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Explaining the Elderly Feminization of Poverty: An Analysis of Retirement Benefits, Health Care Benefits, and Elder Care-Giving

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NOTE

EXPLAINING THE ELDERLY FEMINIZATION OF POVERTY: AN ANALYSIS OF RETIREMENT BENEFITS, HEALTH CARE BENEFITS, AND ELDER CARE-GIVING

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INTRODUCTION: THE AMERICAN ELDERLY WOMAN

America's robust economy and government assistance programs have decreased the poverty rate among elderly[1] Americans, but elderly women, particularly the divorced and widowed, still face frightening statistics. Women make up 70% of seniors over sixty-five years old[2] but comprise 75% of the elderly poor,[3] making an elderly woman more than twice as likely as a man to live below the poverty line.

This Note analyzes the effects of women's longevity, marital status, and employment histories on their financial security as they approach retirement and old age. This Note also considers the need for informal elder care, younger women's role in satisfying that need, and the consequences that younger women face as a result of providing elder care. I argue that the perpetuation of the elderly feminization of poverty stems from five primary sources: (1) the American retirement system's failure to account for the working tenure differences between men and women; (2)

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1. For the purposes of this Note, the term "elderly" will denote individuals age sixty-five and older.

2. LISA HETZEL & ANNETTA SMITH, THE 65 YEARS AND OVER POPULATION: 2000, CENSUS 2000 BRIEF tbl. 2 (2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-10.pdf.

3. DENISE SMITH, THE OLDER POPULATION IN THE UNITED STATES: MARCH 2002, U.S. CENSUS BUREAU CURRENT POPULATION REPORTS (2003), *available at* http://www.census.gov/prod/2003pubs/p20-546.pdf.

an insufficient availability of retirement planning education and incentives to empower and encourage women to prepare for their own retirement and long-term care needs; (3) inadequate public health assistance for community-based long-term care; (4) woman's socialized role as care provider; and (5) insufficient financial support for informal elder caregivers.

This Note proceeds in five parts. Part I identifies the economic challenges facing America's elderly women. Part II analyzes existing federal programs that provide income and assistance to the elderly, the shortcomings of these programs in meeting the needs of elderly women, and the resulting need for informal elder care. Part III discusses how the predominantly female role of informal elder care-giving perpetuates the cycle of poverty among elderly women. I explain how this role causes care-providers to sacrifice opportunities that would otherwise enable them to prepare for and fund their own retirement needs, and how it increases the chances that providers will themselves require the needs of informal elder care as they age. Part IV examines recent legislative proposals aiming to reduce the extent of poverty among America's elderly female population. I identify two key areas in need of legislative reform: (1) incentives and opportunities for women to provide for their future economic needs and (2) relief for existing informal care-givers. Part V provides brief concluding remarks.

I. Economic Challenges Facing Elderly Women

Women face greater economic challenges in retirement than men: they live longer than men,[4] have lower lifetime earnings than men,[5] and reach retirement with smaller pensions and other assets than men.[6] These factors combine to create a social condition in which women are less financially prepared to enter retirement and more likely to be impoverished in advanced age than elderly men.[7]

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4. *See infra* note 8 and accompanying text.

5. The median earnings for full-time women workers in 2004 were $30,000, compared to $40,000 for men. Social Security Administration, Press Office, Social Security Is Important to Women 1 (2006), http://www.ssa.gov/pressoffice/factsheets/women-alt.pdf [hereinafter Social Security is Important to Women].

6. In 2002, only 21% of women aged sixty-five or older were receiving their own pensions (either as retired worker or survivor), compared to 28% of men. *Id.*

7. Older women in general have a higher poverty rate than older men: 10.3% of women aged fifty-five to sixty-four are below the poverty level, compared to 8.4% of men; 12.4% of women aged sixty-five and over are below the poverty level, compared to 7.0% of men. Smith, *supra* note 3, at fig. 7.

A woman reaching age sixty-five is expected to live, on average, an additional twenty years, compared with seventeen years for men.[8] With longer life expectancies than men, elderly women live more years in retirement and have a greater chance of exhausting their sources of income, making it difficult for them to bear the costs of age-related expenses.

Women have less retirement money because they generally earn less money than men during their working lives.[9] Commentators on labor and employment have suggested that the reasons for this income disparity are two-fold. First, women commonly enter lower paying fields of work and are more likely to work in part-time positions than men.[10] Second, as a consequence of serving as the primary caregiver for their families, women typically have less continuous workforce participation.[11] Women's caregiving role leads to more interruptions and less time spent in their working careers, and therefore less tenure at each particular job.[12] Women who never enter the workforce or who work less in order to fulfill a homemaker or caregiver role rely on their husband's income for support. For these women, the threat of divorce[13] or widowhood[14] can mean the difference between security and impoverishment.

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8. SOCIAL SECURITY IS IMPORTANT TO WOMEN, *supra* note 5, at 1 (based on 2005 statistics).

9. According to one estimate, the wage gap between men and women results in women earning about $250,000 less over a lifetime. *A More Secure Retirement for Workers: Proposals for ERISA Reform: Hearing Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Education and Workforce*, 106th Cong. (2000) (testimony of Eula Ossofsky, President, Older Women's League), *available at* http://owl-national.org/ERISAreformproposals.html. *See also* NATIONAL ECONOMIC COUNCIL INTERAGENCY WORKING GROUP ON SOCIAL SECURITY, WOMEN AND RETIREMENT SECURITY 3 (1998), *available at* http://www.ssa.gov/history/pdf/sswomen.pdf [hereinafter WORKING GROUP]; CARMEN DENAVAS-WALT, BERNADETTE E. PROCTOR & CHERYL HILL LEE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2003, at 6, fig. 2 (2004), *available at* http://www.census.gov/prod/2004pubs/p60-229.pdf.

10. In 2005, women in full and part-time positions earned 81% of men's earnings in comparable positions. U.S. Department of Labor, Women's Bureau, *Employment Status of Women and Men in 2005* (Nov. 2005), *available at* http://www.dol.gov/wb/factsheets/Qf-ESWM05.htm. With respect to gender imbalances in part-time employment, 25.2% of employed women work in part-time positions as compared to 10.7% of men in part-time positions. *Id.*

11. *See* Cynthia Estlund, *Women in the Workplace: Preface*, 4 TEX. J. WOMEN & L. 1, 2–3 (1995).

12. Lorraine Schmall, *Women and Pension Reform: Economic Insecurity and Old Age*, 35 J. MARSHALL L. REV. 673, 677 (2002).

13. According to a 2002 Census report, nearly half of recent first marriages may end in divorce. ROSE M. KREIDER & JASON M. FIELDS, U.S. CENSUS BUREAU CURRENT POPULATION REPORTS, NUMBER, TIMING, AND DURATION OF

Disparity in earned income is not the sole predictor and cause of poverty for elderly women. For many elderly people, aging is accompanied by rising costs in prescription medication and long-term care costs.[15] For elderly women without private insurance and who cannot afford rising health care costs, these health care expenses create an enormous economic challenge and may single-handedly force senior women into poverty.[16]

II. Government Programs Providing Income and Assistance to the Elderly

This Part considers existing federal programs that provide income and assistance to the elderly. The discussion is divided into two sections. Section A examines the existing three-pronged approach to retirement and its weaknesses in meeting the needs of many elderly women. Section B discusses health care insurance options for the elderly population, the limitations of these options in providing for long-term care, and the resulting need for informal elder care.

A. *Women's Retirement Security Under the Three-Legged Approach*

Retirement income is typically derived from three sources: Social Security, employment-based pensions, and earnings and asset income. Accordingly, the retirement system in the United States is a three-legged approach, consisting of public, private, and individual efforts. In 2003, each "leg" proportionally funded

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Marriages and Divorces: 1996, at 1 (2002), *available at* http://www.census.gov/prod/2002pubs/p70-80.pdf.

14. *See Women's Pensions: Recent Legislation Generally Improved Pension Entitlement and Increased Benefits: Testimony Before the Subcomm. on Retirement Income and Employment*, 102d Cong., 1st Sess. 7 (1992) (statement of Jane L. Ross, Associate Director, Income Security Issues, GAO) ("It is estimated that 80% of women who are poor as widows were not poor before their husbands died."). *See also* Smith, *supra* note 3, at fig. 3 (noting that "[b]ecause women have longer life expectancies than men, it is not surprising that 31 percent of women and only 9 percent of men aged 55 and over were widowed").

15. Joanna K. Weinberg, *The Past, Present and Future of Long-Term Care—A Women's Issue?*, 25 J. Health Pol. Pol'y & L. 566, 567 (2000).

16. *See* Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Rethinking the Debates Over Health Care Financing: Evidence From the Bankruptcy Courts*, 76 N.Y.U. L. Rev. 375, 377 ("Nearly half of *all* bankruptcies [in 1999] involved a medical problem, and certain groups—particularly women heads of households and the elderly—were even more likely to report a health-related bankruptcy.").

Americans' retirement as follows: Social Security: 39%; pensions: 19%; income, assets, and earnings: 39%; and other: 3%.[17]

1. Social Security

The benefits provided to former wage earners and their survivors through the Social Security system represent the most basic source of post-retirement income. Title II of the Social Security Act of 1935 established the Old-Age, Survivors, and Disability Insurance program, a national plan created to provide economic support for qualifying wage workers upon their retirement.[18] Social Security was not created to be the primary source of retirement income for the elderly; rather, it was created to secure a "floor" level of income during retirement and to serve as one "leg" of the three-legged retirement framework. Nevertheless, many of America's elderly rely more heavily on Social Security than they rely on personal investments and private pension plans combined.[19]

An individual qualifies for Social Security benefits by working in "covered employment" for a specified number of calendar quarters.[20] After collecting Federal Insurance Contributions Act (FICA) payroll taxes from employees and their employers, "Social Security provides a lifetime series of monthly payments that are based in rough measure upon an employee's earnings history."[21] Individuals who collect from Social Security are eligible to receive medical insurance through the Medicare program

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17. SOCIAL SECURITY ADMINISTRATION, OFFICE OF POLICY, FAST FACTS AND FIGURES ABOUT SOCIAL SECURITY, 2005, at 6 (2005), http://www.ssa.gov/policy/docs/chartbooks/fast_facts/2005/fast_facts05.pdf [hereinafter FAST FACTS].

18. Social Security Act of 1935, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301–397(f) (1994)).

19. *See* YVONNE J. GIST & LISA HETZEL, U.S. CENSUS BUREAU, WE THE PEOPLE: AGING IN THE UNITED STATES, CENSUS 2000 SPECIAL REPORTS, fig. 10 (Dec. 2004), *available at* http://www.census.gov/prod/2004pubs/censr-19.pdf (showing that in 1999, almost 90% of householders ages sixty-five and older received Social Security, while less than 50% of householders ages sixty-five and older received other retirement income). In 2003, 90% of non-married persons aged sixty-five and older received Social Security benefits. FAST FACTS, *supra* note 17, at 7. Social Security provided at least 50% of total income for 65% of aged beneficiaries and was the only source of income for 21% of aged beneficiaries. *Id.*

20. LAWRENCE A. FROLIK & RICHARD L. KAPLAN, ELDER LAW IN A NUTSHELL 275–86 (3d ed. 2003).

21. *Id.* at 273. Social Security also provides benefits beyond the scope of monthly benefits to retirees by providing benefits "to a worker's surviving spouse and children under age 18, plus disability coverage if a worker is unable to work until his or her expected retirement age." *Id.* at 274.

when they reach sixty-five years of age.[22] Through its programs, the Social Security system is intended to "enable older persons to obtain a basic level of retirement income and coverage [for] their most pressing medical needs."[23]

The Social Security system is particularly important to elderly women. Women represent 58% of all Social Security beneficiaries age sixty-two and older.[24] For unmarried women[25] of advanced age, Social Security comprises 53% of their total income, while it comprises only 38% of unmarried elderly men's income and 33% of elderly couples' income.[26] Furthermore, 46% of elderly, unmarried women rely almost *entirely* on Social Security for their retirement income.[27]

It is worth noting that the current Social Security system does have certain features that help women meet their economic challenges. First, Social Security benefits are guaranteed to elderly women because these benefits are protected from inflation and last for the full length of the beneficiary's lifetime.[28] Second, Social Security has a progressive benefit formula that provides a higher replacement rate for workers with lower earnings.[29] As a result, Social Security benefits replace 54% of the median female retiree's lifetime earnings, compared with 41% for the median male's.[30] Third, Social Security provides extra benefits to spouses with low lifetime earnings, thus providing a spousal benefit that helps many women, even if they did not work at all outside the home.[31] Fourth, Social Security provides benefits to elderly widows based on the earnings of their deceased spouse[32] and provides benefits to spouses of any age who care for children under sixteen if the working spouse is retired, becomes disabled, or dies.[33] Finally, in the event of a divorce, the former spouse can collect up to one-half of what the

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22. *Id.* at 58.

23. *Id.* at 273–74.

24. SOCIAL SECURITY IS IMPORTANT TO WOMEN, *supra* note 5, at 1.

25. "Unmarried women" in this context includes women who are divorced, widowed, or never married.

26. SOCIAL SECURITY IS IMPORTANT TO WOMEN, *supra* note 5, at 1.

27. In 2004, 46% of all elderly unmarried females relied on Social Security for 90% or more of their retirement income. *Id.*

28. WORKING GROUP, *supra* note 9, at 3.

29. *Id.*

30. *Id.*

31. The spouse of a retired worker is eligible to receive a benefit equal to one-half of the worker spouse's "primary insurance amount" plus Social Security's customary cost of living adjustments. 42 U.S.C. § 402(b)(2), (c)(2) (2000).

32. If the working spouse dies first, the surviving spouse succeeds to the deceased's actual benefits. FROLIK & KAPLAN, *supra* note 20, at 293.

33. WORKING GROUP, *supra* note 9, at 3.

working spouse is eligible to receive if the marriage lasted for at least ten years.[34]

Despite its provisions that benefit women, Social Security benefits alone are inadequate for providing for basic human needs. Statistics on impoverished elderly women highlight the significant weaknesses in the current Social Security framework. While poverty rates among the elderly have fallen dramatically, due largely to Social Security,[35] poverty rates among elderly widowed, divorced, and never married women remain high.[36] In significant ways, the Social Security System reflects the conventional social expectations of the mid-twentieth century concerning gender roles in work and marriage,[37] failing to keep pace with "the most tangible of the social and economic changes in the status of American women in the second half of the twentieth century—the emergence of the majority of married women in the United States from domesticity into paid employment."[38]

The average Social Security benefit for a woman today, based on her own earnings, provides about $798, while a man's average benefit is $1,039.[39] Single women, for example, typically receive lower Social Security payments because of "lower pre-retirement incomes and their tendency to engage in work not recognized by the Social Security system, such as child care and the care of aged family members."[40] Working wives pay FICA taxes but often do not have access to those funds, given the fact that many obtain benefits under the Social Security laws as a

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34. To receive a divorced spouse's benefit, the recipient must be unmarried. 42 U.S.C. § 402(b)(1)(C), (c)(1)(C).

35. The poverty rate among Americans age sixty-five and over has fallen from 35.2% in 1959 to 15.2% in 1979 to 10.5% in 1998. WORKING GROUP, *supra* note 9, at 12. The rate further decreased from 10.2% in 2003 to 9.8% in 2004. DENAVAS-WALT, PROCTOR & LEE, *supra* note 9, at 9.

36. WORKING GROUP, *supra* note 9, at 12. As of 1997, the poverty rate was 22% for divorced women, 20% for never married women, and 18% for widowed women. *Id.* "Whether they have been housewives, wage earner wives, or single workers, women are disproportionately dependent on the social security system in their old age and disproportionately impoverished following the death of their spouses or divorce." Ann F. Thomas, Forward, *Women, Equity, and Federal Tax Policy: Open Questions*, 16 N.Y.L. SCH. J. HUM. RTS. i, iii (1999).

37. Social Security offers financial rewards to sole earner married couples as it imposes additional taxes on dual earner couples who marry. Thomas, *supra* note 36, at i.

38. *Id.*

39. Heidi Hartmann, *Social Security, Why Boomer Women Need More*, *in* BABY BOOMER WOMEN: SECURE FUTURES OR NOT? 46 (Paul Hodge, ed. 2006), *available at* http://www.genpolicy.com/2006_journal/p_files/social_security.pdf.

40. M.L. Reig, Note, *The Unspoken Poor: Single Elderly Women Surviving in Rural America*, 9 ELDER L.J. 257, 268 (2001) (citing Lois Grau, *Illness-Engendered Poverty Among the Elderly*, 12 WOMEN & HEALTH 103, 106 (1987)).

spouse because their derived spousal benefits are higher than the benefits they would obtain directly as a worker.[41]

For women who never entered the workforce and have relied on their husband's income, divorce or widowhood can mean the difference between security and poverty. When a woman is married to a Social Security recipient, the household is eligible to receive the husband's full Social Security benefits and the wife's spousal benefits, which can be of an amount up to one-half of her husband's benefits.[42] In the event of a divorce, however, the non-working woman loses her husband's benefits and may be entitled to collect only one-half of what he was eligible to receive on the condition that the marriage have lasted ten years or more.[43] If a woman receiving spousal benefits is widowed, her benefits succeed to her spouse's actual benefits.[44] This will cause a decline in her aggregate household income from Social Security, as she will collect only two-thirds of what the couple was able to collect when the working spouse was still living.[45] Alternatively, if the deceased spouse had elected to receive reduced Social Security benefits because of "early" retirement, or augmented benefits because of "delayed" retirement, the surviving spouse would receive her husband's reduced or augmented benefit.[46] For women, particularly those who live longer than men and require greater post-retirement finances, a significant decrease in household income adds to the factors causing a feminization of poverty among the elderly.

As discussed above, the Social Security system has become a system on which the elderly rely more heavily than they do on pensions and private savings combined. This reliance is dangerous, however, in that the maintainability of the Social Security system is doubtful. In 2000, President George W. Bush formed the Moynihan-Parsons Commission, charging it with the task of preserving and updating the Social Security system. The Commission forecasted the decay of the Social Security system, reporting that, starting in 2016, revenue from payroll taxes will fall

41. Nancy Christine Staudt, *Women's Economic Security in Old Age: The Importance of Private Savings*, 16 N.Y.L. SCH. J. HUM. RTS. 232, 234 (1999).

42. 42 U.S.C. § 402(b)(2), (c)(2) (2000).

43. 42 U.S.C. § 416(d)(1), (4).

44. 42 U.S.C. § 402(e).

45. Generally, this means that a widow will collect the equivalent of her husband's full Social Security benefits and none of the spousal benefits she was previously entitled to receive.

46. FROLIK & KAPLAN, *supra* note 20, at 293.

short of Social Security benefit payments.[47] At that point, in order to continue providing benefits, the Social Security system

> would need to start relying in part on interest from its holdings of government bonds. [Within ten years], the system would need to start redeeming the bonds themselves to help pay benefits. By 2038, the bonds would be exhausted, leaving the Social Security system able to pay less than three-quarters of promised benefits out of payroll tax revenues.[48]

Due to the Social Security system's uncertain future and inability to provide more than a floor-level of retirement income, our system relies on private pensions and personal savings to keep the three-legged retirement stool from toppling over. As explained in the next two sections, these savings vehicles are similarly unable to provide for the retirement needs of many elderly women, leaving them helpless to ward off the threat of poverty.

2. Pensions

Pensions represent a major part of the wealth of our nation.[49] Contributions to pension programs are our single largest source of private investment.[50] Like the Social Security system, pensions focus on the needs of individuals who have been previously employed. And, like Social Security, pension policymaking traditionally is predicated on a fictionalized model of a woman's role in society and in the economy, a model that diverges from reality.[51] Although pension laws are gender neutral, the things that women do, and all of the ways in which they work, net women very little in the way of pensions.[52] Women

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47. Richard W. Stevenson, *Social Security's Fate Hinges on Investment Plan, Panel Says*, N.Y. TIMES, July 25, 2001, at A14.

48. *Id.*

49. Senator Carol Moseley-Braun, *Women's Retirement Security*, 4 ELDER L.J. 493, 496 (1996).

50. *Id.* at 496–97.

51. *Id.* at 494–95.

52. TERESA HEINZ ET AL., WOMEN'S INSTITUTE FOR A SECURE RETIREMENT, WOMEN AND PENSIONS: AN OVERVIEW, http://216.70.87.179/portal/index.php?option=com_content&task=view&id=255&Itemid=41 (last visited Mar. 28, 2007).

> The jobs that are least likely to provide pension benefits are predominantly occupied by women. Women hold three-fifths of all service jobs. They are 96 percent of all child care workers, 97 percent of receptionists, and 99 percent of secretaries. While representing less than half of the paid workforce, women comprise almost two-thirds of those working for the minimum wage.

Id.

tend to work in more part-time positions[53] in order to act as the primary caretaker of their families. Half of all women work in traditionally female, low paying jobs that do not offer pensions.[54] In the discussion that follows, I show how the gender bias inherent in pension policymaking works to the disadvantage of elderly women, looking specifically at the differences in men's and women's work histories and the effect divorce or widowhood has on retirement living.

Although a woman earns roughly 75% of a man's income over a lifetime, upon retirement, women receive less than one-third of what their male colleagues receive in employer-provided retirement benefits.[55] This gender gap results from a pension calculation which looks to a retiree's length of employment and salary earned.[56] This calculation does not take into account the fact that women are more often called upon to interrupt their jobs in order to rear children or provide elder-care. While a twenty-five-year-old man will spend, on average, 70% of his adult life in the workforce, a twenty-five-year-old woman will spend less than 45% working.[57] This opens the possibility that a woman with a "forty-year career who takes seven years out of the workforce may get half of the pension benefits she might have enjoyed with continuous employment."[58]

In addition, pension policymaking has not accounted for the fact that almost two-thirds of women are widowed or divorced in retirement.[59] Women who are widowed or divorced are often left in a difficult financial position when they reach retirement. For comparison, the average non-married divorced or widowed woman expects about 60% less retirement income than never-married women.[60] Pension income is a major source of this difference: "the median never-married woman expects over $2,000

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53. "Among workers employed by firms that maintain pension plans but who are not included in or covered by the pension plan, 28% of women are not included because they work part-time; only 19% of men are not covered because of part-time work." *Id.*

54. Schmall, *supra* note 12, at 683.

55. Moseley-Braun, *supra* note 49, at 495–96.

56. *Id.* at 496.

57. *Id.* (citing Kerry Hannon, *A Woman's Special Dilemma*, U.S. NEWS & WORLD REP., June 13, 1994, at 93). *See also* HEINZ ET AL., *supra* note 52 ("[T]he 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 reasons as opposed to 1% of wage earning men.").

58. Moseley-Braun, *supra* note 49, at 495.

59. Three out of every five elderly women face retirement without a husband. WORKING GROUP, *supra* note 9.

60. Phillip B. Levine, Olivia S. Mitchell & John W. Phillips, *Worklife Determinants of Retirement Income Differentials Between Men and Women* 19 (Nat'l Bureau

annually in pension benefits, while the median widowed and divorced woman expects none."[61]

Unlike the Social Security system, which allows a woman to choose the higher of either her benefits earned or the benefits she could earn as her spouse's survivor, only certain private pension benefit plans mandate the sharing of benefits with a spouse. Whether her husband received a defined benefit pension plan or a defined contribution pension plan may be critical to a woman's retirement security. Defined contribution plans, such as 401(k) plans, have no statutorily mandated joint and survivor benefit.[62] A worker may also be offered a single-life pension (or lump sum payment). If a worker chooses this plan, all payments to the survivor end when the worker dies.[63] Hence, if a husband does not choose a joint and survivor option or if he chooses a single-life option for his pension benefits, his wife, who may have relied upon these benefits while he was alive, will receive nothing when she is widowed.

Although pension benefits are considered part of marital property, they are not typically divided upon divorce. While a woman's divorce lawyer can seek a court order distributing part of her husband's retirement funds to herself and their children, the rules governing such orders are complicated and frequently flawed. As a result, many women lose some or all of their husband's pension benefits upon divorce.[64]

Women lack equal access and opportunity to contribute to pension plans. Moreover, their unique family responsibilities yield more interruptions in their work careers and less tenure at each particular job, thus affecting pension vesting requirements. Current pension policies and practices do not account for various features of a woman's unique work experience and needs,

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of Econ. Research, Working Paper No. 7243, 1999), *available at* http:www.nber.org/papers/w7243.

61. *Id.*

62. Schmall, *supra* note 12, at 681. If a joint and survivor benefit option is available and is selected, pension benefits equal to at least 50% of a worker's benefit will continue to the surviving spouse. In 1995, only 54% of married private pension plan recipients selected a joint and survivor option, while 46% of all married people did not elect to leave benefits to their spouses. *Id.*

63. Diane K. McLaughlin & Karen C. Holden, *Nonmetropolitan Elderly Women: A Portrait of Economic Vulnerability*, 12 J. APPLIED GERONTOLOGY 320, 328 (1993).

64. Sandra Block, *Golden Years Bleak for Divorcees*, U.S.A. TODAY, Aug. 8, 2000, at 1B. *See also* Schmall, *supra* note 12 at 681 ("Only 7% of divorced people receive a joint and survivor benefit.").

not only discriminating against women but also perpetuating the cycle of poverty among elderly women.[65]

3. Private Investment and Personal Savings

Americans have the lowest private savings rate in the industrialized world,[66] a cause of great concern among economists and policymakers. Given that the seventy-six million baby boomers are preparing to enter retirement, efforts to promote personal savings are among the policy challenges in assuring financial security for America's elderly.[67] Due to the inadequacies of Social Security and employer pension plans, "women . . . must pay close attention to the possibility of investing outside the conventional structures that seem to be failing them."[68] Studies show, however, that very few women have adequate individual retirement accounts.[69] Commentators offer three explanations for why this is the case. First, "women tend to rely exclusively on their spouse for retirement income."[70] As previously discussed, this reliance is risky. Upon divorce or widowhood, women often lose rights to their husband's pension funds and face large reductions in Social Security benefits. Moreover, retirement savings are often reduced or completely eliminated upon the illness or death of a spouse.[71]

Second, women tend to feel preoccupied with their immediate expenses, such as childcare expenses, rather than on their own future needs.[72] As a result, women often do not consider their economic retirement security until it's too late. If it is con-

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65. *See* Schmall, *supra* note 12, at 677.

66. Moseley-Braun, *supra* note 49, at 496 (citing INTERNATIONAL MONETARY FUND, WORLD ECONOMIC OUTLOOK tbl. A44 (1995)).

67. *Id. See also Broken and Unsustainable: The Cost Crisis of Long-Term Care for Baby Boomers: Hearing Before the S. Special Comm. on Aging* 22 (2002) (statement of David M. Walker, Comptroller Gen. of the United States), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearings&docid=f:80168.pdf ("As the 76 million baby boomers born between 1946 and 1964 become elderly, Medicare, Medicaid, and Social Security will nearly double as a share of the economy by 2035.").

68. Staudt, *supra* note 41, at 235.

69. *Id.* (citing *Women and Social Security Revision: Hearing Before the S. Special Comm. on Aging*, 106th Cong. (1999) (statement of Robert L. Clark, Professor at College of Mgmt., North Carolina State University), *available in* LEXIS-CIS Congressional Universe).

70. Staudt, *supra* note 41, at 235.

71. *Id.*

72. Jeanne Hoban, *Personal Approach Helps Women Fathom Growing Retirement Needs: They Earn Less, Live Longer and Demand Trust From Planners*, INVESTMENT NEWS, Apr. 19, 1999, at 27.

sidered, women frequently have the perception that their current expenses preclude them from planning for retirement.[73]

A third explanation is that "women are worried that they have no understanding of financial issues."[74] Afraid of making mistakes, they believe it is better to remain in the status quo in order to avoid jeopardizing what little security they might have.[75] In other words, a majority of women neglect to save for retirement outside the context of Social Security and employer pension funds because they tend to be extremely risk adverse.[76]

The problem of insufficient and unreliable Social Security and pension support is exacerbated by the fact that women do not have adequate private retirement savings, leaving elderly women with little to prevent the onset of poverty. In conclusion, the three legs of America's retirement system—Social Security, pensions, and private savings—do not meet the needs of America's aging women in preparing for retirement, nor are they able to stop the perpetuation of poverty among this group of women.

B. *Providing for Health Care: Options Available for Elderly Women*

The aging of the United States has increased the number of elderly who have chronic illnesses, multiple medical problems, functional limitations, and disabilities.[77] These health concerns, in turn, have generated a growing need among the elderly for "long-term care," generally defined as "assistance given over a sustained period of time to people who are experiencing long-term inabilities or difficulties in functioning because of a disability."[78] Long-term care helps maintain or improve "the ability of elderly people with disabilities to function as independently as possible for as long as possible."[79] It consists primarily of low-tech services and encompasses the social, environmental, and medical needs of the elderly.[80] Long-term care, in its many

73. Staudt, *supra* note 41, at 236.

74. *Id.*

75. *Id.*

76. *Id.*

77. Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 356–57 (2004).

78. Weinberg, *supra* note 15, at 574.

79. Robyn I. Stone, *Long-Term Care for the Elderly with Disabilities: Current Policy, Emerging Trends, and Implications for the Twenty-First Century*, Milbank Memorial Fund 3 (2000), *available at* http://www.milbank.org/reports/0008stone/LongTermCare_Mech5.pdf.

80. Smith, *supra* note 77, at 357.

forms, is an issue of immense concern to women, as women live longer, suffer more chronic illnesses, and thus have a greater need for long-term care than men do.[81] Notably, older women comprise a disproportionate number of those receiving long-term care, yet as a group, women of all ages resist planning for their own long-term care needs.[82]

Access to health care, including long-term care, depends in part on access to health insurance. Routine health care can be prohibitively expensive for uninsured low income persons and more specialized or advanced health care is too expensive for low to moderate income persons. As a result, people without health insurance have significant unmet health care needs and are more likely to become seriously ill than insured persons.[83] This has a particularly distressing impact on elderly women. As women age and face costly chronic diseases and declining resources, their need for health insurance grows proportionately, but pressure on their ability to pay for treatment for these chronic diseases out of declining resources in turn puts pressure on their ability to pay for health insurance, making it difficult for elderly women to maintain proper health insurance.[84]

This section examines America's private and public health care programs, analyzing each program's ability to provide for the chronic medical and long-term care needs of an increasingly feminized and aging population.

1. Private Health Insurance Coverage

Work history greatly affects the types of financial resources that are available for health care in retirement. Women are more likely than men to work part-time, move in and out of the labor force, and work in the types of occupations that do not provide health insurance, making them less likely to receive

81. Caroline W. Jacobus, *Legislative Responses to Discrimination in Women's Health Care: A Report Prepared for the Commission to Study Sex Discrimination in the Statutes*, 16 WOMEN'S RTS. L. REP. 153, 287 (1995). Examples of such chronic illnesses include menopause, hormone replacement therapy, cardiovascular diseases, and osteoporosis. *Id.* at 278–79.

82. *Id.* at 287 ("Cultural stereotypes which value youth over age and which assign financial matters to the male domain combine to create an overwhelming reluctance by women to face the financial realities and especially the long-term care needs they are likely to face.").

83. Mary Anne Bobinski & Phyllis Griffin Epps, *Women, Poverty, Access to Health Care, and the Perils of Symbolic Reform*, 5 J. GENDER RACE & JUST. 233, 240–42 (2002).

84. Steven Miles, *Gender and Health Insurance*, 23 WM. MITCHELL L. REV. 313, 318 (1997).

employer-supported health insurance.[85] As a result, many women receive private insurance as dependents on their spouse's policy,[86] putting them at risk of losing their health coverage in the event of divorce or death of their spouse. They are also at a greater risk of losing coverage if their husband loses his job, his employer drops family coverage, or there is an increase in premium and out-of-pocket costs to unaffordable levels.[87]

These differences are even higher among part-time workers. Among people with discontinuous work histories, women are half as likely to be insured as men.[88] Due to these differences in the insured statuses of American women and men, women are less likely than men to receive private health insurance, and are disproportionately eligible for Medicaid and Medicare public insurance programs.[89]

2. Public Health Insurance Programs

Women's disproportionate eligibility for public health insurance program coverage likewise puts women at a disproportionate risk for governmental intrusion into personal health decisions.[90] Due to the pervasive need among elderly women for long-term care services and the vulnerability of elderly women to the will of health care policymakers, it is important that our public health care system is responsive to the health care concerns of elderly women.

Medicare and Medicaid are the public health care services utilized by the elderly. Both programs provide funding for long-term care, but are heavily biased toward institutional care,

85. Jacobus, *supra* note 81, at 165. According to a report by the Henry K. Kaiser Family Foundation,

> [w]omen are less likely than men to be eligible for and to participate in their employer's health plan, in part because, [sic] they are more likely to work part-time, have lower incomes, and rely on spousal coverage. The take-up rate for job-based coverage among workers is 80% for women and 89% for men.

The Henry K. Kaiser Family Foundation, *Women's Health Insurance Coverage* 1 (March 2006), *available at* http://www.kff.org/womenshealth/upload/6000-04.pdf.

86. Despite similar rates of job-based coverage among men and women, women are less likely to be insured through their own job (38% versus 50%, respectively) and more likely to have dependent coverage (25% versus 13%). *See* The Henry K. Kaiser Family Foundation, *Women's Health Insurance Coverage*, *supra* note 85, at 1.

87. *Id. See also* Miles, *supra* note 84, at 315; Bobinski & Epps, *supra* note 83, at 240–42.

88. Miles, *supra* note 84, at 315.

89. Bobinski & Epps, *supra* note 83, at 243–46.

90. *Id.* at 235.

despite indications that home and community-based services are preferred by consumers.[91] Even where public funding provides for home care, the emphasis has been on medical, post-acute services, rather than on supportive care, such as assistance with activities of daily living.[92] In the discussion that follows, I consider the long-term care provisions of Medicare and Medicaid and the impact each has on elderly women.

Medicare is a federal program that pays for qualified acute medical care services for persons over age sixty-five.[93] Medicare eligibility is tied directly to eligibility for Social Security benefits and does not discriminate on the basis of health status or financial resources.[94] Medicare coverage is important to the majority of the elderly as it is used to pay the health-related expenses of approximately seven out of eight older Americans.[95]

Medicare is particularly important to elderly women.[96] The Health Care Financing Administration reports that "[b]ecause of their longer life expectancy, elderly women outnumber men in the Medicare program by 7% [and the] proportion of female Medicare beneficiaries increases with age . . . ."[97] The program offers some preventative health coverage, including mammograms and pap smears, but does not provide coverage for most long-term care, including nursing home care.[98] As such, "Medicare has a bias toward paying for costly, high technology medical curative care and a bias against paying for care and services that would enable a frail person to manage the ordinary demands of daily life."[99] Women are negatively affected by these program limitations because they tend to have more chronic illnesses and a greater need for nursing home services than men.[100] Some critics find that Medicare, a system purporting to provide *universal* health care insurance for people over sixty-five,

91. Weinberg, *supra* note 15, at 568.

92. *Id.*

93. FROLIK & KAPLAN, *supra* note 20, at 57.

94. *Id.* at 57–58. Medicare is authorized and implemented as part of the Social Security system. *See id.* at 58; 42 U.S.C. §§ 1395–1395hhh (2000).

95. FROLIK & KAPLAN, *supra* note 20, at 58.

96. Bobinski & Epps, *supra* note 83, at 246.

97. Women constitute more than 70% of the Medicare population age 85 and older. HEALTH CARE FINANCING ADMIN., MEDICARE 2000: 35 YEARS OF IMPROVING AMERICANS' HEALTH AND SECURITY 12 (2000), *available at* http://www.cms.hhs.gov/TheChartSeries/downloads/35chartbk.pdf.

98. Medicare primarily covers costs associated with long-term care when an elderly person is hospitalized for acute care. Medicare does fund some skilled nursing care in a nursing facility or in the home, but only when the care qualifies as post-acute care. Smith, *supra* note 77, at 358.

99. Jacobus, *supra* note 81, at 288.

100. Bobinski & Epps, *supra* note 83, at 247.

"has a benefit set that is better designed to fit a man's older life cycle than a woman's older life cycle"[101] as it substantially under-covers the services and treatments that comprise the needs of a predominantly female older population.[102]

Medicaid is a joint federal-state program that provides health insurance coverage to specific subpopulations of the poor—such as adults with disabilities—and supplemental support[103] to impoverished Medicare recipients.[104] Medicaid is the main source of public funding for long-term care.[105] As noted above, older women are more likely than men to be nursing home residents and home health care recipients and, although many cannot afford such expensive care, the poorest can qualify for Medicaid assistance.[106] Thus, Medicaid "plays a pivotal role in protecting many older women from crippling out-of-pocket health costs, which tend to exceed costs experienced by older men in terms of actual dollars and percentage of income."[107]

Medicaid holds limited value, however, for the elderly who need longer-term care services. While most elderly individuals who need long-term care live in the general community rather

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101. Miles, *supra* note 84, at 318.

102. *Id.* at 318–19.

> For example, women have more chronic disease and, therefore, more needs for adaptive aids like wheelchairs. Women have more outpatient care needs, including . . . physician visits for mammograms. They tend to be on a greater number of outpatient medications for conditions like arthritis and depression. They have a much greater use of community services and nursing home care.

Id. To cover some of the holes in Medicare coverage, there are two primary sources of health supplements that older persons can purchase. *Id.* at 319. The first source is "Medigap" policies. These policies are offered by private insurance companies and cover many of the costs not covered by Medicare. FROLIK & KAPLAN, *supra* note 20, at 91. The second source is pension-based insurance policies, which are employer-sponsored health plans that carry over into retirement. These policies are the "primary source of insurance that assists with Medicare's cost-sharing requirements and pays for benefits that are not covered by Medicare . . . ." THE HENRY J. KAISER FAMILY FOUNDATION & HEWITT, RETIREE HEALTH BENEFITS NOW AND IN THE FUTURE, v (2004), *available at* http://www.kff.org/medicare/upload/Retiree-Health-Benefits-Now-and-In-the-Future-Report.pdf. However, as we have seen, not only are women less likely than men to have pension-based benefits, but they have less financial resources in retirement, and are thus less likely to be able to purchase Medigap policies if they do not have pension benefits.

103. Medicaid provides supplemental support in that it is used to pay Medicare Part B premiums, deductibles, and co-payments for eligible low-income Medicare beneficiaries. Bobinski & Epps, *supra* note 83, at 249.

104. *Id.* at 248.

105. Smith, *supra* note 77, at 358–59.

106. Bobinski & Epps, *supra* note 83, at 249–50.

107. *Id.* at 250.

than nursing home institutions, the overwhelming bulk of all Medicaid funding goes to institutional care.[108] Hence, not only are many elderly women unable to afford the costs of long-term care services, they also find limited support affording these services through Medicaid.

As the elderly population increases, an increasing number of chronically ill and poor older women are entering the public health insurance system.[109] The needs for long-term care for the elderly are increasing in the United States, yet the means for financing this care are increasingly inadequate. Inevitably, government policymakers are looking for methods of reform. As "America's biggest business," health care reforms are determined by the competing interests of such powerful groups as employers, insurers, consumer groups, pharmaceutical companies, hospitals, political parties, medical equipment makers, and physicians, each "battling to maximize their benefits in whatever reforms are made."[110] Easily overlooked in the midst of this struggle are the voices and needs of less powerful consumers, such as women, minorities, the elderly, and the disabled.[111] As a result, underinsurance for long-term care for the elderly will continue.

Given the restrictions imposed by Medicare and Medicaid and the economic barriers preventing elderly women from purchasing private health or long-term care insurance, the majority of elderly women who need assistance rely upon informal, unpaid care from family members and friends. This need for informal elder care will be covered in the following section.

III. The Cycle of Poverty: Younger Women Caring for Elderly Women

This section considers how the need for informal elder care, caused by the inadequacies of federal health insurance programs and the inabilities of women to afford long-term health care coverage, creates a unique cycle of poverty among women by taking away from informal care providers—mostly younger women—opportunities to save and prepare for their own retirement. "Informal elder care," as used in the context of this Note, refers to unpaid, non-professional care performed by family members

108. Smith, *supra* note 77, at 359.
109. Miles, *supra* note 84, at 321.
110. Jacobus, *supra* note 81, at 156.
111. *Id.*

for elderly persons with functional impairments.[112] The discussion is divided into four sections. Subsection A examines the need for elder care. Subsection B discusses young women's role in providing informal elder care. Subsection C identifies the costs of providing elder care. Finally, Subsection D considers existing legislation that provides some relief for informal care providers.

A. *The Need for Informal Elder Care*

As baby boomers age and become senior citizens, increased life expectancy and health problems that accompany old age will lead to a greater need for informal elder caregivers. The elderly at the highest risk of needing long-term care are those below or at the margins of poverty.[113] As we have seen, Medicaid and Medicare provide only limited assistance for long-term care, leaving these high-risk elderly unable to afford the formal long-term care they need. Since women are more likely to be poor in advanced age than men and thus unable to afford formal care, the existing need for informal health care assistance for elderly women is substantial.

Informal elder care provides many benefits. First, considering the rising cost of elder health care and the limited resources available to meet the growing need, informal care provided by family members is economically valuable.[114] Second, some have argued that providing care for one another is "essential to a properly functioning society," and that, "considering the fact that every person will at some time either require and/or provide care, the reality of our dependence on others is clear."[115] Third, informal care promotes autonomy among the elderly, increasing their ability to avoid, or at least postpone, institutionalized care.[116] Finally, the quality of the care recipient's life and the

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112. Amy Varner & Robert Drago, *The Changing Face of Care: The Elderly*, THE FACULTY AND FAMILIES PROJECT 1 (2000), *available at* http://lser.la.psu.edu/workfam/eldercare.pdf.

113. Smith, *supra* note 77, at 377.

114. K. Nicole Harms, Note, *Caring for Mom and Dad: The Importance of Family-Provided Eldercare and the Positive Implications of California's Paid Family Leave Law*, 10 WM. & MARY J. WOMEN & L. 69, 80 (2003). "Family caregivers are currently responsible for providing approximately eighty percent of the long-term care in America, and the cost of replacing family caregivers who are unpaid with professional paid caregivers would be nearly $200 billion dollars annually." *Id.* at 82.

115. *Id.* at 82–83.

116. *Id.* at 81.

quality of the care provided are likely to be higher when care is informally provided by a family member or friend.[117]

B. *Who is Providing Informal Elder Care*

The aging of America affects the position of women in the health care system, not only as consumers—as noted above—but also as providers of care. Women provide approximately 70% of all informal elder care.[118] Among elderly couples, wives are more likely to care for elderly husbands, in part because women are on average younger than their husbands and in part because women typically live longer than men.[119] When a spouse is unavailable to provide elder care, the responsibility falls most often on an adult daughter, daughter-in-law, or niece.[120]

Women's principal role as informal caregivers emanates from gender-based social norms[121] and the preferences of elder care recipients.[122] First, there is an enduring assumption that women are better equipped than men to attend to the private realm of family life and associated caregiving responsibilities,

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117. *Id.* The theory is that "[i]t is likely that the care will be of a higher quality because of a family member's 'stronger personal ethical commitment and personal attachment to the client's well-being' as compared with a stranger providing care in exchange for payment." *Id.* at 85 (quoting Rebecca Korzec, *A Feminist View of American Elder Law*, 28 U. Tol. L. Rev. 547, 556 (1997)).

118. Smith, *supra* note 77, at 360.

119. *Id.* at 361.

120. Rebecca Korzec, *A Feminist View of American Elder Law*, 28 U. Tol. L. Rev. 547, 556 (1997).

> Research conducted over the past twenty-five years studying the relationships of elderly parents and their adult children indicate that the traditional assignment of gender roles occurs in carrying out filial responsibility. As a result, adult sons focus on traditional masculine activities, such as earning money, 'at the expense of emotional ties, including those to their parents.'

Id. at 555–56 (citing Sarah H. Matthews, *Gender Roles and Filial Responsibility*, *in* Gender Roles Through the Life Span: A Multi-Disciplinary Perspective 245–46 (Michael R. Stevenson ed., 1994)). *See also* Smith, *supra* note 77, at 361 (noting that in families that include both adult sons and daughters, daughters are twice as likely to have primary caregiving responsibility for an elderly parent). Studies have also shown that wives often supply the bulk of hands-on care for their in-laws, the parents of their husbands. *Id.*

121. James Laditka & Sarah Laditka, *Adult Children Helping Older Parents: Variations in Likelihood and Hours by Gender, Race, and Family Role*, 23 Res. On Aging 429, 432 (2001) ("Women's predominance in caregiving results in part from the social construction of gender, traditional family roles, and societal constructs including economic arrangements.").

122. Smith, *supra* note 77, at 363 (citing Gary Lee et al., *Gender Differences in Parent Care: Demographic Factors and Same-Gender Preferences*, 48 J. Gerontology 9 (1993)).

irrespective of the realities of women's increasing status as waged workers. Second, research of parent-child caregiving relationships suggests that "care recipients may have a preference to receive care from a caregiver of the same gender."[123] Insofar as women constitute the majority of the elderly population requiring long-term care,[124] such a gender-based preference increases the burden on female caregivers.

Hence, informal elder care implicates important gender issues.[125] Women, as the primary providers of informal elder care, are expected to balance the demands of working for income outside the home, child-rearing, and providing care for aging family members. Pressure from social expectations and a growing female elder population calls more women to undertake this caregiving role, solidifying their continued position as care providers.

C. *The Costs of Providing Informal Elder Care*

Despite the numerous benefits informal elder care provides to recipients, elder caregiving comes with costs to the providers of care. As noted above, these providers are primarily women. The costs associated with care-providing are emotional as well as financial and may have lasting effects into a caregiver's own elderly years.

Immediate costs to the care provider include such out-of-pocket costs as assistance with mortgage, home care professionals, food, transportation, and medication expenses.[126] Typically, the care provider incurs these expenses over a two to six-year period, totaling almost $20,000.[127]

Caring for an ill relative can also cause a great deal of stress for the caregiver, particularly when trying to fulfill other responsibilities such as employment and child-rearing. Approximately two-thirds of informal elder care providers are employed, creat-

123. *Id.*

124. Bobinski & Epps, *supra* note 83, at 249–50 ("Over seventy percent of nursing home residents and two-thirds of home health care recipients are women.").

125. *See* Seymour Moskowitz, *Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective*, 86 MARQ. L. REV. 401, 411 (2002) (describing women's pervasive role in caregiving).

126. Smith, *supra* note 77, at 372.

127. *Id.* (citing NATIONAL ALLIANCE FOR CAREGIVING & NATIONAL CENTER ON WOMEN & AGING, THE METLIFE JUGGLING ACT STUDY: BALANCING CAREGIVING WITH WORK AND THE COSTS INVOLVED 6 (1999), *available at* http://www.caregiving.org/data/jugglingstudy.pdf).

ing a work-care conflict for a substantial number of caregivers.[128] As a result of this conflict, "six percent of workers providing care report having to give up work entirely as a result of caregiving, [and] more than half have had to make changes at work, such as leaving early, going in late, changing to part time, or taking time off during the day to accommodate caregiving."[129]

The conflict between elder care and other responsibilities is more pronounced among female caregivers. Not only are women more likely than men to provide informal elder care, they also provide more hours of care, irrespective of their employment status.[130] Moreover, many women caregivers find themselves "saddled with the multiple responsibilities of rearing children, working for income outside the home, and providing care for aging or disabled family members."[131]

Elder care-related work disruptions lead to substantial adverse immediate and long-term economic consequences for informal caregivers. One survey found that these disruptions result in an average total wealth loss of $659,139 over the care provider's lifetime.[132] Further, elder care-related work disruptions not only affect the caregiver's earnings while they are providing care, but each work disruption removes an opportunity to contribute to Social Security and to participate in employee-sponsored pension plans, carrying lasting effects into a provider's senior years. The fact that women are often the ones called to make sacrifices at work in order to fulfill the traditional role as

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128. Harms, *supra* note 114, at 76.

129. U.S. DEPARTMENT OF LABOR, FUTUREWORK: TRENDS & CHALLENGES FOR WORK IN THE 21ST CENTURY 32 (1999), *available at* http://web.archive.org/web/20000817073305/www.dol.gov/dol/asp/public/futurework/report/pdf/ch3.pdf. "In addition to compromising the status of presently employed workers, elder care responsibilities have prevented some caregivers from entering the workforce." Smith, *supra* note 77, at 371.

130. Smith, *supra* note 77, at 371. This suggests that most employed women who provide elder care remain employed and compensate for elder-care disruptions in their work schedule by reducing their leisure time. *Id.*

131. Moskowitz, *supra* note 125, at 411. Providing elder care "is an especially burdensome situation for members of the 'sandwich generation'—women who are responsible for providing care to aging parents or relatives while caring for their children at the same time." Harms, *supra* note 114, at 75.

132. This number represents the combined financial loss attributed to lost wages, lost security benefits, and lost pension benefits. In addition to this loss, elder care providers report that they spend out-of-pocket funds in providing financial assistance for the elderly. NATIONAL ALLIANCE FOR CAREGIVING & NATIONAL CENTER ON WOMEN & AGING, THE METLIFE JUGGLING ACT STUDY: BALANCING CAREGIVING WITH WORK AND THE COSTS INVOLVED 6 (1999), *available at* http://www.caregiving.org/data/jugglingstudy.pdf.

"caregiver" suggests that providing elder care adds an additional risk factor to the feminization of poverty among the elderly.

D. *Relief for Informal Elder Caregivers*

Elder caregiving takes a tremendous toll on worker productivity. In addition to work-care conflicts among employees, employer surveys reveal a growing concern among employers with the costs imposed by "presenteeism"; namely, that "even when workers are not absent, elder care-related distractions lead to time spent on the phone, stress, and ultimately less productivity."[133] The various costs resulting from an employee's work-care conflicts affect employers—one study estimated that the "annual cost of elder care-related workplace disruptions to employers is between $11 billion and $29 billion annually."[134] These productivity costs have influenced some employers to help workers with elder care responsibilities.[135] Most voluntary employer benefits can be grouped into three categories: information benefits, financial benefits, and flexibility benefits.[136]

Information benefits commonly take the form of resource/referral services that provide employees with elder care-related information. These benefits cost employers very little and, as a result, they rank as the most common voluntary employer-based elder care program.[137]

Employer-created dependent care spending accounts and employee-paid long term care insurance plans are two forms of financial benefits that employers provide to assist with elder care.[138] The spending accounts allow employees to put away pre-tax dollars to use on dependent care expenses.[139] The employee-paid long term care insurance plans are policies sold by insurance companies to individuals on a group basis.[140] Typically, the cost of the insurance is not subsidized by the group, but participants receive benefits such as guaranteed acceptability.[141]

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133. Smith, *supra* note 77, at 380.

134. *Id.* at 380 (citing METLIFE MATURE MARKETING GROUP & NATIONAL ALLIANCE FOR CAREGIVING, METLIFE STUDY OF EMPLOYER COSTS FOR WORKING CAREGIVERS 4 (1997), *available at* http://www.metlife.com/WPSAssets/14002396171048285176V1vFEmployer%20Costs%20study%20.pdf). The largest portion of this amount involves expenses (estimated at $5 billion a year) associated with replacing employees, such as recruiting, training, and relocation. *Id.*

135. Smith, *supra* note 77, at 380.

136. *Id.*

137. *Id.*

138. *See* Smith, *supra* note 77, at 381; Harms, *supra* note 114, at 86.

139. Smith, *supra* note 77, at 381.

140. FROLIK & KAPLAN, *supra* note 20, at 134.

141. *Id.* at 135.

Workplace flexibility benefits give employees some freedom in balancing the demands of elder care and the responsibilities of employment. These benefits often include flextime, compressed workweeks, job sharing, and telecommuting.[142] Employers may also offer other benefits to ease the strain of caring for an elderly person, including company-supported elder daycare centers or subsidies to help defray the costs of elder care.[143]

Although employers are becoming more alert to the reality of elder care as a workplace issue, those that offer voluntary elder care benefits are the exception rather than the rule.[144] Absent these employer initiatives, employees caring for aging family members and friends must rely on the Family and Medical Leave Act (FMLA)[145] to reduce work-family conflicts. The FMLA "is the primary federal statutory scheme that assists working caregivers by providing unpaid leave for the care of aging family members."[146] The FMLA provides qualified employees with up to twelve weeks unpaid leave per year to give birth to a child, to adopt a child, to care for a spouse, child, or parent who has a serious health condition, or to care for the employee's own serious health condition.[147] While on FMLA leave, employees are entitled to continue receiving employer-provided health benefits,[148] and upon returning from leave, employees must be restored to their original positions[149] or to equivalent positions with comparable "benefits, pay and other terms and conditions

142. *Id.* at 382.

143. *Id.*

144. *Id.*

145. 29 U.S.C. § 2612(a)(1) (2000).

146. Harms, *supra* note 114, at 72.

147. 29 U.S.C. § 2612(a)(1) provides:

> [A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
>
> (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
>
> (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
>
> (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
>
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

Id.

148. 29 U.S.C. § 2614(c)(1) (2000).

149. 29 U.S.C. § 2614(a)(1)(A).

of employment."[150] In 2000, approximately 10% of all FMLA leave was to care for a parent.[151]

Despite the Act's noble effort to ease the tension between family and work, the FMLA falls short with respect assisting informal elder care providers. FMLA is limited in its ability to aid elder care providers in four ways, each of which will be discussed in turn: (1) the limited scope of qualified employers, (2) its narrow understanding of the family, (3) its purely medical model of caregiving, and (4) its granting of unpaid rather than paid leave.

First, due to the limited scope of employers covered by the provision, the FMLA does not cover many Americans.[152] Smaller workplaces do not fall within FMLA coverage, resulting in the exclusion of more than 40% of American private sector employees.[153]

Second, the FMLA offers no assistance to some workers with elder care responsibilities because the Act has a limited understanding of family. The Act's vision of family is restricted to that of the nuclear family, defined by marriage and parenthood.[154] Leave for caregiving is available only for a worker to care for herself, a child, spouse, or parent.[155] Absent spousal caregiving, the FMLA assumes that adult children will care for their aging parents.[156] Due to a growing trend in childless couples, however, increasing numbers of elderly persons will be unable to rely on children to provide care for them.[157] In addition, many elderly

150. 29 U.S.C. § 2614(a)(1)(B).

151. Smith, *supra* note 77, at 382.

152. In the private sector, the FMLA covers only employers of fifty or more employees. Specifically, the Act defines "employer" as "any person[s] engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. § 2611(4)(A) (2000). All public agencies, regardless of size, are also included in the statutory definition of "employer." 29 U.S.C. § 2611(4)(A)(iii).

153. AFL-CIO, Bargaining Fact Sheet: Family Leave and Expanding the Family and Medical Leave Act 1 (Spring 2001), http://www.aflcio.org/issues/workfamily/upload/family.pdf.

154. Under the Act, leave is allowed for the care of "the spouse, or a son, daughter, or parent, of the employee." 29 U.S.C. § 2612(a)(1)(C) (2000).

155. Smith, *supra* note 77, at 393.

156. The Act defines "parent" as "the biological parent of an employee or an individual who has stood in loco parentis to an employee when the employee was a son or daughter." 29 U.S.C. § 2611(7). For explanation of "in loco parentis," see 29 C.F.R. § 825.113(c)(3) (2005).

157. Census bureau data indicate that the number of childless couples is expected to grow nearly 50% by 2010. AMARA BACHU, U.S. CENSUS BUREAU, LABOR FORCE PARTICIPATION OF WOMEN IN CHILDBEARING YEARS AND FERTILITY (Mar. 2000).

rely on an expanded care network of extended family members as well as non-kin individuals.[158] Importantly, neither extended family members nor non-kin individuals qualify as caregivers under the FMLA, leaving many informal elder care providers without statutory relief.

Third, the purely medical model of caregiving provided in the FMLA limits its applicability to informal caregivers. In the context of elder care, the FMLA only applies when an employee needs time off to care for a parent who has a "serious health condition."[159] The FMLA defines a serious health condition as "an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider."[160] Although many illnesses and disabilities that afflict the elderly qualify as serious health conditions under the Act,[161] care that qualifies for FMLA coverage is limited. For example, the FMLA only provides twelve weeks of unpaid leave,[162] yet illnesses such as Alzheimer's and Parkinson's diseases are long-term degenerative diseases, meaning that informal care will be needed well beyond the twelve-week limit.[163] Further, FMLA regulations[164] and case law[165] demonstrate that the Act's medical

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158. "Over one-half of unmarried, childless elderly individuals identify an extended family member as their greatest source of help . . . . [and] [e]stimates indicate that by 2020, 1.2 million elderly people will live alone, without living children or siblings, almost twice the number without family support in 1990." Smith, *supra* note 77, at 396 (citing UNITED STATES GENERAL ACCOUNTING OFFICE, LONG-TERM CARE: AGING BABY BOOM GENERATION WILL INCREASE DEMAND AND BURDEN ON FEDERAL AND STATE BUDGETS 12 (2002) (statement by David M. Walker, Comptroller General of the United States before the Senate Special Committee on Aging), *available at* http://www.gao.gov/new.items/d02544t.pdf).

159. 29 U.S.C. § 2612(a)(1)(A) (2000).

160. 29 U.S.C. § 2611(11); 29 C.F.R. § 825.114(a) (2005) (defining "serious health condition").

161. Many of the illnesses that accompany aging, such as Alzheimer's disease, strokes, diabetes, arthritis, heart disease, Parkinson's disease, and dementia fit within the meaning of a serious health condition. 29 C.F.R. § 825.114(a)(2); 29 U.S.C. § 2611(11).

162. 29 U.S.C. § 2612(a)(1).

163. *See* Smith, *supra* note 77, at 386.

164. 29 C.F.R. § 825.116(a), (b) (2005) define what it means for an employee to be "needed to care for" a family member:

> (a) The medical certification provision that an employee is "needed to care for" a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also

model of caregiving encompasses physical and psychological care that is restricted to hands-on medical activities that "occur in the home, a care facility, or [are] administered while the care recipient is en route to or from the office of a medical provider."[166]

The requirement for hands-on medical care fails to consider the various non-medical, yet time-consuming, obligations of many employed caregivers absent proof that the care is required because of a serious health condition.[167] This leaves out such care services as coordinating medical appointments, retirement decisions, household duties, and finances. The twelve-week unpaid leave limitation and hands-on medical care requirement of the FMLA frustrates the ability of informal elder care to promote autonomy among the elderly and "perpetuates the stereotype of the elderly as dependent, passive, and unproductive."[168] These restrictions do not take into consideration the elderly with serious heath conditions who wish to remain active but need assistance. Rather, they suggest a vision of the elderly as being hidden, bed-ridden individuals who only venture outside the home for medical care.[169]

The most significant weakness of the FMLA, however, is that many individuals who need leave from work to care for an ailing family member cannot afford to take it because only unpaid leave is covered by the Act. In 2000, this reason was cited by approximately three-quarters of qualifying employees who

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> includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.
>
> (b) The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.

Id.

165. *See, e.g.*, Fioto v. Manhattan Woods Golf Enters., LLC, 270 F. Supp. 2d 401, 404 (S.D.N.Y. 2003) ("[M]erely visiting a sick relative does not fall within the statute's parameters. The employee must be involved in providing some sort of on-going care for his relative in order to qualify for FMLA leave."); Gradilla v. Ruskin Mfg., 320 F.3d 951, 957 (9th Cir. 2003), *withdrawn by* Gradilla v. Ruskin Mfg., 328 F.3d 1107 (9th Cir. 2003) (applying FMLA law to a California Family Rights Act claim and holding that "the scope of the CFRA does not include a requirement that an employer must accommodate an employee whose spouse decides, in spite of her serious medical condition, to travel away from her home for reasons unrelated to her medical treatment").

166. Smith, *supra* note 77, at 392 (discussing the holding of *Gradilla*, 320 F.3d 951).

167. *Id.* at 389.

168. *Id.* at 393.

169. *Id.*

needed, but did not take, FMLA leave.[170] Those low income workers who choose to use unpaid leave are often forced to borrow money, delay paying bills, or cut their leave short.[171] Given that women are more likely than men to be employed in jobs that pay less and less likely to be offered paid leave, they are more likely to suffer the financially burdensome effects of taking FMLA leave.

The FMLA provisions are helpful to women in that they provide unpaid leave in some caregiving situations. They fail to offer adequate statutory support to elder care providers, however, in a number of important respects. The limited scope of qualified employers under the FMLA, the Act's narrow understanding of the family, the medical model of caregiving used by the FMLA, and its provision of unpaid rather than paid leave all work to greatly restrict its capacity to give sufficient support to informal elder care providers. As a result, additional legislative reforms are needed.

IV. BREAKING THE CYCLE: PROPOSALS FOR PREVENTING THE ELDERLY FEMINIZATION OF POVERTY

The current three-legged retirement model is inadequate to meet women's post-retirement needs. Social Security is unable to provide more than a floor level of income during retirement and moreover, its future is unclear. In addition, inequality in the workplace and inequality in family care-giving roles has put women at a disadvantage for accumulating sufficient funds for retirement through both employer-sponsored pension plans and private savings. Facing insufficient savings, many of America's elderly in need of long-term care have turned to family members and close friends, often female, to provide informal care. One of the most significant costs for a caregiver for providing informal elder care are work disruptions, which hinder the care-giver's

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170. Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, MONTHLY LABOR REVIEW 20 (2001) (citing DAVID CANTOR ET AL., U.S. DEPT. OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: THE FAMILY AND MEDICAL LEAVE SURVEYS 2000 UPDATE 2–16, tbl. 2.17 (2001)), *available at* http://www.bls.gov/opub/mlr/2001/09/art2full.pdf.

171. Melissa A. Childs, Comment, *The Changing Face of Unions: What Women Want from Employers*, 12 DEPAUL BUS. L.J. 381, 427 (1999/2000). Low income workers in this context refers to employed individuals earning less than $20,000 a year. Astoundingly, approximately 15% of low income workers who choose to take unpaid leave under the FMLA go on welfare in order to survive. *Id.*

ability to contribute to Social Security, pension plans, and private retirement savings considerably.

Legislative reforms to end the cycle of poverty between female eldercare recipients and providers are needed in two principal areas. Subsection A argues for reform measures directed at narrowing the retirement income gap between men and women, and preventing women from outliving their savings. Subsection B argues for legislation targeted at supporting more cost-effective ways for financing long-term care.

A. *Legislative Proposals for Narrowing the Retirement Income Gap Between Men and Women*

To address the disparity between men's and women's abilities to save for retirement and to prevent women from outliving their savings, changes in legislation should focus on three areas: (1) expanding programs directed at addressing the special needs of women, (2) increasing protection for retirement income, and (3) educating women on retirement planning strategies so that they are equipped to make informed financial decisions.[172] As discussed above, women are less likely than men to qualify for private pension retirement income because a majority of women are not employed in jobs that lead to eligibility for government-sponsored, managed, or sanctioned pensions.

All women who work for pay should be afforded the same opportunities for employment that offers a pension or a comparable substitute for retirement savings. During the 109th Congress, numerous proposals were introduced that promised to create new opportunities for retirement saving. These proposals targeted the inequalities in America's retirement system and offered ways both to educate women on savings issues and to encourage them to take an active role in their retirement planning. The discussion that follows examines three of these proposals and demonstrates that, together, they provide a stronger framework for both addressing the unique challenges women face in planning for retirement and narrowing the retirement income gap between men and women.

In 2005, Senators Gordon Smith and Gaylord Conrad introduced the Retirement Savings and Security Act of 2005.[173] The

172. ICMA-RC, *Women and Retirement: Facing Unique Challenges* 3, http://www.icmarc.org/ImageCache/plans/content/retirementweek/womenandretirementwhitepaper_2epdf/v1/womenandretirementwhitepaper.pdf (last visited Mar. 30, 2007).

173. Retirement Savings and Security Act of 2005, S. 1359, 109th Cong. (2005).

Act proposed a three-pronged approach to ensuring financial security for America's elderly, the first and second of which were enacted as part of the Pension Protection Act of 2006.[174] First, in order to increase participation in 401(k) plans, especially among low- and moderate-income individuals, the bill encouraged employers to adopt automatic contribution plans.[175] Second, in order to encourage private savings, the bill extended the Saver's Credit, a tax credit for certain low- and moderate-income individuals who contribute to workplace retirement plans and IRAs, through 2010.[176] Finally, to protect women from exhausting their retirement income, the bill provided incentives for employee retirement plans to offer life annuity payments.[177]

Senator Herb Kohl introduced the Older Worker Opportunity Act (OWOA)[178] in 2005 to expand the time older employed individuals have to work, save, and secure a more comfortable environment.[179] The OWOA recognized that women are more likely to seek part-time and flexible work schedules, and that companies are less likely to provide pension plans for part-time workers.[180] In response, it provided tax incentives for businesses to hire and retain older workers, offer them part-time and flex-

174. Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 26 U.S.C. & 29 U.S.C.).

175. Retirement Savings and Security Act of 2005, S. 1359, 109th Cong. § 101 (2005). This section, as amended, was enacted as Pension Protection Act of 2006 § 902. Automatic enrollment has been shown to increase participation rates in 401(k) plans significantly, especially among low and moderate income workers. *See The National Summit on Retirement Savings* (2006) (statement of Sen. Gordon H. Smith, Chairman, S. Special Comm. on Aging) ("a study of employees who earn less than $20,000 showed 401(k) participation rates going from 13 percent to 80 percent when the employees were automatically enrolled."), http://www.dol.gov/ebsa/pdf/2006SmithSummit.pdf.

176. Retirement Savings and Security Act of 2005, S. 1359, 109th Cong. § 102 (2005). This section, as amended, was enacted as Pension Protection Act of 2006 § 812 (amending 26 U.S.C. §25B by striking subsection (h)). The Pension Protection Act repealed 26 U.S.C. § 25B(h), which had set the Saver's Credit to expire in 2006. *Bridging the Gender Gap: Eliminating Retirement Income Disparity for Women: Hearing Before the S. Special Comm. on Aging*, 109th Cong. 2 (2006) [hereinafter *Bridging the Gender Gap*] (statement of Sen. Gordon H. Smith, Chairman, S. Special Comm. on Aging).

177. Retirement Savings and Security Act of 2005, S. 1359, 109th Cong. § 202 (2005). The bill would amend Internal Revenue Code § 402(e) to add lifetime annuity payments as exempt trusts. *Id.*

178. Older Worker Opportunity Act, S. 1826, 109th Cong. (2005).

179. *Bridging the Gender Gap*, *supra* note 176 (statement of Sen. Herb Kohl).

180. *Id.* *See also*, *supra* sec. II(A)(2).

time opportunities, and include them in the company's pension and health insurance plans.[181]

In 2006, Senator Gordon Smith and a group of bipartisan senators introduced the Women's Retirement Security Act (WRSA).[182] The most comprehensive of the 109th Congress' proposals dealing with women's retirement security, this Act was introduced to increase retirement savings,[183] preserve income,[184] provide equity in divorce,[185] and improve financial literacy.[186] Importantly, the WRSA would make it easier for part-time employees to participate in long-term retirement savings plans by requiring employers to allow long-term, part-time employees to make contributions to a 401(k) plan.[187] Employers not sponsoring a retirement plan would be required to facilitate arrangements that would simplify the process for employees who want to contribute a portion of their salary to an IRA.[188] The bill would also encourage small businesses to enter and remain in the employer retirement plan system through tax incentives and simplification of some of the more tedious retirement plan rules.[189] Further, the legislation would expand access to IRA contributions for those who have taken a short time off from the workforce.[190]

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181. Older Worker Opportunity Act, S. 1826, 109th Cong. § 101 (2005). *See also Bridging the Gender Gap*, *supra* note 176 (statement of Sen. Herb Kohl).

182. Women's Retirement Security Act of 2006, S. 3951, 109th Cong. (2006).

183. *Id.* §§ 101–104, 111–115 (discussing methods of increasing retirement savings).

184. *Id.* §§ 201–204 (proposing methods to preserve income in retirement).

185. *Id.* §§ 301–303 (proposing methods to provide equity in divorce).

186. *Id.* §§ 401–403 (discussing methods to improve financial literacy).

187. Women's Retirement Security Act of 2006, S.3951, 109th Cong. § 112 (2006). An employee would qualify for this provision if he or she has completed three consecutive 12-month periods during each of which the employee has at least 500 hours of service. *Id.* at § 112(a)(1).

188. *Id.* § 101(a).

189. *Id.* §§ 501–504.

190. *Id.* § 114. The general contribution limit to IRAs for 2007 is the lesser of $4000 or an individual's taxable compensation for the year. 26 U.S.C. § 219(b)(1), (5) (2000). The Act would allow individuals, such as those taking time off from work to provide informal eldercare, to take into account "unused compensation" from the previous two years in calculating their annual Roth contribution limit. "Unused compensation" is defined as the amount of an individual's taxable gross income reduced by the sum of the taxpayer's qualified retirement contribution deduction under 26 U.S.C. § 219(a), non-deductible contributions to individual retirement plans under 26 U.S.C. § 408(o), amount of contribution to a Roth IRA for that taxable year, and amount of compensation includible in the taxpayer's gross income for such taxable year

To protect individuals from outliving their retirement savings, the WRSA provided incentives for annuitization[191] and promoted the use of longevity insurance.[192] Further, the Act called for improving financial literacy in four key ways. The WRSA would (1) allow taxpayers to exclude qualified retirement planning services,[193] (2) authorize grants to community-based taxpayer clinics for retirement savings counseling,[194] (3) authorize the Social Security Administration to develop a user-friendly financial reference handbook, and (4) require the Administration to prepare and distribute a retirement readiness checklist annually.[195]

B. *Legislative Proposals Supporting More Cost Effective Ways of Financing Long-Term Care*

To ensure that the long-term care needs of elderly women are met without sacrificing the future economic security of informal caregivers, legislative reform should focus its attention on two areas. First, incentives for planning and saving for one's long-term care needs must be created. Second, measures designed to provide financial relief to informal caregivers must be devised.

1. Planning for One's Own Long-Term Care Needs

Long-term care trust accounts and long-term care insurance are two vehicles for planning and saving for one's long-term care needs. In 2006, Senator Gordon Smith introduced the Long-Term Care Trust Account Act of 2006.[196] To provide incentives for individuals to create and contribute to a long-term care trust

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taken into account under U.S.C. § 219(c) in determining a married individual's amount of deduction for qualified retirement savings under § 219. Women's Retirement Security Act of 2006, S. 3951, 109th Cong. § 114(b) (2006).

191. The Act would allow taxpayers to exclude from their taxable income a percentage of certain qualified annuity payments and lifetime annuity payments that would otherwise be includible in gross income. Women's Retirement Security Act of 2006, S. 3951, 109th Cong. §§ 201–202 (2006).

192. Longevity insurance is insurance that is paid at the end of a payee's life expectancy. Under § 204 of the Act, for purposes of § 401(a)(9)(G), any value attributable to longevity insurance shall be disregarded in determining the value of an employee's interest under a qualifying § 401 plan prior to the first date that payments are made under the longevity insurance. *Id.* § 204.

193. *Id.* § 402.

194. *Id.* § 401.

195. *Id.* § 403.

196. Long-Term Care Trust Account Act of 2006, S. 2397, 109th Cong. (2006).

account,[197] the Act proposed tax-exempt treatment to both qualified contributions to and distributions from the account.[198] Also proposed by Senator Smith, the Long-Term Care Quality and Modernization Act of 2006[199] would allow a refundable tax credit for an amount up to 10% of the contributions to a Long-Term Care Trust Account for the taxable year.[200]

Private long-term care insurance policies provide "payment toward the cost of long-term care services, such as nursing home care or home care."[201] Currently, "tax-qualified" insurance policies[202] receive favorable tax treatment: premiums paid by individuals may be counted toward the medical expense deduction,[203] interest earned on reserves held by the insurer is not taxable to the insurer or the policyholder,[204] and benefits paid by the policy, within limits, are not taxable income.[205] Nevertheless, many individuals are reluctant to purchase long-term care insurance. Reasons for their reluctance include not wanting to spend

197. A long-term care trust account may be generally defined as "a savings vehicle for the purpose of preparing for the costs associated with long-term care services and purchasing long-term care insurance." *Long Term Care Financing: Are Americans Prepared?: Hearing before the S. Special Comm. on Aging*, 109th Cong. (2006) (statement of Sen. Gordon H. Smith, Chairman, S. Special Comm. on Aging).

198. Long-Term Care Trust Account Act of 2006, S. 2397, 109th Cong. § 2 (2006). Similar proposals were made during the 109th Congress. *See, e.g.*, Aging With Respect and Dignity Act of 2005, S. 2281, 109th Cong. (2005); Long-Term Care Quality and Modernization Act of 2006, S. 3815, 109th Cong. § 303 (2006).

199. Long-Term Care Quality and Modernization Act of 2006, S. 3815, 109th Cong.

200. *Id.* § 304. Unlike a tax deduction, which reduces taxable income and is more valuable to taxpayers in higher tax brackets, a credit reduces the tax bill itself. Thus, a one dollar credit can be equally valuable to low and high-income taxpayers. If a refundable tax credit reduces the taxpayer's tax bill to zero dollars, the taxpayer is entitled to a refund of the amount of credit remaining.

201. Georgetown University Long-Term Care Financing Project, *Tax Code Treatment of Long-Term Care and Long-Term Care Insurance* 1 (May 2003), http://ltc.georgetown.edu/pdfs/taxcode.pdf.

202. Most policies sold today are tax-qualified. A policy is tax-qualified if it meets three key criteria: (1) it must provide benefits only when the policy holder needs help with two or more activities of daily living or needs supervision as a result of a cognitive impairment; (2) the insurer must offer inflation protection; and (3) the insurer must comply with specified consumer protection standards developed by the National Association of Insurance Commissioners. *Id.* at 1–2.

203. 26 U.S.C. § 213(d)(1)(D) (2000).

204. Georgetown University Long-Term Care Financing Project, *supra* note 201, at 2.

205. *Id.*

money on a policy that may never be needed and fear that the company will not be around decades from now when care may be needed.

To encourage people to purchase long-term care insurance, several legislative proposals have included provisions that would enable taxpayers to claim premiums paid on these insurance plans as itemized deductions.[206] These proposals, however, are valuable to a taxpayer only if the sum of her itemized tax deductions is larger than the applicable standard deduction. Hence, the ability to claim an itemized deduction for premiums paid on a long-term care insurance plan is likely to benefit higher-income over lower-income taxpayers, who do not have high expenses for such deductible items as mortgage interest and state income and property taxes.[207] Legislative reform allowing above-the-line deductions[208] for long-term care insurance premiums should therefore be considered.

In addition to encouraging taxpayers to buy long-term care insurance, an above-the-line deduction will have the beneficial effect of reducing federal funding invested in long-term care. Over the lifetime of those individuals purchasing coverage, an above-the-line deduction "will save the Medicaid system more expense than it currently costs the tax system in lost revenues. . . . For every $1.00 the government loses in tax revenue, it [will save] $1.06 in Medicaid money."[209]

2. Support for Informal Elder Care Providers

As discussed above, individuals who interrupt their careers to provide care for an elderly family member face both immediate and future financial consequences. The federal tax code contains various measures of relief for informal elder caregivers, but these provisions fail to address adequately the financial conse-

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206. *See, e.g.*, Aging With Respect and Dignity Act, S. 2281, 109th Cong., § 3 (2005); Long-Term Care Improvement Act of 2006, H.R. 6405, § 301 (2006).

207. Georgetown University Long-Term Care Financing Project, *supra* note 201.

208. Above-the-line deductions are subtracted from the taxpayer's gross income to arrive at the taxpayer's adjusted gross income. Above-the-line deductions are not subject to limitations and phaseouts as are itemized deductions. *See* 26 U.S.C. §§ 67–68 (2000).

209. National Association of Health Underwriters, *Long Term Care Insurance* (2006) (citing Marc Cohen & Maurice Weinrobe, *Tax Deductibility of Long-Term Care Insurance Premiums: Implications for Market Growth and Public Long-Term Care Expenditures* (2000)), http://www.nahu.org/meetings/capitol/2006/LTC IssueSummary.pdf.

quences of providing care.[210] Numerous proposals were introduced during the 109th Congress to provide financial support to informal caregivers. A recurring and controversial theme among these proposals is the introduction of a tax credit for eligible care providers.

In 1999, President Clinton announced a multi-pronged long-term care initiative. Among its chief provisions, the initiative would provide a tax credit of up to $3000 (when fully phased in) to help individuals with long-term care needs and the families who care for them.[211] Although the credit was not enacted, the President's initiative raised awareness and appreciation for the efforts of family caregivers. Several legislative proposals have been made in the years since the President's initiative, attempting to enact a version of Clinton's caregiver's tax credit.[212] While a caregiver's credit would provide a modest level of monetary relief and recognition for both families' caregiving efforts and out-of-pocket expenses, some analysts have criticized it as being both inadequate and designed primarily to benefit middle and upper-middle income taxpayers.[213] Moreover, insofar as the credit is nonrefundable, many lower income families would not have enough tax liability to be eligible for it; and for those who are eligible, the credit would cover only a small portion of significant expenses.[214]

CONCLUSION

As women age, they will have a greater need for long-term care than men. They live longer than men and, as a result, will

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210. *See* Richard L. Kaplan, *Federal Tax Policy and Family-Provided Care for Older Adults*, 25 VA. TAX REV. 509, 535–51 (2005) (discussing personal exemptions and medical expense deductions for elder care providers).

211. William J. Clinton, Statement on Signing Federal Long-Term Care Insurance Legislation (Sept. 19, 2000), http://www.presidency.ucsb.edu/ws/index.php?pid=1313.

212. *See, e.g.*, Caregiver Assistance and Relief Effort (CARE) Act of 2006, S. 2244, 109th Cong. §3 (2006); Long-Term Care and Retirement Security Act, H.R. 2682, 109th Cong. §3 (2005); Improving Long-Term Care Choices Act of 2005, S. 1602, 109th Cong. §122 (2005); Long-Term Care Support and Incentive Act of 2005, H.R. 2935, 109th Cong. §3 (2005) (raising the base tax credit to $4000); Access to Affordable Health Care Act, S. 1225, 109th Cong. §502 (2005).

213. *See* CAROL O'SHAUGHNESSY ET AL., CONGRESSIONAL RESEARCH SERVICE, LONG-TERM CARE: THE PRESIDENT'S FY2001 BUDGET PROPOSALS AND RELATED LEGISLATION 6–7 (2000), *available at* http://www.opencrs.com/rpts/RL30254_20000821.pdf; Carole Fleck, *New Bills Take Small Step Toward Affordable Long-Term Care*, AARP BULLETIN, Sept. 2001, *available at* http://www.aarp.org/bulletin/longterm/a2003-06-23-newbills.html.

214. O'SHAUGHNESSY ET AL., *supra* note 213, at 4.

accumulate greater medical expenses for chronic illnesses and functional impairments. Women, however, collect less money in social security benefits, receive smaller pensions, and accumulate smaller private savings, which leaves them with fewer resources for meeting their care needs upon retirement than men. Women's financial disadvantage in retirement is attributable to the fact that America's three-legged approach to retirement financial security does not take into account the modern reality of women's working patterns and caregiving roles.

America's retirement system fails to account for the shorter work tenures of women and the employment interruptions they experience as a result of taking leave from work to care for family members. Less time in the workforce yields less opportunity for women to contribute to Social Security and pension programs. Social Security provides some benefits to women in the event of divorce or widowhood; however, these benefits cannot provide more than a floor-level of retirement income. The pension "leg" fails to appreciate that women are less likely to work in jobs that offer them pension benefits and it provides limited protection in the event of divorce or widowhood, meaning that women frequently receive little to no pension income in retirement.

The financial insecurity of elderly women often leaves them incapable of meeting the high costs of age-related health care. Many elderly women do not have private health care insurance, and public health care programs do not accommodate the need for community-based long-term care. Out of necessity, elderly women rely on younger women to provide informal care. As a result of providing elder care, younger women frequently suffer opportunity costs, such as work disruptions, that hinder their ability to prepare properly for retirement. As these women reach retirement age, they too often find themselves unable to afford their age-related health care needs, causing them to also turn to informal care. Hence, the elderly feminization of poverty is self-perpetuating: the failure of the American three-legged retirement system to accommodate the care needs of elderly women in turn forces younger women to sacrifice their own retirement preparation in order to fill this void, which leaves them equally unprepared to enter retirement.

The Family Medical Leave Act is the primary statutory scheme designed to assist working caregivers. The Act provides unpaid leave for employees to care for family members with serious health conditions. Due to the limited scope of employers and employees covered by the Act, the Act's narrow understanding of the family, its purely medical model of caregiving, and its grant of "unpaid" leave, however, additional legislative protections are needed to supplement the FMLA's modest level of assistance.

Several legislative proposals were introduced during the 109th Congress that proposed ways to end the feminization of poverty among America's elderly. These proposals addressed the differences between men's and women's private and pension savings capacities, suggested methods for preventing women from outliving their savings, and recommended more cost effective ways for financing long-term care. While it is unclear whether similar proposals will be introduced and enacted during the present or future Congresses, these proposals provide evidence that Congress recognizes the significant difficulties America's elderly women currently face in financing their retirement and meeting their health care needs. In order to break the oppressing cycle of poverty among elderly women and the younger women who provide care for them, a comprehensive retirement model must be developed. This model should include measures that address the differences in the working tenures of men and women, empower women to prepare for their own retirement and long-term care needs, provide public health assistance for community-based long-term care, and offer relief for elder caregivers. Until this is accomplished, the cyclical relationship between female elder care-recipients and caretakers will continue, leaving women deprived of equal treatment under the American three-legged retirement system.