability in society.

219. EBRI DATABOOK ON EMPLOYEE BENEFITS, *supra* note 205, at 62.

220. *Id.* at 128, tbl.15.4.

